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SUMMONS.

The State of New Jersey to Camden Service Stations, Inc., and Joseph F. Mantague, individually and jointly: 10

You are summoned to answer the annexed Complaint of James P. Scott and Martha V. Scott, his wife, in an action at law in the Supreme Court.

AND TAKE NOTICE that unless you file your Answer to said Complaint with the Clerk of Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed Complaint, the Plaintiffs may proceed in the suit and judgment may be entered against you. 20

WITNESS, Thomas J. Brogan, Chief Justice of the Supreme Court, at Trenton, this fourteenth day of August, nineteen hundred and forty-five.

JAMES J. GAVIN,
Clerk.

SAMUEL P. HAGERMAN,
Attorney.

30

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COMPLAINT.

SUPREME COURT OF NEW JERSEY.
GLOUCESTER COUNTY.

10

JAMES P. SCOTT and MARTHA V., his wife, Plaintiffs, vs. CAMDEN SERVICE STATIONS, INC., and JOSEPH F. MANTAGUE, jointly and individually, Defendants.	Action at Law. Complaint.

20

Plaintiffs residing in the Township of Deptford, in the County of Gloucester, say that:

1. Plaintiffs, being the owners of a certain lot, with a garage, erected thereon, situate in the Township of
30 Deptford, aforesaid, on the Almonesson Road, South of the Blackwood to Woodbury Highway, leased orally the same to the said Camden Service Stations, Inc., a corporation of the State of New Jersey, and to Joseph F. Mantague, jointly and individually on or about November 1st, 1941, at a monthly rental of $40. payable on the first day of each and every month thereafter, in advance;

2. That on August 1st, 1945, 45 months rent or the
40 sum of $1800. rental became due;

3. That said Defendants have paid on account thereof the sum of $1420. leaving due thereon a balance of $480.

Plaintiffs claims as damages the said sum of $480. with interest on said monthly balances, as they respectively became due.

10

SAMUEL P. HAGERMAN,
Attorney for Plaintiff.

ANSWER.

NEW JERSEY SUPREME COURT.
GLOUCESTER COUNTY.

20

JAMES P. SCOTT and MARTHA V. SCOTT, his wife, Plaintiffs, vs. CAMDEN SERVICE STATIONS, INC., and JOSEPH F. MONTAGUE, jointly and individually, Defendants.	Action at Law. Answer.

30

Defendants answering Complaint in the above entitled cause, say that:

1. They deny each and every allegation contained in Paragraphs 1, 2, and 3 of the Complaint.

40

Defendants aver that there is nothing due Plaintiffs and they further aver that they are not indebted to the Plaintiffs in any sum whatsoever.

FIRST SEPARATE DEFENSE.

10

Defendants aver that there is no relationship of landlord and tenant. Defendants aver that they never agreed to pay any rental and that they never did pay any rental to the plaintiffs or their agents.

SECOND SEPARATE DEFENSE.

Defendants aver that monthly sums paid to Plaintiffs were in accordance with an agreement whereby the Defendant, Camden Service Stations, Inc., was to pay for the construction of a building on the premises of the Plaintiffs and that such monthly payments were paid to the Plaintiffs in accordance with that agreement and at a time when Plaintiff, James P. Scott, was employed by Defendant, Camden Service Stations, Inc., and while Plaintiff, James P. Scott, was president of Defendant Company, and as a result thereof the building now on the premises of the Plaintiffs, which is built above the ground, is personal property and is the property of the Defendant, Camden Service Stations, Inc., in accordance with the said agreement.

20

30

THIRD SEPARATE DEFENSE.

The Defendant, Joseph F. Montague individually, is not a proper party to this suit. All negotiations

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and agreements between the Plaintiffs and the Defendant, Camden Service Stations, Inc., were carried on by Joseph F. Montague in his representative capacity as Secretary and Treasurer of the Camden Service Stations, Inc. The Defendant, Joseph F. Montague, avers that there is a mis-joinder of parties defendant, with respect to himself individually. 10

WHEREFORE the defendants deny that the Plaintiffs are entitled to any damages demanded in their complaint, and judgment for no cause of action will be demanded by the Defendants.

HARRY M. MENDELL,
Attorney for Defendants.

20

30

40

REPLY.

10 NEW JERSEY SUPREME COURT.
GLOUCESTER COUNTY.

JAMES P. SCOTT and MARTHA V. SCOTT,
Plaintiffs,
vs.
CAMDEN SERVICE STATIONS,
20 INC., and JOSEPH F. MONTAGUE, jointly and individually,
Defendants.

Action at Law.
Reply.

The Plaintiffs join issue on the Answer filed, and deny any and all matters set up in the Separate Defenses.

30 SAMUEL P. HAGERMAN,
Attorney for Plaintiffs.

40

AMENDED COMPLAINT.

SUPREME COURT OF NEW JERSEY.
GLOUCESTER COUNTY.

10

JAMES P. SCOTT and MARTHA V., his wife, Plaintiffs, vs. CAMDEN SERVICE STATIONS, INC., Defendant.	Action at Law. Amended Complaint.

20

Plaintiffs residing in the Township of Deptford, in the County of Gloucester, say that:

1. Plaintiffs, being the owners of a certain lot, with a garage, erected thereon, situate in the Township of Deptford, aforesaid, on the Almonesson Road, South of Blackwood to Woodbury Highway, leased orally the same to the said Camden Service Stations, Inc., a corporation of the State of New Jersey, and on or about November 1st, 1941, at a monthly rental of $40. payable on the 1st day of each and every month thereafter in advance;

30

1a. That on April 1st, 1942, the rent was increased from $40. to $41.25 per month.

2. That on September 1st, 1945, 46 months' rent or the sum of $1891.24 rental became due;

40

3. That said Defendants have paid on account thereof the sum of $1396.24, leaving due thereon a balance of $495.

Plaintiffs claim as damages the said sum of $495. with interest on said monthly balances as they re-
10 spectively become due.

SAMUEL P. HAGERMAN,
Attorney for Plaintiff.

COPY OF JUDGMENT FORM.

NEW JERSEY SUPREME COURT.
GLOUCESTER COUNTY.

20

JAMES P. SCOTT and MARTHA V. SCOTT, his wife, Plaintiffs, vs. CAMDEN SERVICE STATIONS, INC., a corporation, Defendant.	Copy of Judgment Form.

30

This case was tried before Judge Samuel M. Shay, with a jury at the Gloucester Circuit, on December 5th, 1945.

At the direction of the Court, the jury rendered a general verdict against the Defendant, Camden Service Stations, Inc. (the defendant Joseph F. Montague having been eliminated prior to the trial), and in

40

favor of the Plaintiffs for $495.00 (Four Hundred and Ninety-five Dollars).

Whereupon it is adjudged that the plaintiffs, James P. Scott and Martha V. Scott, his wife, do recover of the said defendant, Camden Service Stations, Inc., a corporation, the sum of Four hundred and ninety-five dollars damages together with their costs which have been taxed at the sum of seventy-one dollars and eighteen cents making in the whole the sum of five hundred sixty-six dollars and eighteen cents. 10

Damages	$495.00
Costs	71.18
	$566.18

Judgment entered and signed December 12, 1945.

THOMAS J. BROGAN,
Chief Justice.

20

BOND.

KNOW ALL MEN BY THESE PRESENTS: that we, CAMDEN SERVICE STATIONS, INC., a corporation of New Jersey, as principal, and NATIONAL SURETY CORPORATION, a Corporation of the State of New York, as surety, are held and firmly bound unto JAMES P. SCOTT and MARTHA V. SCOTT, his wife, in the sum of ONE THOUSAND DOLLARS ($1,000.00), to be paid to the said James P. Scott and Martha V. Scott, his wife, their attorney, successors, or assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally. 30

Sealed with our seals and dated this seventeenth day of December, 1945.

Whereas on December 12, 1945, in an action in the New Jersey Supreme Court, Gloucester County, be-

40

tween James P. Scott and Martha V. Scott, his wife, plaintiffs, and Camden Service Stations, Inc., defendant, a judgment was rendered against the said Camden Service Stations, Inc. and the said Camden Service Stations, Inc. has duly filed a notice of appeal from said judgment.

10 Now, the condition of this obligation is that if the said Camden Service Stations, Inc. shall prosecute its appeal with effect and pay all costs if the appeal is dismissed, or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

CAMDEN SERVICE STATIONS, INC. (Seal)
By JOSEPH L. MONTAGUE,
20 Pres.

Attest:
JOSEPH F. MONTAGUE,
Secy.

NATIONAL SURETY CORPORATION,
Surety.
By: R. A. STACK,
Attorney-in-fact.

A. M. Genovese
30 as to surety

40

State of New Jersey }
County of Camden } ss.

BE IT REMEMBERED, that on this 17th day of December, A. D. 1945, before me, the undersigned authority, personally appeared Joseph F. Montague, who being by me duly sworn on his oath saith, that he is the secretary of Camden Service Stations, Inc., the principal herein, and that Joseph L. Montague is the president; that deponent knows the common or corporate seal of said principal and that the seal annexed to the within Bond is such common or corporate seal; that the said Bond was signed by the said president and the seal of said principal affixed thereto in the presence of deponent; that said Bond was signed, sealed and delivered as and for the voluntary act and deed of said principal for the uses and purposes therein expressed, pursuant to a resolution of the Board of Directors of said principal; and at the execution thereof, this deponent subscribed his name thereto as witness.

JOSEPH F. MONTAGUE,
Secy.

Sworn and subscribed the day and year aforesaid.

MILDRED A. FOSTER,
(Seal) Notary Public of New Jersey.
My Commission Expires Sept. 2, 1947.

10 20 30 40

New Jersey State Library

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.
GLOUCESTER COUNTY.

10

JAMES P. SCOTT and MARTHA V. SCOTT, his wife, Plaintiffs, vs. CAMDEN SERVICE STATIONS, INC., Defendant.	Action at Law. Notice of Appeal.

20

TO SAMUEL P. HAGERMAN, Esquire, Attorney of Plaintiffs.

Take notice that Camden Service Stations, Inc., the defendant herein, appeals from the whole of the judgment entered in this cause, to the New Jersey Court of Errors and Appeals.

30

HARRY M. MENDELL,
Attorney for and of Counsel
with Defendant-Appellant.

Dated: December 12, 1945.

40

RULE EXTENDING TIME FOR FILING GROUNDS ON APPEAL.

NEW JERSEY SUPREME COURT.
GLOUCESTER COUNTY.

10

JAMES P. SCOTT and MARTHA V. SCOTT, his wife, Plaintiffs-Appellees, vs. CAMDEN SERVICE STATIONS, INC., a corporation of New Jersey, Defendant-Appellant.	Action at Law. Rule Extending Time for Filing Grounds on Appeal.

20

The matter being opened to the Court by Harry M. Mendell, attorney of Camden Service Stations, Inc., the defendant-appellant, and it appearing to the Court that a Notice of Appeal to the Court of Errors and Appeals having been acknowledged by plaintiffs-appellees as of December 13, 1945, and the said Notice having been duly filed in the office of the Clerk of the New Jersey Supreme Court;

30

And it further appearing that a bond, in accordance with the statutes, having been filed in the New Jersey Supreme Court Clerk's Office, said bond dated December 17, 1945, within the time provided by law;

And it further appearing that Alfred W. Denham, official court stenographer, being unable to deliver

40

his transcript of the said case within sufficient time to file the necessary grounds for appeal, as required by the statute;

And it further appearing that the defendant-appellant now desires an extension of time for the filing of the grounds for appeal, in order to have the transcript available for that purpose:

IT IS, on this 27th day of December, 1945, ORDERED that the time within which the defendant-appellant may file the grounds of appeal be extended for a period of thirty days beyond the time limited by law, to wit: that such extension be until the 13th day of February, 1946.

Let the above rule be entered in the minutes.

SAMUEL M. SHAY,
Judge.

On motion of
HARRY M. MENDELL,
Attorney of Defendant-Appellant.

The entry of the above order is hereby consented to.

SAMUEL P. HAGERMAN, ESQ.,
Attorney of Plaintiffs-Appellees.

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10

JAMES P. SCOTT and MARTHA V. SCOTT, his wife, Plaintiffs-Appellees, vs. CAMDEN SERVICE STATIONS, INC., Defendant-Appellant.	Action at Law. On Appeal. Grounds of Appeal.

20

TO SAMUEL P. HAGERMAN, ESQUIRE, Attorney of Plaintiffs-Appellees:

The above-named defendant-appellant states the following grounds of appeal in the above-entitled cause:

1. Because the Trial Judge, upon the trial of the said cause, directed a verdict in favor of the plaintiffs, and against the defendant, over the objection of the said defendant, wherein the said Trial Judge should have submitted the cause to the jury for its verdict.

30

2. Because at the trial, the Court, over the objection of the defendant-appellant, refused to permit the witness, Joseph F. Montague, to testify as to the

40

conversation by and between the plaintiff, James P. Scott, and the defendant, respecting the arrangements or agreement with respect to the occupancy of the bulk station building. The questions were as follows:

Q. What kind of building is this?

10 A. A corrugated iron structure on a wooden frame.

Q. How was it built?

A. Just set on a concrete foundation, just laid on it.

Q. Can the building be moved?

A. Yes, sir.

Q. Can the building be taken away from its foundation?

A. Yes, sir.

20 Q. Tell us the conversation you had with Mr. Scott about this building. First of all what was the dimensions of it?

A. The building is approximately 45 or 48 by 50.

Q. Tell us what conversation you had?

A. With reference to what, sir?

Q. With reference to this bulk building?

A. The bulk building was to be built on his property there, and we were to pay for it in

30 monthly installments.

MR. HAGERMAN: He is attempting to set up interest in real estate by oral testimony and no records. I have plenty of authorities here for it.

MR. MENDELL: The station in question was personal property and therefore the statute of frauds had no application.

THE COURT: Sustained.

40

MR. MENDELL: Allow me an exception, if your Honor please.

THE COURT: Surely.

(Exception noted for the defendant.)

3. Because at the trial, the Court, over the objection of the defendant-appellant, directed a verdict for the sum of $495.00 when the admitted evidence of the parties disclosed that no such sum was due. The questions were as follows: 10

MR. MENDELL: As a matter of mathematics I have added these checks, and they amount to $1,437.50, and they are admitted in evidence. So mathematically being correct I think there's no dispute about the fact that the item of $1,396.24 counsel has given you is in error, because he can count up these checks if he so desires. May I, therefore, ask the Court to instruct counsel at recess to count up the checks. 20

MR. HAGERMAN: I admit now where it is stated in the statement of claim that on or about November 1st, we had no written record in the way of this check of October 16th, just before that, and I am willing to admit $40. additional be added.

MR. MENDELL: There is also $1.25, so instead of $1,396.24 it is $1,437.50. 30

THE COURT: There is still due in this case $496.25.

MR. MENDELL: Does your Honor intend to rule that way?

THE COURT: I have already ruled.

MR. MENDELL: Your Honor will allow me an exception.

THE COURT: Surely.

40

(Exception noted for the defendant.)

HARRY M. MENDELL,
Attorney for and of Counsel
with Defendant-Appellant.

Dated: January 17, 1946.

10 Service of the within grounds of appeal acknowledged this 18th day of January, A. D. 1946.

SAMUEL P. HAGERMAN,
Attorney for Plaintiffs-Appellees.

20

30

40

TESTIMONY.

NEW JERSEY SUPREME COURT.
GLOUCESTER COUNTY.

10

JAMES P. SCOTT and MARTHA A. SCOTT, his wife,
Plaintiffs,
vs.
CAMDEN SERVICE STATIONS, INC., and JOSEPH F. MONTAGUE,
Defendants.

20

Before SHAY (J) and a Jury.

Woodbury, N. J., Dec. 5, 1945.

30

Appearances:
For the Plaintiffs, Harry M. Mendell, Esq.
For the Defendants, Samuel P. Hagerman, Esq.

MR. HAGERMAN: With the consent of the other attorney I want to withdraw as a defendant Joseph

40

F. Montague, who is charged jointly and individually with the others. And I want to add paragraph 1a that on April 1st, 1942, the rent was increased from $40. to $41.25 per month. Paragraph 2 to be amended to read that on September 1, 1945, 46 months' rent or the sum of $1891.24 rental became due. Paragraph
10 3 that said defendants have paid on account thereof the sum of $1396.24, leaving due thereon a balance of $495. The plaintiffs claim as damages the sum of $495., with interest on said monthly balance as they respectively became due.

MR. MENDELL: I was advised by counsel this morning of these proposed changes, and I have no objection to them, because I want the Jury to have the exact facts. I have no written memorandum of
20 them, and may I suggest also that a written memorandum be given to you of these same facts.

THE COURT: Sure, that's quite all right.

(Jury called and sworn.)

30

(Mr. Hagerman opened the case for the plaintiffs to the Jury.)

(Mr. Mendell opened the case for the defendant to the Jury.)

40

THE CASE FOR THE PLAINTIFFS.

JAMES P. SCOTT, sworn.

BY MR. HAGERMAN:

10

Q. You are one of the plaintiffs?

A. That's right.

Q. Who is the other plaintiff?

A. My wife.

Q. I show you an agreement dated October 31st, 1940, between Pearce, Inc., and yourselves, and look at the signatures and see if this is your agreement?

A. Yes, sir.

Q. That calls for the purchase by you of what premises?

20

A. Purchase of residence situate in Deptford Township, Gloucester County, New Jersey.

Q. On the Hurffville Road?

A. Hurffville Road, yes.

MR. HAGERMAN: I offer this in evidence.

MR. MENDELL: No objection.

30

(Received and marked exhibit P-1.)

Q. I also show you a deed dated the 19th of January, 1945, from Paul Ackley, widower, to James B. Scott and Martha Scott, his wife, and ask you if that relates to the same premises?

A. Yes, this is the same thing. This is the one I settled with the West Jersey Title and Trust Company.

40

Q. Whereby you and your wife became the owners of the property in question?

A. Yes.

Q. Are you still the owners?

A. Yes.

10 MR. HAGERMAN. I offer this in evidence.

MR. MENDELL: No objection.

(Received and marked exhibit P-2.)

Q. Were you a tenant in this property before you entered into the agreement to purchase?

A. Yes, I was.

20 MR. MENDELL: That's objected to as immaterial.

THE COURT: I will allow it.

Q. How did you become induced to ——

THE COURT: We are not interested in that. Did he buy it?

30 Q. You bought these premises?

A. Yes.

Q. What was the inducement that led you to enter into the agreement to buy it?

A. What do you——

THE COURT: Is this the place in which he lived?

MR. HAGERMAN: Lived, and in which he later built the garage.

40

THE COURT: We are not interested in the inducement. All we are interested in is that he owned it, and after that, all right, you can produce that, but I don't know about what he did, or what was done before that. Did he own the property?

Q. You became the owner of the property by this agreement, and was there any difficulty about making settlement? 10

A. Yes, there was, quite a bit.

Q. The agreement was dated 1940, and I see the deed was dated 1944.

A. I had all that time getting it settled up. There was no record of a deed back in 1895.

Q. In the meantime did you desire to make any improvements on the property?

A. Yes, I did. 20

Q. Through whose cooperation was it made possible?

A. Audubon National Bank.

Q. Did you have any attorney to prepare an agreement for that purpose?

A. Yes, I did.

Q. Who was that?

A. Harry Mendell drew that up.

Q. The gentleman standing here or sitting here?

A. Yes. 30

Q. What was that agreement, do you have a copy of that agreement?

A. No, I don't.

Q. What was the purpose or object of the agreement?

A. That I should go ahead and build on the property, or do anything I wanted to do, until final settlement could be made, and they could produce a clear title for me.

40

Q. Pursuant to the authority contained in this agreement, what did you do?

A. I built a corrugated iron garage 38 by 50.

Q. Who was the contractor?

A. Raymond Weiss.

10

MR. MENDELL: There is no dispute about the fact there was a garage. What we contend is that it was not rented to them, that's all. How he got it there we don't care.

THE COURT: After all said and done they built a garage, and you allege they rented it to somebody, is that correct?

MR. HAGERMAN: Yes.

20

Q. Did you have any tenant for the garage after building it?

A. Camden Service Stations, Incorporated.

Q. When did they rent, or go in possession, or enter in the premises?

A. They went in November, 1942, on agreement to pay $40. a month rent.

Q. Did you state 1942?

A. 1942.

30

BY THE COURT:

Q. A written agreement, or otherwise?

A. No written agreement.

BY MR. HAGERMAN:

Q. When did you enter into the contract for the building of this garage?

40

MR. MENDELL: I object to that as immaterial. He built the garage. The question is whether he rented it to whom.

THE COURT: That's right. Do you know who he rented it to.

10

Q. Do you know what date you rented it?
A. I rented it?
Q. Yes.
A. November 1st, 1942.
Q. How many years ago since you rented it?

MR. MENDELL: That speaks for itself, how many years ago did he rent it. He said November 1st, 1942.

BY THE COURT:

20

Q. You say it was not a written agreement?
A. No, it's not a written agreement.

BY MR. HAGERMAN:

Q. What did you do in 1941 in respect to the premises?

MR. MENDELL: I object to that.

30

THE COURT: We are not concerned with that, Mr. Hagerman.

BY THE COURT:

Q. In 1942 you rented to these people for what?
A. $40. a month.

40

BY MR. HAGERMAN:

Q. What were your terms of the leasing?

A. There was no—Montague had the lease drawed up.

Q. Who is Montague?

10 A. Secretary and Treasurer, Camden Service Stations.

Q. What about the lease?

A. He had the lease drawn up, which I would never sign.

Q. Did he present a lease to you?

A. Yes, he presented a lease stating at the end of the year it would automatically renew itself for twenty years.

20 MR. MENDELL: I object to him stating what the lease would do.

THE COURT: He never signed it, it never went into effect.

THE WITNESS: No.

Q. Did you tell Mr. Montague why you would not sign it?

30

MR. MENDELL: I think that's immaterial.

THE COURT: I will allow that.

A. I told him I didn't know what I wanted to be doing twenty years from now.

Q. Do you have that purported lease in your possession?

A. No, I had it lying on the desk there, and I never bothered taking it with me, or anything.

40

Q. Did you show it to anybody?
A. I showed it to my wife.
Q. You discussed it with your wife?
A. Yes.
Q. She's part owner of these premises?
A. Yes.
Q. Any lease would have to be signed by her as well as you? 10
A. Yes.

MR. MENDELL: I object to this as being immaterial. He might have an agency.

THE COURT: Well, I know. I think after all said and done we don't want to try this thing on a technical basis. I want to get the facts and have them presented to the Jury, that's all. 20

Q. Did Mr. Montague ask you more than once to sign that lease?
A. He asked me several different times to sign it.
Q. You always refused for the same reason?
A. That's right.
Q. When did you last see that lease?
A. The last day I saw it was when I left his employment.

30

THE COURT: Let us find out at this particular time, they went in November 1st, 1942, at least that's when the lease was supposed to start, and find out from that time on how long they paid rent, and how much.

Q. How long did you pay rent at $40. a month?
A. Up until I resigned last year.
Q. How long at $40. a month did you pay rent?

40

A. I made a mistake there once. That should have been he rented in 1941, and started paying rent in 1941 instead of 1942.

Q. You just said you paid rent up until 1942?

A. Yes, he started raising the rent in April, 1942.

Q. He increased the rent?

10 A. Yes.

Q. From what to what?

A. From $40. up to $41.25.

Q. He paid that rent regularly until when?

A. Until I resigned last August.

Q. You resigned, what do you mean by that?

A. I quit my job and went somewhere else.

Q. Had you been in the employ of the Camden Service Stations?

A. For about eleven years.

20 Q. Up to the time of resigning in August, 1944?

A. That's right.

Q. Has he paid any rent since then?

A. Not since I left.

Q. What rent became due since you left?

A. It started September 1st. The rent was due in 1944, and I haven't received a penny since.

Q. Therefore, there is due twelve months from September 1st, 1944, until and including August 1st, 1945, is that right?

30 A. That's right.

Q. Amounting to, do you know how much it amounts to?

A. No, I don't until I figure it out.

THE COURT: August what?

MR. HAGERMAN: Including August 1st. 1945.

THE COURT: Is that when the rent was not paid?

40

MR. HAGERMAN: From September 1st, 1944, including August 1st, 1945, a period of twelve months.

THE COURT: Twelve months, how much a month?

MR. HAGERMAN: $41.25. 10

Q. Whose funds were used in the construction of this building?

A. My wife and I borrowed a loan from the Audubon National Bank.

Q. The money was paid all with your funds?

A. Yes.

Q. Did the Camden Service Stations and Mr. Montague assist at all in the payment of this money?

A. Nothing whatever. 20

Q. Or become security?

A. Nothing whatever.

Q. Until they moved in there did you have anything binding on them that would hold them in case they left?

MR. MENDELL: This is rebuttal evidence.

THE COURT: I am going to allow it.

MR. HAGERMAN: Repeat the question. 30

(Question repeated.)

A. No, I didn't.

MR. HAGERMAN: Cross-examine.

40

CROSS-EXAMINATION.

BY MR. MENDELL:

Q. You said you resigned after working eleven years for the Camden Service Stations, is that cor-
10 rect?

A. That's right.

Q. You were President of that company, weren't you?

A. Supposed to.

Q. You were President, weren't you?

A. Supposed to be.

Q. As a matter of fact didn't you tell them people you were an officer of this corporation?

A. I suppose I have.

20 Q. You represented to any number of people you were an officer of this corporation?

A. Yes, sir.

Q. You and Montague were quite friendly while you were employed, weren't you?

A. At times.

Q. When you resigned didn't you resign as President of this company?

A. I never had anything to say I was President of the company.

30 Q. When you resigned you resigned as an officer also?

A. I resigned to drop the whole thing.

Q. Didn't Mr. Montague as secretary and treasurer of this corporation bring you to my office?

A. For what?

MR. HAGERMAN: I object. This is not proper cross-examination.

40

Q. Did you know me before Mr. Montague brought you for the first time to my office?

A. I met you out on the road the first time I met you.

Q. Through Mr. Montague?

A. Yes, through an accident.

Q. You were working for Mr. Montague when he brought you to me? 10

A. That's right.

Q. When do you claim that you had ycur first agreement to rent this building, or station, or bulk station, from Montague?

A. In October, 1941.

Q. In October, 1941?

A. Yes.

Q. When do you claim he paid you the first payment? 20

A. I had the agreement before October, 1941, but I got the first payment in November, 1941. I paid three months of it myself before he moved in.

Q. I said when did you first get any payment from Montague on this building?

A. November 1st.

Q. You never got anything prior to that day?

A. No, not a penny.

Q. Sure of that?

A. I am positive of that. 30

Q. So when was it you first talked to Montague about what you call renting the station?

A. I had talked to him on several different occasions before that.

Q. Before that?

A. Yes.

Q. Can you fix a time when you discussed what you allege is renting the place to him?

A. I don't know just a certain date, no. Montague had been looking for another place somewhere else. 40

Q. How earlier than November 1st, 1941, did you discuss the idea of this building?

A. Every year he was supposed to get out of the building, he was going the year before, and he never moved out.

Q. Didn't he pay you any amount of rent then until

10 before November 1st, 1941?

A. None at all.

Q. Sure now?

A. Positive.

Q. What was your duties of your work at the station?

A. Truck driver.

Q. Didn't you bring this truck back and forth to the places in which you lived?

A. That's right.

20 Q. And wasn't this about ten acres that you had purchased under this agreement?

A. That's right.

Q. You had a house on it, too?

A. That's right.

Q. You were paying $2,350. for the whole place?

A. $2,500. We had that out before.

Q. The agreement called for $2,350?

A. That was $2,350. cash, and another $150. I had to pay cash.

30 Q. At the title company?

A. When you and I split out the money you received none of this under the agreement at that time.

Q. I think you are referring to the settlement sheet. ——

MR. HAGERMAN: I don't see how this has anything to do with it. It is not cross-examination. If it is a matter of defense he should bring it out when he puts in his defense.

40

A. I started to buy the place, and there was such a long time in making settlement, and the other people never bothered with it, and then I went to the Audubon bank to buy the house, and had settlement at the West Jersey Title and Trust Company, and at the same time I paid this price for the house, and not what it says on there. 10

MR. MENDELL: We admit that he ——

THE COURT: You paid how much?

THE WITNESS. $2,500.

MR. MENDELL: At the title company. His agreement calls for $2,350.

Q. Is that correct? 20

A. Yes.

Q. How did the Camden Service Stations pay you these sums?

A. By check.

Q. You got a check for every month, didn't you?

A. Yes.

Q. These checks went from what date to what date?

A. From November 1st, 1941 to the last rent I got was August, 1944. 30

Q. I show you all the checks that you received, in a group, and ask you to look at them, and ask you whether they represent all the checks that you got?

THE COURT: That's a pretty difficult thing to go over the whole thing there on the stand.

Q. I show you a check dated August 5th, 1944, of the Camden Service Stations, made payable to 40

James P. Scott, in the amount of $41.25., and ask you whether you received that check?

A. Yes, I did.

Q. Is that your signature on the back thereof?

A. That's right.

Q. I show you a check dated November 3, 1941,

10 check 5856, and I ask you whether you got that check?

A. That's right.

MR. MENDELL: I ask that these two checks be marked for identification, if your Honor please.

(Received and marked D-1 and D-2 for identification.)

20 Q. I show you a check, which has been marked D-2 for identification, and ask you whether that is the first check you claim you received?

A. That's the first one.

Q. Sure of that?

A. As far as I know.

Q. I show you a check which I will ask to be marked D-3 for identification, and ask you whether this isn't the first check that you got, rather than the one you said you got before?

30

(Received and marked D-3 for identification.)

A. I don't know whether it was the first one or not.

Q. Is that the first one, look at the back of the check?

A. That's right.

Q. For the amount of $40?

A. That's right.

40

Q. And it reads on the front of it, October 2nd, 1941, advance bulk?

A. That wasn't on there at that time.

Q. Is that what is on the check now?

A. It's on there now, yes, that was not on there at that time.

10

MR. MENDELL: There's no question pending now.

Q. I show you a check number 5744, dated May 2nd, 1942, made payable to you, and ask you whether you received that check. Look at the back of it?

A. I received this check, but there's been something wrote on it since.

Q. What do you claim has been written on that since?

20

A. That building.

Q. You say building was not on that check when you got it?

A. Yes.

MR. MENDELL: I ask that be marked for identification.

(Received and marked D-4 for identification.)

30

Q. I show you a check dated January 3rd, 1942, made payable to you, and ask you whether you got that check?

A. Yes, I got that, but building was not on that one either.

Q. You claim the word "building" was not on the check when you got it, is that right?

A. Yes, if it had been I would not have accepted it.

40

MR. MENDELL: I ask that be marked for identification.

(Received and marked D-5 for identification.)

(At this point a luncheon recess was taken until
10 one-thirty o'clock p. m.)

AFTER RECESS.

BY MR. MENDELL:

Q. Immediately before recess you were instructed to examine all thirty-four of these checks, which rep-
20 resent thirty-five monthly payments. Did you examine them?

A. Yes, I did.

Q. Were they all endorsed by you?

A. That's right.

Q. They are all checks of the defendant, Camden Service Stations, monthly payments, is that correct?

A. That's right.

MR. MENDELL: I offer these as a group, if your
30 Honor please.

(Received and marked exhibit D-6.)

Q. Will you please tell the Court and Jury when these monthly payments increased from $40. to $41.25?

A. April 1st, 1942.

Q. As a matter of fact wasn't it March 1st, 1942?

A. It could be, I just can't recall definitely.

40

Q. Look at this check which is in evidence, dated March 7th, 1942, and tell us how much that was?

A. $41.25.

Q. So this increase was in March, 1942, is that correct?

A. Well, March.

Q. Tell the Court and Jury what conversation you had with the defendant which led to the increase in these monthly payments? 10

A. I wanted to quit my job, because I was doing two men's work for the cost of one, which was $25. a week, and I couldn't live on it any longer with a wife and three children, and I told this man, and the amount automatically ——

MR. MENDELL: May I have that stricken? I asked him with reference to the increase from $40. to $41.25. 20

Q. Tell us the conversation you had about that?

A. This was all in the conversation.

Q. I want to know what conversation you had prior to the increase from $40. to $41.25?

THE COURT: He is telling the conversation.

A. I wanted to quit, and he didn't want me to quit, and he automatically raised the rent to $41.25 himself to try to keep me at his work. 30

Q. From March 7, 1942 up to August of 1944, two and a half years later, you were satisfied with the $1.25 a month increase?

A. I got a raise in pay besides that though.

Q. Wasn't it true you went to Mr. Montague and said that the monthly payments on the building, the garage, is $41.25, and "I want that $41.25 for the building"?

40

A. No, it is not.

Q. What were you paying on the building?

A. $41.53 a month.

Q. You have shown us an agreement for the purchase of this building. Didn't you make a subsequent agreement on March 31st, 1941—may be I had better show you it—and ask you whether your signature is on that agreement, you and your wife's?

A. That's right.

Q. Didn't you sign that agreement?

A. That's my signature.

MR. MENDELL: I offer in evidence the subsequent agreement.

(Received and marked exhibit D-7.)

Q. You had ten acres of ground, didn't you?

A. Approximately, not quite.

Q. You had a home on that ground, too, didn't you?

A. That's right.

Q. You under this subsequent agreement, which is in evidence, you were to pay for the home and ten acres of ground, $20. as carrying charges?

A. That's right.

Q. Do you remember Judge Dzick being in this case?

A. He represented Mr. Ackley.

Q. He is in Camden?

A. Yes.

Q. Didn't he threaten you in January, 1944 ——

MR. HAGERMAN: I object to that.

THE COURT: Sustained.

MR. MENDELL: Exception.

THE COURT: Yes.

(Exception noted for the defendant.)

Q. Didn't Judge Dzick on January 3rd, 1944, write to you and threaten to put you out of the premises because you were not paying $20. a month? 10

A. He didn't threaten to put me out of the premises. He wanted the case settled.

Q. I show you a letter addressed to you dated January 3rd, 1944, and ask you whether you didn't bring that to my office?

A. I don't think I brought it in your office.

Q. It's addressed to you?

A. It's addressed to me, but I don't think I brought it to your office. 20

MR. MENDELL: I ask that it be marked for indentification.

(Received and marked D-8 for identification.)

Q. Do you know how I got this letter addressed to you?

30

THE COURT: Naturally he would not know.

Q. Were you in my office in January, 1944?

A. I don't know.

Q. You may have been there, is that right?

A. I could have been, but I don't think I was, but there was the settlement on the house.

Q. Do you deny Judge Dzick sent you a letter of this kind?

40

A. No, I don't deny it.

Q. Didn't that letter threaten to you to put you out of the property if you didn't make a settlement?

A. The way that reads, yes.

Q. You have carefully examined these checks, haven't you?

10 A. That's right.

Q. At recess, in any one of these thirty-five checks, do you see on any one of them the word rent, for any purpose?

A. No, and I don't remember building being on any one of them, either, when I received them.

Q. Is rent on any one of these checks?

A. No. In advance could be for rent, too, couldn't it?

Q. Look at them, do you find rent on any of them?

20 A. It doesn't say rent, but in advance could mean for rent, too, couldn't it?

MR. MENDELL: I ask that be stricken.

THE COURT: Yes.

MR. MENDELL: No further questions.

BY MR. HAGERMAN:

30

Q. You have stated that you were supposed to be President of this Camden Service Stations. Were you ever qualified as President?

A. I never received any shares of stock, or dividends or anything like that.

Q. Did you ever attend a directors' meeting?

A. There was never no meeting.

Q. Did you ever attend a stockholders' meeting?

A. No.

40

Q. No dividends?

A. No.

Q. No shares of stock?

A. No.

Q. Did you do any acts as President?

A. Signed Income Tax forms for them, which Montague made up himself. 10

Q. You never exercised any right, or had any benefit from the company?

A. None at all.

BY MR. MENDELL:

Q. You have stated before that you told other people you were an officer of the company?

A. I said I was supposed to be an officer of the company. 20

Q. Didn't you tell other people you were an officer?

A. I said I was supposed to be an officer.

Q. Didn't you tell other people you were an officer of the company?

A. How could I be an officer of the company?

Q. Answer yes or no?

A. No.

Q. Do you know this gentleman sitting here (indicating)? 30

MR. MENDELL: Will you rise, please, Mr. Casto?

(Mr. Casto stands up in the court room.)

A. Yes.

Q. Did you do business with him?

A. Yes.

Q. Did you tell him you were an officer of the company? 40

A. No.

Q. Did you extend credit to Mr. Casto?

A. I extended credit wherever Camden Service Stations wanted me to.

Q. And was it your function to extend credit to various people that bought from you?

10 A. At first there was an argument over it, and then it was said that if there was anything not paid to mark it not paid and not charge any more.

MR. MENDELL: That's all.

MR. HAGERMAN: That's all, Mr. Scott.

PLAINTIFF RESTS.

20

THE CASE FOR THE DEFENDANTS.

EDWARD CASTO, sworn.

BY MR. MENDELL:

30 Q. Where do you reside?

A. Marlton, New Jersey.

Q. You are in what line of business?

A. Gas service station.

Q. Do you know the plaintiff in this case, who was on the stand previously?

A. Yes.

Q. How long have you known him?

A. Eight years.

Q. Do you know Mr. Montague, the defendant in this case?

40

A. Yes.

Q. How long have you known him?

A. Eight years.

Q. During those eight years were you served by Mr. Scott?

A. I was.

Q. Did he or did he not ever represent to you he was an officer of the company? 10

A. He told me so.

Q. Did he extend credit to you?

A. He did.

Q. As an officer of the company?

A. Yes.

Q. Did he have conversations with you while you were in the gas business?

A. He did.

Q. Can you fix the time of those conversations? 20

A. Pertaining to what?

Q. Did he have conversations with you with reference to who was the owner of the corrugated oil bulk station?

A. Yes.

Q. Tell us what was said to you by him?

MR. HAGERMAN: I object. They can't make title to any real estate, or any part of it, by oral testimony. 30

THE COURT: No question about that.

Q. Do you remember a conversation with the plaintiff in this case, Mr. Scott, with reference to a bulk station near where he lived?

A. Yes.

Q. Tell us what was said?

A. In about October of 1941 he told me that the

40

company was about to buy a property which he could live in, and also have a place to garage their trucks.

Q. How do you fix the time as October, 1941?

A. I went in the service the following year, 1942, and the conversation carried on from time to time
10 from delivery to delivery. We talked about it from time to time. It was just the October before going in the service.

Q. You went in the navy after that?

A. Yes, sir.

MR. HAGERMAN: I ask that it be stricken. That agreement is not in writing, and doesn't concern a thing in writing, and I ask that be stricken off. It is an attempt to establish interest in real estate by oral
20 testimony.

THE COURT: Sustained. I will strike it.

MR. MENDELL: Let me have an exception.

THE COURT: Surely.

(Exception noted for the defendant.)

30 MR. MENDELL: That's all.

CROSS-EXAMINATION.

MR. HAGERMAN: No cross.

40

THE CASE FOR THE DEFENDANT.

JOSEPH MONTAGUE, sworn.

BY MR. MENDELL: 10

Q. What is your office with the Camden Service Stations?

A. Secretary and Treasurer.

Q. This company is the defendant in this suit?

A. Yes, sir.

Q. How long has Mr. Scott been employed by this company?

A. Slightly over eleven years.

Q. What was his relationship with the company? 20

A. He was President of the company.

Q. How long had he been President of the company?

A. I would say almost since its inception.

Q. How many employees did the company have?

A. Our maximum employees was three.

Q. At the time of October, 1941, how many employees did the company have?

A. Two.

Q. Who were the two? 30

A. Mr. Scott and myself.

Q. What kind of business did you run?

A. We supplied service stations with gasoline and kerosene, and stuff like that.

Q. What kind of a job did Mr. Scott have?

A. He operated the delivery equipment principally.

Q. Tell us what conversation you had with him in October, 1941, with regards to the bulk station?

40

A. We were forced to leave our old location, and we was trying to find a new location, and it was desirable at that time we both find a place of business and a home for Mr. Scott; and there was a property adjacent to us about a quarter of a mile away, which we discussed over, and we decided he would buy that
10 place, and we would keep this building on that for the company to operate its business from, and also make a home for him.

Q. Do you know how much that property was to cost?

A. It was to be in the neighborhood of $2,200.

Q. Do you know how much carrying charges Mr. Scott was to pay for that?

A. Yes, sir, it was in the neighborhood of $20.

Q. Did you ever agree to rent a station to be built
20 from him?

A. No, sir.

Q. Tell us how that came about?

A. We agreed to pay for a building that he was to erect on there in monthly installments.

MR. HAGERMAN: I object. It is still making title to real estate by oral testimony.

MR. MENDELL: I will withdraw the question for
30 the time being.

Q. What kind of building is this?

A. A corrugated iron structure on a wooden frame.

Q. How was it built?

A. Just set on a concrete foundation, just laid on it.

Q. Can the building be moved?

A. Yes, sir.

Q. Can the building be taken away from its foundation?

40

A. Yes, sir.

Q. Tell us the conversation you had with Mr. Scott about this building. First of all what was the dimensions of it?

A. The building is approximately 45 or 48 by 50.

Q. Tell us what conversation you had?

A. With reference to what, sir? 10

Q. With reference to this bulk building?

A. The bulk building was to be built on his property there, and we were to pay for it in monthly installments.

MR. HAGERMAN: He is attempting to set up interest in real estate by oral testimony and no records. I have plenty of authorities here for it.

MR. MENDELL: The station in question was personal property and therefore the statute of frauds had no application. 20

THE COURT: Sustained.

MR. MENDELL: Allow me an exception, if your Honor please.

THE COURT: Surely. 30

(Exception noted for the defendant.)

Q. I show you a check, which has been marked for identification D-3, dated October 11th, 1941, and ask you what that check is for?

A. That check represents the first payment towards buying the building.

Q. And that is in what amount?

40

A. $40.

Q. And what is on the side of that check?

A. It says 11-2-1941 advance on bulk.

Q. What do you mean, advance on bulk?

A. That's the bulk service station, which includes the building.

10 Q. Yes. On March 7th of 1942, the payment of $40, was raised to $41.25. Did you have a conversation with Mr. Scott with reference to that raising of this month payment from $40. to $41.25?

A. Yes, sir.

Q. Tell the Court and Jury what that was?

A. Mr. Scott said that the payments to the bank for the building were $41. and something, and we raised it from $40. to $41. to comply with that condition.

20 Q. Did you give him a dollar and a quarter more a month as a raise in his salary, as he stated?

A. No, sir.

Q. I show you a check which has been marked D-5 for identification, dated January 3rd, 1942, and on the side of that there is a writing. What does that writing say on that check?

A. Bldg. meaning building.

Q. Who put that on there?

30 A. I did, sir.

Q. When did you put it there?

A. At the time I made out the check.

Q. I show you a check dated May 2nd, 1942, in the amount of $41.25., and ask you what is written on that check on the side?

A. The same thing, bldg., building.

Q. When did you write that on that check?

A. The same time I made out the check.

40

Q. What date was that?

A. The fifth month, second, 1942.

Q. Was this right after the change from $40. to $41.25?

A. Yes, sir.

Q. All of these checks, do they represent every month that you have made these monthly payments? 10

A. Yes, sir.

Q. Is there on any one of these checks any statement that any one of them was paid for rent?

A. No, sir.

MR. MENDELL: As a matter of mathematics I have added these checks, and they amount to $1,-437.50., and they are admitted in evidence. So mathematically being correct I think there's no dispute 20 about the fact that the item of $1,396.24 counsel has given you is in error, because he can count up these checks if he so desires. May I, therefore, ask the Court to instruct counsel at recess to count up the checks?

MR. HAGERMAN: I admit now where it is stated in the statement of claim that on or about November 1st, we had no written record in the way of this check of October 16th, just before that, and I am 30 willing to admit $40. additional be added.

MR. MENDELL: There is also $1.25, so instead of $1,396.24 it is $1,437.50.

THE COURT: There is still due in this case $496.25.

MR. MENDELL: Does your Honor intend to rule that way? 40

THE COURT: I have already ruled.

MR. MENDELL: Your Honor will allow me an exception?

THE COURT: Surely.

10

(Exception noted for the defendant.)

Q. In addition to these monthly payments did you give Mr. Scott his salary each week?

A. Yes, sir.

Q. In addition to that did you give him anything else?

A. He got a bonus in 1941.

20

MR. HAGERMAN: That is all immaterial, and does not establish a matter of landlord and tenant.

THE COURT: No, the only thing we are concerned with here, this man says you owe him $496. rent. Now, you either owe it, or you don't, and if you don't owe it, tell us why you don't owe it. That is all we are interested in.

30

Q. Tell us why you don't owe it, tell us, Mr. Montague?

A. There never was any agreement for the payment of rent. We agreed to buy the building in installments.

MR. HAGERMAN: I object. There is no writing to that effect.

40

THE COURT: I think you should have something in writing. In other words, if you rent a property,

and then later on you come together with the owner, and you say: "I am going to buy the property," under the law you are supposed to have the thing in writing. Isn't that true?

MR. MENDELL: That is true with respect to real estate. This is a suit for rent. He is going to prove an oral lease. 10

THE COURT: If there is an agreement in writing, if there is an agreement not in writing it should be in writing, it should be in writing.

MR. MENDELL: I mean the question in this case is whether or not this bulk station building was personal property or real estate. 20

THE COURT: Is there a statute on that?

MR. MENDELL: With respect to the payment for rent?

THE COURT: With respect to buying a building or real estate.

MR. MENDELL: Yes. 30

THE COURT: What does it say?

MR. MENDELL: Any purchase of real estate must be in writing, but this is not real estate, this is personal property.

Q. Were you ever a tenant of Mr. Scott, Mr. Montague?

40

A. No, sir.

Q. Did you ever agree to become a tenant of his?

A. No, sir.

Q. Did you receive any receipts from him for any rental?

A. No.

10

Q. Did you in any way ever have any conversation with him promising to pay him any rent?

A. No, sir.

MR. MENDELL: Cross-examine.

CROSS-EXAMINATION.

BY MR. HAGERMAN:

20

Q. Mr. Montague, did you not prepare a lease shortly after you were in there, and submit it to Mr. Scott and his wife for their signature?

A. No, sir. I several times tried to get them to make up an agreement so we would know where we stood, but I couldn't get them to do that.

Q. Didn't you ever have a paper already prepared for their signature?

A. No, sir.

30

Q. Did you not repeatedly ask Mr. Scott to sign it?

A. I repeatedly asked Mr. Scott to prepare some paper which would show our definite position in the place, and I couldn't get him to do it.

Q. Didn't this paper you had prepared lie on your desk for several months?

A. No, sir.

Q. Didn't you speak to Mrs. Watt saying that Jim would never sign the lease for you, and you couldn't understand why?

40

A. I didn't say anything about a lease to her, except I could not get no agreement as to what our position was, and he would not make up any agreement.

Q. You had no agreement at all in your possession?

A. No, sir, not in writing. 10

Q. Do you mean to say you went in the building and stayed there three or four years, and paid money, and didn't know what your position was?

A. We knowed what our position should be, but we couldn't get him to sign any paper.

Q. Nothing was ever consummated?

A. Nothing in writing.

Q. Did you not also speak to Mrs. Dilks that Jim would not sign the lease? 20

A. I spoke to Mrs. Dilks that Jim would not sign any paper defining our position in this.

Q. Didn't you have a paper prepared that you showed to them?

A. No, sir.

Q. Didn't you produce it down before Mr. Haight in April, last spring?

A. No, sir.

Q. Didn't you speak to Mrs. Scott frequently when she came to your office, and point to the lease there, 30 the form of lease on your desk, and say that Jim would not sign it?

A. No, sir.

BY THE COURT:

Q. Isn't it true that you stayed in that property for that length of time?

A. Yes, sir.

40

Q. You didn't pay any rent?

A. No, sir. We paid these checks, which we understood was to be payments on the building.

BY MR. HAGERMAN:

10 Q. You are still in this property?

A. Yes, sir.

Q. What are you doing as to payments?

A. Nothing until we get some understanding as to what we are to do.

Q. Didn't you have a discussion with Mr. Scott relative to the signing of some paper whereby it was a lease at $20., and renewed after twenty years?

A. Mr. Scott?

20 Q. Yes, Mr. Scott?

A. No.

Q. No kind of a discussion about that with him as to a twenty year agreement of some kind?

A. Mr. Scott, when he originally tried to buy the place was to come under some kind of Federal loan of twenty or more years, and he asked what kind of protection he could have under that, and I said if he would hook up under that kind of a purchase then we would protect him for that period of time.

30 Q. How did you mean to protect him?

A. If he couldn't take care of his payments we would take the place over.

Q. Did you give him that in writing?

A. No, sir, we were willing to, but he would not execute anything in writing, and would not give us nothing in writing.

Q. Did Mr. Scott ever tell you that it was necessary for him to borrow from the Audubon Bank, or some other bank, in order to make settlement?

40

A. Mr. Scott told me he was borrowing from the bank, and the presumption was it was to get money for the building of the building.

Q. Presumption, didn't you refer him to your attorney, Mr. Mendell, to help you out in the matter?

A. I referred him to Mr. Mendell for all legal advice, because he handled the corporation business. 10

Q. You knew very well that he was borrowing from the Audubon bank on a mortgage?

A. That's right.

Q. Did not Mr. Foster and other members of the committee from the bank call at the property?

A. They made an inspection, yes, sir.

Q. You entertained them in your office the day they were there?

A. They visited my office, looked around, and looked over all the property. 20

Q. In order to appraise the property for the loan?

A. I presume so.

Q. Did you say anything to them at that time that you claimed an interest by purchase or otherwise in this building?

A. No, sir.

Q. You knew they were going to loan money on it, with that as security?

A. I knew what their function was, I knew it was a visitation over there for some purpose, but just what I didn't know. 30

Q. What do you think it could have been?

A. I didn't even think about it. It was his business.

Q. Don't you recall Mr. Scott telling you before they came that they were coming?

A. No, sir.

Q. He told you he was borrowing the loan? 40

A. He told me he was trying to arrange a loan.

Q. Was Mr. Scott there when they were there?

A. No, sir, he was not.

Q. When Mr. Scott came home, did you have a conversation with him?

A. I said the Audubon bank people came there, yes, sir.

Q. You did, and told him nothing about your pretended claim of ownership in the particular security?

A. No.

Q. Told them whether there was a mortgage on it, or not?

A. No.

Q. Do you know whether there was a mortgage on it at all?

A. No.

Q. As far as you know you told them or him nothing?

A. No.

MR. HAGERMAN: That's all.

BY MR. MENDELL:

Q. What did you mean when you say you offered to protect him?

A. On the money there when the property was bought.

MR. HAGERMAN: I object to it unless it was in writing.

THE COURT: I will allow it.

A. At the time the property was bought he didn't have any finances, and he probably would have to

borrow, and he didn't know what the conditions might be, and we guaranteed that we would take the property over, so he would not have any responsibility.

MR. HAGERMAN: I object to it, it would not even —— 10

THE COURT: How can you have a guarantee unless it was in writing?

A. The bond and warrant would be assumed by us if he couldn't fulfill it.

Q. Did you always agree to take over the building if he couldn't make settlement?

A. Yes, sir.

Q. Did you even offer at this time to take it over for more than he had paid for it? 20

A. Yes, sir.

MR. MENDELL: That's all.

BY THE COURT:

Q. You are still in the building?

A. Yes, sir.

Q. And not paying rent? 30

A. No, sir.

BY MR. MENDELL:

Q. Have you offered to make a reasonable rental agreement with him?

A. Yes, sir.

MR. MENDELL: That's all.

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MR. HAGERMAN: That's all.

MR. MENDELL: Defendant rests.

MR. HAGERMAN: I move for a directed verdict, as there has been nothing at all shown here except possession, and there has been no claim at all as to anything that is legal or lawful to show any interest whatsoever other than the condition of landlord and tenant of the defendant company as to the premises in question, in any particular whatsoever.

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THE COURT: I think you folks had better get together and do these things in a legal way, and I am going to render a verdict in your favor, and give your opponent an exception, for the sum of $495., and interest.

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MR. HAGERMAN: We won't bother with interest.

THE COURT: All right, strike that. The Jury is excused with the thanks of the Court.

MR. MENDELL: May I have an exception, if your Honor please?

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THE COURT: Surely.

(Exception noted for the defendant.)

MR. MENDELL: May I note on the record it is the contention of the defendant that this is a Jury question with respect to whether or not the relation-

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ship of landlord and tenant exists as between the parties hereto.

THE COURT: I think I will have them render a verdict for $495. in accordance with my direction. You are directed to render a verdict in favor of the plaintiff against the defendant in the sum of $495. I understand they waive interest. The Clerk will take your verdict.

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BY ENDORSEMENT THIS CHECK IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE | AMOUNT

IF INCORRECT PLEASE RETURN NO RECEIPT NECESSARY

CAMDEN SERVICE STATIONS, INC.
22 PAYSON AVENUE

No. 5856

AUDUBON, N. J. 11/3 1941

PAY TO THE ORDER OF James P. Scott $40.00/100

Forty Dollars DOLLARS

TO
AUDUBON NATIONAL BANK
55-495 AUDUBON, N. J.

Joseph D. Montague
SECY.-TREAS.

PRESIDENT

DEFENDANTS EXHIBIT D-2

BY ENDORSEMENT THIS CHECK IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE | AMOUNT

10/2/41 advance

IF INCORRECT PLEASE RETURN NO RECEIPT NECESSARY

CAMDEN SERVICE STATIONS, INC.
22 PAYSON AVENUE

No. 5868

AUDUBON, N. J. 10/16 1941

PAY TO THE ORDER OF James P. Scott $40.00/100

Forty Dollars DOLLARS

TO
AUDUBON NATIONAL BANK
55-495 AUDUBON, N. J.

Joseph D. Montague
SECY.-TREAS.

PRESIDENT

DEFENDANTS EXHIBIT D-3 (p. 60)

BY ENDORSEMENT THIS CHECK IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE		AMOUNT

IF INCORRECT PLEASE RETURN
NO RECEIPT NECESSARY

CAMDEN SERVICE STATIONS, INC.
22 PAYSON AVENUE
AUDUBON, N. J. 5/2 1942

D4 DI 12/3/41 DW

No. 5744

PAY TO THE ORDER OF James F. Scott $41.25/100

Forty One Dollars Twenty Five Cents DOLLARS

TO
AUDUBON NATIONAL BANK
55-495 AUDUBON, N. J.

Joseph D. Montague
SECY.-TREAS.

PRESIDENT

DEFENDANTS EXHIBIT D-4

BY ENDORSEMENT THIS CHECK IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE		AMOUNT

IF INCORRECT PLEASE RETURN
NO RECEIPT NECESSARY

CAMDEN SERVICE STATIONS, INC.
22 PAYSON AVENUE
AUDUBON, N. J. 6/3 1942

D5 DI 12/3/41 DW

No. 5731

PAY TO THE ORDER OF James F. Scott $41.25/100

Forty One Dollars Twenty Five Cents DOLLARS

TO
AUDUBON NATIONAL BANK
55-495 AUDUBON, N. J.

Joseph D. Montague
SECY.-TREAS.

PRESIDENT

EXHIBIT D-7.

AGREEMENT made and entered into this 31st day of March, A. D. 1941, by and between PAUL ACKERLE, party of the first part, hereinafter called the Seller, and JAMES P. SCOTT, of Sewell, R.F.D. No. 1, New Jersey, party of the second part, hereinafter called the Buyer; 10

WITNESSETH:

Whereas, on the 31st day of October, 1940, the Seller and the Buyer did enter into an agreement of sale, and the Buyer did place a cash deposit in the sum of $100.00, leaving a balance due upon settlement in the sum of $2,250.00; and 20

Whereas there has been some delay in making settlement; and

Whereas the Buyer is now in possession of the said property, and is paying a rental charge of $20.00 per month; and

Whereas it is not possible to know exactly when this settlement will take place, because at the present time, the Seller is not in a position to clear the title to the said property and as a result thereof some delay will take place; and 30

Whereas, it is necessary for the Buyer to proceed with certain alterations and additions to the said property, and for that reason the Buyer must be assured of some subsequent settlement date;

NOW THEREFORE in consideration of the aforesaid, and in further consideration of ONE DOLLAR ($1.00), in hand paid by the Buyer to the Seller, the receipt of which is hereby acknowledged by the

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Seller, it is mutually agreed by and between the parties hereto as follows:

1. That the Seller and the Buyer will enter into an agreement whereby, in consideration of the possession by the Buyer, the Buyer is to pay monthly on the due date thereof, a sum equal to one-twelfth of the taxes on the lands aforesaid, together with the sum of one-twelfth of the balance of the purchase price of $2,250.00, to wit: $11.25 monthly; together with one-twelfth of the the annual insurance and water rents on the said property.

This sum will be computed monthly, and any sums paid in excess of this sum, are to be credited to the Buyer at the time of the settlement; and if there is any moneys remaining due by reason of the fact that the payments will not cover the monthly sum already paid, then the Buyer agrees to add this sum to the purchase price at the time of settlement.

2. This agreement is to continue in force until the Seller is able to make settlement with the Buyer, and is to be in full force and effect until such settlement is had.

3. This settlement of course is to take place when, as, and if the Seller can provide a good and marketable title to the said property.

4. At the time of settlement, this agreement is to merge with the agreement of sale dated October 31, 1940, and after a title to the said property is given upon the terms and conditions mentioned in the agreement of October 31, 1940, then this present agreement is to become void and of no effect, and is to merge with that of the deed.

This agreement is to be a part of the agreement of sale of October 31, 1940, and both agreements are to be a part of the settlement to be made, and the purpose of this agreement is to enable the Buyer to make improvements and to proceed with the use of the said property.

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IN WITNESS WHEREOF, the parties have hereunto interchangeably set their hands and seals the day and year first above written.

PAUL ACKERLE
MATILDA ACKERLE L.S.
PAUL ACKERLE
JAMES P. SCOTT L.S.
JAMES P. SCOTT
MARTHA V. SCOTT L.S.
MARTHA V. SCOTT

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Signed, sealed and delivered in the presence of
LOUIS C. JOYCE, JR.

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EXHIBIT D-8.

BENJAMIN J. DZICK
COUNSELLOR AT LAW
432 MARKET STREET
CAMDEN, N. J.

Camden 1488

January 3, 1944

Mr. & Mrs. James P. Scott
Sewell, R.F.D. No. 1
New Jersey

Dear Mr. & Mrs. Scott: Re: Ackerle Property

You promised to be in my office January 3, 1944, to make settlement on the above property.

Kindly be advised that my client considers the agreement terminated and we are about to start ejection proceedings in the above matter.

Yours truly,

BENJAMIN J. DZICK
BENJAMIN J. DZICK

BJD/cb

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NEW JERSEY COURT OF ERRORS AND APPEALS.

James P. Scott and Martha V. Scott, his wife,
Plaintiffs-Appellees,

vs.

Camden Service Stations, Inc.,
Defendant-Appellant.

Action at Law.

On Appeal from New Jersey Supreme Court, Gloucester County.

BRIEF OF DEFENDANT-APPELLANT.

FACTS.

Plaintiff, James P. Scott, was employed by defendant, Camden Service Stations, Inc., for slightly over eleven years (S. of C., p. 45). Plaintiff was president of the said company from its inception; the company never had more than three employees, and

during the month of October, 1941, it had two employees—the plaintiff, Scott, and witness, Montague, who is secretary and treasurer of the defendant-company. The plaintiff, Scott, was president of this company from its inception up to the time that he quit his employment in August, 1944.

Scott and Montague were trying to remain in the highly competitive wholesale gasoline business, and Scott was the truck driver for the company.

The company needed some space or ground for its bulk station and Montague testifies (S. of C., p. 46) that it was desirable to move the bulk station and they found a property about a quarter of a mile away. They had a conversation and they made arrangements to take over the said property, that the carrying charges for ten acres of ground including the residence of the Scotts was $20. a month, that the defendant agreed with Scott that they were to build the bulk station on a tiny portion of this ground, and that it would make it easy for the plaintiff to conduct his business as truck driver, because he would always be near his home and when he returned from his work, he would be at his home. As a part of the employment, the company would build this bulk station, and Scott and the defendant would consider the station as personal property, and that the company would pay the monthly installments for the building of the said bulk station, and that the company could remove the bulk station at any time; and it was agreed between them that this corrugated iron structure on a wooden frame was to be considered between them always as the property of the company and as personal property.

After entering into this agreement, the company delivered its first check marked Exhibit D-3 (S. of

C., p. 60), to Scott in the amount of $40., which check showed that it was an advance payment on the bulk station. Exhibits D-4 and D-5 (S. of C., p. 61) also showed checks of the defendant to the plaintiff, which showed upon their face that they were payments for "bldg." The company continued to make monthly payments for thirty-six consecutive months, one payment being for two months. In all there were thirty-five checks delivered to the plaintiff, Scott, and not one of these checks were ever marked for rent (S. of C., p. 40).

The plaintiff, Scott, admits that his monthly payments made to the bank for the construction of this corrugated iron bulk station were $41.53 (S. of C., p. 38).

The plaintiff, Scott, is unable to state with accuracy when he discussed what he alleges to be the rent of this place, with the defendant (S. of C., pp. 31 and 32).

Most surprisingly, at or about the time that the plaintiff contends that he leased this station to the defendant, he states that the original agreement commenced with the plaintiff paying to himself the rent for the first three months (S. of C., p. 31):

> "Q. When do you claim he paid you the first payment?
>
> A. I had the agreement before October, 1941, but I got the first payment in November, 1941. I paid three months of it myself before he moved in."

It is the contention of the plaintiffs that out of such conversations and out of such actions, an agreement to rent originated.

It is the contention of the defendant that there was a relationship of employer and employee; that the bulk station was always personal property and that it was built on the grounds of the plaintiff for the convenience of the plaintiff; that there never was any relationship of landlord and tenant; that there never was an agreement to pay rent; that the plaintiff, Scott, received certain salaries, bonuses, and a certain favored position by the employer for the privilege of permitting this station to be built on his ground; and that under such an agreement, the defendant had a right to remove its personal property when the plaintiff, Scott, quit his employment. The defendant contends that since no agreement exists to pay rent, that such an agreement cannot be inferred from occupancy, and that under the facts in the case, this was a question of fact for the Jury instead of the question of law for the Court (S. of C., pp. 50, 51 and 52).

The plaintiff contends that the corrugated iron bulk station, when built upon the grounds of the plaintiff, immediately became real estate and that no oral conversations referring to ownership of the said bulk station could be introduced in evidence because it would violate the statute of frauds. The defendant contends that under the testimony, the said bulk station was personal property, and that it was a fact question for the Jury to determine. The defendant contends that conversations that would show the intention of the parties, and conversations that would show whether or not the said property was real estate or personal property, were evidential, and it was harmful and prejudicial error to deny the defendant the right to show these conversations; and that it was error to deny the witness, Montague, to

testify as to such conversations (S. of C., pp. 46 and 47). An exception was taken to the Court's ruling, which said ruling is made the basis of the Second Ground of Appeal in this cause.

LAW.

Point 1. Error was committed when the learned Trial Judge directed a verdict in favor of the plaintiffs, and against the defendant; when the Trial Judge should have submitted the cause to the Jury.

(a) The question for decision, and in issue in this cause was and is—Does the relationship of landlord and tenant exist? Has a contract to pay rental been proved? Has this relationship been denied? Is this issue factual or is the existence or non-existence of the relationship of landlord and tenant a legal question?

The relationship of landlord and tenant is always created by contract, either express or implied. It cannot exist without such contract.

32 *American Jurisprudence* 46.

Its existence is not to be presumed merely because it is asserted. It must be proved as do all contracts that form the basis of suits.

In re: *Wilson's Estate,* 37 A2 709 (349 Pa. 346).

This Court reversed a directed verdict in favor of a landlord and against the tenant, stating the facts

in the case constituted a question for the Jury. This Court states: "The relationship of landlord and tenant is created by contract, and may be created although the landlord is not the owner of the property." Further, "the relation of landlord and tenant does not depend on the landlord's title, but is created by contract, either expressed or implied, by the terms of which the tenant enters into possession of the lands under the landlord, and such relation may be created although the landlord is not the owner of the property."

Ocean City Co. v. Johnstone, 166 A. 307.

No action can be maintained for use and occupation where the relationship of landlord and tenant does not exist, as where the defendant enters upon lands under a contract to purchase and sale, and for a deed.

Brewen vs. Administrators, 18 N. J. L. 215.

The action for use and occupation can be maintained only upon a contract, express or implied.

Stewart vs. Fitch, 31 N. J. L. 19.

The action for use and occupation is predicated on the relation of landlord and tenant, and based on contract, express or implied; and while from the fact of occupancy the relationship of landlord and tenant will ordinarily be inferred, such inference is negatived by acts of the parties amounting to a repudiation of that relation.

Mason vs. Haurand, 79 N. J. L. 375.

(b) Where the relationship of landlord and tenant is denied, and the defendant's proof conclusively es-

tablishes no such status, and the proofs as to whether or not such relationship of landlord and tenant does exist is in issue; is it a legal question for the Court, or is it a question of fact for the Jury?

Justice Perskie, speaking for this Court, in *Christine, et als. vs. Mutual Grocery Co.*, 119 N. J. L. 149 (194 Atl. Rep. 625) states:

> "The question requiring decision is * * * Did the learned Trial Judge err in entering a judgment, based on a directed verdict * * * we think so.
>
> "It is well settled that, in passing upon a motion for a directed verdict, the evidence will not be weighed. All of the evidence which supports the claim of the party against whom the motion is made must be accepted as true, and he is entitled to the benefit of all legitimate inferences which may be drawn therefrom. And where fair-minded men might honestly differ as to the conclusions to be drawn from facts, whether controverted or uncontroverted, the question at issue should be submitted to the jury. Repasky v. Novich, 113 N. J. L. 126, 172 A. 374; Shields v. Yellow Cab, Inc., 113 N. J. L. 479, 483, 174 A. 567; Israel v. Travelers' Ins. Co., 116 N. J. L. 154, 182 A. 840. Cf. Goldin v. Universal Indemnity Ins. Co., 117 N. J. L. 192, 187 A. 163 (involving a non-suit). Did the learned trial judge, by directing a verdict for the defendant under the circumstances here exhibited, violate this principle? We think so."

This Court, in *Scarano, et al. v. Lindale, et al.*, 121 N. J. L. 549 (3 A. 2nd 633) states:

"In passing upon such motions the evidence will not be weighed. All the proofs which support the claim of the party against whom the motions are made must be accepted as true, and he is entitled to the benefit of all legitimate inferences which may be drawn therefrom. Where fair-minded men might honestly differ as to the conclusions to be drawn from the proofs, the questions at issue should be submitted to the jury. Lipschitz v. New York & New Jersey Produce Corp., 111 N. J. L. 392, 394, 168 A. 390; Morris v. Muller, 113 N. J. L. 46, 51, 172 A. 63."

State of New Jersey, defendant-in-error v. William S. Sutherland, Sr., et al., plaintiffs-in-error, 15 A. 2nd 749, 125 N. J. L. 273, Court of Errors and Appeals:

"The applicable law is settled. In passing upon a motion to direct a verdict, just as in passing upon a motion for a non-suit, the evidence will not be weighed. The party against whom the motion is made is entitled to all the evidence in his favor and all the legitimate inferences to be drawn therefrom treated as true. When fair-minded men may honestly differ as to the conclusion to be reached from that evidence, controverted or uncontroverted, the case must be submitted to the jury. Repasky v. Novich, 113 N. J. L. 126, 172 A. 374; Christine v. Mutual Grocery Co., 119 N. J. L. 149, 151, 152, 194 A. 625. A verdict may be directed in favor of one party only when the evidence, together with the legitimate inferences to be drawn therefrom is such that no view which the jury might lawfully take of it favorable to the other party

would be sustained. Sardino v. Agnellino, 119 N. J. L. 7, 194 A. 137."

Fitzpatrick v. Merchants & Manufacturers Fire Ins. Co., 122 N. J. L. 468 (5 A. 2d 771), Justice Heher, speaking for Court of Errors and Appeals:

> "Where the matter in issue has been the subject of conflicting evidence, the resolution of the conflict is within the exclusive province of the jury. Unless the case presents admitted or uncontroverted facts, the issue must be submitted to the jury. Dickinson v. Erie R. Co., 85 N. J. L. 586, 90 A. 305; Schmidt v. Marconi Wireless Tel. Co., 86 N. J. L. 183, 90 A. 1017, Ann. Cas. 1918B, 131; Koehl v. Bollinger, 112 N. J. L. 70, 169 A. 683. The credibility of the witnesses and the probative value and weight of the conflicting evidence are for the determination of the triers of the facts, unless the particular witness' testimony is inherently improbable or is inconsistent with the common principles by which the conduct of mankind is naturally governed. Clark v. Public Service Electric Co., 86 N. J. L. 144, 91 A. 83, 85; Second National Bank of Hoboken v. Smith, 91 N. J. L. 531, 103 A. 862, 1 A. L. R. 470; Sivak v. New Brunswick, 122 N. J. L. 197, 3 A. 2d 566."
>
> Further—"The test to determine whether the Trial Judge properly directed a verdict is—whether the evidence, if credited, would justify the affirmation by men of ordinary reason and fairness, of the proposition sought to be maintained."

This Court reversed a judgment of non-suit, and awarded a venire de novo, on the question of whether a contract did or did not exist, depending upon whether the oral agreement was an original one, or a collateral agreement, and barred by the statute of frauds.

This Court stated this to be a factual question, and should have been submitted to the Jury for its determination, rather than a question of law and subject to a non-suit directed by the Court.

Federal Wine & Liquor Co. v. Jabberwock Country Club, et al., 120 N. J. L. 331 (199 A. 594).

Point 2. Did the Learned Trial Judge err in refusing to permit the witness, Montague, to testify as to the conversation he had with the plaintiff, Scott, referring to the bulk station built on the grounds of the plaintiff, Scott? Was such ruling an error substantially affecting the rights of defendant?

Title to personal property may be proved by Parol.

Sherron vs. Humphreys, 14 N. J. L. 217.

The question whether personal property annexed to the realty is a part of the realty is for the Jury, and evidence is admissible that there was no intent to annex it; or that by agreement it became personalty as between vendor and vendee.

Gibbs vs. Cooper, 86 N. J. L. 226 (90 A. 1115).

This Court stated in *Gibbs vs. Cooper*, supra, "it was error to direct a verdict and the Judgment must be reversed, to the end that there may be a venire de novo.

The real question in the case was whether certain property was a part of the realty, or was personal property. The Judge held it was part of the realty. There was evidence that by agreement it was reserved as personal property. This presented a question for the Jury, since the inference arising from annexation of personal property to real estate is an inference of fact, not a conclusion of law.

Pope vs. Skinkle, 45 N. J. L. 39;
Campbell vs. Roddy, 44 N. J. E. 244;
Palmateer vs. Robinson, 60 N. J. L. 433.

It was equally permissible for the defendant to prove either that there was no intent to annex to the realty, or that subsequently by agreement the apparatus again became personal property between the parties."

Whether a building erected by A on B's land, with B's permission, is real or personal property, is a question of fact, to be decided according to their actual or imputed intention.

Pope vs. Skinkle, 45 N. J. L. 39.

What constitutes trade fixtures is usually a mixed question of law and fact for a jury.

The inference arising from the annexation of personal property to real estate is an inference of fact, not a conclusion of law; the question whether it becomes part of the realty is a question for the Jury, and evidence is admissible to prove either that there was no intent to annex the personalty to the realty or that subsequently by agreement it again became personal property as between vendor and vendee.

ARGUMENT.

Point 1 (a).

It is respectfully submitted that the Court cannot make a contract for the parties where none exists. Either a contract of landlord and tenancy exists or it does not exist. The plaintiff, in a confused fashion, states that such a relationship did exist and it existed by agreement between the plaintiff and the defendant; and the defendant agreed to pay rent in monthly installments, but surprisingly, the plaintiff states that the tenancy started by the plaintiff paying to the plaintiff rent for the first three months (S. of C., p. 31); and then, in a confused fashion, the plaintiff attempts to set forth a relationship of landlord and tenancy.

This can only exist, if at all, by an agreement between the parties.

The defendant, in clear fashion, disputes these statements and positively asserts that no relationship of landlord and tenant ever existed; that a relationship of employer and employee did exist; that the employer agreed to build a bulk station on the grounds of the plaintiff; that it was the agreement between the parties that the said station was to remain personal property; that the defendant would pay the monthly installments for the building of the bulk station; that the defendant never agreed to become a tenant and never paid any money as rent (S. of C., pp. 51 and 52).

The defendant's proof, in addition to his testimony, is evidenced by checks which are shown in Exhibits

D-3, D-4, D-5 (S. of C., pp. 60 and 61). Exhibit D-3 shows the initial agreement between the parties dated October 2, 1941, and on the face of the check, we have the words "advance Bulk." On Exhibits D-4 and D-5 the word "bldg." appears thereon. The testimony discloses that of the thirty-five checks delivered by the defendant to the plaintiff, not one check ever stated anything on it which would indicate the monthly payments were payments for rent. On the contrary, the checks distinctly show that they were monthly payments for a building.

There were two employees—Scott and Montague, in the entire concern. Scott was president; Montague was secretary-treasurer of the company. They worked together as employer and employee. Their agreements with respect to this building were not reduced to writing. In August, 1944, they had certain differences between them and Scott quit his employment. Thereafter, Scott instituted this suit claiming that the relationship which commenced in October, 1941, was one of landlord and tenant.

This was clearly a question of fact and the inferences to be drawn from the testimony of the defendant were strongly persuasive that the honest agreement between the parties was as stated by the defendant. Certainly, if the testimony of the defendant and the legitimate inferences to be drawn therefrom be treated as true, fair-minded men might honestly reach the conclusion that the defendant's version of the case was the correct one, and fair-minded men could easily have found for the defendant.

It was for the Jury to say whether or not this relationship between Scott and Montague commencing in October, 1941, is one of landlord and tenant,

or is one of employer and employee for the convenience of the employee.

Is it likely that an employee in a two-man concern would become the landlord charging twice the amount of carrying charges for a tiny portion of a ten acre ground upon which Scott maintained his home? The testimony discloses that the carrying charges for the ten acres of ground and the home thereon was $20. per month. Is it reasonable to suppose that the employee would have charged his employer twice as much as he was paying, for a tiny portion of ground; and that he would have his home and the grounds at a profit of $20. per month while this was going on? Or is it more believable that out of this status of employer and employee, this relationship of convenience was established, and that the testimony of the defendant is the more believable testimony?

Is this a legal question, or is it a factual question? Could fair-minded men honestly differ as to the conclusions to be drawn from this controverted evidence? If they could, it was a question solely for the Jury.

Can the Court conclude, as a question of law, that the testimony of the defendant and the legitimate inferences to be drawn therefrom is untrue, and deserves no consideration, and that it should be ignored, in order to arrive at a point where a direction of verdict for the plaintiff would be considered proper?

It is respectfully submitted that this set of circumstances as to whether or not a contract of landlord and tenant existed, was a fact question only, and it was not the province of the Court to take this fact question from the Jury.

Point 2.

It was error on the part of the Trial Judge to refuse to permit the witness, Montague, to testify as to what the conversation was between the plaintiff, Scott, and himself, representing the defendant-company, with reference to the bulk station.

An exception was taken at the trial (S. of C., pp. 46 and 47).

This was substantial error in that it prevented the defendant from showing to the Court and Jury that the station in question was personal property, and that the statute of frauds had no application with respect to personal property. This conversation would have disclosed the intention of the parties that the said bulk station was to remain personal property, and it would have disclosed under what arrangements between the parties this station was built on the ground of the plaintiff, Scott. This was harmful error in that it deprived the defendant of the opportunity of explaining the relationship of employer and employee between the parties, and the intention of the parties, and what the agreement of the parties was with respect to the said bulk station.

By sustaining the objection on the ground that it violated the parol evidence rule under the Statute of Frauds, there was error in that the defendant was prevented from showing the circumstances surrounding the monthly payments for the said personal property known as the bulk station.

Parol evidence is admissible to determine whether or not the property in question is personal property or real estate, and it was prejudicial error for the

Court to rule that the said station was real estate when every portion of the testimony disclosed to the contrary, and there was no testimony on the part of any witness that would contradict the defendant's testimony that the said station was built in such a manner that it could be removed from the foundation on which it was placed.

The defendant was within his substantial rights in disclosing the relationship of the parties, and that the conversation between them was such that the the bulk station would have been shown clearly to have been personal property, if this conversation were permitted.

At the trial of this cause, it was plainly suggested to the Court that the statute of frauds had no application, in that the station was built as personal property, but despite this fact being expressed to the Court, the Court ruled that no testimony was permissible and that the station was real estate.

How could the defendant testify that it was not real estate, and that it was the intention of the parties to keep it personal property, if the Court refused to permit this conversation between the parties at the time that the bulk station was about to be built?

It is respectfully submitted that the Court erred in disregarding the evidence of the conversation between the parties at the time that the station was about to be built.

Point 3.

If the attorneys for the plaintiff and the defendant admit before the Court that the amount in dispute is less than the amount demanded to be due,

should the Court direct a verdict for the full amount and take no cognizance of the amount which both the attorney for the plaintiffs and the defendant agreed should be credited, which lessens the amount due?

It was brought to the Court's attention that the amount of $40. advance payment for the bulk station on October 16, 1941, was paid prior to the payment commencing with November, 1941, which is set forth as Exhibit D-2. The plaintiff contends that the agreement of landlord and tenant was created in November, 1941. This is denied by the defendant, but even admitting it to be true, there would have to be credited to the defendant the advance payment of October 16, 1941 in the amount of $40. Also, the plaintiff admits that he made an error of $1.25 on one of the payments, so that it was admitted that $41.25 should be credited to the defendant (S. of C., pp. 49 and 50).

Despite this uncontradicted testimony, and the admitted facts, the Court states that there is due $496.25, and then proceeds to direct a verdict in the amount of $495., whereas there could be no sum in excess of $443.75 due even if a contract of tenancy did exist, such as is claimed by the plaintiff.

It is respectfully submitted that where the undisputed facts in the case show that mathematically a sum of $443.75 is due and no other sum can be due, that an orderly trial becomes impossible if the Court, despite this evidence, refuses to consider the admitted testimony of both counsel for plaintiff and defendant, and rules that the entire sum of $495. is due, and directs a verdict accordingly.

A reversal of the Judgment of the Court below is earnestly urged and requested, and it is respectfully

submitted that a venire de novo issue in the said cause.

Respectfully submitted,

HARRY M. MENDELL,
Attorney for and of Counsel with Defendant-Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JAMES P. SCOTT and MARTHA V., his wife,
Plaintiffs-Appellees,
vs.
CAMDEN SERVICE STATIONS, INC.,
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL FROM NEW JERSEY SUPREME COURT, GLOUCESTER COUNTY.

BRIEF OF PLAINTIFFS-APPELLEES.

COUNTER STATEMENT OF FACTS BY DEFENDANT-APPELLANT.

James P. Scott, one of the Plaintiffs, was employed by Defendant for 11 years as a truck driver delivering oil, gasoline, etc. He was called President (S. of C., pp. 30, 40), and upon request had signed income tax reports, and other papers, but had never had any stock issued to him, nor received a divi-

dend, nor attended a director's meeting, nor a stockholders' meeting, and was in no sense qualified to act as President, or director; apparently all of the stock was held in the name of Joseph F. Montague, who called himself Secretary and Treasurer; Mr. Scott merely got wages of $25. weekly, and an occasional bonus.

Plaintiffs had leased a 10-acre place with dwelling on it on Almonesson Road, nearby the location of the business, from which location the Company had been notified to vacate; pursuant to an oral arrangement, Plaintiffs bought the 10-acre place, and erected a bulk garage building with office, financed the same through the Audubon National Bank, independent of Defendant (S. of C., pp. 28-25-29); after completion in Fall of 1941, and after Plaintiffs had paid three installments on Bank note, Defendant moved in and began paying $40. monthly; later the payment was increased to $41.25 monthly; Mr. Montague had a lease prepared, but Plaintiffs refused to sign the same because it was for a term of only one year with option to renew for 20 years (S. of C., p. 26), which latter clause was objected to. On August 1st, 1944, Mr. Scott left the employ of Defendant; at the same time, the Defendant Company ceased making any payment for rent beginning with the payment due on September 1st, 1944; the Company stayed on in possession, and still is in possession without paying (S. of C., p. 28). At the trial, the Court directed a verdict for Plaintiffs for $495., being the amount of 12 months' rent accrued up to the time of starting suit. Defendant undertook to establish an oral agreement (S. of C., pp. 46, 47) to purchase the building which he had found erected there, by Plaintiffs, claiming that it

was movable and was personalty and not real estate; no mention whatever was given of the cost of the building to Plaintiffs, nor what amount Defendant expected to pay for it; nor any other consideration moving to Plaintiffs for the use of their land and the risk of the investment except the dubious and empty honor of being referred to as President of the Defendant Company.

Mr. Montague admitted that he had known of the Plaintiffs' application to the Audubon National Bank for a loan on mortgage, that he entertained the bank's committee in his office, and that although he had full knowledge of the purpose of their visit, that he had not then notified them of his interest or claim to title by parol agreement to the building which they were investigating as the subject of the loan, but had allowed the loan to take its course (S. of C., p. 55).

STATEMENT OF QUESTION INVOLVED.

In a suit for rent, where the owner had erected a bulk garage on his land, designed to meet the needs of Defendant, had secured a loan from a bank, after its investigating committee had inspected the premises and been entertained by Defendant who had full knowledge of their mission, but failed to notify them of his alleged claim by parol agreement to buy the garage, which was to be included in the mortgage; and where Defendant had entered into possession, paid monthly payments of $40. and $41.25

for about three years, and had prepared a lease which Plaintiffs had refused to sign because it contained an option to renew for 20 years; where at the trial Defendant undertook to set up a parol agreement to the garage claiming it to be movable, being personalty and not realty, and failed to state either the cost to Plaintiffs, or what amount or in what time Defendant had expected to pay for said purchase, did the trial judge err in directing a verdict in favor of Plaintiff for accrued rent?

ARGUMENT.

(*First Ground* (*S. of C., p.* 15)).

Plaintiffs claim that there was no error in directing the verdict for the Plaintiffs and against the Defendant for accrued rent.

All the testimony being taken into consideration, the evidence showed beyond any doubt that Plaintiffs had built the garage out of their own funds, prior to the taking possession by Defendant; and that the main difference between them during the three years or more had been no question involving purchase or price whatever, but on the other hand, the length of term of a lease. Defendant itself had caused a lease to be prepared, but Plaintiffs had not signed because it called for a term of one year, with option to Defendant to renew for 20 years. If there had ever been any discussions as to the purchase by

Defendant, no definite terms as to price, area, or other features had been determined, and there was never any agreement in writing or orally, that would be complete or definite for either realty or personalty.

The rule in such cases has been clearly expressed in the case of *Capone vs. Ranzulli,* 99 N. J. Eq. 627 (1926), to wit:

> "There are some cases in which our courts have validated parol contracts regarding interests in land, but as Vice Chancellor Grey said in Hartman vs. Powell, 66 N. J. Eq. 293,
>
> > 'In this state the Court of Errors and Appeals has, with regard to this section of the statute of frauds, declared that in all cases in which any court has validated parol contracts passing an interest in land, the contract itself has been required *to be proved to the point of demonstration.'* (Italics ours.)
>
> "That is far from the situation in the cases now before me * * * but, at all events, the parol agreement has not been proved 'to the point of demonstration'."

An examination of the alleged parol contract as set forth in this case is uncertain and incomplete, and the contract was not proved "to the point of demonstration," namely:

(a) Uncertainty as to price; if there were negotiations for the purchase of the garage, surely there was no meeting of the minds as to price; there was no evidence as to the cost to the Plaintiffs, how much had been borrowed from the Bank, nor of any amount the Defendant had expected to pay.

(b) Uncertainty as to time of payment. The Defendant had paid monthly from October 1st, 1941 to August 1, 1944; it stopped only when one of the Plaintiffs quit its employ; from what appears it would have continued indefinitely to pay so long as Plaintiff remained in its employ.

> "A right to come upon land of another, and remain for an indefinite time, can only be granted by deed."
>
> *Hatfield vs. Central Railroad Co.*, 29 N. J. L. 571.

(c) Uncertain as to area of land to be included, if any.

(d) Uncertain or no consideration to Plaintiffs for the use of their land, or the risk of investment of their money. It is true that Defendant does allege that Mr. Scott had the dubious honor of being called President of the Company Defendant; however, this seems to have been more for the advantage of Defendant than for the benefit, if any, to Plaintiff.

(e) Lack of mutuality in the alleged parol contract. The alleged parol contract if binding on Plaintiffs was not mutually binding on Defendant. Had Defendant not moved in after the garage had been built designed to meet his needs, in the absence of a writing, Plaintiffs would have had no guarantee or obligation of any kind to enforce the alleged parol contract. Plaintiffs would have been left holding an empty bag (S. of C., p. 29).

(f) Lack of corroboration in any respect as to the essential features.

(g) Deficient because of no writing; as required by the Statute of Frauds.

With such uncertainty, indefiniteness, lack of mutuality, writing, etc., the Court was justified in failing to find the parol contract was proved "to the point of demonstration," and in directing a verdict in favor of the Plaintiffs and against the Defendant for the accrued rent.

(*Second Ground of Appeal* (*S. of C., pp.* 15, 16)).

The law relating to fixtures is usually applied in those cases where the non-owner erects a structure on land of another. This case is to be distinguished from those cases. In them it is held, "It is well settled that the erection of structures on the land of another is such an interest in lands as the statutes of frauds requires to be in writing." *Capone vs. Ranzulli,* supra. Here, the non-owner or tenant erected nothing; the structure had been erected before he entered into possession, independent of any financial aid from him. Not having either been built by him or with his money, when built it became realty, and remains so until and unless something happened to change it into personalty. Nothing of the kind has happened in the way of a writing; also, no evidence was shown of any intent to that effect on the part of Plaintiffs, nor of any written agreement entered into by Plaintiffs. It is respectfully submitted that the garage having become realty the Court was justified in refusing to allow parol evidence as to a sale of this part of the realty.

(*Third Ground of Appeal* (*S. of C., p.* 17)).

The apparent discrepancy arises from the fact that it appears that the occupancy by Defendant began on Oct. 1, 1941, instead of November 1, 1941. When we apply the old rule of bookkeeping that every debit must have a credit, this extra month of occupancy and extra month of payment check out, and do not affect the final balance due. The Plaintiff (S. of C., pp. 28, 29), testified that there was due rent from Sept. 1, 1944 to the time when suit was started, being 12 months at $41.25 per month, or $495., the amount for which the verdict was rendered. At no time did Defendant dispute the statement that he had paid anything after August 1st, 1944, when Mr. Scott left its employ. It is respectfully submitted that the verdict for $495. is the correct amount and is supported by clear evidence to that effect, and should not be disturbed.

Respectfully submitted,

SAMUEL P. HAGERMAN,
Attorney for and of Counsel with Plaintiffs-Appellees.