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New Jersey Court of Errors and Appeals

MONMOUTH COUNTY

THOMAS P. MCKENNA, <div style="text-align: right; padding-right: 20px;">Plaintiff,</div>	}	10
vs.		
WALTER READE, <div style="text-align: right; padding-right: 20px;">Defendant.</div>	}	20
		Action at Law

NOTICE AND GROUNDS OF APPEAL.

*To Perkins & Drewen, Esquires, Attorneys of
Plaintiff:*

Sirs:

Please take notice that the defendant in the above entitled cause appeals to the Court of Er- 30
rors and Appeals, in the last resort in all causes in New Jersey, from the whole of the judgment, on the following grounds, to wit:

(1) Because the Court denied defendant's motion to strike out the testimony concerning a written lease from the plaintiff to one, William E. Ketchell, it appearing thereafter that said lease was in writing.

Notice and Grounds of Appeal

(2) Because the Court overruled defendant's objection to the following question asked of Thomas Gill:

10 "What is the rate of rent paid for the space used for such displays?"

(3) Because the Court, at the close of Thomas Gill's direct-examination, denied defendant's motion to strike out said witness's testimony relating to signboards.

(4) Because the Court denied defendant's motion to strike out the entire testimony of Thomas Gill.

20 (5) Because the Court overruled defendant's objection to the following question asked of William A. Hulit, Jr.:

"What would be the rental value of parking space in Broadway in the location to which we have been referring?"

(6) Because the Court denied defendant's motion for a nonsuit.

30 (7) Because the Court, after plaintiff had rested, denied defendant's motion to strike out all testimony relating to the removal of the topsoil.

(8) Because the Court, after plaintiff had rested, denied defendant's motion to strike out all testimony relating to billboards.

40 (9) Because the Court, after plaintiff had rested, denied defendant's motion to strike out all testimony relating to the use of plaintiff's premises by the owners of land lying immediately to the west and east thereof.

Notice and Grounds of Appeal

(10) Because the Court overruled defendant's objections to the admission of testimony having to do with the removal of topsoil; the presence of billboards and the use of plaintiff's premises by the owners of lands lying immediately to the west and east thereof. 10

(11) Because the Court erred in permitting plaintiff to amend his complaint by adding thereto a count identical with the fourth count of the original complaint, which count had been stricken out and had been abandoned by the plaintiff.

(12) Because the Court denied defendant's motion to strike out the fourth, fifth and sixth counts of plaintiff's Amended Complaint. 20

(13) Because the Court denied defendant's motion for a nonsuit on the causes of action respectively set forth in the fourth, fifth and sixth counts of plaintiff's Amended Complaint.

(14) Because the Court denied defendant's motion for a nonsuit addressed after the amendment to plaintiff's Complaint.

(15) Because the Court denied defendant's motion to compel plaintiff to elect among the fourth, 30 fifth and sixth counts remaining in said Amended Complaint, prior to the introduction of proof by the defendant.

(16) Because the Court erred in making the following comment in the presence of the jury:

"If you propose to show that the same dirt is there now that was there before Reade went into possession I will admit 40 it."

Notice and Grounds of Appeal

(17) Because the Court sustained plaintiff's objection to the admission in evidence of a portion of the record of a suit in the Court of Chancery, wherein Walter Reade was complainant, and Thomas P. McKenna was defendant, marked
10 "U" for identification.

(18) Because the Court denied defendant's motion for a direction of a verdict.

(19) Because at the close of all testimony, the Court refused to strike out the fourth count of plaintiff's Amended Complaint.

(20) Because the Court, at the close of all testimony, denied defendant's motion to strike out
20 plaintiff's evidence relating to the following: (a) removal of topsoil; (b) billboards and signboards; (c) the depositing of building materials from adjacent property, on the premises of plaintiff; (d) the use of plaintiff's property by wagons carrying scenery to and from the theatre owned by the Broadway Theatre Company.

(21) Because the Court erred at the close of all testimony in allowing the plaintiff to amend
30 the sixth count of the Amended Complaint.

(22) Because the Court denied defendant's motion for a direction when only the fourth and sixth counts of plaintiff's Amended Complaint remained.

(23) Because the Court charged as follows:

"Therefore you will understand, gentlemen, that in considering this case there
40 are two angles, as I shall call them, which

Notice and Grounds of Appeal

are now involved and with reference to which you must ascertain whether the plaintiff has satisfied you by credible legal evidence—he carrying the burden of proof—that the counts now remaining in the
10 complaint are supported thereby." 10

(24) Because the Court charged as follows:

"Now from that date, namely, June 22, 1925, as found by the Court of Chancery in the litigation indicated, I hold that Reade no longer had any right to occupy or possess the tract of land in question. The relation then had been suspended by a finding of the Court that the contract
20 was breached by Reade's refusal to accept the deed. Now necessarily from that time on, holding as I do as a matter of law, Mr. Reade had no right to occupy the premises and should have surrendered them to McKenna."

(25) Because the Court charged as follows:

"Does it clearly appear by the evidence just why Reade was buying this lot of land?
30 Was it for parking purposes? Was it for the purpose of putting a building on it? Whatever the purpose may have been, you will have to discover from an examination of the evidence yourselves."

(26) Because the Court charged as follows:

"And therefore if you find in this case as a fact that some corporation or some
40 other person, not Reade, was responsible 40

Notice and Grounds of Appeal

for the excavation on the lot in question, or indeed, that there was no such excavation on the premises, then I charge you there can be no verdict against Mr. Reade."

10 (27) Because the Court charged as follows:

20 "And again it is said that the land was used for parking purposes, apparently in connection, I may say, with patrons of the theatre. But was Reade responsible for that or was the Broadway Theatre Company responsible? Then again it is said that certain radiators were parked, as it were, or placed upon the land. It further appears in that connection that at that time there was a building operation going on on the land belonging to Mrs. Reade, not to Reade. Unless you found some evidence in the case that warranted the inference that Reade was responsible for having those radiators placed there, of course, you could not hold him."

(28) Because the Court charged as follows:

30 "Now I have held as a matter of law that from the date of entry by Reade into possession, if he did, with the consent of McKenna, to June 22, 1925, if Reade committed any damage or waste either himself or through his employees or agents, then the right of McKenna to recover would be in the nature of a breach of Reade's contract to take title to the land. Just when that excavating occurred I do
40 not know. I have been unable to discover

Notice and Grounds of Appeal

from the testimony. The complaint alleges that Reade occupied this land from the 10th of June, 1925, to sometime in June or July, 1927. In order to hold Reade, you must ascertain first that between the date of the contract, or rather, the time
10 when he went into possession with consent of McKenna, to June 22, 1925, when the Court of Chancery found Reade had breached the contract by declining to take the deed, your right to award any damages in favor of McKenna against Reade must be for something that Reade did."

(29) Because the Court charged as follows:

20 "Now, if he occupied the land then I charge you that the normal and natural damages to McKenna following from his refusal to take the deed would be in the nature of a breach of his contract and would involve depriving McKenna of the use of the land, to be translated into dollars and cents if you find it warranted under the evidence."

(30) Because the Court charged as follows: 30

"Then if you find in addition to that, that during that period Reade directly or indirectly took any topsoil from the land the measure of damages would be the difference in value of the land before Reade took possession and after the breach of the contract on June 22, 1925."

Notice and Grounds of Appeal

(31) Because the Court charged as follows:

10 "But the significance of the taking of the topsoil has relation to the depreciation in value of the tract of land immediately before the contract and up to the time that it is alleged that Reade breached it on June 22, 1925."

(32) Because the Court charged as follows:

20 "Now there is some evidence here that is offered by the plaintiff to the effect that the use of the land for advertising purposes was worth something. You have a right to take that into consideration so far as McKenna's deprivation of use is concerned. There was no relation of landlord and tenant between McKenna and Reade, because Reade went in as a buyer prospective. And therefore you will understand, I think, what McKenna would be entitled to recover if you find that he was wrongfully deprived of the use of the property in the circumstances by reason of Reade's breach of the contract."

30 (33) Because the Court charged as follows:

40 "Now from June 22, 1925, up to some period of time, when Reade surrendered possession—and I am not at all clear that Reade was in possession after June 22, 1925, or what he did; actually there was pending litigation in the Court of Chancery covering the period—it is for you to say whether Reade is shown by the evi-

Notice and Grounds of Appeal

dence to have remained in possession from that date, the breach of the contract, June 22, 1925; I hold that if you find Reade in possession he was there without right and therefore a trespasser, and McKenna would then be entitled to recover what under the evidence you may find he suffered by reason of being deprived of the use of the property, or as we say, mesne profits, up to the time that either Reade gave up possession, if you find that circumstance in the evidence, or such time as you do find the occupation continued."

(34) Because the Court charged as follows:

20 "Now as I see it, there are those two phases of the case; the right of McKenna to recover against Reade from the time that he went into possession under the contract up to the time that Reade, in accordance with the view of the Court of Chancery, breached the contract, on June 22, 1925; and there the damages recoverable would be for a breach of contract: From that date on to the time that you find that Reade gave up possession, if you find he was in possession at all, he would be in the nature of a trespasser, and the damages there would be for mesne profits, what McKenna lost by being deprived of the use. And therefore a fair rental value, in the latter aspect, would be the measure; using that term rental, however, not in the sense ordinarily understood, involving the

Notice and Grounds of Appeal

relation of landlord and tenant, but for mesne profits."

(35) Because the Court charged as follows:

10 "Now take the case, and if you find that McKenna has proven his case and is entitled to recover damages for the period covered by the complaint as amended, either in the aspect of a breach of contract up to June 22, 1925, and after that if you find Reade under the greater weight of the evidence to have been in possession as a trespasser, then of course you will award such damages as the facts warrant under the rules of law given you."

20

(36) Because the Court refused to charge the following request of the defendant:

"If you find for the plaintiff you can find no more than nominal damages."

STEIN, McGLYNN & HANNOCH,
Attorneys of Defendant.

SUMMONS.

(Filed July 15, 1927)

THE STATE OF NEW JERSEY TO WALTER READE:

You are summoned to answer the annexed complaint of THOMAS P. MC- 10
L. S. KENNA, 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 the Supreme Court at Trenton within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice 20
of the Supreme Court, at Trenton, this 30th day of June, A. D. 1927.

EDWARD J. KELLEHER,
Clerk.

PERKINS & DREWEN,
Attorneys.

COMPLAINT.

(Filed July 15, 1927)

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10

Transcript of Pleadings for Trial

THOMAS P. MCKENNA,

Plaintiff,

vs.

20 WALTER READE,

Defendant.

Action at Law

Plaintiff, Thomas P. McKenna, residing at Long Branch, Monmouth County, New Jersey, says that:

FIRST COUNT.

1. On the 10th day of June, 1925, and from thence hitherto, plaintiff was and is the owner of the following described tract of land and premises:

Beginning at a point on the south side of Broadway at the northeast corner of property belonging to the party of the second part adjoining the property herein described, thence (1) southwardly along lands of the party of the second part about 230 feet to the northwest corner of lands of one now or formerly Vannote, thence (2)

40

Complaint

eastwardly along said Vannote land about 60 feet to a corner, thence (3) southwardly along said Vannote land about 88 feet to the north side of Belmont Avenue, thence (4) eastwardly along said north side of Belmont Avenue about 60 feet to an alley, thence (5) northwardly along the west side of said alley about 197 feet to the south side of another alley, thence (6) westwardly along the south side of said last mentioned alley about 70 feet, thence (7) northwardly about 118 feet to the said southside of Broadway, thence (8) westwardly along the said south side of Broadway, 50 feet to the point of beginning. Together with the rights accruing to the said premises in said alleys.

10

20

2. On said day the defendant by permission of plaintiff entered upon and into the possession of the above described lands and premises and from thence to the 10th day of June, 1927, used, occupied, possessed and enjoyed the same.

3. Defendant was and is liable to pay to plaintiff the reasonable value of the use and possession of said premises from the said 10th day of June, 1925, to the 10th day of June, 1927.

30

4. The reasonable value of the said use and possession of said premises during said period was the sum of \$3,500. Defendant has not paid the same.

5. Plaintiff sues for the value of said use and possession and demands on this count from the defendant the sum of \$3,500.

40

Complaint

SECOND COUNT.

1. Plaintiff sues for the reasonable use and occupation of the premises described in paragraph one of the First Count, from the 10th day
10 of June, 1925, to the 10th day of June, 1927.

2. Defendant heretofore, to wit, on June 10th, 1925, entered into the use and occupancy of said premises and continued therein from the last-mentioned day to and including the 10th day of June, 1927.

3. By reason of such use and occupancy by the defendant the said defendant became liable to
20 pay to the plaintiff the reasonable value thereof.

4. The reasonable value of such use and occupancy of said premises was \$3,500 and defendant became liable to pay said sum to plaintiff therefor. Defendant has not paid the same.

5. Plaintiff demands of the defendant on this count \$3,500.

THIRD COUNT.

30 1. Defendant owes to plaintiff the sum of \$3,500 for rent of premises described in the first paragraph of the First Count, from June 10, 1925, to June 10, 1927, which he, the defendant, agreed to pay.

2. No part thereof has been paid.

3. Plaintiff demands on this count the sum of
40 \$3,500.

Complaint

FOURTH COUNT.

1. On May 9, 1925, defendant agreed to purchase from plaintiff the premises described in First Count.

2. Defendant thereupon entered into possession of the premises. 10

3. Defendant afterwards abandoned his said contract of purchase and thenceforth without right, continued his said possession until the present time.

4. Defendant is liable to plaintiff for the mesne profits of said premises during his possession from June 22, 1925, to the present time, no part
20 of which has been paid.

5. Plaintiff sues for said mesne profits and demands \$3,500 damages.

FIFTH COUNT.

1. The defendant, by permission of the plaintiff, held and enjoyed the lands and premises described in the First Count from the 10th day of June, 1925, to the 10th day of June, 1927. 30

2. Defendant whilst so in possession of said premises and on divers days between said dates, committed waste upon said lands and premises, took away, removed and converted to his own use 2750 yards of topsoil and gravel of the value of \$5,500, and injured and damaged the said property of the plaintiff to the amount of \$5,500.

3. Plaintiff was and is thereby injured in his estate and interest in said lands, with the appur-
40 tenances, to the amount of \$5,500.

Complaint

To the within-named Defendant:

In case the within Summons and Complaint be served upon you personally then take notice that if you intend to make a defense to this action, 10 you must file an affidavit of merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of said service, and in default of the filing of such affidavit of merits or answer, judgment will be entered against you.

PERKINS & DREWEN,
Attorneys for Plaintiff.

20 Received in Monmouth County Sheriff's Office
July 1, 1927, at 8:15 o'clock A. M. 1927.

HARRY N. JOHNSON,
Sheriff.

Sheriff's Fees \$6.97/100

AFFIDAVIT OF MERITS.

(Filed July 12, 1927)

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10

THOMAS P. MCKENNA,

Plaintiff,

vs.

WALTER READE,

Defendant.

Action at Law

20

State of New York, }
County of New York. } ss:

Walter Reade, being duly sworn according to law upon his oath deposes and says that he is the defendant in the above stated cause; that he believes that he has a just and legal defense to the said action on the merits of the case.

WALTER READE.

30

Sworn to and subscribed before me,
this 8th day of July, 1927.

Rose Berne.

(Seal)

Rose Berne Notary Public Bronx County Clerk's
No. 155

New York County Clerk's

Term expires Mar. 30, 1929.

No. 45963—Series B.

40

Affidavit of Merits

State of New York, }
County of New York. }^{ss:}

10 I, William T. Collins, Clerk of the County of
New York, and also Clerk of the Supreme Court
in and for said county,
(Seal)

20 Do Hereby Certify that said Court is a Court
of Record, having by law a seal; that Rose Berne
whose name is subscribed to the annexed certifi-
cate of acknowledgment of the annexed instru-
ment was at the time of taking the same a Notary
Public acting in and for said county, duly com-
missioned and sworn and qualified to act as such;
that *he* has filed in the Clerk's Office of the
County of New York a certified copy of *his* ap-
pointment and qualification as Notary Public for
the County of Bronx with his autograph signa-
ture; that as such Notary Public he was duly au-
thorized by the laws of the State of New York
to protest notes; to take and certify depositions;
to administer oaths and affirmations; to take af-
fidavits and certify the acknowledgment and proof
of deeds and other written instruments for lands,
30 tenements and hereditaments to be read in evi-
dence or recorded in this state; and further, that
I am well acquainted with the handwriting of
such Notary Public and verily believe that his
signature to such proof or acknowledgment is
genuine.

40 In Testimony Whereof, I have hereunto set my
hand and affixed the seal of said Court at the
City of New York, in the County of New York
this 9 day of July, 1927.

WILLIAM T. COLLINS,
Clerk.

ANSWER.

(Filed July 13, 1927)

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

THOMAS P. MCKENNA,

Plaintiff,

vs.

WALTER READE,

Defendant.

Action at Law

10

20

Defendant, answering the complaint filed by the
plaintiff herein, respectfully shows and alleges:

ANSWER TO FIRST COUNT.

1. He denies the allegations of paragraph 1.
2. He denies the allegations of paragraph 2.
3. He denies the allegations of paragraph 3.
4. He denies the allegations of paragraph 4. 30
5. He denies the allegations of paragraph 5.

ANSWER TO SECOND COUNT.

6. He denies the allegations of paragraph 1.
7. He denies the allegations of paragraph 2.
8. He denies the allegations of paragraph 3.
9. He denies the allegations of paragraph 4. 40
10. He denies the allegations of paragraph 5.

Answer

ANSWER TO THIRD COUNT.

- 11. He denies the allegations of paragraph 1.
- 12. He admits that no payments have been made as alleged in paragraph 2, and alleges that no payments are due.
- 13. He denies the allegations of paragraph 3.

ANSWER TO FOURTH COUNT.

- 14. He admits the allegations of paragraph 1.
- 15. He denies the allegations of paragraph 2.
- 16. He denies the allegations of paragraph 3.
- 17. He denies the allegations of paragraph 4.
- 18. He denies the allegations of paragraph 5.

ANSWER TO FIFTH COUNT.

- 19. He denies the allegations of paragraph 1.
- 20. He denies the allegations of paragraph 2.
- 21. He denies the allegations of paragraph 3.
- 22. He denies the allegations of paragraph 4.

ANSWER TO SIXTH COUNT.

- 23. He admits the allegations of paragraph 1.
- 24. He denies the allegations of paragraph 2.
- 25. He denies the allegations of paragraph 3.
- 26. He denies the allegations of paragraph 4.
- 27. He denies the allegations of paragraph 5.
- 28. He denies the allegations of paragraph 6.
- 29. He denies the allegations of paragraph 7.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant.

ANSWER.

(Filed August 12, 1927)

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

THOMAS P. MCKENNA,

Plaintiff,

vs.

WALTER READE,

Defendant.

Action at Law

10

20

The defendant, Walter Reade, residing in Monmouth County, New Jersey, answering the complaint in the above entitled case says that:

- 1. He admits that the plaintiff is the record owner of and has an interest in property described in paragraph 1 of the First Count, but denies that plaintiff has an exclusive interest therein.
- 2. He denies paragraph 2, 3, 4 and 5 of the First Count.
- 3. He denies paragraph 1, 2, 3, 4 and 5 of the Second Count.
- 4. He denies paragraph 1, 2 and 3 of the Third Count.
- 5. He admits paragraph 1 of the Fourth Count.
- 6. He denies paragraph 2, 3, 4 and 5 of the Fourth Count.

40

Amended Complaint

7. He denies paragraph 1, 2, 3 and 4 of the Fifth Count.

8. He admits paragraph 1 of the Sixth Count.

9. He denies paragraph 2, 3, 4, 5 and 6 of the Sixth Count.

10. As to paragraph 7 of the Sixth Count, defendant denies plaintiff's right to damages.

STEIN, McGLYNN & HANNOCH,
Attorneys of Defendant.

AMENDED COMPLAINT.

(Filed March 22, 1928)

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

THOMAS P. McKENNA,

Plaintiff,

vs.

WALTER READE,

Defendant.

Action at Law.

Plaintiff, Thomas P. McKenna, residing at Long Branch, Monmouth County, New Jersey, says that:

Amended Complaint

FIRST COUNT.

1. On the 10th day of June, 1925, and from thence hitherto, plaintiff was and is the owner of the following described tract of land and premises:

Beginning at a point on the south side of Broadway at the northeast corner of property belonging to the party of the second part adjoining the property herein described thence (1) southwardly along lands of the party of the second part about 230 feet to the northwest corner of lands of one now or formerly Vannote, thence (2) eastwardly along said Vannote land about 60 feet to a corner, thence (3) southwardly along said Vannote land about 80 feet to the north side of Belmont Avenue, thence (4) eastwardly along said north side of Belmont Avenue about 60 feet to an alley, thence (5) northwardly along the west side of said alley about 197 feet to the south side of another alley, thence (6) westwardly along the south side of said last mentioned alley about 70 feet, thence (7) northwardly about 118 feet to the said south side of Broadway, thence (8) westwardly along the said south side of Broadway, 50 feet to the point of beginning. Together with the rights accruing to the said premises in said alleys.

2. On said day the defendant by permission of plaintiff entered upon and into the possession of the above described lands and premises

Amended Complaint

and from thence to the 10th day of June, 1927, used, occupied, possessed and enjoyed the same.

3. Defendant was and is liable to pay to plaintiff the reasonable value of the use and possession of said premises from the said 10th day of
10 June, 1925, to the 10th day of June, 1927.

4. The reasonable value of the said use and possession of said premises during said period was the sum of \$3,500. Defendant has not paid the same.

5. Plaintiff sues for the value of said use and possession and demands on this count from the defendant the sum of \$3,500.

20

SECOND COUNT.

1. Plaintiff sues for the reasonable use and occupation of the premises described in paragraph one of the First Count, from the 10th day of June, 1925, to the 10th day of June, 1927.

2. Defendant heretofore, to wit, on June 10th, 1925, entered into the use and occupancy of said premises and continued therein from the last mentioned day to and including the 10th day of June,
30 1927.

3. By reason of such use and occupancy by the defendant the said defendant became liable to pay to the plaintiff, the reasonable value thereof.

4. The reasonable value of such use and occupancy of said premises was \$3,500 and defendant became liable to pay said sum to plaintiff there-
40 for. Defendant has not paid the same.

Amended Complaint

5. Plaintiff demands of the defendant on this count \$3,500.

THIRD COUNT.

1. Defendant owes to plaintiff the sum of \$3,- 10
500 for rent of premises described in the first paragraph of the First Count from June 10, 1925, to June 10, 1927, which he the defendant agreed to pay.

2. No part thereof has been paid.

3. Plaintiff demands on this count the sum of \$3,500.

FOURTH COUNT.

20

1. On May 9, 1925, defendant agreed to purchase from plaintiff the premises described in First Count.

2. Defendant thereupon entered into possession of the premises.

3. Defendant afterwards abandoned his said contract of purchase and thenceforth without right, continued his said possession until the pres- 30
ent time.

4. Defendant is liable to plaintiff for the mesne profits of said premises during his possession from June 22, 1925, to the present time, no part of which has been paid.

5. Plaintiff sues for said mesne profits and demands \$3,500 damages.

40

Amended Complaint

FIFTH COUNT.

1. The defendant, by permission of the plaintiff, held and enjoyed the lands and premises described in the First Count from the 10th day of June, 1925, to the 10th day of June, 1927.

2. Defendant whilst so in possession of said premises, and on divers days between said dates, committed waste upon said lands and premises, took away, removed and converted to his own use 2750 yards of topsoil and gravel of the value of \$5,500, and injured and damaged the said property of the plaintiff to the amount of \$5,500.

3. Plaintiff was and is thereby injured in his estate and interest in said lands, with the appurtenances to the amount of \$5,500.

4. Plaintiff sues for said injury and demands \$5,500 damages.

SIXTH COUNT.

1. On the 9th day of May, 1925, defendant agreed to purchase from plaintiff the premises described in the First Count.

2. Defendant entered into possession of said premises on the 10th day of June, 1925, and continued in possession thereof until the 10th day of June, 1927.

3. After making said contract for purchase, the defendant abandoned the same.

4. Defendant while in possession of said premises committed waste thereon and wrongfully took away, removed and converted to his own use 2750 yards of topsoil and gravel.

Amended Answer

5. By means whereof defendant injured and damaged said premises to the amount of \$5,500.

6. Plaintiff sues for said injury and demands \$5,500 damages.

7. Plaintiff credits the defendant with the sum of \$5,000 paid by him on said contract and demands the sum of \$500 damages on this count.

PERKINS & DREWEN,
Attorneys for Plaintiff.

AMENDED ANSWER.

(Filed Mar. 22, 1928)

20

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

THOMAS P. MCKENNA,

Plaintiff,

vs.

WALTER READE,

Defendant.

Action at Law 30

The defendant, answering such Counts as remain in plaintiff's amended complaint, says that:

1. He admits paragraph 1 of the Fourth Count, but denies each and every allegation contained in all other paragraphs appearing in said count.

Amended Answer

2. He denies each and every allegation contained in the Fifth Count.

10 3. He admits the allegations in paragraph 1 of the Sixth Count, but denies each and every allegation contained in all other paragraphs appearing in said count.

FIRST DEFENSE.

20 On neither June 10th, 1925, nor June 22nd, 1925, did plaintiff have the right to possession of the premises described in the First Count of plaintiff's amended complaint, said right to possession being at such times vested in divers persons who had purchased the same at certain tax sales.

STEIN, McGLYNN & HANNOCH,
Attorneys of Defendant.

POSTEA.

(Filed April 9, 1928)

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10

THOMAS P. MCKENNA,

Plaintiff,

vs.

WALTER READE,

Defendant.

Action at Law

20

This case was tried at the Monmouth Circuit in Freehold before Rulif V. Lawrence, Judge, and a jury.

On the 21st day of March, 1928, the jury returned a general verdict in favor of the plaintiff and against the defendant for Thirty-seven Hundred and Twenty-five Dollars (\$3725).

RULIF V. LAWRENCE,
Judge.

30

40

ORDER ENTERING JUDGMENT.

NEW JERSEY SUPREME COURT

10	THOMAS P. MCKENNA,	}	Action at Law	
	Plaintiff,		On Postea	
	vs.			
	WALTER READE,	}	\$3725.00	
	Defendant.		68.97	
			\$3793.97	

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of Three Thousand Seven
 20 Hundred and Twenty-five Dollars, besides costs to be taxed *nisi*.

Entered April 9, 1928.

On motion of

PERKINS & DREWEN,
Attorneys.

JUDGMENT.

NEW JERSEY SUPREME COURT

10	THOMAS P. MCKENNA,	}	Action at Law	
	Plaintiff,		On Postea	
	vs.			
	WALTER READE,	}	\$3725.00	
	Defendant.		68.97	
			\$3793.97	

Perkins & Drewen, Attorneys.

Judgment entered this ninth day of April, A. D. nineteen hundred and twenty-eight in favor of plaintiff and against the defendant for the sum
 20 of three thousand seven hundred and twenty-five dollars damages and sixty-eight dollars and ninety-seven cents costs.

WM. S. GUMMERE,
C. J.

CLERK'S CERTIFICATE.

I, Fred L. Bloodgood, Clerk of the Supreme
 30 Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office.

In Testimony Whereof, I have set my hand and the seal of said Court at
 (Seal) Trenton, this sixteenth day of April
 A. D. nineteen hundred and twenty- 40 eight.

FRED L. BLOODGOOD,
Clerk.

TESTIMONY.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10	THOMAS P. MCKENNA,	}	Action at Law
	Plaintiff,		
	vs.		
	WALTER READE,	}	Action at Law
	Defendant.		

Freehold, N. J., March 6, 1928.

20 Before Hon. R. V. LAWRENCE, Judge, and a Jury.

Appearances:

For Plaintiff: Messrs. Perkins & Drewen and A. J. C. Stokes, Esq.

For Defendant: Stein, McGlynn & Hannoeh and Lester C. Leonard.

30 Mr. Leonard: If the Court please, before Mr. Drewen opens I would like to move that the Court instruct the plaintiff to elect the count or counts in his complaint upon which he proposes to proceed, for this reason, that there are six counts, in some of which it is alleged that the defendant went upon the land of the plaintiff with the plaintiff's permission. In other counts it is alleged that he went upon the lands of the plaintiff without the plaintiff's permission; some counts sound

40

Testimony

in tort, while other counts sound in contract; some express, some implied. We ask that they make an election.

The Court: What is the attitude of counsel?

Mr. Drewen: If your Honor please, our theory will be, our claim is that this defendant went on our lands with our permission, and so far as the counts that sound in tort are concerned, there I submit is no call for election, because they are in addition to the counts for use and occupation. For example, we allege waste in certain counts. They are cumulative. They are in addition to the other counts for use and occupation by the defendant.

10

The Court: It will be understood as to those counts involving use and occupation that it was done with permission?

Mr. Drewen: Yes.

The Court: And therefore such counts, for example, as charge that it was done without permission, they will be abandoned?

Mr. Drewen: Yes.

The Court: The other counts that are recorded there in consequence, as a result of occupation, as to the allegation of damages, will probably remain. I will control the situation at the close of the plaintiff's case as far as that is concerned; in the light of the admission that they are going to rely upon the allegation that the defendant went upon the plaintiff's lands with his permission.

30

Mr. Leonard: I move to strike out the fourth count, which alleges that they went on without permission.

Charles Sweeney—Direct

Mr. Drewen: Our allegation would result in that.

The Court: Yes, that would follow. I take it the gravamen of the action is the occupation, and therefore the intent to attempt to recover for
10 use and occupation and for waste he committed under that count such evidence as is appropriate. It is rather a simple situation, I take it.

Mr. Drewen: I think so.

The Court: Well, the fourth count is abandoned in any event, if that be the one charging possession without consent.

Mr. Drewen: That is the one, apparently.

The Court: All right. Proceed.

20 (Mr. Drewen opens for the plaintiff and Mr. Leonard opens for the defendant.)

CHARLES SWEENEY, sworn for plaintiff.

Direct-examination by Mr. Drewen:

Q. Mr. Sweeney, where do you live? A. Trenton.

Q. You are a clerk in the office of the clerk of the Court of Chancery of this state? A. I am.

30 Q. Have you produced in court this morning the original files in the case of Walter Reade, plaintiff, and Thomas P. McKenna, defendant, in the Court of Chancery, docket 58,718? A. Yes, sir; of the original up-to-date files.

By the Court:

Q. In other words, the last paper filed is included in it, starting with the complaint and summons and winding up with the decree, I suppose?
40 A. Yes, sir.

Alfred J. Meyer—Direct

Q. Plus the appeal to the Court of Errors, notice of appeal.

Mr. Drewen: I offer it in evidence, taken from what this witness has produced.

The Court: The file will be received. 10

Mr. Leonard: I object. I have no objection to the final decree going in, but should the whole record of the Court of Chancery case?

The Court: I want to know what the facts are.

Mr. Leonard: That is disclosed in the record.

The Court: That is the reason I want it. The file will be received. 20

(Objection noted for defendant as ground of appeal.)

(File marked Exhibit P-1.)

Mr. Drewen: Now, I don't know what arrangement we will make. Your Honor will take judicial custody of these papers? We need them here.

The Court: Yes, I will take charge of them. 30

ALFRED J. MEYER, sworn for plaintiff.

Direct-examination by Mr. Drewen:

Q. Where do you reside, Mr. Meyer? A. Long Branch.

Q. New Jersey? A. Yes, sir.

Q. And what is your business or profession, Mr. Meyer? A. Photographer. 40

Alfred J. Meyer—Direct

Q. How long have you been a photographer?

A. Nearly forty years.

Q. And are you familiar with the property that is situated adjoining the theatre on—what street does that theatre face? A. Broadway.

10 Q. On Broadway in Long Branch and Belmont Avenue? A. Yes, sir.

Q. Did you make a series of photographs of the premises that I have just referred to? A. I did.

The Court: When?

A. On several dates; some in 1926 and some—

Q. Have you made a record or a memorandum yourself of the dates on which those pictures—

20 A. No, I put the dates on the back.

Q. On the back of the pictures? A. Yes.

Q. I show you four photographs and ask you if those photographs were taken by you as you have just stated? A. Yes, sir; they are.

Q. I show you other photographs and ask you if they likewise are photographs taken and made by you of the premises in question? A. Yes, sir; they are the same.

30 Q. Thirteen photographs in all, are there not? A. Yes, sir.

Q. Now, can you tell us when those photographs were taken by you? A. Yes, the dates are on all of them.

Q. You say the dates are on all of them? A. Yes, sir.

The Court: Let him tell what they are.

Q. Tell what the dates are.

40 The Court: So as to get them into the record.

Alfred J. Meyer—Direct

Q. First, tell us how many different dates were these taken; about two or three? A. I think they were taken four times.

Q. Give us the dates. A. Here is one taken on May 15, 1925.

Q. What is the other date? A. September 6, 10 1926.

Q. Now, another date upon which pictures were taken. A. September 12, 1925. This is August 28, 1926.

Q. Now, you have given us four dates. Is there any other date? A. September 4, 1926; September 6, 1926. Here is another one September 6, 1926. Here is one May 15, 1927; September 12, 1925, and August 28, 1926. 20

Q. Now, on the back of each of these photographs have you marked the date upon which the photograph was taken? A. That is the date upon which it was taken; yes, sir.

Q. And that appears on the back of each photograph? A. Yes, sir.

Q. In your handwriting? A. Yes, sir.

By the Court:

Q. Do they correctly represent what they purport to? A. They do. 30

Mr. Drewen: I offer the pictures in evidence.

The Court: Show them to your adversary.

(Photographs submitted to Mr. Leonard.)

Mr. Leonard: Well, I presume he will have them marked for identification and 40

Alfred J. Meyer—Direct

later tie them up with the premises in question.

The Court: Yes, they will only be received and marked with that understanding, that they be connected up with the premises in the case.

Mr. Leonard: I am sure they are going to have difficulty in showing most of that property as belonging to Mr. McKenna.

The Court: I will allow them to be marked with the understanding that if they are not properly connected with the issues in the case they will be thrown out.

(Objection noted for defendant as ground of appeal.)

The Court: I suppose really, technically, the proper way would be to have them marked for identification.

Mr. Drewen: Well, the witness has already testified that he knows the property in question.

The Witness: Well, I don't know the lines of that property.

Mr. Drewen: It doesn't make any difference; it is easy to prove them.

The Court: Just hold them for the time. Mark them for identification for the time being.

(Photographs marked Exhibits A to M, inclusive, for identification.)

Q. Can you tell us about what time of day these pictures were taken? A. They were mostly taken in the afternoon.

40 Q. About what time? A. Oh, I should say be-

Alfred J. Meyer—Cross
Walter J. Schiverea—Direct

tween one and three or four o'clock in the afternoon.

Q. Not later than four o'clock at any time? A. No, sir.

10

CROSS-EXAMINATION by Mr. Leonard:

Q. I assume you took the pictures yourself?

A. Yes, sir.

Q. You took them at Mr. McKenna's direction?

A. He ordered me to take them; yes, sir.

Q. Was he there when you took them? A. No, sir.

Q. Did he instruct you what to take? A. He told me what to do.

20

Q. And after he told you what to do, you attempted to do it; is that it? A. Yes, sir.

WALTER J. SCHIVEREA, sworn for plaintiff.

Direct-examination by Mr. Drewen:

Q. What is your profession, Mr. Schiverea? A. Civil engineer.

30

Q. And how long have you practiced your profession? A. Possibly twenty years.

Q. Have you made a survey of the premises in question here in this suit? A. I didn't make the survey. I took levels to estimate the cross section area or cubic contents that had been removed.

Q. Did you reduce the result of your findings to drawings or writings? A. I did.

40

Walter J. Schiverea—Direct

Q. Now, I show you what purports to be such a drawing and ask you if that is what you referred to? A. I did.

Q. Is that all one paper? A. There are two drawings here, one showing the general plan like, 10 of the building, but this shows the cross section areas.

Mr. Drewen: Well, we will withdraw this for the moment.

Q. This, do you say, that I show you now, is the general plan of the property? A. The general plan; yes, sir.

Q. When was that made by you? A. Made on the 27th of February.

20 Q. Was it made by you? A. Made by me, yes.

Q. Of 1928? A. 1928. This is just drawn from a description, not from a survey.

Q. Well, did you make a survey of these premises? A. I didn't make a survey. This is an approximate plan drawn from a description given to me by Mr. McKenna.

Q. And what does it show? A. It shows approximately—

30 Mr. Leonard: I object. It will speak for itself. Moreover, it has not been identified with the property in question and it has not been proved as a survey.

The Court: It is not a survey, merely a plan drawn from a description, he says.

Mr. Drewen: But I will prove the correct dimensions on the description. The point I wish to make is the general shape, not so much as dimensions of this prop- 40 erty.

Walter J. Schiverea—Direct

The Court: For that purpose it may be offered, to show the contour of the land.

Mr. Drewen: That is what I intend to show.

The Court: The boundary lines, as it were, and shape. It is not made as a re- 10 sult of the survey of the land.

Q. What does it show? A. It shows approximately the shape and dimensions of the lot in question.

By the Court:

Q. As indicated to you by the description submitted to you by Mr. McKenna? A. Yes.

The Court: That is all it shows. 20

Mr. Drewen: For the purpose indicated, I offer this paper in evidence.

The Court: You may offer it for the purpose indicated, showing the contour of the land.

Mr. Drewen: Yes, that is what I offer it for.

The Court: It may be received and marked.

Mr. Leonard: I object, not that I wish 30 to prolong the examination; but what description Mr. McKenna gave this engineer we are not told. He simply gave him some description and from that description he made a map, which may be a map of a property a mile away.

The Witness: This description is right with the drawing.

Mr. Leonard: So I insist that that 40

Walter J. Schiverea—Cross

should be marked for identification at this time rather than in evidence.

The Court: It may be marked for identification. Counsel is correct about that. Of course, we are interested in the actual
10 *locus in quo*.

Mr. Drewen: I understand, but I can't prove it by one witness.

The Court: Of course you can't, but you are going a roundabout way.

Mr. Drewen: I am doing it to help some witnesses get away. That is the usual result.

The Court: I understand. It may be
20 marked for identification, both the description and the plotting.

(Map marked Exhibit N for identification, description marked Exhibit O for identification.)

CROSS-EXAMINATION by Mr. Leonard:

Q. In this survey marked N for identification, you have indicated that a place somewhat to the rear of the square marked "Lunch wagon" an
30 alley. A. Well, that is just what is on the ground there now. There is a passageway in there. It is not on this property.

Q. Did that description also marked for identification say anything about an alley? A. No, I just show that there as what is on the ground.

Q. What? A. No, it doesn't mention that here, but there is a passageway there.

Q. Then what you drew was a little bit more
40 than what Mr. McKenna told you to do? A. Not exactly. We tried to show here for the benefit of

Walter J. Schiverea—Cross

everybody interested the actual conditions on the ground adjoining the buildings on that land, just to show up the physical facts surrounding the property.

By the Court:

Q. As a matter of fact, that alley was not there
10 in the description? A. It is not, no, but there is a passageway there and I just marked it there for the purpose of information.

By Mr. Leonard:

Q. Did you mark other alleys for everyone's
information? A. Yes, I have mentioned all those which are mentioned in this here. I have named the alley here, also the alley along here.
20

Q. Now, show me where that alley, indicating
the alley running from Belmont Avenue. Where is the alley mentioned in the description? A. Well, it is just mentioned in this description as an alley there.

Q. Show me where it is. A. It runs along the property from Belmont Avenue back to another alley shown right here, which is mentioned in this description.

Q. Well, show me just where it is mentioned.
30 A. "Running along Belmont Avenue approximately 60 feet to an alley; thence north along the west side of said alley about 197 feet to the south side of another alley."

Q. That merely uses an alley to identify the easterly extremity of some land which you say Mr. McKenna owned? A. Yes.

Q. Well, you have to identify the alley there, don't you? A. No, I don't.

Q. You don't? A. No, that is just drawn in
40 there to show that it was an alley there.

Walter J. Schiverea—Cross

Q. Is the width of that alley drawn to scale?

A. Approximately, as far as I could. I didn't determine the lines of the alley on the cross-section; that is, it was cross-sectioned approximately in twenty-five foot squares, and when I came over
10 here I show here, not the width of the alley but the approximate line of buildings on the other side of what we think is the alley there, which is marked "Alley."

Q. Did the description upon which you rely show the approximate line of the buildings? A. It does not, no.

Q. Then you went outside of that description, didn't you? A. Yes, I had to show the physical
20 conditions as they are approximately.

Q. What I am getting at is did you endeavor to show anything beyond what is contained in that description? A. Yes, I did.

Q. Now, two things we have then that you endeavored to show, one was the alley, indicating an alley in the rear of the lunch wagon; and another is an alley running from Belmont Avenue.
A. You misunderstand me. This drawing I don't claim to be just the plot of this description;
30 it is a drawing showing the physical condition adjoining this alley, this theatre here.

By the Court:

Q. But admittedly not a survey? A. Admittedly not a survey.

Q. Is that a plotting of this description? A. It is just a drawing showing the physical conditions including this plot of land. It shows more than what this description calls for. Here is the
40 lunch wagon in here and things of that kind, just to show what is there.

Walter J. Schiverea—Cross

By Mr. Leonard:

Q. Who told you to put the lunch wagon in?

A. Well, in making a drawing of this kind—

Q. Who told you to put the lunch wagon in, did any one? A. I don't remember whether Mr. McKenna told me or not. I think he said it would
10 be well to show it.

Q. And you showed it? A. And I showed it.

Q. That is not mentioned in this description?

A. No.

Q. Who told you to add the alley? A. No one.

Q. Did that of your own accord? A. Yes.

Q. Who told you to mark "Theatre" back of the red line, indicating to the left of the survey?

A. No one; except that the idea of this drawing—
20

Q. I said, who requested you to do it? A. Well, I was given the order to make the drawing showing conditions as they are there.

Q. And showing such conditions as were brought to your attention by Mr. McKenna? A. Not necessarily. I saw that they were there and marked it.

Q. But you do admit that he brought specifically to your attention the lunch wagon? A. Yes, he did. He mentioned that.
30

Q. And that you put in? A. I put that in.

Q. And you put this alley over to the left? A. Yes, it is mentioned here in the description as a boundary on the easterly side.

Q. And what made you put in the width? A. Well, I measured across there. I wanted to show the approximate location of this line of buildings here.

Q. Who requested you to do that? A. Well,
40 no one. If I understood, my order was to make

Walter J. Schiverea—Cross

a drawing showing as plainly as I possibly could the conditions as they are there now, and adjoining buildings and so forth, just to make it clear to every one interested just what is there.

10 Q. You are interested in it? A. No, no more than making this drawing.

Q. Is everything drawn to scale? A. Yes, it is drawn to scale here except that these dimensions are more or less—they are all approximate. It is not an accurate survey, it is a general plan as marked, an approximate map.

Q. I direct your attention to the word "alley" here on the extreme right of this paper marked for identification. Do you see it? A. You can
20 see the alley—

Q. I say, do you see that word "alley" there? A. I see "alley," yes.

Q. Why did you put the word "alley" there? A. It is mentioned in the description and it is also a passageway through there now.

Q. Why didn't you draw the other side of it? A. Because I was not particularly interested in that, it is too far to the right of the property in question. That didn't enter into it.

30 Q. You didn't think it did? A. No, never understood anybody.

Q. So in that regard you didn't display the physical proportion? A. Well, only this adjoining property. That was all that was to the right, or to the east, I thought, just my personal opinion.

Q. And you didn't take the trouble to ascertain how far west it extended, did you? A. No, I
40 didn't think it was important.

Walter J. Schiverea—Re-direct

Q. You didn't think it was important? A. No.

Q. Had you been told by Mr. McKenna the nature of its travel? A. No, sir; not a thing about it.

Q. What did you have to guide you, then, in determining whether or not this were important
10 or unimportant? A. Well, only my observation.

Q. How could you tell— A. I knew that this piece of land here was in controversy; I knew the controversy was over this piece of land.

Q. Who told you that? A. Mr. McKenna.

Q. And as a result of what he told you, you deemed it unimportant to prolongate the north-
erly line of that alley, didn't you? A. I didn't
give it any thought at all. 20

RE-DIRECT EXAMINATION by Mr. Druwen:

Q. Mr. Witness, when you went to this property, did you undertake to show such things as were obvious and the things that you saw there?

A. That is what I attempted to do, yes.

Q. And that is what you attempted to put upon this paper which you now have before you? A.
Yes. 30

Mr. Leonard: Don't lead.

Thomas P. McKenna—Direct

THOMAS P. McKENNA, sworn for plaintiff.

Direct-examination by Mr. Drewen:

Q. Mr. McKenna, you are the plaintiff in this action? A. Yes, sir.

10 Q. How long have you known the defendant, Walter Reade? A. About ten years.

Q. Did you make a contract with Mr. Reade for the purchase by him of you of a property at Long Branch? A. Yes, sir.

Q. Do you remember when that was, Mr. McKenna? A. In May, 1925.

Q. That contract was reduced to writing, was it not? A. Yes, sir.

20 Q. I show you a paper writing and ask you if that is the contract you entered into with the defendant. A. Yes, sir.

Mr. Drewen: I offer it in evidence.

Mr. Leonard: I presume it is the same as the—

(Paper submitted to Mr. Leonard.)

The Court: It may be marked.

(Paper marked Exhibit P-2.)

30 Q. How long have you owned this property, Mr. McKenna? A. About thirty years.

Q. And all that time was it vacant property? A. Yes, sir; except—oh, the first ten or fifteen years an old house stood on the property known as the Herbert property.

Q. At the time of the making of this contract, P-2 in evidence, was it vacant? A. Yes, sir.

40 Q. Entirely, or was there some small structure on the front of it? A. There was a lunch wagon on the front of it and some trees.

Thomas P. McKenna—Direct

Q. Since the making of this contract, Exhibit P-2 in evidence, has it continued to be vacant?

A. Except as to the lunch wagon, yes.

Mr. Leonard: May I interrupt? I presume that you are going to supplement that testimony by showing that the record title was vested in Mr. McKenna. I don't object. I assume that you are going to show that. Then you are referring to that as Exhibit P-2. I didn't know anything else was marked in evidence. 10

Q. Does the contract, Exhibit P-2 in evidence, correctly set forth the metes and bounds of the property owned by you and which is the subject of the contract you made with the defendant, Reade? 20

Mr. Leonard: I object. There is no basis for a comparison on the record.

The Court: Well, I think that is probably true. In the first place, it speaks for itself. Then you would produce your deed or the record of the deed. Do you want to send for that? I will allow you.

Mr. Drewen: If your Honor please, of course, we will send for it if it is necessary, but I don't think that our deed, our title—they admit it in their answer. 30

The Court: Do they?

Mr. Drewen: Yes.

The Court: The answer to that would be that you state the description in the complaint. If the answer admits that description that is the end of it. 40

Thomas P. McKenna—Direct

By the Court:

Q. Now, Mr. McKenna, is the description set up in the complaint that referred to in the contract? A. Yes, sir.

10 The Court: I assume that is probably so.

Mr. Leonard: I do not find here in the answer prepared by Mr. Hannoeh, in answering the paragraph in which—

The Court: The paragraph which is admitted?

20 Mr. Leonard: He admits that the plaintiff has the record title for all of said interest in the property described in paragraph 1, but denies that the plaintiff has an exclusive interest therein. It is a little nebulous what it does mean.

The Court: Well, that is one of those admissions without admitting.

Mr. Leonard: But I think it will disclose subject to the rights of the public, that was my point, over the alley. Now, I think that these should be offered to disclose the exact situation.

30 Q. After the making of this contract, P-2, was there any change in the possession and the use of that property? A. Yes, sir.

Q. In what way? A. Mr. Reade entered into possession of the property.

Mr. Leonard: That is objected to as a conclusion of law.

40 The Court: I don't know whether it is or not. I can't tell.

Thomas P. McKenna—Direct

By the Court:

Q. What do you mean by that, that Reade entered into possession, Mr. McKenna? How do you know he entered into possession? A. Well, first he spoke to me about it, and secondly he put up a sign on the property with his own name 10 on it, and thirdly—

Mr. Leonard: Is this man testifying from his own knowledge?

Q. Did you see the sign? A. Yes, and his employees told me that—

Mr. Leonard: Objected to.

The Court: Yes, I sustain the objection. 20

By Mr. Drewen:

Q. Never mind what they told you. Now, when you say that Mr. Reade spoke to you about going into possession, what did he say? A. Well, when the contract was made he asked me whether there was any objection to going right ahead and making his preparations for the building and taking possession of the property, and I told him there was not. 30

Mr. Leonard: I object. It was all merged into the written contract.

The Court: No, he is now telling about a conversation after the contract was signed.

Mr. Leonard: Nevertheless, he didn't say that. I except as the record stands.

By the Court:

Q. When was that conversation, after the con- 40 tract was signed and executed? A. Yes, sir.

Thomas P. McKenna—Direct

By Mr. Leonard:

Q. You change it then?

The Court: Never mind. We can't start a row here. Go on. There is nothing in it.

10

By Mr. Drewen:

Q. Have you told us all that he said to you about this possession? A. Yes, sir.

Q. You have? Now, were you in a position to see this property from day to day or from week to week after this contract was made? A. Yes, sir.

Q. Did you notice any change from what you could observe in the use and occupation of the property? A. Yes, sir.

Q. What change did you notice? A. The dirt was taken off the surface of the property for a depth of about two or three feet, the theatre trucks were stored on the property and they are still stored there today in the same manner. Trees were removed from the property, electric lights were put up over the property and the property used for parking for the people attending the theatre, and signboards were put up on the property.

Q. What kind of signboards? A. Advertisement signboards.

Q. And were these electric lights used in any way in connection with the display of those signs? A. There were electric lights used in connection with the display of the signs and there were electric lights put up to light the property at night for the parking.

40

Thomas P. McKenna—Direct

Q. I show you what purports to be a map of property at Long Branch made for the Monmouth Title Company and ask you if that map is a map of the property which is described in the contract, P-2? A. Yes, this is a map of the property made by Throckmorton & Morris at Long Branch for Mr. Barron, Mr. Reade's lawyer, and he gave it to me.

10

Q. Who gave it to you? A. Mr. Barron or Mr. Engleman, of the Monmouth Title Company, in connection with their title. They gave me a copy of it.

Q. Have you examined this map you have just referred to? A. Yes.

Q. Does it correctly set forth the dimensions of the property as you have known them? A. Yes, except that those dotted lines here show an extension of an alley across my property which does not exist.

20

Q. The dotted lines show the— A. The dotted lines are not found in the title.

Mr. Drewen: Is there any objection to this.

Mr. Leonard: Mr. Reads says he never heard it.

30

Mr. Drewen: I offer it in evidence.

Mr. Leonard: I object to it as not being proved.

The Court: Unless it is admitted you will have to have your surveyor here.

Mr. Leonard: There is testimony also that part of it is wrong, like the other map.

Mr. Drewen: I ask that it be marked at this time for identification.

40

Thomas P. McKenna—Direct

The Court: It may be so marked.
(Map marked Exhibit P for identification.)

10 Q. Now, I show you a series of photographs that have been marked for identification and ask you to state which of those photographs show exclusively what you say is your property and which show other property; and before you answer that question please examine the photographs. Separate them into two groups, if there are two. A. Each of these photographs shows my property and other property as well.

Q. Each of them? A. Each of them, yes.

20 Q. Now, directing your attention to the photograph marked F, will you describe where your property is shown in that photograph, and where other property is shown? A. Well, the property on this photograph showing the surface of the ground is my property. The signboard shown to the right—first is the lunch wagon to the extreme right of the photograph; that is on my property; and the signboard behind it is on my property; then after that, going towards the left, is Mr. Reade's theatre, with his sign and all on it, "Reade's Theatre," then follows the cars in there parked and—

30 Q. On whose grounds do those cars stand? A. On my property. Then shows the entrance door to the rear of the theatre which opens on my property.

40 Q. Go ahead. A. Then the photograph shows a truck or platform standing on my property which belongs to Mr. Reade's theatre, for unloading scenery, I think.

Thomas P. McKenna—Direct

Q. Now, do I understand you to say with reference to photograph F, that the vacant ground there shown in the photograph, is your property? A. Yes, sir.

Q. All of it? A. Yes, sir.

Q. I will lay that aside for a moment. Now, I 10 direct your attention to photograph marked B, and ask you to state to what extent your property is shown on that photograph.

Mr. Leonard: If it is shown at all.

A. Yes, sir. My property is shown on here; shows the surface where the dirt has been taken off in light color, and the signboard—

Q. Do those signboards stand on your property 20 in that photograph? A. They did stand on my property in this one at the time the photograph was taken.

Q. What has become of that property since?

A. The signboards have since been taken off and they are put up on top of a building that Mr. Reade built elsewhere.

Q. Now, do I understand you to say with regard to this photograph B, that the vacant land shown in the photograph, including that upon 30 which the signboards in the photograph stand, is your property? A. Yes, sir.

Q. I direct your attention to the photograph marked M, and ask you the same question with regard to that photograph. A. Yes, sir; the vacant ground shown here in light is my property, from which the topsoil has been taken. This shows the theatre trucks standing on my property and the signboard on my property.

Thomas P. McKenna—Direct

Q. Now, in regard to photograph M, do I understand you to say with regard to that photograph that the vacant ground shown in the picture, including that upon which the signboard in the picture stands, is your property? A. Yes, 10
sir.

Q. Now, I show you together, photographs marked K and C and ask you if those photographs show in part the land owned by you as described in the contract here in evidence. A. Yes, sir. This photograph marked C shows more particularly the Broadway frontage of my property and here are the lunch wagon and the sign with Mr. Reade's name on it for parking, soliciting a parking business, and the cars also parked 20
there, and also shows the signs on my property behind the lunch wagon; and then it shows the property of Mr. Reade and which he now says is his wife's.

By Mr. Leonard:

Q. You are prepared so to prove, I take it? A. No.

Q. You are not? A. I will take his word for it, whatever they say. 30

By Mr. Drewen:

Q. Now, with regard to photographs K and C, I understand you to say that the vacant property shown in those photographs, including that upon which the signboard stands, including, of course, of the street and the sidewalk, is your property? A. Yes, sir; with the exception of the part called Reade's store.

Q. That is not vacant. I said vacant. A. Yes, 40
this is some vacant here, Mr. Drewen, on which their stores stand.

Thomas P. McKenna—Direct

Q. But does the sign which reads, "Parking, 25c, park with us, Walter Reade," does that stand on your property? A. Yes, sir.

Q. Entirely? A. It did at the time. They have taken it down entirely.

Q. These photographs K and C are the same, 10
aren't they, virtually? They are the same pictures, they are duplicates? A. Yes, sir; they are duplicates.

Q. And I show you photographs H and E and ask you if the vacant land in those photographs is your property? A. Yes, sir; the vacant land shown on both of those photographs is on my property.

Q. I call your attention to a quantity of radiators and building material and the like shown in the photographs last referred to and ask you if those things belonged to you? A. No, sir; they didn't belong to me. They were used— 20

Mr. Leonard: Now, one moment. Do you know what they were used for? Do you know who put them there?

A. I don't know who put them there, but I know where they were used. 30

Mr. Leonard: One moment.

Q. Don't let Mr. Leonard frighten you. Do you know where they were used? A. Yes, sir.

By the Court:

Q. Where were they used? A. They are the heating radiators from Mr. Reade's stores.

Q. Do you know they were used there? A. Yes, they are used there today. 40

Thomas P. McKenna—Direct

Q. Now, the inquiry is, how do you know? A. Well, I visited the property when his stores were being built and while this building material was being used and mortar boards were being used and the lumber came into and out of his stores.

10 Q. That is the reason you say it? A. Yes, I saw it.

Mr. Leonard: I presume that they are able to show that these things are Mr. Reade's, otherwise the subject will be stricken out, I take it.

The Court: Yes.

Q. I show you photographs marked Exhibits D and J and ask you if the vacant land shown in
20 those photographs, including that upon which the signboards stand, is your property? A. Yes, sir; that is my property. Possibly here to the left there may be some—

Q. To the left, or right, do you mean? A. To the right, may be the property upon which Mr. Reade's stores—upon which the stores have been built, but I think that is all my property, the vacant property there.

Q. Now, that is the property on both photo-
30 graphs? A. Yes.

Q. Is the property shown in this photograph upon which the signboards are erected your property? A. Yes.

Q. Exclusively? A. Yes.

Q. Both photographs? A. Yes.

Q. I show you photographs G and I and ask you if the vacant property shown in those photographs is your property? A. Yes, sir.

40 Q. Do the signboards shown in the two photo-

Thomas P. McKenna—Direct

graphs just mentioned stand exclusively on your property? A. They do.

Q. I call your attention to the fact that the land upon which the lunch wagon stands as shown in the photographs G and I is sharply higher than the other land shown in the photographs, and ask
10 you if that was the condition that prevailed at the time this contract was made between you and Mr. Reade? A. No, sir.

Q. What caused that condition as shown in the photographs last mentioned? A. It was excavated as shown by the photographs.

Q. What was excavated? A. The topsoil and clay was taken out to a depth of two or three
20 feet.

Q. And was the topsoil and clay removed for a depth of two or three feet over the whole area of your property except that portion that is shown in the photographs last mentioned? A. No, not over the whole of it. I think over the whole of it was for a greater depth than that, but down at Belmont Avenue, that is, to the south end of my property, was probably not so much, but the top of it was taken off here to a greater
30 depth than two or three feet and about two or three feet at the point shown in the photographs.

Q. Now, referring again to the photographs G and I, I ask you if the elevation as shown, of the land, the soil, as shown in the photograph, upon which the lunch wagon stands, represents what the elevation was over the whole area before Mr. Reade went into possession? A. Yes, sir.

Q. I show you photograph marked Exhibit L and ask you if the vacant land shown in that
40 photograph is your property? A. Yes, sir.

Thomas P. McKenna—Direct

Q. Do the signboards as shown in the photograph L stand exclusively on your property? A. Yes, sir; excepting possibly the signboard with the word "Chrysler" on it. I am not sure about that.

10 Q. I call your attention to what appears to be two uprooted tree trunks in photograph L and ask you if you know how they came there? A. Yes, those are the roots of trees that stood on this property, and they were uprooted in the excavating.

Q. Did they stand exclusively on your property? A. Yes, sir.

20 Q. Now, will you look at the photograph once more for just a moment and tell us whether or not the topsoil and clay was removed from the vacant land shown in each of those photographs? A. Yes, sir.

Q. Now, I show you photograph marked Exhibit A and ask you if the vacant land shown in that photograph is your property? A. Yes, sir.

30 Q. I call your attention to the drop, sharp drop of two feet or so in the surface elevation there and ask you if you know how that came to be there. A. Well, that shows where the topsoil and the clay was excavated from my property.

Q. In the manner that you have already described? A. Yes, sir.

Mr. Drewen: I offer these pictures in evidence.

The Court: Is there any objection? They may be marked.

40 (Photographs marked Exhibits P-3 to P-15, inclusive.)

Thomas P. McKenna—Direct

Q. Now, I show you, Mr. McKenna, the blueprint sketch marked for identification, Exhibit P, and ask you to state and show the jury the lines on that property which mark the outlines of your property which is the subject of your contract with the defendant, Reade. 10

Mr. Leonard: That is objected to unless it is identified. May I see the map? Perhaps we can identify the map in some way so we can offer it in evidence.

(Mr. Leonard examines map.)

Mr. Leonard: I have no objection to this going in with this exception: there are various designations of ownership of adjacent land. We, of course, do not propose to be bound by that designation. 20

The Court: It is not admitted.

Mr. Drewen: We don't propose to bind them by that.

The Court: Of course, they could not do it anyway. That would have to be proved. With that qualification, it may be received and marked. The names of the owners may be eliminated for that purpose. 30

Mr. Drewen: Therefore, I offer Exhibit P for identification in evidence.

Mr. Leonard: Is the date on it when it was made?

Mr. Drewen: June 3, 1925.

(Map marked Exhibit P-16.)

Q. Now, I repeat my question to you, Mr. McKenna: Will you indicate to the jury on the blueprint sketch now in evidence as P-16 the lines of 40

Thomas P. McKenna—Direct

your property which is the subject of your contract with the defendant, Mr. Reade? A. Broadway is shown here at the top of the map and my line starts here at the point of division between the theatre property and my property, runs down
10 along the theatre property and beyond it to the Van Note property here a distance of about two hundred and thirty feet; then runs at right angles to the east about sixty feet; then it runs at right angles to the south eighty feet to Belmont Avenue; then it runs along Belmont Avenue—the map shows 59.67 feet, practically 60 feet, to this alley which is on the east side of my property. Then the line runs along the west line of the
20 alley, 194.18 to the south side of another alley. Then it runs at right angles approximately to the west to a corner; then it runs at approximately right angles to Broadway a distance of 116.36 feet as shown on this map; then along Broadway westerly fifty feet to the point that I indicated as the beginning point.

Q. Now, is the property that you have just described by reference to the exhibit, the property which is described in your contract of sale with
30 Mr. Reade? A. Yes, sir. There might be some variations in distances, but that is the property.

Q. So just simply for the purpose of showing the jury the outline, you say it starts here, goes to this point, then here, then here to Belmont Avenue, and along Belmont Avenue to an alley, on back to the other alley and over here in back to Broadway and over to the point of beginning?
A. Yes, sir.

40 Q. So that it runs through from Broadway—
A. To Belmont.

Thomas P. McKenna—Direct

Q. —at one end and to Belmont at the other end? A. Yes, sir.

Q. Where is this lunch wagon shown on this sketch that appears in the photographs? A. It is shown a little to the south of the southerly
10 line of Broadway.

Q. It is marked there, isn't it? A. Marked on this diagram.

Q. It is marked "Lunch Room," isn't it? A. "Lunch Room," yes, sir.

Q. It is up on Broadway? A. Yes, sir.

Q. Now, where on this sketch that you have before you is the point where there is shown in the photograph the entrance sign with Mr. Reade's name on it referring to parking for
20 twenty-five cents? A. I will indicate it in lead pencil and then show it. It is right over on Broadway to the east of the lunch wagon.

Q. On Broadway? A. On the south side of Broadway. The driveway is still there. The parking sign has been taken down.

Q. Where, with reference to your property line as shown on the sketch now before you, is the theatre located? We have referred to it as Mr. Reade's theatre. A. The theatre is at the left
30 side, westerly side of my property, and is marked on this map with the words "Broadway Theatre." But the word "Theatre" is really over one of the stores which are—

Mr. Leonard: We are not going to have any controversy over that.

Mr. Drewen: I consent that that be stricken out.

Thomas P. McKenna—Direct

Q. Again referring to the area of property shown on the sketch before you, will you kindly indicate to the jury the course along which the signboards, as you say, were erected by Mr. Reade on the property?

10 Mr. Leonard: I object. There is no such testimony, that they were erected by him. The testimony stands merely—

Mr. Drewen: I will reframe the question.

Q. Along which the signboards were erected.

The Court: Signboards containing the name of Walter Reade.

20 Mr. Leonard: I object to the Court's comment, if the Court please.

The Court: I thought they were in the photograph.

The Witness: They are.

Mr. Leonard: I except to the Court's comment.

The Court: Oh, let me see the photographs. Strike it out anyway. Strike it out. I will satisfy myself.

30 Mr. Leonard: I take exception to the Court's comment for the purpose of having his mind satisfied. It is a matter for the jury.

By the Court:

Q. Now, let me call your attention to this exhibit—what is it, P-3? Do you say that there is a sign there with the name Walter Reade? A. Yes, sir.

40 Q. Where is it? A. Right here (indicating).

Thomas P. McKenna—Direct

Q. In other words, you are referring now to the twenty-five cent parking sign? A. Yes, sir.

Q. And you say the name Walter Reade is there? A. Yes, sir.

Q. Well, you have got to get me a magnifying glass to show that is so. A. It is there all right. 10

Q. You say that sign is on your land, do you? A. Yes, sir; it was on my land. They have removed it.

Mr. Drewen: With your Honor's permission, what I was speaking of at the time the last question was asked Mr. McKenna was not the sign which is referred to by the Court, it was the other sign, the advertising sign. 20

Mr. Leonard: That was the reason I objected to it.

By Mr. Drewen:

Q. Shown in the photographs in evidence, and ask you to kindly indicate to the jury by reference to the sketch, the blueprint sketch in evidence, where those signs are erected on the property, which you say—

The Court: Now, that is independent of that parking sign that the Court and the witness had that colloquy about? 30

Mr. Drewen: Yes, independent.

A. Signs were erected along the westerly line of my property here, and along the southerly line of my property, which is the north line of the property marked on this blueprint as formerly Van Note's, and then along the easterly line of the property marked Van Note. 40

Thomas P. McKenna—Direct

Q. Is that all? A. Yes, sir.

Q. Along here and along here and along here; in other words, these signs were erected along the westerly side of your property? A. Yes, sir.

10 By the Court:

Q. You have no personal knowledge as to who put them there, Mr. McKenna? A. Yes, sir.

Q. What is your knowledge as to who put them there? A. Well, I know that the American—

Mr. Leonard: I object. It might call for a hearsay remark.

The Court: I don't know. I can't tell. He may answer and then I will analyze it.

20 Go on.

A. They are signs of the American Bill Posting Company.

Q. So far as you know, they were put there by employees of the American Bill Posting Company, is that right? A. Yes, they told me that they did it.

Q. Never mind.

By Mr. Dreden:

30 Q. Do you know of your own knowledge, Mr. McKenna, what, if anything, Mr. Reade had to do with it? A. No, sir; except what direct knowledge that they told me—

The Court: That is not evidence.

Mr. Leonard: I object.

Mr. Dreden: I consent that it be stricken out.

40 The Court: Strike it out. The hearsay rule has not been eliminated yet. It may be some day.

Thomas P. McKenna—Direct

Q. Were those signboards erected at a uniform height along the westerly end of the property?

Mr. Leonard: I object to all evidence at this stage of the proof having to do with the signboards.

The Court: This is all on the assumption that it is going to be connected with the defendant. If it is not it will be stricken. That is understood. All this testimony is so understood.

By the Court:

Q. Were all of those signboards erected at the same height?

By Mr. Dreden:

Q. Uniform height? A. Yes, sir.

Q. About how high are they? A. They are about twelve feet high, what is known as a single deck sign.

Q. A single deck sign is twelve feet high? A. Well, approximately that. The photographs show it.

Q. These signs are all what you call single deck signs, are they? A. Yes, sir.

Q. This single deck sign, is that such as is shown in Exhibit P-4, and showing a very healthy looking man smoking a pipe, with an inscription "Granger Rough Cut"?

Mr. Leonard: Did you assure his Honor that you will connect these signs with Mr. Reade?

Mr. Dreden: I would appreciate it if Mr. Leonard would let me make my own examination without interruption.

Thomas P. McKenna—Direct

The Court: Counsel is objecting to the admission of this testimony on the ground that it has not been shown to be connected in any way with Mr. Reade. What is counsel's reply to that?

10 Mr. Drewen: My reply to that is this: that Mr. Reade has been shown by this witness to have asked for use and possession of that property.

The Court: You are going to claim that he leased the sign privilege to those people?

20 Mr. Drewen: No; I don't care who he leased it to. We are going to show that he was responsible for the presence of the sign.

The Court: That he was responsible?

Mr. Drewen: I mean legally, yes. I don't want to mislead the Court as to what I mean by legally.

Mr. Leonard: Not factually?

30 Mr. Drewen: No. Here is a man takes possession of the property. After he takes possession certain changes take place on the property. One of the changes is the erection of a sign with his name on, offering the property for a certain purpose. That is for him to show; if he didn't do it, that is for him to show.

The Court: I will pass on this question when it comes to me.

40 Q. Have you ever been paid any rent whatsoever for the use and occupation of the premises which you say were occupied and used by Mr. Reade? A. No, sir.

Thomas P. McKenna—Direct

By the Court:

Q. Have you been paid for any topsoil taken off, as you claim? A. No, sir.

By Mr. Drewen:

Q. Did you receive any money whatever from Mr. Reade in connection with this property or for its use or for its occupation except the \$5,000 which he paid on account of its purchase? A. No, sir. 10

Q. You did receive that \$5,000? A. Yes, sir.

Q. This contract resulted in a suit against you by Mr. Reade in the Court of Chancery, did it not? A. Yes, sir.

Q. And that suit has been tried and concluded? A. Yes, sir. 20

Q. Was it appealed to the Court of Errors and Appeals? A. Yes, sir.

Q. And was it affirmed there? A. Yes, sir.

Mr. Leonard: The record will disclose all of it. It speaks for itself.

Q. I call your attention to a provision in Exhibit D-4, which is the agreement of purchase between you and Mr. Reade, relative to a lease to one William E. Getchell, dated January 29, 1925, 30 expiring on January 23, 1926. Is William E. Getchell the man who occupied that lunch wagon? A. Yes, at that time.

Q. How much space did he have there, do you know, under his lease? A. He had thirty feet by fifty, I think.

Q. What was the rent he paid? A. Fifty dollars a running foot, \$1,500.

Q. A year? A. Yes, sir.

Q. He owned the lunch wagon himself, didn't he? A. Yes, sir. 40

Thomas P. McKenna—Direct

Q. That was ground rent that he paid? A. Yes, sir.

Q. Now, has the use and occupation of this property been restored to you? A. No, sir. Mr. Reade still has possession of it, except as the
10 Court of Chancery record would restore it to me by the decision.

Q. No, we are discussing the use and occupation, which you say you permitted him to have there at the time of the contract between you. Now, has that use and occupation which you have decided in this case, the use and occupation of that property by Mr. Reade, been discontinued? A. No, sir.

20 Q. It has not? A. No, sir.

By the Court:

Q. How does he still occupy it? A. Still occupies it with the theatre trucks today; they were there yesterday; and his building material, considerable of the refuse from his buildings are still there.

By Mr. Drewen:

Q. Are the signs still standing on the property? A. No, sir.
30

Q. Since when have they disappeared? A. During the past year.

Q. Do you remember the month? A. No, I don't remember the month.

Q. Where have they been placed? A. I think most of them are placed on top of the stores which have been built there on the Reade property adjoining my property on the east, but I
40 don't know about that. All I know is they have been removed from my property.

Thomas P. McKenna—Direct

Q. Can't you give us the month when they were removed? A. No, sir; the gentleman is here to testify to it.

Q. All right. Do you know whether or not this property was used as parking space during the time that Mr. Reade had possession of it? A. 10 Yes.

Mr. Leonard: It doesn't appear, if the Court please, that he has so testified.

The Court: I am not so sure. Of course, Mr. McKenna has testified that Mr. Reade was in possession under the terms of the contract. The objection is overruled. He may answer.

Mr. Leonard: If he has testified to that, 20 of course—

The Court: He said Reade came to him and asked him if there was any objection to his going in there.

Mr. Leonard: Under the terms of the contract.

The Court: Under the terms of the contract, yes.

By the Court:

Q. Do you know whether any part of your land was used for parking purposes? A. Yes. 30

Q. The question included Mr. Reade. How do you know Mr. Reade used that for parking purposes? A. Because Mr. Reade's sign with his name on it is there, was there on the premises.

By Mr. Drewen:

Q. How much of this property was used for parking purposes? A. All of it excepting—while 40 it is used for parking purposes, of course, there

Thomas P. McKenna—Direct

had to be an entrance into the place where the cars were actually standing, used as a driveway for parking.

Q. I am talking about the parking space. Didn't I understand you to say that all of this
10 was used either for parking or as a means for approaching to the parking space? A. Yes, sir.

Q. For those two purposes it was all used? A. Yes.

Q. How long after Mr. Reade took possession, as you say, was it that the use of this property for parking space began? A. During the summer of 1925.

Q. When did the use of the property for parking space end, if it has ended? A. It began about
20 June, 1925, and it has not ended yet. They are still parking there.

Q. How long is it since Mr. Reade's sign has disappeared? A. During the past year.

Q. Do you know the month? A. No, I think it was last fall.

Q. Do you remember the time when this case was decided by the Court of Chancery? Was the sign on there at any time after the decision in
30 this case in the Court of Chancery? A. Yes.

Q. It continued to be there afterwards? A. Yes, until, I think, last September, 1927.

Q. And can you say whether or not the removal of the signs upon your property occurred at the same time as the discontinuance of the use of the property for parking space? Which occurred first, if there is any difference? A. Well, the removal of the signs occurred and the parking con-
40 tinued to the present time.

Recess to 1:15 P. M.

Discussion

Trial of the cause resumed at 1:15 P. M.

Mr. Leonard: If the Court please, during the noon recess Mr. Drewen and I, with the aid of a magnifying glass, deter- 10 mined what was on that sign appearing in photograph, P-13.

The Court: What was it?

Mr. Leonard: "Parking twenty-five cents." You read it all.

Mr. Drewen: "Twenty-five cents, parking, twenty-five cents. This parking space donated by Walter Reade to the stage employees." Then two or three words are a
20 little uncertain.

The Court: They are there?

Mr. Drewen: They are there. The rest is quite clear. "Broadway Theatre. Park with us. Twenty-five cents."

Mr. Leonard: "The stage employees of the Broadway Theatre. Park with us."

The Court: Then it is understood what is on that sign. The jury will have the right to see it anyway. Walter Reade's
30 name appears as donator and the bottom line is "Broadway Theatre;" is that right?

Mr. Drewen: Yes.

The Court: No company attached to it?

Mr. Drewen: No, no company, just "Broadway Theatre."

Thomas P. McKenna—Cross

THOMAS P. MCKENNA, resumed.

By Mr. Drewen:

Q. Did you make any arrangements with anyone whatever, Mr. McKenna, with regard to the use of this property for parking space? A. No, sir.

Q. Did you make any arrangements with anyone whatever with regard to the use of this property for the display of advertising signs? A. No, sir.

Q. Did you receive any pay, money or consideration whatever from anyone directly or indirectly for the use of this property for parking space? A. No, sir.

Q. Nor for the purpose of the use of the display of advertising signs? A. No, sir.

CROSS-EXAMINATION by Mr. Leonard:

Mr. Leonard: (To the stenographer) Would you mind turning back to the question asked by Mr. Drewen of Mr. McKenna along this line, whether or not the premises in question during the period in question had ever been rented by Mr. McKenna?

(Testimony read by stenographer as follows: "Have you ever been paid any rent whatsoever for the use and occupation of the premises which you say were occupied and used by Mr. Reade? A. No, sir.")

Q. No question about that? A. About the premises used by Mr. Reade.

Q. I show you Exhibit P-2, the last paragraph but one of the first page, and ask you to use it. Read it. A. I have.

Thomas P. McKenna—Cross

Q. Read it aloud. A. "Subject, however, to a lease to one William E. Getchell, dated January 29, 1925, and expiring January 23, 1926."

Q. So you meant to except that, didn't you? A. No, that is not covered by the question. The question was whether the space used by Mr. Reade. Mr. Reade didn't use that space.

Q. I didn't ask you that. I say that was your answer to my question? A. Yes, sir.

Q. Was this lease in writing? A. Yes, exhibited to Mr. Reade's lawyers.

Q. Did I ask you anything about to whom it was exhibited?

Mr. Leonard: I move to strike it out, if the Court please.

The Court: Strike out the latter part.

Mr. Leonard: And I also move to strike out that testimony upon the record purporting to cover the terms of the lease, which we now learn is in writing, and consequently that testimony is not the best evidence.

The Court: Oh, well, I think it is a collateral matter, unimportant, as far as that is concerned. I see no reason for striking that testimony in the circumstances. Of course, that lease will speak for itself. He may state what rent he was getting.

Mr. Drewen: That is what I asked him, what he actually received.

The Court: That may stand.

Q. You know the Merritt brothers, of Long Branch, do you not? A. Yes.

Thomas P. McKenna—Cross

Q. They occupied the premises in question between 1925 and 1927, didn't they? A. I didn't think so when I answered the question. I think they occupied the same space covered by the lunch wagon.

10 Q. The same space? A. I think so, to the best of my recollection. Anyhow it was not the space used for the parking.

Q. No, I didn't ask you that. A. Well, the question asked of me or that my attention was directed to was the premises occupied by Mr. Merritt.

Mr. Leonard: Will Mr. Kelly repeat the question?

20 (Question repeated as follows: "Q. They occupied the premises in question between 1925 and 1927, didn't they? A. No, sir. Q. Did they occupy any part of it? A. I don't think they occupied any part of the premises used by Mr. Reade.")

Mr. Leonard: I move to strike it out, if the Court please, as not responsive.

The Court: Strike out that part of it in reference to Mr. Reade.

30 By the Court:

Q. Did they occupy any of the premises in question? That is all the question. A. No, sir; I don't think so.

By Mr. Leonard:

40 Q. Aren't you sure? A. No, sir. They occupied a small space on Broadway and I thought outside of the space covered by the lunch wagon or alongside of it; but it is not the space in question in this litigation, it is the space which has

Thomas P. McKenna—Cross

been used for three purposes, or four, that we have testified to.

Mr. Leonard: I move that the argument be stricken out.

The Court: No, I think that should stand. 10

Q. I show you Exhibit P-2 and ask you to look at the description in there and ask you if you recall the physical land that that description describes. A. Yes, sir.

Q. Now, will you say whether or not the Merritt brothers occupied any portion of the land described in that exhibit? A. Yes, sir; they occupied a portion of the land described in this. 20

Q. And how long did they occupy it? A. My recollection is that it was prior to the lease to the lunch wagon.

Q. And how long did they occupy it? A. For several years prior to that, but I am not exactly sure as to the date, but it is my general recollection.

Q. You recently sued them, didn't you? A. Yes.

Q. For rent? A. For rent, and they paid it. 30

Q. Of these premises or part of them? A. For the premises occupied by the lunch wagon.

Q. And yet you think that Merritt Brothers occupied the premises next to the lunch wagon? A. No, I didn't say it was next to the lunch wagon.

Q. Well, where is it, or was it? A. Where the lunch wagon is located, and it may have extended a little bit to the east of the lunch wagon. 40

Thomas P. McKenna—Cross

Q. Now, you charged rent for that occupancy?
A. I did.

Q. And after you sued them they afterwards paid the rent, you say? A. Yes, sir.

Q. Were they on any part of those premises
10 after June 10, 1925? A. I don't recall that they were, Mr. Leonard.

Q. Don't you know when they were there? A. I don't exactly; no, sir. They just had a little vegetable stand—

Q. I am not asking you what they had. Don't you recall whether they were there two years ago or three years ago? A. My recollection is that they were there three years ago; yes, sir.

Q. And that they were not there after June,
20 1925? A. I wouldn't like to say that they were or not, but my recollection is that they were not.

Q. When did you sue them, do you know? A. I think in 1925.

Q. Would you by reference to any papers you may have in your possession be able to tell the jury exactly when these people did occupy a part of the premises in question? A. No, sir.

Q. You would not? A. No, sir.

Q. Why not? A. Well, because I didn't con-
30 sider it in this case, and it is simply a very trifling matter, a vegetable stand fronting on Broadway; nothing to do with the space occupied here by parking.

Q. No, I don't think you understood my ques-
40 tion. I asked you if you were afforded the opportunity to consult what records you have you would be able to tell this jury when the Merritt Brothers had occupied the premises. A. I haven't the record with me.

Thomas P. McKenna—Cross

Q. I didn't ask you if you had the record with you. I asked you whether or not you would be able if you had access. A. I beg your pardon. You said in my possession, and I leave it to the court room, and I say I don't know.

Q. I am not going to argue with you. A. I will
10 have to answer your questions as you ask them of me.

Q. Have you any record anywhere that might refresh your recollection as to when the Merritt Brothers occupied the premises covered in this suit? A. No, sir.

Q. Don't you keep any record of your tenants?
A. Oh, yes; but we don't keep records for years afterwards. After matters are cleared I don't
20 keep records.

Q. Are you certain that you have no record of the Merritt Brothers being there? A. No, sir; I wouldn't say. I am not certain, but I say I have no recollection of any place to put my hand on it.

Q. But you wouldn't mind looking tonight so you can tell us tomorrow morning, will you? A. No.

Q. You will look, won't you? A. I don't know
30 of any place to look.

Q. Have you that Getchell lease with you? A. No, sir; Mr. Reade's attorney, I think, has that, Mr. Barron.

Mr. Leonard: I move to strike it out.

Mr. Drewen: I think it is responsive. He says he hasn't got it but says where it is.

The Court: He says he hasn't it. 40

Thomas P. McKenna—Cross

Q. The trees that you say were removed, some trunks of which you pointed out to us in one of those photographs, they came from your property, didn't they? A. Well, I had trees on the property and this excavation has taken place and
10 it has taken place around the trees. I take it that they are the trees from my property. Nobody would bring stumps in and leave them on my property. But as to having stood there and watched them, I wouldn't say that they are the particular stumps that came from my property.

Q. That is all I wanted to know, whether you saw them removed. I direct your attention to Exhibit P-16, and particularly to the northerly part,
20 on which is indicated the lunch wagon on your property. Directing your attention to that line, the line to the east of your property, in 1925 and 1926 that was a vacant land, wasn't it? A. Yes, sir.

Q. And you didn't own it? A. No, sir; I had a claim to it, but it is not in this litigation.

Q. And there were cars at times parked upon all that vacant area, weren't there? A. Yes,
sir.

30 Q. You saw the cars there? A. Yes, sir.

Q. And one of the signs to which you refer was on that property, wasn't it? A. No, sir.

Q. There were two signs? A. Four signs.

Q. What? A. Four or five signs.

Q. None on that property? A. Yes, there were signs on that property. That is the one where the Chrysler name is on the signboard there, to my recollection.

40 Q. And were you able to distinguish when you

Thomas P. McKenna—Cross

examined those photographs that imaginary line separating the two pieces of property, your property from the property of the person who owns that area, indicating the area to the east? A. Yes, sir.

Q. You were? A. Yes, sir. 10

Q. And were you also able to distinguish the extension of that line (indicating the westerly line of the property lying to the east of the McKenna property), a prolongation of that line indicated on the map by dotted lines? A. I was not asked to and I didn't testify in connection with the photograph as to that line.

Q. You know that an alley was there and still is there, do you not? A. In the rear of those
20 stores, yes, in the rear of that property.

Q. Have you the deed of this property with you today? A. No, sir; it is recorded in the County Clerk's office.

Q. What is that? A. It is recorded in the County Clerk's office.

Q. You didn't bring the deed with you? A. No, sir.

The Court: He said he didn't.

Q. Do you know anything about the character
30 of this property before you purchased it? A. Yes.

Q. Do you know the property that you claim you now own? A. Yes, sir.

Q. It was used for carnivals and circuses years ago, wasn't it? A. No, sir. Occasionally after I owned it we gave permission for charitable picnics and things of that kind to be held.

Q. And there was a church on or nearby the
40

Thomas P. McKenna—Cross

property some years ago? A. Yes, a church nearby.

Q. And there were sheds to the rear or to the side of the church under which the various wagons of the congregation would go? A. Yes, sir.

10 That is not on this property.

Q. Then, after that the property in question was used for a time as a general vegetable market, wasn't it? A. No, sir.

Q. Didn't you say farmers congregated there and sold their produce in that rear area? A. I gave permission there for a little while.

Q. Then you did see them, didn't you? A. Oh, yes; but not used generally.

20 Q. And those farmers would get in there either by that alley or towards Broadway, would they not? A. Yes, drove in from Belmont Avenue, regardless of the alley, and drove in from Broadway regardless of the alley, just drove in, that was all.

Q. Do you know Mr. Rubin? A. Mr. Rubin; yes, sir.

30 Q. One evening in August, 1926, you and Mr. Rubin went to the rear of your lot and proceeded to count some cars that were parked or scattered about, did you not? A. I proceeded to count them with Mr. George Miller, the officer of the court here.

Q. I say, in August, I think 1926, did you go to the rear of your property or anywheres on your property with Mr. Rubin and count some cars that were there? A. I may have. I was there frequently. I don't recall now going with Mr. Rubin to count the cars.

40 Q. But you did count them at various times? A. Yes, sir.

Thomas P. McKenna—Re-direct

RE-DIRECT EXAMINATION by Mr. Drewen:

Q. Mr. McKenna, in the side of the theatre that abuts upon your property is there any entrance to the theatre?

Mr. Leonard: That is objected to, if the Court please. What is its materiality to this case? 10

The Court: Mr. Drewen may state how he thinks it is material, what is his purpose in asking this question.

Mr. Drewen: Simply this: to show that there is no access to this theatre for bringing scenery to that theatre except over this property of ours. 20

The Court: I will let him prove it properly and connect it up with Mr. Reade. I assume that all this testimony must converge eventually upon the vital question whether Reade was liable for everything that was done there. I will allow it.

A. Yes.

30 Q. How many entranceways are there to the theatre in the side that abuts on your property, one or more than one? A. There is one on the side directly next to my property and one on the side of the theatre. There are two entrances.

Q. In reference to the blueprint sketch, P-16, where are those two entrances that you now refer to? A. There is one entrance right there and here is an entrance right where my pencil is.

40 Q. Well, that second entrance is not on your property, is it? A. No, sir; but it is from my property into that. You see you can go in this way.

Thomas P. McKenna—Re-direct

Q. Which of those entrances, if either of them, is the one through which scenery would have to be brought into the theatre? A. The one that I marked A.

Q. Now, is there any other means of access to
10 that doorway except over your property? A. No, sir.

The Court: Ingress and egress, isn't that the stereotyped question?

Mr. Drewen: Yes, sir.

The Witness: Yes, sir.

Q. You have said, Mr. McKenna, I think, in answer to one of Mr. Leonard's questions, that you went there a number of times to count cars on
20 this property? A. Yes.

Q. Subsequent to the making of your contract with Mr. Reade? A. Yes, sir.

Q. How often did you do that? A. Well, four or five times at least.

Q. Can you tell us approximately when that was? A. Well, I went there one evening in the summer of 1926, I think it was. I can tell by that slip.

Q. Who made this slip? A. Mr. George Miller
30 and myself made it.

Q. Well, either one of you made it. In whose handwriting is it? A. The body in my handwriting and his signature at the bottom.

Q. When did you make that with reference to the things that it states? A. September 4, 1926.

Q. What did you make it for? A. Made it for the purpose of counting the number of cars that my space was holding, and the number of cars
40 that was held by the space which has been re-

Thomas P. McKenna—Re-cross

ferred to this morning as the space upon which Mrs. Reade's stores were built.

Q. And how many cars were there at that time parked upon your property? A. One hundred and seventeen on my property.

Q. That was on this one occasion? A. Yes,
10 that was about the same nearly every night.

RE-CROSS EXAMINATION by Mr. Leonard:

Q. Did you go there every night? A. No, sir; every night I was there.

Mr. Leonard: I move to strike out what he said.

By the Court:

Q. How many times was that? A. About six
20 times.

The Court: The testimony can relate only to the six times, of course.

By Mr. Leonard:

Q. What did you do, Mr. McKenna, when you saw the cars parked on your property? A. Just took account of them.

Q. Took account of them? A. Yes.

Q. And did you do that each time you went
30 there? A. I didn't take account of them every time. I took account of them in writing at that time.

Q. But you did take account of them sometimes, made a mental note of it or a written note of it? A. Yes.

Q. Just made it and put it among your records? A. Yes.

Thomas P. McKenna—Re-direct
Thomas Gill—Direct

RE-DIRECT EXAMINATION by Mr. Drewen:

Q. I think I asked you a question with regard to the lease which you got from the man Getchell, who leased this lunch wagon place. Entirely
10 aside from the terms of the lease, about which I am not asking you at all, will you tell us how much rent you actually received from him, how much was actually paid you for that property?
A. \$1,500.

Q. A front foot? A. Yes, \$50 a front foot.

The Court: \$50 a front foot, \$1,500 a
20 year.

THOMAS GILL, sworn for plaintiff.

Direct-examination by Mr. Drewen:

Q. Mr. Gill, where do you reside, please? A.
Long Branch.

Q. New Jersey? A. Yes.

Q. How long have you lived in Long Branch,
30 New Jersey? A. About seven years.

Q. And what is your business, please? A. Out-
door advertising.

Q. And that includes, does it not, the advertising by means of what are commonly called sign-
boards? A. Yes, sir.

Q. Are you connected with any corporation or any company engaged in that business? A. Yes,
40 sir; I am president of the G & G Advertising Company.

Thomas Gill—Direct

Q. Are you familiar with the property that has been described in the testimony in this case?

A. Yes, sir.

Q. Shown on this sketch here, P-16, running from Broadway through to Belmont Avenue, to the opposite end? A. Yes, sir. 10

Q. Did you ever visit that property for the purpose of determining the extent to which it was used for display signboards? A. No, sir.

Q. You never did that? A. No, sir.

Q. Did you ever make any measurements of the dimensions or the length of signboards displayed on that property? A. No, sir.

Q. Are you familiar with the rate paid for space that is used for the display of signboards? A. Yes, sir. 20

Q. Of the kind that is shown in the photographic Exhibits P-2 to P-15? A. Yes, sir.

Q. What is the rate of rent paid for the space used for such displays?

Mr. Leonard: Objected to.

The Court: I think that is quite objectionable. After all, it does not get down to what is actually paid in this specific instance. You can't prove that by prevailing rates. I presume there must be con-
30 tracts in existence somewhere.

Mr. Drewen: Well, I have no right to any such proof.

The Court: Oh, yes, you have. You could have examined the defendant before trial; you could have filed interrogatories.

Mr. Drewen: That is not the point here, if your Honor will hear me just a moment. 40

Discussion

All that the law allows us as a measure of damages in a suit for use and occupation is reasonable rental value.

The Court: I agree.

10 Mr. Drewen: Now, then, all I am trying to show by this witness is what the rental value was at the time in question, as reflected in the rate paid.

The Court: For signboard space?

Mr. Drewen: Yes; one of the features for which this property—

The Court: And in that neighborhood?

Mr. Drewen: Yes.

20 The Court: You must confine it to that neighborhood.

Mr. Drewen: I shall do that and I intended to do it.

The Court: Well, of course, that may be admissible. Now, of course, as far as the rental goes, you might not have to show, that might be a prevailing rate; but it may be shown that that was actually not the contract price at all.

30 Mr. Drewen: They are at liberty to do that, certainly.

The Court: Of course they are.

Mr. Leonard: I object, in the first place in that no connection has been shown at all, and it should come in somewhere, and for that reason, upon the present state of the proof, we object to its admission.

The Court: You mean as to connecting Mr. Reade with it?

40 Mr. Leonard: Yes, and upon the second ground that it is not the legal measure of damages.

Thomas Gill—Direct

The Court: Oh, I think the reasonable rental value may be restricted to the advertising sign as a source of income. Objection overruled. You may have an exception. Go on.

The Witness: May I have that last re- 10 peated?

By the Court:

Q. What were the accepted rates for signs of the character indicates in Exhibits P-2 to P-15, prevailing in the immediate neighborhood, namely, Long Branch, between June, 1925, and June, 1927? A. Those rates would vary considerably at different parts of that property. Parts of that property would be worth up to \$4 20 a foot and parts of it I would consider expensive at 50 cents a foot.

Q. Well, now, for example, can you tell off the photographs, take the exhibits and indicate which are which? A. Yes, sir.

By Mr. Drewen:

Q. Now, when you say a foot, do you mean a running foot? A. Running foot; yes, sir.

By the Court: 30

Q. Can you tell us the size of those signs by looking at the photograph? A. Yes, approximately. The sign in Exhibit P-4, the sign shown there, is a sign of about 11 feet high and approximately 22 or 23 feet long per banner.

By the Court:

Q. And the prevailing price of that, the reasonable cost of that, would be what? A. The sign 40 shown in this—

Thomas Gill—Direct

Q. Not the cost, but the price to the landlord.
A. I would estimate this at about 50 cents per foot in this photograph, P-4, the reasonable rates.

Q. And based upon the location which you find it? A. Yes, upon that location.

10 Q. All right. Go on. 50 cents a foot, you said?
A. Yes, in that one location.

By Mr. Drewen:

Q. Is that per year, Mr. Gill? A. That is per year; yes, sir.

Q. All right. Go on. A. In P-8 there are shown two signs, I would consider worth a dollar or two dollars per foot. In other words, we would say a dollar a foot if we were allowed to
20 place a single sign there. If we were allowed to place a double deck sign there, that is, one sign on top of the other, we would pay \$2 a foot for that location.

Q. Those are single deckers? A. Those are single deckers shown in the photograph.

Q. What is the length of that one you have last referred to, the one you say you would pay \$2 a running foot for? A. That runs parallel with the theatre and is approximately, from the photo-
30 graph, I judge to be about 40 feet from the street.

Q. Is the sign itself 40 feet in length? A. The sign is 44 feet in length, parallel with the theatre, and about 22 feet in length at right angles with the theatre, parallel with Broadway.

Q. That is 66 feet all together? A. Yes, that is 66 feet all together. It would be worth presumably something about that price.

40 Q. \$2 per year a foot? A. Yes, a fair price.

Thomas Gill—Direct

And, of course, the nearer a sign is to Broadway, the more valuable it is. In other words, we rented a space immediately adjacent to this theatre, that is, that showed down Broadway, we paid \$5 a running foot for.

By the Court:

Q. When was that? A. At the same period. We had just got a five-years' lease on it.

Q. A \$5 sign, the lease ended in 1927? A. Yes.

Q. Are there any \$5 signs indicated on these photographs? A. No, sir; because the lunch wagon is in such position that the sign could not be near enough to Broadway.

Q. The best price there is \$2 a foot and the
20 lowest about 50 cents? A. Yes.

By Mr. Drewen:

Q. Can you tell how many running feet there were during the period commencing with the \$4 a foot signs? A. If I could examine that blueprint—

Q. You mean P-16? A. Yes, sir. This property is Mr. Reade's property, isn't it (indicating)?

Q. The only property here, Mr. Gill, with which we are concerned, is the property that Mr. McKenna owned, is that within those lines there? Is that in your handwriting, the sketch I show you?
30 A. No, sir.

Q. Are the figures in your computation? A. Yes, sir.

Q. Now, tell us, will you please, the footage throughout the course of this property that is available for use in the display of signs and what
40

Thomas Gill—Direct

the respective rates are for the various portions of that footage.

Mr. Leonard: This entire line is objected to generally.

10 The Court: It is objected to generally and it is understood that it must be connected with the defendant.

A. There is about 22 feet of this property, one sign, in other words, one banner, at the maximum, that would be worth about \$4 a foot for a double-deck sign. There would be about—there is about 200 feet that would be worth about \$2 a foot.

20 Q. That is single-deck or double? A. Double-deck.

Q. That is just half, the single? A. I am referring to double-deck in every case. And about 88 feet that would be worth 50 cents a foot. This would be the price that I would offer for basing—

By the Court:

Q. Not what you would offer, but are they the prevailing rates? A. They are the prevailing rates.

30 Q. Or were they the prevailing rates? A. They were the prevailing rates, yes.

Q. During the period we are talking about? A. Yes.

Q. 1925 to 1927? A. Yes.

The Court: As a matter of fact, there appears to have been four signs there, Mr. Drewen, that is right, during the period?

Mr. Drewen: Frankly, I don't know.

Thomas Gill—Direct

By Mr. Drewen:

Q. What is the total footage available for use in display of signs on the property as shown by P-16, can you tell us again? A. That footage would be determined by whether or not a part of this property which is owned by Mr. McKenna 10 was built on.

The Court: You are not able to answer that question?

Q. Assuming—I will prove this later if I have to—that this property here on sketch P-16 was opened, not built upon at all, assuming that to be true, what then is the footage available for use in the display of signs on this property, total of 20 footage? A. The total footage would be approximately 300 feet.

Q. 300 feet? A. Yes, sir.

Mr. Leonard: I move at this time to strike out all that testimony relating to the photographs offered in evidence and to which this witness referred, upon the ground that there has been no distinction made between the signs appearing in this photograph and which rest upon lands 30 owned other than by the plaintiff and the signs that the plaintiff claims were upon his land.

The Court: Well, I think, of course, this witness has not done that, although he has distinguished in the prices in accordance with the size of the sign; and it is understood that this testimony can relate only to signs upon the lot in question, that is un- 40

Thomas Gill—Cross

derstood. For that reason the objection is overruled. You may have an exception. (Objection noted for defendant as ground of appeal.)

10 CROSS-EXAMINATION by Mr. Leonard:

Q. Do you paint signs or are you in the poster business? A. I paint signs.

Q. You are not in the poster business? A. No.

Q. These are poster signs, are they not? A. Yes, sir.

Mr. Leonard: I move to strike it out upon the ground that he has not qualified, if the Court please. It does not appear
20 that he is a poster expert.

By the Court:

Q. You have been testifying, are you qualified? A. Yes.

Q. How, for the poster sign rather than the painting sign? A. Our space is limited, not competitive, not poster space.

Q. You were familiar, then, with both types of advertising, is that right? A. Yes, sir.

30 The Court: All right. This motion is denied.

By Mr. Leonard:

Q. Now, if you put a poster or a billboard across this 50-foot frontage on Mr. McKenna, you couldn't get very much clear space either side of his property, could you? A. No, sir.

Q. And in one of your estimates, one of your
40 choice estimates, you had a large sign going immediately across his property, didn't you, facing Broadway? A. No, sir.

Walter J. Schiverea—Direct

Q. That would be about a choice site for a sign?

A. It would be a choice site, sir, but in estimating the—

Q. Would it be a choice site? A. Yes, sir.

Mr. Stokes: Let him answer.

10

Q. Is it a choice site? A. Yes, sir.

Mr. Drewen: Mr. Leonard asks a question and then he won't let him answer.

WALTER J. SCHIVEREA, re-called for
plaintiff.

20

Direct-examination by Mr. Drewen:

Q. Calling your attention to the sketch of plaintiff's property as shown in Exhibit P-16, have you taken any levels, made any examination of the surface of the land shown within the confines I indicate on this sketch for the purpose of determining the extent to which topsoil and clay has been removed from that surface? A. I have.

Q. What means or method did you pursue for the purpose of determining that? A. I have a
30 drawing. I can explain that drawing.

Q. All right. Explain it, please. Is this the drawing you refer to (indicating)? A. Yes.

Mr. Leonard: I object and require that all this be connected with the defendant.

The Court: You know you can take care of all this at the close of the case.

(The sketch was placed on the easel.)

40

Walter J. Schiverea—Direct

Q. Now, indicate by this map or sketch what method or means you pursued for the purpose of determining how much topsoil or clay had been removed from the property referred to. A. The area in the boundaries was cross-sectioned by 25-foot squares, the readings taken at the intersection of the 25-foot line. Here where the excavation is irregular more sections were taken to make my estimate as accurate as possible. As I was not familiar with the original surface of the ground it is necessary to make some assumptions. Now, the assumptions made were that the original surface was indicated by vegetation or the age of the area in question, grass growing, vegetables and things of that kind. And Mr. McKenna was with me and said—

Mr. Leonard: I object to what he said.
The Court: No, not what he said.

Mr. Leonard: And moreover, should not that assumption, if it is an assumption, be established as a fact before he goes into it?

The Court: No, I don't think we need do it now. He can tell how he arrived at it, but it is not purely an assumption, he is talking about a fact as to the foliage and herbage and so on around it. Now, that is understood.

A. I mentioned that as the only visible thing that I could base any calculations on.

The Court: The weight and credence seems to be a matter for the jury, as far as that is concerned.

Walter J. Schiverea—Direct

A. Now, I think it is very natural and possible to assume that the surface was at least a straight line from one side of the property to the other. It may have been very irregular; it may have been higher, but that is my assumption, that it was a straight line from one side across to the other.

By Mr. Drewen:

Q. Now, when you say a straight line from one side across to the other side, how did you determine the height or elevation on the side from which to which you figured? A. Well, with an instrument, of course, with a surveyor's instrument.

Q. Let us assume that this is one side line of the piece of property as it is and this is another. Do I understand you to say that you assume that the elevation is the same from this point to this point? At least you have determined the elevation— A. I determined the elevation at this side. I determined the elevation at this side and draw a straight line from this elevation to that and assume that that is the elevation.

Q. How did you determine the elevation on those two sides, on this side? A. This is done by surveyor's instruments and then running a level, too. And to determine where these points were taken, we start here at Broadway, as my zero. These first stations were taken, the first station at 20 feet, 5 feet more, 40 feet, then 25, then I came up here, but the surface is more or less irregular, and I took that over there 25 feet long and touched here, and then over 25 feet at right angles to this building here, or at right

Walter J. Schiverea—Direct

angles, as I assume, to this boundary on this side.

By the Court:

Q. Well, your assumption really means this:
10 that you were not familiar with the surface in the center, for example? A. Absolutely.

Q. You didn't know that? A. I didn't know that.

Q. But you assumed from the physical condition at the side that it was level square across to the other side? A. Straight line, yes.

Q. Now, that may or may not have been so?
A. It may or may not have been so.

20 The Court: Go on.

By Mr. Drewen:

Q. When you say you took these surfaces at the sides, from which to which you figured the elevation between you, you say you used a surveying instrument? A. A level, yes.

Q. Did I also understand you to say that you took the elevation of vegetation at this point?
A. Absolutely, just took it right at the apparent vegetation there, the apparent original surface
30 of the ground, to the edge.

Q. Does the instrument that you speak of determine the elevation on the side here or does the vegetation determine it? A. Well, the instrument determines relative elevations. We start from what we know as a bench mark, and no elevation is taken here.

Q. As a matter of fact, your bench mark was placed at vegetation? A. No, it is not. The
40 bench mark is the starting point from which we

Walter J. Schiverea—Direct

base all our levels. We base a certain datum and then we hold the rod, a surveyor's rod is held on the surface, and by calculation the elevation at which one of those points of vegetation or original surface as assumed here is determined.

Q. What is the name of this instrument you
10 use? A. Why, it is a surveyor's level and leveling rod.

Q. You have been using it for that purpose for how many years? A. Oh, twenty years.

Q. And have you testified on questions exactly like this in proceedings at law? A. Yes, sir.

Q. Now, as a result of your investigation, did you determine how much topsoil and clay was removed from the area? A. Based on my as-
20 sumption therefrom, approximately 500 cubic yards removed.

Q. Now, is this assumption, as you call it, a minimum, an average or a maximum? A. Well, I should say an average.

Q. An average assumption? A. It is possible that there were some places a little lower and other places a little higher, and I think possibly that would equalize.

By the Court:

Q. How many cubic yards? A. 500.

Q. 500? A. Approximately, yes, sir; a calculation of this kind is an approximation.

Q. That is understood. That is cubic yards?
A. Cubic yards.

The Court: Proceed.

By Mr. Drewen:

Q. What do you call this, a chart? A. No,
40 these are cross-sections.

Walter J. Schiverea—Cross

Q. These are cross-sections? A. Cross-sections of the property. And that is the assumption I just spoke of. That is what we assume the original surface. It is made of sections.

By the Court:

10 Q. Does the chart show the cross-sections? A. The chart does show the cross-sections.

Mr. Drewen: I offer it in evidence.

The Court: There is no objection, I understand.

Mr. Leonard: There is an objection upon the ground offered before.

The Court: I understand it must be connected in some way with the defendant, of course.

(Chart marked Exhibit P-17.)

CROSS-EXAMINATION by Mr. Leonard:

Q. You say when you prepared that vegetation appeared on either side? A. Yes, there was some grass growing around the edge there.

Q. Indicating that the dirt had been moved off, if it were removed, before you made that? A. Well, I have no way of telling that or knowing that at all.

Q. You couldn't tell whether the dirt which you determined was removed five years before or one year before or six months before? A. No, sir; I couldn't tell.

Q. Or whether it was moved ten years before, no way of telling? A. No, no way of telling that.

Thomas P. McKenna—Direct, Cross

THOMAS P. MCKENNA, re-called for plaintiff.

Direct-examination by Mr. Drewen:

Q. Mr. McKenna, the testimony of the last witness, that is, the calculations as to the quantity of topsoil and clay removed, is based upon the assumption that the surface was level. Will you state to the Court what, in fact, the state of the surface was as between the edges and the center, prior to the excavations? A. The center was very much higher than the edges, approximately six feet higher than the edges.

Q. There was an elevation running toward the edges from the center of the property? A. Towards the center of the property and towards Broadway.

Q. On P-16 there, about at what point in the property was the highest elevation, where you have indicated an X? A. Yes, sir.

CROSS-EXAMINATION by Mr. Leonard:

Q. Mr. McKenna, the same kind of soil was all over your property, the same kind, before this alleged removal took place? A. Yes, sir.

Q. Any rich, dark loam, topsoil? A. There was.

Q. Topsoil? A. Topsoil.

Q. All topsoil? A. All topsoil on the top of the property and clay below.

Q. The top of the property? A. Yes, sir.

Vernon Smith—Direct

VERNON SMITH, sworn for plaintiff.

Direct-examination by Mr. Drewen:

Q. Mr. Smith, what is your business? A. I am connected with the American Poster Advertising
10 Service.

Q. And what is the particular business? A. Poster advertising, outdoor advertising.

Q. That is commonly known as signboard display, advertising display? A. Yes, sir.

Q. How long have you been connected with that company? A. Eight years.

Q. And how long all together have you been in that line of business? A. About thirty-seven
20 years.

Q. From the middle of 1925 on did you have any signs displayed by your company under your supervision in the McKenna property in question in this suit? A. Yes, I think we had; yes, sir.

Mr. Leonard: Does he know?

By the Court:

Q. Well, do you know? A. Well, sir; they are
30 on property, I heard McKenna owned it.

By Mr. Drewen:

Q. Did you have anything to do with the display of signs on this property yourself? A. I erected the signs there.

Q. Well, you erected them. A. What they called; I don't know that Mr. McKenna owned that.

Q. You don't know the property?

40 The Court: Well, you see it is in his mind that he doesn't know who owned the property.

Vernon Smith—Direct

By the Court:

Q. But did you put up any signs adjoining the Broadway Theatre? A. I did.

By Mr. Drewen:

Q. In Long Branch? A. In Long Branch. 10

Q. And when was that done?

Mr. Leonard: I object unless he identifies it with the property in question. There are signs all over creation there, it seems.

The Court: Yes, show him the photographic exhibits and ask him whether he can identify it, whether he had anything to do with them. That is the way to do it. 20

Mr. Drewen: I withdraw the last question. I think it is unanswered.

Q. I show you, Mr. Smith, photographs in evidence in this case and marked Exhibits P-2 to P-15, and ask you if you can tell us from those photographs whether or not the signs shown in the photograph are the signs you erected on the property in question.

Mr. Leonard: I object. It does not appear that they were upon the property in question. 30

The Court: Strike out the latter part, "On the property in question."

Mr. Drewen: I consent that it be stricken out.

The Court: So that it merely stands, "The signs shown on the picture."

(Witness indicates.)

Vernon Smith—Direct

Q. Are those two shown here in P-10? A. Yes.

Q. Your answer is "yes, sir"? A. Yes, sir. There is three there.

Q. Exhibit P-5, are the two signs which are shown on P-5, other than the one painting and
10 the word "Chrysler"; were they signs that were erected by you? A. Yes, sir.

Q. Now, looking at P-12 and P-13, are the signs shown in those photographs signs that were erected by you? A. Those three.

Q. Are they? A. They are.

Q. Calling your attention to photograph P-14, are those signs shown in that photograph signs that were erected by you? A. Only those three.

Q. Only the three that stand together on the
20 right of the photograph? A. That is right.

Q. Calling your attention to Exhibit P-4, the sign marked "Granger Rough Cut," the one immediately adjoining it, were those signs erected by you? A. No.

Q. They were not? A. No, they were erected before my time.

Q. And the three shown on photographs P-9 and P-8, you say were erected by you, is that
30 right? A. That is right.

Q. When were those exhibits shown in the photograph erected by you, approximately? A. Well, I don't recall the date.

Q. Do you remember whether it was in the summer of 1925? A. No, I don't recall what summer it was. It was the summer that Mr. Reade donated a space to the stage hands unit.

Mr. Leonard: I object and move to
40 40 strike it out. It is quite obvious they are well acquainted.

Vernon Smith—Direct

The Court: Yes, you had better strike it out, because that is an assumption. They say figures don't lie, but somebody figures. This is a sign, Mr. Drewen.

Mr. Drewen: Will your Honor permit us to find out how much of what he said is
10 true? I don't know.

The Court: I will allow you to show this, if you can: that it was the year that there was a signboard in that section there somewhere carrying the language indicated in the photograph, whatever it may be, upon which you used a magnifying glass this morning, apparently showing a parking sign there.

Mr. Drewen: I did.

Q. Did it have Walter Reade's name on it?

Mr. Leonard: That is objected to. It will speak for itself. It is and has names on it.

The Court: Show him the photograph and ask him if he ever remembers seeing that sign.

Q. I show you a photograph, Mr. Smith, P-12,
30 showing a sign on this property which reads undoubtedly, "25 cents, parking 25 cents. This space donated by Walter Reade to the stage hands of the Broadway Theatre. Park with us." Do you remember seeing that sign there? A. Yes.

Q. Do you remember when that sign was put up there? A. Before I erected my work.

Q. Was that sign there when you put up those
40 billboards? A. Yes.

Vernon Smith—Direct

Q. And I understand you can't tell us whether this work of erecting the billboards was done by you in the summer of 1926 or 1925? A. Why, I don't just recall it. We change so many of them every year.

10 Q. Did you at any time take these signs down that you erected? A. Yes, they were taken down.

Mr. Leonard: Objected to.

Q. Did you say yes or no? A. Yes.

Q. When? A. When Mr. Reads started to build—

Mr. Leonard: One moment, please.

20 Q. In point of the calendar, with reference to the calendar. A. I think in 1927.

Q. Sometime in 1927? A. Sometime in 1927.

By the Court:

Q. About the time some store buildings were put up there? A. The store buildings were erected there; yes, sir.

By Mr. Drewen:

30 Q. What store buildings do you refer to? A. Store buildings erected by Mr. Reade.

By Mr. Leonard:

Q. Mr. McKenna told you just a moment ago, didn't he? You don't deny you spoke to your witness, do you?

The Court: Never mind. Let it stand as it was, of the period of the erection of the store.

Vernon Smith—Direct

By Mr. Drewen:

Q. The stores that you refer to—forgetting for the moment by whom they were built—were they built on Belmont Avenue or on Broadway?

Mr. Leonard: I object. It doesn't appear that this man is acquainted with the situation at all. 10

Q. You say that you do recall that the year was 1927 when you took those signs down. Do you remember whether it was the summer of 1927? A. I beg pardon.

Q. Do you know whether it was the summer of 1927 when you took them down? A. During the summer of 1927.

Q. After you took those signs down, what did you do with them? 20

Mr. Leonard: Objected to as immaterial.

The Court: He may state how he thinks it is material.

A. They were carried away.

Mr. Leonard: One moment. There is an objection. 30

The Court: What do you want to show?

Mr. Drewen: I want to show where he took those signs.

By the Court:

Q. All right. When you took them down, what did you do with them? A. Took them away, took them off the property entirely.

By Mr. Drewen:

Q. What was done with them? 40

Vernon Smith—Cross

Mr. Leonard: Objected to as immaterial.

The Court: Yes, it is immaterial.

10 Q. How did you come to put the signs on this property?

Mr. Leonard: Objected to, if the Court please.

Q. On the McKenna property which you identified in the photograph.

20 Mr. Leonard: May I at this time be permitted to examine to see whether this witness is familiar with what brought about their being placed there and also that he is not—

The Court: Yes, I will allow you.

By Mr. Leonard:

Q. Are you still employed by the company which you say erected those signs? A. I am.

Q. And what was your capacity with that company when these signs were erected?

By the Court:

30 Q. What was your relation? A. Foreman of the bill-posters.

By Mr. Leonard:

Q. Where is your company's office? A. Now, or then?

Q. Then? A. It was on Second Avenue.

By the Court:

40 Q. Long Branch? A. Long Branch, opposite Belmont.

Vernon Smith—Re-direct

By Mr. Leonard:

Q. Were you one of the officers of the company?

A. Now?

Q. Then? A. No.

Q. And you did what you were instructed to do by the officers or by those in charge of the company? A. Yes. 10

By Mr. Drewen:

Q. Regardless of the fact that you did what you were told to do by the officers of the company, do you know of your own knowledge by whom the officers of the company were requested to have those signs put on the property?

Mr. Leonard: Objected to, if the Court please, first— 20

The Court: It is based on personal knowledge. If he has none he will have to say so.

By the Court:

Q. Have you any personal knowledge on that subject? A. No.

By Mr. Drewen:

Q. Were you present when the orders were given to the representatives of your company to put the signs? 30

Mr. Leonard: I object. If it were he has no knowledge of it, and he has just testified.

The Court: I will allow that. The English language has a peculiar facility. He answered no and it is meaningless.

A. No. 40

Vernon Smith—Re-direct

Q. Was this defendant, Walter Reade, present on the premises at any time while you were erecting those signs?

10 Mr. Leonard: That is objected to, if your Honor please, as immaterial if he were.

The Court: I don't think that would have very much bearing. He might have been looking on the side entrance of his theatre.

20 Mr. Drewen: If your Honor please, without any word of Mr. Reade's—and we haven't come to the time yet when we can get it—is there any question now we have in evidence that Mr. Reade was the direct vendee for this property, that he had a contract then for the use and possession of the property, that there was evidence by a sign there on this property that he had donated, that Reade had donated it for use to certain individuals?

The Court: Now, what is your argument addressed to, this last question?

30 Mr. Drewen: Yes, I simply want to say this: after all the deviation in the index, I want to say simply this: that is Mr. Reade, after all I have just stated, was present and saw those signs go up we have the right to the use of that for what it is worth.

The Court: I am not so sure of that. Suppose I had stopped there and saw a sign going up.

40 Mr. Drewen: Your Honor would have had no connection with it any more than I

William A. Hulit, Jr.—Direct

stood there. It would be absolutely colorless when you and I stopped there, but not Mr. Reade. Too much had gone before in connection with Mr. Reade.

The Court: Oh, I will allow it.

(Objection noted for defendant as ground of appeal.) 10

Mr. Leonard: There is testimony that part of this property was a public alley.

Q. Did you see Mr. Reade there while your signs were going up? A. I never met Mr. Reade.

The Court: It is stipulated that instead of keeping the original files of the Court of Chancery in the case of Reade v. Mc- 20 Kenna here that copies may be used.

WILLIAM A. HULIT, JR., sworn for plaintiff.

Direct-examination by Mr. Drewen:

Q. Mr. Hulit, where do you live? A. Long Branch. 30

Q. And what is your business? A. Real estate.

Q. How long have you been in the real estate business? A. About twelve years.

Q. And where is your office? A. On Third Avenue, right opposite the depot.

Q. In Long Branch? A. Yes, sir.

Q. And during that twelve years have you always been in the real estate business in Long Branch? A. Yes. 40

William A. Hulit, Jr.—Direct

Q. During that twelve years have you dealt as a real estate agent in Long Branch properties?

A. Yes, sir.

Q. Are you familiar with the property of Thomas P. McKenna adjoining the Broadway Theatre? A. Yes.

Q. How far from this property do you live, Mr. Hulit? A. About three-quarters of a mile.

Q. How far from the property is your office located? A. About the same distance.

Q. Are you familiar with the rental value of properties in Long Branch? A. Yes, sir.

Q. Can you tell this court and jury, having in mind the use of the property in question as parking space, can you tell the court and jury what would be a fair rental value of that property per year?

Mr. Leonard: Objected to, if the Court please. It is introduced for a specific purpose.

The Court: Well, he has not yet said whether he was qualified to testify as to the reasonable rental value of parking spaces in Long Branch.

30 By the Court:

Q. Are you qualified to speak on the subject, Mr. Hulit, as to the reasonable rental value of parking spaces in Long Branch? A. Well, only so much as—in so far as that particular section is concerned.

Mr. Drewen: Well, that is what we are interested in.

40 Q. Well, you are then familiar with the rental values of parking spaces in that particular section? A. I would say so, yes.

William A. Hulit, Jr.—Direct

Q. And what is your experience? A. Well, it was the fact that the property in question is right alongside the theatre, and in the City of Long Branch we have a police order or regulation that for about five months in the year we are restricted to a forty minute parking period on Broadway. 10 Therefore, it would be necessary for any one who wants to shop or even go to the theatre to put their car either in a parking place or on some side street away from the main thoroughfare.

Mr. Leonard: That doesn't show his experience.

Q. Now, are you qualified to give the reasonable rental value for such purposes? A. Why, I don't quite get the question. 20

Q. What would be the rental value of parking space in Broadway in the location to which we have been referring? A. For the particular property I would say—

Mr. Leonard: That is objected to, if the Court please, on the grounds I just stated.

The Court: I don't know what he is going to say. I will allow him to answer.

(Objection noted for defendant as 30 ground of appeal.)

A. For that particular property I would say between \$2,000 and \$2,500.

Q. What do you base that on? A. I base that on the fact that it is adjoining the theatre. Of course, people generally coming to the theatre nowadays come in automobiles and there is a congestion—

William A. Hulit, Jr.—Direct

Q. Have you ever acted as agent for parking places? A. No, sir.

Q. For parking purposes? A. No, sir.

Q. Never have? A. No, sir.

Q. Do you know what similar properties have
10 been rented for for that purpose? A. There isn't
any section nor anywhere around there.

Q. Or anywhere around there? A. There is
no parking place there.

Q. That is the only one, as a matter of fact?
A. Except down on the beach.

Q. You never rented any of them? A. No, sir.

By Mr. Drewen:

Q. Is there any piece of property for park-
20 ing space available anywhere in this neighbor-
hood except the one we are talking about? A. No,
sir.

Q. There is not? A. No, sir.

Q. Well, as one who has twelve years' experi-
ence in dealing with real estate in that neighbor-
hood, can't you tell us what the reasonable rental
value per year for this property, taking it as
it stands there, is? A. For the parking part, you
mean, or for the whole of it?

30 Q. Well, if you rent it you can park— A.
Well, you see it has two values; the front has a
value and the back has a practical value.

Q. What are the two values? A. The Broad-
way front has a different value from the park-
ing.

Q. What is it, the whole piece as a whole,
running from Broadway to Belmont, use it for
any purpose for which Reade had a right to use
40 it, for any purpose, what would be the reason-

William A. Hulit, Jr.—Direct

able value of it? A. Take the whole thing as a
whole, I would say it would be worth between
\$3,500 and \$4,000.

Q. A year? A. Yes, sir.

Q. And in giving that value, do you have in
mind the availability of that property for use as
10 a parking property? A. Yes, sir.

Q. Have you any idea how many cars this place
will park? A. I should imagine in the neighbor-
hood—

Mr. Leonard: One moment, please.

The Court: No.

Q. Your estimate. A. Well, I have never
counted them; I have never measured it up. I
can't give it accurate. 20

Q. Well, give us your estimation, considering
your cars, and what every woman knows about
the fair size of an automobile, how many cars do
you suppose could be parked in that property?

Mr. Leonard: I object. In the first
place, the property has not been specifi-
cally identified.

The Court: That is true. It is objec-
tionable for that reason. 30

Q. All right. Mr. Hulit, I show you a blue-
print. I call your attention to the blueprint
sketch, P-16, in evidence; and direct your mind
to the fact that the property in question begins
here on Broadway, as I am indicating, and runs
to this line here, goes over to this point, down to
Belmont Avenue, where it has a width of 53.67
feet, and the dimensions go back to this point,
over here to this point and then back all the way 40

William A. Hulit, Jr.—Cross

to Broadway, where it has an entrance of a width of 50 feet. Is the property that I have just directed your attention to on P-16 the property concerning which you have been testifying? A. Yes, sir.

10 Q. You say it is? A. Yes, sir.

CROSS-EXAMINATION by Mr. Leonard:

Q. Did you know the dimensions of the property when you purported to testify to its reasonable rental value? A. Yes, sir.

Q. What frontage is there on Broadway? A. About 50 feet.

Q. What frontage is there on Belmont Avenue? A. About 60 feet.

Q. And what is the length of this easterly line? A. Well, it is irregular. It goes back 118 feet from Broadway and then it goes easterly, I think about 65 or 70 feet and then it goes in a southerly direction, I should say about 189 feet, somewhere around there.

Q. There is an alley running across, isn't there? A. There is an alley goes in there, yes. I don't know whether it runs across or not.

30 Q. How long ago did you examine the property? A. I examined it yesterday.

Q. You went down there with Mr. McKenna? A. Yes, sir.

Q. Did you ever examine it before? A. Yes.

Q. With Mr. McKenna? A. No, sir.

Q. At his request? A. Well, I have examined it at different times.

40 Q. At his request? A. No; years ago I looked at it when Mr. McKenna offered it for sale a couple times. He came into my office and asked me—

Edward Hughes—Direct

Q. But you went all around it yesterday with him? A. Yes, sir.

EDWARD HUGHES, sworn for plaintiff. 10

Direct-examination by Mr. Drewen:

Q. Mr. Hughes, where do you live? A. Long Branch.

Q. You are employed by the defendant, Walter Reade, are you not? A. I am.

Q. In what capacity? A. As a carpenter, Broadway Theatre.

Q. And how long have you been employed by Mr. Reade? A. About sixteen years. 20

Q. In Long Branch? A. Yes, sir.

Q. How long have you worked in this particular theatre? A. I think about twelve years at the theatre.

Q. That is as long as the theatre has been there, isn't it? A. I think so. Ever since it has been built.

Q. Mr. Reade, you say, is your employer now, is he? A. Yes, sir. 30

Q. He employs you as a stage carpenter in the theatre? A. Yes.

Q. Mr. Hughes, this photograph, P-3, which I show you, does that represent the side of the Broadway Theatre building where you are employed? A. The back of it, sir.

Q. The back of it? A. The back of the stage.

Q. What is the street that runs to the right of this theatre building as you look at it? A. Where is the street? 40

Edward Hughes—Direct

Q. Right to the side. A. No street there anywhere.

Q. Isn't there? A. No, sir; it is the back of the theatre.

Q. What street does this signboard face on?

10 A. Broadway. That is Broadway.

Q. Well, that street runs along there, doesn't it? A. No, you are looking at the back of the theatre, in that. Broadway is away over here where the signs are.

Q. And this theatre where you are employed is known as Reade's Broadway Theatre isn't it?

A. As far as I know.

Q. That is the sign that is painted on the rear wall of it in P-3, isn't it? A. Yes, I guess so.

20 Q. And said "Reade's Broadway Theatre"? A. Yes.

Q. Mr. Hughes, I show you photographs in evidence, P-12 and P-13, and direct your attention to the parking sign. A. Yes, sir.

Q. Having the name "Walter Reade" there and the statement of its donation of parking space, and ask you if you can recall, if you know when that sign was put up. A. I think it was put up first the year 1925; I am not sure.

30 Q. In 1925? A. Yes.

Q. Do you remember the season of the year? Was it the summer? Do you remember the month? A. I think it was summer.

Q. Summer of 1925? A. Yes.

Q. Is it still there? A. No, sir.

Q. When was it taken down? A. It blew down.

Q. Blew down? A. Yes, sir.

40 Q. Did you have anything to do with the erecting of the sign? A. Yes, sir.

Edward Hughes—Direct

Q. What did you have to do with it? A. Well, just like the other boys; I helped paint the sign.

Q. You helped paint the sign? A. Yes.

Q. When you say the other boys, to whom do you refer? A. The boys on the stage.

Q. The boys on the stage? A. Yes, sir. 10

Q. And they are also employed by Mr. Reade? A. Yes, sir.

Q. How many of the other boys are there all together, Mr. Hughes? A. There is four in there, the crew. There is a crew in there of four men, three besides myself.

Q. And are those the boys to whom the sign refers when it says that the parking space is donated by Mr. Reade? A. The boys of the stage. 20

Q. The boys of the stage? A. Yes.

Q. And that refers to these four in number? A. Yes.

Q. Three and yourself to whom you have referred? A. Yes, sir.

By the Court:

Q. Now, I assume your crew got the revenue from the parking? A. Yes, sir; the benefits.

Q. The benefits? A. Yes, sir. 30

By Mr. Drewen:

Q. Was there a strike of the stage hands there at that time? A. No, sir.

Q. Prior to that time? A. No, sir.

Q. Never at any time? A. I don't remember any strike at the Broadway Theatre.

Q. Well, now, Mr. Hughes, you are a member of the stage hands' local, aren't you? A. Yes, sir. 40

Edward Hughes—Direct

Q. You would remember a strike there, would you?

Mr. Leonard: Are you cross-examining your own witness?

Mr. Drewen: No, I am not. I am asking him the question. 10

Mr. Leonard: What has that got to do with this?

The Court: He says there was no strike there. Why waste time? He says there was none.

Q. Mr. Hughes, isn't it a fact that there was a strike of the stage hands at the theatre some time before this sign was erected? A. No, sir.

20 Q. Which you attended? A. Before then?

Q. Yes. A. Before we ever had a parking space?

Q. Yes. A. Not as I know of.

Q. Was there any since then? A. No, sir.

Q. When was this parking space donated to you boys by Mr. Reade? A. I think during the year 1925.

Q. And during the early summer of 1925? A. Yes.

30 Q. What? A. Yes, around there, I am pretty sure.

Q. And were all of the proceeds to go to you boys, or a portion of it? A. All the proceeds?

Q. Yes. A. Just to us boys; yes, sir.

Q. Well, part of it was to go to Mr. Reade, wasn't it? A. How, from parking?

Q. Any part of it? A. We never made any agreement.

40 Mr. Leonard: What are you referring to? There are two parking spaces.

Edward Hughes—Direct

Mr. Drewen: Let us alone, Mr. Leonard. We will get along, Mr. Hughes and I.

Mr. Leonard: I ask counsel to specify.

The Court: He may make his general answer and then he may be specific. 10

Mr. Leonard: I submit I am entitled to know what part he is referring to, whether he is referring to the part owned by Mrs. Reade or the part owned by Mr. McKenna. The witness has not said a word about that.

By the Court:

Q. Did Mr. Reade receive any of the proceeds of the parking space donated to you boys? 20

Mr. Leonard: That is objected to unless it specifies what parking space they refer to.

Q. Did Mr. Reade receive any of the benefits from any parking space donated to you boys? A. Not that I know of.

By Mr. Drewen:

Q. Who made this arrangement with Mr. Reade with regard to the donation of the parking space? A. I did. 30

Q. You did? A. Yes.

Q. Now, when you answered this Court and said, "Not that I know of," you would know, wouldn't you, whether or not there was any arrangement with Mr. Reade for payment of part of this money to him? A. I would know?

Q. Yes, you made the arrangement with him didn't you? A. I made an arrangement with 40

Edward Hughes—Direct

Mr. Reade. I will tell you just how it started, if that is what you want in the case.

Q. Go ahead. A. I went to Mr. Reade to ask him what he was going to do with that space where he built the stores, an open lot there. I
10 told him the boys would like to have it for a parking space there; and he says, "Go ahead and use it," and we did. We never made any arrangement to give Mr. Reade any of our money or anything from it.

Q. What about the McKenna property, upon which this parking space was— A. We had no permit of any kind to go on the McKenna property. I got the property from Mr. Reade, his
20 place, and we took it in our own hands.

Q. When did you put the sign on this McKenna property?

Mr. Leonard: It does not appear that it is on there.

Mr. Drewen: Oh, yes; it does.

The Court: One moment. Let's ask him.

By the Court:

30 Q. Where did you put the sign, Mr. Hughes?
A. We put it one side, I guess it was over on Mr. McKenna's property.

Q. How did you come to put the sign on McKenna's property? A. How did we come to put it?

Q. Yes. A. We just simply put it up there.

Q. Just put it up? A. Yes.

Q. Did you have permission from any one?
40 A. I didn't have permission from any one. I just turned it over to the rest of the boys for them.

Edward Hughes—Direct

By Mr. Drewen:

Q. How long before this sign was actually put up was it that you had your talk with Mr. Reade about it? A. How long after?

Q. How long before you put up the sign was it that you had talked with Mr. Reade about it? 10

A. Just repeat that.

(Question repeated.)

A. Oh, I talked to Mr. Reade first before I ever put the sign up.

Q. Yes, how long before you put the sign up?

A. How long before I put the sign up? During the same year.

Q. How many weeks before? A. I couldn't tell 20 you that.

Q. How many months before? A. It was in—I think maybe it was in June.

By the Court:

Q. Did you tell Mr. Reade you were going to put the sign up? A. No, I didn't tell him anything about it. We just put that up for our own selves. We told Mr. Reade nothing. He never asked us anything. 30

By Mr. Drewen:

Q. He never asked you anything? A. No.

Q. And Mr. Reade parked his car there, didn't he? A. Yes, sir.

Q. And he was there practically every day himself? A. Not every night.

Q. Every day, I said. A. No, sir.

Q. Every other day? A. I couldn't tell you that. 40

Edward Hughes—Cross

Q. Two or three times a week? A. No, I don't know that.

Q. How often was he there? A. I haven't any idea.

Q. Have no idea whatever? A. No, I know he
10 was there.

Q. How often do you know he was there? A. I can't answer that.

Q. Can't you give us any help whatever? A. I will give you all the help I can about it. I don't remember just how many times Mr. Reade was there.

Q. Did you ever ask Mrs. Reade after that about parking on this property? A. Mrs. Reade?

20 Q. Yes. A. No.

Q. Where the stores are built now? A. No.

Q. You never spoke to her about it at any time? A. No, sir.

Q. After the stores were built in 1926, you continued to use the McKenna property for the parking, didn't you? A. We still park in there till this day.

Q. In there, you chaps, you boys, you are still parking there? A. Yes.

30 Q. And you are still using it to this day? A. Yes, sir.

CROSS-EXAMINATION by Mr. Leonard:

Q. Mr. Hughes, there were two signs, weren't there? A. Yes.

Q. One sign indicated on the photograph? A. Yes, sir.

Q. And another sign upon Mrs. Reade's prop-
40 erty? A. Yes.

Q. I ask you if you can find on any of these

Edward Hughes—Re-direct

photographs the other sign. You didn't include the other sign upon Mrs. Reade's property? A. No.

Mr. Stokes: There is none there.

Q. At the time this sign which the plaintiff
claims was entirely upon his property, where was
the other sign? A. Down on Mr. Reade's prop-
erty. 10

Q. The property upon which the stores were built? A. Yes, one way was in and the other way was out. The sign was marked.

Q. You painted the sign, you say? A. I just filled them in, that was all.

Q. Who worked on those signs? Who prepared them? A. I think Niles, a sign painter by
the name of Niles, did the lettering on them. 20

Q. And who was responsible for the lettering; that is to say, who gave him the lettering? A. The boys on the stage.

Q. You made it up yourselves? A. Yes, sir.

Q. Did Reade have anything to do with the expression "Donated by Walter Reade"? A. No, sir.

Q. That was all done by you? A. Yes, sir. 30

RE-DIRECT EXAMINATION by Mr. Druwen:

Q. Which passageway was in, the Reade part or the McKenna part, or any on each? Which was it? A. Well, they could either go in both ways. We had no objection, but they had that marked that way and the police of Long Branch, they gave us protection.

Q. Well, which, as a matter of fact, was used 40

Edward Hughes—Re-direct

for entrance? A. Well, it didn't make any difference.

Q. What did you mean before? A. Well, up this way to the lunch wagon, down Broadway from the theatre.

10 Q. What did you mean before when you said that one side was for entrance and the other was for exit? A. I did.

Q. What did you mean by that? A. Well, up towards Broadway, the other side, if cars would come in that way they would come that way, we always tried to make it that way. After they passed that ordinance they went in this way and came out the other.

20 Q. What did the other side read? A. Just the same, said donated by Reade.

Q. Just the same as this sign? A. Yes.

Q. This doesn't say in or out, does it, on this side? A. You can't see it on there.

Q. Can't you? A. I couldn't tell you now. I am telling you just what was on them, is all.

Q. Well, that is what I am asking.

(Witness examines photograph.)

30 A. No, it doesn't show on there, but there really was.

Q. Where? A. Right down to the bottom here, right along down here somewhere.

Q. Right along down here somewhere where? A. Right at the bottom, just a little sign, it said "In." If you have got a glass you could see it.

40 Q. I will let you see if you can find it with a glass. I will give you now the official magnifying glass. A. I am telling you it was there.

Edward Hughes—Re-direct

By the Court:

Q. What was the word? A. "In." Just that one little space.

By Mr. Drewen:

Q. Do you find it there? A. No, I can't see it, but I know it was on there. 10

Q. And the other one said "Out," no question about that there? No question about what the other said at that time? A. One was "In" and the other was "Out."

Q. What street did the other sign face, the "Out" sign, as you say? A. Broadway. They were both on the Broadway side.

The Court: They just went in and circled around and came out. 20

Q. How far from this one? Can you indicate to us by photograph? A. Suppose I just tell you roughly, will that do?

Q. If you don't make it too rough. A. I don't even know how deep Mr. Reade's lot is across there. I imagine about 75 feet. I can't give you any definite answer, any measurement on that.

Q. 75 feet from this sign? A. Yes.

Q. Shown in P-12? A. Yes, down this way. 30 This is the Broadway side here. This way you come down from the Broadway Theatre. The lunch wagon and alley goes through there, about 75 yards, I guess.

Q. 75 yards, you say now. Which do you mean, yards or feet? A. Well, yards.

Q. 75 yards? That is 225 feet? A. Well, I don't know.

Q. You don't mean that, do you? A. 75 feet. 40

William Colonie—Direct

Q. 75 feet then? Now which is it? A. 75 feet, I guess. I don't know how wide Mr. Reade's lot is.

The Court: Well, that is his answer. He is giving us the best he can.

10 Q. When the Reades put the stores on their vacant lot how did they get out then with the cars? A. Why, there is three different ways of getting out there.

By the Court:

Q. What are the three different ways? A. One is an alley goes down by the Phil Daly fire engine house on Broadway near Second Avenue; then
20 one leads out Broadway. That lot is still open yet. They used it every day, everybody. And one at Belmont Avenue. That is three ways.

By Mr. Leonard:

Q. When was the sign taken down, do you know? A. I don't know.

30 WILLIAM COLONIE, sworn for plaintiff.

Direct-examination by Mr. Drewen:

Q. Where do you live? A. Long Branch.

Q. And how long have you lived in Long Branch? A. About twenty years.

Q. And what is your business? A. Landscape.

Q. Are you a landscape gardener? A. Yes.

Q. Did you at any time go with Mr. McKenna to look at the top soil on this property in Long
40 Branch? A. Yes.

Q. Yes, you did? A. Yes.

William Colonie—Direct

Q. When was that? A. Well, it was a Friday, I think.

Q. Last Friday? A. Yes.

Q. And while you were there did you look at the topsoil that there is left there on these premises? A. Yes. 10

Q. Do you in your work as a landscape gardener— A. Yes, sir.

Q. Buy topsoil? A. Yes, sir.

Q. Are you familiar with the value of topsoil of the kind that you saw on this property? A. Yes.

Q. How much is it? What is the value of topsoil? What do you pay for it? A. Well, topsoil, you get topsoil for \$1.50 a load, then \$1.25; the
20 lowest price is a dollar a load; you can't get it less than that.

Q. How many cubic yards to a load? A. It is a yard to a load.

Q. One yard in a load? A. Yes.

Q. From 1925 to 1927 what was the cost of topsoil? A. Well, now, that is very hard. Before it was so cheap.

Q. What did it cost in 1925 and 1927, a dollar, 50 cents or \$2? A. I don't know. I know I be in
30 this business about seven years, to work for myself. I have been seven years in business for myself.

Q. When did you say that this stuff cost \$1.50 to \$2 a load? A. Right now.

Q. Now? A. Yes.

Q. How long has it been \$1.50 to \$2 a load? A. I don't know.

Q. For two years has it been that way? A. It
40 was that four or five years ago, but the last price I paid a dollar a load.

William Colonie—Cross
John Clayton—Direct

CROSS-EXAMINATION by Mr. Leonard:

Q. Do you grow flowers? A. Yes.

Q. Is the kind of dirt you saw in this lot the kind of dirt you would use for flowers? A. No, 10 the dirt for the flowers you would use about \$3 a load.

Q. You wouldn't use this kind of dirt? A. Well, use it for filling, use it for grading.

Q. Do you use topsoil for grading? A. Certainly.

JOHN CLAYTON, sworn for plaintiff.

20

Direct-examination by Mr. Drewen:

Q. Where do you live, Mr. Clayton? A. I am living in Shadow Lawn Manor now; that is on the Oakhurst side.

Q. And what is your business, Mr. Clayton? A. Landscape gardener.

Q. And how long have you been a landscape gardener? A. About twenty-six years.

Q. And have you worked as a landscape gardener in and around Monmouth County? A. Most 30 of the time, yes, sir.

Q. Did you go at any time to look at the quality of topsoil on a piece of property adjoining the Broadway Theatre in Long Branch? A. No, I never went with Mr. McKenna. I never went there for that purpose.

Q. Did you go? A. I went there. I have been over the property. I am acquainted with the top- 40 soil and the lay of the land. Two years ago I

J. Edward Howland—Direct

was there and drove my horse on there and tied. I was on the land but I didn't know anything about Mr. McKenna.

Q. Are you acquainted with the quality of the topsoil that there is on that land or was on that land? A. Well, it seemed to be good topsoil. I 10 didn't dig into it. It looked all right to me at that time.

Q. Are you familiar with the cost and value of topsoil that is used in your gardening? A. Well, we give about a dollar a load for it.

Q. How much is a load? A. Including a certain amount of subsoil with it, a load is a yard.

Q. A cubic yard? A. Yes, we use jiffy carts. They are dump carts. That is a dollar. 20

J. EDWARD HOWLAND, sworn for plaintiff.

Direct-examination by Mr. Drewen:

Q. Mr. Howland, where do you live? A. Sea Bright.

Q. What is your business? A. Contracting, superintending, contracting. 30

Q. You are associated in business with your father, are you not? A. Yes, sir.

Q. What is the name under which you and your father do business? A. It is his name, Jesse A. Howland.

Q. How long have you been associated with your father in that business? A. Well, all my life; worked at it at least fifteen years.

Q. Did your father or your concern do any ex- 40 cavating or any removal of topsoil from the prop-

J. Edward Howland—Direct

erty adjoining the Broadway Theatre in Long Branch, next to it and running from Belmont Avenue to Broadway? A. No.

Q. You didn't? A. No.

Q. Did you do any contracting work there on
10 that property at all? A. Not that particular property.

Q. Which property did you? A. Where the stores are.

Q. Where the stores are? A. Yes, sir.

Q. Now, Mr. Howland, showing you Exhibit P-16 and calling your attention to this end here as the Broadway end of the property and this
20 down here as to the Belmont Avenue end of the property, and this here as Broadway Theatre, on Broadway— A. I know the property.

Q. You know the layout, don't you? A. Yes.

Q. Where was your excavating work done? A. Why, done down in here.

Q. Will you indicate with a pencil?

(Witness marks.)

A. That is Second Avenue, there is the building here on the south, the east line of the Reade
30 building. I would say it was somewhere in here.

Q. Did it come out to the Broadway line, your excavating? A. I think when we started it was in some feet, say twenty-five or thirty feet.

Q. But it had already been excavated from the Broadway line, had it? A. Yes.

Q. In from the Broadway line at the point that you have made and I have put a ring around it? A. Yes.

40 Q. Now how close to that line, to the left of the

J. Edward Howland—Direct

space you have indicated, did the excavation come? A. That I don't know exactly.

Mr. Leonard: Did you say to the left or to the right?

Mr. Drewen: To the left, he said. 10

Q. What is the work done down here? I say to the line to the left of that space, how near to that line did the excavation come? A. As I recollect most of all work was over near the building on the east. We didn't take much material out because we didn't get good results, and it was better to go buy it than get it for nothing.

Q. What do you mean, couldn't get good results? A. Couldn't get enough. All we hauled
20 at that time was two trucks there.

Q. Two trucks there doing what? A. Carting material.

Q. What kind of material? A. Well, soil and sand, clay.

Q. And when was that that those things occurred that you are now testifying to, Mr. Howland? A. Well, whatever time that that excavation was going on. From the testimony it was in
30 1925, the summer.

Q. The summer of 1925? A. I would say early summer.

Q. How long were you there on this property in connection with your work or your father's work in taking material away? A. Probably not over three or four times, just for a few minutes at a time.

Q. On separate days or always on one day, on the same day? A. Well, different days. 40

Q. Will you describe to the Court and jury what

J. Edward Howland—Direct

you mean when you say you couldn't get enough at that time? A. There were too many others taking the same material away.

Q. What do you mean by that? A. Well, there was probably eight or ten trucks would pull in
10 there and we would go up with our trucks and there would be some truck in the way, probably stuck. And the trucking was a big item.

Q. Do you know the owners of any trucks that you saw there besides your own? A. Well, Mr. Gaskin's boys were there.

Q. Any others? A. I just don't know which ones, but there were several of them. Loreno, Robert Loreno. Any other trucks I didn't take
20 particular notice.

Q. Is it Loreno or Moreno? A. Loreno.

Q. I show you photographs, Mr. Howland, in evidence, P-12 and P-13, and ask you if you can recognize the buildings and the sign there, the parking sign there, as marking the point at which you entered this property at the time the excavation was going on. A. I remember seeing a sign there. I have parked in the property. That is
30 either the Reade property or whatever—I don't know what line there is there.

Q. Well, overlooking that for the moment—

By the Court:

Q. When you parked how did you come out?
A. I always went in near the lunch wagon and went out the other way.

Q. What do you mean the other way? A. The other side of Broadway, to the east.

Q. Toward the ocean, nearer the ocean? A.
40 Yes.

J. Edward Howland—Direct

Q. Went in one way and came out the other?
A. I did.

By Mr. Drewen:

Q. Now confining your attention to this time when the excavation was going on was that sign
10 there then when you drove your truck in there to make the excavation? A. No.

Q. It was not there then? A. No, couldn't park there.

Q. No, I am not talking about parking. I am talking about the time that you went on the property to try to take material away which you did take away. A. There were no signs. This was preliminary to that. You couldn't park there.
20

Q. Preliminary to what? A. Well, it had to be graded. You couldn't get in there with a car.
20

Q. Why couldn't you park there at that time?
A. Well, when they took the debris material you would have to run in on the sand. There was nothing there but sand, probably a little clay there.

Q. Before what you call the preliminary work was done what was the condition of this property in there where the parking subsequently took
30 place? Why couldn't you park there before the preliminary work was done? A. I think—I can't say for sure—I think there was some cinders that had to be put in there, or gravel.

Q. Well, was it necessary to take anything out to grade this property? A. Necessary?

Mr. Leonard: What property?

Mr. Drewen: On this property alongside the treatre, from Belmont Avenue to
40 Broadway.

J. Edward Howland—Direct

Mr. Leonard: You mean just Mr. McKenna's or the portion owned by Mr. Reade?

Mr. Drewen: I mean Mr. McKenna's 50 feet, it was.

10 A. Well, I am talking about parking space in general, not just that 50 feet.

Q. Well, if that is all one parking space tell us about it, if it is all one thing. A. Well, after I worked in there, after the thing was completed ready to take cars, it was about level.

Q. It was about level? A. Yes.

Q. All right. How was it before? A. Why before at the street it probably started at nothing and went up probably a couple feet high.

Q. On which street do you mean, Broadway? A. Broadway.

Q. And aside from its elevation that you speak of was there anything else in the condition of the soil there that had to be changed before parking could be done there? Do I make myself clear to you? A. Not quite.

Q. Mr. Howland, you said before that this work of excavating and taking out this material was preliminary to the parking; is that right? A. Well, I don't know whether they would consider it preliminary, by taking it out, I would say, in order to make it fit to park, would have to put something back on it in the line of cinders or gravel.

By the Court:

Q. Prepare it for a parking space? A. The 40 cars would sink in.

J. Edward Howland—Direct

Q. You couldn't use it in the rough? A. No.

The Court: All right. Go on.

By Mr. Drewen:

Q. Now, this preliminary work that you have mentioned, referring to Exhibit P-16 and calling 10 your attention to this tract from Broadway to Belmont Avenue, this tract between these lines, are you familiar with that? A. More so with the Broadway part, but I have noticed it.

Q. Here is the lunch wagon at the Broadway end. Directing your attention to that space there, over how much of that area will you indicate that you saw this preliminary work of excavating and preparing this place for parking, 20 you say, going on? A. Well, when we were working there the work had started at this point next to the furniture house east of the store building. That would be the east line of the Reade property. It was in here, and that is where we stopped carting, before it got over to this point which I have any knowledge. That is when we were working there, and I don't know even now just how far that line goes there.

Q. Had you subsequently acquired any knowl- 30 edge as to the excavating of this other property?

A. No, I didn't even know that it was excavated.

Q. Your father is not home, I understand. He is in Florida? A. Florida.

By Mr. Leonard:

Q. That furniture house you refer to is to the extreme east of Mr. Reade's property, isn't it? A. East.

Adjourned till March 7, 1928, at 10 A. M. 40

Jesse Green—Direct

Freehold, N. J., March 7, 1928.

Trial of the cause resumed at 10 A. M.

JESSE GREEN, sworn for plaintiff.

10

Direct-examination by Mr. Stokes:

Q. Mr. Green, where do you live? A. Long Branch, New Jersey.

Q. And how long have you lived at Long Branch, New Jersey? A. Thirty-two years.

Q. Do you know Walter Reade, the defendant in this action? A. I do.

Q. And were you ever in his employ? A. I was.

Q. And for how many years? A. About twelve years.

Q. About June, 1925, did you know the lot of McKenna's next to the theatre? A. Yes, sir.

Q. And how long had you known that lot? A. Well, as long as the theatre has been built.

Q. And on or about June, 1925, did you have a conversation with Mr. Reade? A. In regards to what?

30 Q. In regards to that lot or the soil thereon. A. Yes, sir.

Q. And how did you come to have that conversation with Mr. Reade? A. I saw an ad in the Long Branch Record where the ad read that dirt would be given away.

Objected to.

By the Court:

40 Q. As a result of seeing it what did you do? A. Called on Mr. Reade.

Jesse Green—Direct

By Mr. Stokes:

Q. Why did you call on Mr. Reade? A. Why, to get permission to take that dirt away.

Q. What led you to call Reade? A. I was to call—

Mr. Leonard: I move to strike it out. 10

Q. I don't mean that. Was there anything in connection with the ad that mentioned Reade's name? A. Yes.

Objected to.

The Court: Strike it out.

Mr. Leonard: May I at this time ask him one question?

By Mr. Leonard: 20

Q. Did you remove that dirt? A. Not myself, my men did.

By the Court:

Q. Under your direction? A. Yes, sir.

Q. As a result of it what did you do? A. Called up Mr. Reade.

Q. And had a conversation with him? A. Had a conversation with him.

By Mr. Stokes: 30

Q. Had a conversation with him? A. Yes.

Q. As a result of that conversation what did you do? A. Had that man come there with his trucks to remove the dirt.

Q. Why did you have a man come there to remove the dirt? A. On account of Mr. Reade's orders.

Q. That is what I want; what is Mr. Reade's orders to you? A. He told me not to take all the dirt, level it up with the sidewalk. 40

Jesse Green—Direct

Q. And how much did you take after that? A. We carted for two days.

Q. With what? A. Trucks.

Q. At the end of two days what happened, do you know? A. Well, the man that I had the deal-
10 ings with to remove this dirt he said there was other trucks there.

Mr. Leonard: I object, if your Honor please.

The Court: Yes, don't tell what he told you. It is hearsay.

Q. Did you have a letter from Mr. Reade? A. Yes, sir.

20 Q. In reference to this dirt? A. Yes, sir.

Mr. Leonard: Well, produce it. Don't go into the contents of it. If they don't produce it I move to strike it out.

Mr. Stokes: I am not asking the contents of it.

Mr. Leonard: Oh, yes, you did.

The Court: Never mind. The letter is the best evidence.

30 Q. What did Mr. Reade say to you, not in a letter but in a conversation that you had with him, about this dirt? Give us the whole conversation as you recall it, will you? A. He told me to take the dirt.

Q. What did you say to him first and what did he say to you? A. I asked him if we leveled it off even with the sidewalk if I could have the dirt, and he told me yes. And I went to this man and
40 told him about this dirt.

Objected to.

Jesse Green—Direct

Q. Not what you said to him, what you said to Reade. As a result of that you did hire somebody to take that dirt away? A. Yes.

Q. You were familiar with that lot, you say, for many years? A. Yes.

Q. Can you tell the Court and jury what the
10 height of the lot was above the sidewalk, the general contour of that land? A. Well, I should imagine you could take it all the way from about four feet above the level of the sidewalk.

Q. Do you know where the lunch wagon was located on that lot? A. I do.

By the Court:

Q. Where did you take the dirt, or your employees? A. Where did we take the dirt?
20

Q. Yes, from what part of the tract there? A. Well, we commenced to take it from all over the tract, the sidewalk level, and we commenced with those trucks there and took it all over there.

By Mr. Stokes:

Q. Where did you take it with reference to the lunch wagon which is located between the theatre and Broadway?

By the Court:

30 Q. With reference to the theatre where did you take it? A. We commenced at the west end, I think, and worked west.

Q. East end or— A. East end, Judge.

Q. That would be the ocean side? A. Yes, sure; the ocean side.

Q. And worked west? A. Yes.

Q. How far did you go west? A. Well, we didn't exactly work—until we got down to the
40

Jesse Green—Direct

sidewalk level we kept working west, got the top-soil off first.

Q. How far west did you go? A. I think we had worked up to the lunch wagon when we quit.

Q. Did you go beyond the lunch wagon? A.
10 Not my men.

By Mr. Stokes:

Q. Was it about in the rear of the lunch wagon?

A. My men didn't touch it there.

Q. Didn't touch it there? A. No, the other truck was taking it there.

Q. Were you down there while these other trucks were working there? A. Yes.

Q. And did you see other trucks removing the
20 dirt? A. I did.

Q. Both alongside of and back of the lunch wagon along the theatre? A. Yes, sir.

Q. I see from this photograph marked Exhibit P-7 there seems to be a walk along the east wall of the theatre building. Is that so or not? A. A walk?

Q. Yes. A. You mean the east side of the stores, on the east side of the theatre?

Q. Well, east side, yes, facing on Broadway.
30

The Court: He says not on the east side of the theatre.

Q. I mean on the edge of the stores. A. Yes, sir.

Q. With that theatre sign on top of it? A. Yes, sir.

Q. How high is that passageway up there where it has been extended at the present time?

40 A. I judge about four feet.

Jesse Green—Direct

Q. I see on this same photograph a lot of radiators in back of the lunch wagon and next to the east wall of those stores. Do you know whose they were? A. No, sir.

Q. Do you know whether there were any large trees upon this property at any time? A. There
10 was.

Q. I show you photograph P-5 and ask you if you see those two large stumps upon this photograph and ask you where the trees were with reference to about where those stumps are lying at the present time? A. Well, one of them was right on the southeast corner of the theatre and the other one was back right near the lunch wagon.

Q. The high building shown in this photograph
20 is the theatre? A. Yes.

Q. And the building in front, facing on Broadway, is what you call the stores? A. Yes, sir.

Q. Are these signs shown on this photograph on the property of Mr. McKenna?

Mr. Leonard: I object unless he is able to identify Mr. McKenna's property.

The Court: Yes, that presupposes knowledge.
30

Q. Do you know where Mr. McKenna's property was? A. Yes.

Q. Where was it? Just describe what frontage he had on Broadway. A. I should judge—

Mr. Leonard: I object. We want facts.

The Court: Unless you know.

A. I will say fifty feet east of the stores.

Mr. Leonard: I would like to ask Mr.
40 Green whether he knows Mr. McKenna's

Jesse Green—Direct

property before he goes on and tells what is on it.

Mr. Stokes: Go ahead and examine him.

By Mr. Leonard:

10 Q. You say it has fifty feet frontage? A. Yes, about fifty feet. I wouldn't say the exact.

Q. Facing on Broadway? A. Facing on Broadway.

Q. You say you won't be exact? A. No, sir. How could I be?

Q. I don't know. A. Well, that is what I want to know.

20 Q. And how far to the rear did it go? A. I think the property runs back there to Belmont Avenue.

Q. In a straight line? A. No.

Q. Well, the first course running from Broadway, how far does it go back? A. Around 100 feet, maybe 150 feet.

Q. Either 100 or 150 feet; and then where does the course go? A. Where does what go?

Q. The course. A. The course, it goes to the eastward and then goes out—

30 Q. How far to the eastward? A. Oh, I don't know. I never measured it.

Mr. Leonard: I submit he is not qualified.

The Court: I disagree. I think he identifies the property.

(Objection noted for defendant as ground of appeal.)

40 The Court: I will allow the answer. Go on.

Jesse Green—Direct

By Mr. Stokes:

Q. Do you know where the signs shown on P-5 is on McKenna's property, with the exception of the Chrysler sign?

The Court: If you don't know, say so. 10

A. Yes, that was on the property.

By the Court:

Q. Well, you are not testifying that you say your men took that topsoil off from the McKenna lot, are you? A. No, sir.

By Mr. Stokes:

20 Q. Don't you say, Mr. Green—I understood you to say that you took it out near the lunch wagon? A. I said it was certainly back of the lunch wagon.

Q. How close to the lunch wagon did you work? A. I think we worked right up to the lunch wagon.

Q. If the lunch wagon only had 30 feet frontage as has been testified in this case, and Mr. McKenna's lot had only 50 feet, then you must have taken some of it.

Mr. Leonard: I object and ask to strike it out as argumentative.

The Court: Yes. 30

Q. Are you sure you didn't take any off of McKenna? A. No, I can't say.

Q. Do you know how much you took? A. I don't know. We took some topsoil off.

Q. How much did you take? A. I couldn't tell you how many yards.

Q. How many loads? A. I couldn't tell you. We carted two days, I know, from the property.

Q. You first said you didn't take any from the 40

Jesse Green—Direct

McKenna property. What is the fact? A. In back of the lunch wagon, I said.

Q. Are you sure it was on McKenna's lot? A. Yes.

Q. How much did you take off from there? A. I didn't take any.

Q. Then you didn't take any from the McKenna lot? A. Yes.

Q. How much did you take? A. We took some from the east side, but I don't know how much.

Q. But you don't know where, except from the east side? A. East side of the lunch wagon.

Q. Were you directed by Reade to take any from the McKenna lot? A. No, sir; I wasn't.

Q. Did he direct you not to take any from there?

Mr. Leonard: That is objected to.

A. He didn't tell me where to take it.

The Court: I shouldn't think you would object to it. He says, "He didn't tell me where to take it."

By the Court:

Q. At any rate, he didn't tell you to take it from the McKenna lot, did he? A. No, sir.

By Mr. Stokes:

Q. What dirt did he say?

Objected to.

Q. What dirt did you talk to him about when you had the conversation with Reade after reading the advertisement in the newspaper?

Mr. Leonard: I object. It becomes immaterial in that it didn't have to do with

Jesse Green—Cross

the dirt on the McKenna lot, as he has just testified.

The Court: Well, he told the story. As a matter of fact, he says he was not told where to get it.

By Mr. Stokes:

Q. Did you talk to him anything about the McKenna lot when you talked to Mr. Reade?

Objected to.

A. The McKenna lot wasn't mentioned between Mr. Reade and I.

CROSS-EXAMINATION by Mr. Leonard:

Q. Most of the dirt you took was from the property on which later the stores were built? A. Well, I won't say it was, because the stores don't run all the way back.

Q. Where the stores do stand, you took some dirt? A. I did.

Q. Considerable dirt? A. I didn't, my men.

Q. And you knew that your men took considerable dirt from the property on which now stand the new stores? A. Yes, sir.

Q. And you knew that your men took considerable dirt from the land lying immediately to the rear of the stores?

By the Court:

Q. Is that right? A. No, sir; it is not.

By Mr. Leonard:

Q. Your men confined their two day activity particularly to the area on which the stores now stand? A. Well, and west of the stores.

Jesse Green—Cross

Q. Where the stores now stand and west of them? A. West of them.

Q. How far west? A. Well, up to the lunch wagon, I said.

Q. Did you pay anybody for removing the dirt?

10 A. No, sir.

Q. Did you sell the dirt? A. I did.

Q. For some years you were employed by the Broadway Theatre Company, weren't you? A. By Mr. Reade.

Q. You were employed by the Broadway Theatre Company? A. Not as I know of.

Q. You were employed at the Broadway Theatre, though? A. That is it, yes.

20 Q. And you were employed there how long? A. About twelve years.

Q. You were finally discharged? A. No, sir; never was.

Q. You just severed connections? A. I was not discharged. What do you mean by discharged?

Q. I say you just severed connections? A. What do you mean by discharged?

Q. You don't know what discharged means? A. I certainly do.

30 Q. All right. Then don't argue. A. I would like to know—

By the Court:

Q. Were you discharged? A. No, sir; I was not.

By Mr. Leonard:

Q. You just parted company with the concern? A. No, sir.

40 Q. Are you still with them? A. No, sir. I was not discharged, no.

Jesse Green—Re-direct

RE-DIRECT EXAMINATION by Mr. Stokes:

Q. What position do you hold in the City of Long Branch? A. City fire line superintendent.

Q. And have had that for how long? A. Nine years.

Q. Where is the entrance to the theatre of Mr. Reade, the rear entrance to the theatre of Mr. Reade? 10

Mr. Leonard: That is objected to.

The Court: It has already been testified to. There are two entrances on the side.

Mr. Stokes: I don't think there are two entrances on the side at all.

The Court: Go ahead and ask him. I will allow it. 20

By the Court:

Q. Where are the entrances to the theatre? A. It is on the east side of the theatre.

By Mr. Stokes:

Q. And on whose property does the entrance lead from to the theatre?

Mr. Leonard: Objected to, unless he knows and is able to identify. 30

The Court: Yes.

Q. Have you been there this morning? A. I have.

Q. Whose property does the entrance lead through into the theatre at the present time? A. McKenna property.

Q. Is there any way of getting into that side entrance except going over the McKenna property? 40

Conover Gaskin, Jr.—Direct

Mr. Leonard: This testimony is objected to on the ground that he has not identified the McKenna property.

The Court: Objection overruled. He may answer.

10 A. The only entrance you have that you can get in the side entrance is coming up the alley from Second Avenue into the theatre. I understand there is a strip of land for a driveway from Second Avenue, but I don't know how wide that is.

Q. What about the rear entrance then? A. The rear entrance you can't.

Q. How can you get into the rear entrance? A. 20 You can't do it without crossing McKenna's property.

Q. That is what I mean; you must cross McKenna's property? A. Yes, sir.

CONOVER GASKIN, Jr., sworn for plaintiff.

30 Direct-examination by Mr. Stokes:

Q. Mr. Gaskin, where do you live? A. 207 New Ocean Avenue, Long Branch.

Q. Did you remove any dirt off of the lot east of the stores in front of Reade's Theatre on Broadway?

40 Mr. Leonard: Objected to for three reasons; first, that it presupposes the theatre is Mr. Reade's. Secondly, it presupposes a knowledge on the part of this witness of the property in question.

Conover Gaskin, Jr.—Direct

The Court: And third?

Mr. Leonard: The third, I withdraw my third.

The Court: As a matter of fact, your two are good. Objection sustained.

Q. Do you know the stores in front of the Broadway Theatre? A. Do I know them? Yes, 10 sir.

Q. Did you remove any dirt from the lot immediately east of the stores in front of the Broadway Theatre?

Mr. Leonard: Objected to, if your Honor please—east of the stores.

Q. East of the stores in front of the Broadway Theatre. 20

The Court: Oh, he may answer that.

A. Why, I moved dirt on the east side of that lot.

By the Court:

Q. You mean on the ocean side? A. That is on the ocean side, and I should judge maybe 75 or 85 feet this way from the east side.

By Mr. Stokes: 30

Q. Do you know where the lunch wagon is there? A. Yes, sir.

Q. Did you remove any dirt near the lunch wagon? A. Not that I recall at any time.

By the Court:

Q. Do you know the space between the stores—I understand there is a space there between the stores and the theatre. A. Yes. 40

Evangelos Tsalavoutes—Direct

you see them removing dirt? A. Well, there was carting, I should judge, around 35 feet.

Q. 35 feet from Belmont Avenue? A. I mean back from Broadway.

Q. Back from Broadway 35 feet? A. Back
10 from Broadway 35 feet.

Q. How far in the rear of the lunch wagon did you see them removing dirt? A. How far back from the lunch wagon?

Q. Yes, from the lunch wagon. A. From the lunch wagon?

Q. Yes. A. I should judge 35 feet. They carted most on land there.

By the Court:

20 Q. East or west? A. Well, that is back of the lunch wagon.

By Mr. Drewen:

Q. South of the lunch wagon? A. South of the lunch wagon.

EVAGELOS TSALAVOUTES, sworn for
30 plaintiff.

Direct-examination by Mr. Drewen:

Q. You speak English, I trust? A. A little bit.

Q. Are you the proprietor of the lunch wagon that stands next to the Broadway Theatre A. Yes, we had it.

Q. You had it? When did you have it? A. 1924 and 1925.

40 Q. 1924 and 1925? A. Yes.

Evangelos Tsalavoutes—Direct

Q. When did you leave there? A. 1925, August 15th.

Q. August 15, 1925? A. Yes, sir.

Q. I show you a photograph in evidence, Exhibit P-7, and ask you if that is a photograph of the rear of the lunch wagon that you refer to. A. 10
Yes.

Q. Is this wall that is shown here in the photograph the wall of the theatre? A. Yes, sir.

Q. That is the Broadway Theatre? A. Broadway Theatre.

Q. Now, when you were there in charge of this lunch wagon did you see men removing the dirt and soil—

Mr. Leonard: Don't lead. 20

Q. From the property there?

Mr. Leonard: Objected to as leading.

The Court: I don't know whether that is leading or not. That doesn't suggest the answer. It may be yes or no.

Mr. Drewen: I withdraw it.

By the Court:

Q. Did you see men removing topsoil? A. Yes, 30
I see it.

By Mr. Drewen:

Q. Point out on the picture the places there where you saw the men removing the topsoil.

Mr. Leonard: I object to showing him the photograph dated May, 1927. It appears that this man left the premises on August 15, 1925. Unless he can show acquaint-
40 anceship with the conditions at the time

Evangelos Tsalavoutes—Direct

the photograph was made he cannot refer to it.

Mr. Drewen: I withdraw the present question.

10 Q. Does this photograph show the condition of the earth there as it was when you left the lunch wagon in August, 1925?

Mr. Leonard: If the Court please, that is objected to. It can't possibly—if their testimony is true, that the photograph truly portrays conditions as they existed in 1927, and it appearing that this man was there in August, 1925, about two years before—

20 The Court: Oh, well, let him identify where he saw them taking the dirt.

Q. Since you have been out of this lunch wagon where have you been, across the street? A. Across the street.

Q. Been there ever since? A. Yes.

Q. Are you there now? A. Yes.

Q. Now, you said something a moment ago about the earth being two feet lower. What do you mean by that? A. Took the dirt two feet far from the lunch wagon.

30 Q. Which way from the lunch wagon? A. The front and the second side.

Mr. Leonard: The same objection. I presume that they will connect it with the defendant.

The Court: Yes, all this testimony is subject to that.

40

*Evangelos Tsalavoutes—Direct
Motion for Nonsuit*

Q. When you saw them taking dirt from the front and second side show us on this photograph where you mean they took it. A. I mean this is the front on Broadway over here.

Q. Are you pointing now to the wall of the building? A. Well, it was coming across to the wagon. 10

Q. How far over toward the theater wall as shown in the Photograph P-7 did you see them removing dirt in the rear of the lunch wagon? A. Yes, I seen.

Q. How far to the wall? A. I don't know exactly the wall, but four or five feet across the wall in the back. 20

Q. How close to the back of the lunch wagon did they remove it? A. They come two feet close on one side and the other side from five to six feet from the back. Once they come two feet and the other side four or five feet.

No cross-examination.

Plaintiff rests.

(The Court and counsel retire to chambers.) 30

MOTION FOR NONSUIT

Mr. Leonard: I move for a nonsuit in behalf of the defendant upon the ground that as to the use and occupation charged in the complaint there is no evidence of the defendant's having gone into possession. An 40

Discussion

10 extraordinary struggle has been exerted to show that Mr. Reade, the defendant, acted upon what Mr. McKenna claims was permission given to Mr. Reade to go upon the premises which were the subject of the contract of sale. The record does not show much about that other than this: McKenna's testimony, page 6 of the record—

The Court: After the making of this contract was there any change in the possession and the use of that property?

Mr. McKenna: Yes, sir.

The Court: In what way?

20 Mr. McKenna: Mr. Reade entered into possession of the property.

Mr. Leonard: That is objected to as a conclusion of law.

The Court: Well, I don't know whether it is or not. I can't tell. What occurred? What do you mean by that, that Reade entered into possession, Mr. McKenna? How do you know he entered into possession?

Mr. McKenna: Well, first he spoke to me about it, and secondly, he put a sign—

30 Mr. Leonard: Is this man testifying from his own knowledge? Did you see the sign?

Mr. McKenna: Yes, his employees told me.

Mr. Leonard: I object.

The Court: Yes, I sustain the objection.

40 Mr. Drewen: Never mind what they told. Now when you say that Mr. Reade spoke to you about going into possession what did he say?

Discussion

Mr. McKenna: Well, when the contract was made he asked me whether there was any objection to going right ahead and making his preparations for the building and taking possession of the property, and I told him there was not. 10

Mr. Leonard: I object. It was all merged into the new contract.

The Court: No, he is now telling about a conversation after the contract was signed.

Mr. Leonard: Nevertheless he didn't say that.

The Court: When was that conversation, after the contract was signed and executed?

Mr. McKenna: Yes, after the contract 20 was signed and executed.

Mr. Leonard: Assuming that the defendant had the right to go into possession of this property the record does not disclose that he did in fact go into possession of it. They endeavored to show that he did go into possession by showing that he was instrumental in or exercised control of or received money from the erection of certain large billboards there; but I think the record will clearly disclose no connection with the defendant. 30

A similar effort was made to show that Mr. Reade accepted the opportunity that was offered him by showing that some soil was removed. Expressed in another way, that the plaintiff has failed to connect the defendant with anything that may have been done on the McKenna property. 40

Motion for Nonsuit

10 The Court: I incline to the view that while the testimony may be tenuous to a degree, nevertheless there is a *prima facie* situation which has been established here which would militate against a granting of a motion for nonsuit, in as much as it appears that a request was made by the defendant Reade for permission to go upon the *locus in quo* after the agreement for the purchase of the property had been entered into by him and Mr. McKenna. That permission was given and there is testimony to the effect that certain things were done upon the property, such as removing topsoil and an occupation with regard to signs and access to the rear of the theatre property in which apparently Mr. Reade was interested, having in mind the contract of sale and its terms. For these reasons it would appear that a *prima facie* case, at least, is made out by the plaintiff justifying the denial of the motion for nonsuit. You may have an exception.

30 (Objection noted for defendant as ground of appeal.)

Mr. Leonard: Now, may I move for a nonsuit upon the further ground that the relation of landlord and tenant has not been established, and under the circumstances could not be established by reason of the relation of vendor and vendee existing.

40 The Court: Well, it is my theory of the law that where the relation of vendor and

Discussion

vendee is shown and a failure to consummate or carry out the terms of the contract in which such relation arises, that if there had been an occupation of the property which was not contemplated by the agreement for sale that the owner has a right to sue to recover a reasonable rental value for such use and occupation. Isn't that the principle of law? 10

Mr. Leonard: If you will permit me just one moment, under such circumstances the person who occupied the premises would be a trespasser and would be—

The Court: No, not where permission was granted. 20

The Leonard: The cases hold that in order to recover for use and occupation it is necessary that the relation of landlord and tenant exist, and that there can never be a recovery for use and occupation unless that relation exists. Query in this case: can the relation of landlord and tenant exist when between the parties alleged to bear that relation to each other there was made a contract for sale of land? 30

The Court: I am going to agree with you that the relation of landlord and tenant did not exist in this case.

Mr. Leonard: If the relation of landlord and tenant did not exist in this case then there can be no recovery for use and occupation.

The Court: Now let's see if you are right about that. 40

(Mr. Leonard cites authorities.)

(Mr. Drewen replies.)

Discussion

Mr. Leonard: My last motion for a nonsuit was based upon the ground that the relationship of landlord and tenant has not been shown and therefore there can be no recovery for use and occupation nor for waste.

10

The Court: I think I will continue this case until Friday morning and examine this legal situation. Disposition of the motions made for a nonsuit will be reserved until March 15, 1928.

(Counsel and Court return to the courtroom.)

20

The Court: This will be continued until next week. A legal situation has arisen here involving the examination of authorities by the Court, and I am frank to say that I am not at the moment ready to decide on the legal points. The ruling on the motions made, therefore, will be reserved until Thursday, March 15th, and the case continued until that time. The present jury will be directed to return Thursday morning, March 15th, and the case will then be disposed of or continued, as the Court may decide.

30

Adjourned till March 15, 1928, at 10 A. M.

40

Discussion

Freehold, N. J., March 16, 1928.

Trial of the cause resumed pursuant to the several adjournments.

The Court: I desire to announce in this case that I have arrived at a conclusion as a matter of law; I am of the opinion that the defendant, Reade, is shown under the undisputed testimony to have been a vendee in possession of the *locus in quo* from the date of the contract, which I recall, was in May, 1925, to June 22, 1925, on which date the evidence indicates he declined to accept a deed for the premises, that fact being *res adjudicata* in this litigation by reason of the findings of the Court of Chancery in the suit for specific performance; that therefore, for that period of time the relation of landlord and tenant, express or implied, did not exist; with the result that the plaintiff would not be entitled to recover for use and occupation for such period.

10

20

However, in a case which I will give to the stenographer later, one of those early cases there was criticised by Chief Justice Beasley later in the Hadden case. There, however, where there was a situation involving the moving of some buildings by a vendee in possession, the Court of Appeals sustained a right of recovery for the value of those buildings. Now, while McKenna would not be entitled to recover for use and occupation during the period indicated,

30

40

Discussion

nevertheless if there was any damage committed, such as taking topsoil, during that period, the defendant Reade would be liable in what might be termed the old common law remedy of action on the case for the value of the topsoil taken, if any. I am not clear under the proofs whether there was any alleged taking during that period. So much for that phase of the matter.

Then I hold that from June 22, 1925, if I have the correct date—and of course that must be verified—Mr. Reade, having refused to accept a deed when tendered, then became a trespasser on the premises, with the result that McKenna would have the ordinary remedy to recover any damages committed by him as a trespasser, such as mesne profits, for example, or the taking of topsoil if the proofs justify such a recovery. Whether he might be regarded as a tenant at sufferance or at will for the period subsequent to June 22, 1925, I am not deciding. For the purposes of the case I incline to the view that he can be regarded as a trespasser. Of course that is an issue of fact. He may say that he was not in possession after that date and he did nothing in the way of a trespass. That is a matter of defense, of course.

Now, in view of the ruling of the Court I am not clear whether it becomes necessary to amend your complaint, because you have rested your case in the count for use and occupation. Now, of course that

Discussion

would not a proper pleading in view of my ruling. Therefore you may have to amend, Mr. Drewen, in order to meet the Court's ruling.

Mr. Drewen: Will your Honor hear me now? 10

The Court: Yes.

Mr. Drewen: If your Honor please, what I have been prepared to argue this morning, after an exhaustive study of the cases, as exhaustive as I could possibly make, was that after June 22d, under our decision, the defendant was not a trespasser but a tenant at will; that he would not become a trespasser until he had been given a demand for possession by the owner of the title. Now, I understand from what your Honor has just stated that it is the holding of this Court that he was a trespasser. Now, if your Honor holds that he is a trespasser I shall have to ask the Court for leave to amend my complaint— 20

The Court: Your fourth count?

Mr. Drewen: To the extent of asking the Court's permission to revise the fourth count, wherein we alleged that he was not rightfully upon the premises. 30

The Court: That is right.

Mr. Drewen: Now, if, on the other hand, your Honor will go so far as to say that he was a tenant at will after June 22d, then I do not have to ask that, but in any event I ask it.

The Court: Well, I think he was not a 40

Discussion

tenant at will, Mr. Drewen, because there the permission to occupy the premises as vendee had really expired; that is to say, the purpose of admitting Mr. Reade into the premises no longer existed. The idea was that when he went in he was allowed to do so because he contemplated and was under contract to purchase the property and take the deed on or before some date either expressed in the contract or mutually agreed upon. And the Court of Chancery finally found as a fact that McKenna fixed that period by stating that unless Mr. Reade accepted his deed on or before a certain date—

Mr. Drewen: June 22d.

The Court: June 22d, that the contract was off, as it were. Now, I incline to the view that canceled the relation between the parties, and that after that the evidence would not justify a holding that McKenna was consenting to his possession at all. Therefore I think he was a trespasser after that, subject to the latter's right to recover for damages as in an ordinary action of trespass, plus mesne profits. Therefore I think that you will have to revive that fourth count.

Mr. Drewen: I am asking the Court to permit me to do it, and by way of supporting this plea of mine I would like to quote the opinion of Chief Justice Beasley, one of the old cases.

The Court: The Heddon case?

Discussion

Mr. Drewen: I think it is the Hedden, where he says no harm is done if there is a misapprehension of pleading.

The Court: Oh, well, in the modern days of pleading that is different. The Courts will not only permit an issue but permit proper pleading.

Mr. Drewen: Well, if it were so in his day it would be much more so in ours.

The Court: Much more so, in our day. Mr. Leonard, I am going to permit counsel to amend his complaint in order to meet the issue. What have you to say?

Mr. Leonard: Well, that comes somewhat of a surprise, if the Court please. Does your Honor recall that at the outset of the case there was such a count in tort as Mr. Drewen now requests should be added to this complaint, and that I moved that he be forced to elect whether to proceed in contract or proceed in tort? And we have a stenographic transcript of that motion. I think the Court has it in its papers, wherein Mr. Drewen said that he elected to proceed upon the count for use and occupation and for waste, and that he in open court abandoned his count of trespass. He tried his case accordingly, and I cross-examined accordingly. Now, at this time, after the abandonment of that count, if the Court permits him to reinstate, I assure the Court we become very much surprised.

The Court: How long will it take you to get over your surprise?

Discussion

Mr. Leonard: It would take this: it would take us to overcome that surprise—

The Court: I will allow you till the 28th of March to get over your surprise.

10 Mr. Leonard: That is not the point. The point is this: that we conducted our entire cross-examination in accordance with their allegation in open court that they abandoned their case in tort. I think it would be unfair for the Court now to say that notwithstanding you granted that with apprehension, and having cross-examined accordingly, you are now, notwithstanding, bound to defend an action which was not
20 then before you, an action in tort. That is not a fictitious surprise, it is a real surprise. It irks somewhat, it seems unfair to the defendant.

The Court: What is your idea, to force them to discontinue and sue over again?

Mr. Leonard: To be sure.

The Court: What is my business, to suppress litigation or to encourage it?

30 Mr. Leonard: I think your Honor should do neither.

The Court: Why don't you say encourage it?

40 Mr. Leonard: I don't think it is the prerogative of the Court to encourage litigation or to suppress it, nor is it mine, but my point is this: that that entire argument on the motion submitted with respect to their action might be in trespass but it is certainly not in use and occupation.

Discussion

The Court: I thought that was your idea at first.

Mr. Leonard: It is sir, but now having defended an action for use and occupation and now to be confronted with an action in tort for trespass— 10

The Court: You say you originally filed your answer with that very idea. That count was in the complaint when it was served on you?

Mr. Leonard: It was, sir.

The Court: Now it appears that counsel was mistaken in allowing it to be withdrawn from the complaint.

Mr. Leonard: Exactly. Now, we have made no mistake. It is he that has made
20 it. Why should we be penalized?

The Court: You are not being penalized. You have got to meet the issue some time.

Mr. Leonard: Are we to have the opportunity to meet the cross-examination of their witnesses?

The Court: Certainly.

Mr. Leonard: We have not.

The Court: Yes, you will. 30

Mr. Leonard: Will they all go back on the stand again?

The Court: Yes.

Mr. Leonard: That means trying the case anew?

The Court: Yes.

Mr. Leonard: That is satisfactory.

The Court: It goes off to the 28th, and counsel may amend his complaint and if
40 necessary counsel may amend his answer

Discussion

to meet the complaint as amended and I will continue the case to the 28th, unless you want it to go off for the term.

Mr. Leonard: No, I don't. I want to have the case tried and disposed of.

10 (After further discussion.)

The Court: Well, do you want to go on today?

Mr. Leonard: Provided I can preserve my right on the record.

The Court: Well, then, the case will be continued today after the conclusion of the case that is now on. Note your exception.

20 (Objection noted for defendant as ground of appeal.)

The Court: Note an exception to the Court's ruling as to the nature of the action as indicated by the evidence so far taken, and that exception is allowed to the defendant. Then a further exception to the Court's ruling that the plaintiff may amend his complaint in order to conform to the Court's ruling.

30 Mr. Leonard: May I also except to your Honor's denial of the motion for nonsuit, which motion was addressed not only to the count for use and occupation, but to the count for waste as well.

The Court: Yes. All right.

Mr. Leonard: I believe that already it appears upon the record that we pleaded surprise to this amendment?

40 The Court: Oh, in that regard the Court has already stated that if counsel desires a continuance it would be allowed to the

Discussion

28th of March. He now states, however, that his client is here with his witnesses, and he desires to conclude the case.

Mr. Leonard: Do I understand with the case going on today the plaintiff will try his case anew? 10

The Court: No, sir. I am going to allow the evidence as already taken to be considered.

Mr. Leonard: In the event the case were continued to the 28th day of March would the plaintiff be required to put in his case anew?

The Court: No, sir.

20 Mr. Leonard: We having a choice then of merely putting in our defense, to do so on March 28th, we choose today rather than the other date.

The Court: That is it.

Mr. Leonard: What we insist, however, is that it is a surprise to us to go on by reason of our cross-examining upon that other theory.

The Court: That is up to you, whether you go on today or not. 30

Mr. Leonard: Well, the same status exists, whether we go on today or whether we go on on the 28th of March.

The Court: I have allowed this amendment the same as I would in any other case. Now, I say to you if that amendment is a surprise and you want a continuance, take it. If, on the other hand, you are waiving that question and want to conclude the case, you may do so. 40

Discussion

Mr. Leonard: Your Honor has suggested no alternative, whereby we are permitted to waive.

The Court: You are surprised by the amendment?

10 Mr. Leonard: Surprised in the sense that our cross-examination was directed to issues then before the Court, namely, on the grounds for use and occupation.

The Court: Are you surprised by the amendment?

Mr. Leonard: I am surprised.

The Court: Do you want the 28th, want it continued to the 28th of March?

20 Mr. Leonard: Will the case be tried anew on the 28th?

The Court: No, sir.

Mr. Leonard: Then we are in no different position then than we are now.

The Court: Do you want a continuance to the 28th of March?

Mr. Leonard: If that be the only situation that we will be concerned in we would rather go on today.

30 May I now move to strike out all the testimony upon the record having to do with the alleged removal of topsoil, upon the ground that during the trial counsel for the plaintiff assured the Court that that removal would be connected with the defendant. We insist that the removal has not been connected with the defendant, directly or indirectly.

40 The Court: Mr. Drewen, I intended to suggest to you when allowing the amend-

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ment that there should be necessary parties brought in. Thus far there has been no direct evidence on the subject, there has been merely a suggestion that possibly the corporation known as the Broadway Theatre Company might be liable for any 10 trespasses that were made and not Reade individually. Now, whether you have the proper parties in court or not I am unable to say.

Mr. Drewen: The evidence shows that the man in possession, the man who exercised—

The Court: Well, however, if that is your attitude we won't discuss it further. 20 You, in other words, will go to the jury, if the case gets to the jury at all, on the theory that Reade was responsible for anything that was done there?

Mr. Drewen: Yes.

The Court: It may become a question of fact or it may become a question of law at the conclusion of the case?

Mr. Drewen: Yes.

The Court: Now, the motion to strike 30 out the testimony will be denied.

Mr. Leonard: May I address a similar motion to all that testimony having to do with the alleged erection of billboards upon the premises in question, upon the ground that counsel for the plaintiff likewise assured the Court that the billboards would be connected in some way with the defendant and I assert that they have not 40 connected those billboards with the defend-

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ant, directly or indirectly. We therefore ask that that testimony be stricken out.

The Court: Motion denied. It is an issue of fact to be tried in the ordinary way.

10 (Objection noted for defendant as ground of appeal.)

Mr. Leonard: That is one sentence, I believe, upon the record reading something like this, "That that is satisfactory to me." When I made that remark I had in mind that if the case were postponed to March 28th the case would be tried anew. That, of course, would be satisfactory. 20 But when I learned, as I do now, that the case would not be tried anew on that day, but merely that we would put in our defense, of course, it is not satisfactory.

The Court: I may say to you, Mr. Leonard, if you desire to re-cross examine any of the witnesses for the plaintiff, including the plaintiff, I will allow you to do it, under the amendment of the complaint.

30 Mr. Leonard: We submit that that indirect way of putting the case—

The Court: If there is anything that you have omitted to ask that you would have asked if the complaint had been amended originally, I will allow you to do it, either the plaintiff or any of the witnesses for the plaintiff.

40 Mr. Leonard: We submit that that indirect way of cross-examining in this case is so unsatisfactory that it denies us a day

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in court, in a sense. For that reason, if it be an advantage, we do not take advantage of it for that particular reason.

The Court: Now, is there anything more?

Mr. Leonard: Just one little exception 10 to the record. May I except to your Honor's ruling that after the 22nd of June, 1925, the defendant became, as your Honor has said, a trespasser; we respectfully contending that he was a tenant at will. I think your Honor made the remark that this defendant was a trespasser subsequent to a certain date. We submit that there is no evidence upon the record to justify such 20 an assertion by the Court, it having been made in the presence of the jury. We ask for a mistrial.

The Court: The jury does not happen to be in the box. It is not your jury.

Mr. Leonard: Well, I presume the jury is in the court room.

The Court: Just put this on the record. The Court's remark that after June 22, 1925, defendant was a trespasser, of 30 course, was merely tending to indicate the legal situation as indicated by the evidence offered in the case. It is not a statement of facts at all. It is open to the jury to ascertain whether he was or not, whether he did anything. The Court had no intent whatever in foreclosing the jury in ascertaining what the fact was. They may find that it was not so at all, that he did not trespass, never was on the land, neither 40

Discussion

in an express or an implied way. It was merely for the purpose of disposing of the motion, that is all, that that expression was used. The Court stands corrected.

10 (The case was resumed in the presence of the Court and counsel in chambers.)

Mr. Leonard: If the Court please, I have here a copy of the amended complaint of the plaintiff. Is plaintiff permitted to file that complaint as amended?

The Court: Well, yes; I assume that is the effect of it. I allowed him to amend his complaint by striking our certain counts and adding another, didn't I?

20 Mr. Leonard: He does not say that, sir.

The Court: I think really, Mr. Drewen, what you should do is really to make this an amended complaint instead of a new one.

Mr. Drewen: That is an amended complaint.

30 The Court: No; well, you call it an amended complaint; I am aware of that. Of course, the original complaint stands in the record as it was. I think you ought to have an introductory paragraph stating that plaintiff by leave of the Court amends this complaint as follows.

Mr. Leonard: May I assume that such language is in it?

Mr. Drewen: Yes.

40 Mr. Leonard: Now, assuming that that introductory paragraph be made a part of this amended complaint, is it my under-

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standing that the Court permits the complaint to be filed as an amended complaint?

The Court: Yes.

Mr. Leonard: May I except to that ruling given?

The Court: Yes, you may have an ex- 10 ception to the ruling given on the amended complaint.

Mr. Leonard: Now, I move for a nonsuit to the first count, which is the same as the original count, upon the ground that the count is for use and occupation, and that under the facts of this case, in light of the law, clearly established by the cases, that action for the use and occupation will 20 not and cannot lie.

The Court: Prior to June 22, 1925?

Mr. Leonard: At any time at all.

The Court: Oh, yes. All right. I get you.

Mr. Leonard: So, for the purpose of convenience and clarity, my motion for nonsuit is directed to the first count, which is for use and occupation.

The Court: Yes. 30

Mr. Leonard: Will your Honor rule separately on these motions?

(After argument.)

The Court: I will rule out the first count.

(Objection noted for plaintiff as ground of appeal.)

Mr. Leonard: I address a similar motion for a nonsuit, or in the alternative, a motion to strike out the second count, on 40

Discussion

the ground that it likewise sounds in contract for use and occupation, and there is neither fact nor law to support it.

The Court: There will be the same ruling on that, then.

10 (Objection noted for plaintiff as ground of appeal.)

Mr. Leonard: The ruling is, I suppose, a nonsuit as to that count?

The Court: The second count, those two counts.

20 Mr. Leonard: I move for a nonsuit, or in the alternative, I move to strike out the third count, upon the ground that it is predicated upon an express contract.

The Court: For rent?

Mr. Leonard: For rent, and there is no evidence to support it.

The Court: Well, I am inclined to think you are right.

Mr. Leonard: I suppose your Honor rules the same?

30 The Court: Yes. You may have an exception.

(Objection noted for plaintiff as ground of appeal.)

The Court: The fourth count I hold is good.

Mr. Leonard: The fourth count is introduced as a result of the Court permitting an amendment to be made?

40 The Court: Yes.

Discussion

Mr. Leonard: I move to strike out the fifth count upon the ground that under the case or in the cause therein encompassed it is necessary to show the relation of landlord and tenant, and that relationship has not been established, directly or indirectly, 10 in the record in this case.

The Court: On the ground that he alleges waste?

Mr. Leonard: On the ground that it is a count for waste.

(Mr. Drewen replies.)

The Court: I am going to deny the motion, on that, because there is some semblance of authority in the earlier cases. 20 I am going to allow that to stand.

Mr. Leonard: I address a similar motion on the same grounds to the sixth count, which purports to interpose the action for waste.

The Court: I make the same ruling as to that. These motions for nonsuit under these counts will be denied, the fourth, fifth and sixth, and I will not allow the jury to consider the case under counts one, two 30 and three.

(Objection noted for defendant as ground of appeal.)

Mr. Leonard: Now, I have made no motion as to the fourth count as amended, and with the Court's permission, I do so now. I move for a nonsuit upon the ground that the record discloses no evidence whatsoever of a trespass. The evidence discloses 40

Discussion

10 that the defendant, if he went on the premises at all, went on the premises with the permission of the plaintiff, and the record is barren of the remotest suggestion that there was ever thereafter a demand for the premises, and in the absence of that demand no tort can ever be spelled.

20 The Court: Oh, I do not follow you on that. I think that he went into possession as vendee and after he failed to take his deed then the relationship ceased and any damage that he committed, such as taking topsoil, if he did—of course, that is a matter for the jury to determine—would be a damage for which an action might be sustained by the plaintiff.

Mr. Leonard: My motion is denied?

The Court: Yes. In other words, the motion for the reasons stated is therefore denied.

30 Mr. Leonard: Yes, as to that count. I move also with relation to the fourth count for a nonsuit, or in the alternative, to strike out, upon the ground that as the evidence now stands upon the record it does not appear that the defendant ever went into possession or that he ever took anything from the premises. The reason why your Honor was prompted to make such an inference when the motion was addressed before the complaint was amended was because if the relationship of landlord and tenant were deemed to have existed then there might be some presumption, a permission once having been given, that

40

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the defendant thereafter continued in possession. But this count now sounding in tort, there is no permission of any sort; and as they have not connected the proofs, as they assured this Court would be done, this count in tort will not lie. 10

The Court: I am inclined to think that the plaintiff makes a *prima facie* case on the subject now indicated in the motion for nonsuit, and that it is for the jury to determine whether or not he has been shown to have been connected with any taking of topsoil or use of the premises contrary to his rights as vendee under the original contract. 20

Mr. Leonard: I ask an exception to all of these various rulings.

(Objection noted for defendant as ground of appeal.)

Mr. Leonard: I move for a nonsuit, or in the alternative I move to strike out the fourth count on the ground that it does not sound in trespass, but it is *sui generis* in that claim is made for mesne profits, which are peculiarly and historically associated with an action of ejectment. 30

The Court: There is some authority for the statement in an action for trespass the measure of damages might include mesne profits; therefore the motion is denied for that reason.

(Objection noted for defendant as ground of appeal.) 40

Discussion

Mr. Leonard: I now ask that the plaintiff be compelled to make an election between or among the fourth, fifth and sixth counts, because they are inconsistent with each other; the fourth count disaffirming any alleged relationship of landlord and tenant, whereas the fifth and sixth are predicated upon waste, are predicated upon contract and are diametrically opposed to any theory of a wrongful entry or a wrongful possession; therefore that one cannot in one breath say that the defendant is my tenant and in the next say he is a trespasser.

The Court: The motion is denied, with the statement of the Court that the issues will be controlled by the Court and submitted to the jury under the charge.

(Objection noted for defendant as ground of appeal.)

Mr. Leonard: And for a further ground why an election at this time should be compelled, may I not suggest that if the fourth count be interpreted to be a count for trespass generally, then it might perhaps include damages sustained, if any, by the removal, if such removal were in fact made, of topsoil and gravel. If that be true, for the identical removal we have the pleadings alleging that such removal was lawful and was done by reason of the relation of landlord and tenant—waste—and in the next unlawful because that relationship did not exist. For us to be compelled

Thomas P. McKenna—Cross

to defend a case where the issue is thus made nebulous works a hardship.

The Court: I do not see that at all. Your defense is single, there is no doubt about that. In other words, you are going to deny you took any topsoil and you are going to deny you used and occupied the premises through your servants or employees, and also deny that any damage was committed at all upon the premises by your client by the use and occupation, by signs or any other form of actionable wrong.

(Objection noted for defendant as ground of appeal.)

Adjourned till March 21, 1928.

Freehold, N. J. March 21, 1928.

Trial of the cause resumed at 10 A. M.

Mr. Leonard: I offer for filing answer to amended complaint.

The Court: I will consider the amended answer to the amended complaint filed.

THOMAS P. MCKENNA, re-called.

Further cross-examination by Mr. Leonard:
Q. Mr. McKenna, the statements contained in your complaint are true statements, aren't they?

Mr. Drewen: Well, now, that is objected to on the ground that it calls for a

Thomas P. McKenna—Cross

conclusion. I don't know that Mr. McKenna knows what the statements are. The complaint is a pleading drawn by a lawyer, not a factual thing that a client knows much about.

10 By the Court:

Q. Have you read the amended complaint, Mr. McKenna? A. Yes, I have read the amended complaint.

Q. Now, the question is whether the statements therein are true.

Mr. Drewen: May I address my question, to make the question perfectly clear, let Mr.—

20

Mr. Leonard: Let me do it in my own way.

Mr. Drewen: No, let Mr. McKenna read the complaint.

Mr. Leonard: He says he knows what is in it.

By Mr. Leonard:

Q. Do you know what is in it, or not? A. No, sir; I don't know now what is in the complaint.

30 Q. Before answering that question, is it necessary for you to read the amended complaint, Mr. McKenna? A. Yes, to know what is in it.

The Court: If you want an answer to the question I will permit him to read the complaint.

Mr. Leonard: May I ask him a question to assist this?

40

Thomas P. McKenna—Cross

By Mr. Leonard:

Q. Without referring to the amended complaint, Mr. McKenna, don't you know whether there was introduced in that pleading and untrue statement? A. No, sir.

Q. So you now, without refreshing your recollection by looking at it, don't know whether it contains false statements or true statements? A. Well, I should say that it contained true statements.

Q. Now, in paragraph three of the fifth count there appears this statement: "The plaintiff was and is thereby injured in his estate and interest in said land, with the appurtenances, in the amount of \$550." You claim that statement is true? A. Yes, sir; more than that.

20

Q. Now, I will go back to the second paragraph of the same fifth count, and it reads: "Defendant still was in possession of said premises and on divers days between said dates committed waste on said land and premises and took away, removed and converted to his own use 2,750 yards of topsoil and gravel, of the value of \$5,500, and injured and damaged the said property of the plaintiff to the amount of \$5,500." You claim that that statement is true? A. To the best we could estimate; yes, sir.

30

Q. Now, we will go back to the first paragraph, the only remaining paragraph in the fifth count: "The defendant by permission of the plaintiff held and enjoyed the land and premises described in the first count from the 10th day of June, 1925, to the 10th day of June, 1927." Is that statement true? A. Yes, sir.

40

Benjamin J. Parker—Direct

BENJAMIN J. PARKER, sworn for defendant.

Direct-examination by Mr. Leonard:

Q. Mr. Parker, you live where? A. Shrewsbury. 10

Q. You have lived there for how long? A. Sixty years.

By the Court:

Q. You admit that age, do you? A. Yes, sir.

By Mr. Leonard:

Q. What is your business, Mr. Parker? A. Well, I have been a farmer all my life; for thirty 20 years I was a contractor, excavating and grading, and now I am connected with the Second National Bank.

Q. In what capacity are you connected with the Second National Bank? A. Vice President.

Q. Of Red Bank? A. Yes, sir.

Q. In your capacity as a farmer and general contractor, did you acquaint yourself with the different values or with the values of different topsoil and dirt and gravel? A. Yes, sir.

Q. Were you acquainted with the market value of topsoil and gravel in 1925? A. Yes, sir. 30

Q. And in 1926? A. Yes.

Q. And in 1927? A. Yes.

Q. You accompanied me early in the morning of the first day of this trial, did you not, and where did we go? A. Went to Long Branch.

Q. Where in Long Branch? A. To the plot of ground next to the Broadway Theatre.

Q. Do you recognize that plot of ground? A. 40 Do I recognize it?

Benjamin J. Parker—Direct

Q. Yes, had you ever seen it before? A. Yes.

Q. How long had you been acquainted with that plot of ground? A. Well, as long as I remember anything.

Q. Describe the general character of that plot of ground. A. Well, that day or years ago? 10

Q. From thence on.

Mr. Drewen: From whence on?

Q. From thence on what was it?

Mr. Drewen: When?

The Court: When? When he first was on it?

Mr. Leonard: From the day he first became acquainted with it. 20

By the Court:

Q. Well, when did you first see it as far as you now recall, how many years ago? A. Well, probably forty or forty-five years ago.

Q. Now, he has asked you to describe it. A. At that time the Herberts had the property.

By Mr. Leonard:

Q. That is known as the old Herbert property? A. I don't know at this day what it is known 30 as, but at that time it was known as the Herbert property.

Q. What was it used as that day?

Mr. Drewen: Objected to as incompetent, irrelevant and immaterial.

The Court: A little remote. You had better bring it down.

Mr. Leonard: I am going to trace the character of the land from the present 40

Benjamin J. Parker—Direct

time. My purpose is to show that it was an open market place from that time to the present time.

The Court: Ask that question.

10 By the Court:

Q. What was it used for, if you know, Mr. Parker? A. Well, in later years there was a market place there, when it was known as the market place. The last few years I don't know what it has been used as.

Q. For how long was it used as a market place, if you know?

20 Mr. Drewen: You see this witness has said that for the last few years he didn't know what it has been.

The Court: It is admitted in the case that it was used for a market place, the whole tract.

By Mr. Leonard:

Q. When we examined the premises a week or so ago, did you examine the soil? A. Yes, sir.

Q. How carefully did you examine the soil?

30 A. Well, we dug into it, and, in fact, took some of it away with us.

Q. And when you say "we," you mean whom?

A. I mean Mr. Byram and myself.

Q. On what part of the premises did you examine the soil?

Mr. Drewen: Object to unless—all the testimony that we have in it refers to topsoil. This witness is not being asked with reference to topsoil.

40 Mr. Leonard: It is not there.

Benjamin J. Parker—Direct

Mr. Drewen: Then I rather assume that is the reason for my objection.

The Court: Reframe the question.

(Question repeated.)

The Court: I will allow it.

Mr. Drewen: Unless it has reference to 10 topsoil I think it has no bearing on this question.

Mr. Leonard: Suppose topsoil is not there; how can he possibly refer to it?

By the Court:

Q. What part of the premises did you examine?

A. Back where there is a lunch wagon.

By Mr. Leonard:

20 Q. And what was the character of the ground or dirt, whatever Mr. Drewen might choose to call it, back of the lunch wagon?

Mr. Drewen: Earth.

A. Well, where we examined there was very little topsoil, it was mostly sand and ashes.

Q. What would you say, Mr. Palmer, would be the fair, reasonable value of such earth as you examined?

30

Mr. Drewen: Of course, that is objected to.

The Court: Oh, yes. You will have to show the character of the soil before any removal. Now, the evidence of the witness at the present moment would tend to indicate a condition after removal. In other words, you would have to connect it.

40

Discussion

Mr. Leonard: Is not the character of the dirt already there some evidence of what might have been there before its alleged removal?

10 The Court: If you propose to show that the same dirt is there now that was there before Reade went into possession, I will admit it.

Mr. Leonard: Why does your Honor say that Reade went into possession?

20 The Court: All I know is that McKenna said here that he consented and Reade went into possession. Don't let's discuss it. Go on. Note your exception, the easiest way to do it, and then take it to the Court of Errors.

(Question repeated as follows: "What would you say, Mr. Parker, would be the fair, reasonable value of such earth as you examined?")

Mr. Drewen: I objected to that. I think your Honor ruled against the question.

30 The Court: Only on the assurance that you are going to show that the soil which Mr. Parker saw was the same soil that is in issue here, I will permit the question, otherwise not; unless you show that the soil was the same character as the soil that they carted away I will allow him to answer.

Mr. Leonard: Repeat my last question and answer.

40 Mr. Stokes: You haven't given the Court an assurance.

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Mr. Leonard: I will take care of it.
(Previous question and answer repeated.)

The Court: I will allow him to answer. Go on.

(Objection noted for plaintiff as 10 ground of appeal.)

A. It would depend entirely how near to that point somebody had a place to fill in.

By the Court:

Q. That contemplates that if it was a long haul it would not be worth— A. Very little.

Q. It would be worth very little? A. Yes.

Q. Can you give any estimate, regardless of 20 where it might ultimately be used? A. Well, it could be used anywhere if a person had a fill to make.

Q. And what would be the reasonable value?

A. It would depend entirely on how far it had to be hauled.

Q. Well, regardless of how far it might be hauled, in the event that a buyer desired to purchase from the owner of that ground such soil as you observed to be upon that land in the rear 30 of the lunch wagon, what would you say would be a fair and reasonable value of that soil?

Mr. Drewen: Of course, I must object to that.

The Court: Oh, yes; it has got to be in 1925. Fix the time, the time that this issue arose.

Mr. Drewen: I also object to it because it is digging into the earth now, not that 40

Benjamin J. Parker—Direct

topsoil which is gone, and there is nothing around that concerns us. We don't put any value on that.

The Court: It doesn't hurt you. How are you hurt? Go on.

10 Q. Describe the general appearance of the surface of this property which you examined a week or so ago. A. Well, back of the lunch wagon there had been stuff carted out to the extent, I should say—

By the Court:

Q. It was directly evident, was it, Mr. Parker, that that soil had been carted out back of the lunch wagon and all you saw was the condition
20 in which it then was? A. Yes.

Q. You didn't know what kind of soil had been carted out? A. No, sir.

Q. Didn't see it? A. No, sir.

Q. Hadn't seen it? A. No, sir.

Q. And you are unable to fix a valuation on what was taken out? A. No, sir.

By Mr. Leonard:

30 Q. Were you able to examine the cross-section?

Mr. Drewen: Cross-section of what?

Mr. Leonard: Of the earth, condition of the portion that had been removed.

A. Well, back of this lunch wagon.

Mr. Drewen: I don't understand that question, the earth part and portion that had been removed. He doesn't mean that.

40 Q. Did you examine the cross-section to the extremity of the area?

Benjamin J. Parker—Direct

By the Court:

Q. What he means to say is this: were you able to tell from the condition there the kind of topsoil that had been there?

Mr. Leonard: Well, that calls for a conclusion of law. 10

The Court: No, that is a question of fact.

Q. Were you able to tell the kind of topsoil that had been there before? A. Certainly not.

The Court: He says he is not able to tell.

Mr. Leonard: What I am about to have the man do, the same as their expert did, 20 with the Court's permission I shall pursue that line—

By Mr. Leonard:

Q. Did you examine the cross-section or the strata? A. Yes.

Q. At a point where some dirt had apparently been removed? A. Yes.

Q. And were you able to tell the type of dirt or soil or earth that was layered in that cross-section? A. It was very light, yes. 30

Q. Now, assuming that such soil as was indicated in the cross-section that you observed was over the entire area of the property, what would you say was the fair market value in 1925 or 1926 of such earth as you for this purpose assumed to be over the entire premises?

Mr. Drewen: I must object to that question for the reason that it might just as 40

Benjamin J. Parker—Direct

well be assumed that there was gold all over the top of the premises, or pay dirt.

The Court: I will allow you to ask him what, in his opinion, was the value of the topsoil of the character indicated by the strata that he saw.

10

Mr. Leonard: Exactly.

The Court: I will allow that. It is for the jury to say whether that character of soil prevails throughout the *locus in quo*, and there is evidence on that subject.

By the Court:

Q. How much would that topsoil be worth of the character that you saw near the portion that had been dug out? Are you able to say? A. Why, if it was a near haul it would be worth about fifty cents a yard.

20

Q. But the longer the haul the less the value? A. The less the value, yes.

By Mr. Leonard:

Q. In the cross-section or the strata that you have been talking about, how did the earth go that you call topsoil?

30

Mr. Drewen: Well, now, it is not shown that this man can tell how deep the topsoil went when he was there.

The Court: I don't know whether he can't or can. He may answer. If he can't tell, he will say so.

A. The space there that there seemed to be topsoil on was from two and a half to three inches deep.

40

Q. And had the premises been excavated at a

Benjamin J. Parker—Direct

point below the depth of the topsoil? A. Oh, yes.

Q. How far below the depth of the topsoil had that been excavated? A. Well, from eighteen to probably twenty-two inches.

Q. And what was the substratum below the stratum of the earth you call topsoil? A. Very light sand.

10

Q. And what was the fair and reasonable value of that light sand in 1925 or 1926.

Mr. Drewen: Well, we didn't ask anything about light sand.

The Court: I will allow him to answer.

A. If the haul was of any distance, very little value. If it was somewhere near it where there was a fill to be made, it was worth from ten to fifteen cents a yard.

20

Q. Now, did the topsoil or stratum of topsoil that you observed extend entirely around the portion of the premises that had been excavated, or did the layer of the topsoil vary as it extended around the portion that had been excavated? A. Well, it was about the same, what I saw.

By the Court:

30

Q. In other words, there is practically a uniform excavation to a depth of twenty-two inches all over the lot?

Mr. Leonard: There has been no such testimony, sir.

Q. I am asking you, is that so? A. No, there are places that is probably twenty-two inches and places where it is not over twelve inches and some places where apparently none at all.

40

Benjamin J. Parker—Cross

By Mr. Leonard:

Q. And those places where there was apparently no excavation at all are located where with reference to Belmont Avenue, for instance? A. Well, I don't know how far it was to Belmont
10 Avenue. It wasn't far back of the lunch wagon.

Q. And from your observation could you approximate the surface area that had been excavated? A. No.

Q. Well, with reference, for instance, to the size of this room. A. It was not as large as this room.

Q. The area that had been excavated? A. No.

Q. Not as large as this room? A. No.

20 Q. Was it half as large? A. No, I should say not; not over a third as large.

CROSS-EXAMINATION by Mr. Drewen:

Q. Mr. Parker, you don't know anything, or rather, you didn't know at the time you went to this place with Mr. Leonard, you didn't know anything about the condition of the topsoil that was there before it had been removed, did you? A. All I knew was what was there at the present
30 time.

Q. And when you told the Court here that you couldn't tell what that topsoil was worth that had been removed, that was the truth, wasn't it? A. Why, I hadn't even seen it.

Q. And when you talk about something being worth fifty cents a yard you mean the soil or whatever it was that was there when you saw those premises? A. That is it, what topsoil I
40 saw there at that time, not the subsoil.

Q. Now, then, you say, do you not, that from

Benjamin J. Parker—Cross

practically all over this whole premises the topsoil had been removed, don't you?

Mr. Leonard: No such testimony.

Mr. Drewen: Let me ask the witness.

Mr. Leonard: You can't surmise a subject matter that the record does not show. I object to it. 10

By the Court:

Q. With reference to the entire tract, how much topsoil had been removed, if you know? A. I don't know how much topsoil had been removed, Judge. The only part I know is where the excavation was.

By Mr. Drewen: 20

Q. Can you describe the size of this lot? Have you any impression at all as to that? A. No, I have not.

Q. Over how much of this whole tract between Broadway and Belmont Avenue did you go with Mr. Leonard? A. I walked over practically all of it.

Q. And how much of it do you say that the topsoil was there in its natural state? A. I don't know. I say the excavation that I saw was about
30 one-third as large as this room.

Q. I am not speaking now of the excavation, I am referring to the removal of topsoil. You don't refer to the removal of the topsoil, as the excavation, do you? A. No.

Q. No, neither do I. Omitting from your mind for the moment the excavation, tell us, won't you, over how much of this entire tract the topsoil had been removed? A. Well, I don't know that
40 at all. I know it had been removed over most of

Benjamin J. Parker—Cross

this excavation, except where there were sand piles where it looked as if it hadn't been removed.

Q. Of course, we will assume, Mr. Parker, that where there was an excavation the topsoil was removed. We will certainly assume that. But
10 forgetting for a moment the excavation, over how much of the rest of this tract had the topsoil been removed? A. I don't know.

Q. That is the point. You didn't make any observation of that at all? A. Yes, I walked over the land, but I didn't know how much topsoil had been removed.

Q. Well, over how much of the area of this tract of land did it appear to you topsoil had
20 been removed? A. Where that excavation was.

Q. Nothing else? A. Not that I know of.

Q. What do you mean by that, not that you know of? Did you examine the surface of the earth there for the purpose of determining it, whether the topsoil was there in its natural state or had been removed? A. Yes, where we dug down, you will find my testimony is from two and a half to three inches deep.

Q. Topsoil? A. Yes.

Q. In how many places did you do that? A.
30 Oh, I don't know. I suppose a half a dozen.

Q. Whereabouts on this tract with reference to Broadway and Belmont Avenue? A. Oh, in various places back of the lunch wagon, toward—

By the Court:

Q. All your examination was back of the lunch wagon? A. No, it took in land further back.

By Mr. Drewen:

Q. How far back of the lunch wagon did you
40

Frank C. Byram—Direct

go? A. Well, I don't really know in feet how far it was.

Q. Did you go back as far as the theatre? A. Yes.

Q. Did you go back of the alley? A. No.

Q. You didn't? A. No. 10

By Mr. Leonard:

Q. Mr. Parker, where is the dirt that you dug?

A. Well, I don't know whether Mr. Byram has it here in the car or not.

Mr. Leonard: I will put him on the stand. I will ask him.

20

FRANK C. BYRAM, sworn for defendant.

Direct-examination by Mr. Leonard:

Q. Mr. Byram, you live where? A. Shrewsbury Borough.

Q. You have lived there how long? A. Fourteen years.

Q. You are Borough Clerk, are you not? A. Yes, sir.

Q. And what is your business? A. Contractor,
30 general contractor.

Q. How long have you been a contractor? A. Twenty years, about.

Q. And in that line did you become acquainted with the value of different types of earth and sand? A. Yes, sir; I think so.

Q. And do you recall the visit that Mr. Parker and I made in Long Branch in the early morning of the first day on which this trial occurred?
40 A. Yes, sir.

Frank C. Byram—Direct

Q. Tell the jury, please, Mr. Byram, what area you would say had been excavated in reference, for instance, to the size of this room? A. Well, I would think that, while I didn't put a tape on it, that excavation had been made probably fifty
10 feet back from Broadway and about—well, I would say forty feet wide.

Q. Did you examine the substrata surrounding that excavation? A. I examined the top strata surrounding the excavation, but not the sub. I didn't examine the bank as it was standing up.

Q. Now, will you describe the character of the bank? A. Well, there was an excavation, had
20 been an excavation made there, as I said before, about forty by fifty, while I didn't tape it, and on the top of the ground surrounding the excavation I found from two and a half to three to four inches of what I would consider topsoil, very ordinary topsoil.

Q. And what was below that? A. Well, it was simply fill earth, sand, or whatever you may use it for.

Q. In 1925 or 1926 what would you say that
30 topsoil of the character you observed was worth? A. Well, now, I will tell you. I consider the topsoil that was there fit to use for lawn purposes. I wouldn't consider it worth over forty or fifty cents a cubic yard. I can buy excellent topsoil today and am handling it, at fifty cents a cubic yard on the ground, without considering any delivery.

Q. Better or worse topsoil than what you saw
40 on those premises? A. Oh, most certainly better.

Frank C. Byram—Cross

Q. Now, going below that stratum of topsoil, what kind of earth did you find? A. Sand.

By the Court:

Q. Did it have any market value? A. Yes, I would think that it would be worth ten or fifteen cents a cubic yard. In fact, lots of times I get
10 it for nothing, but I never pay more than ten or fifteen cents a yard for fill earth on the ground.

By Mr. Leonard:

Q. Did you take any samples of earth? A. Yes, sir.

Q. Have you those samples here? A. They are in my car down in the park there. If you want to send somebody to get it, they can tote it
20 around.

The Court: Let Mr. Leonard do that at recess.

Q. How heavy is that bag, Mr. Byram? A. Oh, I should say it would weigh forty pounds, possibly.

Mr. Leonard: I will do it before lunch.

CROSS-EXAMINATION by Mr. Drewen:

Q. Mr. Byram, I show you Exhibit C-2 and call
30 your attention to the sketch of the premises in question, this being Broadway here, here is the lunch wagon shown and designated on the sketch, here is the entrance to the property, the property goes back here—

The Court: I think you had better put that on the easel, so the jury can see what you are talking about.

(The map was placed on the easel.) 40

Frank C. Byram—Cross

Q. On Exhibit P-2 this is Broadway, Mr. Byram, there is the entrance to the premises, that is the width, there is the lunch wagon included, and the word "Lunches;" then the premises extend here and run through to Belmont Avenue.
 10 Now, having in mind this lunch wagon as shown on the blueprint, will you indicate to the jury by reference to the blueprint and also with reference to the lunch wagon, where it was that you examined this topsoil? A. The topsoil right in the rear here; evidently the original grade of the property where the lunch wagon stands. And then there was an excavation back—well, it might have been forty feet or fifty feet—forty feet, we
 20 will say—from the lunch wagon, there had been an excavation made and refilled with cinders.

Q. Directly in the rear of the lunch wagon? A. Directly in the rear of the lunch wagon, beside the theatre. Then this went back, I would say proportionately—oh, something like that. I said about fifty feet. Well, I didn't put a tape on it. But here is the alley, isn't there, going alongside of this?

Q. There is. A. That is alongside the store
 30 building that was put up?

Q. Well, I don't know about that Mr. Byram. I don't recall. A. I think there is.

Q. Well, did you examine any of the premises back here? A. Yes, I went over that.

Q. Did you find topsoil there? A. Very little.

Q. Very little? A. Yes.

Q. It had all been removed, hadn't it? A. I don't know anything about what had been removed, there wasn't any soil there that I would
 40 consider having use for—

Frank C. Byram—Cross

Q. Whether there had been any soil there and had been removed prior to your visit to the premises, you can't tell, can you? A. No, I can't tell.

Q. Now, I show you a photograph in evidence, being marked Exhibit P-6, and I call your atten- 10 tion to the high terrace of earth upon which the lunch wagon stands as shown in the photograph, and ask you if that is what you refer to as the original grade? A. That is what I referred to, where the lunch wagon stands. This doesn't seem to be a very good picture to me, as I remember it, as I saw it.

Q. And the excavation that you speak of, is that a depth that is created below that natural 20 grade upon which the lunch wagon stands, the depth of the dirt shown in the excavation? A. Yes, that is the excavation.

Q. That is what you refer to as the excavation? A. Yes.

Q. Now, about how deep—thinking of the grade upon which the lunch wagon stands as the natural grade—about how deep is this excavation as shown in the photograph? A. Of the terrace in the rear of your excavation? 30

Q. Yes. A. Well, I would say the average would be about eighteen inches.

Q. That is the depth of excavation? A. Yes, that excavation would average about eighteen inches. In places it is more and in places less.

Q. Now, will you please tell us what portion of this tract from Broadway back to Belmont Avenue this excavation of approximately eighteen inches was made? A. About fifty feet from Broadway and forty feet wide. 40

Frank C. Byram—Cross

Q. It didn't go beyond that? A. No, the excavation.

Q. Now, in addition to this excavation did you examine the rest of the premises for the purpose of ascertaining the presence or absence of top-soil? A. I did.

Q. And as to that additional portion of the premises that you say you could not tell whether the topsoil had been removed or not, but there was very little there when you were there? A. There was about from three to five inches, I would say, on that, and showing as it showed along the edge of the bank at the excavation, and of an inferior quality at that.

Q. I show you, Mr. Byram, Exhibit P-15, a photograph, and ask you if that photograph to the right of it shows the natural grade, as you call it, upon which the lunch wagon stands? A. This here, you mean?

Q. Yes, I mean where your thumb is. A. Yes, I would say it evidently represents it.

Mr. Leonard: If the Court please, Mr. Byram has just asked me if he could go home.

The Court: Yes, he may go, and Mr. Parker, too. Now, about identifying that bag, of course, they strictly should be here, I take it, to identify it. But can't it be by agreement of counsel? Do you want it brought in?

Mr. Leonard: It should. Why can't it be brought in now?

I ask that this be marked for identification, a certified copy of a deed from Henry

J. Wesley Seaman—Direct

Rosenberg to the Broadway Theatre Company of Long Branch, Incorporated, recorded in the Monmouth County Clerk's office in Book 1037 of Deeds, page 332 and so forth.

(Paper marked Exhibit Q for identification.)

Mr. Leonard: May I have marked also for identification deed from Charles Bryan and Sally G. Bryan, his wife, to Gertrude Reade, dated September 15, 1925.

(Paper marked Exhibit R for identification.)

20

J. WESLEY SEAMAN, sworn for defendant.

Direct-examination by Mr. Leonard:

Q. Mr. Seaman, where do you live? A. Long Branch, New Jersey.

Q. And what is your business? A. Civil engineer.

Q. You have been a civil engineer how long? A. Thirty years and more.

Q. And where have you practiced your profession? A. Long Branch.

Q. Are you acquainted generally with property on Broadway in the City of Long Branch? A. Yes, sir.

Q. Are you acquainted with the premises in question, owned by Mr. McKenna? A. Yes, sir.

Q. I show you Exhibit Q for identification and ask you if you recognize the premises described in that deed? A. Yes, sir.

40

J. Wesley Seaman—Cross

Q. With reference to Mr. McKenna's property, where do the premises described in that deed lie?

A. Immediately west.

10 Mr. Leonard: I offer the deed in evidence.

Mr. Drewen: I object to it on the ground that—first I want to cross-examine Mr. Seaman.

CROSS-EXAMINATION by Mr. Drewen:

Q. These are not the premises that are in litigation in this suit, are they? A. I understand not; no, sir.

20 By the Court:

Q. What premises are they, so we can identify them? A. On which the Broadway Theatre is built and the row of stores.

By Mr. Drewen:

Q. And all this property described in the deed marked for identification is to the west of the property in suit here, as you understand it? A. Yes, sir.

30 Mr. Drewen: I object to it on the ground that it is incompetent, irrelevant and immaterial to this issue.

The Court: I will allow it to be marked.

(Objection noted for plaintiff as ground of appeal.)

(Paper marked Exhibit D-1.)

By the Court:

40 Q. Does that describe the lands on both sides of the McKenna tract? A. No, sir.

J. Wesley Seaman—Direct

Mr. Leonard: Just the Broadway Theatre property.

The Court: All right. It may go in.

Mr. Drewen: May I state a further objection, please, that this is simply a deed to the Broadway Theatre Company of Long Branch, Inc. Now, what possible bearing on this issue can the fact that this property was conveyed by Henry Rosenberg to the Broadway Theatre Corporation on the day of the date of this deed have? It doesn't show title, it doesn't show that title was in the Broadway Corporation or anything of the sort. There is no search of the property. 10

The Court: What is the date? 20

Mr. Drewen: The date of this deed is December 15, 1916.

The Court: Oh, well, that may indicate—I assume they are going to show the relevancy of it by following that the property is still owned by the Broadway Theatre Company.

Mr. Drewen: I ask an exception.

(Objection noted for plaintiff as ground of appeal.) 30

The Court: You can't tell whether it is going to remain pertinent or not until the case is over.

By Mr. Leonard:

Q. I show you Exhibit R for identification and ask you if you recognize the premises described in that deed? A. Yes, sir. 40

J. Wesley Seaman—Direct

Q. And in reference to Mr. McKenna's premises, where do those premises lie? A. Immediately east.

By the Court:

10 Q. Who is the grantee in that deed, Mr. Seaman? A. Gertrude Reade.

Q. Now, that covers the entire eastern line, does it? A. Yes, sir.

Mr. Leonard: Not the entire eastern line.

Q. How far back does it run from the corner? A. It is in the entire lot.

Q. It is in the entire lot? A. Yes.

20 Q. The eastern boundary line? A. Yes, sir.

Mr. Leonard: Well, he is referring, I take it, up to an alley.

The Witness: Yes, sir; on Broadway.

Mr. Leonard: Does your Honor have in mind the premises to the rear here?

The Court: Yes, I was thinking whether he carried the eastern line back as far as Belmont Avenue.

30 The Witness: Oh, no; only to the alley.

Mr. Leonard: If your Honor is interested, we can show the various owners of this property.

The Court: I see that. It is of no consequence now.

Mr. Leonard: As to the signatures of the witnesses, you, I take it, won't require formal proof. I offer it in evidence.

J. Wesley Seaman—Cross

CROSS-EXAMINATION by Mr. Drewen:

Q. Mr. Seaman, you have stated the location of the property described in this deed now offered as in the other one with relation to the McKenna property. How do you know where the McKenna 10 property is? A. I have known the McKenna property for a long, long time.

Q. I didn't ask you that, Mr. Seaman. I asked you how you know it.

By the Court:

Q. Did you ever actually survey these premises? A. Yes, sir.

By Mr. Drewen:

Q. You surveyed the McKenna property? A. 20 Adjoining both sides.

Q. Adjoining both sides? A. Yes.

Q. That, I take it, did not involve the survey of the McKenna property, did it? A. As a check-up; yes, sir.

Q. Well, if you surveyed the lines to the west of the McKenna property and the lines to the east of the McKenna property, that would involve a recognition of the westerly and easterly lines of the McKenna property, wouldn't it? A. Yes, 30 sir.

Q. When was that survey made? A. Well, east of the McKenna property was made in the last two years, and west of the property several years ago, I couldn't tell you the exact time.

Mr. Drewen: Now, what is it you want to know, Mr. Leonard?

Mr. Leonard: I offer it in evidence. Of course, I didn't formally prove the signa- 40

J. Wesley Seaman—Direct

ture. I take it you do not insist upon that strict proof.

Mr. Drewen: No, I don't. That is all right.

Mr. Leonard: I offer it in evidence.

10 (Paper marked Exhibit D-2.)

Mr. Leonard: May I have a deed from Florence E. Pelletreau to Charles Bryan, dated August 1, 1922, marked for identification?

The Court: It may be so marked.

(Deed marked Exhibit S for identification.)

20 FURTHER DIRECT-EXAMINATION by Mr. Leonard:

Q. I show you Exhibit S for identification and ask you if you recognize the premises described in that deed? A. Yes, sir.

Q And with reference to the premises described in the deed marked Exhibit D-2, where do those premises lie? A. The same property.

30 Mr. Leonard: I offer Exhibit S for identification, in evidence. I take it you will waive proof of the signatures?

Mr. Drewen: Subject to the same objection I made with regard to the first deed.

Mr. Leonard: And what is that objection?

Mr. Drewen: That is does not establish title to the property, it merely shows a conveyance by that deed.

40 The Court: Objection overruled. It may be marked. I assume there will be

J. Wesley Seaman—Direct

supplemental testimony to show that the title has not been changed and was not at the time of the issues which arose in this litigation in 1925.

(Paper marked Exhibit D-3.)

Mr. Leonard: May I ask at this time, 10 does Mr. Drewen insist upon a search and the actual searcher in court? Because I contend that I can assure him that the record titles as to that premises immediately lying on the west of the Broadway Theatre property and immediately lying to the east of Gertrude Reade's property are respectively vested in those parties at the present time and have been since the execution 20 of those deeds.

The Court: Gentlemen, I suppose there is no question about it.

Mr. Leonard: I do admit it, if Mr. Leonard will say it is true, I will admit it.

The Court: It is merely a question of formal proof. There is no question of the title. In other words, Mrs. Reade owns the lot to the east on which the stores were put up and the Broadway Theatre Com- 30 pany owns the lot to the west.

Mr. Drewen: Yes.

By Mr. Leonard:

Q. Mr. Seaman, when did you make a survey of the premises adjacent to the premises in question? A. On the east side within the last two years, on the west side several years ago, ten years ago, probably.

Q. For what purpose were those surveys made? 40

J. Wesley Seaman—Direct

A. The erection of the stores and the Broadway Theatre property.

Q. And had you ever had occasion prior to that to make a survey of this locality? A. I made a map of all Long Branch, a tax map of Long
10 Branch.

Q. And in what capacity did you make a tax map of Long Branch? A. City engineer of Long Branch.

Q. For how long were you City Engineer? A. Well, twenty years or more.

Q. And does any portion of that tax map or map include the premises now known as Mr. McKenna's premises? A. Yes, sir.

20 Q. Have you such a map in your possession? A. Yes, sir.

Q. Produce it, please.

(Witness produces map.)

Q. Would you turn to the page covering and including the premises in question?

Mr. Leonard: May I have this marked for identification?

30 (Map marked Exhibit T for identification.)

Q. I show you Exhibit T for identification, the map, and ask you by whom it was prepared. A. By me.

Q. Who made the original survey? A. I did.

Q. Was the original survey a true and accurate survey? A. Yes, sir.

40 Q. And that map was made from the notes gleaned from that actual survey? A. And other maps of property and deeds.

J. Wesley Seaman—Direct

Q. And who prepared that map? A. I did, sir.

Q. Does it truly represent the conditions that it purports to include? A. Yes, sir; as far as I know.

Q. Point out, Mr. Seaman, the premises in question owned by— 10

Mr. Drewen: Before there is any reference to the map, may I ask that I have some part in finding out what the authenticity of this map is?

Mr. Leonard: Surely.

By the Court:

Q. It is a copy of the tax map of the City of Long Branch? A. Yes, sir. 20

Mr. Leonard: I don't think I formally offered it in evidence.

Q. As I understand it, it is a copy officially made for the Tax Assessment Commission of Long Branch? A. Yes, sir.

By Mr. Drewen:

Q. Where are the premises shown here?

Mr. Leonard: May I at this time offer it in evidence? 30

The Court: Yes.

Mr. Leonard: You don't object to it, do you, or do you want to examine on it?

Mr. Drewen: Just for a question or two.

Mr. Leonard: The offer is withheld.

J. Wesley Seaman—Cross

CROSS-EXAMINATION by Mr. Drewen:

Q. Mr. Seaman, this is what you call a tax map? A. Yes, sir.

Q. And what is required of a tax map? What is the office and purpose that the tax map really serves? A. Shows the metes and bounds of the property.

By the Court:

Q. Accurately, as the result of surveys? A. Yes. Perhaps there may be some dispute sometimes. I am not supposed to settle those things on a tax map.

By Mr. Drewen:

Q. Now, you as an engineer, in the question of owning title, would not stand alone upon what a tax map showed, would you? A. No, sir.

Q. So that this, even according to your word, this map here is not intended to show with what might be called accuracy the metes and bounds and the property lines of the property involved in this suit?

Mr. Leonard: I might say it is not offered for that purpose.

A. Yes, where maps of the property were obtained and maps filed; yes, sir

Mr. Drewen: Mr. Leonard says it is not offered for that purpose.

Mr. Leonard: I might say that it is not offered to establish the size of the McKenna lot. The figures are already in evidence.

40

J. Wesley Seaman—Cross

Q. I show you, Mr. Seaman, this Exhibit D-2, which is in evidence, a survey of this property, and ask you whether or not your tax map with regard to these premises differs from the premises as shown on the survey in evidence?

Mr. Leonard: I submit that does not go to the admissibility of the map, but rather, to its weight.

Mr. Drewen: If it does not differ, I will not object to it. If it does, in view of what the witness has already said, I have a right to object to it.

By the Court:

Q. Does it differ? A. The only difference I can see is they show a dotted line across between the property fronting on Broadway and the property fronting on Belmont Avenue. It is an alley which should extend to the east line of what is known as the theatre property. That is the only difference I observe.

By Mr. Drewen:

Q. Well, there is only that alley there, is there, on the premises? A. Yes, sir.

Q. No, I mean across the area as shown by the dotted line. A. On the premises?

Q. Yes. A. Yes.

Q. What do you mean by the alley? What do you understand an alley to be? A. Well, it has no fence. I don't mean it is a fence showing an alley. An alley is shown leading out to Broadway there and was always considered an alley to the west line of the Herbert property, which is the east line of the Broadway Theatre property.

J. Wesley Seaman—Cross

Q. Who considered it? Always considered? You don't know anything about the title to that alley, do you? A. No, sir.

Q. And you don't know anything about the ownership of the tract of land extending across
10 the McKenna plot that you say is an alley, do you?

Mr. Leonard: If the Court please, isn't this going rather far afield on the right to cross-examine as to the admissibility of this map? It is a proper subject for cross-examination, perhaps.

By the Court:

Q. You say that map has been used for taxing
20 purposes in Long Branch? A. Yes, sir.

The Court: Why do you offer it? What do you want to show, Mr. Leonard?

Mr. Leonard: To see if the little alley is there.

Q. Mr. Seaman, is there an alley there? A. I have always considered there is an alley there. It is shown on the official map of that property.

Q. It is shown on the official map? A. Yes,
30 sir.

Q. Who put it there, you? A. No, sir.

Q. Do you know who put it there? A. Yes,
sir.

Q. Who? A. William H. Denyse.

Q. How long ago? A. 1898.

Q. And you have actual knowledge of the presence of that alley, have you, seen it? A. I have; yes, sir. It extends out to Second Avenue.

40 Mr. Leonard: Now, can I offer it in evidence?

J. Wesley Seaman—Cross

The Court: It may be marked.

Mr. Drewen: I object to it on the ground that the very reference that the witness makes is to a map that is not here, I have not seen, the jury has not seen, the
10 Court has not seen. It is hearsay. He talks about something that appears on the official map.

Mr. Leonard: Do you say it does not appear here?

Mr. Drewen: This is only a tax map.

Mr. Leonard: Well, let's use it. I don't see any other map we can use. Don't you want to use it?

Mr. Drewen: I object to it on the
20 ground that the only question involved here is not as to whether there is an alley there or not but as to who owns the alley. Now, certainly this witness can give no such testimony and has said that he can't.

Mr. Leonard: I am not going to ask him, either.

Mr. Drewen: And the Denyse official map is not here, either.

By the Court:

30

Q. Well, really, that is merely a copy, is it, of the tax map? A. That part of it; yes, sir.

Q. That part of it? A. Yes, sir; I mean includes other properties.

Q. Is the official map in existence? There is an official map? A. Yes, sir.

Q. Where is it? A. I have a copy right here. I haven't got the original.

Q. Where is the original? A. In Mr. Denyse's
40 office, I presume. He is dead now.

J. Wesley Seaman—Re-direct

Q. Do you know that to be a correct copy of the map? A. Yes, sir.

Q. Have you seen it? A. Yes, sir; the original?

Q. Yes, have you seen the original? A. I
10 wouldn't be sure whether I have seen the original or not.

The Court: The objection to the offer of the map is sustained.

Mr. Leonard: I except to the Court's ruling.

The Court: You may have an exception.

(Objection noted for defendant as
ground of appeal.)

20

FURTHER DIRECT-EXAMINATION by Mr. Leonard:

Q. Do you know whether an alley runs from Second Avenue across the so-called McKenna premises? A. As shown on this map; yes, sir.

By the Court:

Q. Well, have you seen it physically on the property, Mr. Seaman, been there? A. Yes, sir.

30 Q. Well, there is such an alley? A. Yes, sir.

Q. Well, it is used as an alley would naturally and normally be used? A. Yes.

By Mr. Leonard:

Q. And how long has it been used as an alley naturally and normally would be used?

The Court: To your knowledge.

A. Are you speaking of the part that is be-
40 tween McKenna's two tracts? The whole alley

J. Wesley Seaman—Re-direct

goes in from Second Avenue, the alley between the two tracts, that is the dead end of it.

By the Court:

Q. All right. You describe it. I don't care whether it is between the dead end or from the street or where. Describe the direction of the
10 alley, where it begins and where it ends. A. It begins at the east line of Broadway Theatre property and extends eastwardly to Second Avenue.

Q. Does not go across the McKenna lot? A. Yes, sir.

By Mr. Leonard:

Q. And how long has it been used? A. Ever since I can remember.

Q. And how long is that? A. Twenty or
20 twenty-five years.

Q. Do you recognize the alley on Exhibit P-16? A. Yes, sir.

Q. Now, would you point out to the Court and jury by running your pencil over the same alley that you described a moment ago as having been used for a period of twenty or twenty-five years. A. Starts at Second Avenue and runs westerly to the Broadway Theatre.

Q. All the way across to the Broadway Theatre
30 property? A. Yes.

Q. Now, would you describe the other boundary line, the northerly boundary line of the alley? A. This is the north boundary line of the alley.

Q. Does that run all the way to the Broadway Theatre? A. Yes, from Second Avenue to the Broadway Theatre property. I have a copy of the original map.

40

J. Wesley Seaman—Re-cross, Re-direct

RE-CROSS-EXAMINATION by Mr. Drewen:

Q. Mr. Seaman, when you speak of this as an alley, you mean to say that you continue, once you get on the McKenna property, you continue to original alley lines, don't you? Because you
10 said before this alley is not fenced in, for when you get through between those two buildings you are out on the open plot of ground, aren't you?
A. The same as the property to the east of it.

Q. This is not built up at all, is it? A. No, sir; that is vacant.

Q. Is this vacant up here? A. It is built up now.

Q. It is built up now? A. Yes, sir.

20 Q. That is where the stores back of this line, is it? A. Yes, sir.

Q. McKenna owned all this tract at one time, didn't he? A. Yes, sir; I believe he did.

Q. McKenna laid this alley out, didn't he, up to this point here, which I have marked with my pencil and with an X? A. I don't know, sir.

Q. You don't know that? A. No, sir.

RE-DIRECT EXAMINATION by Mr. Leonard:
30 ard:

Q. The map in question, is it an official map now used by the City of Long Branch? A. Yes, sir.

Q. Is this book marked Exhibit T for identification a true copy of that map? A. Yes, sir.

Q. And you have already testified that the survey was made by you? A. Yes, sir.

40 Q. And that this copy is a true and accurate copy? A. Yes, sir.

J. Wesley Seaman—Re-direct

Q. And that the survey was a true and accurate survey? A. Yes, sir.

Mr. Leonard: I offer it in evidence.

Mr. Drewen: I object for the same—

The Court: One more question.

10

By the Court:

Q. Does the map show your survey? That map there, does it show your survey? A. Yes, sir.

Q. Is it accurate? A. Yes, sir.

Q. Well, then, you would adopt it as the result of your survey, would you? A. Yes.

Q. Without hesitation? A. Yes.

Q. Because it is accurate? A. Accurate.

20

The Court: It may be marked.

(Objection noted for plaintiff as ground of appeal.)

(Book marked Exhibit D-4.)

By Mr. Leonard:

Q. I show you Exhibit D-4 and ask you to open to the page including, or which includes the McKenna premises. A. Yes, sir (indicating).

30 Q. Does the little alley that you referred to a moment ago as running all the way from Second Avenue clean through to Broadway Theatre appear on that map? A. Yes, sir.

Q. Does it appear on that map as running entirely from Second Avenue to the Broadway Theatre? A. Yes, sir.

Q. Would you point out to us where that running appears? Point out to the jury. Where is Broadway? A. This is Second Avenue. The 40

J. Wesley Seaman—Re-cross

alley begins at Second Avenue and extends westerly to this point, which is the east line of the Broadway Theatre property and the west line of what was known as the McKenna property.

Q. And where is the Broadway line of the McKenna property now? A. McKenna owns those two lots there.

Q. And his easterly line extends where? A. From Broadway southerly to the alley. I understand that McKenna owns the tract south of the alley fronting on Belmont Avenue.

Q. And draw a line along that.

(Witness complies.)

20 RE-CROSS-EXAMINATION by Mr. Drewen:

Q. You don't know whether that is shown on the Denyse official map or not, do you? A. Yes.

Q. Didn't you tell the Court a moment ago that you had never seen the Denyse official map? A. I have a copy of it, obtained by my office.

Q. I am not talking about copies, Mr. Seaman, I am talking about the Denyse official map. You can't say now, can you, whether or not it is shown on the Denyse official map. You can't say now, 30 can you, whether or not it is shown on the Denyse official map? If the answer is no, please let us have it. A. Well, I don't know.

Q. You don't know? A. No, sir.

Q. Why don't you know? A. Well, I hesitated first because I am not sure. I think I had the original map when this tax map was made and I put it in my field book, a copy of it.

Q. The original map you put in the field book? 40 A. A copy of it, yes.

Q. Let's get away from copies and talk about

J. Wesley Seaman—Re-cross

the original official Denyse map. Can you tell us whether or not this alley is shown in that official Denyse map? A. It was obtained by my office. I didn't see the original the other day.

Q. So you don't know; you have never seen the original, then? A. I wouldn't be sure, but I 10 think I have. I will change my testimony.

Q. You will change your testimony? A. Yes.

Q. What makes you think so? What makes your change your testimony? A. Because I have them on my field book and on my tax map.

Q. You knew that before? A. Yes, I knew.

Q. That didn't cause you to change your testimony, did it? A. Well, in studying the thing over. It is several years ago. 20

Q. When did you think it over? A. I have been thinking it over since I gave my testimony here two or three months ago.

By the Court:

Q. Under the probing of counsel? A. No, I have been thinking the thing over.

By Mr. Drewen:

Q. But maps or no maps, Mr. Seaman, you don't know anything about the title of that alley, 30 do you? A. No, sir.

Q. You can't tell who owns it, whether McKenna owns it or whether somebody else owns it? A. No.

By the Court:

Q. But you do know for twenty-five years it has been used as an alley? A. Yes, drive in from Second Avenue.

Q. And used by whom? A. Well, the people 40 who owned property on that alley.

J. Wesley Seaman—Re-cross

Q. You have seen them going in and out? A. Oh, yes.

The Court: Anything more now, gentlemen?

10 By Mr. Drewen:

Q. You have already testified, as I understand it, that the McKenna property lies to the north of this alley, as you call it, and also to the south. A. Yes, sir.

Q. I thought I heard you, but my associates evidently didn't. Mr. Seaman, I call your attention to the description by metes and bounds that is set forth in paragraph 1 of the first count of the amended complaint filed in this present suit, and ask you if you will kindly read that description.

Mr. Leonard: If I may anticipate Mr. Drewen's question, if the Court please, I object to any reference being made to a count that your Honor has stricken out on my motion.

The Court: The first count was stricken.

Mr. Drewen: But it is referred to in each count throughout the complaint, the description.

The Court: It is referred to?

Mr. Drewen: Surely.

The Court: It is referred to in each count?

Mr. Drewen: Certainly.

Mr. Leonard: Let's see if it is.

The Court: Well, gentlemen, why refer to the complaint at all? Eliminate that complaint from the question and say, "I

Leon C. Cubberly—Direct

show you a description and ask you if you recognize it."

Mr. Drewen: That is a good suggestion.

Q. I show you a description of property by metes and bounds and ask you if you recognize it. A. Yes, sir. 10

Q. That is the description of the McKenna property, is it not, Mr. Seaman? A. I understand that is what he owns, yes.

Q. And that description includes a portion that you have testified to as the alley that goes over his land? A. Yes.

20

LEON C. CUBBERLY, sworn for defendant.

Direct-examination by Mr. Leonard:

Q. Mr. Cubberly, you live where? A. Long Branch.

Q. Lived there for how long? A. All my life.

Q. And what is your business? A. Architect.

Q. How long have you been an architect? A. Thirty years.

Q. Do you know the McKenna premises? A. Yes, sir. 30

Q. In your activity as an architect, Mr. Cubberly, are you able to ascertain by the observation of an excavation how much earth has been removed from that excavation in terms of yards? A. Yes, sir.

Q. Did you ever make such an observation with regard to the McKenna property? A. Yes, sir.

Q. And did you find there any excavation? A. Yes, sir. 40

Leon C. Cubberly—Direct

Q. And did you ascertain or did you endeavor to ascertain how much earth had been removed from such excavation? A. Yes, sir.

Q. And did you succeed in determining how much earth was removed? A. I figured it out.

10 Q. And give us your figures. A. I have them there on my plan.

(Plan produced and handed to witness.)

Q. When were the notations made? A. About the time they took up the question of this trial.

Q. When was the observation made with reference to the time you put down your figures? A. Recent to that date.

20 Q. Are you able to give the figures without referring to any memoranda? A. I don't recollect them at the present time.

Q. Using any memoranda that you desire to refresh your memory, will you tell us how many cubic yards—

Mr. Drewen: Before you do that will you let me ask him some questions?

The Witness: This is not the map, Mr. Leonard.

30 (Another map produced by Mr. Leonard.)

The Witness: This is not the one.

(Another map produced.)

Q. Is this it? A. Yes.

Mr. Drewen: May I cross-examine this witness as to his qualifications to give us these figures?

40 The Court: Yes, I will let you qualify him.

Leon C. Cubberly—Cross

CROSS-EXAMINATION by Mr. Drewen:

Q. Mr. Cubberly, did you make this map? A. The one I have?

Q. Yes. A. Yes, sir.

Q. You personally? A. Personally.

Q. When you say you made it recent to the 10 taking of the observation, what do you mean by that? A. The calculations.

Q. You made the calculations recent to making the observations; is that it? A. The calculations were made at the time this trial came up.

Q. And how long after you went there and saw the premises did you make the calculations? A. At the time.

Q. And how long after you made the calcula- 20 tions did you make this map? A. Made the map before.

Mr. Leonard: I thought this cross-examination had to do with the man's qualifications. I offered no map in evidence.

Mr. Drewen: No, but you are having him read from the map.

Mr. Leonard: Using his memoranda to refresh his memory.

The Court: Merely to refresh his mem- 30 ory, that is all. He has testified he couldn't give the figures out of his head.

Q. Now, Mr. Cubberly, how did you determine the natural grade of this property—

The Court: That is cross-examination. He may answer this question, Mr. Leonard.

Leon C. Cubberly—Cross

By the Court:

Q. Give the figures. A. 650 yards.

Q. Cubic yards or yards? A. Cubic yards.

Q. Cubic yards? A. Yes, sir.

Q. To what depth does that involve? A. An
10 average of three feet.

By Mr. Drewen:

Q. How many cubic yards, 650, you say? A.
Yes.

Q. How did you determine, Mr. Cubberly, the
natural grade of this property before the sur-
veys were made? A. By elevations which I had.

Q. Where did you get those from? A. At the
time they built the Broadway Theatre building.

20 Q. Well, you didn't take elevations covering
the area in which the present excavation was
made, did you? A. Yes.

Q. Why would you do that in connection with
the Broadway Theatre? A. We had to determine
the curb and the grade to establish the new floor
line of the stage, which was our starting point.

Q. Well, this excavation that you now speak
of and which you make the subject of this map
here, that fronts, so to speak, on Broadway,
30 doesn't it? A. Yes.

Q. It is in the rear of the lunch wagon and to
the east of that? A. Yes.

Q. How far south did you go, did the excava-
tion go after you made the excavation? A. The
excavation went about to the alley in some por-
tions.

Q. That is this dotted line alley that is shown
on this sketch in evidence? A. Yes.

40 Q. Did the excavation go over to the easterly

Leon C. Cubberly—Cross

line of the McKenna property, east of the lunch
wagon? A. Yes.

Q. Now, as to what was done either in the re-
moval of topsoil or in the making of excava-
tions to the south of this so-called alley, you don't
know, do you? A. I don't think there were any. 10

Q. You don't know, do you? A. No.

Q. Well, when you say you don't think there
were any, you don't think there were any excava-
tions? A. Well, I was more or less on the
property from the time we built the Broadway
Theatre until the present time and to my knowl-
edge there had been nothing taken off the rest of
the lot.

Q. When was the Broadway Theatre built? A. 20
1912. That is, I started the plans in 1912. I
think it was finished during the year 1912.

Q. Well, when you say that you have been on
there more or less, I think you said, what would
keep you on there up to the present time?

Mr. Leonard: Objected to as not the
proper subject of cross-examination, not
touched upon in direct.

The Court: It goes to the credibility of
the witness. 30

(Objection noted for defendant as
ground of appeal.)

Q. I will repeat it. What was there to keep
you on these premises, Mr. Cubberly, from 1912
to the present time, that is, sixteen years? A.
Making plans for Mr. Reade for various build-
ings and various properties.

Leon C. Cubberly—Cross

Q. Well, now, that would not require you to be there constantly, so as to see what was being done in the way of removal of topsoil, for example? A. Not constantly, no; on and off.

10 By the Court:

Q. But you knew the property, lived in Long Branch all your life? A. Passed it by most every day.

Q. Familiar with it? A. Yes, sir.

Q. Anything that happened to it, you would observe it? A. Yes.

Q. Do you know that alley they talk about? A. Yes, sir.

20 Q. How long have you known it? A. Since the time when we started the Broadway Theatre.

Q. Who used that alley, do you know? A. Oh, adjacent property owners.

Q. You saw them using it? A. Yes, sir.

The Court: Proceed.

By Mr. Drewen:

Q. Mr. Cubberly, did you draw plans for a building to cover this tract that is now in suit?

30 Mr. Leonard: That is objected to as not touched upon in direct-examination and not a proper subject for cross-examination; and moreover, for the reason that it is immaterial to this case.

The Court: Yes, either one of them is good.

Mr. Drewen: I will reframe the question.

40 Q. Mr. Cubberly, the plans that you made, you say you made them for Mr. Reade or the Reade

Leon C. Cubberly—Cross

corporation, I don't know which, for buildings on those premises, is that right?

Mr. Leonard: Objected to for the same reason.

The Court: It is not proper cross-ex- 10 amination.

Mr. Drewen: I can make Mr. Cubberly my witness, can't I?

The Court: Sure.

Mr. Leonard: I submit that he may do so only in rebuttal, or at least he should. It is in the Court's discretion.

The Court: You had better leave that subject alone for the time being. Go on.

Mr. Leonard: I guess this is the sand. 20

The Court: You offer the sand, do you?

Mr. Leonard: Yes. I haven't seen it. Do you object to its going in?

Mr. Drewen: No.

The Court: It may be marked as an exhibit.

(Sand marked Exhibit D-5.)

Mr. Drewen: I think Mr. Leonard ought to indicate what part of this land it was taken from, then I won't have any objec- 30 tion.

The Court: Well, Mr. Parker testified it was taken from behind the lunch wagon, and also Mr. Byram, but it was taken out of the excavation.

Mr. Drewen: That answers the question.

Recess till 12:50 P. M.

40

Exhibits Offered in Evidence

Trial of the cause resumed at 12:50 P. M.

10 Mr. Leonard: May I have marked for identification what purports to be the state of the case in the Court of Errors and Appeals between Walter Reade, complainant, and Thomas B. McKenna, defendant, printed by the Court Press?

The Court: I suppose there is no objection, really, to the record. It is in convenient form, is all. We had the original record here from the Court of Chancery.

20 Mr. Leonard: I am not going to offer the whole record, I don't propose to do that. I mean a part of the testimony, just one portion of it.

Mr. Drewen: What do you mean you are going to offer one portion of the testimony?

Mr. Leonard: Or all of it if you desire. I am not interested in—

The Court: You may state the purpose of your offer. Why do you offer it?

30 (Paper marked Exhibit U for identification.)

Mr. Leonard: I wish to offer a portion of page 83 of this record marked U for identification, in that it contains what seems to be an admission on the part of the plaintiff. The portion to which I refer begins at line 10.

40 The Court: That is upon the theory that the plaintiff was not entitled to possession of the property at the time of the

Exhibits Offered in Evidence

institution of this suit, the theory being at that time that the property had been sold for taxes and certain certificates of tax sale had been issued?

Mr. Leonard: No, sir.

The Court: What is the point? 10

Mr. Leonard: Line 10, page 82.

The Court: Well, I assume there is no objection as to that.

Mr. Drewen: Well, of course, there probably is not, but I do not like the idea of Mr. Leonard picking out one portion of the testimony and offering it in evidence.

The Court: No question the proper way to go about it, Mr. McKenna should have 20 been called and his attention should then have been directed to any testimony given the Chancery suit, for the purpose of contradiction, and using it merely as affirmative evidence of an admission without laying a proper foundation seems to be an irregular way of getting at it.

Mr. Leonard: Does not the rule as to laying a proper foundation apply only 30 where the person is a witness and not a party? My understanding of the rule is that where a party makes a record that that is an admission and that no foundation need be laid, and that a foundation need be laid only when the person who is about to be contradicted is a witness in the case. That was my reason for stating this as an admission.

The Court: No, I think the proper way 40

Exhibits Offered in Evidence

to get at that would be to call Mr. McKenna and direct his attention to page 82 of the record of the Chancery Court and read it to him and say, "Did you say this?" Then I think you could use it as an admission.

10 Mr. Leonard: There is no suggestion that the record is not a true record of the proceedings below, is there, Mr. DREWEN?

Mr. DREWEN: None whatever.

Mr. Leonard: I offer page 82 of the record, lines 10 to 29.

The Court: Is there objection?

Mr. DREWEN: Yes, there is, for the reasons stated.

20 The Court: I think in the circumstances it is an irregular way to get in an admission. The objection is sustained, and I will allow you, Mr. Leonard, in order that you may take no prejudice at all by reason of the Court's ruling, to call Mr. McKenna and call his attention to it.

(Objection noted for defendant as ground of appeal.)

30 Mr. Leonard: There has already been offered in evidence a complete record of the Court of Chancery, has there not?

The Court: The file?

Mr. Leonard: And in lieu of the original file we are to substitute the opinion of the court and the final decree as appears where?

Mr. DREWEN: In this record (referring to Exhibit U for identification).

40 Mr. Leonard: The opinion of Vice-

Exhibits Offered in Evidence

Chancellor Berry having then been already offered in evidence by the plaintiff and the final decree having already been offered, may I be permitted to spread upon the record the last paragraph of the opinion at this time, so as to make the chronology of 10 the presentation of the case?

Mr. DREWEN: It is all in the record now.

Mr. Leonard: I ask leave of the Court to read it. (Reads. "I shall therefore advise a decree dismissing the bill of complaint; but as defendant—"); it is admitted that Mr. McKenna was the defendant in this suit, is it not?

The Court: Yes, that is true.

Mr. Leonard: "But as defendant has offered to return to complainant the \$5,000 deposited on the execution of the contract, the decree will so provide."

And I am referring to that portion of the decree having to do with the \$5,000; "It is further ordered, adjudged and decreed that the defendant Thomas B. McKenna, do pay to the complainant (the complainant being Walter Reade, it is admitted) or his solicitors, within sixty days from the date hereof, the sum of \$5,000 representing a return of the deposit referred to in the contract hereinabove more particularly set forth, and that said sum and the same is hereby declared to be, a lien upon the following lands and premises mentioned and described in said contract, that is to say:" and the description of the land follows. 40

Walter Reade—Direct

WALTER READE, sworn for defendant.

Direct-examination by Mr. Leonard:

Q. Mr. Reade, you are the defendant in this action? A. Yes, sir.

10 Q. And you live where? A. New York City.

Q. Has Mr. McKenna ever returned to you the \$5,000 which he was directed so to do by the decree of the Court of Chancery which I have just read? A. No, sir.

Q. I show you a deed marked Exhibit D-1 and ask you if you recognize the premises described in it as premises belonging to the Broadway Theatre, Inc.? A. Yes, sir.

20 By the Court:

Q. And to your knowledge, is the Broadway Theatre, Incorporated, still the owner of that property? A. Yes, sir.

Q. What is your relation to the Broadway Theatre? A. I am president of that corporation.

Q. Therefore your knowledge is based upon your official association with the company? A. Yes, sir. I have the stock in my safe, some of it.

30 By Mr. Leonard:

Q. And by what company or by what individual was the Broadway Theatre operated? A. Operated by the Broadway Theatre Company.

Q. And was it operated by the Broadway Theatre Company in 1916, the time when this deed was given to the Broadway Theatre Company? A. Right after.

40 Q. And has it been operated by the Broadway Theatre Company ever since? A. Ever since; yes, sir.

Walter Reade—Cross

Q. Do you know where Mr. McKenna's property lies? A. Yes, sir.

Q. Did you ever remove any earth or topsoil from those premises? A. No, sir.

Q. Did any one in your employ or at your request or express direction ever remove any earth or topsoil from Mr. McKenna's premises? A. No, sir. 10

CROSS-EXAMINATION by Mr. Drewen:

Q. Mr. Reade, the contract that was made with Mr. McKenna for the purchase of this McKenna property was made by your personally, wasn't it? A. No. It was executed by me personally; it was made by a lawyer by the name of Saul J. Barron between McKenna and myself. 20

Q. But the parties to it were Walter Reade and Thomas P. McKenna? A. Yes, sir.

Q. And so far as that contract is concerned, the only parties to it were yourself and Mr. McKenna? A. Yes, sir.

Q. The Broadway Theatre Corporation operates the theatre that is adjoining the property that is the subject of this suit, doesn't it? A. Yes, sir. 30

Q. And Mr. Reade, you own the corporation, do you not? A. No, sir.

Mr. Leonard: That is objected to, if the Court please.

Mr. Drewen: It was answered long ago.

The Court: He said no.

Mr. Leonard: There can't be a corporation sole in New Jersey except the Chancellor. 40

Walter Reade—Cross

Q. You have control of the Broadway Theatre Corporation, do you not, Mr. Reade? A. I have.

Mr. Leonard: Objected to as immaterial, if the Court please.

10 The Court: I am going to let him answer.

(Objection noted for defendant as ground of appeal.)

A. I have never had a share of the stock of the Broadway Theatre Company until about four months ago. That stock in its entirety has been in the estate of Henry Rosenberg. I bought it from them in its entirety about four months ago.

20 Q. Well, prior to four months ago you personally never owned a share of stock in the corporation? A. No, sir.

Q. I simply wish to get it clear. How long is it since the theatre itself has been known as Reade's Broadway Theatre?

Mr. Leonard: Objected to as immaterial.

The Court: It is cross-examination. He may answer.

30 A. Oh, I don't remember. Maybe two or three years ago.

Q. Wasn't it always known as Reade's Broadway Theatre? A. Oh, no.

Q. You say no? A. No.

Q. How did it come to be known three years ago as Reade's Broadway Theatre?

Mr. Leonard: Objected to on the same ground.

40 The Court: He may answer.

Walter Reade—Cross

Mr. Leonard: Immaterial, no way to prove ownership.

A. The industry that I was connected with in the operation of theatres grew to such a large extent that I adopted the trade-mark of Reade and put it on every premises that I was connected with in any capacity whatsoever, manager, director, owner and so forth. 10

Q. Well, were you connected with this theatre at that time? A. Oh, yes.

Q. How long had you been prior to the adoption of this trade name? A. Since the day it was built.

Q. And that was back in 1912 or thereabouts?

A. Yes, sir. 20

Q. What was the nature of your connection with the theatre from its beginning in 1912? A. I worked there for my father, Henry Rosenberg, as manager.

Q. And that was your connection with it? A. Yes, sir.

Q. And you continued to be manager until when? A. Until today.

By the Court:

Q. Still are? A. Still am. 30

By Mr. Drewen:

Q. But you have become other things in addition to manager, Mr. Reade? A. I have since acquired the stock from the estate, about four months ago.

Q. And you now own the majority of the stock, at least you have for the past four months? A. Yes, sir. 40

Walter Reade—Cross
Motion for the Direction of a Verdict

Q. And at the same time that you embrace this theatre enterprise in your name, do you say that you did it with all the other theatre enterprises that you were connected with? A. Yes.

10 Q. As manager? A. Yes, sir.

Q. You were connected with quite a number as manager at the same time and they all took upon them the name Reade's Theatre at the same time? A. Yes, sir.

Q. And that, you say, was about how many years ago? A. About three years ago.

Q. Can you tell us whether or not it was before or after this contract was made between you and
20 McKenna? A. Long before.

Both sides rest.

MOTION FOR DIRECTION.

Mr. Leonard: I move for the direction of a verdict in favor of the defendant for, among other things, the grounds submitted on my motion for a nonsuit. It seems, I suppose, unnecessary to
30 repeat those motions. I have other grounds in addition to the grounds offered at the time on the motion for nonsuit, which grounds I should like to adopt at this time.

The Court: They will be considered as repeated.

Mr. Leonard: And will your Honor rule separately?

The Court: Well, I will deny your motion for
40 a direction of a verdict on the grounds advanced

Motion for the Direction of a Verdict

for the nonsuit, if that is what you mean, and you may have an exception.

(Objection noted for defendant as ground of appeal.)

Mr. Leonard: Now, I move for a direction up- 10
on the ground that there is no evidence upon the record showing a trespass on the part of this defendant. In other words, there are no facts to support the allegations contained in the fourth count of the complaint as amended. Indeed, there is testimony from the plaintiff himself that would absolutely preclude an action for trespass lying for this reason: that this question was asked the
20 plaintiff: "Is it true, as you allege in your fifth count, that the defendant, by permission of the plaintiff, held and enjoyed the lands and premises described in the first count from the 10th day of June, 1925, to the 10th day of June, 1927?" And he said, "Yes." Now, if the defendant held the land for that period of time with the permission of the plaintiff there certainly can be nothing to support the fourth count, which is in trespass.

The Court: I will hear what you have to say. 30
(Mr. Drewen replies.)

(After argument.)

The Court: I shall deny Mr. Leonard's motion for a direction for the ground last stated, in view of the evidence in the case as a whole, not merely the isolated question that is the basis for this motion, coupled with the answer.

(Objection noted for defendant as ground of 40
appeal.)

Motion to Strike Out

Mr. Leonard: And for the same reason I move to strike out the fourth count.

The Court: That relates to the trespass?

Mr. Leonard: That relates to the trespass.

The Court: The motion is denied. You may
10 have an exception.

(Objection noted for defendant as ground of appeal.)

Mr. Leonard: I move to strike out all testimony relating to the alleged removal of topsoil or earth by the defendant upon the ground that they have not connected such removal directly or indirectly with the defendant, and therefore have
20 not connected in accordance with the assurance that they gave in open court that the name of the defendant would be connected with such removal. On the contrary, it appears that when we learn the only ones who did remove it were men who removed topsoil from other property entirely.

The Court: Not under the direction of Reade?

Mr. Leonard: And not under the direction of Reade.

The Court: I think in that regard that the
30 case has a circumstantial aspect. It may be that it has not been shown that Reade had any direct connection with the removal of topsoil at all, the testimony being that the lot upon which the stores were erected belonged to Mrs. Reade and that on the west belonged to the Broadway Theatre Company, in which Reade was a mere stockholder at that time, or officially connected with the company as manager, not a stockholder. Now, that
40 is coming to an interesting point to me in this

Motion to Strike Out

case. Mr. Leonard has not yet made his motion but I think it is pertinent to be made. The motion to strike the testimony will be denied.

(Objection noted for defendant as ground of appeal.)

10

Mr. Leonard: May I move to strike any and all testimony relating to the signboards or billboards, upon the grounds that despite the assurance of counsel in open court that such placing on the premises in question would be attributed directly or indirectly to Mr. Reade, and we submit that has not been done.

The Court: The motion is denied.

(Objection noted for defendant as ground of
20 appeal.)

Mr. Leonard: I move to strike out all testimony relating to the alleged use of the property by certain wagons carrying scenery to and from the theatre owned by the Broadway Theatre Company.

The Court: The motion to strike is denied.

(Objection noted for defendant as ground of
30 appeal.)

30

Mr. Leonard: I move also to strike out all the testimony relating to the placing of radiators and the like upon the premises in question by some one, the inference being that they came from buildings under construction on property lying directly to the west of the premises, in that the record now discloses that those premises were then owned and are still owned by Gertrude Reade.
40

40

Motion to Strike Out

The Court: I decline to strike the testimony.
 (Objection noted for defendant as ground of appeal.)

Mr. Leonard: I now move for a direction upon
 10 the ground that the relation of vendor and vendee
 will not permit an action for waste, which action
 is specifically set forth in the fifth and sixth
 counts, and my motion being specifically directed
 to the causes of action therein contained.

The Court: Well, technically speaking, I think
 you would be entitled to that motion, but for the
 fact that an effort was made to amend this com-
 20 plaint to meet the issues and the fact that the
 complaint has retained the use of the word
 "waste" in those counts, which really sound in
 a breach of contract, as I recall, it being the in-
 tention of the court to permit the plaintiff to
 amend so as to charge a breach of contract up to
 June 22, 1925, and a trespass thereafter, until
 such date as the evidence showed possession had
 been surrendered, if indeed there is any evidence
 in the case showing that Reade retained posses-
 30 sion till after June 22, 1925. The only thing in
 the case that might indicate that was the fact
 that he himself filed a bill for specific perform-
 ance.

The motion for a direction, for the reasons
 stated, will be denied.

(Objection noted for defendant as ground of
 appeal.)

Mr. Leonard: I move to strike out both the
 40 fifth and sixth counts, upon the ground that the
 relation of vendor and vendee will not support

Motion for the Direction of a Verdict

such actions as are set forth under those respec-
 tive counts.

The Court: I think I shall strike the fifth
 count, which charges practically waste. The
 fourth count charges trespass. (Reads.) I will
 allow that fourth count to stand. The fifth count, 10
 evidently that count is in waste, which in turn is
 predicated upon a relation of landlord and ten-
 ant, and I decline to hold that relation, therefore
 under the evidence in the case I shall strike the
 fifth count.

(Objection noted for plaintiff as ground of
 appeal.)

The Court: The sixth count charges an agree- 20
 ment to purchase, entry thereunder, continuance
 in possession after making the contract, the de-
 fendant abandoned the same, the defendant while
 in possession of said premises committed waste
 thereon and wrongfully took away. Now, I will
 allow you to strike out of this count "waste
 thereon" so that it shall read "Defendant while
 in possession of said premises wrongfully took
 away and removed and converted to his own use
 2,750 yards of topsoil and gravel," and strike 30
 from that count the words "committed waste
 thereon."

Mr. Leonard: I except to your Honor's strik-
 ing out from the sixth count the words "com-
 mitted waste thereon."

(Objection noted for defendant as ground of
 appeal.)

Mr. Leonard: Now, I move generally for a
 direction of a verdict upon the ground that there 40

Motion for the Direction of a Verdict

is no evidence in the case supporting the plaintiff's claims as set forth in the three counts originally remaining in the amended complaint or under the counts remaining after the striking out of any counts on this motion.

10 The Court: You mean connecting the defendant?

Mr. Leonard: No, generally, as a matter of law, that there are no facts to support a cause of action or causes of action as set forth in the remaining counts of the amended complaint.

The Court: The motion will be denied for the reasons stated. You may have an exception.

20 (Objection noted for defendant as ground of appeal.)

Mr. Leonard: I move for the direction of a verdict upon the further ground that there is no evidence to show that the defendant ever went into physical possession of the premises in question.

The Court: The motion is denied. You may have an exception. The court conceives that there is circumstantial evidence here which
30 would warrant that conclusion.

(Objection noted for defendant as ground of appeal.)

Mr. Leonard: I move for a direction upon the further ground that there is no evidence of the measure of damages, upon the ground that assuming the case proceed upon the theory of trespass, the reasonable value of the premises for
40 the period wrongfully occupied would perhaps be the measure of damages. There is no such

Motion for the Direction of a Verdict

evidence upon the record; the only evidence being this: that it is not charged that the defendant ever—it is not charged or is it proven that the defendant ever occupied the entire premises owned by the plaintiff; but on the contrary the uncontradicted proof shows that there was a lease
10 of a portion of the premises. Now, as I conceive the law of this state, it is necessary to show the reasonable rental value of the premises exclusive of the portion so demised and that the difference between the alleged reasonable value and the amount of rents charged is not evidence of the reasonable value of the residue of the premises.

The Court: The motion will be denied. 20

(Objection noted for defendant as ground of appeal.)

The Court: If the counts in question of the matter incorporated in the present motion is supported by the slightest evidence, at least nominal damages would be warranted and prevent the motion in question being granted.

Mr. Leonard: Now, may I again press a motion to the fourth count and move to strike it
30 out, or in the alternative, move for a direction as to the case thereon set forth, that that count, if anything, sounds not in trespass but in trespass on the case; and that trespass on the case will lie only where there has been a physical injury to the freehold.

The Court: That is claimed here.

Mr. Leonard: But not in the fourth count.

The Court: What is in the fourth count? (Ex- 40

Motion for the Direction of a Verdict

amines complaint.) The motion is denied. You may have an exception.

(Objection noted for defendant as ground of appeal.)

10 Mr. Leonard: That if the fourth count—and I might say that the fifth count as well—be deemed counts for trespass *quare clausum fregit*, that that action must be supported either by the facts or the record or by the allegations contained in the respective counts, for the reason that the action of trespass will never lie when the possession was not wrongful, upon the accepted theory underlying trespass that for an
20 action to lie it must always be attended with a breach of the peace.

The Court: The motion is denied for the reasons stated.

(Objection noted for defendant as ground of appeal.)

Mr. Leonard: I move for a direction of a verdict in favor of the defendant upon the ground that the plaintiff has failed to connect the de-
30 fendant in any way with the alleged wrongful possession of the premises in question and has, moreover, failed to connect him in any way with the alleged wrongful removal of the topsoil.

The Court: Now, Mr. Drewen, I will hear you.
(Mr. Drewen replies.)

The Court: I will deny the motion and send it to the jury.

40 (Objection noted for defendant as ground of appeal.)

(The Court and counsel return to the court room.)

CHARGE OF THE COURT.

Gentlemen of the Jury: The plaintiff in this case seeks to recover of the defendant damages for an alleged invasion, unlawfully, of a tract of land owned by him at Long Branch, in this county, plus the deprivation of the use of the property while it is alleged by him that it was oc-
10 cupied by the defendant.

Now, originally when this suit was brought, for the purpose of pleading, apparently, in a comprehensive way a number of what might be termed grounds of action were stated. Some five or six counts were in the original complaint. Well, obviously the issues in the case eventually had to be defined by the court in order that the jury might understand just what the controversy
20 was all about; because you heard during the progress of the trial, in part, at least, a number of motions were made to strike various counts of the complaint, and I may say that they all related to precisely the same controversy between the parties; but for the purpose of meeting the technical situation as to pleading, the matters involved therein were stated in five or six counts. Now that the trial is over it is my duty to state
30 to you that the case is submitted to you to determine as a question of fact on only two counts, and they appear in what is known as the amended complaint which was permitted to be filed by the court. Therefore, you will understand, gentlemen, that in considering this case there are two angles, as I shall call them, which are now involved and with reference to which you must ascertain whether the plaintiff has satisfied you
40 by credible legal evidence—he carrying the bur-

Charge of the Court

den of proof—that the counts now remaining in the complaint are supported thereby.

10 It appears that in May, 1925, these gentlemen entered into a contract in writing whereby the defendant Reade agreed to purchase of the owner McKenna the tract of land in question for a price agreed therein, which, as you have heard, was \$50,000. As is usual in such contracts there was a stipulation that a certain amount on account of the purchase price should be paid. In this case it turned out to be \$5,000, and it was paid by Reade to McKenna; then likewise that at some time further agreed upon in the contract Reade should take the deed to the property and pay the balance of the purchase price.

20 Now it appears that instead of that being done a controversy arose, with which we are really not concerned except as it has some bearing upon the present issues in this case. In any event, on June 22, 1925, McKenna, it appears, tendered to Reade or some person representing him a deed for the property, which Reade, through his representative, declined to accept. It later appears that 30 Reade filed a bill in the Court of Chancery in this state for what is known as a specific performance of the contract, and requiring McKenna to give him a deed. Certain reductions in the purchase price were insisted upon or urged as of right on the part of Reade; but it appears that the Court of Chancery decreed that Reade's failure on the 22d of June, 1925, to take the deed from McKenna was equivalent to a refusal on his part, which re- 40 pudiated the contract, wiped it out, as it were;

Charge of the Court

and therefore the Court of Chancery declined to give Reade a decree requiring McKenna to specifically perform the contract in the manner which he urged and to give him a deed.

10 Now, from that date, namely, June 22, 1925, as found by the Court of Chancery in the litigation indicated, I hold that Reade no longer had any right to occupy or possess the tract of land in question. The relation then had been suspended by a finding of the Court that the contract was breached by Reade's refusal to accept the deed. Now necessarily from that time on, holding as I do as a matter of law, Mr. Reade had no right to occupy the premises and should have surrendered them to McKenna. It appears that after the contract was signed Reade asked McKenna if he might immediately take possession of the premises and McKenna consented. Just why Reade wanted to take possession at that time is not clearly indicated in the testimony, or just why he was buying this land is not clearly indicated in the testimony. The only evidence in the case at all is the suggestion of Cubberly, the architect, that some building operation was eventually con- 20 templated by Reade upon the tract of land in question. Now whether Reade, therefore, in asking McKenna if he might take possession and get started, meant that he wanted to start a building operation which would necessitate an excavation on the premises, I am not at all clear and I am leaving that to you to discover under the evidence. Does it clearly appear by the evidence just why Reade was buying this lot of land? Was it for parking purposes? Was it for the purpose of 30 40

Charge of the Court

putting a building on it? Whatever the purpose may have been you will have to discover from an examination of the evidence yourselves. I say that because it is a circumstance that the jury may consider, that if you believe the testimony on the

10 part of the plaintiff that someone went on the property after the contract was signed and permission for possession was given Mr. Reade and began excavating. Now, whether Reade was responsible for that excavating or not I am unable to say. He says he was not. You heard him deny under oath here today that he had anything to do with it whatever. And therefore if you find in this case as a fact that some corporation or

20 some other person, not Reade, was responsible for the excavation on the lot in question, or indeed, that there was no such excavation on the premises, then I charge you there can be no verdict against Mr. Reade. In other words, that would leave the case in a situation where perhaps they had not sued the right party. And necessarily you must find in this case evidence that would warrant, either directly or of a circumstantial character, the conclusion and the inference of

30 fact that if there was any excavating on that land, if there was any occupation for parking purposes or for signs, that it was done under the direction of Reade. Now, if the evidence fails to satisfy you in that regard there can be no verdict against Reade. I say that because of the rather nebulous situation in which the case, as I see it—in comment—has been left in that regard. It was brought out, for example, on the part of wit-

40 nesses produced by the plaintiff here that a sign

Charge of the Court

was put up; and yet it appears that that sign was put up by employees of the Broadway Theatre Company. It is true it is said to have carried the legend that it was donated by Walter Reade; and you may consider that bit of testimony with regard to its circumstantial bearing upon the issue here. And again it is said that the land was used for parking purposes, apparently in connection, I may say, with patrons of the theatre. But was Reade responsible for that or was the Broadway Theatre Company responsible? Then again it is said that certain radiators were parked, as it were, or placed upon the land. It further appears in that connection that at that time there was a building operation going on on land belonging to Mrs. Reade, not to Reade. Unless you found some evidence in the case that warranted the inference that Reade was responsible for having those radiators placed there of course you could not hold him.

10

20

Now, I have held as a matter of law that from the date of entry by Reade into possession, if he did, with the consent of McKenna, to June 22, 1925, if Reade committed any damage or waste either himself or through his employees or agents, then the right of McKenna to recover would be in the nature of a breach of Reade's contract to take title to the land. Just when that excavating occurred I do not know. I have been unable to discover from the testimony. The complaint alleges that Reade occupied this land from the 10th of June, 1925, to sometime in June or July, 1927. In order to hold Reade you must ascertain first that between the date of the contract, or

30

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Charge of the Court

rather, the time when he went into possession with consent of McKenna, to June 22, 1925, when the Court of Chancery found Reade had breached the contract by declining to take the deed, your right to award any damages in favor of McKenna
10 against Reade must be for something that Reade did.

Now, if he occupied the land then I charge you that the normal and natural damages to McKenna following from his refusal to take the deed would be in the nature of a breach of his contract and would involve depriving McKenna of the use of the land, to be translated into dollars and cents if you find it warranted under the evidence. Then
20 if you find in addition to that that during that period Reade directly or indirectly took any topsoil from the land the measure of damages would be the difference in value of the land before Reade took possession and after the breach of the contract on June 22, 1925.

Now, to ascertain the depreciation in value by the taking of the topsoil you would have the right to consider the value of it; and there has been
30 some evidence pro and con on that subject; some offered in behalf of the plaintiff here at the rate of a dollar a load; then some more to the contrary on the basis of fifty cents a load; and you heard Mr. Byram say today, as I recall, as well as Mr. Parker, that some would be as low as fifteen cents a load. But the significance of the taking of the topsoil has relation to the depreciation in value of the tract of land immediately before the contract
40 and up to the time that it is alleged that Reade breached it on June 22, 1925.

Charge of the Court

Now, there is some evidence here that is offered by the plaintiff to the effect that the use of the land for advertising purposes was worth something. You have a right to take that into consideration so far as McKenna's deprivation of use is concerned. There was no relation of landlord
10 and tenant between McKenna and Reade, because Reade went in as a buyer prospective. And therefore you will understand, I think, what McKenna would be entitled to recover if you find that he was wrongfully deprived of the use of the property in the circumstances by reason of Reade's breach of the contract.

Now, from June 22, 1925, up to some period
20 of time when Reade surrendered possession—and I am not at all clear that Reade was in possession after June 22, 1925, or what he did; actually there was pending litigation in the Court of Chancery covering the period—it is for you to say whether Reade is shown by the evidence to have remained in possession from that date, the breach of the contract, June 22, 1925; I hold that if you find Reade in possession he was there without right
30 and therefore a trespasser, and McKenna would then be entitled to recover what under the evidence you may find he suffered by reason of being deprived of the use of the property, or, as we say, mesne profits, up to the time that either Reade gave up possession, if you find that circumstance in the evidence, or such time as you do find the occupation continued.

Now, as I see it there are those two phases of the case: the right of McKenna to recover against
40 Reade from the time that he went into possession

Charge of the Court

under the contract up to the time that Reade, in accordance with the view of the Court of Chancery, breached the contract, on June 22, 1925; and there the damages recoverable would be for a breach of contract; from that date on to the time
 10 that you find that Reade gave up possession, if you find he was in possession at all, he would be in the nature of a trespasser, and the damages there would be for mesne profits, what McKenna lost by being deprived of the use. And therefore a fair rental value, in the latter aspect, would be the measure; using that term rental, however, not in the sense ordinarily understood, involving the relation of landlord and tenant, but for mesne
 20 profits.

Now, the case is left with you for your consideration. It does appear in the case that Mr. Reade paid \$5,000 under his contract and it has never been returned. And I notice that counsel for him in the opening suggested that the only basis of this suit at all was the fact that McKenna had been directed to return the \$5,000 by the Court of Chancery, had not done so, and therefore to obviate the necessity of returning it this
 30 suit was brought to recover such damages as he might in reduction of the amount that had been paid. In fact, in his complaint as originally drawn McKenna suggests that he be permitted to credit any damages he seeks to recover against Reade on the \$5,000. Now, of course if that has any tendency to make you gentlemen conclude that there was no basis in fact for this suit, or tends to affect the credibility of McKenna, it is
 40 open to you to consider. However, I have en-

Plaintiff's Exceptions

deavored to give you the situation of the case with regard to the law as I see it; and of course whatever I say, being the presiding judge here, becomes the law in the case with regard thereto.

Now, take the case, and if you find that McKenna has proven his case and is entitled to re-
 10 cover damages for the period covered by the complaint as amended, either in the aspect of a breach of contract up to June 22, 1925, and after that if you find Reade under the greater weight of the evidence to have been in possession as a trespasser, then of course you will award such damages as the facts warrant under the rules of law given you. But you will understand that I express no
 20 opinion one way or the other as to what the verdict should be. You endeavor to do justice between these parties.

PLAINTIFF'S EXCEPTIONS.

Mr. Stokes: The plaintiff excepts to that part of the charge in which the Court said "Why was Reade purchasing this tract of land? That is not clear to me and you will have to find that from the evidence." We claim that it was immaterial
 30 why and for what purpose Reade was purchasing the same and it was not a proper subject for the jury's consideration.

2. The plaintiff also excepts to the statement of the Court that there must be something Reade did; thus taking from the jury the right to find that the same was not done by Reade personally but might have been done by his authority and
 40 consent.

Defendant's Exceptions

3. The plaintiff also excepts to the statement of the Court that the value of the topsoil had been testified to by some of the witnesses for the plaintiff as high as one dollar a load. We claim that there was proof of a higher value than one dollar a load that had been testified to by witnesses for the plaintiff.

DEFENDANT'S EXCEPTIONS.

Mr. Leonard: I except in behalf of the defendant to the Court's refusal to charge the single request presented. That the only damages that could be recovered were nominal.

2. I except also to that portion of the charge which reads in substance as follows: "Reade had no right to occupy the premises and should have surrendered them to the plaintiff."

3. The defendant also excepts to those portions of the charge reading in substance as follows: "Whether building operations required excavation; for what purpose was the excavation made; whether Reade is responsible for the excavation is a question for you; you must also consider whether Reade was responsible for the leaving of the radiators on the premises in question."

4. The defendant also excepts to that portion of the charge reading in substance as follows: "If Reade occupied the land it would be in the nature of a breach of his contract."

5. The defendant further excepts to that portion of the charge in which the alleged earth and topsoil was submitted to the jury upon the theory of a breach of contract.

Defendant's Request to Charge

6. The defendant also excepts to that portion of the charge reading in substance as follows: "You must consider also the advertising purposes."

7. The defendant also excepts to that portion of the charge reading in substance as follows: "You must determine if the plaintiff was wrongfully deprived of his premises on the theory of a breach of contract."

8. The defendant also excepts to that portion of the charge reading in substance as follows: "If you find Reade was in possession after June 22, 1925, he was there without right and a trespasser."

9. The defendant also excepts to that portion of the charge reading in substance as follows: "Reade would be a trespasser if he remained after June 22, 1925."

10. The defendant also excepts to those portions of the charge which recited that there are two angles to the case; damages arising before June 22, 1925, upon the theory of breach of contract; and secondly, damages arising thereafter to accrue to the plaintiff if it be found that Reade remained in possession of the property.

11. The defendant excepts generally to the charge because therein there was not submitted to the jury the issues as embraced by those portions of the complaint that remain.

DEFENDANT'S REQUEST TO CHARGE.

If you find for the plaintiff you can find no more than nominal damages.

Exhibit P-1.

BILL OF COMPLAINT.

(Filed Aug. 21, 1925)

IN CHANCERY OF NEW JERSEY, *To the Honorable*
10 *Edwin Robert Walker, Chancellor of the*
State of New Jersey:

The complainant, Walter Reade, of the Borough of Deal, in the County of Monmouth, State of New Jersey, respectfully shows:

1. That on May 9th, 1925, Thomas P. McKenna of the City of Long Branch, County of Monmouth, State of New Jersey, entered into a certain contract in writing, a copy of which is here-
20 unto annexed and made a part hereof, whereby he agreed to convey to complainant, for the sum of Fifty Thousand (\$50,000.00) Dollars by deed which shall contain the usual full covenants and warranty, on May 25, 1925, all that certain land and premises described in said annexed contract. The said contract, after having been duly acknowledged, was recorded in the Register's Office of said County of Monmouth.

30 2. That Five Thousand (\$5,000.00) Dollars of the consideration for said lands as mentioned in paragraph one hereof, was duly paid by complainant to the said Thomas P. McKenna upon the execution and delivery of said contract.

40 3. Since the execution of the said contract, complainant has had an examination of the title made, and has discovered that at the time of the signing of the said contract, and ever since there-

Exhibit P-1

after, that the said Thomas P. McKenna was not seized of the whole tract, and that there were numerous outstanding liens and encumbrances against the same.

#4. That the time for closing had been ex-
#2 10 tended from time to time to enable Thomas P. McKenna to clear up the questions in said title.

5. That the said Thomas P. McKenna is of full age.

6. Complainant is desirous of obtaining a conveyance of the lands and premises contracted to be conveyed to him as aforesaid.

7. That the said Thomas P. McKenna has re-
20 fused and still refuses to convey to complainant the said lands and premises contracted to be conveyed to him as aforesaid.

8. That the complainant has been and is ready, able and willing to perform said agreement on his part.

Complainant is without adequate remedy in the Courts of Law and therefore prays:

a. That Thomas P. McKenna who is the de-
30 fendant to this suit, may answer this bill of complaint and each statement therein made.

b. That the said Thomas P. McKenna may be decreed specifically to perform the said agreement, entered into by the said Thomas P. McKenna with complainant, the complainant tendering himself ready and willing and hereby offering specifically to perform the said agreement on his part.
40

Exhibit P-1

c. That a writ of subpoena may issue, commanding said defendant to answer this bill of complaint and to abide by such decree as the Court may make in the premises.

10 d. That complainant may have such other and further relief in the premises as the nature of the case may require.

STEIN, STEIN & HANNOCH,
Solicitors of Complainant.

#3 #THIS AGREEMENT made the 9th day of May, 1925, between THOMAS P. MCKENNA, of the City of Long Branch, County of Monmouth, State of New Jersey, hereinafter described as the seller, and WALTER READE, of Asbury Park, New Jersey, hereinafter described as the purchaser,

20

WITNESSETH

The seller agrees to sell and convey, and the purchaser agrees to purchase, all that certain plot, piece or parcel of land hereinafter particularly described, situate, lying and being in the City of Long Branch, County of Monmouth, State of New Jersey, and more particularly bounded and described as follows:

30

BEGINNING at a point on the south side of Broadway at the northeast corner of property belonging to the party of the second part adjoining the property herein described, thence -1- southwardly along lands of the party of the second part about 230

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Exhibit P-1

feet to the northwest corner of lands now or formerly Vannote, thence -2- eastwardly along said Vannote land about 60 feet to a corner, thence -3- southwardly along said Vannote land about 80 feet to the north side of Belmont Avenue, thence -4- eastwardly along said north side of Belmont Avenue about 60 feet to an alley, thence -5- northwardly along the west side of said alley about 197 feet to the south side of another alley, thence -6- westwardly along the south side of said last mentioned alley about 70 feet, thence -7- northwardly about 118 feet to the said south side of Broadway, thence -8- westwardly along the said south side of Broadway, 50 feet to the point of Beginning.

10

Together with the rights accruing to the said premises in said alleys.

SUBJECT, however, to a lease to one William E. Kitchell, dated January 29th, 1925, and expiring on January 23rd, 1926.

20

The price is Fifty thousand (\$50,000) Dollars payable as follows: Five thousand (\$5,000.) Dollars on the signing of this contract, the receipt whereof is hereby #acknowledged. Twenty thousand (\$20,000.) Dollars in cash or certified check on the delivery of the deed, as hereinafter provided. Twenty-five thousand (\$25,000.) Dollars by the purchaser or his assigns executing a bond in that amount, secured by a purchase money mortgage on the above described premises,

30

#4

40

Exhibit P-1

Endorsed:

M.

58/718

10 IN CHANCERY OF NEW JERSEY

Between	}
Walter Reade	
Complainant	
and	
Thomas P. McKenna	
Defendant.	

20

On Bill Etc.
Bill of Complaint

Stein, Stein & Hannoeh, Solicitors
of Complainant,
#31 Clinton St.,
Newark, N. J.

30 I do hereby depute and appoint John R. Gravatt my Special Deputy to serve and execute the within writ.

Witness my hand this 29th day of August A. D. 1925.

JOHN H. VAN MATER
Sheriff.

40

Exhibit P-1

RETURN

Duly and personally served a true copy of the within Chancery Subpoena upon Thomas P. McKenna August 29, 1925, at his home No. 145 Morris Avenue, City of Long Branch, County of Monmouth, New Jersey. 10

JOHN H. VAN MATER
Sheriff.

Per John R. Gravatt
Special Deputy.
A true Copy
Thomas Barber
Clerk.

NEW JERSEY, to wit, THE STATE OF NEW JERSEY, to 20
THOMAS P. MCKENNA

GREETING: Whereas a bill of complaint has lately been exhibited against you in our Court of Chancery by

(Seal)

WALTER READE

to be relieved touching the matters therein contained.

Therefore, we command you, if 30 you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, on or before the expiration of twenty days from and after the eight day of September, 1925, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

40

Exhibit P-1

WITNESS, his Honor, EDWIN ROBERT WALKER, Chancellor of our said State, at Trenton, the twenty-first day of August, in the year of our Lord one thousand nine hundred and twenty-five.

10 THOMAS BARBER Clerk.
Stein, Stein & Hannoeh Sol'rs.

Endorsed:
M. 58/718

20 In Chancery of New Jersey

Between
Walter Reade Compl't,
and
THOMAS P. MCKENNA Def't. } Sub. ad Resp.

30 Ret'ble September 8th A. D. 1925.
Stein, Stein & Hannoeh, Sol'r.
Filed Sep 8 1925
Received in Monmouth County Sheriff's Office
Aug. 21 1925 at 150 o'clock P. M. 1925.
John H. Van Mater, Sheriff
Sheriff's Fees \$602c/100

Exhibit P-1

ANSWER.

(Filed Sep 29 1925)

IN CHANCERY OF NEW JERSEY

10 Between
WALTER READE, Complainant,
and
THOMAS P. MCKENNA, Defendant. } On Bill, etc. 10

20 Answer of Thomas P. McKenna to the bill of complaint of Walter Reade, complainant.

(1) Defendant admits that on the 9th day of May, 1925, he entered into a contract in writing, copy of which is annexed to the bill of complaint, whereby he agreed to convey to complainant, for the sum of \$50,000.00, the premises described in the bill of complaint; that by said agreement title was to close on the 25th day of May, 1925. He has no knowledge or information sufficient to form a belief as to whether said contract has been recorded in the office of the Clerk of Monmouth County. 30

(2) He admits the allegations of paragraph two.

(3) He denies the allegations of paragraph three.

Exhibit P-1

10 (4) He denies the allegations of paragraph four that the time for closing was extended from time to time to enable this defendant to clear up the questions of said title, but that on the contrary this defendant does allege that on each occasion when an extension was granted it was at the especial request of the plaintiff.

(5) This defendant admits the allegations of paragraph five.

(6) This defendant admits the allegations of paragraph six.

20 (7) This defendant denies the allegations of paragraphs seven and eight of the bill of complaint.

#2 #Further answering the complainant's bill of complaint, this defendant says:

30 (1) That on the 22nd day of May, 1925, three days before the day named in said contract for the passing of title, this defendant did, at the request of the complainant and the representatives of complainant, sign a stipulation that the time fixed for the passing of title under said contract be extended from May 25, 1925, to June 1, 1925. This defendant does further allege that on the 25th day of May, 1925, he was ready and willing to perform his part of the said contract.

40 (2) On the first day of June, 1925, this defendant was ready at the time and place agreed upon, as aforesaid, between the parties, to perform the said contract on the part of the defendant, but complainant did not attend and did not

Exhibit P-1

offer to perform the said contract on his part, but by his representatives did especially request the defendant to extend the time for the passing of title under said contract from June 1st, 1925, to June 11th, 1925. In accordance with complainant's said request this defendant did so agree. 10

(3) On the 11th day of June, 1925, this defendant was ready at the time and place agreed upon between the parties to perform the said contract on his part, but the complainant did not attend and did not offer to perform the said contract on his part, but did, on the contrary, by his representatives, especially request the defendant further to extend the time for the passing of title from June 11th, 1925, to June 22nd, 1925. In accordance with complainant's said request, this defendant did so agree. 20

(4) On the 22nd day of June, 1925, this defendant was present at the time and place agreed upon for the performance of the said contract, and was then and there ready and willing to perform the same on his part. But the complainant did not attend and did not offer to perform said contract on his part. The complainant did, on 30

the contrary, send to this defendant a messenger with the request that this defendant agree to the further extension of time for the passing of title under said contract. This the defendant declined to do, but did tender to the messenger of complainant, at the time and place agreed upon for the performance of said contract, the performance of said contract on the part of defendant, and did also then and there tender delivery of deed, fully #3 40

Exhibit P-1

executed, and complying in all respects with the terms of said contract.

10 (5) At the time of the making and execution of the original contract, as well as on the occasion of each of the requests made by the complainant, as above set forth, this defendant did expressly state to complainant, and to complainant's representatives, that this defendant did insist upon the prompt performance of said contract by complainant, and that it was essential to defendant by reason of defendant's business and financial obligations, that the said contract be promptly performed. And on the occasion of each request for further extension of time, as aforesaid, the complainant and his representatives did expressly promise and agree with this defendant that such extension was the last that would be requested. Each of said extensions was granted at the special request of complainant, and for reasons which the complainant did not disclose to this defendant.

30 (6) This defendant further shows that at all times from the date agreed upon in said contract for the passing of title thereunder, viz: May 25th, 1925, and until the 22nd day of June, 1925, this defendant was ready, willing and able to perform said contract and convey said title, as the complainant well knew; but the complainant, on the contrary, at no time complied with, or offered to comply with, the terms of the said contract on his part.

40 (7) On the 18th day of August, 1925, the attorney of complainant did again request said defendant to further extend the time for the clos-

Exhibit P-1

ing of title, that is to say, until the 1st #day of September, 1925, which request this defendant declined. #4

10 (8) This defendant doth verily believe, and therefore alleges the fact to be, that during the period between the 25th day of May, 1925, and the 18th day of August, 1925, said complainant had foregone any intention to fulfill the said contract on his part, and had fully conceived the purpose of abandoning the performance thereof, on his part, and did abandon it, and did become in default in his performance thereof. Defendant doth further show that some time early in the month of August, 1925, the realty market in the City of Long Branch did exhibit a sudden activity, with a consequent general enhancement of realty values; that the lands and premises which are the subject of the contract between complainant and defendant became of a value greatly in excess of the price named in said contract. This defendant doth further allege that but for facts occurring subsequent to the complainant's abandonment of his said contract, and his default thereunder, as aforesaid, which facts gave to the land which he had contracted to purchase a value greatly in excess of what he had contracted to pay for it, the complainant would not have sought by this suit to revive his right in said contract. 20 30

(9) Wherefore this defendant alleges and charges the fact to be that the complainant defaulted on his said contract and is not entitled to the specific performance thereof. 40

Exhibit P-1

Wherefore this defendant prays that complainant's bill be dismissed and that said complainant be decreed to pay the costs of the defendant in this behalf most wrongfully sustained; and also, that it be decreed by this honorable Court that the said contract, as set forth in the complainant's bill of complaint be cancelled of record in the Clerk's Office of the County of Monmouth, or wheresoever the same may have been recorded by complainant.

PERKINS & DREWEN,
Solicitors for Defendant.

A True Copy
Thomas Barber
Clerk

20

Endorsed:
M.

58/718

IN CHANCERY OF NEW JERSEY

Between
Walter Reade,
Complainant
and
Thomas P. McKenna,
Defendant. } On Bill, etc.

30

ANSWER.

Perkins & Drewen, Solicitors
for Defendant,
921 Bergen Avenue,
Jersey City, N. J.

40

Exhibit P-1

REPLICATION.

(Filed Oct 7 1925)

IN CHANCERY OF NEW JERSEY

Between
WALTER READE,
Complainant,
and
THOMAS P. MCKENNA,
Defendant. } On Bill, Etc. 10

The complainant joins issue on the answer filed by the defendant herein. 20

STEIN, STEIN & HANNOCH,
Solicitors of complainant.

A True Copy
Thomas Barber
Clerk

Endorsed:
M.

58/718

IN CHANCERY OF NEW JERSEY 30

Between
Walter Reade,
Complainant,
and
Thomas P. McKenna,
Defendant. } On Bill Etc.
Replication. 40

Stein, Stein & Hannoeh, Solicitors
of compl't.

Exhibit P-1

ORDER OF REFERENCE.

(Filed Oct. 24 1925)

IN CHANCERY OF NEW JERSEY

10

Between WALTER READE, Complainant, and THOMAS P. MCKENNA, Defendant.	} On Bill Etc. } 58-718.
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20

It is on this 24th day of October, 1925, on motion of Stein, Stein & Hannoeh, solicitors of the complainant Ordered that the above stated cause be referred to Hon Alonzo Church one of the Vice Chancellors to hear the same for the Chancellor and report thereon to him, and advise what order or decree should be made herein.

E. R. WALKER
C.

30

The above order is consented to:

PERKINS & DREWEN,
Solicitors for defendant.

A True Copy
Thomas Barber
Clerk

40

Exhibit P-1

ORDER OF RE-REFERENCE.

(Filed Nov 12 1925)

IN CHANCERY OF NEW JERSEY

10

Between WALTER READE, Complainant, and THOMAS P. MCKENNA, Defendant.	} On Bill, &c. } 58-718
---	----------------------------

20

It appearing to the Court that the property involved in the above entitled cause is located in Long Branch, New Jersey,

It is, on this 12th day of November, 1925, on motion of Stein, Stein & Hannoeh, Esqs., solicitors of complainant, Ordered that the Order of Reference heretofore entered herein to the Honorable Alonzo Church, be, and the same is hereby vacated, and set aside, and the above stated cause is hereby referred to Honorable M. L. Berry one of the Vice Chancellors, to hear the same for the Chancellor, and report thereon to him and advise what order or decree should be made herein.

E. R. WALKER
C.

30

We consent to the entry of the foregoing
PERKINS & DREWEN
Solicitors of the Defendant

40

A True Copy
Thomas Barber
Clerk

Exhibit P-1

Endorsed:

M.

58/718

IN CHANCERY OF NEW JERSEY

10

Between

Walter Reade,
Complainant

and

Thomas P. McKenna,
Defendant.

20

On Bill, &c.
Order of Re-Reference

Stein, Stein & Hannoeh, Solicitors
of Complainant,
765 Broad St.,
Newark, N. J.

Exhibit P-1

DESIGNATION.

(Filed Dec 1 1925)

IN CHANCERY OF NEW JERSEY

10

Between

WALTER READE,
Complainant,

and

THOMAS P. MCKENNA,
Defendant.

On Bill, &c.
58-718

20

I hereby designate Wednesday the 17th day of
February 1926, at the Chancery Chambers in the
City of Newark, at ten o'clock in the forenoon,
as the time and place for the hearing in the above
entitled cause.

MAJA LEON BERRY
V. C.

We consent to the making of the foregoing des-
ignation

30

STEIN, STEIN & HANNOCH
Solicitors of Complainant
PERKINS & DREWEN
Solicitors of Defendant

A True Copy
Thomas Barber
Clerk

40

Exhibit P-1

Endorsed:
M.

58/718

IN CHANCERY OF NEW JERSEY

10

Between	}
Walter Reade,	
Complainant	
and	
Thomas P. McKenna,	}
Defendant.	

20

On Bill Etc.
Designation

Stein, Stein & Hannoeh, Solicitors
of Compl't.

Exhibit P-1

DESIGNATION.

(Filed Jan 23 1926)

IN CHANCERY OF NEW JERSEY

: 10

Between	}
WALTER READE,	
Complainant,	
and	
THOMAS P. MCKENNA,	}
Defendant.	

On. Bill etc.

: 20

It is on this 23rd day of February, 1926, on motion of Stein, Stein & Hannoeh, solicitors of complainant, Ordered that the above cause be set down for hearing on bill, answer, replication and proofs, at the Chancery Chambers, Prudential Building, Newark, N. J. on April 19th 1926, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard.

MAJA LEON BERRY
V. C. 30

The above order is consented to.

PERKINS & DREWEN
Solicitor of Defendant.

A True Copy
Thomas Barber
(Clerk

40

Exhibit P-1

Endorsed:
M.

58/718

10 IN CHANCERY OF NEW JERSEY

Between

Walter Reade,
Complainant

and

Thomas P. McKenna,
Defendant.

20

On Bill, Etc.
Designation

Stein, Stein & Hannoeh, Solicitors
of Complainant,
31 Clinton Street,
Newark, N. J.

Exhibit P-1

NOTICE OF HEARING.

(Filed Mar 3 1926)

IN CHANCERY OF NEW JERSEY

10

Between

WALTER READE,
Complainant,

and

THOMAS P. MCKENNA,
Defendant.

20

Please Take Notice of the final hearing in the
above entitled cause before Honorable M. L.
Berry, Vice-Chancellor at the Chancery Cham-
bers, Newark, N. J. April 19, 1926, at ten o'clock
in the forenoon, or as soon thereafter as counsel
can be heard.

STEIN, STEIN & HANNOCH
Solicitor of Complainant. 30

A True Copy
Thomas Barber
Clerk

40

Exhibit P-1

Endorsed:
M.

58/718

IN CHANCERY OF NEW JERSEY

10

Between

Walter Reade,
Complainant

and

Thomas P. Mc Kenna,
Defendant.

20

On Bill Etc.
Notice

Stein, Stein & Hannoeh, Solicitors
of Complainant,
31 Clinton St.,
Newark, N. J.

Due service of a true copy of the within notice
30 is hereby acknowledged, this 26 day of Feb 1926

PERKINS & DREWEN
Solrs of Deft.

40

Exhibit P-1

AMENDED BILL.

(Filed May 5 1926)

IN CHANCERY OF NEW JERSEY.

10

*To the Honorable Edwin Robert Walker, Chan-
cellor of the State of New Jersey:*

The complainant, Walter Reade, of the Borough
of Deal, in the County of Monmouth, State of New
Jersey, respectfully shows:

1. That on May 9th, 1925, Thomas P. McKenna,
of the City of Long Branch, County of Monmouth,
State of New Jersey, entered into a certain con- 20
tract in writing, a copy of which is hereunto an-
nexed and made a part hereof, whereby he agreed
to convey to complainant, for the sum of Fifty
Thousand (\$50,000.00) Dollars, by deed which
shall contain the usual full covenants and war-
ranty, on May 25th, 1925, all that certain land and
premises described in said annexed contract. The
said contract, after having been duly acknowl-
edged, was recorded in the Register's Office of
said County of Monmouth. 30

2. That Five Thousand (\$5,000.00) Dollars of
the consideration for said lands as mentioned in
paragraph 1 hereof, was duly paid by complain-
ant to the said Thomas P. McKenna, upon the ex-
ecution and delivery of said contract.

3. Since the execution of the said contract,
complainant has had an examination of the title
made, and has discovered that at the time of the
signing of the said contract, and ever since there- 40

Exhibit P-1

after, that the said Thomas P. McKenna was not seized of the whole tract, and that there were and still are numerous outstanding liens and encumbrances against the same.

10 4. That the time for passing title has been extended from time to time to enable said Thomas P. McKenna to clear up the questions in said title.

#2 #5. Said Thomas P. McKenna has failed and refused, and still fails and refuses to convey to complainant the said lands and premises contracted to be conveyed to him, as aforesaid.

20 6. Complainant has been at all times, and is still ready, able and willing to perform said agreement on his part to be performed.

30 7. Complainant is desirous of obtaining a conveyance of the said lands and premises agreed to be conveyed to him, as aforesaid, or so much of said lands as the defendant, Thomas P. McKenna, shall be able to convey, with an abatement of the purchase price in such sum as shall represent the fair value of such part, interest in or encumbrance upon the title to said mentioned premises, which the defendant cannot convey.

8. Said Thomas P. McKenna was, at the time he entered into the aforesaid contract, and still is, to the knowledge and belief of the said complainant, the husband of Sadie O. R. McKenna, who claims an inchoate right of dower in the premises agreed to be conveyed by the said defendant to the said complainant, by the aforesaid mentioned agreement.

Exhibit P-1

9. Complainant further says that the said defendant fraudulently induced and still continues to fraudulently induce his said wife to refuse to release her alleged inchoate right of dower in said premises to said complainant.

10. Complainant further shows that the heirs-at-law on one Deborah Herbert, who was seized of an interest in said mentioned premises, claims to have some right or interest in the premises mentioned in said agreement. 10

11. Complainant further shows that there are a large number of outstanding and unpaid tax liens upon and against said premises, together with other encumbrances and rights of way over said mentioned premises. 20

#12. Complainant further shows that said defendant, Thomas P. McKenna, is of full age. #3

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That said Thomas P. McKenna, who is the defendant in this suit, may answer this bill of complaint and each statement therein made, without oath, the same being hereby expressly waived. 30

2. That the said Thomas P. McKenna, may be decreed specifically to perform the said agreement entered into by him with complainant, Walter Reade, said complainant tendering himself ready and willing, and hereby offering specifically to perform the agreement on his part.

3. That the said defendant, Thomas P. McKenna, may be further decreed to execute and 40

Exhibit P-1

10 deliver to the complainant, a bond with good and sufficient sureties, as indemnity against the inchoate right of dower of his said wife, the said Sadie O. R. McKenna, in the lands agreed to be conveyed to your complainant, or in lieu thereof, to be ordered and decreed to accept a deduction in the agreed purchase price to be paid by the complainant for said mentioned lands, as compensation for the outstanding inchoate right of dower of the defendant's said wife.

20 4. That, in the event that the said defendant, Thomas P. McKenna shall not be able to convey the premises contracted for, an account shall be taken of the amount and value of any and all outstanding interests, mortgages, liens and encumbrances, and that he may be decreed to convey to complainant, such part and interest in the said mentioned lands, as he shall own and possess, and shall be ordered and decreed to accept therefor, a deduction in the purchase price agreed to be paid by the complainant, for such interests, mortgages, liens or encumbrances, as he shall not be able to convey or discharge.

30 #4 #5. That a writ of subpoena may issue out of this Honorable Court, commanding said defendant to answer this bill of complaint and to abide by such order and decree as the Court may make in the premises.

40 6. That complainant have such other and further relief in the premises as the nature of the case may require.

STEIN, STEIN & HANNOCH
Solicitor for Complainant.

Exhibit P-1

#5 #THIS AGREEMENT made the 9th day of May, 1925, between THOMAS P. MCKENNA, of the City of Long Branch, County of Monmouth, State of New Jersey, hereinafter described as the seller, and WALTER READE, of Asbury Park, New Jersey, hereinafter described as the purchaser, 10

—WITNESSETH—

The seller agrees to sell and convey, and the purchaser agrees to purchase, all that certain plot, piece or parcel of land hereinafter particularly described, situate, lying and being in the City of Long Branch, County of Monmouth, State of New Jersey, and more particularly bounded and described as follows: 20

BEGINNING at a point on the south side of Broadway at the northeast corner of property belonging to the party of the second part adjoining the property herein described, thence -1- southwardly along lands of the party of the second part about 230 feet to the northwest corner of lands of one now or formerly Vannote, thence -2- eastwardly along said Vannote land about 60 feet to a corner, thence -3- southwardly along said Vannote land about 80 feet to the north side of Belmont Avenue, thence -4- eastwardly along said north side of Belmont Avenue about 60 feet to an alley, thence -5- northwardly along the west side of said alley about 197 feet to the south side of another alley, thence -6- westwardly along the south side of said last mentioned 30 40

Exhibit P-1

alley about 70 feet, thence -7- northwardly about 118 feet to the said south side of Broadway, thence -8- westwardly along the said south side of Broadway, 50 feet to the point of Beginning.

10

Together with the rights accruing to the said premises in said alleys.

SUBJECT, however, to a lease to one William E. Kitchell, dated January 29th, 1925, and expiring on January 23rd, 1926.

20 #6

The price is Fifth thousand (\$50,000.) Dollars payable as follows: Five thousand (\$5,000.) Dollars on the signing of this contract, the receipt whereof is hereby #acknowledged. Twenty thousand (\$20,000.) Dollars in cash or certified check on the delivery of the deed, as hereinafter provided. Twenty-five thousand (\$25,000.) Dollars by the purchaser or his assigns executing a bond in that amount secured by a purchase money mortgage on the above described premises, conditioned for the payment of the said Twenty-five thousand (\$25,000.) Dollars, together with interest at the rate of six per cent (6%) per annum, payable semi-annually, on or before two years after the date of the making of the said bond and mortgage. The said principal of Twenty-five thousand (\$25,000.) Dollars shall be payable Five thousand (\$5,000.) Dollars and accrued interest, twelve (12) months after the date of the making of the said bond and mortgage, and the balance of Twenty thousand (\$20,000.) Dollars on or before two years.

30

40

Exhibit P-1

It is understood and agreed that the mortgagor shall have the option to pay off the whole of the said mortgage at any time before its expiration.

Said bond and mortgage shall contain the usual provisions found in a purchase money bond and mortgage. The deed shall be delivered upon receipt of the said payments at the office of Thomas P. McKenna, 42 Broadway (Suite 1744), Borough of Manhattan, City of New York, at 11 o'clock in the forenoon on the 25th day of May, 1925.

10

All sums paid on account of this contract and the reasonable expense of the title to said premises are hereby made liens thereon, and said liens shall not continue after default by the purchaser under this contract.

20

The deed shall be in proper statutory form for record, as provided for under the laws of the State of New Jersey, and shall contain the usual full covenants and warranty and shall be duly executed and acknowledged by the seller, at #the seller's expense, so as to convey to the purchaser the fee simple of the said premises, free from all incumbrances, except as herein stated.

#7

30

The deed shall also convey all right, title and interest of the seller in and to the land lying within the bounds of any public or private street or lane adjoining the property, to the center line thereof.

The stipulations aforesaid are to be applied to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

40

Exhibit P-1

IN WITNESS WHEREOF the parties have here-
unto interchangeably set their hands and seals the
day and year first above written.

THOS. P. McKENNA L.S.
WALTER READE L.S.

10

In the presence of
Acknowledgment by Rose. Berne.
A True Copy
Thomas Barber
Clerk

Endorsed:
M.

58/718

20

IN CHANCERY OF NEW JERSEY

Between
Walter Reade,
Complainant
and
Thomas P. McKenna,
Defendant.

30

On Bill Etc.
Amended Bill

Stein, Stein & Hannoeh, Solicitors
of complainant.

Service of a true copy of the within amended
complaint is hereby acknowledged, this 27 day of
40 April 1926

PERKINS & DREWEN,
Solrs of Deft.

Exhibit P-1

ANSWER TO AMENDED BILL.

IN CHANCERY OF NEW JERSEY

Between
WALTER READE,
Complainant,
and
THOMAS P. McKENNA,
Defendant.

10

On Bill, etc.

The answer of Thomas P. McKenna to the
amended bill of complaint of Walter Reade, com- 20
plainant, says:

(1) Defendant admits that on the 9th day of
May, 1925, he entered into a contract in writing,
copy of which is annexed to the bill of complaint,
whereby he agreed to convey to complainant, for
the sum of \$50,000.00, the premises described in
the bill of complaint; that by said agreement title
was to close on the 25th day of May, 1925. He
has no knowledge or information sufficient to 30
form a belief as to whether said contract has been
recorded in the office of the Clerk of Monmouth
County.

(2) He admits the allegations of paragraph
two.

(3) He denies the allegations of paragraph
three.

(4) He denies the allegations of paragraph 40
four that the time for closing was extended from

Exhibit P-1

time to time, to enable this defendant to clear up the questions to said title, and says, on the contrary, that in each instance when an extension was granted it was at the special request of the complainant.

10

(5) He denies the allegations of paragraph five.

(6) He denies the allegations of paragraph six.

(7) He denies the allegations of paragraph seven.

20

(8) He admits the allegations of paragraph eight.

(9) He denies the allegations of paragraph nine.

(10) He denies the allegations of paragraph ten.

(11) He denies the allegations of paragraph eleven.

30

(12) He admits the allegations of paragraph twelve.

#2

Further answering the complainant's amended bill of complaint, this defendant says:

40

(1) That on the 22nd day of May, 1925, three days before the day named in said contract for the passing of title, this defendant did, at the request of the complainant and the representatives of complainant, sign a stipulation that the time fixed for the passing of title under said contract

Exhibit P-1

be extended from May 25, 1925, to June 1, 1925. This defendant does further allege that on the 25th day of May, 1925, he was ready and willing to perform his part of the said contract.

10

(2) On the first day of June, 1925, this defendant was ready at the time and place agreed upon, as aforesaid, between the parties, to perform the said contract on the part of the defendant, but the complainant did not attend and did not offer to perform the said contract on his part, but by his representatives did especially request the defendant to extend the time for the passing of title under said contract from June 1st, 1925, to June 11th, 1925. In accordance with complainant's said request this defendant did so agree.

20

(3) On the 11th day of June, 1925, this defendant was ready at the time and place agreed upon between the parties to perform the said contract on his part, but the complainant did not attend and did not offer to perform the said contract on his part, but did, on the contrary, by his representatives, especially request the defendant further to extend the time for the passing of title from June 11th, 1925, to June 22nd, 1925. In accordance with complainant's said request, this defendant did so agree.

30

(4) On the 22nd day of June, 1925, this defendant was present at the time and place agreed upon for the performance of the said contract, and was then and there ready and willing to perform the same on his part. But the complainant did not attend and did not offer to perform said contract on his part. The complainant did, on

40

Exhibit P-1

#2

#

10

the contrary, send to this defendant a messenger with the request that this defendant agree to the further extension of time for the passing of title under said contract. This the defendant declined to do, but did tender to the messenger of complainant, at the time and place agreed upon for the performance of said contract, the performance of said contract on the part of defendant, and did also then and there tender delivery of deed, fully executed, and complying in all respects with the terms of said contract.

20

(5) At the time of the making and execution of the original contract, as well as on the occasion of each of the requests made by the complainant, as above set forth, this defendant did expressly state to complainant, and to complainant's representatives, that this defendant did insist upon the prompt performance of said contract by complainant, and that it was essential to defendant by reason of defendant's business and financial obligations, that the said contract be promptly performed. And on the occasion of each request for further extension of time, as aforesaid, the complainant and his representatives did expressly promise and agree with this defendant that such extension was the last that would be requested. Each of said extensions was granted at the special request of complainant, and for reasons which the complainant did not disclose to this defendant.

30

40

(6) This defendant further shows that at all times from the date agreed upon in said contract for the passing of title thereunder, viz: May 25th,

Exhibit P-1

1925, and until the 22nd day of June, 1925, this defendant was ready, willing and able to perform said contract and convey said title, as the complainant well knew; but the complainant, on the contrary, at no time complied with, or offered to comply with, the terms of the said contract on his part.

10

(7) On the 18th day of August, 1925, the attorney of complainant did again request said defendant to further extend the time for the clos-

#

#3

ing of title, that is to say, until the 1st day of September, 1925, which request this defendant declined.

20

(8) This defendant doth verily believe, and therefore alleges the fact to be, that during the period between the 25th day of May, 1925, and the 18th day of August, 1925, said complainant had foregone any intention to fulfill the said contract on his part, and had fully conceived the purpose of abandoning the performance thereof, on his part, and did abandon it, and did become in default in his performance thereof. Defendant doth further show that some time early in the month of August, 1925, the realty market in the City of Long Branch did exhibit a sudden activity, with a consequent general enhancement of realty values; that the lands and premises which are the subject of the contract between complainant and defendant became of a value greatly in excess of the price named in said contract. This defendant doth further allege that but for facts occurring subsequent to the complainant's abandonment of his said contract, and his default

30

40

Exhibit P-1

thereunder, as aforesaid, which facts gave to the land which he had contracted to purchase a value greatly in excess of what he had contracted to pay for it, the complainant would not have sought by this suit to revive his right in said contract.

10

(9) Wherefore this defendant alleges and charges the fact to be that the complainant defaulted on his said contract and is not entitled to the specific performance thereof.

Wherefore this defendant prays that complainant's bill be dismissed and that said complainant be decreed to pay the costs of the defendant in this behalf most wrongfully sustained.

20

COUNTERCLAIM.

By way of counterclaim against the complainant, this defendant says:

(1) He repeats each and every of the allegations hereinabove set forth in the further answer to complainant's amended bill, and makes the

#5

same a part of this counterclaim as fully as if the said allegations were here repeated.

30

(2) Wherefore this defendant prays that it be decreed by this honorable Court that the said contract set forth in the complainant's amended bill be cancelled of record in the Clerk's office in the County of Monmouth, or wheresoever the same may have been recorded by the complainant.

PERKINS & DREWEN
Solicitors for Defendant.

40

A True Copy
Thomas Barber
Clerk

Exhibit P-1

Endorsed:

H. H.

58/718

IN CHANCERY OF NEW JERSEY

10

Between

Walter Reade,
Complainant

and

Thomas P. McKenna,
Defendant.

20

On Bill, etc.
Answer to Amended Bill.

Perkins & Drewen Solicitors
for defendant,
921 Bergen Avenue,
Jersey City, N. J.

Filed June 11, 1926

Exhibit P-1

REPLICATION TO ANSWER TO AMENDED BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY

10 Between
 WALTER READE,
 Complainant,
 and
 THOMAS P. MCKENNA,
 Defendant.

On Bill Etc.

20 The complainant joins issue on the answer to the amended Bill of Complaint.

STEIN STEIN & HANNOCH
Solicitors of Complainant.

A True Copy
Thomas Barber
Clerk

Exhibit P-1

Endorsed:
M.

58/718

IN CHANCERY OF NEW JERSEY

Between
 Walter Reade
 Complainant
 and
 Thomas P. Mc Kenna,
 Defendant.

.10

On Bill Etc.

20

Replication to Answer to Amended Bill of Complaint.

Stein, Stein & Hannoeh, Solicitors
of Complainant, Essex Bldg.,
Newark, N. J.

Filed June 14, 1926

Exhibit P-1

ORDER PERMITTING FILING OF AMENDED BILL, &C.

IN CHANCERY OF NEW JERSEY

10 Between
 WALTER READE,
 Complainant,
 vs.
 THOMAS P. MCKENNA,
 Defendant.

} On Bill &c.

20 The Complainant having applied for leave to file an amended bill and the Court being satisfied to grant his application, upon the terms hereinafter set forth;

It is on this 17th day of April, 1926, on motion of Stein, Stein & Hannoeh, Solicitors of the Complainant,

ORDERED that

30 1. The complainant be and he is hereby permitted to file an amended bill herein.

2. That a copy of said amended bill be served upon the defendant, or his solicitors within five days from the date of filing thereof.

40 3. That the defendant be permitted to answer or otherwise plead to said amended bill within twenty days from the date of service thereof upon him, or his solicitors, and in default thereof that such decree may be entered against him, as the Court shall think proper.

Exhibit P-1

4. That final hearing in the cause be set down for June 17, 1926, at the Chancery Chambers,
 #
 City Hall, Long Branch, New Jersey, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

#2

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E. R. WALKER
C.

Respectfully advised:
 Maja Leon Berry
 V. C.

A True Copy
 Thomas Barber
 Clerk

Endorsed:
 M.

20

58/718

IN CHANCERY OF NEW JERSEY

Between
 Walter Reade,
 Complainant
 and
 Thomas P. Mc Kenna,
 Defendant.

30

On Bill Etc.

Order Permitting Filing of Amended Bill.

Stein, Stein & Hannoeh, Solicitors
 of Complainant,
 Essex Bldg., Newark, N. J.

40

Filed Jul 26 1926

Exhibit P-1

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY

10

Between

WALTER READE,

Complainant,

and

THOMAS P. MCKENNA,

Defendant.

On Bill for Specific Performance.

On Final Hearing.

58/718

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Stein, Stein & Hannoeh, for Complainant

Perkins & Drewin, for Defendant.

BERRY, V. C.

30

#2

This is a bill for specific performance of a contract for the sale of land. The complainant is the vendee and the defendant the vendor. The contract is dated May 9, 1925, and provides for the sale by the defendant to the complainant of certain lands in the City of Long Branch for the consideration of \$50,000., \$5,000 of which was paid

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on the execution of the contract and the balance was to be paid \$20,000 in cash at the settlement and \$25,000 by the execution and delivery of a purchase money mortgage in that amount. Under the terms of the contract settlement was fixed for May 25, 1925. Time was not, in so many words, made of the essence of the contract, but it is apparent from the dealings between the parties

Exhibit P-1

that prompt action was intended. The complainant was represented by a Mr. Baron, a New York attorney, who prepared the form of contract, and defendant is himself a lawyer, so that the parties dealt "at arm's length." The day of settlement fixed by the contract was postponed by written stipulation to June 1, to June 15th and finally to June 22d, 1925. The last stipulation is dated June 11th.

10

On June 20th, Baron, Reade's attorney, applied to McKenna for a further extension which was refused. Baron's version of what occurred at that time is as follows:

"He said that in view of the fact that these objections were outstanding that he #wouldn't enter into a formal stipulation fixing a date, but he would co-operate with the title company and then he would fix a date and I let it go at that until June 22d, when I made another attempt through a representative of my office to get a formal stipulation."

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#3

The defendant's version of what took place between him and Baron is as follows:

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"Mr. Baron asked me if I would give another extension, that he had to go away, and I told him no, I would not. I said that 'At the last extension you said you wouldn't ask for any more and we at that time both agreed that that should be the last extension.' He said, 'Yes, I know it, but I have got to go to Cleveland'—or Cincinnati or some place—and he said, 'I

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Exhibit P-1

would like to have another extension as a personal favor.' I said, 'I can't grant it as a personal favor. This contract was closed with me at this reduced price upon Mr. Reade's statement that I would be paid in cash the full amount, and that later the cash was cut in half to \$25,000.' and I said 'I have explained to you several times that I am losing valuable opportunities for investment of this money and that I will not grant any further adjournments.' Mr. Baron said, 'Well,' he said, 'McKenna, I don't think it makes any difference.' He says, 'Mr.—I am sure Mr. Reade can buy the property from you later at a reduced price. You have held it for over thirty years and you weren't able to sell it.' I said, 'Be that as it may, I won't grant any further #extensions. You can send somebody else down to close the title; you don't have to be here.' "

Baron was in Court when this testimony of the defendant was given and did not take the stand in rebuttal and made no denial of this testimony except as made in his direct testimony above quoted.

I am inclined to believe Mr. McKenna's version of what took place at the meeting on June 20th, as it seems to be corroborated by the later acts of the parties and their representatives. On June 22d, a Mr. Joseph, of Mr. Baron's office, went to Mr. McKenna with a proposed written stipulation extending the time for settlement to a definite date, but Mr. McKenna refused to sign

Exhibit P-1

it. Joseph says that nothing else occurred on that occasion except that he requested McKenna to sign the stipulation, and McKenna refused; but McKenna says he first inquired of Joseph if he represented Mr. Baron, and on receiving an affirmative reply, tendered to Mr. Joseph a deed for the property which was the subject of the sale, which Mr. Joseph refused, and that he, McKenna, then made a note of this tender on the papers.

The note referred to appears on one of the exhibits. Joseph denies that any tender was made, but I am unable to accept that denial, as it is undisputed that on July 10th Baron saw McKenna and asked to be shown the papers tendered to Joseph. If Joseph spoke the truth, why did Baron ask to inspect the papers? Baron did not deny that such a request had been made by him, and if McKenna had said, as Baron claims, that they would hold the matter of settlement in abeyance without day until the title objections had been cleared up, why was there any necessity for sending Joseph to McKenna on June 22d? Baron left for Europe on July 25th and did not return until late in August. During his absence the complainant was represented by his solicitors of record, but it is admitted that neither the complainant nor any of his attorneys communicated with defendant in any way between June 22d and August 18th, except for the call of Baron on McKenna on July 10th, when he asked to be shown the papers which had been tendered to Joseph. In the meantime, the defendant, assuming that the complainant had abandoned the contract, listed his property for sale with various real

Exhibit P-1

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estate agencies. About August 10, 1925, a real estate boom struck Long Branch and vicinity and the value of the property in question went up from \$50,000. to \$100,000. or \$125,000. Complainant alleges this as the reason for McKenna's refusal to perform while McKenna counters with the charge that this is the defendant's excuse for attempting to revive the abandoned contract. Complainant alleges numerous defects in defendant's title as the cause of the delay. It appears that the parties had been negotiating with reference to this property for some weeks before the contract was eventually signed and that Baron had had an examination of the title made prior to the preparation of the contract in order to determine whether or not McKenna was the record owner. The abstract submitted by the Title Company on this application was offered in evidence and it appears to be practically complete. Later, however, a more complete search and abstract was made, the final report in which reached Baron early in June. If time was not, in so many words, made of the essence of this contract, as originally prepared, the circumstances are strong that time was intended to be of the essence and this is evidenced by the short settlement date fixed in the contract and the three short adjournments.

30 #7

In *Orange Society v. Konski*, 94 N. J. Eq. 632, at page 633, Vice Chancellor Backes said:

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"The law is that a day fixed in a contract for closing title, without more, is merely formal; but if it is stipulated that

Exhibit P-1

time is of the essence, or the circumstances are persuasive that that is the case, prompt performance is essential, and it is also the law that where the time fixed is regarded as a formality only, and the period has gone by, or where time is of the essence and there is a waiver, that time may nevertheless be made of the essence by formal demand that the title be closed by a given day; but the time given must be reasonable."

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But it is unnecessary for me to decide here whether or not time was originally of the essence (and as I have already said, the circumstances indicating this are strong), because I think that both parties intended to make time of the essence when the last extension to June 22 was given.

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If I accept McKenna's statement as to what occurred on June 11th when this extension was arranged (and I have already indicated that I do accept that statement), it was then understood by both McKenna and Reade that no further extension was to be granted and it was not as a matter of right, but as a personal favor, that Baron later asked for a further extension which was refused. In my judgment time was then made of the essence if it had not been so before and the only question now is whether or not the time then fixed as the final date for closing was, under the circumstances, reasonable. The only matter suggested by complainant requiring additional time was the clearing up of title objections and defects. Obviously no time was required by

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Exhibit P-1

10 the complainant for this purpose because it was not complainant's business to clear up these objections or to remedy the defects. That was the defendant's job. It is, therefore, pertinent to inquire what were the title objections required to be removed. First, outstanding certificates of tax sale, most, if not all of which McKenna had in his possession ready for cancellation at settle-

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20 ment; (2) the \$12,000 mortgage, unacknowledged and unrecorded satisfaction piece for which McKenna had and exhibited to Baron; (3) outstanding Herbert interest, if any. As to this it may be said that McKenna had a policy of title insurance from the Fidelity Trust Company of Newark guaranteeing perfect title in him and on which he had a right to rely. Further than this, he had been in peaceable possession of the property for over thirty years; (4) discrepancies in property lines which complainant himself says were of no considerable importance. But McKenna's testimony was that he told Baron that if any of the title objections were not satisfactorily cleared up at the settlement, sufficient of the purchase price might be withheld at settle-

30 ment to cover all the uncanceled items, if necessary. This was a practical solution of the difficulties, if any existed. But I am not convinced, nor am I called upon here to decide, that there is any outstanding so-called "Herbert interest" in this property. The evidence on this point is merely that one title examiner, representing a responsible title company, out of an abundance of

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Exhibit P-1

caution, set up this question of outstanding interest as one of the things to be disposed of on settlement; but as against this we have the fact that another equally responsible title company has already guaranteed the defendant's title. Under these circumstances and coupled with the fact that an examination of this title had been made at Baron's request prior to the execution of the contract, report of which he had in his possession at the time, the time fixed for final closing was reasonable. The instant case is similar to that of *Barry v. Ruskin*, 4 N. J. Adv. Repts. p. 1042, recently decided by me, where I held that time not originally of the essence of the contract had been subsequently made of the essence by agreement of the parties. In the instant case it is apparent that there was a complete agreement between Baron and the defendant on June 11th that June 22d was to be the final date.

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The complainant himself had very little to do with the negotiations with respect to this contract. Correspondence and other exhibits to-

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#11

30 gether with the testimony of the architect are persuasive that complainant did not understand that the contract had been abandoned; but Baron admittedly acted for the complainant and with his full authority. It may be that Baron thought he was taking no chances and that Reade could buy the property later at a less price, as McKenna said Baron declared. If Baron was gambling he was playing with Reade's chips and Reade must stand Baron's losses. Both sides lay consider-

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Exhibit P-1

able stress in the argument on the letter of August 18th, 1925, addressed by complainant's solicitor to the defendant; but this letter, as I view it, is an attempt to restore a lost cause. Considerable space is also taken up in complainant's
 10 brief by the argument respecting defendant's credibility as a witness. It is unnecessary for me to make any comment on this point except to say that there is ample corroboration of defendant's testimony with respect to the vital points in this case to warrant its belief. I shall, therefore, advise a decree dismissing the bill of complaint, but as defendant has offered to return to complainant the \$5000. deposited on the execution
 20 of the contract, the decree will so provide.

Heard June 17, 1926

Submitted August 13, 1926—

Decided August 17, 1926.

A True Copy

Thomas Barber
 Clerk

Exhibit P-1

Endorsed:

M.

58/718

IN CHANCERY OF NEW JERSEY

10

Between

Walter Reade

Complainant

and

Thomas P. McKenna

Defendant.

20

On Bill for Specific Performance. On Final
 Hearing.

Conclusions. 58/718

Berry, V. C.

Filed Aug 20 1926

Exhibit P-1

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY

10	Between WALTER READE, Complainant-Appellant, and THOMAS P. MCKENNA, Defendant-Respondent.	}	On Bill &c.
----	--	---	-------------

The Complainant, Walter Reade, hereby ap-
 20 peals from the final decree made in the above en-
 titled cause on October 26th, 1926, and from the
 whole and every part thereof, to the Court of
 Errors and Appeals, in the last resort in all
 causes.

Dated November 3, 1926.

30	STEIN STEIN & HANNOCH Solicitor for and of Counsel with complainant.
----	--

I conceive there is good cause for appeal in the above entitled cause.

HERBERT J HANNOCH
 Of Counsel with Complainant
 Walter Reade.

40	A True Copy Thomas Barber Clerk
----	---------------------------------------

Exhibit P-1

Endorsed:

M.

58/718

IN CHANCERY OF NEW JERSEY

10	Between Walter Reade Complainant Appellant and Thomas P. McKenna, Defendant. Respondent	}	20
----	--	---	----

On Bill Etc.
Notice of Appeal.

30	Stein, Stein & Hannoeh, Solicitors of Complainant-Appellant 31 Clinton St., Newark, N. J.
----	--

Due service of a true copy of the within Notice of Appeal is hereby acknowledged, this 8th day of November 1926

PERKINS & DREWEN
 Solicitors of Deft. Respondent.

Filed Nov 10 1926

40

Exhibit P-1

AMENDED NOTICE OF APPEAL ON APPEAL FROM THE COURT OF CHANCERY.

IN CHANCERY OF NEW JERSEY

10 Between
 WALTER READE,
 Complainant-Appellant,
 and
 THOMAS P. MCKENNA,
 Defendant-Respondent. } On Bill, &c

20 The complainant, Walter Reade, hereby appeals from the final decree made in the above entitled cause on October 26th, 1926, by the Chancellor upon the advice of Hon. M. L. Berry, Vice-Chancellor, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes.

Dated November 15, 1926.

30 STEIN, STEIN & HANNOCH
 Solicitors for and of Counsel
 with Complainant.

I conceive there is good cause for appeal in the above entitled cause.

HERBERT J. HANNOCH
 Of Counsel with Complainant,
 Walter Reade.

40 A True Copy
 Thomas Barber
 Clerk

Exhibit P-1

Endorsed:

A. 58-718 4032

IN CHANCERY OF NEW JERSEY

10 Between
 Walter Reade Complainant-Appellant
 and
 Thomas F. McKenna
 Defendant-Respondent } 20

On Bill etc.

Amended Notice of Appeal on Appeal from
 The Court of Chancery (V. C. Berry)

Stein, Stein & Hannoeh, Solicitors
 of complt.-Appellant
 31 Clinton St.,
 Newark, N. J. } 30

Due service of a true copy of the within amended appeal is hereby acknowledged, this 17th day of November, 1926.

PERKINS & DREWEN,
 Atty. of Deft. Resp.

Filed Nov. 19, 1926

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FINAL DECREE.

IN CHANCERY OF NEW JERSEY

10	Between WALTER READE, <div style="text-align: right;">Complainant,</div> and THOMAS P. MCKENNA, <div style="text-align: right;">Defendant.</div>	}	On Bill, etc.
----	--	---	---------------

This cause coming on to be heard in the presence of Messrs. Stein, Stein and Hannoeh, solicitors for the complainant, and Messrs. Perkins & Drewen, solicitors for the defendant; and the pleadings having been read and proofs taken, and the arguments of the respective counsel having been heard and considered, and it appearing to the court that the complainant is not entitled to specific performance of the contract set out in the bill of complaint, for the sale of lands and premises situated in the City of Long Branch, County of Monmouth, and State of New Jersey, which contract bears date the 9th day of May, 1925, and was made between Thomas P. McKenna of the City of Long Branch, Monmouth County, New Jersey, and the complainant, Walter Reade.

And it further appearing that the complainant is not entitled to the relief prayed for in his bill of complaint;

40

It is, on this 26th day of October, 1926, by Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed, that the complainant's bill be and the same is hereby dismissed with costs, and that there be allowed to Messrs. Perkins & Drewen of counsel with the

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defendant a counsel fee of \$500.00, same to be taxed as part of the costs of said defendant and collected accordingly.

It is further Ordered, Adjudged and Decreed that the defendant, Thomas P. McKenna, do pay to the complainant, or his solicitors, within sixty days from the date hereof, the sum of \$5000.00 representing a return of the deposit referred to in the contract hereinabove more particularly set forth, and that said sum, and the same is hereby declared to be a lien upon the following lands and premises mentioned and described in said contract, that is to say:

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All that certain plot, piece or parcel of land hereinafter particularly described, situate, lying and being in the City of Long Branch, County of Monmouth, State of New Jersey, and more particularly bounded and described as follows:

30

Beginning at a point on the south side of Broadway at the northeast corner of property belonging to the party of the second part adjoining the property herein described, thence (1) southwardly along lands of the party of the second part about 230 feet to the northwest corner of lands of one now or formerly Vannote, thence (2)

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Exhibit P-1

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eastwardly along said Vannote land about 60 feet to a corner, thence (3) southwardly along said Vannote land about 80 feet to the north side of Belmont Avenue, thence (4) eastwardly along said north side of Belmont Avenue about 60 feet to an alley, thence (5) northwardly along the west side of said alley about 197 feet to the south side of another alley, thence (6) westwardly along the south side of said last mentioned alley about 70 feet, thence (7) northwardly about 118 feet to the said south side of Broadway, thence (8) westwardly along the said south side of Broadway, 50 feet to the point of Beginning.

20

Together with the rights, accruing to the said premises in said alleys, and all right, title, and interest of the seller of in and to any property adjoining or adjacent to the above described premises.

and

#3

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It is further Ordered, Adjudged and Decreed #that unless said moneys are so paid to the complainant, or his solicitors, within the time above mentioned, that execution do issue therefor without further order of this Court, in accordance with the practice and rules of this Court in such case made and provided.

E. R. WALKER
C.

Respectfully Advised

Maja Leon Berry

V. C.

40

A True Copy

Thomas Barber

Clerk

Exhibit P-1

Endorsed:

M.

58/718

IN CHANCERY OF NEW JERSEY

10

Between

Walter Reade,

Complainant

and

Thomas P. McKenna,

Defendant.

20

On Bill, etc.

Final Decree

Perkins & Drewen, Solicitors
of Defendant, 921 Bergen Ave
Jersey City, N. J.

Filed 10/26/26

Exhibit P-1

RULE ON AFFIRMANCE OF DECREE AND REMITTITUR.

NEW JERSEY COURT OF ERRORS & APPEALS

10

February Term, A. D. 1927

Between

WALTER READE,
Complainant Appellant,
and

20 THOMAS P. MCKENNA,
Defendant-Respondent.

On Appeal
from the Court
of Chancery.

This cause coming on to be heard at the February Term, 1927, and being argued by Herbert J. Hannoeh of Stein, Stein and Hannoeh, counsel for the complainant-appellant, and John Drewen of Perkins & Drewen, counsel for the defendant-respondent, and the Court having considered the same, and being of the opinion that the decree of the Chancellor should be affirmed in all things;

It is now on this 16th day of May, A. D. 1927, Ordered, Adjudged and Decreed that the decree of the Chancellor be in all things affirmed with costs; and that the record and proceedings be remitted to the Court of Chancery, to be therein

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Exhibit P-1

proceeded on according to law and the practice of the said Court.

On motion of

PERKINS & DREWEN,
Solicitors of Defendant-Respondent.

10

A True Copy

Joseph F. S. Fitzpatrick

Clerk

A True Copy

Thomas Barber

Clerk

Endorsed:

A.

58-718

4032

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NEW JERSEY COURT OF ERRORS AND APPEALS.

Between:

Walter Reade
Complainant-Appellant,
and

Thomas P. McKenna,
Defendant-Respondent.

30

Perkins & Drewen

On Appeal from the Court of Chancery
Rule on Affirmance of Decree and Remittitur.

\$55.20

5.50

\$60.70

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Exhibit P-1

Endorsed:

“Filed May 18, 1927,
Joseph F. S. Fitzpatrick,
Clerk.”

10 Filed June 2, 1927

ORDER.

IN CHANCERY OF NEW JERSEY

20	Between WALTER READE, Complainant, and THOMAS P. MCKENNA, Defendant.	On Bill, etc.
----	---	---------------

This matter being opened to the Court by Herbert J. Hannoeh, Esq., of Stein, McGlynn & Hannoeh, solicitors for and of counsel with the complainant, on motion of the complainant for an order that execution issue in favor of the complainant and against the defendant for the sum of \$5,000.00, less counsel fees and costs, as provided in the final decree in this cause;

And the Court having heard the argument of the said Herbert J. Hannoeh, solicitor for the complainant, and of John Drawen, of Perkins &

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Exhibit P-1

Drawen, solicitors for and of counsel with the defendant, and having considered the same;

And it appearing to the Court that the said defendant Thomas P. McKenna has instituted a suit against the said complainant Walter Reade, in the New Jersey Supreme Court, Monmouth County, for damages for the use and occupation by the said Walter Reade, of the lands and premises which are the subject of this suit, and for mesne profits derived therefrom, and for waste committed thereon; and it also appearing to the Court that the said action at law is now pending and undetermined,

It is, on this 19th day of July, A. D. 1927, Ordered and Adjudged that the complainant's said motion herein be, and the same hereby is denied pending the final determination of the defendant's said action at law and until the further order of this Court.

E. R. WALKER
C.

Respectfully advised,
Maja Leon Berry V. C.

Approved as to form.
Stein, McGlynn & Hannoeh
Solrs. of complt.

A True Copy
Thomas Barber
Clerk.

30

40

Exhibit P-1

Endorsed:

A.

58-718

4032

10 IN CHANCERY OF NEW JERSEY

Between

Walter Reade,
Complainant

and

Thomas P. McKenna
Defendant.

20

On Bill, Etc.
Order Denying Motion

Perkins & Drewen, Solicitors
of defendant,
921 Bergen Ave.,
Jersey City, N. J.

Filed July 22, 1927

Exhibit P-3.





329

Exhibit P-3.



Exhibit P-4.



Exhibit P-5.





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Exhibit P-7.



Exhibit P-8.



Exhibit P-9.



336
Exhibit P-10.



337
Exhibit P-11.

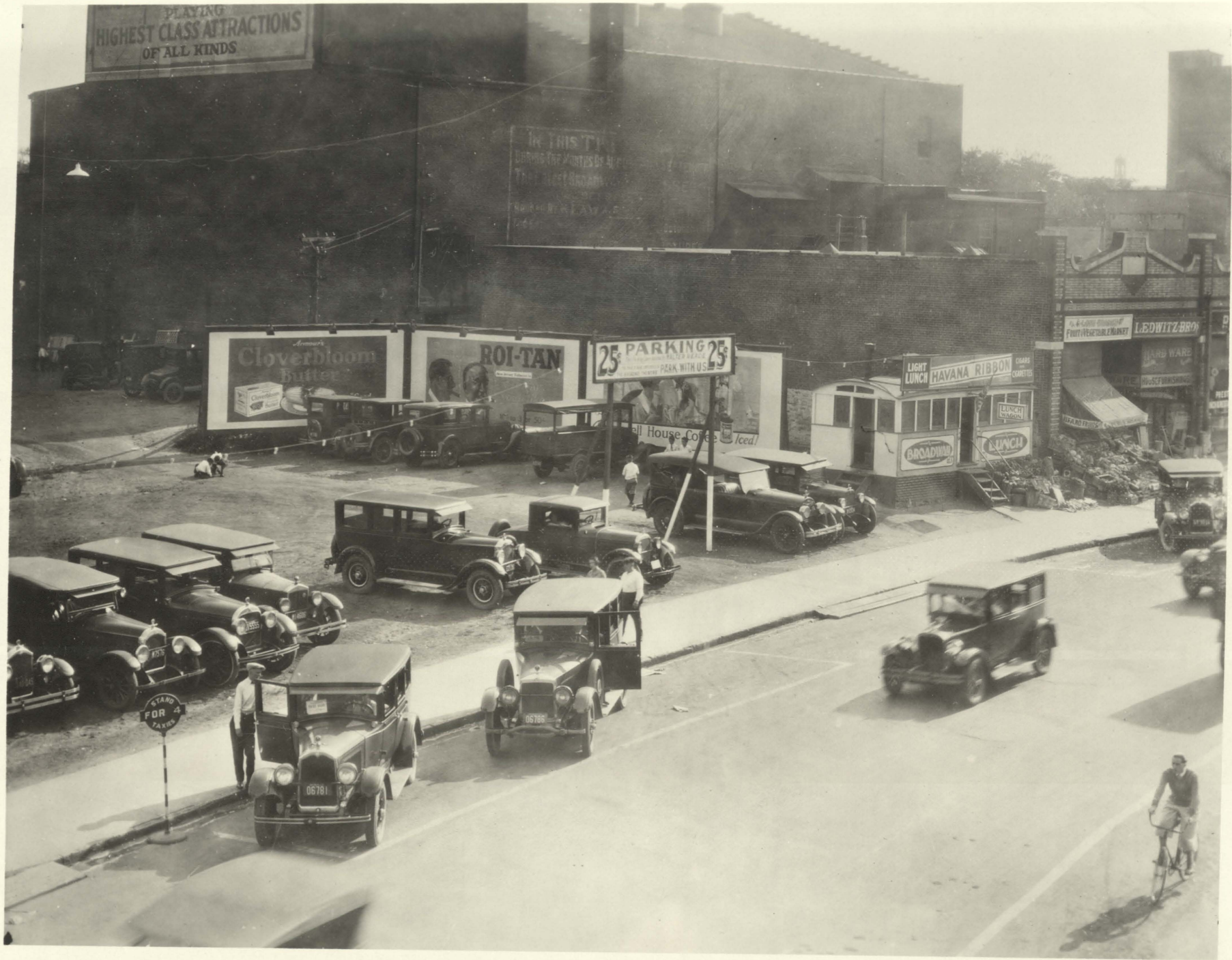


Exhibit P-12.



Exhibit P-13.



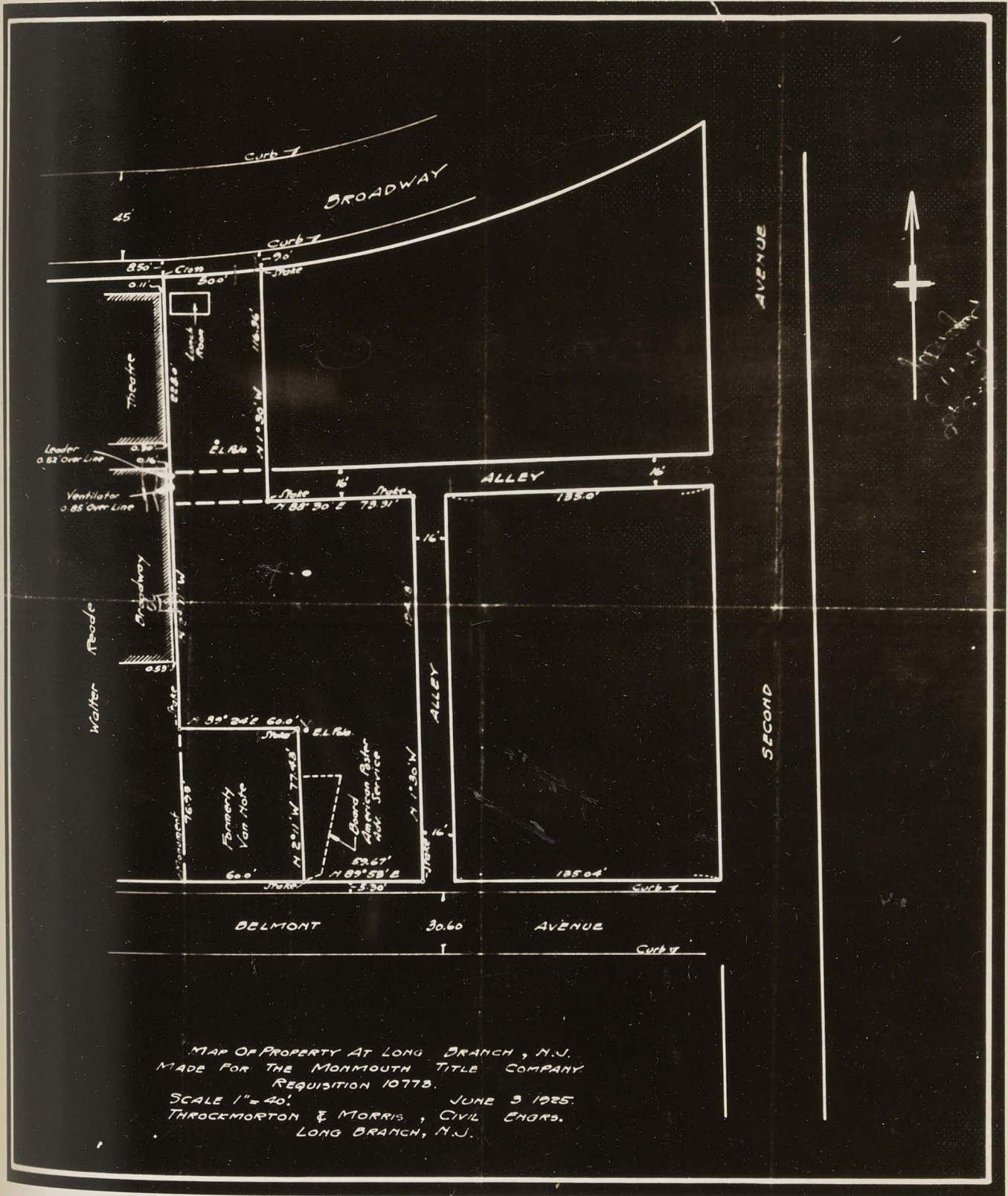
Exhibit P-14.



341

Exhibit P-15.

Exhibit P-16.



342a

Exhibit P-17.

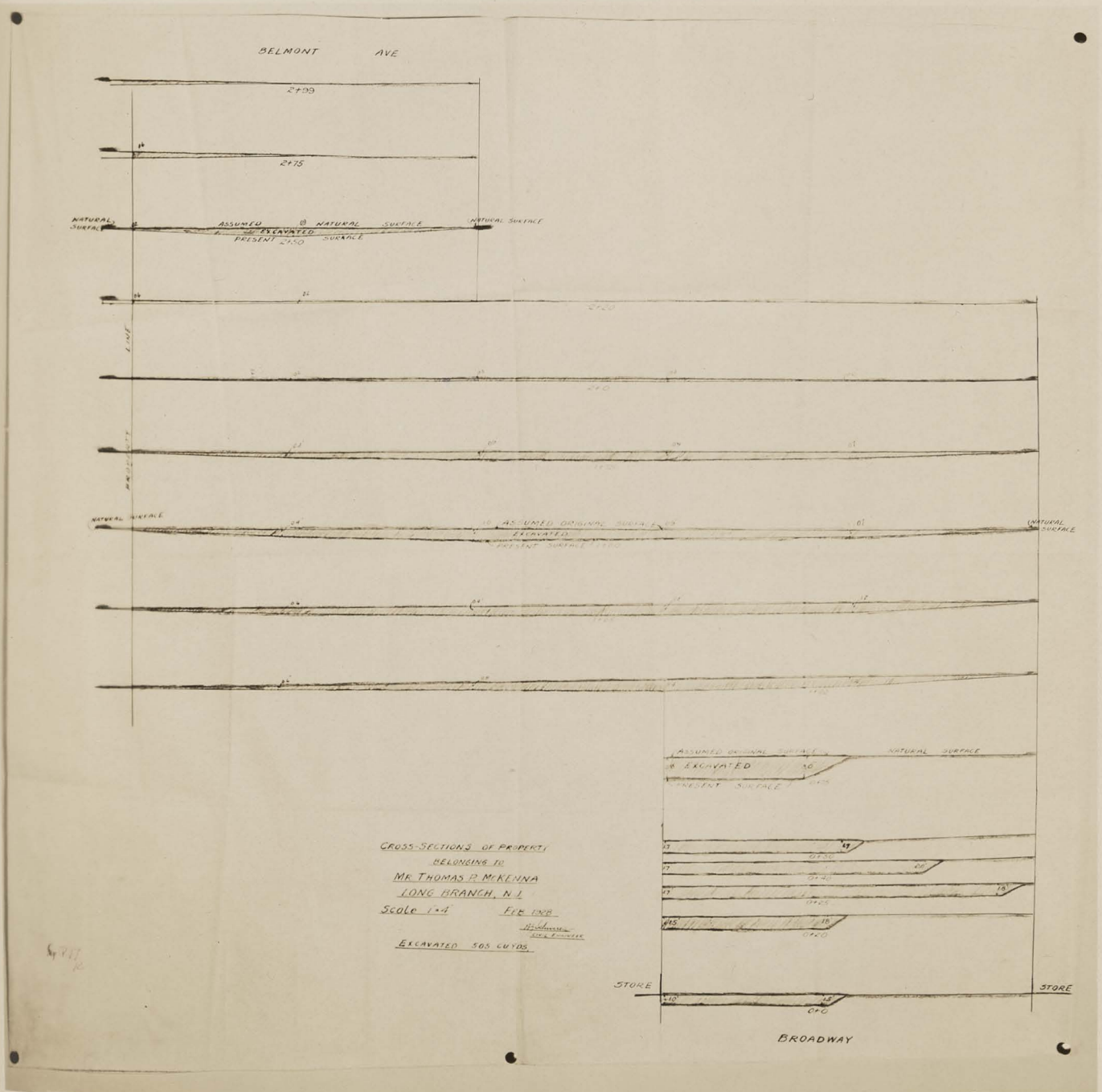


Exhibit D-1.

HENRY ROSENBERG <i>et ux</i>	}	THIS INDENTURE, Made the Fifteenth day of December, in the year of our Lord One Thou- sand Nine Hundred and Sixteen, BETWEEN	10
to			
BROADWAY THEATRE Co., of Long Branch Inc.			

Henry Rosenberg and Anna Rosenberg, his wife,
of the City of New York, in the County of New
York and State of New York, parties of the first
part;

And Broadway Theatre Co. of Long Branch,
Inc. (A Corporation organized under the laws of
the State of New Jersey) party of the second
part;

Witnesseth, that the said parties of the first
part, for and in consideration of One hundred
dollars (\$100.00) and other valuable considera-
tions, lawful money of the United States of Amer-
ica, to them in hand well and truly paid by the
said party of the second part, at or before the
sealing and delivery of these presents, the receipt
whereof is hereby acknowledged, and the said
part of the first part, therewith fully satisfied,
contented and paid, have given, granted, bar-
gained, sold, aliened, released, enfeoffed, con-
veyed and confirmed, and by these presents do
give, grant, bargain, sell, alien, release, enfeoff,
convey and confirm unto the said party of the sec-
ond part, and to its successors and assigns for-
ever,

Exhibit D-1

All those certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Long Branch, in the County of Monmouth and State of New Jersey.

10 Beginning at a point on the southerly side of Broadway distant therein five hundred and twenty-nine feet and six inches easterly from its intersection with the easterly side of Academy Street said beginning point being also the most northeasterly corner of premises conveyed by Hirsh Hommel and Margaret Hommel, his wife, Siegfried Hommel and Kate Hommel his wife to one Harry M. Clayton, by deed dated March 14th, 20 1912 and the most northeasterly corner of the premises herein described and from thence running (1) south three degrees and forty-five minutes east along the easterly side of Harry M. Layton's property one hundred and ninety-eight feet and two and one-half inches to a point in the line of lands now or formerly of Schneider and Hilkin; thence (2) north eighty-six degrees and nine minutes east along the northerly line of said lands and lands now or formerly of Eric Nordell, one 30 hundred and twenty-one feet and six inches to the line now or formerly of Thomas McKenna; thence (3) north four degrees and seven minutes west one hundred and ninety-eight feet along the westerly line of said lands to the southerly side of Broadway; thence (4) along the southerly side of Broadway, south eighty-six degrees and fifteen minutes west one hundred and twenty feet and two and one-half inches to the point or place 40 of beginning. Together with all the right, title and interest of the parties of the first part hereto

Exhibit D-1

to the land in Broadway in front of the premises hereinabove described to the center line thereof, subject to the rights of the public therein as a public street.

Being the same premises conveyed to Henry Rosenberg, one of the parties of the first part, 10 by Hirsh Hommel and Margaret Hommel, his wife Siegfried Hommel and Kate Hommel, his wife, by deed of conveyance bearing date March 25th, 1912, and recorded in the Monmouth County Clerk's Office in Book 924 of Deeds for said County, page 338, &c.

SUBJECT, to any and all mortgages, liens or encumbrances whatsoever now on and against the said premises. 20

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining.

ALSO all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part, of, in and to the same, and of, in and to every part and parcel thereof. 30

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

AND the said parties of the first do for themselves, their heirs, executors and administrators covenant and grant to and with the said party 40 of the second part, its successors and assigns, that

Exhibit D-1

the said parties of the first part are the true, lawful and right owners of all and singular the above described land and premises and of every part and parcel thereof, with the appurtenances thereunto belonging, and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents are not encumbered by any mortgage, judgment or limitation or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever;

AND ALSO that the said parties of the first part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid;

AND ALSO that the said parties of the first part will Warrant, secure and forever defend the said land and premises unto the said party of the second part, its successors and assigns forever, against the lawful claims and demands of all and every person or persons freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

IN WITNESS WHEREOF the said parties of the first part have hereunto set _____ hands and seals the day and year first above written.

HENRY ROSENBERG (L. S.)

ANNA ROSENBERG (L. S.)

Signed, sealed and delivered

in the presence of
G. J. Baumann
as to both.

Exhibit D-1

State of New York,
City & County of New York {ss:

BE IT REMEMBERED that on this eighth day of January in the year of our Lord One Thousand Nine Hundred and Seventeen before me, George J. Baumann, a Notary Public for New York County, personally appeared Henry Rosenberg Anna Rosenberg, his wife, who I am satisfied are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon duly acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed;

AND the said Anna Rosenberg being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, Freely, without any fear, threats or compulsion of her said husband.

(L. S.) GEORGE J. BAUMANN,
Notary Public, New York County No. 309
Registers No. 7030

State of New York
County of New York {ss: No. 34354 Series B.

I, William F. Schneider, Clerk of the County of New York and also Clerk of the Supreme Court for the said County, the same being a Court of Record, Do Hereby Certify That George J. Baumann whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written was,

Exhibit D-1

at the time of taking such deposition or proof and acknowledgment, a Notary Public in and for such County duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any
 10 Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

In Testimony Whereof I have hereunto set my
 20 hand and affixed the seal of the said Court and County, the 30 day of January, 1917.

(L. S.) WM. F. SCHNEIDER Clerk.

Received and recorded Feby. 5th, A. D. 1917 at
 8 A. M.

JOSEPH McDERMOTT Clerk.

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

30 I, Joseph McDermott, Clerk of said County, do hereby certify, that the foregoing copy of Deed. HENRY ROSENBERG *et ux* To BROADWAY THEATRE Co. of Long Branch Inc. is true and correct as the same remains of record in my office in Book 1037 of Deeds, on pages 332 &c.

In Witness Whereof, I have hereunto set
 40 (Seal) my hand and affixed the official seal of said County, this 5th day of March A. D. 1928.

JOSEPH McDERMOTT
 Clerk.

Exhibit D-2

Endorsed:

COUNTY CLERK'S OFFICE,
 Monmouth County,
 New Jersey.

Certified Copy of
 Deed.

10

HENRY ROSENBERG *et ux*

To

BROADWAY THEATRE Co. of
 Long Branch Inc.

Recorded in Mon. Co. Freehold N. J., in Book 20
 1037 of Deeds on pages 332 &c.

JOSEPH McDERMOTT
 County Clerk.

Exhibit D-2.

THIS DEED,

made the 15th day of September, in the year of
 our Lord One Thousand Nine Hundred and Twen-
 ty-five, 30

Between CHARLES BRYAN and SALLY G. BRYAN,
 his wife, both of the City of New York, in the
 County of New York and State of New York of
 the first part;

And GERTRUDE READE, of the City of New York
 in the County of New York and State of New
 York of the second part: 40

Exhibit D-2

That the said parties of the first part, in consideration of the sum of One Hundred and 00/100 (\$100.00) Dollars, lawful money of the United States of America, and other valuable considerations to us in hand paid, by the said party of the
 10 second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell, and convey, unto the said party of the second part, and to her heirs and assigns forever,

ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Long Branch
 20 in the County of Monmouth and State of New Jersey.

Lots No. 3 and 4 on Map of the Herbert Estate, and known as City Lots Nos. 8 and 9, bounded and described as follows:

BEGINNING at a point in the southerly line of Broadway, at the northeasterly corner of Lots No. 2 on said map; thence southerly, along the easterly line of said Lot No. 2, one hundred feet
 30 four inches, to an alley; thence easterly, along said alley, fifty feet; thence northerly, along land now or formerly of Cowpland, one hundred and four feet eleven inches, to the said southerly line of Broadway; thence along said southerly line of Broadway, about fifty feet, to the place of beginning.

Also, Lots No. 5 and 6 on Map of the Herbert Estate, and known as City Lots Nos. 6 and 7,
 40 bounded and described as follows:

Exhibit D-2

BEGINNING at the northwest corner of lands formerly belonging to Josephine D. Corlies; thence southerly, along the west line of said Corlies Lot, one hundred eighteen feet and nine inches, to the north side of an alley; thence westerly along the north side of said alley, fifty feet,
 10 to lands formerly belonging to Herbert Estate; thence northerly, parallel with the first course, along the line of said Herbert Estate, one hundred and four feet eleven inches, to the southerly side of Broadway; thence easterly, along the southerly side of Broadway, to the place of beginning.

Also, Lot No. 7 on Map of the Herbert Estate, known as City Lot No. 5, bounded and described,
 20 as follows:

BEGINNING, at a point on the southerly side of Broadway, at the northeast corner of land now or formerly of Cowpland; thence southerly, one hundred and eighteen feet nine inches, to an alley; thence easterly, along the northerly side of said alley, twenty-five feet; thence northerly, along and formerly of said Corlies, to the southerly side of Broadway; thence westerly along the southerly side of Broadway to the place of beginning.
 30

TOGETHER with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining:

AND ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, as well in law as in equity, of the said part of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the
 40 appurtenances.

Exhibit D-2

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

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

CHARLES BRYAN
SARAH G. BRYAN

20 Signed, sealed and delivered
in the presence of

State of New York, }
County of New York } ss:

BE IT REMEMBERED, that on this 15th day of September, in the year of our Lord Nineteen Hundred and twenty-five before me, the subscriber, a notary public personally appeared CHARLES BRYAN and SALLY G. BRYAN, his wife, who, I am satisfied, are the grantors mentioned in the within Deed; and I having first made known to them the contents thereof, thereupon acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed; and the said SALLY G. BRYAN, being by me privately examined, separate and apart from said husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and

Exhibit D-2

deed, FREELY, without any fear, threats or compulsion of said husband .

ROSE BERNE (Seal)
Bronx Co. Clerk's No. 31
New York Co. Clerk's No. 257,
New York Co. Reg. No. 7312 10
Term Expires March 30, 1927
No. 13166 Series B

State of New York, {
County of New York, } ss:

I, WILLIAM T. COLLINS, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county,

Do Hereby Certify, That said Court is a Court of Record, having by law a seal; that Rose Berne whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Bronx with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such

Exhibit D-2

Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 7
10 day of June 1926

WILLIAM T. COLLINS
Clerk.

Endorsed:

DEED

BARGAIN AND SALE

20 Charles Bryan, and Sally G.
Bryan, his wife,

to

Gertrude Reade

Dated, September 15, 1925

Received in the Clerk's Office of the County of Monmouth on the 9th day of June A. D. 1926, at 8 o'clock in the forenoon, and Recorded in Book
30 1351 of Deeds, pages 426

JOSEPH McDERMOTT
Clerk
COMPARED

Return W C Burroughs
Mattison Ave
Asbury Park
Chg 2.50

40

Exhibit D-3.

THIS INDENTURE, made the eleventh day of August, in the year of Our Lord One Thousand Nine Hundred and Twenty-two, Between

FLORENCE E. PELLETREAU, widow, individually and as Administratrix with the Will annexed of Vennette F. Pelletreau and as Trustee under the Will of Vennette F. Pelletreau, of the City of New York, in the County of New York and State of New York, of the First Part; 10

And CHARLES BRYAN, of the City of New York, in the County of New York and State of New York, of the Second Part:

WITNESSETH, That the said party of the first part, in consideration of the sum of 20
to her duly paid before the delivery hereof, has remised, released and forever quit-claimed, and by these presents does remise, release and forever quit-claim to the said party of the second part and to his Heirs and assigns, ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Long Branch in the County of Monmouth and State of New Jersey, as follows:

Lots No. 3 and 4 on Map of the Herbert Estate, and known as City Lots Nos. 8 and 9, bounded and described as follows: 30

BEGINNING at a point in the southerly line of Broadway, at the northeasterly corner of Lot No. 2 on said map; thence southerly, along the easterly line of said Lot No. 2, one hundred feet four inches, to an alley; thence easterly, along said alley, fifty feet; thence northerly, along land now or formerly of Cowpland, one hundred and four feet eleven inches, to the said southerly line 40

Exhibit D-3

of Broadway; thence along said southerly line of Broadway, about fifty feet, to the place of BEGINNING.

Also Lots No. 5 and 6 on Map of the Herbert Estate, and known as City Lots Nos. 6 and 7,
10 bounded and described as follows:

BEGINNING at the northwest corner of lands formerly belonging to Josephine D. Corlies; thence southerly, along the west line of said Corlies Lot, one hundred eighteen feet and nine inches, to the north side of an alley; thence westerly along the north side of said alley, fifty feet, to lands formerly belonging to Herbert Estate; thence northerly, parallel with the first course,
20 along the line of said Herbert estate, one hundred and four feet eleven inches, to the southerly side of Broadway; thence easterly, along the southerly side of Broadway, to the place of BEGINNING.

Also Lot No. 7 on Map of the Herbert Estate, known as City Lot No. 5, bounded and described as follows:

BEGINNING at a point on the southerly side of
30 Broadway, at the northeast corner of land now or formerly of Cowpland; thence southerly, one hundred and eighteen feet nine inches, to an alley; thence easterly, along the northerly side of said alley, twenty-five feet; thence northerly, along land formerly of said Corlies, to the southerly side of Broadway; thence westerly along the southerly side of Broadway to the place of BEGINNING.

40 with the appurtenances and all the estate, right, title and interest,

Exhibit D-3

of the said party of the first part, therein, To HAVE AND TO HOLD, the above mentioned and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first
part has hereunto set her hand and seal the
day and year first above written. 10

FLORENCE E. PELLETREAU
Individually and as Administratrix
with the will annexed of Vennette F.
Pelletreau and as Trustee under the
Will of Vennette F. Pelletreau.

Signed, Sealed and Delivered
in the presence of
Edward Claxton 20

State of New Jersey, } ss:
County of Hudson

BE IT REMEMBERED, That on this 11th day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-two, before me, the subscriber, an Attorney at Law of New Jersey, personally appeared Florence E. Pelletreau,
30 (Widow) who, I am satisfied is the grantor mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed:

EDWARD CLAXTON
Attorney at Law 40
of New Jersey

Exhibit D-3

Endorsed:

DEED.

10 Florence E. Pelletreau, widow, individually and as Administratrix with the Will annexed of Vennette F. Pelletreau and as Trustee under the Will of Vennette F. Pelletreau,

To

Charles Bryan.

Dated, August 11th, 1922

20 Received in the Clerks Office of the County of Monmouth on the 24th day of Aug A. D., 1922 at 8 o'clock, in the forenoon and Recorded in Book 1189 of DEEDS for said County, on pages 445 &c.

JOSEPH McDERMOTT
Clerk

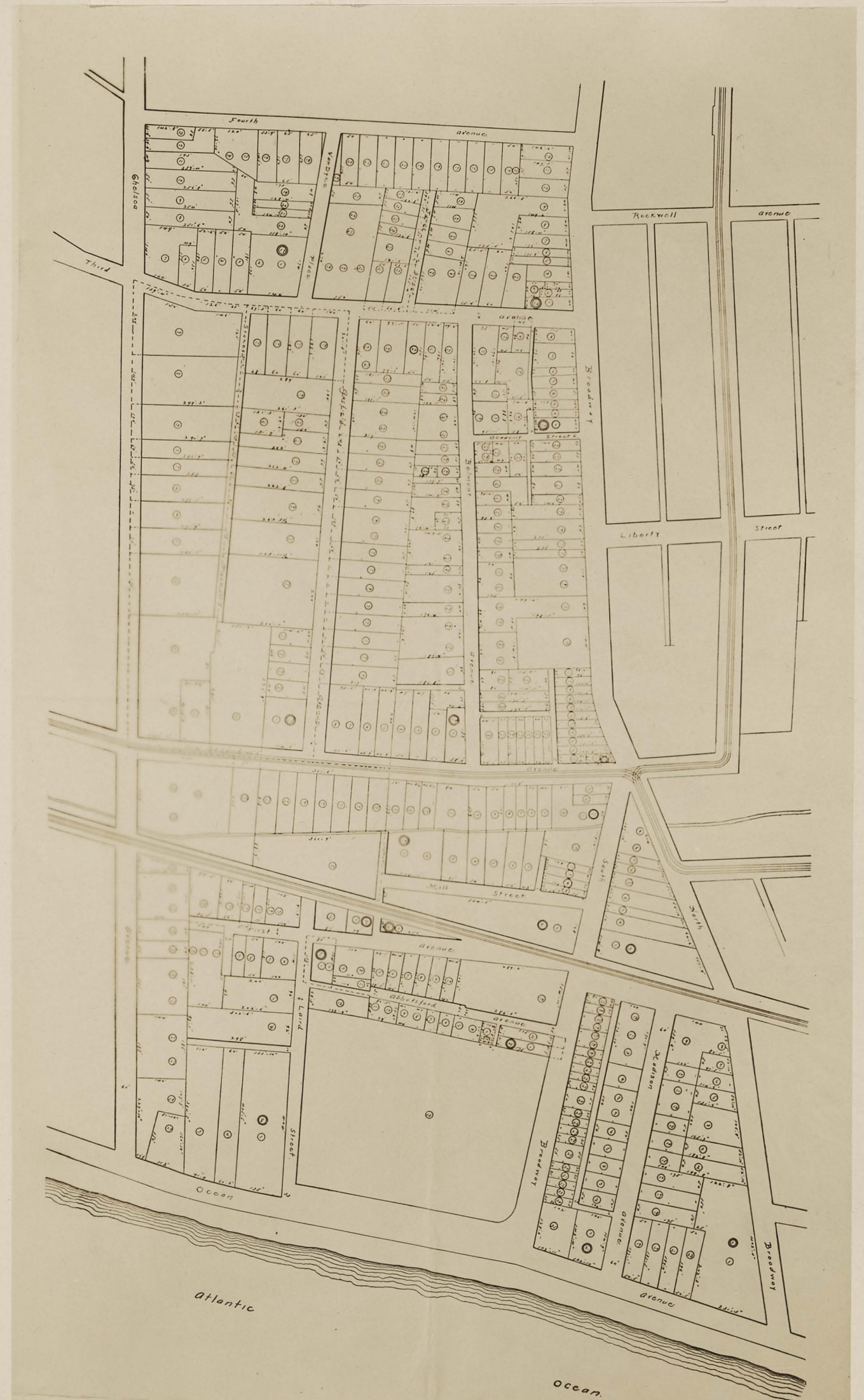
COMPARED

30 Ret Heine, Bostwick & Bradner
Kinney Bldg.
Newark

Pd 2.00

40

Exhibit D-4



New Jersey Court of Errors and Appeals.

THOMAS P. MCKENNA, <i>Plaintiff-Respondent,</i>	} <i>Action at Law.</i>
<i>vs.</i>	
WALTER READE, <i>Defendant-Appellant.</i>	

PRELIMINARY STATEMENT.

This appeal brings up for review a judgment for \$3,793.97 entered in favor of the plaintiff on a jury's verdict in the Supreme Court, Monmouth County.

THE FACTS.

Plaintiff claimed damages and mesne profits occasioned by an alleged occupancy of his land by the defendant.

Thomas P. McKenna owned a sizable vacant lot (Exhibit P 16, p. 342) in Long Branch, N. J., adjacent to the Broadway Theatre, owned by the Broadway Theatre Company, a corporation in which the defendant, Walter Reade, held stock. On the opposite side of the McKenna lot was land of Gertrude Reade, wife of the defendant. The defendant owned no land in the immediate vicinity.

By a written contract dated May 9, 1925, McKenna agreed to sell the premises in question to Reade, title to be passed on May 25, 1925. The terms of transfer were extended by agreement to June 22, 1925, which closing date passed without a tender by Reade, who claimed certain defects in the

title; whereupon McKenna refused to convey and Reade filed a bill for specific performance. (See record of Chancery suit, Exhibit P 1.) The bill was dismissed upon the ground that the contract had been abandoned by mutual assent. Reported in 99 N. J. Eq. 764, affirmed 137 Atl. 918.

The learned Vice Chancellor found (Exhibit P 1, p. 309, line 38) that after June 22, 1925, McKenna, 'assuming that the complainant had abandoned the contract, listed his property for sale with various real estate agencies'.

At the hearing in chancery McKenna offered to return Reade's deposit of \$5,000 (p. 314) and the final decree, entered on October 26, 1926, specifically directed the return of the deposit. On June 30, 1927, the present action was commenced—an admixture of actions *ex contractu* and *actions ex delicto*.

THE PLEADINGS AND ISSUES.

The complaint as originally drawn consisted of six counts. The first, for use and occupation, alleged that defendant, 'by permission of plaintiff entered upon and into the possession, the land in question and from thence to the 10th day of June, 1927, used, occupied, possessed and enjoyed the same'. (P. 13.)

The second count was also for use and occupation.

The third alleged an express agreement to pay rent.

The fourth sounded in trespass, it being there alleged that the defendant, 'without right,' continued his said possession from June 22, 1925, to the present time. Here mesne profits were claimed.

The fifth was for waste. In this count entry and possession by permission were alleged, also the removal of certain topsoil and gravel.

The last count set forth that defendant committed waste and wrongfully took away, removed

and converted to his own use 2,750 yards of topsoil and gravel. In this count plaintiff attempted to credit defendant with the \$5,000 which the chancery decree directed plaintiff to pay within sixty days, but which he had not paid at the time this action was started.

When the case was called plaintiff's counsel was directed to make an election between the counts alleging possession with permission and those counts alleging possession without permission. (pp. 34, 36.) These latter counts were expressly abandoned (p. 35), the court saying: 'The other counts that are recorded there in consequence, as a result of occupation, as to the allegation of damages, will probably remain. I will control the situation at the close of the plaintiff's case as far as that is concerned; in the light of the *admission* that they are going to rely upon the allegation that the defendant went upon the plaintiff's lands *with his permission*'.

At the close of the plaintiff's case a nonsuit was urged upon the ground that an action for use and occupation would not lie by a vendor against his vendee, nor would waste, as the relation of landlord and tenant was essential to both actions. This motion was made on March 6, 1928. The court, as it said, in order to examine the legal situation, adjourned the case until March 15, 1928. On March 16th the trial was resumed and defendant's motion denied; the plaintiff being permitted, over objection, to retract his admissions in electing to prove occupancy with permission and to substitute the very count he had elected to abandon, i. e., that in which he had alleged occupation without permission.

The first two counts, for use and occupation, and the third, alleging an express agreement for rent, were thereupon stricken out over plaintiff's objection. (pp. 179, 180.) The case was then adjourned to March 21, 1928, and completed on that day.

After both sides had rested the fifth count, charging waste, was stricken out on motion of defend-

ant's counsel, and plaintiff again was allowed to amend his complaint by eliminating the words 'waste therefrom,' which appeared in the sixth count. (p. 247.) Thus finally remained only the reinstated fourth count in trespass and the sixth count as modified, which sounded also in trespass.

AS TO THE MOTIONS AT CLOSE OF PLAINTIFF'S
CASE.

The grounds of appeal may be conveniently grouped under this and three following captions: Under the present head would fall grounds Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15; under the second, 18, 19, 20, 21 and 22; under the third, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35; and under the last, Nos. 1, 2, 3, 4, 5, 17 and 36.

On none of the five counts remaining at the close of the plaintiff's case could recovery be based in the absence of establishing the relation of landlord and tenant. This relationship was not shown.

The action for use and occupation is founded upon an implied contract to pay rent. It was unknown to the common law which allowed recovery for rent (assumpsit) only upon an express contract made at the time of the demise.

Johnson v. May, 3 Lev. 150; Bull. N. P. 138, cited with approval in *Smith v. Stewart*, 6 John. 46; 5 Am. Dec. 186.

To imply a promise, was made possible by a statute, which created the action for use and occupation. 11 Geo. II, c. 19, Sec. 14. This act, passed in the reign of George II, afforded the pattern for the act now existing in New Jersey and which similarly created the statutory action. The New Jersey act is found in 3 C. S. 3066, Sec. 3, and reads as follows:

Action for Use and Occupation—That it shall and may be lawful to and for the landlord or landlords, his, her or their

heirs or assigns, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements or hereditaments, held or occupied by the defendant or defendants, in an action on the case, for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action, any parol demise, or any agreement (not being by deed), whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefor be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered.' (Rev. 1877, p. 570.)

It will be seen that the statute has no application except in cases where exists the relation of landlord and tenant. No such relation was established between the parties at bar and indeed, no such relation could be shown, as it would be repugnant to their respective positions of vendor and vendee. That where the latter relation obtains the former cannot, has been repeatedly established by an unbroken line of authorities in the state. The leading case is *Brewer v. Admrs. of Conover*, 18 N. J. L. 214, from which the following quotation is taken:

'No action can be maintained for use and occupation, where the relation of landlord and tenant does not exist. 13 John. R. 489. And that relation does not exist where the defendant enters upon land under a contract of purchase and sale and for a deed. 6 J. R. 46. This claim, then, for use and occupation, is not sustained by the evidence.'

A typical example of the weight accorded the *Brewer* case is to be found in *Donovan v. Brenning*, 79 N. J. L. 202.

A diligent search has not revealed a single New Jersey decision where a vendor has ever recovered in an action for use and occupation.

If a technical abandonment, followed by contin-

ed possession, creates a tenancy, then *a fortiori* would the relation of landlord and tenant be established by a vendee's arbitrarily refusing to accept a deed and paying the balance of the purchase price. It was just such an arbitrary refusal that was before Chancellor Kent in *Smith v. Stewart*, 6 Johns. 46; notwithstanding, no exception to the general rule was made and a judgment of nonsuit entered.

It becomes both interesting and significant that this opinion of Chancellor Kent was one of the two authorities cited by Justice Nevius in *Brewer v. Admrs. of Conover*, *supra*, the first case to recognize the doctrine in New Jersey. What was said in the *Smith Case* may be said here: 'He is liable in another way, to be turned out, as a trespasser, and is responsible, in that character, for the mesne profits'.

Wheaton v. Collins, 91 N. J. L. 236, is a case in which the vendor recovered in tort, the vendee being charged with holding possession without right. A similar count was in plaintiff's complaint but he elected to abandon that one and rest not upon tort but upon contract. His case was conducted accordingly; so was defendant's counsel's cross-examination.

If the two counts in the complaint, having to do with the alleged removal of topsoil be deemed actions for waste—for in both appears the phrase, 'committed waste'—there should be no recovery under an act entitled, 'An Act for the prevention of waste'. 4 C. S., 5789. Not one of the relationships therein included was established.

Only by this statute is a landlord given a remedy against tenants committing or suffering waste. Such a remedy, like the action for use and occupation, did not exist under the common law. *Smith v. Salvation Army*, (1928) 6 Adv. Rep. 395 at 397.

The plaintiff was not and could not be the defendant's landlord. He was his vendor.

There seems to be no case in this state where a

vendor has recovered in waste for the removal of realty by the vendee without the vendor's consent. The nearest approach to anything having the semblance of support is *Freeman v. Headley*, 33 N. J. L. 523, which, if not overruled by the criticism of Chief Justice Beasley in *Beattie v. Connolly*, 39 N. J. L. 159, is so confined that it has never been cited for the broad proposition that a vendor may recover for waste against his vendee. As politely said by the Chief Justice, *Freeman v. Headley*, 'must be confined to a combination of facts identical with those forming the ground of that judgment'. If the facts at bar are at all similar to that 'combination of facts', the similarity cannot survive this striking difference: there the vendor gave the vendee permission to remove a building (the alleged waste); while here there was no evidence that the plaintiff ever gave the defendant permission to remove topsoil. From that permission to remove, the required tenancy was somehow created and thus formed the ground of the judgment.

Plaintiff, in failing to make out a case of use and occupation and waste, failed in his first, second, fifth and sixth counts; and failing to establish any express agreement to pay rent, he failed in his third count. Nothing was left.

Plaintiff's counsel (p. 167), although denying that defendant was ever a trespasser, but in order to escape a nonsuit, asked leave to amend by introducing the very count in trespass that he had at the outset of the trial elected to abandon. By his admission that defendant was not a trespasser, the plaintiff should have been bound. Defendant's counsel's examination, as the record discloses, was conducted in accordance with the issues as raised by the allegations in the pleadings on which the plaintiff had elected to stand or fall.

After the amendment the motion for nonsuit was renewed upon the ground that there was no evidence to show that defendant was a trespasser. In-

deed, the plaintiff's own counsel claimed he was not one, when he said (page 167) :

'If your Honor please, what I have been prepared to argue this morning, after an exhaustive study of the cases, as exhaustive as I could possibly make, was that after June 22nd, under our decision, the *defendant was not a trespasser* but a tenant at will; that he would not become a trespasser until he had been given a demand for possession by the owner of the title. Now I understand from what your Honor has just stated that it is the holding of this court that he was a trespasser. Now if your Honor holds that he is a trespasser I shall have to ask the court for leave to amend my complaint'.

Objection was made to any testimony having to do with the presence of radiators and other building materials upon the plaintiff's premises (p. 60). The testimony was received upon the assurance that the matter would in some way be connected with the defendant. This connection was never made.

Testimony relating to certain signboards (pp. 69, 70, 90, 94) was admitted over objection upon the same assurance that a connection would later be shown. This connection was never made, yet the motion to strike out the testimony at the close of the case was denied. (p. 174, 175.)

A similar motion was addressed to the reception of testimony having to do with the use of property by the Broadway Theatre Company (p. 85) and again to testimony relating to topsoil (p. 96, 102, 155).

Finally, on his motion, for plaintiff to elect among the three inconsistent counts which remained in the complaint, being denied, defendant proceeded to introduce proof on the issues as inaugurated by the reinstated count in trespass and the two in waste. An election should have been compelled for as said in *Marm v. Haurand*, 79 N. J. L. 375 at 378, 'an owner cannot treat the possession

of an occupant as that of a trespasser, and that of a lawful tenant during the same period'. (p. 184 of record.)

AS TO THE MOTIONS AT THE CLOSE OF THE ENTIRE CASE.

In order affirmatively to establish that defendant was not a trespasser plaintiff was asked (p. 187) the following question :

Q. Now we will go back to the first paragraph, the only remaining paragraph in the fifth count: 'The defendant by permission of the plaintiff held and enjoyed the land and premises described in the first count from the 10th day of June, 1925, to the 10th day of June, 1927'. Is that statement true? A. Yes, sir.

The motion for a direction was nevertheless denied—a denial which could be justified only by evidence showing that defendant was a trespasser.

Finally the fifth count, in waste, went out, and over objection the sixth count, originally in waste, was amended by eliminating the word 'waste'. There then remained only two counts, both in trespass. Upon these counts the case went to the jury.

The motion for a direction was renewed after the amendment, upon the ground that there was no evidence of any wrongful entry or wrongful possession. (p. 250.)

Motions were again made to strike out the testimony relating to the presence of building materials on the plaintiff's premises, as it had been affirmatively shown that the building materials were used on premises belonging to another. (See photograph of materials, Exhibit P 15); that the scenery which had been carted over plaintiff's premises was for use in the adjacent theatre; that it had not been shown that defendant had anything to do with the erection or maintenance of the many billboards, (see

photographs); nor had there been shown any connection of the defendant with the removal of topsoil. These motions were denied. (pp. 244, 245.)

THE CHARGE.

Ground 24.

Because the court charged as follows:

Now from that date, namely, June 22, 1925, as found by the Court of Chancery in the litigation indicated, I hold that Reade no longer had any right to occupy or possess the tract of land in question. The relation then had been suspended by a finding of the court that the contract was breached by Reade's refusal to accept the deed. Now necessarily from that time on, holding as I do as a matter of law, Mr. Reade had no right to occupy the premises and should have surrendered them to McKenna.

Holding as a matter of law that Reade had no right to occupy the property was contrary to the uncontradicted testimony of the plaintiff. (p. 187.) No effort was made to contradict such testimony because the counts for use and occupation had been stricken out. Reade's testimony was therefore directed solely to the two counts relating to the alleged removal of topsoil. (pp. 238, 242.)

Ground 25.

Because the court charged as follows:

Does it clearly appear by the evidence just why Reade was buying this lot of land? Was it for parking purposes? Was it for the purpose of putting a building on it? Whatever the purpose may have been, you will have to discover from an examination of the evidence yourselves.

Reade's object or purpose in contracting to buy McKenna's premises could hardly have been ma-

terial to the issues as framed in the two counts in trespass, the only counts left in the complaint.

Ground 26.

Because the court charged as follows:

And therefore if you find in this case as a fact that some corporation or some other person, not Reade, was responsible for the excavation on the lot in question, or indeed, that there was no such excavation on the premises, then I charge you there can be no verdict against Mr. Reade.

It would seem quite proper for a verdict of no cause of action to enter without the jury's determining who took away the topsoil. The question was, if any question remained, did Reade take it away?

Ground 27.

Because the court charged as follows:

And again it is said that the land was used for parking purposes, apparently in connection, I may say, with patrons of the theatre. But was Reade responsible for that or was the Broadway Theatre Company responsible? Then again it is said that certain radiators were parked, as it were, or placed upon the land. It further appears in that connection that at that time there was a building operation going on on the land belonging to Mrs. Reade, not to Reade. Unless you found some evidence in the case that warranted the inference that Reade was responsible for having those radiators placed there, of course you could not hold him.

There was no evidence in the record upon which the inference mentioned could be based.

Ground 28.

Because the court charged as follows:

'Now I have held as a matter of law that from the date of entry by Reade in-

to possession, if he did, with the consent of McKenna, to June 22, 1925, if Reade committed any damage or waste either himself or through his employees or agents, then the right of McKenna to recover would be in the nature of a breach of Reade's contract to take title to the land. Just when that excavating occurred I do not know. I have been unable to discover from the testimony. The complaint alleges that Reade occupied this land from the 10th of June, 1925, to sometime in June or July, 1927. In order to hold Reade, you must ascertain first that between the date of the contract, or rather, the time when he went into possession with consent of McKenna, to June 22, 1925, when the Court of Chancery found Reade had breached the contract by declining to take the deed, your right to award any damages in favor of McKenna against Reade must be for something that Reade did'.

In the complaint there was no claim of damages for any breach of contract nor had there ever been. The counts upon which the jury's verdict had to rest were both in tort.

Ground 29.

Because the court charged as follows:

Now, if he occupied the land then I charge you that the normal and natural damages to McKenna following from his refusal to take the deed would be in the nature of a breach of his contract and would involve depriving McKenna of the use of the land, to be translated into dollars and cents if you find it warranted under the evidence.

No action for breach of contract was ever before the court.

Ground 30.

Because the court charged as follows:

Then if you find in addition to that,

that during that period Reade directly or indirectly took any topsoil from the land the measure of damages would be the difference in value of the land before Reade took possession and after the breach of the contract on June 22, 1925.

There was no evidence to support any wrongful deprivation.

Ground 33.

Because the court charged as follows:

Now from June 22, 1925, up to some period of time, when Reade surrendered possession—and I am not at all clear that Reade was in possession after June 22, 1925, or what he did; actually there was pending litigation in the Court of Chancery covering the period—it is for you to say whether Reade is shown by the evidence to have remained in possession from that date, the breach of the contract, June 22, 1925; I hold that if you find Reade in possession he was there without right and therefore a trespasser, and McKenna would be entitled to recover what under the evidence you may find he suffered by reason of being deprived of the use of the property, or as we say, mesne profits, up to the time that either Reade gave up possession, if you find that circumstance in the evidence, or such time as you do find the occupation continued.

The court's pronouncement that if Reade were in possession he was in possession without right and was therefore a trespasser, violated the only proof of any occupancy. McKenna had testified to quite the contrary. (p. 187.)

Ground 34.

Because the court charged as follows:

Now as I see it, there are those two phases of the case: the right of McKenna to recover against Reade from the time

that he went into possession under the contract up to the time that Reade, in accordance with the view of the Court of Chancery, breached the contract, on June 22, 1925; and there the damages recoverable would be for a breach of contract. From that date on to the time that you find that Reade gave up possession, if you find he was in possession at all, he would be in the nature of a trespasser, and the damages there would be for mesne profits, what McKenna lost by being deprived of the use. And therefore a fair rental value, in the latter aspect, would be the measure; using that term rental, however, not in the sense ordinarily understood, involving the relation of landlord and tenant, but for mesne profits.

The language, 'and therefore the damages recoverable would be for a breach of contract', did not embrace the issues as delineated by the pleadings. The pleadings contain no action for breach of contract. Reade, if there at all, was there with permission of McKenna. He was not a trespasser. (p. 187.)

Ground 35.

Because the court charged as follows:

Now take the case, and if you find that McKenna has proven his case and is entitled to recover damages for the period covered by the complaint as amended, either in the aspect of a breach of contract up to June 22, 1925, and after that if you find Reade under the greater weight of the evidence to have been in possession as a trespasser, then of course you will award such damages as the facts warrant under the rules of law given you.

Here again the charge assumes the presence of an action for breach of contract when no action *ex contractu* appeared in the pleadings. It may

again be observed that McKenna said Reade enjoyed possession with permission. (p. 187.)

MISCELLANEOUS GROUNDS.

Ground 17.

The authenticity of the State of Case of the Chancery suit being admitted, a portion thereof was offered in evidence as an admission on the part of the plaintiff, Thomas McKenna, page 234-236. Objection to this offer was sustained upon the ground that no foundation had been laid, i. e., that McKenna had not been asked if he had said at a certain time and place what was in the Chancery Record.

McKenna was a party, and not a mere witness. What was offered, was offered as his admission, an exception to the hearsay rule. In referring to the rule requiring a foundation to be laid in the case of witnesses other than parties, the Court of Errors and Appeals in *McBlain v. Edgar*, 65 N. J. Law 634 at 637, said:

This is the rule applicable to a witness other than a party in a cause, but we are not aware of any authority sustaining the application of that rule to the statements of a party plaintiff or defendant.

Ground 1.

A portion of McKenna's premises had been rented for a lunch-wagon stand (see photographs pp. 333, 335, 337 and 339) prior to his contract with Reade. The tenant continued to occupy his portion throughout the periods in issue.

McKenna gave testimony of his agreement with the tenant, p. 71.

It thereafter appeared, on cross-examination, that this agreement had been embodied in a writing. A motion was thereupon made to strike out all testimony concerning the terms of the lease

in that such testimony was not the best evidence. The motion was denied, p. 77.

Ground 36.

Plaintiff's expert witnesses testified to the value of McKenna's *entire* premises. They did not except or make allowance for the portion demised. For illustration, see testimony of real estate expert, pp. 113-118, especially p. 118.

It would seem grossly irregular to subtract the rent from the figures given by the experts. The rent McKenna received from the small portion may or may not have been its reasonable value. The deduction, if made, would be arbitrary and would constitute no evidence of the value of the land remaining. Only the remaining land was the subject of the present action. To this remainder the experts on value did not direct their testimony.

There being no basis for assessing damages, defendant requested the Court to charge as follows: (p. 260 and p. 10) :

If you find for the plaintiff, you can find no more than nominal damages.

The request was denied.

* * * * *

The remaining grounds have not been specifically discussed because they fall within the scope of the arguments appearing in Parts I. II and IV of this Brief. There is no intention to abandon these grounds.

Respectfully submitted,

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Of Counsel.

26 OCT. 1. 1928

26

New Jersey Court of Errors and Appeals

OCTOBER TERM, 1928.

THOMAS P. MCKENNA,
Plaintiff-Appellee,

vs.

WALTER READE,
Defendant-Appellant.

Action at Law.
ON APPEAL
FROM
SUPREME
COURT.

BRIEF FOR PLAINTIFF-APPELLEE.

This action for use and occupation and for waste was tried at the Monmouth Circuit. The jury returned a verdict in favor of the plaintiff. Defendant appealed.

The case is simple enough, but the strategy of the defense seems to have been a maximum multiplicity of objections. Because of this, it is of the first importance that there be the clearest statement of the facts constituting the causes of action as well as those attending the conduct of the trial, in order the better to determine the question brought up as to the propriety of the allegations, the correctness of the Court's charge, as well as to the plaintiff's substantive right to hold the verdict given him.

The plaintiff, Thomas P. McKenna, was the owner of a vacant tract of land in the City of Long Branch. Various views of this tract are shown in the photographs, Exhibits P-3 to P-15 inclusive. He entered into a written agreement to sell this land to Walter Reade, the defendant, for \$50,000. The agreement appears in the printed case at page 264, line 18 *et seq.* It is dated May 9,

1925. The date set for the passing of title is May 25, 1925.

When the contract was made Reade went into possession with the permission of the plaintiff. The testimony as to this is as follows (Case, page 53, line 24):

“Well, when the contract was made he asked me whether there was an objection to going right ahead and making his preparations for the building and taking possession of the property, and I told him there was not.”

Reade, thereupon, went into possession. He caused the premises to be appropriated to use as parking ground for autos. He caused the removal of top soil and of trees in preparation of the area for that use, if not for some other purpose of his own. Defendant's possession and use continued long after his default as contract vendee, hereinafter shown, and until the trial itself.

The day fixed in the contract for the passing of title came and went. There was no performance on the part of the defendant as contract vendee. A number of adjournments were granted by the plaintiff as vendor. He finally made it essential that the contract be performed on June 22, 1925. On that day he offered a deed to the defendant. Defendant declined. Quite a time thereafter, when a boom struck Long Branch, defendant filed a bill in equity for specific performance. Plaintiff answered, and in his answer denied defendant's right to compel performance and *freely offered a return of the deposit money of \$5,000* (Case, page 314, line 19). Defendant's bill was dismissed. The opinion of the Court of Chancery is printed in the Case at page 306. The Court says (Case, page 310):

“If time was not, in so many words, made of the essence of this contract, as originally prepared, the circumstances are strong that time was intended to be of the essence and this is evidenced by the short settlement date fixed in the contract and the three short adjournments. * * * But it is unnecessary for me to decide here whether or not time was originally of the essence (and as I have already said, the circumstances indicating this are strong), because I think that both parties intended to make time of the essence when the last extension to June 22 was given.”

There is evidence in the present case to show that the possession of the defendant and the use to which he put the property, or permitted it to be put during that possession, continued not only up to defendant's default under the contract on June 22, 1925, but for the full period alleged in the complaint in this case, indeed, right up to the trial itself.

The proof in the case that substantiates this statement of defendant's possession and its duration is:

After the granting of permission by McKenna a sign was erected on the property forming an arched entrance thereto, as shown in Exhibit P-12, page 338. The sign reads: “25¢ Parking 25¢—This Parking Space donated by Walter Reade to the Stage Employees” (Case, page 75, line 18).

This sign was erected on plaintiff's property (Case, page 67, line 11). It was intended as an entrance to plaintiff's property from the time that the property was used for parking, the place of exit for cars from the parking ground being at another point and on contiguous land owned by the wife of the defendant (Case, page 127, line 13).

After defendant got permission to possess the land sign boards, having a rental value, were erected on the premises as shown in the

photographs (Testimony of McKenna; testimony of Smith, page 104; testimony of Gill, page 88).

During part of the period of his possession Reade was the manager of a theatre adjoining the McKenna property; and during the remainder of that period he was the owner of the theatre. The parking space was used for the patrons of the theatre. Access to the rear entrance of the theatre through which scenery, stage properties, etc. were taken was impossible without the use of the plaintiff's premises.

The witness, Edward Hughes, was an employee of the defendant, an unwilling and evasive witness. He testified that Reade donated the property for parking space; that the revenue was for the stage hands at the theatre; that the witness did not know of any arrangement with Reade as to a portion of the proceeds; that Reade parked his own car there; that the parking space was donated by Reade *during the early summer of 1925*. The property was *still used for parking at the time of the trial* (See testimony of Hughes, Case, pages 119-130).

During the possession of the defendant top soil was removed from the property, and trees were removed (See testimony of McKenna, *passim*).

A count of the cars parked upon plaintiff's property on the evening of September 4, 1926, showed the number to be 117, which seemed to be the condition nearly every night (Case, page 87, line 10).

The witness Schiverea, an engineer, testified that the top soil and clay removed from the premises approximated 500 cubic yards (Case, page 101, line 20).

The witness Howland took part in some of the digging and described what he saw of the preparation of the premises for parking use; that the whole parking space had to be made level (Testimony of Howland, page 133, *et seq.*).

The witness, Jesse Green, states that the defendant and he had a conversation with regard to Green's removing soil and earth from the premises. Reade instructed Green to dig level with the side walk. Green carted for two days with trucks. The witness states that he was familiar with the property and that before the leveling took place the premises went to a height of about four feet above the level of the walk; that at the same time other trucks were taking earth from McKenna's property around the lunch wagon; that the trees, stumps of which are shown in the photograph, Exhibit P-5, were removed from McKenna's property. The witness was sure that it was McKenna's lot as well as from defendant's lot that the soil was dug and carted (Case, page 148, line 3).

An idea of the change in the height of plaintiff's land is given by the height of the terrace upon which the lunch wagon stands, as shown in photographs, Exhibits P-6 to P-14. Note also the height of the terrace left contiguous to the wall of the theatre in the background of Exhibit P-6.

The defendant himself testified that he is president of the corporation owning the theatre adjoining the property in question. He made no denial of any testimony as to the use of plaintiff's premises for parking, nor as to his donation of the premises to others for such use, nor did he offer any explanation of the use of the plaintiff's property for the display of advertising sign boards. And significant too, is the failure of the defendant to deny his asking possession of the land and the plaintiff's granting it.

So, what the jury had before it in the way of fact from which to draw proper inferences was that the defendant was the owner or manager of a large theatre. Contiguous to the rear of it was the plaintiff's vacant land, a "sizable" plot (See defendant's brief). Defendant contracted to pur-

chase this "sizable" plot, and asked at the time for possession. Possession is granted. There upon the land is possessed and put to use in ways in which it had never been used before. Defendant is published, by signs erected on the premises, as "donating" the premises for parking space to the employees of his theatre. The premises are continuously used throughout for parking. Defendant himself parked his car there. These things are not denied by him in his testimony as a witness. The place of defendant's business interests immediately adjoins the scene of these new activities on the land. He was "there" (Case, page 126, line 10), and must have seen conditions. Large signs erected by outdoor advertising concerns are put upon plaintiff's premises. Their erection there is not denied by the defendant, nor any explanation of their presence given by him. Whether or not this privilege, like the other of parking, was donated by him to others is not shown. Defendant gives instructions promiscuously for the removal of top soil and earth from the premises and for the leveling of the land with the side walk. And many trucks are engaged for days in removing top soil and earth from the premises until the height of the area of the plaintiff's land is cut down by several feet. Defendant's own architect testifies to excavations on the McKenna property (Cubberly, page 227). These conditions continued for the full period alleged in the complaint, from June 1925 to June 1927, and there is some evidence that they still existed at the time of the trial.

Now, it is our contention that whatever error was committed at the trial was prejudicial, not to the defendant, but to the plaintiff. The chief result of the Court's rulings and conduct of the case was, we submit, the improper constricting of the scope and theory of the plaintiff's case.

The first count of the complaint was for use and occupation with the express permission of the plaintiff. This the Court struck out.

The second count is for use and occupation without express allegation of permission. This count the Court struck out.

The third count is for an amount due for rent. This the Court struck out.

The fourth count alleges the agreement to purchase, defendant's entering into possession, his abandonment of his contract to purchase and his liability for mesne profits during the period of possession. This count the Court permitted to stand.

The fifth count is based on defendant's possession with permission of the plaintiff. It alleges defendant's removal during possession, of top soil and gravel and its consequent injury to the estate and interest of the plaintiff in the land. This the Court struck out.

The sixth count alleges the agreement to purchase, entry into possession, continuance thereof from June 10, 1925, to June 10, 1927, abandonment of the contract, commission of waste during possession and the wrongful taking away and converting to his own use of a large amount of top soil and gravel, and the consequent injury to plaintiff's estate. From this count the Court struck out the allegation of "commission of waste", allowing to remain the charge of wrongful taking of the top soil, etc. Otherwise the count was permitted to stand.

Thus, there remained of the complaint the Fourth Count, and the Sixth Count as amended. And under these two Counts the Court submitted the case to the jury.

At the opening of the case plaintiff's counsel stated that the claim would be that the defendant's possession was with plaintiff's permission.

After the argument on the motion for nonsuit the Court stated that he would rule as a matter of law that after June 22, 1925, the date of defendant's default as contract vendee, defendant became a trespasser on the premises, "with the result that McKenna would have the ordinary remedy to recover any damages committed by him as a trespasser, such as mesne profits, for example, or the taking of top soil. * * * Whether he might be regarded as a tenant at sufferance or at will for the period subsequent to June 22, 1925, I am not deciding" (Case, page 166, line 20).

This ruling was against our contention that subsequent to defendant's default he was a tenant at will. In view of the Court's ruling, however, he instructed that the Fourth Count in the original complaint, wherein the wrongful possession of the defendant is alleged, be revived. That was done. For no greater reason than this we have in the record what is called an "amended complaint" (Case, page 24). (See discussion, pages 165-169.)

POINT I.

After the defendant had abandoned his contract on June 22, 1925, he was a tenant at will, and for his use and occupation of plaintiff's land from that time on he was liable for the reasonable rental value of the land. This is a minimum statement of plaintiff's rights.

And as a tenant at will the defendant is also chargeable with the waste committed by him during his tenancy.

It is *res adjudicata* in this case that on July 22, 1925, after defendant's default, the contract for the purchase of plaintiff's land no longer existed.

So, that after that date there was nothing in the situation between the plaintiff as owner of the land and defendant as the person in possession which would prevent the relation of landlord and tenant by implication, if not by express agreement. The termination of any possible relation of vendor and vendee was complete. Defendant was denied specific performance because the contract had been abandoned; and the plaintiff was decreed to return the deposit money, as he had offered to do. So it is that any authorities that are cited as holding to the principle that there can be no recovery for use and occupation on the ground that the parties are vendor and vendee, and therefore cannot be landlord and tenant, have no bearing on this argument. But while it is such cases exclusively that are cited by the defendant, they either are not pertinent here *or they really support our contention under the facts in this case, as it is our purpose to show.*

The case of *Brewer vs. Conover* in 18 N. J. L. at page 214 is not in conflict with our proposition. In the *Brewer* case the contract was terminated by reason of the *death* of the vendee. There was no wilful abandonment of the contract by the vendee. *Nor does the case at all consider the occupancy, if there was such, after the end of the contract to purchase.* The *Brewer* case seems never to have reached this Court.

Van Valkenbergh vs. Den, 23 N. J. L. 583 (Court of Errors and Appeals). In this case Van Valkenbergh was in possession under a contract to purchase from one Drake. The plaintiff (Rahway Bank) recovered judgments against Drake, and by virtue of execution and sale thereunder obtained a sheriff's deed. The bank brought ejectment against the vendee in possession. One of the defenses was that Van Valkenbergh and Osborne were tenants and as such entitled to

notice to quit. The case holds that they were not tenants, "in such sense as to entitle them to three months notice to quit." And adds, "but the defendants, being lawfully in possession under their contract for purchase, cannot be treated as trespassers and ejected from their possession without a demand for possession first being made." These statements are taken from the charge to the jury, which was approved in that case by this Court. The precise point was whether or not the party in possession was entitled as a tenant to notice to quit, or was entitled merely to demand for possession before ejectment. The Court says in its opinion (Case at page 587):

"If a party be let into possession under such contract, and the sale be not afterwards completed, *he holds strictly at the will of the vendor, unless there be something in the contract of sale to the contrary.*"

Cited in *Van Valkenbergh vs. Den* is the English case of *Winterbottom vs. Ingham*, 7 Q. B. 611, where, as stated in the opinion, the contract "had afterwards been terminated for want of title". The opinion remarks that in the case referred to it was held that the vendor "could not on *these grounds only* recover for use and occupation."

The following from the Van Valkenbergh opinion is significant:

"These cases seem to involve a principle not at all depending for its application on the fact that the contract went off without any default upon the vendee. It is that though there is ownership on the one side, and occupation by permission on the other, still use and occupation will not lie, if the occupation be given, taken and kept *under such circumstances as show that no contract of tenancy was in contemplation between the parties.*"

It is this KEEPING after the contract was abandoned, and the circumstances thereof, which in the present case fairly imply a relationship of landlord and tenant and an obligation to pay for the use and occupation. Using the negative form as in the Van Valkenbergh opinion, there is certainly nothing in the present case having to do with the circumstances under which the property was *kept* which shows "that no contract of tenancy was in contemplation between the parties."

The next case cited in the Van Valkenbergh opinion is *Doe vs. Chamberlaine*, 5 M. & W. 14. This case represents something of a parallel to the present case. Of it the opinion says that it was a case

"Where the stipulation was to pay at the rate of five per cent. per annum on the purchase money until the completion of the purchase, which was to be in three months. The purchase was not completed, and the *vendee continued in possession*. IT WAS HELD THAT HE WAS IN STRICTLY AT THE WILL OF THE VENDOR * * *."

While in the case last cited in the Van Valkenbergh opinion there is no determination as to the liability for rent, why does it not follow, if the party continued in possession "at the will of the vendor", that so long as possession endured there was the necessary relationship to imply the obligation to pay rent? And then follows this statement in the Van Valkenbergh opinion:

"If not subject to the liabilities of tenants, there would be little fairness that vendees should be permitted to hold against vendors as tenants."

The case of *Freeman vs. Headley*, 33 N. J. L. 523, is a case in which Freeman had an oral agreement to sell a parcel of property to Headley, on

which stood an old building. Headley's purpose was to erect a new building for use as a livery stable upon the premises, and pending the execution and delivery of the deed Headley asked permission to go upon the land and destroy the old structures. The permission was granted. Pursuant to this permission the buildings were destroyed. Thereafter a misunderstanding arose between the parties as to the extent of the land to be conveyed. The defendant, in the situation that developed, declined to accept the deed or to go through with the contract. Plaintiff sued the defendant for waste. The Court held that the defendant under the circumstances was a *tenant at will* for the purpose of such a suit and reversed the decision of the Supreme Court which held to the contrary.

This Court in *Freeman vs. Headley* said that the permission was conditional, the condition being the defendant's carrying out his agreement to purchase; and that the defendant's right under the permission to destroy the buildings was contingent upon his performance of the contract; that since he defaulted in performance of the contract his destruction of the building was wrongful and waste.

Similarly, in the present case, it can be fairly claimed that the permission given to Reade to go upon the premises and to get ready for his buildings was conditional obviously upon Read's performance of his contract to purchase; and that any waste committed or injury done while in possession under such permission is chargeable to him as in the Freeman case.

This Court in the Freeman case cites:

Suffern vs. Townsend, 9 Johns. R. 35;
Jackson vs. Miller, 7 Cow. 747;
Howard vs. Shaw, 8 M. & W. 118;
Gould vs. Thompson, 6 Metc. 224.

And the Court says after a consideration of these decisions:

"Upon these authorities and upon principles applicable to the case, I have no difficulty in holding that a purchaser in possession of lands, under a contract to purchase, whether written or verbal, is a *tenant-at-will* for the purpose of sustaining an action on the case in the nature of waste, for destruction committed while in such possession."

And the Court says further (page 536):

"That tenants-at-will were liable at common law, and independent of this statute, for voluntary waste like this, is conclusively shown by the cases cited in the opinion of the Supreme Court, by Justice Depue, in the case of *Moore v. Townshend*, decided in February Term, 1869, in which the history and progress of the common and statute law with regard to waste, and the remedies for it are shown with great learning and research."

Of the case of *Howard vs. Shaw*, *supra*, this Court in *Freeman vs. Headley*, at page 535, says:

"Barons Parke and Alderson both expressly declare that a purchaser in possession, under a contract to sell, was a tenant-at-will, but was entitled to occupy the premises rent free, and, therefore, no action for use and occupation could be brought against him for that time, *but only from the time when the contract was at an end*. C. B. Abinger, differed, and held that, until the contract was at an end, he could not be considered a tenant."

Beattie vs. Connolly, 39 N. J. L. 159. This case is relied upon by defendant's counsel as a criticism of *Freeman vs. Headley*. But Chief Justice Beasley, at page 163, says that the rule in *Freeman vs. Headley* unquestionably did justice in that case. He does point out

“that it would often operate adversely to justice, is equally unquestionable. The latter would be the case whenever the licensee, by virtue of his license, had performed two distinct acts—the one beneficial and the other injurious to the premises.”

And it is only concerning the supposed application of *Freeman vs. Headley* to the situation he contemplates that Chief Justice Beasley is critical. But this is not such a situation. Reade's occupation of the premises in question was beneficial in no way to the land, but only injurious thereto. The benefits of the occupancy inured legally to Reade exclusively.

But the most significant thing about *Beattie vs. Connolly* is the dictum of Chief Justice Beasley on page 164. He says:

“It may well be, notwithstanding what was said in *Brewer vs. Conover's Adm'rs 3 Harr. 214*, that on the circumstances, as they appear to exist in this case, that an action on an implied contract for use and occupation of the premises in question, will lie against these defendants.”

It is therefore important that we determine the extent of the parallel between the facts in the present case and in *Beattie vs. Connolly*. There the plaintiff bought a brick yard at sheriff's sale. He entered into an agreement to give defendants, the former owners of the property, a fixed time within which to repurchase. In the meantime the defendants were permitted to go into possession, which they did. They defaulted in their agreement to repurchase. There is no vital difference between that situation and the one we are now concerned with. And if the defendants in the *Connolly* case could be held, as the Chief Justice says, in an action on an implied contract for use and occupation of the premises, there certainly ap-

pears to be no reason why an action for use and occupation does not lie against Reade, certainly at least for the period beginning with his default under the contract to purchase.

The case of *Donovan vs. Brenning*, 79 N. J. L. 202 (Supreme Court), is no authority whatever against the plaintiff's contention here. In that case there was an express provision in the contract of sale giving the vendee possession pending the conveyance of title, without reserving any rent. And it was the plaintiff, as contract vendor, who could not perform his contract. Certainly if the vendor permitted the vendee to go into possession without rent, as part of the contract of sale, and then could not perform that contract on his part, there should be no difficulty in reaching the conclusion that the plaintiff would have no right to recover for use and occupation.

Defendant's possession of the plaintiff's property comes within the definition of a tenancy at will, as laid down in the case of *Den vs. Drake*, 14 N. J. L. 523. That case holds:

“All general and undefined tenancies, whether they originate simply by permission of the owner, or where the tenant has entered under a void lease, or been let in pending a treaty for a purchase, or wherever there has been no express agreement between the parties as to the terms of the occupancy, provided the entry was a lawful one, or with the privity and consent of the owner, are now held to be tenancies at will.”

The latter case was decided in 1835. It was recently cited with approval by Vice-Chancellor Berry in the case of *Standard Realty Company vs. Gates*, 99 N. J. Equity 271 at 275.

If it be objected that there is no separate understanding or demise for the period beginning with the date of Reade's default under his contract, it

can be answered that the law clearly holds a demise in any action for use and occupancy to be unnecessary. *Chambers vs. Ross*, 25 N. J. L. 293; *Mason vs. Hourand*, 79 N. J. L. 375.

“Where a party has occupied premises belonging to another it follows, as a matter of course, that he is bound to pay for the use and occupation, unless he can show an agreement to the contrary or a satisfactory reason why he should not be charged.” (Conover case, 1 N. J. Eq. 403.)

It is not perceived “what satisfactory reason” the defendant could possibly show why he should not be charged for the period beginning with June 22, 1925.

It is established that the mere existence of a contract between the parties under which they are vendor and vendee will not preclude a collateral agreement which makes them at the same time landlord and tenant sufficient for the purpose of a suit for use and occupation. That was the holding in the case of *Nestal vs. Schmid*, 39 N. J. L. 686. What reason, therefore, can be urged for the principle in the present case that the *prior* existence of a contract to purchase is sufficient to preclude the subsequent relationship between the parties, of landlord and tenant?

In the case of *Wheaton vs. Collins* (90 N. J. L. 29) Chief Justice Gummere says, at page 30:

“The first contention made before us is that the plaintiff was not entitled to recover under the pleadings in the present suit for the use and occupation of his property, unless the relation of landlord and tenant existed between the parties, and that no such relationship was disclosed. We do not find it necessary to determine the soundness of the proposition thus advanced. The real merits of the case were tried out, and the plaintiff was manifestly entitled to compensation for the de-

privation of the use of his property. It was to meet just such a case as this that the legislature passed section 27 of the new Practice Act of 1912, which provides that ‘no judgment shall be reversed * * * for error as to matter of pleading or procedure, unless after examination of the whole case it shall appear that the error injuriously affected the substantial rights of a party. Pamph. L. 1912, P. 377.’”

POINT II.

There was proof of defendant's occupation ample beyond what the law requires.

We refer the Court, under this point, to the detailed statement of the evidence set forth in the preliminary part of this brief. But it is apparent from a reference to authorities that far more evidence was introduced than was necessary.

“Entry or occupation is required to support the action, and if such occupancy is commenced by the assent of the owner, the tenant will be responsible for the rent until the tenancy is *legally determined*, and although the tenant voluntarily abstains from the occupation of the premises before the legal termination of the tenancy. It is not necessary, however, to prove that defendant has been in actual occupation of the premises during the whole time for which recovery is sought. *Legal possession under the power given by the landlord to occupy and enjoy is sufficient*” (39 CYC 857).

We take from the annotations of the foregoing text from CYC the following:

“Entry and occupation held sufficient see *McGunnagle v. Thornton*, 10 Serg. & R. (Pa.) 251; *Sullivan v. Jones*, 3 C. & P. 579, 14 E. C. L. 724 (holding that the putting up of a board

for the purpose of letting houses, by a person who built them, and agreed to become tenant of them from a certain time, is sufficient to enable the person for whom they were erected to recover rent on a count for use and occupation); *Neal v. Swind*, 2 *Cromp. & J.* 377, 1 *L. J. Exch.* 118, 2 *Tyrw.* 464 (where defendant, in expectation of a lease, by indenture, which he had agreed to take from plaintiff, procured attornments from some of the tenants, and received rent from others, and was held liable for use and occupation); *Glenn v. Dungey*, 4 *Exch.* 61, 18 *L. J. Exch.* 359; *Smith v. Twoart*, 2 *M. & G.* 841, 3 *Scott N. R.* 172, 40 *E. C. L.* 883 (where a party who had agreed to rent a house sent in a woman to clean the house, and a workman to paper one of the rooms, and it was held to be sufficient evidence of occupation)."

POINT III.

Nothing in the instructions to the jury was prejudicial to the defendant upon the whole case.

In some of the exceptions to the Court's charge reference is made to what counsel calls evidence of express permission to the defendant for the full period of the occupancy. This evidence is a single answer made by the plaintiff at the close of his examination. It is pointed out here so that the defendant may not succeed in making much of it in the consideration of the Court's charge. This so-called evidence of express permission for the full period is all that there is in the whole case which in any way refers to the license for the occupation during the period subsequent to June 22nd, 1925. Plaintiff's election is not based upon it; evidence now in point might be looked upon merely as the plaintiff's *statement* of his election

to regard the defendant as a tenant at will. But what is this evidence?

After the plaintiff had closed his case, and upon the resumption of the trial *five days later* (page 85 of Case, lines 2-33), the defendant called McKenna for further cross-examination. The plain effort of this "further cross-examination" was, by indirection and device, to get on the record statements which the defendant might contend amounted to express permission for his remaining on the property for the full period. What bearing this had on the merits of the issue, one way or the other, is not apparent. McKenna was asked nothing less than that he *characterize as true or false various allegations in the complaint filed in this suit*. Such was the method of eliciting this "evidence". When objection was made to this course, the Court said to defendant's counsel: "If you want an answer to the question, I will permit him to read the complaint" (Case, page 189, line 35). But defendant's attorney insisted upon asking the questions without McKenna's "referring to the amended complaint" (Case, page 187, line 1). And all that this manoeuvring leads to is this:

"Q. Now we will go back to the first paragraph, the only remaining paragraph in the fifth count: 'The defendant, by permission of the plaintiff, held and enjoyed the lands and premises described in the first count from the 10th day of June, 1925, to the 10th day of June, 1927'. Is that statement true? A. Yes, sir."

It is this "Yes, sir" that counsel refers to in his argument against some of the passages in the Court's charge.

Now, the Trial Judge in his charge submitted the question to the jury upon the two counts which he permitted to remain in the complaint: the

fourth, and the sixth as amended. The fourth count, it will be remembered, alleges the agreement to purchase, defendant's entering into possession, defendant's abandonment of his contract to purchase, and his continuing in possession thereafter *without* right, and defendant's liability to plaintiff for mesne profits. The sixth count alleges the agreement to purchase, the entering into possession, abandonment of the contract, and the wrongful taking by defendant, when in possession, of the top soil, etc.

We contend that the Court erred against the plaintiff in granting the defendant's motion to strike the several counts. We say that the Court might properly have submitted the case to the jury upon the basis of defendant's status as tenant at will subsequent to June 22nd, 1925, provided, of course, that they found actual possession or occupation by him. As it turned out, the defendant suffered no prejudice. The Court left the jury absolutely free to determine the fact of actual possession and use, going to the extremity in defendant's favor of referring to the evidence bearing upon this as "rather nebulous" (Case, page 254, line 35).

Having found actual possession and use subsequent to the breach of the contract to purchase, and throughout the period covered by the evidence, what difference was there that the jury should have found reasonable rent as mesne profits, considering the defendant as trespasser; or should have found reasonable rental for use and occupation, considering the defendant as a tenant at will? It is the law that damage for continuing trespass is the fair rental value (*Wheaton v. Collins*, Ct. E. & A., 91 N. J. L. 236).

So it is our purpose to show that the Court's instructions in no way were harmful to the rights of the defendant under the whole case.

The first portion of the charge that is excepted to is as follows:

"Now, from that date, namely, June 22, 1925, as found by the Court of Chancery in the litigation indicated, I hold that Reade no longer had any right to occupy or possess the tract of land in question. The relation then had been suspended by a finding of the Court that the contract was breached by Reade's refusal to accept the deed. Now necessarily from that time on, holding as I do as a matter of law, Mr. Reade had no right to occupy the premises and should have surrendered them to McKenna."

And concerning this, counsel says:

"Holding as a matter of law that Reade had no right to occupy the property was contrary to the uncontradicted testimony of the plaintiff."

This "uncontradicted testimony of the plaintiff" was the "Yes, sir" above referred to. But counsel proceeds to explain that no effort was made to contradict such testimony because "the counts for use and occupation had been stricken out." Why he should have made any contradiction, we do not know. Perhaps he could have shown that defendant was in possession of the plaintiff's land *without* the plaintiff's permission. At any rate, he gives us, as a reason for the failure to contradict, the fact that the counts for use and occupation had been stricken out. Whatever was done by the Trial Judge in the way of striking out was done on the motion of defendant's counsel and to the prejudice of the plaintiff. And if defendant's counsel so far relied upon the validity of what the Trial Judge was induced by him to do as to withhold any evidence which was available to him in his defense, the resulting dilemma is of his own making.

But, as already pointed out, whether or not the Trial Judge was strictly accurate in holding as a matter of law that "Mr. Reade had no right to occupy the premises and should have surrendered them to Mr. McKenna," the defendant suffered no legal harm. Let us suppose that the Court had said that the defendant *did* have a right to occupy the premises. Certainly he could not have told the jury that such right was free from an accompanying obligation to pay for its enjoyment. The jury believed the ample evidence of defendant's possession and use. He took unto himself the legal avails of possession, and he was liable as a consequence for reasonable rent, upon the theory of use and occupancy, or for mesne profits in the form of reasonable rent, upon the theory of trespass.

The twenty-fifth, twenty-sixth and twenty-seventh grounds of appeal are frivolous.

The twenty-ninth ground of appeal takes exception to this passage:

"Now if he occupied the land, then I charge you that the normal and natural damages to McKenna following from his refusal to take the deed, would be in the nature of a breach of his contract, and would involve depriving McKenna of the use of the land, to be translated into dollars and cents if you find it warranted under the evidence."

What difference did it make to either party that the trial judge said, *if Reade "occupied the land"*, that the normal and natural damages would be "*in the nature of a breach of his contract?*" Even if it is to be conceded that this language is not the happiest, nevertheless it was the *measure* of damages that was in point. And what the Court said on that subject was not erroneous and was not excepted to. The fact that the instructions contained the statement that the damages would be "in the

nature of" something or other, prejudiced no one so long as the rule for determining the *quantum* was correctly given. The argument that counsel makes in his brief against this passage is simply the statement that "no action for breach of contract was ever before the Court". The Court did not say that there was.

The thirtieth ground of appeal takes exception to the following:

"Then if you find in addition to that, that during that period, Reade directly or indirectly took any top soil from the land, the measure of damages would be the difference in value of the land before Reade took possession and after the breach of the contract on June 22nd, 1925."

All that counsel says about this is that "there was no evidence to support any wrongful deprivation". We do not know what counsel means. This passage was entirely justified by the evidence in the case, especially the testimony of the witness, Jesse Green, and the engineer, Schiverea, to mention no others. As a matter of fact, the period of time limited by this instruction for the change in the value of the premises to that between the time "that Reade took possession and after the breach of the contract on June 22nd, 1925," if prejudicial at all, was prejudicial to the plaintiff. For the plaintiff had a right to have damages for the difference in his land which was the result of its use and appropriation, throughout the *whole period*, by the defendant.

What we have already said concerning the Court's mention of Reade as a trespasser after June 22nd, 1925, applies also to the argument under the thirty-third ground of appeal. The only point that counsel makes under this ground of appeal is a reference to the evidence embodied in the "Yes, sir" of the plaintiff, above mentioned.

The thirty-fourth ground of appeal is directed to this:

“Now, as I see it, there are those two phases of the case: the right of McKenna to recover against Reade from the time that he went into possession under the contract up to the time that Reade, in accordance with the view of the Court of Chancery, breached the contract, on June 22, 1925; and there the damages recoverable would be for a breach of contract; from that date on to the time that you find that Reade gave up possession, if you find he was in possession at all, he would be in the nature of a trespasser, and the damages there would be for mesne profits, what McKenna lost by being deprived of the use. And therefore a fair rental value, in the latter aspect, would be the measure; using that term rental, however, not in the sense ordinarily understood, involving the relation of landlord and tenant, but for mesne profits.”

Here again there is no prejudice to the real rights of either party to this suit, whether after June 22nd, 1925, the defendant be referred to as one “*in the nature of a trespasser*” or not. In this passage it is made clear that any verdict against the defendant is contingent upon the jury’s first finding that “*he was in possession at all.*” What the Court says here, as to the measure of damages, gives soundness for every practical purpose to the entire reference to defendant’s relation to the land subsequent to the ending of the contract.

The first part of the passage here considered—that which refers to the damages during the period prior to the abandonment of the agreement to purchase as being for a breach of contract—must not be read alone, but together with what the Court had already said about this (Charge, P. 255, L. 40; P. 256, L. 10; P. 256, L. 20-26).

The references to damage as “in the nature of” breach of contract are always in connection with any harm found to have been done by Reade to the premises between the time of his entry and the end of the contract to purchase. And as already pointed out, such limiting of the time within which the jury could find Reade to have done any despoiling was favorable to the defense, not harmful.

Having already instructed the jury on the nature of the damages for any waste committed prior to the breach of the contract to purchase, and for any use and occupation after that time, the Court, in the passage under this thirty-fourth ground of appeal is simply making a final reference by way of summary to “these two phases of the case.”

Whatever merit there is in the thirty-fifth ground of appeal has been considered in dealing with the other grounds of appeal directed to the Court’s charge.

In every way the language of the charge as a whole safeguards the rights of the defendant. Again and again the jury is told that any finding whatever of damages can be predicated only upon proof that the “defendant actually possessed the land”. And as to this, the Court repeatedly takes occasion to refer to the plaintiff’s proofs in a manner that certainly did not exaggerate their effect. The same is true concerning the Court’s reference to waste. As an instance, the Court said:

“Now, I have held as a matter of law that from the date of entry by Reade into possession, if he did, with the consent of McKenna, to June 22, 1925, if Reade committed any damage or waste either himself or thru his employees or agents, then the right of McKenna to recover would be in the nature of a breach of Reade’s contract to take title to the land. Just when that excavating occurred I do not know. I have been unable to discover from

the testimony. The complaint alleges that Reade occupied this land from the 10th of June, 1925, to some time in June or July, 1927. In order to hold Reade you must ascertain first that between the date of the contract, or rather, the time when he went into possession with the consent of McKenna, to June 22, 1925, when the Court of Chancery found Reade had breached the contract by declining to take the deed, your right to award any damages in favor of McKenna against Reade must be for something that Reade did."

Taking the charge as a whole, and even discounting whatever ineptitudes of language it may be said to contain, it performed the task of placing the case in such posture before the jury that no legal prejudice to the rights of either party could have followed.

The judgment of the Supreme Court, entered upon the jury's verdict, should be affirmed.

Respectfully,
 PERKINS & DREWEN,
 Counsel for Thomas P. McKenna,
 Defendant-Appellee.

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