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NEW JERSEY

Court of Errors and Appeals.

MORRIS COUNTY CIRCUIT COURT, }  
*Of the Twenty-ninth day of October,*  
*eighteen hundred and sixty-four.* }

PIERSON A. FREEMAN,

*vs.*

SAMUEL F. HEADLEY.

} *In Case.*

Morris County, *ss*: Pierson A. Freeman puts in his place Augustus W. Bell his attorney against Samuel F. Headley, in a plea of trespass on the case,

Morris County, *ss*: Samuel F. Headley puts in his place Vancleve Dalrymple his attorney at the suit of Pierson A. Freeman, in a plea of trespass on the case.

Morris County, *ss*: Samuel F. Headley the defendant, was summoned to answer unto Pierson A. Freeman the plaintiff in this suit of a plea of trespass on the case, and thereupon the said plaintiff Augustus W. Bell his attorney, complains for that whereas, long before and at the time of the committing of the grievances hereinafter next mentioned, he, the plaintiff, was seized in his demesne as of fee of and in a certain messuageous shop or building and land with the appurtenances, situate, lying and being in the township of Morris, in the said county of Morris, and within the jurisdiction of this court. 10

And whereas, the said defendant afterwards, to-wit, on the first day of June, eighteen hundred and sixty-one, at the township of Morris aforesaid, to-wit, in the said county, and within the jurisdiction aforesaid, was the possessor and occupier of said messuage, lands and premises with the appurtenances, and during all that time then held the same of the said plaintiff as his tenant thereof at will.

- 10 And the said defendant being so possessed thereof, he the said defendant afterwards, to-wit, on the first day of August, eighteen hundred and sixty-one, at the township of Morris aforesaid, to-wit, in the said county, and within the jurisdiction aforesaid, surrendered and yielded up the possession of the said premises with the appurtenances, to-wit, to the plaintiff. Yet the defendant contriving, and wrongfully and unjustly intending to hurt and injure the said plaintiff in his estate of inheritance of and in the said messuage or shop and land with the appurtenances, during the time that he the said defendant was possessed of said several premises with the appurtenances, and some time before, he, the said
- 2) defendant, left or yielded up the possession of said premises with the appurtenances, and whilst he the said plaintiff was so seized thereof as aforesaid, to-wit, on the first day of July, eighteen hundred and sixty-one, at the township of Morris, to-wit, in the county and within the jurisdiction aforesaid, wrongfully and unjustly, and without the license and against the will of the said plaintiff, broke down, pulled down, prostrated, broke to pieces, spoiled and destroyed, and caused and procured to be broke down,, pulled down, prostrated, broke to pieces, spoiled and destroyed the said shop or
- 30 building of and belonging to the said premises, and then affixed thereto, and being of great value, to-wit: of the value of five hundred dollars, and wrongfully and unjustly carried away, and caused to be carried away, the materials of the same, and converted and disposed thereof to his own use, whereby the said plaintiff was and is greatly injured, prejudiced and damnified of and in his estate and reversionary interest, and in his said messuage, shop or building, and land with the appurtenances; and the said plaintiff by reason of the premises has lost the use and occupation of the
- 4) said shop and building, and the rents and profits thereof

which might and otherwise would have arisen and accrued to the said plaintiff, to-wit, at the said county of Morris.

And whereas, also the said plaintiff long before, and at the time of the committing of the grievances hereinafter next mentioned, he, the plaintiff, was seized in his demesue as of fee of and in a certain other messuage, shop or building, and land with the appurtenances, situate, lying and being in the township of Morris, in the said county of Morris, and within the jurisdiction of this court; and whereas, the said defendant afterwards, to-wit, on the first day of June, 1861, at the township of Morris, to-wit, in the county and within the jurisdiction aforesaid, was the possessor and occupier of the said messuage, shop or building, and land with the appurtenances, and during all that time there held the same of the said plaintiff, under and in pursuance of a parol agreement of purchase before then made between the said plaintiff and the said defendant of the said messuage, shop or building with the appurtenances by the said defendant from the plaintiff, and the said defendant being so possessed thereof as last aforesaid, he the said defendant, afterwards, to-wit, on the second day of May, in the year last aforesaid, at the said township of Morris, to-wit, in the county and within the jurisdiction aforesaid, surrendered and yielded up the possession of the said premises to the plaintiff. Yet the defendant contriving, and wrongfully and unjustly intending to hurt and injure the said plaintiff in his estate of inheritance of and in the said messuage, or shop or building of land with the appurtenances during the time that he the said defendant was possessed of the said messuage, shop or building, with the appurtenances and some time before, he the said defendant, left and yielded up the possession of the said premises with the appurtenances, and whilst he, the said plaintiff, was so seized thereof as aforesaid, to-wit, on the first day of June, in the year last aforesaid, at the said township of Morris, to-wit, in the county and within the jurisdiction aforesaid, wrongfully and unjustly, and without the license and against the will of the said plaintiff, broke down, pulled down, prostrated, broke to pieces, spoiled and destroyed, and caused and procured to be broke down, pulled down, prostrated, broke to pieces, spoiled and destroyed the said messuage, shop or

building of and belonging to the said premises and then affixed thereto, and being of great value to-wit, of the value of five hundred dollars; and wrongfully and unjustly carried away the materials of the same and converted and disposed thereof to his own use, whereby the said plaintiff was and is greatly injured, prejudiced and damnified of and in his estate and reversionary interest, and in his said messuage, shop and buildings and land with the appurtenances, and the plaintiff by reason of the premises, has lost the use and occupation of the said shop or building, and the rents and profits thereof which might and otherwise would have risen and accrued to him the said plaintiff, to-wit, at the said county of Morris.

And whereas, also the said defendant before and at the time of the committing of the grievances hereinafter next mentioned, held and enjoyed a certain messuage or shop of land with the appurtenances, situate, lying and being in the township of Morris, to wit: in the County of Morris, and within the jurisdiction of this Court, as tenant thereof to the said plaintiff, that is to say, as tenant thereof for so long a time as they the said plaintiff and defendant should respectively please, to wit: at the County of Morris aforesaid — Yet the said defendant contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the said plaintiff in his estate of inheritance of and in the said messuage or shop and land with the appurtenances, during the time that he the said defendant was possessed of said premises with the appurtenances, and some time before, he the said defendant, left and yielded up the possession of said premises with the appurtenances, and whilst he the said plaintiff was so seized thereof as aforesaid, to wit: on the first day of July, eighteen hundred and sixty-one, at the township of Morris, to wit: in the County and within the jurisdiction aforesaid, wrongfully and unjustly, and without the license and against the will of the said plaintiff, broke down, pulled down, prostrated, broke to pieces, spoiled and destroyed, and caused and procured to be broke down, pulled down, prostrated, broke to pieces, spoiled and destroyed the said shop or building of and belonging to the said premises, and then affixed thereto, and being of great value, to wit: of the value of five hundred dollars, and wrongfully and unjust-

ly carried away, and caused to be carried away the materials of the same, and converted and disposed thereof to his own use, whereby the said plaintiff was and is greatly injured, prejudiced and damnified of and in his reversionary estate and interest, and in his said messuage, shop or building and land with the appurtenances; and the said plaintiff by reason of the premises, has lost the use and occupation of the said shop or building, and the rents and profits thereof which might and otherwise would have arisen to him, the said plaintiff, to wit: at the said County of Morris. 10

And whereas, also the said defendant before and at the time of the committing of the grievances hereinafter next mentioned, held and enjoyed a certain messuage or shop and land with the appurtenances, situate, lying and being in the township of Morris, and in the County of Morris, and within the jurisdiction of this Court, as tenant thereof to the said plaintiff at sufferance. Yet the said defendant contriving and fraudulently intending to hurt and injure said plaintiff in his estate of inheritance of in and to the said messuage or shop or other the premises with the appurtenances during the time that he, the said defendant, held the same of said plaintiff as his tenant thereof as last before mentioned and sometime before, he the said defendant left or yielded up the possession of the said premises with the appurtenances, and whilst he the said plaintiff was seized thereof, to wit: on the first day of July, eighteen hundred and sixty-one, at the township of Morris aforesaid, to wit: in the said County and within the jurisdiction of this Court, wrongfully and unjustly, and without the leave or license and against the will of the plaintiff, broke down, pulled down, prostrated, spoiled and destroyed the rafters, beams, joists, roof, ceilings, walls, wainscots, floors, windows, window frames, doors and door eases of and belonging to the said messuage or shop, and wrongfully and without the leave or license, and against the will of the said plaintiff, took and carried away the materials, to-wit, forty cart loads of brick, forty cart loads stones, twelve timber planks and boards of said plaintiff thereof coming of a large value, to-wit of the value of five hundred dollars, and converted and disposed thereof to his own use, to-wit, at the county of Morris aforesaid, whereby 20 30 40

the said plaintiff was and is greatly hurt, injured, prejudiced, and damnified of and in his said reversionary estate and interest of and in his aforesaid messuage, shop or building and premises with the appurtenances, to-wit, at the county of Morris, and by means of the said premises, he the said plaintiff has not only lost and been deprived of the use and occupation of the said shop or building, but has lost all the rents and profits thereof which might and otherwise would have accrued to him the said plaintiff, to-wit, at the county of Morris aforesaid.

10 And whereas, also the plaintiff heretofore, to-wit, on the first day of April, eighteen hundred and sixty-one, at Morristown, to-wit, in the township of Morris, in the county of Morris and within the jurisdiction of this court, was seized in his demesne as of fee of and in a certain other messuage, shop or building of land with the appurtenances, situate, lying and being in the township of Morris, in the county of Morris, and within the jurisdiction of this court; and whereas, heretofore, to-wit, on the day and year aforesaid, at Morristown, to-wit, in the said county and within the jurisdiction of this court, the said plaintiff and defendant made a parol agreement whereby the said plaintiff at the request of the said defendant bargained, and agreed to sell and convey to the defendant, and the defendant then and there bargained and agreed to purchase of the plaintiff the said messuage shop or building, land and premises with the appurtenances, and he the said defendant then and there undertook and faithfully promised the plaintiff to pay him the sum of twelve hundred dollars upon the said plaintiff's well and sufficiently granting and conveying unto the said defendant, his heirs and assigns the said messuage, shop and building, land and premises with the appurtenances, to have and to hold to him the said defendant, his heirs and assigns forever. And the plaintiff in fact says that afterwards, and after the making of the said agreement and of the promise and undertaking of the said defendant, and whilst he the said plaintiff was so seized thereof as aforesaid, to-wit, on the day and year last aforesaid at Morristown, to-wit, in the said county and within the jurisdiction aforesaid,

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30 he the said defendant under and in pursuance of the said agreement of purchase, entered into the said premises with

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the appurtenances, and was possessed thereof until as is hereinafter stated. Yet the said defendant contriving, and wrongfully and unjustly intending to hurt and injure the said plaintiff in his estate of inheritance of and in the said messuage or building, and premises with the appurtenances, and during the time the said defendant was so possessed of the said messuage and premises with the appurtenances, and whilst he the said plaintiff was so seized thereof as aforesaid, to-wit, on the twentieth day of April, eighteen hundred and sixty-one, at Morristown, to-wit, in the county and within the jurisdiction aforesaid, wrongfully and unjustly, and without the leave or license of the said plaintiff, and against the will of the said plaintiff, broke down, pulled down, prostrated and destroyed the said messuage, shop or building of and belonging to the said premises and affixed thereto, and of great value, to-wit, of the value of five hundred dollars, and wrongfully and unjustly carried away from off of the said lands and premises, and the materials thereof, and converted and disposed thereof to his own use. 10

And the plaintiff further says, that afterwards, to-wit, on the fifth day of August, in the year last aforesaid, at Morristown, to-wit, in the county, and within the jurisdiction aforesaid, he the said plaintiff was ready and willing to make, and did make and execute a good and sufficient conveyance and title in fee simple and for and to the said tenements and appurtenances unto the said defendant, and then and there offered and tendered to the said defendant the said good and sufficient conveyance and title in fee simple of the said lands and tenements with the appurtenances in pursuance of the said agreement, and then and there demanded of the said defendant the purchase money for such conveyance in pursuance of the said agreement. Yet the said defendant not regarding his said agreement and undertaking, but contriving, &c., did not nor would not at the said time when the said conveyance was so tendered by the plaintiff to the defendant as aforesaid, or at any other time pay or cause to be paid to the plaintiff the said purchase money so as aforesaid agreed to be paid by the defendant to the plaintiff for the said lands and premises or any part thereof, but then and there wholly neglected and refused so to do, and then wholly refused then or at any other time to complete the said 20 30 40

agreement and purchase, or to accept of a conveyance of the said lands and hereditaments with the appurtenances to him the said defendant ; and the plaintiff in fact further says that afterwards, to-wit, on the fifth day of August, eighteen hundred and sixty-one, at Morristown, to-wit, in the county and within the jurisdiction aforesaid, he the said defendant was requested by the plaintiff to pay him for the value of the said messuage, shop or building so broke down, pulled down, prostrated and destroyed by the said defendant, and taken  
 10 and removed off of the said lands and premises by the defendant as aforesaid, but he the said defendant then and there wholly refused, and ever since hath and still doth refuse to pay the plaintiff for the same, to-wit, at the said county of Morris ; by reason of the said several premises, he the said plaintiff was and is greatly hurt, injured, prejudiced and damnified of and in his said estate and interest, and in his said messuage, or shop, or building and land with the appurtenances ; and he the said plaintiff has not only lost and been deprived of all the profits and advantages which  
 20 might and would otherwise have arisen and accrued to him from the performance and completion of the said agreement and purchase on the part of the defendant, but the plaintiff has wholly lost the use and occupation of the said shop or building, and the rents and profits thereof which might and otherwise would have accrued and arisen to him the said plaintiff, to-wit, at the said county of Morris.

And for that whereas, the said plaintiff heretofore, to-wit, on the second day of July, eighteen hundred and sixty-one, at Morristown, to-wit, in the said county of Morris and with-  
 30 in the jurisdiction of this court, was lawfully possessed as of his own property of a certain shop or building of great value, to-wit, of the value of six hundred dollars, and being so possessed thereof he the said plaintiff afterwards, to-wit, on the day and year last aforesaid, at Morristown, to-wit, in the county and within the jurisdiction aforesaid, casually lost the said shop or building out of his possession, and the same afterwards, to-wit, on the day and year last aforesaid at Morristown, to-wit, in the said county and within the jurisdiction aforesaid, came to the possession of the said defend-  
 40 dant by finding. Yet the said defendant well knowing the

said shop or building to be the property of the said plaintiff, and to belong and appertain to him, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not as yet delivered the said shop or building to the said plaintiff, though often requested so to do, and hath hitherto refused so to do, and afterwards, to-wit, on the day and year last aforesaid at Morristown, to-wit, in the county and within the jurisdiction aforesaid, converted and disposed of the said shop or building to his own use.

And whereas, the said plaintiff afterwards, to wit: on the first day of September, eighteen hundred and sixty-one, at Morristown, to wit: in the County of Morris, and within the jurisdiction of this Court, was lawfully possessed as of his own property, of certain other goods and chattels, to wit: five hundred loads of wood, twenty doors, fifty door posts, forty windows, forty window frames, five thousand boards, ten thousand feet of flooring, forty stones, sixty window sash, one hundred and fifty square yards of roof, forty loads of bricks, forty loads of stone, forty loads of timber, forty loads of plank, forty loads of ether boards, forty loads of posts, one hundred beams, one thousand joists, two hundred rafters, of the value of eight hundred dollars, as of his own property, and being so thereof possessed the said plaintiff afterwards, to wit: on the day and year last aforesaid, at Morristown, to wit: in the County and within the jurisdiction aforesaid, casually lost the said wood, doors, door posts, windows, window frames, boards, flooring, window sash, roofs, brick, stones, timber, plank, posts, beams, joists, rafters, out of his custody and possession, and the same afterwards, to wit: on the day and year last aforesaid at Morristown, to wit: in the County and within the jurisdiction aforesaid, came to the possession of the said defendant by finding. Yet the said defendant well knowing the said goods and chattels in this count mentioned to be the property of the said plaintiff, and of right to belong and appertain to him, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not, although often requested so to do, delivered the same or any part thereof to the said plaintiff, and hath hitherto wholly refused so

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to do, and afterwards, to wit: on the day and year last aforesaid, at Morristown, to wit: in the said County and within the jurisdiction aforesaid, converted and disposed thereof to his own use, to the damage of the said plaintiff two thousand dollars, and therefore he brings his suit, &c.

And the said defendant, by Vancleve Dalrimple his attorney, comes and defends the wrong and injury, when, &c., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any  
10 part thereof in manner and form as the said plaintiff hath above thereof declared against him, and of this he puts himself upon the country, &c.

And the plaintiff doth the like. Therefore, let a jury thereupon come before our said Court at Morristown in the said County of Morris, on the third Tuesday of January, in the year of our Lord one thousand eight hundred and sixty-six, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., at which day before our said Court at  
20 Morristown aforesaid, came the parties aforesaid by their attorneys, and the jurors of that jury being demanded, also come, who to speak the truth concerning the premises above mentioned, being elected, tried and sworn upon their oath say, that the said defendant is guilty of the premises within laid to his charge in manner and form as the said plaintiff has above thereof complained against him, and they assess the damages of the said plaintiff by reason of the nonperformance of the promises above mentioned at five hundred dollars, besides cost of suit.

Therefore it is considered that the said Pierson A. Freeman do recover against the said Samuel F. Headley his said  
30 damages in form aforesaid assessed, and also sixty-two dollars and ten cents for his costs and charges by him about his suit in this behalf expended and now here by our said Court to the said Pierson A. Freeman with his assent adjudged, which said damages, costs and charges amount in the whole to five hundred and sixty-two dollars and ten cents.

And the said Samuel F. Headley in mercy, &c.  
Judgment signed January 19, 1866.

## MORRIS CIRCUIT COURT.

PIERSON A. FREEMAN,  
*v.*  
 SAMUEL F. HEADLEY.

} *In Case.*

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This cause came on to be tried upon the issue joined, *pro ut* the pleadings, at a Circuit Court held at Morristown, in and for the County of Morris, on the eighteenth day of January, in the year eighteen hundred and sixty-six, before the Hon. Peter Vredenburgh Judge of said Court, and a Jury being duly empannelled, chosen and sworn according to the statute in such case made and provided. The plaintiff by his counsel opened his case, and thereupon the evidence hereinafter stated was adduced before the Jury, and the exceptions hereinafter stated were prayed and allowed to the defendant. 20

The said plaintiff Pierson A. Freeman, a witness on his own behalf, being duly sworn, deposed and said :

I bought this property at Sheriff's sale.

(Deed dated 26th August, 1854, from Wm. W. Fairchild, Sheriff to said plaintiff. Recorded 25th December, 1854, in Book F, 5, of Deeds for Morris County, page 116, offered in evidence by said plaintiff, and read *pro ut* the same.) 30

I agreed to sell that property to defendant in February or March, or thereabouts in the year 1861. There were two shops, one was two story frame building used as a carriage painter and trimmer shop ; the painter and trimmer shop up stairs. That shop was in good condition, good frame, was removed from opposite side of the street in 1840 and refitted ; the other shop was not in so good condition—it was a blacksmith shop ; James L. Robinson had been occupying this property ; he had died shortly before this agreement ; no one was occupying it at the time of the sale to defendant. 40

The plaintiff here proposed and offered to prove what the said property had rented for prior to said contract with defendant, to which evidence the said defendant objected on the ground that the amount for which the land and buildings rented was no criterion of the value of the buildings, which objection was overruled, and the said evidence admitted, whereupon the defendant excepted to the ruling of the Court, and prayed a bill of exceptions to the same, and that it might be sealed, and it is sealed accordingly.

- 10 Witness proceeded. I rented the woodshop for \$125 a year, and the blacksmith shop for \$50 a year. That was a fair rent for them. In February or March, 1861, defendant came to me with Matthias F. Noe, and said he wanted to purchase the property; he asked the price; I said \$1500, he wanted them for less; he did not purchase them. He was to see me the second and probably the third time, I finally agreed to sell for \$1200, and he agreed to take the property. He was to assume a mortgage of \$1000 on the property, and
- 20 to give his two notes for the balance. He remarked that I said I had sold the property cheap, and he said—give me the sheriff's deed and I will take it and make you a deed for nothing. He asked me the number of feet; I said I did not know—I had never measured it. I told him I had bought it at sheriff's sale; there it was, and I would sell it for so much money. He took the sheriff's deed and drew a deed, and I handed it to Mr. Bell to look over, and he said it was all right—I showed it to Bell immediately. I was to deliver it the next day; the next day Noe came and said that Headley had to go to Trenton unexpectedly, and the carpenters
- 30 were there all ready to take the buildings down, and that Headley told him to call on me and ask me if I had any objections to taking the buildings down, and I said no. He said Headley would be back in a day or two, naming the day, and that he would then carry out the contract according to our understanding. I told him it would make no difference if he fulfilled. They went to work and tore the building down, and removed a greater part of the timber. Headley did return several days after that, but I was not able to
- 40 see him in some time. I could not get sight of him. I tried

to see him. I met him in the street. I had the deed with me ready for delivery, acknowledged and executed. I offered it to him. I told him the buildings had been torn down, and I was ready. He refused to have anything to do with it; then he began to talk about the gore. Said he would take the title to the property if I would get the title to that strip. I told him I knew nothing about the gore or wedge; that I sold him the property as I bought it, that I could not sell him any more than I owned. I had conveyed all that I had and all that I had agreed to convey. 10

He refused to do anything with it till I got the strip.— Soon after that I agreed to get the strip, and did get it. He said he would take the property, provided I would get the wedge, and I did agree to get it.

The defendant here objected to all evidence of any parol or other agreement alleged to have been made subsequent to that already proved, and in which the said strip or wedge, was to be included, and to all evidence of fulfillment by plaintiff of such subsequent contract, and moved to overrule all evidence already given as to such subsequent contract, on the ground that the same was under the statute of frauds void, but the Court decided to receive and allow the said evidence, and refused the said motion, and overruled the said objection, to which last mentioned ruling of the Court the defendant excepted and prayed a bill of exceptions, and that it might be sealed, and it is sealed accordingly. 20

Witness proceeded :

I afterwards obtained the title to that strip, and this deed now shown me was tendered by me to defendant in pursuance of what I had promised him. The heirs of James L. Robeson had title to the strip. I then made and executed a deed to Headley, and showed him the deed from the heirs, and tendered him a deed for the whole. Plaintiff here offered deed from 30

DANIEL ROBESON,	}	Dated	
and others,		2d August, 1861	
to		Acknowledged	
PIERSON A. FREEMAN.		3d August, 1861	40

Recorded 9th August, 1861, in Book Y. 5, page 479, *pro ut* the same.

- I went with my own and this deed and showed them to Col. Headley, and he refused to take the property; he mentioned that the time had been too long. There was no time mentioned between him and me when I should get the title. I got it as soon as I could. I had a great deal of trouble to get it; the heirs of Robeson at first refused to let me have the strip, and then consented. Headley said Noe refused to take possession of the livery stables which he intended to put on the property if he bought it, or to carry them on.— He said he was going to build a livery stable and get Noe to superintend it, and that Noe said that so much time had elapsed that he would not take the stables; this was about the time that the last deed was tendered. I told him the buildings had been torn down, and he said so much time had elapsed it was unfair to ask him to take the property. He said he would have nothing to do with it; it was unfair to ask it. He never denied tearing the buildings down.—
- 10 He did not ask me for a deed from the time he promised to take it; the gore was got when I tendered him the deed the second time. The defendant was away a good part of the summer; it was pretty hard work to find him anyhow. I had not before the sale contemplated destroying the buildings. I received these two letters from defendant. The plaintiff here offered in evidence two letters from defendant to him, one dated 8th August, 1861, and the other 29th August, 1861, *pro ut* same.

- When the defendant asked me to get title to the wedge,
- 30 he gave me the boundaries on the paper.

The plaintiff's counsel then put to witness the following:

Q. Could you rent the property for any purpose after the buildings were taken off?

A. No.

- To which question and answer the defendant objected, because the same were immaterial, the defendant being liable, if at all, only for the actual value of said buildings. The Court overruled the objections and permitted the witness to
- 40 answer, to which last mentioned ruling of the Court the de-

defendant excepted, and prayed a bill of exceptions, and that it might be sealed : and it is sealed accordingly.

Witness being cross-examined further saith :

The defendant said he wanted to buy the two shops ; I don't know whether the shops covered the wedge ; I have never taken any pains to ascertain whether my sheriff's deed covers the wedge ; I had possession of the shops when I made the bargain ; Noe told me that defendant said he would fulfill the contract on his part when he came back, and that Headley told him to tell me so. I never heard anything about the wedge until after the buildings were torn down ; when the contract was made defendant said he had employed Noe to superintend. 10

*Silas Leonard*, a witness, produced and sworn on the part of said plaintiff, said :

I tore down the shop in spring of 1861 ; Mr. Noe hired and paid me. He went towards Col. Headley's to get the money. Some of the stuff went to defendant's, and some to Mr. Noe's ; defendant came home a day or two afterwards when I was tearing down part of stone wall ; he stopped us from tearing down the end of the wall. He did not want the wall torn down. He talked of putting a window or door in there. 20

*William O. Force*, a witness, produced and sworn for plaintiff, deposed and said :

I helped carry away the best timber and boards from the lot in question. Defendant and Noe told me to carry off the best of the timber, and put it up in a shed on Mr. Noe's premises or Mr. Howell's lot. I carried the timber over there. I saw Mr. Headley's team taking away lumber one day. I do not know where they took it. This was at the same time I was putting up the building on the other side of the road. 30

*Matthias F. Noe*, a witness, produced and sworn on the part of said plaintiff, deposed and said :

It was the last of January or first of February, 1861, when we went to buy that property. It was then talked of, but the bargain was not closed. We were there again, do not think the bargain was then closed. Freeman asked more 40

than we were willing to give—\$1,500, I think—and then he talked before we left he would take a little less. Headley offered \$1,200. The mortgage on the property was to remain, and the balance to be paid in one and two years. I do not think the bargain was then closed, but that was the talk. In February, one day, defendant told me to go to Mr. Freeman and ask his permission, if he was willing that the buildings should be torn down; that he was going to Trenton that morning, and that if Mr. Freeman was not willing, not to touch the property; he said he would be back in a few days. He told me to get some one to tear down the buildings, provided Mr. Freeman was willing to have them torn down. I went to Mr. Freeman and told him that defendant was going to Trenton, and he wanted me to come and see him and ascertain if he was willing to have the buildings torn down; that he would be gone but a few days, and would see him on his return. He said go ahead and tear them down, that he had no objections whatever. I then left Mr. Freeman's store and walked down to the buildings and got Leonard to tear them down. Two loads of the old stuff I think were carted by hand to Mr. Headley's; this was some days after the buildings were torn down; about that much moved across the road to my door, and the best of the remainder moved on to Mr. Howell's lot, and a shed made of it. The stuff to build this shed was moved off latter part of February or first of March.

The plaintiff having rested, the defendant moved that he be called for the following reasons :

Because the declaration is in trover, and for tearing down the buildings, &c., without the consent or permission, &c., of plaintiff, and the plaintiff's case is as made by him that the buildings were torn down by consent and permission of plaintiff, and by mutual arrangement between him and defendant.

Because the plaintiff cannot under a parol agreement for the sale of real estate recover at law damages for the tearing down by his consent of the buildings in question, or for the conversion of the material thereof, even though the defen-

defendant refused after the buildings were so torn down and materials converted, to accept the title to the property.

Because the action in the shape it is by the evidence, is an action to charge the defendant on a parol contract for the sale of lands, tenements hereditaments and real estate.

Which motion the Court denied, whereupon the said defendant excepted to the said last mentioned ruling prayed that a bill of exceptions might be sealed, and it is sealed accordingly. 10

Whereupon the said defendant was sworn as a witness on his own behalf, and deposed and said :

On the eve of 31st January, 1861, Mr. Noe, and myself called on Freeman in reference to this property. I asked Mr. Freeman if he owned the Robison property joining the Easton property? He said he did. I asked his price. He said he thought it was worth \$1500. I replied that was different from what I had heard, and I started to go away. He said don't be in a hurry, and we walked back to where he had a private desk. He then said he would take \$1250. I told him I wanted to get his lowest figure, for if I bought it I would buy the Easton property, and I wanted to put up a livery stable for Mr. Noe. I told him that property of Easton's ought to bring \$1650, or about that; that I thought it worth more than his, but that I would think of it, and after some conversation I left. Then, I think on 7th February, I saw him again after I had seen Mr. Easton, and got his verbal proposition. I told him, Freeman, that I had been thinking the matter over, and that \$200 or \$300 was not much in uniting two properties like that, and the kind of building I was going to put up; that I had had Mr. Lounsbury to look at it, and that a building could be put there by uniting it to the brick building that would accommodate over 30 horses, and by finishing a nice front on street, and entering from blacksmith shop lot, as they could do on space between blacksmith shop and end of street, would not make a nuisance, and could finish the building handsomely, and if his title was all right, and if I could have a deed made to me within a very few days, so that I could get the material and 40

have the building up by early spring, I would take it at \$1200, which I told him was more than it was worth. He gave me a description of his losses, and said that I ought not to be hard, that I could make money out of it, and I said I thought I could by uniting the two buildings together.— He said his title was perfect; he would give me the deed he had from the sheriff, and that he had also got the release of the widow's dower. I took the deed. I was to have as much time as I wanted on the mortgage—that Judge White-

10 head did not want the money; my main object was to start my neighbor in business, and that we would both make money by it.

I told this to Freeman—the stable was to go in Noe's name. I drew a deed and gave it to Freeman. He said he would show it to Mr. Bell. I have never seen it since. I said I should want to have the property surveyed before I accepted the deed, and advised with him as to who I had better get to survey it. He advised Mr. Tuttle and I got him. I took the description from the

20 sheriff's deed; my impression is I called for the boundaries. I have never taken possession of or had charge of the property. Mr. Tuttle came and made the survey, had some papers of his own and the sheriff's deed. I gave the deed to Freeman Saturday, and left home the next Monday, and returned the next Friday. I told Mr. Noe not to touch the buildings. He wanted to go on as time was important. I told him I had not my title, and if Freeman wanted the buildings down, to take them down and I would pay the expense. Freeman and I had talked about the buildings, and

30 neither of us considered them worth anything. I said to Noe that my rule was never to touch property till I had a title; that I should not touch this till I had a title; that if the buildings were taken down, they must be taken down under Freeman's authority and consent. When I came home I found the buildings down and a couple of jags of stuff in my yard. I told Mr. Noe not to put another stick there. That was never used by me or for my use or benefit to my knowledge. Either that day or the next Tuttle made the survey. He had the sheriff's deed and some papers of

0 his own. Noe and I were there. There was a gore 3 to 5 feet in front running to a small point in the rear of the

sheriff's deed did not cover. I went immediately to Mr. Freeman and told him the result of the survey and that Mr. Easton had informed me that he had deeded that gore to Robeson at request of Wood and Whitehead who had paid him for it. He said he did not know it, he asked me what I thought the strip was worth. I told him the property to me was worth nothing without it. The one shop stood on this gore except about one foot along the Easton line. Freeman told me that I should go to the Robeson's and get a deed, as he thought I could do the best; he thought I ought to get it for \$50 or less. I went and saw Daniel Robeson one of the heirs. I did all I could to get a deed, and did not succeed, and informed Mr. Freeman, and he said some of the rest of them would see him. I told Mr. Freeman I wanted the lot badly, and he said I might depend on getting it soon. I told him I would make arrangements to have the building put up. He said I had better say nothing about the gore. I spoke to Cory to put up the wall; to Mr. Lounsbury to put up the building; I went to Newark and contracted for lumber. I went to Trenton and bought 7 horses altogether, carriages and harness. I found I was not likely to get the property, and countermanded the order and used lumber for other purposes. I kept the horses at heavy expense till the middle of July, when I disposed of them as best I could, and in latter part of July I informed Freeman I would have nothing to do with the property. I had nothing to do with putting up of building across the road. When I came home on that Friday, Leonard had a bar throwing down stone wall that is near the stairs to brick shop, and I told him to stop throwing it down. I went to see Freeman about the middle of July.— Mr. Freeman said he never sold me that strip of ground, and was not bound to make over the title for it. I asked him if he did not think that was not honest, and if I did not buy the whole, and if he had not been looking to that. He said he sold me what he had, not what he hadn't. He said he would make me take the property without the strip. I asked him if he had not been trying to get it? I told him I was willing to take it with that strip yet, and without it I would not; as he said he was not bound to give it, that was an end of it, and I would have nothing more to do with it.—

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He told me 4 or 5 days before he came with the deed, that he had bought that strip. I said I had sold the horses and no use now. Mr. Noe had given up the business. This was about the 1st August.

*J. Boyd Headley*, a witness, produced and sworn on the part of said defendant, deposes and saith :

I think this last summer a year ago, Freeman said there was some misunderstanding between him and Mr. Headley, and wished me to see him in reference to the matter. I told him I did not know what the misunderstanding was, and wished him to tell me. He said that he sold these lots to father, and that there was a difference about the title to a piece, and father refused to take them on that ground ; that he was under a misapprehension at the time he sold the lot ; he supposed he owned the whole of it ; that he had since obtained a title to the piece, and was now prepared to make a deed for the whole ; that father refused to take it now, from the fact that too long a time had expired ; that as a matter of equity it ought to be arranged, and about what I said about it father would do. He said he did not blame father, there was a misunderstanding on both sides ; there was nevertheless a loss to him, and he thought it would be fair at least to divide it. I told him I would report the matter to my father. He said he thought the loss was about \$20. He said he thought he ought to have \$100, and the loss ought to be equally divided.

Cross examined :

He said he was under a misapprehension of the matter when he made a sale. He said he had put the matter in Bell's hands once when I spoke to him. He said to arrange it he would take \$100. He said he wanted to avoid a lawsuit, and would take \$100. I do not think suit was commenced in spring of 1861. I lived in Illinois.

Deed from Wm. J. Easton and wife to James L. Robeson, dated May 11, 1853, recorded in B. 5, page 237, *pro ut same*.

*Matthias F. Noe* being recalled by defendant and examined as a witness in his behalf, further deposed and said :

I think Mr. Freeman said, when he and Headley were bargaining, that he would give a good title for the property.— When Headley was about leaving to go to Trenton, as I have

before stated, I felt anxious, as the season was getting late, and went to Headley and asked him if I should get some one to take the buildings down. He said no, not without going to and seeing Mr. Freeman first, and I accordingly went and saw Mr. Freeman. Headley said, do whatever Mr. Freeman said I should do. That I should ask Mr. Freeman if he was willing to take the buildings down, and whatever Mr. Freeman said, I should do. If he said no, not to do it; and if he said yes, do it. I went to Mr. Freeman, and he said yes. I told him what Headley said, and that he would come and see him when he came home. Mr. Freeman said, take them down, he did not care. I do not recollect Freeman saying anything about his being willing if Headley would take the property. Yesterday I stated as nearly as I could what took place between Headley and me, and me and Freeman. Leonard commenced tearing down buildings before dinner. I saw defendant that morning early.

Cross examination :

I suppose Freeman said he supposed it would be all right to go on. I think it is likely he did. I do not know but that the defendant said at some time that the war coming on we could not do as well with the livery stables; whether this was before or after we abandoned the business, I cannot say.

Deed dated June 18, 1849, from Wood and Whitehead to James L. Robeson, recorded in V 4, page 401, *pro ut* same.

Plaintiff's rebutting evidence :

*Pierson A. Freeman* recalled :

I have no recollection of defendant mentioning the surveyor. I did not know till now that he had had the lot surveyed. I have had two or three conversations with Boyd Headley. The first time I talked with him, he said he understood there was some difference between his father and me. I told him some part did not go into the whole. He said he would give me \$100 if I would drop it. I said I would not consider it for a moment. He said rather than to have any difficulty he would give me \$100. I did not say to Boyd that I was under any misapprehension as to the lot or the title to it. I did not offer to take \$100.

I told the defendant I was not bound to give him the gore, but to avoid difficulty I would get it, and did so. There was no time specified within which I was to get it. I had interviews with the defendant about getting the title to it, and he knew I was negotiating for it.

Plaintiff offered to prove what the witness Noe had told him defendant had said about his reasons for refusing to complete the purchase. To which evidence the defendant objected; the Court overruled the objection and admitted the evidence, to which last mentioned ruling of the Court the defendant excepted, and prayed a bill of exceptions and that it might be sealed, and it is sealed accordingly.

PETER VREDENBURGH.

{ L. S. }

Thereupon witness further said :

20 Mr. Noe told me that Mr. Headley told him that the war coming on, and the prospect of money being tight he would abandon the whole thing; he told me so at the time, and has told me so within forty-eight hours. Until after I offered the second deed in July, defendant never told me he would not take it.

30 Whereupon the Court charged the jury that if the plaintiff gave permission to the defendant to take down the buildings on the understanding sworn to by plaintiff—that is, on condition that the defendant should take the property under the agreement, the plaintiff must recover for such taking down; but if the buildings were taken down by the plaintiff himself, and the defendant did not have anything to do with it, then the plaintiff cannot recover. And that the title of plaintiff to the premises in question or to any part thereof cannot be disputed in the action, and that it was immaterial in this action whether the plaintiff had title to the gore or wedge or not, and that the measure of damages was the value of the buildings as they stood upon the lot before being torn down.

The defendant excepted to that part of the charge of the Court which instructed the jury that the plaintiff could recover for taking down the buildings, if they were taken down by the defendant on the understanding sworn to by plaintiff, because that was not the case made in this declaration, and if plaintiff gave defendant consent to take down said buildings, then the defendant was not liable in the suit for such taking down, and prayed a bill of exceptions, and that it might be sealed, and it is sealed accordingly.

PETER VREDENBURGH. 10

L. S.

The defendant further prayed a bill of exceptions to that part of the charge of the Court which instructed the jury that the title of the plaintiff to the premises in question or any part thereof cannot be disputed in this action, and that it was immaterial whether the plaintiff had title to the gore or wedge or not, because if plaintiff failed after said buildings were taken down to make a good title to said premises, he could not treat defendant as a wrong doer, and prayed that the said last mentioned bill of exceptions might be sealed, and it is sealed accordingly. 20

PETER VREDENBURGH.

L. S.

Whereupon the defendant asked the Court to charge the jury, that if the defendant took down the buildings by himself or his agents for that purpose by the consent and with the knowledge of the plaintiff, this action cannot under the pleadings be maintained for such taking down. 30

The Court refused so to charge, to which refusal the defendant excepted, prayed a bill of exceptions, and that it might be sealed, and it is sealed accordingly.

PETER VREDENBURGH.

L. S.

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Whereupon the defendant further asked the Court to charge the jury, that if the defendant by himself took down the buildings by consent of plaintiff, the act was lawful, and the subsequent refusal of defendant with or without cause to take the property, did not make him a trespasser or tortfeasor by relation or otherwise.

The Court refused so to charge, to which refusal the defendant excepted, prayed a bill of exceptions, and that it might be sealed, and it is sealed accordingly.

PETER VREDENBURGH.

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{  
L. S.  
}

Whereupon the defendant further asked the Court to charge the jury, that if the consent of plaintiff to the taking down of the buildings was on condition that defendant should become the purchaser of the property under the contract sworn to by plaintiff, and defendant afterwards refused with or without cause to perform the contract, the plaintiff's remedy is not in a Court of law but in Equity if anywhere, and he cannot recover for taking down the buildings in this action.

The Court refused so to charge, to which refusal the defendant excepted, and prayed a bill of exceptions, and that it might be sealed, and it is sealed accordingly.

PETER VREDENBURGH

{  
L. S.  
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*Deed dated August 26th, 1854. Recorded in Book, F. 5,  
page 116, &c.*

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WILLIAM W. FAIRCHILD,

Sheriff, &c.,

to

PIERSON A. FREEMAN.

*For the following  
Described Lands.*

To all that lot of land and premises, situate lying and being in the township of Morris, in the County of Morris and State of New Jersey. Bounded on the east by lands of Joseph Lovell, west by lands of Wm. J. Easton, north by the 20  
First Presbyterian burying ground, and south by Morris street, containing one tenth of an acre more or less, and more fully described as follows: beginning in the middle of Morris street in Morristown at a point bearing north seventy-three degrees and thirty minutes east distant twelve links from the beginning corner of the lot first described in a certain deed of conveyance from Samuel Freeman and wife to the said Ira C. Whitehead and William N. Wood, bearing date the seventeenth day of March, A. D, 1839, and recorded in the Morris County Record of Deeds in Book T, 3 folios 30  
143, 144 & 145; Thence (1) along the line of a lot now or late of Joseph Fairchild, north nine degrees and forty-five minutes west one chain and nineteen and a half links to the corner of the Burying ground; thence (2) south eighty-four degrees and forty-five minutes west seventy-six links to a stake; thence (3) south eleven degrees and thirty minutes east one chain and thirty-eight links to an iron stake in the middle of Morris street aforesaid; thence (4) north seventy-three degrees and a half east eighty-three links to the place of beginning, containing one tenth, of an acre of land more 40

or less. It being the second lot described in the aforesaid deed from Samuel Freeman and wife to the said parties of the first part, lying on the north side of Morris street aforesaid, on which are the blacksmith and wagon maker shop, and more particularly set forth and described in a deed of conveyance from Ira C. Whitehead and wife and William N. Wood and wife to James L. Robeson, bearing date of June 18th, A. D., 1849, and recorded in the Morris County Record of Deeds, V, 4, folios 401 & 402.

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NEW JERSEY SUPREME COURT.

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SAMUEL F. HEADLEY,

*vs.*

PIERSON A. FREEMAN.

} *Error to Morris*  
 } *Circuit Court.*

And the said Samuel F. Headley by Henry C. Pitney his attorney, comes and says, that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bills of exception, and also in the giving the verdict and judgement aforesaid, there is manifest error.

For that the said Justice before whom, &c., and at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, did suffer and permit the defendant, Pierson A. Freeman, to prove and give in evidence the evidence offered by him as in the first one of the said exceptions is mentioned, to-wit, the amount for which the premises mentioned in the pleadings below had rented for prior to the said alleged contract between the parties, whereas, by the law of the land the said Justice ought to have excluded the said evidence, because the same was illegal and unimportant.

For that the said Justice at and upon the said trial, did admit and receive in evidence parol evidence of the contract

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to purchase the land and premises alleged to have been made between the said parties, and did permit the said Pierson A. Freeman to prove the contract set forth in the second and fifth counts of the declaration by parol. Whereas, by the law of the land it was incompetent to prove the same by parol, and the said evidence should have been rejected and annulled.

For that the said Justice on the trial aforesaid, permitted the said Pierson A. Freeman when on the stand as a witness in his own behalf, to answer the question put in the third exception, to-wit, *Could you rent the property for any purpose after the buildings were taken off*, and thereby permitting the said Pierson A. Freeman to prove the rental value of the said premises after the said buildings were removed; whereas the true measure of damages was the value of the buildings removed. 10

For that the said Justice on the trial of said cause after the said Pierson A. Freeman had rested his case, refused, when thereunto moved by the said Samuel F. Headley, to nonsuit the said Pierson A. Freeman, and refused to direct and instruct the jury to render a verdict for the defendant. 20

For that the said Justice on the trial of said cause permitted the said Pierson A. Freeman to give in evidence and prove the declarations of one Matthias F. Noe, a third party, made to said Pierson A. Freeman at divers times before the said trial in which said Noe stated certain declarations made by said Samuel F. Headley. Whereas, by the law of the land said evidence was illegal and incompetent, and should have been excluded by said Justice. For that the said Justice charged the Jury on the trial below, that the said Pierson A. Freeman could recover in the action against said Samuel F. Headley, notwithstanding the said buildings were so taken down by the permission of said Pierson A. Freeman, and on the understanding sworn to by him. 30

For that the said Justice charged the Jury on the trial below that the title of the said Pierson A. Freeman to the premises mentioned in the pleadings or any part thereof could not be disputed in that action, and that it was immaterial whether said Pierson A. Freeman had the title to a certain gore part of the premises in question or not. 40

For that the said Justice upon the trial of said cause after the evidence was closed on both sides, refused upon request by said Samuel F. Headley to charge the Jury that if said Samuel F. Headley by himself or his agents took down the buildings mentioned in the pleadings below by the consent and with the knowledge of said Pierson A. Freeman, the said action under the pleadings could not be maintained for such taking down.

10 For that the said Justice upon the trial of said cause after the evidence was closed on both sides, refused upon request of said Samuel F. Headley, to charge the Jury that if said Samuel F. Headley took down the said buildings by consent of said Pierson A. Freeman, the act was lawful, and the subsequent refusal of said Samuel F. Headley with or without cause to purchase said property did not make the said Samuel F. Headley a trespasser or tortfeasor by relation or otherwise.

20 For that the said Justice upon the trial of the cause, and after the evidence on both sides was closed, refused upon request of said Samuel F. Headley to charge the jury that if the consent of the said Pierson A. Freeman to the taking down of the said buildings was on condition that said Samuel F. Headley should become the purchaser of the property under the contract sworn to by said Pierson A. Freeman, and the said Samuel F. Headley afterwards refused with or without cause to perform the contract, the remedy of said Pierson A. Freeman was not in a Court of law, but in equity, and he cannot recover for taking down the buildings in this action.

30 And for that by the record and proceedings aforesaid it appears that the judgment aforesaid in form aforesaid was given for the said Pierson A. Freeman and against the said Samuel F. Headley, whereas by the law of the state the said judgment should and ought to have been given for said Samuel F. Headley and against said Pierson A. Freeman, and therefore the said Samuel F. Headley prays that the judgment aforesaid for the errors aforesaid may be reversed, annulled and held for nothing, and that he may be restored to all things he hath lost on occasion of the same.

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H. C. PITNEY,

*Att'y. p'f.*

## SUPREME COURT.

PIERSON A. FREEMAN,  
*v.*  
 SAMUEL F. HEADLEY.

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A parol license which has been executed, is as effective, by way of justification of an entry upon land, or of any other act touching the reality, as would be a license in writing.

On a parol sale of land, when the vender put the vendee into possession, and authorized him to take down a building standing thereon, and such vendee after having torn down the building, refused to take a title for the premises, held an action would not lie at law against him for the destruction 20  
 of such building.

This was an action on the case, and was tried in October, 1864, before the Circuit Court of the County of Morris. It appeared from the evidence, that the defendant agreed by parol to purchase a small lot of land upon which stood a building of the plaintiff. That a deed was prepared, but before it was delivered the defendant sent to the plaintiff and asked his permission to take down this building: such consent was given. The plaintiff, who was a witness in his own behalf, thus stated this fact. He says, a Mr. N. came to him 30  
 and stated "that Headley told him to call on me and ask me if I had any objection to taking the buildings down, and I said no. He said Headley would be back in a day or two, and would then carry out the contract according to our understanding. I told him it would make no difference if he fulfilled. It was further proved that subsequently the defendant had the building torn down, and part of the materials carried off the premises to his own property.

Under these circumstances a disagreement arose between the parties with regard to the extent of the lot which was to 40

be conveyed—the defendant insisting that it should embrace a small gore to which the plaintiff had no title : the plaintiff denied this allegation, but after a delay of some months obtained a title to the gore and tendered a deed for the whole tract : such tender was not accepted by the defendant on the ground that the purpose for which he had designed to use the lot had been frustrated by the lapse of time.

10 The action was in tort ; some of the counts setting out the possession of the land by the defendant under a parol agreement to purchase, and alleging that he tore down the building in question against the will and without the license of the plaintiff. There were also counts in trover for the buildings and materials. The Judge who presided, among other things, charged the jury, first : “ that if the plaintiff gave permission to the defendant to take down the buildings on the understanding sworn to by the plaintiff—that is, on condition that the defendant should take the property under the agreement—the plaintiff must recover for such taking down ; and second : that the title of the plaintiff to the premises in  
20 question, or to any part thereof, cannot be disputed in this action, and that it was immaterial in this action whether the plaintiff had title to the gore or wedge or not.” These points, as well as others which it is not necessary to mention, were excepted to. The case came before this Court by writ of Error, and was argued before the Chief Justice and Justices Elmer and Bedle.

FOR THE PLAINTIFF.

FOR THE DEFENDANT.

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The opinion of the Court was pronounced by Beasley, C. J.

BEASLEY, Ch. Jus.

The gravamen of this action was the tearing down of a building. At the time the defendant did this he was in possession of the premises under an agreement by parol for their purchase ; it was also proved that such act was done by the permission of the plaintiff ; at the trial the point on  
40 which, in this respect, the case was put was, that such permission was conditional in the taking by the defendant of the property on the terms agreed upon.

The judge who presided, accordingly charged the jury, that if such was the case, and the defendant refused to accept the title which was offered to him, the plaintiff was entitled to recover.

Upon mature reflection, I am satisfied there was error in this instruction. The demolition of the building, at the time it occurred, was not an unlawful act. The defendant was in the rightful possession of these premises, and did the act complained of by the consent of the plaintiff.

It is true that such consent was by parol, and therefore, 10  
for all the purposes of an executory agreement, was not enforceable by reason of the Statute of Frauds. But to the extent to which the contract between these parties had been executed, it was as a defence in all respects legal, efficacious and obligatory.

A vendee, who, under a treaty for purchase enters, with the consent of the vendor, into the possession of land, is not a trespasser, nor can he be treated as such. A parol license which has been executed, is as effective, by way of justification of an entry upon land, or of any other act touching the 20  
reality, as would be a license in writing; the rule of law upon this subject is entirely at rest. I refer to the following lines of cases to show the extent and application of the principle. Thus it has been repeatedly held, that ejectment will not lie against a person who has taken possession of land by force of a parol contract to purchase, before notice from the vendor of a rescission of such contract. *Right vs Beard*, 13 East 201; *Jackson vs Moncrieff*, 5 Wend. 29; *Doe vs Stennett*, 2 Esp. 717; *Jackson vs Ostrander*, 9, John 330.

So a verbal license to enter upon land to remove goods, 30  
the property of the licensee is valid until revoked, and will afford a perfect defence to an action for such entry. (*Witmarsh vs Walker*, 1 Met. 313; *Wood vs Manley*, 11 Adol. & Ell. 34.

In *Pierpont vs. Barnard*, (2 Selden 279,) the court of appeals of New York was of opinion that a license to cut standing timber was a full justification for all things done within its scope and that the licensee acquired a right to the timber which had been felled before the license was recalled, which could not be divested by its subsequent revocation. *M. Tyron vs.* 40

Blakeman, (22 Barb, 336.) A similar license to dig and carry away gravel from the land of the plaintiff, was maintained as a good answer to an action of trespass de bonis asportatis; and in *Davis vs. Townsend*, (10 Bart. 333,) a like view was taken with regard to a license to a tenant to remove buildings erected during the term, and nowhere is this principle more strikingly illustrated than in the case of *Miller v. the Auburn and Syracuse Rail Road company* (6 Hill 64,) for the court there held that although a license by parol was at  
 10 all times revocable, yet notwithstanding it afforded a complete defence for everything done in accordance with its terms; and that consequently, the plaintiff could not sustain his action against the company for building and continuing a railroad on his land by his verbal permission, it appearing that the damages sued for had accrued prior to the revocation of such authority.

These cases are amply sufficient to exemplify the application and practiced bearings of the rule in question. There can be no doubt therefore that the authority granted by the  
 20 plaintiff to the defendant to take down the building, the prostration of which forms the substance of this action, gave an entire legality to the act of the defendant in that respect. The act therefore was not originally tortrous could it become so by the subsequent conduct of the defendant; at the trial the view appears to have been entertained that the license was dependant on the condition that the defendant would accept a conveyance of the land on the terms settled between the parties; but I am not aware of any principle of law whereby a party to a contract which has been partly per-  
 30 formed by him, can be converted into a trespasser by a failure on his part to complete such contract. In all cases in which a purchaser is permitted to enter upon land before the execution of the conveyance, it is on the implied understanding or condition that his agreement to take the land will be complied with, and yet it has never been supposed that on a failure to comply, such purchaser becomes a trespasser ab initio. Even a tortrous abuse of the privilege to enter according to established maxims, would not have this effect; for it is the old and well known distinction, that a man will,  
 40 generally, become a wrongdoer retrospectively by an abuse

of the authority which the law confers, but never from an abuse of an authority derived from an individual. Ever since the six carpenters case (8 Coke 290) this has been the accepted principle; and in that case it was said; but when the party gives an authority or license himself to do anything, he cannot for any subsequent cause, punish that which is done by his own authority or license."

And in *Allen v. Crofoot* (5 Wend 506) in conformity with this venerable precedent, the doctrine was maintained that where a party had entered a dwelling house by license, he could not be considered a trespasser ab initio, by reason of any unlawful act after such entry. In the present case—  
 therefore, assuming that the permission accorded to the defendant to enter was induced by his promise to take the title and pay for the land, and that the defendant refused, without just cause to comply with such stipulation, such breach of contract could not reach back and annul the plaintiff's license to take down the building. If the contract alluded to had been in writing, this effect, it is presumed, would never have been assigned to it; in such event the remedy would have been by suit on the contract itself, by means of which the plaintiff would have been indemnified for all his damages by reason of its non performance by the defendant; but it is clear that with regard to the license to enter and destroy the building which has been executed, so far the contract must be deemed to be presumed of the same legal efficacy as though it had been committed to writing, the essence of the rule is, that a party who has authorized a certain thing to be done, cannot under any circumstances treat such act as a tort, because this would be to alter the substantial nature and legal consequences of such act. If in this case the plaintiff has no contract by force of which he can be reimbursed for his losses by an action at law, it is a position of his own choosing. The mischance could have been avoided by a slight degree of vigilance. A vendee sometimes finds himself under a similar embarrassment, for if the defendant in this case, instead of taking down had put up a building on the premises in question, and the plaintiff had refused to execute a conveyance, the former would at common law, have had no legal claim for the cost incurred in such imprisonment (*Gellet v.* 40

Maynard 5 John—Rep—85—Smith v. administrator of Smith 4 Dutch, 217,) the sum of the matter is, the parties have trusted each other in a manner which the law on grounds of policy does not countenance; but under the circumstances of this case it is clear that the plaintiff was not destitute of an adequate remedy. He should have insisted on a specific performance of his contract, and which, on the score of its part performance, a court of equity would have enforced.

10 But, in my opinion, he cannot acquiesce in an abandonment of a full performance of the contract, and then claim to treat as unlawful those acts of the defendant which were done with his sanction. In the recent case of Pratt v. Ogden (34 New York 20) the court of appeals of New York, giving full effect to the doctrine above stated, decided that persons taking possession of land under a contract of purchase and a license to cut timber, could not be held liable for cutting the timber therein while the license was operative, even though by non-compliance with the contract to purchase they had forfeited all right to the land. This adjudication  
20 rests on the principle involved in the facts of the present case, and was, it is conceived, correctly decided.

I think on this ground that error is manifested in the record now before us. And if any doubt had been entertained on this first head, it is conceived there could be none whatever with respect to the presence of error in the second point of the charge to the jury. The first point charged was, that if the plaintiff gave permission to the defendant to take down the buildings on condition that the defendant would take the  
30 property under the agreement, the plaintiff must recover for such taking down; and the second point was that the title of the plaintiff to the premises in question could not be inquired into in this action. It was a part of the defence attempted to be made in this case, that the plaintiff had broken his agreement by not conveying the premises within the time contemplated in his contract. Upon the assumption that the license of the defendant to remove the building was conditional on his compliance with his agreement, and that the non-performance of such condition was to have the effect to render unlawful his previous acts done by the con-  
40 sent of the plaintiff. It seems to me that the question of

the plaintiff's title was clearly involved in the case. The jury was instructed that the license was conditional on the defendant taking the property; if, therefore, this be so, it would seem to have been plainly competent for the defendant to show that it was the fault of the plaintiff which had prevented the fulfillment of such condition. Suppose the plaintiff had refused to make any conveyance, could it be pretended that notwithstanding his license, he could maintain his suit against the defendant, who was in no fault founded on a tortious distinction of the building; and yet if the plaintiff had no title to the property, the offer of a conveyance was an unmeaning ceremony possessed of no legal value; so, too, if his title failed to any part of the property embraced in the contract. The effect, therefore, of the evidence relative to a defect of the plaintiff's title was to discharge the defendant from the legal consequence, whatever it might be, of a non-compliance with the agreement on his part, and to thrust that quality of the transaction to the side of the plaintiff. To make this endeavor unlawful, it must be assumed as a legal principle that the plaintiff could, after the execution of his license, revoke it in the absence of all default on the part of the defendant, because a refusal of the latter to take a deed for land, to which the former had no title, could not be considered a violation of the agreement; consequently, my conclusion is, that conceding the first legal proposition of the charge to have been well founded, the question with regard to the title of the plaintiff became one of vital importance.

The judgment, on these grounds, should be overruled.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

10

PEARSON A. FREEMAN,

*vs.*

SAMUEL F. HEADLEY.

} *Error to the  
New Jersey  
Supreme Court.*

Afterwards, that is to say, on the \_\_\_\_\_ day  
 1868, before the Court of Errors and Appeals  
 comes the said Pearson A. Freeman by Augustus W. Bell  
 his attorney, and says in the Judgments and proceedings  
 aforesaid, and in reversing the Judgments aforesaid, there is  
 manifest error, and the said plaintiff in error here assigns  
 20 the following errors for which the Judgments of the Supreme  
 Court should be revised, namely :

Because the said Supreme Court before whom this case was  
 argued, revised the Judgment of this Circuit Court and gave  
 judgment in favor of the said Samuel F. Headley and against  
 the said Pearson A. Freeman where by the constitution and  
 laws of this state the said Judgment should and ought to  
 have been affirmed and given in favor of the said Pearson  
 A. Freeman and against the said Samuel F. Headley.

30 Because the said Supreme Court erred in deciding that  
 the said Pearson A. Freeman was without remedy in a court  
 of law as against the said Samuel F. Headley, because the  
 said Freeman had given a license to said Headley to commit  
 the injury complained of in this cause for the damages of  
 which injury this action was brought to recover.

For that the said Supreme Court erred in deciding that  
 the Judge of the Circuit Court before whom this cause was  
 tried, erred in charging the jury that if the plaintiff gave per-  
 mission to the defendant to take down the buildings in ques-  
 tion in this suit on condition that the defendant would take  
 40 the property under the agreement, plaintiff must recover for

the such taking down, and the said Supreme Court and that they also erred in deciding that there was error in the Judge refusing at the trial of said cause to permit the defendant to enquire into the title of the plaintiff to the premises in question in this action.

Because the said Supreme Court erred in deciding that a defect of the plaintiff's title to the premises in question would discharge the defendant from the legal consequence, whatever it might be, of a non-compliance of the agreement on his part, because by the evidence and documents offered in this cause, it clearly appeared that the said Pierson A. Freeman had full and complete title to all of the said premises. † 10

For that the said Supreme Court erred that there was error in the charge of the Judge of the Circuit Court to the jury in this cause, whereas there was no error in such charge.

Because the said Justices of the said Supreme Court erred in deciding that there was error in the trial of said cause at the Circuit in the Judge refusing to charge the jury as requested by the defendant's counsel at the trial of said cause.

Because the Supreme Court reversed instead of affirming the said Judgment of the said Circuit Court. 20

And the said Pierson A. Freeman prays that the order, Judgment and reversal of the said Judgment for the errors aforesaid, and for other errors in the said record of proceedings being, may be reversed, annulled and altogether holden for naught; that he may be restored to all things which he hath lost by occasion of the said reversal of the said Judgment.

AUGUSTUS W. BELL,  
*Att'y of Plaintiff in Error.* 36

