

New Jersey Court of Errors and Appeals

EDGAR T. WHEATON,
Plaintiff-Respondent,

vs.

JOHN COLLINS,
Defendant-Appellant.

Brief for Respondent.

This is an appeal from a judgment of the Supreme Court affirming a judgment entered in the Union County Circuit Court for the plaintiff pursuant to the verdict of a jury for the sum of \$790.00 and costs. The facts are practically undisputed.

The plaintiff and defendant in September of 1910 entered into an agreement, whereby the defendant agreed to purchase from the plaintiff premises known as 10 and 12 7th avenue, Cranford, N. J. Number 10 was a small house and No. 12 was a large house. Title was to pass on April 1st, 1911. Shortly after the agreement was made, the defendant put his son, John I. Collins, in the physical possession of the large house. At that time the small house was in the possession of a tenant who was paying rent to the plaintiff. This tenant's lease was to expire on May 1st, 1911, that is, a month after the title was to pass (p. 21, l. 27). Dr. Wheaton testified that Mr. Collins said to this tenant "I will be your landlord after the 1st day of May" (p. 22, line 1). When April 1st arrived, Mr. Collins refused to take the title, although a proper deed was tendered by Dr. Wheaton to him (p. 19, line 3). The

fact that a deed was tendered and that Mr. Collins refused to take the title is not disputed. Instead of vacating the property, however, Collins continued to assert possession, apparently on the theory that he was entitled to possession until the deposit which he paid on the contract was returned to him. His son, who was acting for him, obtained the keys of the smaller house (p. 23, line 3) and refused to deliver them to Dr. Wheaton, the plaintiff, and for a period of time was in the physical occupation of the small house. On May 12, 1914, Dr. Wheaton obtained possession of the small house by breaking open the door and at that time he found certain of the belongings of John I. Collins in the house and these were removed. John I. Collins was meanwhile living in the large house, and it was necessary for Dr. Wheaton to bring an action in ejectment against John I. Collins and John Collins, the present defendant, for the possession of that house. This he did with success and secured a judgment against John Collins, not only for possession, but also for the rental value of the large house during the time it was occupied by John I. Collins, and John Collins has paid this judgment.

During the time that the Collins family were in possession of the two houses, they were damaged through neglect and the second count of the complaint (p. 9) was for moneys expended in repairing the large house. The trial court permitted no recovery under this count on the ground that these damages should have been asked for in the ejectment suit. The second count was therefore removed from the case, and the judgment under review was obtained upon the first count. The first count alleges (p. 9, para. 3) that after the defend-

ant's refusal to comply with his contract of April 1st, 1911, he remained in possession of the premises No. 10 7th avenue, from May 1st, 1911, to May 12th, 1914, and this count of the complaint sought recovery for the rental value of the premises during this period, all of which was after the time for the completion of the contract had arrived, and the contract had been repudiated.

The question now before the court is, whether any of the grounds of appeal afford a reason for the reversal of this judgment.

The grounds of appeal from the judgment of the Supreme Court are printed on page 3 of the appellant's brief. The first, second and third of these are merely directed to the opinion of the Supreme Court and are obviously not proper grounds of appeal. The remaining grounds relate to the failure of the trial court to direct a verdict for the defendant and its failure to charge the jury that there could be no recovery unless the relation of landlord and tenant existed between plaintiff and defendant. The only question, therefore, before this court is whether the trial court should have directed a verdict for the defendant, because it is quite apparent that if the plaintiff was entitled to any verdict, so that the instructions asked were not proper, the appellant has no just ground of complaint in this court. In view of the record in this case, therefore, the discussion under Point 2 in the appellant's brief is of no avail. At no time was any alleged distinction as to the right of the plaintiff with respect to the period of occupancy after the dismissal of the appeal in the Chancery suit and the period of occupancy before the dismissal thereof suggested to the trial court. No request to charge was presented involving this point and the mo-

tion for the direction of a verdict found on page 72 of the state of the case was based entirely upon the suggestion that the plaintiff was entitled to recover nothing whatever. In view of the record, therefore, the only point before the court is whether the plaintiff was entitled to a verdict at all, or whether a verdict should have been directed against him. We may say in advance that this case presented an unjustifiable defiance by the defendant of the property rights of the plaintiff, occasioning him great inconvenience and loss, and necessitating his actually breaking into his own property to regain possession thereof. Justice would seem to require, therefore, undoubtedly that the defendant should pay for the rental value of the property during the time that he kept the plaintiff out of it by his wholly unwarranted acts. The character of the defendant appears from his testimony.

If any further illustration of it is needed it may be found in his change of counsel. In the specific performance suit, wherein he alleged that his counsel filed an answer without consulting him and of which he did not know the contents (page 52), he was represented by Mr. Bradner. This relation ceased because, as he testified in this case, Mr. Bradner permitted the present plaintiff to buy himself "out of a hole" (page 56) so that in the ejectment suit, which involved the large house, he was represented by Mr. Titus (page 56). At the conclusion of that suit he transferred his allegiance to Messrs. Lindabury, Depue & Faulks, who represented him in the present case before the Union Circuit Court and in the court below. Now, apparently having forgotten the past, he has returned to his first counsel, Mr. Bradner. Owing no doubt that the present

counsel for the appellant are not familiar with all of the ramifications of this case made necessary by the litigious character of their client, we may attribute the statements on page 2 of their brief to the effect that it did not appear whether or not Dr. Wheaton ever offered to convey the premises to Mr. Collins with an allowance (see Case, page 32, line 27) and also that it did not appear that at any time before the commencement of this suit did the plaintiff ever offer to return the \$600.00 deposit. The fact is that this \$600.00 was credited to Mr. Collins in the ejectment suit and the record in this case so shows (page 45, line 25). It appears very clearly, indeed, from all the evidence, that John Collins, the defendant, was in personal control of the entire situation, and that the possession of the small house was his possession. He admitted himself that he claimed he was in possession of the property (p. 51) and his son said, "We claimed we were entitled to possession until some settlement was made" (p. 64, line 27): that his father was in accord with him (p. 64, line 15): that they thought they had the same right to the small house as they had to the big one (p. 66) and that his father was aware of his occupation of the small house (p. 66, line 9).

In view of this uncontradicted testimony, the majority of the grounds of appeal may be dismissed without further comment.

If in respect to these items the court was in any respect inaccurate—which we deny to have been the fact—it is nevertheless very plain that no substantial injury was done to the defendant. The charge put it up plainly to the jury to determine first, whether the defendant had been in possession of the property in question,

and in the second place, if he was in possession, what he should pay as a fair value for the use of the premises. Nor was any error committed in the admission or rejection of evidence. The sole point remains, therefore, whether the court should have directed a verdict for the defendant pursuant to his request. The ground of the motion was (p. 71, line 30) that whatever possession there was of the property, was under a contract for the sale of the property and under these circumstances there could be no verdict for the plaintiff. The motion in the Circuit Court for the direction of a verdict was based upon the authority of *Donovan v Brenning*, 50 Vr., p. 202.

As already pointed out, no suggestion was made upon the motion for the direction of a verdict nor upon the submission of requests to charge of the argument made under Point 2 of the appellant's brief.

We respectfully submit that the case at bar is not controlled by *Donovan v. Brenning*, and that the judgment under review should be sustained. The argument of the defendant ignores the nature of the plaintiff's claim as set forth in the complaint. No recovery whatever was asked for the period of possession pending the contract, but only for the period beginning one month after the contract had been repudiated by the defendant, and the demand was for "*the use and occupation of said premises and the mesne profits thereof*" during this period.

That such a recovery is warranted by the cases in this state, as well as well considered authorities elsewhere is plain.

In *Donovan v. Brenning, supra*, the sole point at issue was whether an action for use and

occupation would lie where it was conceded that the relation of landlord and tenant did not exist. That was an action brought for the rental value of the property in question from the time possession was taken thereof, *which was before the contract of sale was abandoned*. The court is careful to quote the state of demand which was for the use and occupation of the premises "from the time of entering thereof up and until the time of the institution of this suit." It undoubtedly was the legal duty of the defendant on April 1, 1911, when he refused to complete the contract and take the deeds, to surrender possession of the property. It is undoubtedly true that the vendee in possession under a contract of sale must surrender possession if he refuses to take title and he cannot dispute the vendor's title in an ejectment proceeding.

Tindall v. Conover, 1 Zab. 651 at p. 654.

Richman v. Baldwin, 1 Zab. 395-405.

Tindall v. Conover, Spencer 214-218.

The cases hold that in many respects the relation of landlord and tenant exists as between the owner of property and a person who enters into possession because of a contract of sale. The relation exists to an extent sufficient to hold the possessor for waste committed by him during the period of his occupancy. The ground upon which cases of the character of *Donovan v. Brenning* are founded, is that there can be no implied undertaking to pay for use and occupation during the time that possession is had of land under a contract of sale for the reason that the possession is referrable to the contract, and it is apparent, therefore, that no undertaking to pay for this period exists; in other words, when possession is taken under

a contract of sale pending the fulfillment thereof, it is understood by all the parties that no rent is to be paid, and therefore there can be no implied promise to pay rent. After the contract has been repudiated, however, and the possession is held not pursuant to the contract, but in denial of the obligation thereof, and without any reference thereto, then the reason for holding that no promise can be implied ceases, and it has been held that from the time at which the contract is abandoned, the occupant, if he continues to remain in possession, must respond for the use and occupation of the premises.

Thus it is said in *Taylor on Landlord & Tenant*, para. 636:

“If, however, the position of the parties to each other can be referred to any other ground than that of a distinct tenancy, no promise to pay rent can be implied; this action cannot therefore be sustained against a person who came in under the plaintiff as purchaser, although he may continue to hold after the contract of sale has fallen through, for rent accruing previous to the breaking of the contract.”

And in section 637 the same author says:

“Yet if a party is let into possession under a contract of sale which goes off, he is liable in use and occupation at the suit of the vendor, for the period during which he continues in possession after the contract went off; although he may not be for occupation prior to the rescinding of the contract.”

This Court in *Freeman v. Headley*, 4 Vr. 523, held that the relation of landlord and tenant ex-

ists between the vendor and vendee to an extent sufficient to make the vendee in possession a tenant at will for the purpose of sustaining an action for waste committed while in such possession. There is a discussion of many authorities on this subject in the opinion.

A leading case in which the facts are quite similar to those in the case at bar is *Howard v. Shaw*, 8 Mees & Wels., p. 118. In that case the defendant was let into the possession of land under a contract of purchase but (to quote the Court), p. 119:

“Disputes arising between him and Pockock as to the appropriation of the purchase-money, the sale was not completed, and the defendant shortly afterwards demanded his deposit back from the auctioneer, and received a part of it, but failing to obtain the remainder, kept possession of the stable and coach-house by way of indemnity against his loss, and had ever since retained the possession without paying any rent, until October, 1839, when, on being served with a declaration in ejectment at the suit of the plaintiff, he delivered up the possession to him, and paid the costs of the ejectment up to that time.”

Under these circumstances, it was contended that the relation of landlord and tenant had never existed between the plaintiff and defendant, and therefore the action for the use and occupation could not be maintained. It was held, however, by all of the eminent judges who took part in this case, that the action could be maintained for the use and occupation from the time the contract went off. Baron Parke said, page 122:

“I quite agree, however, that while the agreement subsisted, the defendant was not

bound to pay a compensation for the occupation of the land, because the contract shows that he was to occupy without compensation, and so long as it subsisted, he was entitled so to occupy, but still he was tenant at will. When the agreement went off, he still continued tenant at will; but after that, there is nothing to show that he was not to pay a compensation for his occupation, because the stipulated compensation, by payment of the purchase-money, was at an end. From that time, therefore, he became liable to be sued for such compensation, in an action for use and occupation."

Howard v. Shaw was quoted with apparent approval by this Court in *Freeman v. Headley*, *supra*, and has apparently never been questioned.

Quite in point also is the case of *Hull v. Vaughan*, 6 Price 147, which is thus quoted with approval by Chief Justice Green in *Chambers v. Ross*, 1 Dutch. 293, at page 296:

"The case of *Hull v. Vaughan*, 6 Price 157, covers every point made in this case by the defendant's counsel, and goes much further. *Vaughan*, the defendant in that case, was the original owner of the premises. He entered into a contract for sale to one *Bach*, who undersold a part of the premises to *Hull*, the plaintiff. *Vaughan* subsequently refused to execute a deed for the property to *Bach* according to his contract. The vendee thereupon filed a bill in Chancery for a specific performance. *Hull*, the plaintiff, had been let into possession, but *Vaughan*, availing himself of a rumor that he had succeeded in his defense in

equity, induced Hull to give up possession, and Vaughan subsequently during the pendency of the suit in Chancery, held possession of the premises against the consent of Hull. The suit having been decided in favor of the first vendee, Vaughan accepted the purchase money, delivered the title deeds, and gave up possession. Thereupon Hull brought his action for use and occupation. He had a mere equitable title, arising out of a contract for purchase with the first vendee, who had not himself acquired a title. The defendant held the legal title. He entered into possession, not as tenant, but as the rightful owner, with the consent of the plaintiff, given under a mistaken apprehension of his rights. He subsequently held possession without the consent, and against the will of the plaintiff. On the trial, a non-suit was ordered. But the court, at bar, held unanimously that under the circumstances, the law would raise an implied assumpsit to pay rent for the premises, and set the non-suit aside. The decision is in accordance with the obvious justice of the case."

In the case at bar the jury have found that the defendant was in the possession of the property during a considerable period of time after his repudiation of the contract. They have also placed the value upon this occupation. It would seem to be a travesty of justice if the defendant could now escape the liability for this use and occupation. As was said in *Hull v. Vaughan, supra*:

"It is not necessary in this specie of action that the proper relation of landlord and tenant should be distinctly made out between the parties because the action is

calculated in form to meet cases where the parties do not bear those characters, if there be in point of fact an ownership on one hand and an occupation on the other, and it should be liberally applied where it may be found to be a party's only remedy."

And if the action of use and occupation was not available to the plaintiff, the defendant could still be made to respond for the rental value of the premises by the demand for *mesne* profits. This is the suggestion made by Mr. Justice Parker in *Mason v. Haurand*, 50 Vr. 375.

Therefore, whether we view the action as one for use and occupation, or one for the *mesne* profits of lands held by a person improperly holding over, the rental is the same and the proceedings could, if necessary be moulded to reach the proper result.

The grounds of appeal suggested by the defendant are technical and in view of the facts, we submit, it is very apparent that justice has been done between the parties, and that the defendant can complain of no injury to his substantial rights (see section 27, Practice Act of 1912).

Clearly the defendant was not entitled to the direction of a verdict nor to the binding requests to charge suggested by him. The opinion of the Supreme Court (page 79) is a complete justification of the judgment below. The defendant for years had persistently and without any shadow of right whatever kept the plaintiff out of the possession of his own property all the while he was insisting that he was not bound to take it because of the plaintiff's inability to convey a marketable title. This altogether unwarranted defiance of the plaintiff's rights continued for over a year after the specific per-

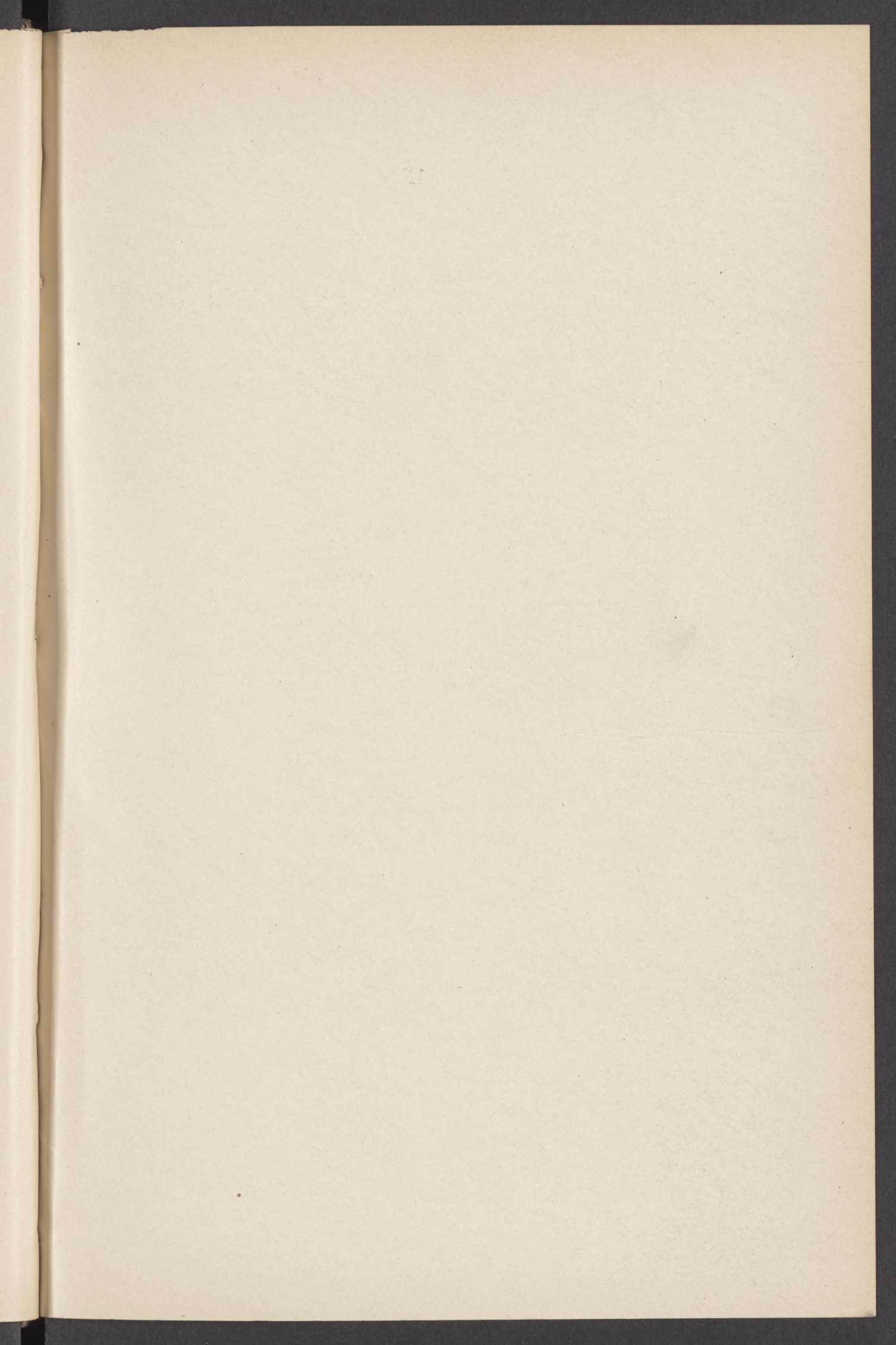
formance bill was dismissed. Under these circumstances, in view of the most impartial and clear manner in which the real issue in this case was left to the jury, viz., whether the defendant had been in possession of the plaintiff's property, and if so, what he should pay for this possession in view of the rental value thereof, the court should not strain in search of a technicality where, as pointed out by the Supreme Court, the defendant can justly complain of no injury to his substantial rights.

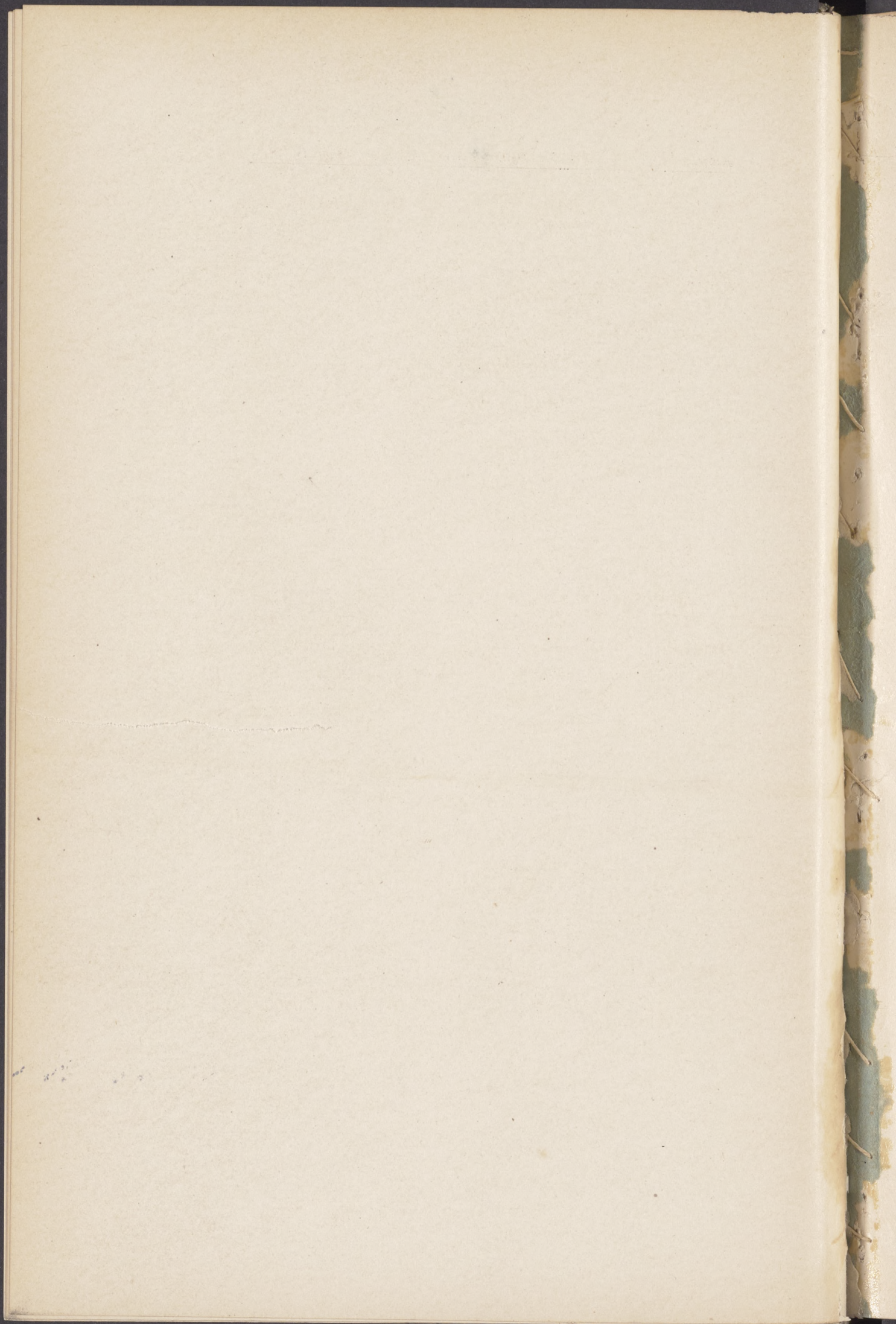
We therefore very respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

ARTHUR F. EGNER,
Of Counsel with Respondent.

June Term, 1917.





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Notice of Appeal.

Notice of Appeal.

Filed March 23rd, 1917.

New Jersey Supreme Court.

10

EDGAR T. WHEATON,
Plaintiff-Respondent,

vs.

JOHN COLLINS,
Defendant-Appellant.

*Action at
Law.*

*Notice of Ap-
peal.*

TAKE NOTICE, that the defendant, John Collins, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

20

Dated March 21st, 1917.

Yours respectfully,

PALMER BRADNER,
Attorney of Appellant.

To McCARTER & ENGLISH, Esqs.,
Attorneys of Plaintiff.

30

Service of a copy of the within notice is hereby acknowledged this 21st day of March, 1917.

McCARTER & ENGLISH,
Attorneys of Plaintiff.

40

Grounds of Appeal.

Grounds of Appeal.

Filed April 13th, 1917.

New Jersey Court of Errors and Appeals

10

EDGAR T. WHEATON,
Plaintiff-Respondent,

vs.

JOHN COLLINS,
Defendant-Appellant.

*Action at
Law.*

*Grounds of
Appeal.*

20

The appellant states the following grounds of appeal:

1. The Supreme Court determined that it was not necessary to decide whether the relation of landlord and tenant existed between the parties or not.

2. The Supreme Court determined that the real merits of the case had been tried out, and that the plaintiff was entitled to compensation for the deprivation of the use of his property.

30

3. The Supreme Court determined that the plaintiff was entitled to recover compensation for the use and occupation of the premises by the defendant up to the time of the making of the decree by the Court of Chancery, in the Specific Performance suit.

4. The Supreme Court affirmed the refusal of the Judge of the Circuit Court, to direct a verdict in favor of the defendant.

40

5. The Supreme Court affirmed the refusal of the Judge of the Circuit Court to charge the

Grounds of Appeal.

defendant's request to charge as follows:
 "Plaintiff cannot recover from the defendant for the use and the occupation of No. 10 Seventh Street, unless the relation of landlord and tenant existed between them."

6. The Supreme Court affirmed the refusal of said Judge to charge the defendant's request to charge, as follows: "Plaintiff cannot recover from the defendant for the use and occupation of No. 10 Seventh Street, if the possession thereof by the defendant was under a contract for the sale thereof to him." 10

7. The Supreme Court affirmed the judgment of the Circuit Court.

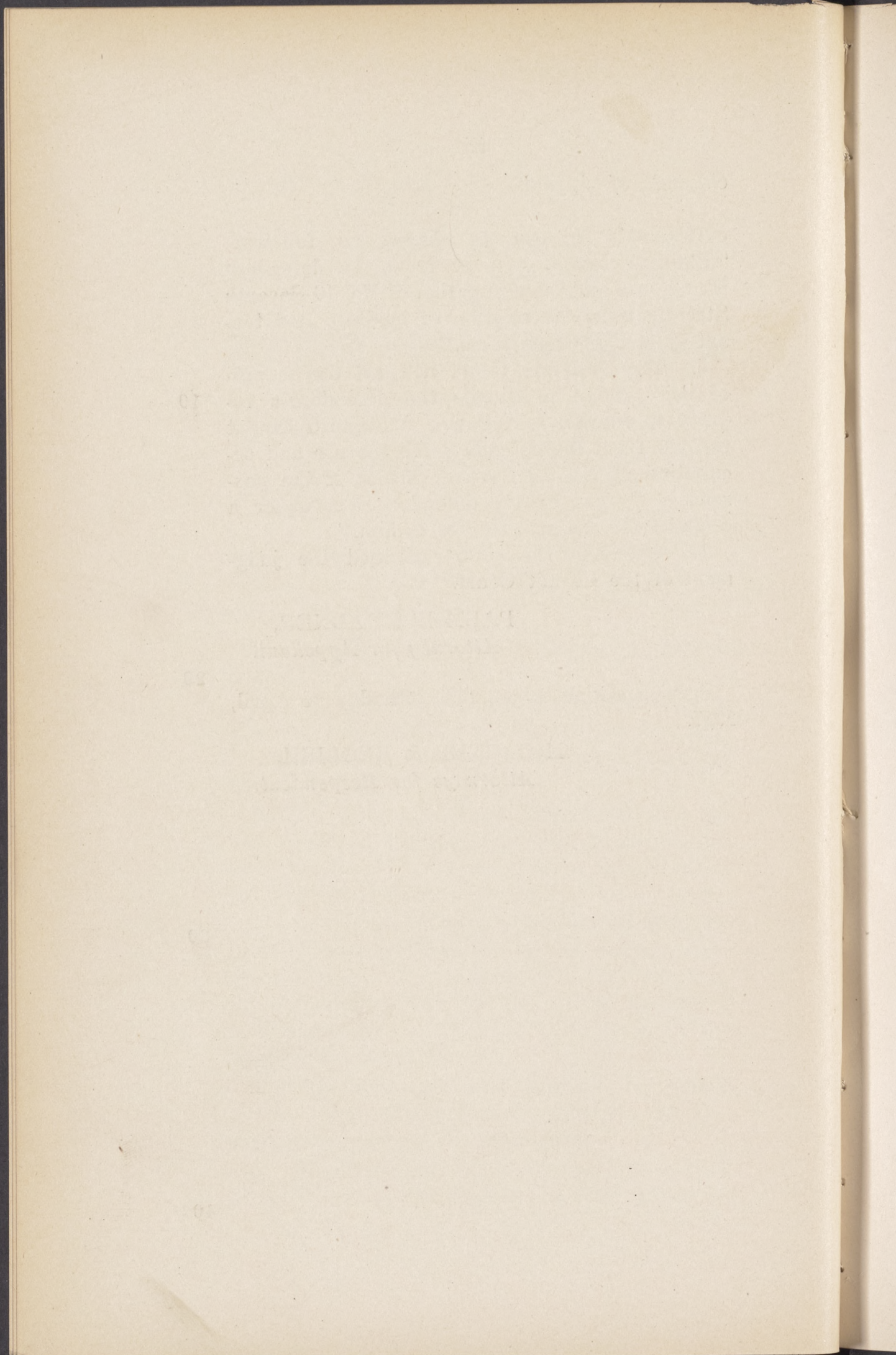
PALMER BRADNER,
Attorney for Appellant.

Service acknowledged this 10th day of April, 1917. 20

McCARTER & ENGLISH,
Attorneys for Respondent.

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Notice of Appeal.

Notice of Appeal.

Filed February 24, 1916.

Union County Circuit Court.

10

EDGAR T. WHEATON,

Plaintiff-Appellee,

vs.

JOHN COLLINS,

Defendant-Appellant.

Action at Law

On Contract.

On Appeal.

20

To Messrs. McCarter & English, Attorneys for
Plaintiff-Appellee:

TAKE NOTICE that the defendant-appellant, John Collins, appeals to the New Jersey Supreme Court from the whole of the judgment entered on February 15, 1916, in a certain cause in the Union County Circuit Court wherein Edgar T. Wheaton was the plaintiff and John Collins was the defendant.

30

Yours respectfully,

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant-Appellant.

Dated February 18, 1916.

Service of the within notice of appeal is hereby acknowledged this 18th day of February, 1916.

McCARTER & ENGLISH,
Attorneys of Plaintiff-Appellee.

40

Return.

Return.

STATE OF NEW JERSEY, }
COUNTY OF UNION, } ss.

10 I, Abram P. Morris, Clerk of the County of Union and of the Circuit Court holden therein, do hereby certify the foregoing to be a true and correct copy of a certain Notice of Appeal, and the annexed a true copy of the Judgment Record in the above entitled cause, as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and the seal of said Court, this second day of March, A. D. 1916.

ABRAM P. MORRIS,
Clerk.

20 (SEAL)

30

40

Grounds of Appeal.

Grounds of Appeal.

Filed March , 1916.

New Jersey Supreme Court

EDGAR T. WHEATON, <i>Plaintiff-Appellee,</i> <i>vs.</i> JOHN COLLINS, <i>Defendant-Appellant.</i>	}	<i>Action at Law</i> <i>On Appeal</i> <i>from Union</i> <i>County Cir-</i> <i>cuit Court.</i> <i>Grounds of</i> <i>Appeal.</i>	10
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To Messrs. McCarter & English, Attorneys of Plaintiff-Appellee: 20

TAKE NOTICE that the following are the grounds upon which the defendant John Collins appeals from the judgment heretofore entered herein in favor of the plaintiff:

1. The said judgment was given for the plaintiff, Edgar T. Wheaton, and against the defendant, John Collins; whereas, by the law of the land judgment ought to have been given for the said John Collins and against the said Edgar T. Wheaton. 30

2. The judge before whom the trial of the issues joined between the parties was had permitted the attorney for the plaintiff to ask the following question, notwithstanding the due and timely objection of the attorney for the defendant.

To the plaintiff Edgar T. Wheaton. (Referring to repairs made to the premises referred to in the first count of the complaint herein.)

“Q How much did it cost you?” 40

Grounds of Appeal.

3. The judge before whom the trial of the said issues was had overruled the following question:

To the plaintiff Edgar T. Wheaton. (Referring to rent credited on account of purchase price of the premises referred to in the first count of the said complaint upon the sale thereof by the plaintiff.)

10 "Q How much was he given credit for?"

4. The judge before whom the trial of the said issues was had refused to direct a verdict in favor of the defendant at the close of the case upon the application of the defendant.

5. The said judge refused defendant's request to charge as follows:

20 "Plaintiff cannot recover anything from the defendant for the use and occupation of No. 10 Seventh Street, unless it was used and occupied by him."

6. The said judge refused defendant's request to charge as follows:

"Plaintiff cannot recover from the defendant for the use and occupation of No. 10 Seventh Street unless the relation of landlord and tenant existed between them."

7. The said judge refused defendant's request to charge as follows:

30 "Plaintiff cannot recover from the defendant for the use and occupation of No. 10 Seventh Street if the possession thereof by the defendant was under a contract for the sale thereof to him."

8. The said judge refused defendant's request to charge as follows:

40 "The plaintiff cannot recover from the defendant for the use and occupation of Number 10 Seventh Street while the same were used and occupied by or in the possession of John

Grounds of Appeal.

I. Collins unless the said John I. Collins entered as the tenant or agent of the defendant," except with the addition

"or unless he entered into the premises with the consent and acquiescence of the older Mr. Collins."

9. The said judge refused defendant's request to charge as follows: 10

"The plaintiff cannot recover from the defendant for the use and occupation of Number 10 Seventh Street while the same were used and occupied by or in the possession of John I. Collins, unless the said John I. Collins was authorized to enter, use, occupy and possess the same by the defendant,"

except with the addition

"or unless it was done with the consent or acquiescence of the defendant." 20

10. The Court erroneously charged the jury as follows:

"The plaintiff cannot recover from the defendant for the use and occupation of Number 10 Seventh Street while the same were used and occupied by or in the possession of John I. Collins, unless the said John I. Collins entered into the premises as the tenant or agent of the said defendant, or unless he entered into the premises with the acquiescence or by the consent of the older Mr. Collins." 30

11. The Court erroneously charged the jury as follows:

"The plaintiff cannot recover from the defendant for the use and occupation of Number 10 Seventh Street while the same were used and occupied by or in the possession of John I. Collins, unless the said John I. Collins was authorized to enter into the possession and 40

Grounds of Appeal.

occupation of the same by the defendant or unless it was done with the consent or acquiescence of the defendant.”

10 12. The Court erroneously charged the jury that the plaintiff could recover for the use and occupation of premises No. 10 Seventh Street while the same were used and occupied by or in the possession of John I. Collins if the said John I. Collins entered into the premises with the acquiescence or by the consent of the defendant.

13. The Court erroneously charged the jury that the plaintiff could recover for the use and occupation of premises No. 10 Seventh Street by John I. Collins if it was done with the consent and acquiescence of the defendant.

20 14. The Court erroneously gave to the jury instructions in pursuance of which it could and did bring in a verdict for damages in excess of those allowed by law.

Yours respectfully,

LINDABURY, DEPUE & FAULKS,
Attorneys for Appellant.

Dated March 15th, 1916.

30 Due and legal service of the within grounds of appeal is hereby acknowledged this 15th day of March, 1916.

McCARTER & ENGLISH,
Attorneys of Plaintiff-Appellee.

Complaint.

Complaint.

Filed July 22, 1915.

10 Edgar T. Wheaton, residing in the City of
Scranton, in the State of Pennsylvania, says:

First Count.

20 1. The plaintiff, being the owner of certain lands
and premises situate in the Township of Cranford,
County of Union and State of New Jersey, said
premises being known and designated as numbers
Ten and Twelve Seventh Street in said Township
of Cranford, on or about the month of September,
nineteen hundred and ten, entered into an agree-
ment with the defendant whereby the defendant
agreed to purchase said lands and premises, and
the plaintiff agreed to sell the same unto the de-
fendant, title to said lands and premises to pass,
and the purchase to be completed on the first day
of April, nineteen hundred and eleven, pursuant
to the agreement then made between the plaintiff
and defendant, the defendant, after the making of
the said contract, entered into and took the pos-
session of said lands and premises.

30 2. On the first day of April, nineteen hundred
and eleven, the defendant failed to perform the
said contract which he had entered into and he
failed to perform the contract at any other time.
The defendant, however, refused to surrender pos-
session of the said lands and premises, although
often requested so to do, and remained in posses-
sion of the premises known and designated as
number Ten Seventh Avenue until the twelfth
day of May, nineteen hundred and fourteen, upon
which date the plaintiff, then still being the owner
40 of said premises, re-took the possession thereof.

Complaint.

3. The defendant after his refusal to comply with his contract, and without right, remained in the possession and use and occupation of the said premises number Ten Seventh Avenue continuously from May first, nineteen hundred and eleven, to May twelfth, nineteen hundred and fourteen. The fair rental value of said premises number Ten Seventh Avenue is the sum of twenty-two dollars per month, which sum, together with interest thereon the plaintiff demands from the defendant for the use and occupation of said premises and the mesne profits thereof, during the time that he remained in the possession thereof. 10

Second Count.

1. The plaintiff repeats the allegations of paragraph one of the first count. 20

2. The plaintiff repeats the allegations of the first count as to the failure of the defendant to comply with and perform the contract referred to in the first paragraph. The defendant remained in possession of the said premises known and designated as number Twelve, Seventh Avenue, Cranford, New Jersey, until on or about the eighth day of February, nineteen hundred and fifteen when the possession of said premises was awarded to the plaintiff in ejectment proceedings prosecuted by the plaintiff against the defendant. 30

3. While the defendant was in the possession of said premises the said defendant and his agent and agents so negligently and improperly and carelessly occupied and used said lands and premises known and designated as numbers Ten and Twelve, Seventh Street, that great injury was occasioned to the said premises, and it was necessary for the plaintiff when he regained possession of said lands and premises to expend large sums of money in the repair thereof. 40

Complaint.

4. The repairs necessary to said premises and the cost thereof occasioned by the said improper, careless and negligent actions of the defendant and his agents were as follows:

No. 12 Seventh Street.

	Installing new range.....	\$ 45.00
10	New tank in bath room.....	15.00
	New toilet in bath room.....	8.00
	Galvanized boiler in kitchen.....	7.50
	Mason work and repairing and fixing chimney	60.00

No. 10 Seventh Street.

	Repairing plumbing.....	36.00
--	-------------------------	-------

Total.....\$171.50

20 5. The plaintiff has requested the defendant to pay him said sums expended by him for such repairs, but he has refused to do so.

The plaintiff demands of the defendant on the first count, the sum of seven hundred and ninety-nine dollars together with lawful interest thereon and costs of suit, and upon the second count the sum of one hundred and seventy-one dollars and fifty cents, together with lawful interest thereon and costs of suit.

30 McCARTER & ENGLISH,
Attorneys of Plaintiff.

I hereby deputize and appoint Jacob G. Miller a Special Deputy to serve the within writ.

Witness my hand and seal this 21st day of July, A. D., 1915.

(L. S.)

GEORGE C. OTTO,
Sheriff Union County,

40

By JAMES E. WARNER,
Under Sheriff.

Complaint.

Served the within summons and complaint July 22d, 1915, upon John Collins, by leaving a true copy thereof as his usual place of abode on Mountainside avenue, Springfield, N. J., with a member of his family above the age of fourteen years.

GEORGE C. OTTO, *Sheriff,*

10

By JACOB G. MILLER,

Shffs fee \$2.80

Special Deputy.

Received July 21, '15.

GEO. C. OTTO, *Shff.*

20

30

40

*Answer and Counterclaim.***Answer and Counterclaim.**

Filed August 16, 1915.

Defendant, John Collins, residing at Springfield, Union County, New Jersey, says that:

10 *Defense to First Count.*

1. He admits that plaintiff entered into an agreement with him whereby he agreed to purchase and plaintiff agreed to sell certain lands and premises situate in the Township of Cranford, County of Union and State of New Jersey, said premises being known and designated as Nos. 10 and 12 Seventh Street in the said Township of Cranford, and that title to said lands and premises was to pass and the purchase thereof to be completed on April 1, 1911. He denied that he has at any time entered into, taken, or been in possession of the portion of said lands and premises known as No. 10 Seventh Street, or any part thereof. He has no knowledge or information as to whether the plaintiff is the owner of said lands and premises.

2. He denies the allegations of paragraph 2 of the first count of the complaint, except so far as the same are admitted in the following statement.

30 He has no knowledge or information as to whether the plaintiff entered into possession of the premises known and designated as No. 10 Seventh Avenue on May 12, 1914, or on any other date. He says that on April 1, 1911, he was ready and willing and has at all times since been ready and willing, and still is ready and willing, and hereby tenders, to perform all and singular the covenants and agreements on his part to be performed in the said contract mentioned in paragraph 2 of
40 the first count of the complaint, but that on April

Answer and Counterclaim.

1, 1911, and at all times since, the plaintiff has failed and refused, and still fails and refuses, to perform the covenants imposed upon him by said contract.

3. He denies the allegations of paragraph 3 of the first count of the complaint.

Defense to Second Count.

10

4. He repeats the allegations of paragraph 1 hereof.

5. In answer to the allegations of paragraph 2 of the second count of the complaint, he repeats the allegations of paragraph 2 hereof.

6. He denies the allegations of paragraph 3 and 4 of the second count of the complaint.

7. He denies the allegations of paragraph 5 of the second count of the complaint, except so far as the same are admitted in the following statement: 20

He admits that he has refused and still does refuse to pay the sums mentioned in paragraph 5 of the second count of the complaint, or any part thereof.

By way of counterclaim, defendant says that:

8. In or about the month of September, 1910, plaintiff agreed to sell defendant and defendant agreed to buy from plaintiff certain lands and premises situate in the Township of Cranford, County of Union and State of New Jersey, known and designated as Nos. 10 and 12 Seventh Street, in the said Township of Cranford, and plaintiff further agreed to make, execute and deliver to defendant a good and sufficient deed of warranty, conveying a clear and indefeasible title in fee simple of, in and to all and singular the said lands and premises, on April 1, 1911, upon payment by defendant of the purchase price named in said agreement therefor. 30 40

Reply.

9. On April 1, 1911, defendant was ready and willing to pay plaintiff the sum agreed to be paid for said premises, upon delivery to him by plaintiff of a good and sufficient deed conveying a good and indefeasible title in fee simple to said premises.

10 10. On April 1, 1911, plaintiff failed and refused to convey a good and indefeasible title in fee simple to said premises and ever since said date has failed and refused so to do, although often requested by defendant to make said conveyance.

20 11. By reason of plaintiff's failure, neglect and default as aforesaid, defendant has sustained great loss and injury consisting in part in sums necessarily expended by him in connection with repairs to the house upon said premises No. 12 Seventh Street, and in part for loss of gains and profits in all amounting to the sum of \$2,000.

Defendant demands of plaintiff on his said counterclaim the sum of \$2,000 together with lawful interest thereon, and costs of suit.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant.

30

Reply.

Filed August 30, 1915.

1. The plaintiff denies every allegation of the defense to the first count and the defense to the second count which does not admit the allegations of the first and second counts.

40

Answer to Counterclaim.

Answer to Counterclaim.

Filed August 30, 1915.

1. The plaintiff admits the allegations of paragraph 8 of the counterclaim.

2. The plaintiff denies the allegations of paragraph 9 of the counterclaim. 10

3. The plaintiff denies the allegations of paragraph 10 of the counterclaim, and avers that the defendant failed and refused to comply with the said contract of sale on April 1st, 1911, and that thereafter the said contract was abandoned by the mutual consent of the parties thereto.

4. The plaintiff denies the allegations of paragraph 11 of the counterclaim, and avers that the alleged rights in this respect of the defendant have already been the subject to adjudication between the plaintiff and the defendant. 20

The plaintiff gives notice that at the trial of this cause he will move to strike out the counterclaim of the defendant upon the following grounds:

1. The counterclaim discloses no cause of action on the part of the defendant against the plaintiff.

2. The alleged claims which are the basis of the counterclaim have already been the subject of adjudication between the plaintiff and the defendant in certain ejectment proceedings instituted by the plaintiff against the defendant, and tried before the Union County Circuit Court, in which said proceedings these same alleged claims of the defendant were the subject of a counterclaim interposed by him. 30

McCARTER & ENGLISH, 40
Attorneys of Plaintiff.

Reply to Answer to Counterclaim.

We consent to filing of within reply as of time.

LINDABURY, DEPUE & FAULKS,
Attys of Deft.

10

Reply to Answer to Counterclaim.

Filed September 18, 1915.

Defendant denies each and every allegation of plaintiff's answer to counterclaim.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant.

20

30

40

Judgment.

Judgment.

Entered February 15, 1916.

This action was tried before Judge George S. Silzer with a jury at the Union County Circuit, on January 31, 1916. 10

The cause having been heard and submitted to the jury, they returned their verdict as follows: That they find in favor of the plaintiff and against the defendant and assess the plaintiff's damage at the sum of seven hundred and ninety dollars (\$790.00).

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of seven hundred and ninety dollars (\$790.00) and his costs, which are taxed at the sum of fifty dollars and forty-eight cents (\$50.48) making in the whole the sum of eight hundred and forty dollars and forty-eight cents (\$840.48). 20

Judgment entered February 15, 1916.

GEORGE S. SILZER,
Judge.

On motion of

McCARTER & ENGLISH,
Attorneys of Plaintiff.

30

40

Dr. Edgar T. Wheaton, direct.

Testimony.

The case was tried before Judge George S. Silzer and a jury, at the Union Circuit on January 31, 1916.

10 Appearances:

McCarter & English, present Arthur F. Egner, Esq., for the plaintiff.

Lindabury, Depue & Faulks, present John W. Bishop, Jr., for the defendant.

A jury being empanelled and found satisfactory, they were sworn.

Mr. Egner opens the case for the plaintiff.

20 Mr. Bishop opens the case for the defendant.

DR. EDGAR T. WHEATON, plaintiff, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Egner.

Q Now, doctor, talk up so we can all hear. You are the plaintiff in this case? A Yes, sir.

Q And the owner of premises number ten and twelve Seventh street, in Cranford? A Yes, sir.

30 Q And you owned those properties in 1910? A Well, I did own them but it is sold now.

Q At that time you owned them? A At that time I did; yes, sir.

Q And number twelve is a large house and number ten is a small house, is it not? A Yes, sir.

Q And at that time you entered into a contract with Mr. John Collins, the defendant, for the sale of those two premises to him, did you not? A Yes, sir.

40 Q That is admitted in the pleadings in this case. And the title in the case was to pass—under that

Dr. Edgar T. Wheaton, direct.

contract—was to pass on April first, 1911? A Yes, sir.

Q Now, prior to April first, 1911, or on that day, did you tender deeds for these premises to Mr. Collins? A Yes, sir; I did.

Mr. Egner. Is there any dispute about that? 10

Mr. Bishop. What?

Mr. Egner. That he tendered deeds for the property at that time. I have the deeds here; I won't offer in evidence if there is no dispute.

All right, I will offer them in evidence.

Q Now, doctor, I show you a deed from Dr. T. Wheaton and wife to John Collins, dated March twenty-eighth, 1911, and acknowledged on March thirtieth, 1911? Did you ever see that deed before? (Witness examines deed.) A Yes, sir, that is our signature. (Answer repeated by the stenographer.) 20

Q How was that deed prepared, and for what purpose? Why was that deed prepared? A It was prepared to pass the title of the property over to Mr. Collins.

Q And is that the deed you tendered him on or before April 1, 1911.

The Court. Gentlemen, isn't it settled in this case there was ejectment proceedings and that matter has been disposed of? 30

Mr. Egner. I think so.

Mr. Bishop. That there was ejectment proceedings; no, sir.

Mr. Egner. As to the big house, and not the small house—

The Court. Which is the big and which is the small house? 40

Dr. Edgar T. Wheaton, direct.

Mr. Egner. Number ten, the smaller number, is the smaller house; number twelve is the larger number and it is the larger house.

The Court. Were there proceedings as to number ten?

10 *Mr. Egner.* No, sir; because we took possession of it.

The Court. And the ejectment proceeding was as to number twelve.

Mr. Egner. I am not going to spend much time on that.

Q This deed covers both ten and twelve doesn't it? A I think it does; I have two deeds.

The Court. You know, Mr. Egner, don't you?

20 *Mr. Egner.* It does. Both tracts.

Q That covers all the property you agreed to sell him, doesn't it, doctor? A Yes, sir; that is a combination deed for both properties.

Q Would Mr. Collins accept this deed? A He didn't.

Mr. Egner. I would like to have this marked in evidence.

30 *Mr. Bishop.* I object to its being marked in evidence.

The Court. Why?

Mr. Bishop. I do not see it is relevant.

The Court. It identifies the paper he offered to give to him.

(Paper deed marked in evidence as Exhibit P. 1.)

40 Q Without going into detail, the price which was to be paid for this property was how much? A Six thousand dollars.

Dr. Edgar T. Wheaton, direct.

Q Six thousand dollars. At any time after Mr. Collins' refusal to take this deed, did he ever offer to comply with the contract, and pay you six thousand dollars for the conveyance of those pieces of property? A No, sir.

Q Never did? A Never did.

Q What arrangement did you and Mr. Collins have with respect to the possession of this property, pending the time—up until the time that Mr. Collins was to take title? 10

Mr. Bishop. I object to that.

(Question repeated by the stenographer.)

The Court. That calls for a conclusion I assume.

Mr. Egner. I will change the question.

Q Just answer this yes or no. Did you and Mr. Collins have any understanding with reference to the possession of this property up to the time of passing title? A Yes, sir, we did. 20

Q Yes. And what was said between you on that subject? A Why, the small house was occupied by a tenant.

Q Yes? A And the lease didn't expire until the first day of May. And I said what will you do about this lease. Why, he says, you go right on and carry out that lease, he said. When that lease expires, then we will take possession. 30

Q That was as to the little house? A For the little house; yes. On the large house he was to take possession right away. Even before the time.

Q And he did take possession of the large house, did he? A He did; yes.

Q Did you and Mr. Collins have any conversation with reference to the possession of the small house in the presence of the tenant of the small house? A Why, yes. There was something said at that time when the first deal was made. He re- 40

Dr. Edgar T. Wheaton, direct.

marked to the tenant "this is all mine, now. And I will be your landlord after the first of May.

Q He said that in the presence of the tenant?

A Yes, sir.

Q Did you get rent from this tenant up to the first of May? A Yes, sir.

10 Q And after the first of May did you get any rent from him? A Not any at all.

Q Nothing at all. Do you know how long this tenant actually was in the premises? A Well I don't—but I think it is sometime—until the following September.

Q The following September? A I think; sometime; just a minute and I can give it to you nearly exact date.

20 Q Give it if you have got it. A Sixteenth of September.

Q Yes. A On the sixteenth of September.

Q Now, you said he actually went into the possession of the large house. Who was in the physical possession of the large house, if you know? A Not before; there wasn't anybody. It was vacant before he took possession of it.

Q You say he took possession. Did he live there or did somebody else? A His son, John I. Collins.

30 Q His son, John I. Collins? A Yes.

Q After this tenant moved out of the small house, who had the keys of the small house? (Witness examines paper.) A I can't tell you who he delivered the keys to. He told me afterwards.

Q Who told you? A He wrote to me, or notified me that he left the keys with the real estate agent.

The Court. Who said that?

40 A Tenant.

Dr. Edgar T. Wheaton, direct.

Q The tenant. Do you know whether any time after that the keys came into the possession of either John Collins or his son, John I. Collins? A Yes, sir.

Q Did they? A John I. Collins had the keys.

Q John I. Collins had the keys. And at any time after that up to the time you took possession of these premises in May, 1914, did you have the keys? A No, sir. 10

Q Did you make any effort to get the keys? A Yes, sir.

Q You did? A Yes, sir.

Q All right; we will come to that in a minute. Now, between the sixteenth of September and May twelfth, 1914, when you took possession of the premises, was the little house, number ten, at any time in the physical occupation of anybody? A Yes, sir; Mr. John I. Collins occupied it. 20

Q And when did he occupy it? When did he occupy it during what period? A I cannot tell you just the date.

Q Well, about? A About—I think it was some time in September of 1912.

Q Yes. A And I found him in possession occupying the premises. I think it was then. I won't be certain about the exact date, but it was somewhere in there. 30

Q So that somewhere along in December, 1912, you saw John I. Collins with his family actually living in number ten? A Yes, sir.

Mr. Bishop. I object to that; it is leading.

Q There was a fire in the big house, wasn't there? A Yes, sir.

The Court. When was that?

A I think it was in the spring sometime—I think in June. 40

Dr. Edgar T. Wheaton, direct.

Mr. Bishop. I object to what he thinks.

Q Who told you that; you know, don't you?

A In June, 1912. I think somewheres around there.

Q It was in the spring, 1912? A I think so; yes.

10

Q Do you know how soon after that fire Mr. John I. Collins went into the little house?

(Question repeated by the stenographer.)

A They told me they went right in there.

Mr. Bishop. I object.

Q Who told you that? A Mrs. Collins told me that.

20

Mr. Bishop. I move it be stricken out.

The Court. That will be stricken out.

Q Did either John I. Collins or Mrs. Collins tell you anything about it?

Mr. Bishop. I object to anything anybody told him except the defendant.

Mr. Egner. All right.

Q You did see with your own eyes John I. Collins in the small house? A Yes, sir.

30

Q Tell us what efforts—after you found out Mr. Collins wouldn't take title to the premises—tell us what efforts you made to get the keys to the little house. A I went to Mr. John I. Collins' business place in Newark.

Q Yes. A In company with a member of that firm.

Q Mr. Stooter? A Yes, and he refused to give possession.

40

Q What is that; he refused to give possession at that time you went there with Mr. Stooter?

Dr. Edgar T. Wheaton, direct.

Was there anything said about the smaller house?

A Yes, sir; there was. I asked for the key for this small house and that is what he refused to give possession of.

Q Refused to give them to you? A Yes.

By the Court.

10

Q When was that? A That was—I can't remember the date—

Q About when? A (Continued)—of that exactly.

By Mr. Egner.

Q As near as you can, doctor, it is hard to remember dates, but tell us as near as you can.

The Court. What year was it?

20

A I think it was some time in January. Possibly it might have been in January, 1913.

Q January, 1913? A Yes.

Q After that occasion, did you make any further efforts to get the key? A Yes; I asked my agent to make application for possession of the keys. Mr. Stone.

Q Who was your agent? A Mr. Stone.

Q Mr. Stone? A Yes.

Q Did you get the keys from your agent, Mr. Stone? A I didn't. 30

Q Did you finally, on May twelfth, 1914, get possession of that small house? A I didn't get you.

(Question repeated by the stenographer.)

A On May twelfth, 1914; yes, sir.

Q You did? A We did; yes, sir.

Q And just tell the jury how you got possession of the small house? A By advice of my attorney, I took some men with me and we took 40

Dr. Edgar T. Wheaton, direct.

possession. I notified the family of John I. Collins, adjoining that I had come down for the purpose of taking possession of the small house and put it in order for a tenant.

Q Yes. A And I said if you have the key, I would be glad to receive it. And if not, we are
10 going to take possession anyway. And she said she hadn't got the key. I said all right. We found on the back window of the back porch a broken pane which we removed that piece and reached in and unlocked the door from the porch and opened the door and went in.

Q So you didn't get in with a key? A No.

Q What did you do with reference to the locks on the house? A Changed them all. Put new
20 locks on.

Q When you took possession in that manner on May twelfth, did you find anything in the house? A Yes; there was some furniture in there of various kinds, and children's toys. And I can't remember just what. I think there was a swing stored in there that they used for outdoors; a swing for children.

Q What did you do with that property? A We set the things out of the back door of the adjoining house, notifying them that their things were there, if they belonged to them they could
30 take care of them.

Q And the adjoining house was the one John I. Collins was living in? A Yes, sir.

Q Your other house? A Yes, sir; my other house.

Q Do you know whether or not everything was taken into John I. Collins' house? A Yes, sir; some of it was right at that time, while I was still
40 on the premises they took in some of the things.

Dr. Edgar T. Wheaton, cross.

I think there was a mattress, if I am not mistaken, in this furniture, and I think that that was a part of the goods that were taken in.

Q What rent did you receive for the small house prior to May, 1911?

Mr. Bishop. I object to that.

10

Mr. Egner. I suppose that would be material on the rental value of the house.

The Court. No; the question is what is the reasonable rental value at this time.

Mr. Egner. Never mind it, I will withdraw that. I will prove that by somebody else. I think that is all. Cross examine.

Cross examination by Mr. Bishop.

Q Doctor, you say that some time in 1912 you saw John I. Collins and his family occupying number ten. When was that? Do you remember? A Why, I think it was some time in September.

20

Q How many times were you there? A Once.

Q What time of day? A I can't remember whether it was forenoon or afternoon; it is hard to remember, but it was during the day time.

Q Do you know what day of the week it was? A What is that?

30

Q Do you know what day of the week it was? A No; I can't say that.

Q Was it Sunday? A I don't think it was Sunday; it is possible it might have been.

Q You don't remember what day of the week it was? A What is that?

Q You don't remember what day of the week it was? A No; I don't remember.

Q Did you speak to any one there? A Yes; I spoke to Mrs. Collins.

40

Dr. Edgar T. Wheaton, cross.

Q Who did you see in the house? A Why, I saw the family of John I. Collins.

Q Just who did you see? A I saw Mrs. Collins.

Q Well, now who else? A Children; I don't know their names.

10 Q How many of them? A Well, there were two or three there, I think.

Q Did you see John I. Collins there? A He wasn't there himself; no, sir.

Q After John I. Collins entered into the possession of the large house, did your tenant stay in there? In the small house? A Until the first of May following. Well, he was there—until September.

20 Q He was there in September? A Until the sixteenth of September.

Q How do you know when he left? A He wrote me a letter. I have it here in my pocket under his signature that he left the premises on the sixteenth of September.

Q Why did he write you, do you know? Why did he write you, do you know?

30 *Mr. Egner.* I do not see how he could know why he wrote him. I object to the question.

The Court. I will overrule the question.

Q How long did he pay you rent for that property? A He paid rent up until the first of May until the time of the expiration of his lease.

Q Did he pay you any rent after that? A No, sir.

Q When did he write you?

40 *Mr. Egner.* I object to that.

Dr. Edgar T. Wheaton, re-direct.

A I would just as soon answer that question if my attorney is willing. I can answer it by my letter in my pocket.

Mr. Egner. I do not care; I am sorry I objected.

Mr. Bishop. We will withdraw that. That is all, I think, doctor. 10

Re-direct examination by Mr. Egner.

Q There is one thing I forgot. When you got into the little house in the manner you have suggested, what did you find with reference to the condition of the plumbing? A Why it was froze up. Pipes bursted.

The Court. Any claims for damages to the little house? 20

Mr. Egner. Just the one item.

The Court. I thought that was on the big.

Mr. Egner. Only for the plumbing.

The Court. Only for the plumbing.

Mr. Egner. Yes.

Q You found the plumbing had been frozen?
A Yes, sir.

Q And the pipes were burst? A Yes, sir. 30

Q Do you know whether the plumbing was in that condition on May first, 1911? A Why, it must have been in good condition on May first, 1911, or the tenant would have notified me.

Mr. Bishop. I object to that, if the Court please; that is a conclusion. I move that be stricken out.

The Court. That will be stricken out.

Mr. Egner. That will be stricken out. 40

Dr. Edgar T. Wheaton, re-direct.

Q As far as you knew, you never heard any complaint about it, is that right? A No, sir.

Q Did you have this plumbing repaired? A No, sir.

Q After you got in, did you have it repaired?

A Yes, sir; I did.

10 Q How much did it cost you?

Mr. Bishop. I object to that, if your Honor please.

The Court. Why?

Mr. Bishop. Because I do not think it is proper measure of the amount of the repairs, expended for that; the amount he paid to have it repaired.

The Court. Why not?

20 *Mr. Bishop.* He may have paid an excessive amount.

The Court. He may have and may not. I think it should appear what the damages or repair was. I will permit it.

Mr. Bishop prays exception.

Q How much did you pay? A The first contract—

30 *The Court.* What did you pay, is the question? A I paid \$36.70.

Q You paid \$36.70?

By the Court.

Q And that put it in as good condition as it was before? A I think it did.

Q Any better or just the same? A Just the same.

Dr. Edgar T. Wheaton, re-cross.

By Mr. Egner.

Q Just the same. You got possession of number twelve, after the judgment of the Union County Circuit Court in ejectment, did you not? A Yes, sir.

Q And after that judgment John I. Collins and his family moved out of the big house? A Yes, sir. 10

Q And after you got possession of the big house, what did you find with reference to the range in the kitchen?

Mr. Bishop. Now, if the Court please, that raises the point we have suggested the other day.

The Court. Have you anything further to say on that, Mr. Egner? 20

Argument by counsel.

The Court. I will overrule this question, and I will rule that you are bound by your former suit, and that you waived your right to damages on property number twelve.

Mr. Egner. Yes, sir.

The Court. And allow you an exception.

Mr. Egner. All right. 30

Mr. Egner. That is all.

Re-cross examination by Mr. Bishop.

Q Doctor, you brought an action in chancery to enforce this contract, didn't you? (Question repeated by the stenographer.) A Yes, I did.

Q To make Mr. Collins purchase the property? A Yes, sir.

Q You got a decree holding that he was bound to purchase it if you had a marketable title, didn't 40

Dr. Edgar T. Wheaton, re-redirect.

you? (Question repeated by the stenographer.)

A Yes, sir.

Q Why didn't you make him purchase it under that decree? A Well, there was a technicality in that title which—

10 Q You didn't have a marketable title, did you? A What is that?

Q You didn't have a marketable title, did you? A Yes, sir, I did.

Q What do you mean by a technicality in the title? A Well, I mean that there was a building restriction that I didn't know about. That had been in former deeds, but had been left out of the later ones.

20 Q In other words there was a restriction in that title which rendered it such that the Court of Chancery would not make him take it?

A Yes.

Mr. Bishop. That is all.

Re-redirect examination by Mr. Egner.

Q And you remember in that chancery suit Mr. Collins filed an answer in which he said he never agreed to buy the property? A Yes, sir.

30 Q The Court said he was wrong about that, didn't it? And he was represented in that suit by Mr. Bradner of Newark? A Yes, sir.

Q And you remember meeting Mr. Collins and Mr. Bradner in my presence in Mr. Bradner's office? A Yes, sir.

Q Where you talked about the alleged defects in the title? A Yes, sir.

40 Q And do you remember you offered at that time to complete your deal and make an allowance if Mr. Collins would take the title? A Yes, sir.

Dr. Edgar T. Wheaton, re-redirect.

Mr. Bishop. I object to that, if the Court please.

The Court. I don't know; what is the point of it?

Mr. Bishop. I do not think it is at all material whether the plaintiff in this case was willing to make any allowance for the defect in the title. I don't think the defendant is liable for that. 10

The Court. I do not think—

A I didn't agree to allow him anything.

Mr. Egner. Your Honor will observe I did not say a word about that. He brought it out in the cross, and I am quite willing to go into it if he wants to. 20

Mr. Bishop. I do not think what you are trying to show is relevant.

Mr. Egner. That is all.

The Court. That is all, doctor.

Was there a decree in Chancery?

Mr. Bishop. Yes.

The Court. What did it do?

Mr. Egner. In the chancery suit—

The Court. What was the final determination? 30

Mr. Egner. The final determination was that there was a decree of dismissal, which happened in this way; dismissal of the bill on our application. Dr. Wheaton brought suit against Mr. Collins for specific performance. In the suit there was a stipulation between counsel, and he filed answer in which he denied having made the contract, and in view of that denial there was a stipulation 40

George Dwight Stone, direct.

10 between counsel—that was heard before Vice
Chancellor Emery—the issue should be met on
that point alone, whether he made a con-
tract, leaving the other questions out. That
was found by the Vice Chancellor that there
was a contract, and the decree specified pro-
vided title was all right. We made an ex-
amination of that title, and I had an abstract
handed to Mr. Bradner, who looked it all
over and made certain objections. One of
the objections was there was a bill of restric-
tion in this lease, providing that no house
less than twenty-five hundred dollars, I think
it was, should be placed on any lot. In view
of that I advised Dr. Wheaton he did not
20 have a title which he could make him take.
Thereupon we applied to the Court to dismiss
the bill. Mr. Bradner appeared there after-
wards and he got costs out of us.

The Court. It was after that demand was
made for possession?

Mr. Egner. Before that.

The Court. Before that?

Mr. Egner. Yes, sir.

30 GEORGE DWIGHT STONE, produced as a wit-
ness on behalf of the plaintiff, being duly
sworn, on his oath according to law, saith:

Direct examination by Mr. Egner.

Q Mr. Stone, you are now librarian of the
law library in Union county? A Yes, sir.

Q And are also in the real estate business in
Cranford? A I am.

40 Q How long have you been familiar with Cran-
ford real estate? A Since December, 1906.

George Dwight Stone, direct.

Q Yes. And during that time you have rented properties and sold properties? A Yes.

Q And conducted a general real estate business in Cranford? A I did.

Q Now, in 1913, did you in any way act as agent for Dr. Wheaton? A I did.

Q In connection with the premises on Seventh street? A I did. 10

Q And did you do anything about obtaining the keys of the small house, number ten? A I did; about the first of May, 1913.

Q Just tell us what you did. A I received a letter from Dr. Wheaton asking me to get the keys for the smaller house. I went out in the evening to see Mr. John I. Collins and showed him a letter which I had from Dr. Wheaton. He refused to deliver me the keys. Shall I go on further? 20

Q He refused to give you the keys? A Yes.

Q After that what happened? A A few days after that I believe four or five days Mr. John Collins came in my office.

Q That is the plaintiff in this case? A That is the plaintiff in this case; yes, sir; the old gentleman; I showed the order I received from Dr. Wheaton for the keys for the small house; he said he wouldn't give possession of the smaller house until an equity of—I think the figure was \$1,467—was paid to him. Or that he would take seven hundred dollars—or he would give seven hundred dollars and take what title to the property that Dr. Wheaton could give. He further said he would allow Dr. Wheaton ten days to consider the proposition, and if he didn't accept in that time he would take possession of the whole property. 30 40

George Dwight Stone, direct.

Q Yes. Did he say anything about the fact that you had asked for the keys from the young man? A Yes; that was the occasion of his visit to me, I suppose.

Q Did he say anything about that? A Yes, he did.

10 Q He knew you had asked for the keys from the young man? A He did; yes.

By the Court.

Q What did he say about it? A He said that he would not give possession of this house.

Q What did he say about knowing that you had been after the keys to this house? A I don't know. I infer that the only reason he came to see me was because I asked the son for the keys.

20

By Mr. Egner.

Q You didn't send for him? A I didn't send for him.

Q His visit to you was unexpected? A Yes.

Q Did you have anything to do with it after that? A Not directly. Except after one of the fires.

Q There were several fires in the places were there? A There were three, I think, altogether.

30

Q Mr. Stone, as a real estate man tell us what the fair rental value of that small house, number ten was during the period beginning May first, 1911, down to May twelfth, 1914? A Well, the small house was worth, at the lowest figure, twenty-two dollars a month. There had been times when business was better in Cranford when it would have brought thirty to twenty-five dollars.

40

Q You consider twenty-two dollars a low figure? A Twenty-two dollars was a low rent.

Mr. Egner. Cross examine.

George Dwight Stone, cross.

Cross examination by Mr. Bishop.

Q How far is that house from the station? A It is just about one mile.

Q How many rooms has it? A I don't know; I was never in the smaller house, except—I won't say how many rooms were in it. I never was in the smaller house. 10

Q You don't know what kind of condition it was in, do you? A No, sir, I do not.

Q A mile from the station. It wasn't a large house, was it? A No, it is not a very large house; very nice, comfortable house.

Q Did you ever rent the house for Dr. Wheaton? A No, sir.

Q Do you know what it ever rented for? A Well, no, I don't know except by hearsay. I knew a tenant that lived there formerly. 20

Q You don't know how many rooms it had? A No, sir, I don't, I should judge it was a house six or seven rooms, from the size of it.

Q Don't know what kind of condition it was in? A No, excepting from the exterior appearance.

Q Would not the number of rooms in the house affect its value any, wouldn't the interior arrangement affect its value? A The appearance of the house to me looked like more of a modern house. 30

Q I am speaking about it inside. The condition of the walls, painting, and plastering, and plumbing and all that sort of thing. A I never was in the house.

Q How are you able to say what its rental value was? A Judging from other properties.

Q How can you compare this property with other properties when you have not been inside 40

Charles L. Bell, direct.

of it. You don't know about the size of it; how the rooms were arranged; whether it had been painted in fifty years. You don't know what plumbing was inside? A No, sir.

10 Q From that how can you base your judgment on what the rental value was? A Because I was acquainted with a party lived there for some years, and knew what he paid.

Q He may have been paying too much. You don't know what the condition of the house was.

Mr. Bishop. That is all.

Mr. Egner. That is all.

The Court. That is all; call your next.

20 CHARLES L. BELL, produced as a witness on behalf of the plaintiff, being duly sworn, on his oath according to law, saith:

Direct examination by Mr. Egner.

Q Mr. Bell, you live in Cranford? A Yes.

Q What is your business? A Contractor and builder.

30 Q Contractor and builder, how long have you lived in Cranford? A About fourteen years, six months.

Q And during that time have you had any dealings with real estate? A Yes, sir.

Q Bought and sold property? A Yes, sir.

Q Rented it? A Yes, sir.

Q Are you—you say you are a contractor and builder; you have knowledge as to the general lines of contracting and building? A Yes, sir.

40 Q Now are you the gentleman that accompanied Dr. Wheaton when he broke into his own house in May, 1914? A Yes, sir.

Charles L. Bell, direct.

Q You went with him at the time? A I did.

Q And got in—you heard Dr. Wheaton testify this morning? A I did.

Q And his testimony is correct with reference to the way you got in possession of the premises, is it not? A Yes, sir.

Q Did you change the locks? A Yes, sir. 10

Q And what did you find in the house when you took possession of it? A I found a mattress; a small go-cart that the children have for playing with. Two or three chairs; and a number of small articles; I think a lawn swing with the rest.

Q What did you do with those articles of furniture? A Took them out and placed them over on the next property where Mr. Collins lived. 20

Q Do you know what became of them? A I have no knowledge of what became of them. I think they took some of them into the house. I was there a few days later and I saw part of them had gone and part of them were still on the lawn.

Q What did you observe with reference to the condition of the plumbing in that house when you got in there? A Why the plumbing was out of repair and I advised the doctor to get Mr. John Doyle to come and look it over and see what he would put it in repair for, because I was not a plumber. 30

Q Do you know what happened to the plumbing? A It had frozen.

Q Showed evidences of having frozen? A Yes.

Q Mr. Bell, Dr. Wheaton paid thirty-six dollars to have that plumbing fixed— 40

Charles L. Bell, direct.

Mr. Bishop. Just a moment, please. I object to that on the same ground; I object to Dr. Wheaton testifying to the same subject.

The Court. He has not finished the question.

10 Q Doctor Wheaton paid \$36.00 to have that plumbing fixed; what have you to say from your knowledge as a general builder and contractor as to the reasonableness of that amount for the work that was done?

Mr. Bishop. I object to that on the ground this man is not qualified to testify on that. He said he wasn't a plumber.

By the Court.

20 Q Have you knowledge on this subject? A Yes, sir.

The Court. I will admit the question.

By Mr. Egner.

Q You are not a plumber, but you had a lot of plumbing done? A Yes, sir.

Q What can you say as to the reasonableness of that price? A All bills—

30 *The Court.* Is that reasonable or not?

A Yes, sir.

Q What was the general condition of this little house?

The Court. That is all you claim.

Mr. Egner. Your Honor didn't wait until I finished the question.

40 Q What was the condition of the small house with respect to the general condition? A Needed repairs; needed painting and varnishing.

Charles L. Bell, cross.

Q Had you been in the house prior to that time? A Many times; I built the house.

Q You build the house. Have you got any knowledge as to what the condition was on May first, 1911? A No, sir.

Q You haven't? A No, sir.

Q When was that house built? A About fifteen years ago. 10

Q Is it a well built house? A Yes, sir.

Mr. Egner. That is all.

Cross examination by Mr. Bishop.

Q Mr. Bell, where was that house built? A Built in Kenilworth then called "New Orange."

Q Then called New Orange. And it was moved over to Cranford, wasn't it? A Yes, sir. 20

Q How big a house was it? A Twenty-four by thirty; six rooms and bath; all improvements otherwise. Furnished.

Q How big was the large house? A I can't remember exactly the size of the large house.

Q You built that too, didn't you? A Yes, sir.

Q It was larger, I take it. Was it much larger? A The larger house had eight rooms. 30

The Court. Mr. Bishop, isn't the large house out of the case now?

Mr. Egner. Yes.

Mr. Bishop. I want to compare the two houses as to the value of the rent.

A The large house was a larger house.

Q It was two rooms larger at least? A Yes, sir.

Q And they were bigger rooms all the way through? A No. 40

Charles L. Bell, cross.

Q They weren't? A Not all the way through.

Q Now about this plumbing, what had to be done to that plumbing? A Why, replacing the frozen pipes.

Q How many of them? A I didn't count them.

10 Q Do you know how much had to be done? A I looked over the bill and thought it was about right, and I so told the doctor.

Q Do you know whether, as a matter of fact, the work specified on that bill was done? A Yes, sir.

Q How do you know? A I looked it over.

Q Did you look the situation over first? A I looked it over after it was installed.

20 Q Did you see what had been done? In the house? Not on the bill? A That's what I said. I looked it over after it was installed.

Q You didn't look it over before it was installed? A No, sir; I looked over the plumbing when the doctor and I went in there.

Q That is what I asked. But you found it was damaged; how much of it was done? A I didn't count the pipes were broken by frost; didn't go into that part of it.

30 Q And yet you are able to say—do I understand after the repairs were done you went down and looked at the plumbing again? A That's right.

Q And you found that everything that was done was necessary work? A Yes, sir.

Q How many stories is the large one? A How many stories?

Mr. Egner. I object as immaterial.

40 *The Court.* Mr. Bishop wants to make some comparison as to the rental values.

Charles L. Bell, re-direct.

A Two stories or what they call two stories and attic. Two stories; two floors.

Q How many stories has the small house? A It is what we call a story and a half. Rooms in the upper floor are built in the roof with dormer windows.

Mr. Bishop. That is all. 10

Re-direct examination by Mr. Egner.

Q What, in your opinion, was a fair rental value of this small house? A From twenty-two dollars to twenty-five dollars.

Q During a period from May first, 1911, down to May 14th, 1914?

Mr. Bishop. I object to that on the ground that this gentleman has not been qualified as to testify as to rental values. 20

The Court. You may test him if you have any doubt about it.

By Mr. Bishop.

Q Did you ever act as real estate agent for the rental of this house? A Yes, sir.

Q In Cranford? A Yes, sir; I rented this very house you are talking about.

Mr. Bishop. I withdraw my objection then. 30

By Mr. Egner.

Q Now, Mr. Bell, answer the question. A From twenty-two to twenty-five dollars; according to the times.

Q According to the times? A Yes; called for house.

Q After you went into this little house with Dr. Wheaton in a manner such as described, did you receive any epistles through the mail? A From whom? 40

Q From John Collins? A Yes, sir.

Arthur F. Egner, direct.

Q I show you a letter and ask you if you have ever seen that? A Yes, sir; I received that and forwarded it to Dr. Wheaton.

Q You received it through the mail? A Yes, sir.

10 *Mr. Egner.* Do you admit this letter is from Mr. Collins?

(Mr. Bishop examines letter.)

Mr. Egner. It is admitted this letter bears Mr. Collins' signature, and I therefore offer it in evidence.

(Letter admitted in evidence and marked Exhibit P No. 2.)

(Mr. Egner reads P No. 2 to the jury.)

20 *Mr. Bishop.* I move to strike that out as irrelevant.

The Court. It will be admitted.

ARTHUR EGNER, produced as a witness on behalf of the plaintiff, being duly sworn on his oath, according to law, saith:

Direct examination (by himself).

30 A I represented Doctor Wheaton in his law suit in chancery with Mr. Collins some time in 1913—I don't remember exactly when—but I know it was after Dr. Wheaton had made some demand for the keys of the premises. I saw Mr. John I. Collins at his printing place on Broad street in Newark, and I asked him whether he would surrender possession of the premises. Meaning—stating to him that as to the large house we wanted an admission by him that he would bond under us and we would let him stay
40 there as a tenant if he wanted. And as to the small house that he wanted the keys so we could

Arthur F. Egner, direct.

rent it to somebody else. And Mr. Collins refused to give me the keys or surrender possession of the house. I asked him why he wouldn't and he said he couldn't. I said why not. And, while I don't remember his exact language, it was something to this effect; that he couldn't because of his father.

10

Mr. Egner. Cross-examine.

Mr. Bishop. That is all.

A Juror. Can I see that letter?

Mr. Egner. Yes. (Hands letter to the juror.)

Foreman of Jury. I would like to ask a question about the original contract. Did the defendant pay down any sum in making the original contract to purchase?

20

Mr. Egner. I can answer that; shall I?

The Court. It is admitted he paid down six hundred dollars.

Mr. Egner. He paid down six hundred dollars and in the ejectment suit which involved the other property he was given credit for the six hundred dollars, so that has been squared up.

The Foreman. Question whether it is a legal binding transaction to start off with.

30

Mr. Egner. The Court held it was.

It is admitted that the specific performance suit was dismissed by a decree signed on March twenty-second, 1913.

The Court. March twenty-second, 1913?

Mr. Egner. Yes.

That is our case, if Your Honor please.

Plaintiff Rests.

40

John Collins, direct.

DEFENDANT'S CASE

JOHN COLLINS, the defendant, being produced and sworn on his oath, according to law, saith:

10 *Direct examination by Mr. Bishop.*

Q Mr. Collins, where do you live? A Township of Springfield.

Q How long have you lived there? A Going on five years.

Q You are familiar with, of course, the premises ten and twelve Seventh street, Cranford, referred to as large and small house in this testimony, aren't you? A Familiar?

20 Q Yes; you know the property? A Yes, sir.

Q You agreed at one time to purchase it from Dr. Wheaton, didn't you? A Yes, sir.

Q What were you purchasing that property for? A Six thousand dollars; less five per cent. cash; I paid the cash.

Q You paid down something on account at the time; didn't you? A Yes, sir.

Q You also—strike that out—what were you going to do with the property if you bought it?

30 *Mr. Egner.* I object as immaterial.

The Court. How is that material?

Mr. Bishop. Perhaps it isn't.

Q Did you ever take possession of that property, yourself?

Mr. Egner. I object; that is a conclusion.

A No, sir.

The Court. Let it stand.

A I never was in possession of either of them.

40 Q Never lived in either house, did you? A No, sir.

John Collins, direct.

Q Did you ever intend to live in either of them? A I did.

Q Which one? A The small one.

Q Did anybody ever live in the large one after you agreed to purchase it? After the first of May, 1911? A My son lived there.

Q How did he happen to go in there? 10

Mr. Egner. I object as immaterial on the large house.

The Court. We are not trying the large house now.

Q Did you live in the small house? A Never lived in either of them.

Q Did you ever rent the small house to anyone? A No, sir. 20

Q Did you ever instruct anybody to enter the small house? A No, sir.

Q Did you ever have keys to the small house? A No, sir.

Q Did you ever instruct anybody to get keys to the small house? A No, sir.

Q Did you ever receive any rent from anyone for the small house? A No, sir.

Q There was a tenant in there for the small house when you made the agreement? A Yes, sir. 30

Q Stayed there to the first of September? A Yes, sir.

Q Did you ever get any rent from him? A No, sir.

Q Did you ever ask for any rent? A No, sir.

Q Did he give you the keys when he left? A No, sir.

Q Did he give them to anybody representing you? Any real estate agent? A No, sir. 40

John Collins, cross.

Q Your son occupied that house for a short time, did he not? A Not to my knowledge. I never saw him there.

Q Did you ever authorize him to go in there? A No, sir.

10 Q Ever tell him he could go in there? A No, sir.

Q Did he ever pay you any rent for the property? A No, sir.

Q Did you ever instruct him—did you ever instruct him not to deliver up the keys of the property to anyone? A No, sir.

Q Do you know the condition of—I withdraw that.

Mr. Bishop. That is all.

20 *Cross examination* by Mr. Egner.

Q You knew he had the keys, didn't you, Mr. Collins? A No, sir.

Q Didn't know that? A No, sir.

Q Now you know you are under oath, don't you? A Yes, sir.

Q You did see Mr. Stone, though, didn't you? A I went to see Mr. Stone to ascertain where the key was.

30 Q Oh! A He told me that Mr. Rankin had the keys.

Q Never mind what he told you. A All that I know is what they tell me.

Q You know you went to see Mr. Stone, didn't you? A I was at Mr. Stone's place.

Q And the reason you went to Mr. Stone's was to find out where the keys was. A I wanted to know where Mr. Egner done with them.

40 Q You wanted to find out where the key was. What business of yours was it to know where the key was? A None.

John Collins, cross.

Q Why did you go— A To find out whether I was responsible for that property, and another man holding the key.

Q Oh! What made you think you were responsible for the property? A Because Court of Chancery said I was; I bought it.

Q And you claimed at the time, didn't you, that that decree of chancery permitted you to stay in the property, didn't you? A Not materially; no. 10

Q Well, materially or any other way. You made that claim, didn't you? A I made claim that I bought that property in good faith and paid large sums of money.

Q Yes. A And the property—

Q And that you wouldn't go out until this thing was cleaned up? A That was the big one. 20

Q And the little one, too? A Nothing to do with the little one.

Q Nothing to do with the little one? A No.

Q Isn't it true that you said to Mr. Stone that you would not surrender possession of the property until you got your equity out of it? A Never demanded any possession through me.

Q Answer the question. Did you say to Mr. Stone, as he has testified, that you would not surrender either of these properties until you got your equity out of it? A I don't remember that I did. 30

Q Well, you won't deny that it is true if he says so? Will you? You don't want to do that? A I wasn't there but a minute, and I don't think I told him anything.

Q Did you speak to him at all? A I asked for the keys and he hadn't them.

Q For the little house? You asked where the keys was of the little house? A I wanted to 40

John Collins, cross.

find out what I am telling you. He said he had nothing to do with them.

Q You knew at that itme that Mr. Stone had been to your son's and asked for the keys, didn't you? A No, sir.

10 Q Didn't know that? A No, sir.

Q It was just an accident you came to be at his office three or four days after he saw your son? A I saw the house was—

(Question repeated by the stenographer.)

A I presume it were just an accident. Went along there.

Q I see. What made you, all of a sudden, get the idea you wanted to find out about that key?

A I told you.

20 Q Is that an accident too? How did you get that idea into your head; you wanted to find out about the key? A Mr. Rankin was no agent of mine and I wanted to find out whether he had placed the key of that house in the hands of Mr. Wheaton's agent or not.

Q It was just an accident that at that particular time you happened to become worried about the key? A At that time Mr. Rankin said: that

30 is the key of the little house. Do you want it? And I said, "No, sir."

Q Your testimony is that at no time did you have the key, and at no time did your son have the key, to your knowledge; is that right? A I have no knowledge of him ever having the key of the small house or big one; neither one.

Q And your testimony also is that at no time did you make any claim whatever to the possession of the little house; is that right? A Yes.

40 Q That is absolutely correct? A I never made any claim.

John Collins, cross.

Q Never; at no time? Not even down to today, have you? A I have claimed that I bought the property and that the property was under the rule of the Court of Chancery was mine.

Q Yes? A And I paid large sums on it.

Q Isn't it true, Mr. Collins, that you always claimed that you were entitled to the possession of those two houses? A Well, I might have claimed that I was in possession, but I never was. 10

Q You claimed it, but you never was? A I never was.

Q But you claimed it all right, didn't you? A That's what the Court of Chancery said.

Q And you said it too? A Yes, sir; I approved of what the Court of Chancery said.

Q In your answer in the Court of Chancery you said you never agreed to buy that property, didn't you? A Mr. Wheaton said I did, and the Court found that I did. 20

Q But you said you hadn't, didn't you? A Well, that was my counsel.

Q And your counsel said what you told him to say? A I never told him.

Q After the Court said you were wrong, you agreed that the Court was right, didn't you? A I never agreed I was wrong. 30

Q What is that? A I never agreed I was wrong.

Q Well, do you mean to say, then, was the Court of Chancery wrong about it? A The Court of Chancery ruled just as I wanted. Gave me what I had bought.

Q Well, then, you know you filed an answer in which you said you never bought that property, didn't you? A My counsel did, maybe.

Q You knew about it, didn't you? A No, I didn't. 40

John Collins, cross.

Q What did you want him to do? File an answer and admit you bought the property? A Yes.

Q Why were you in a law suit? A He made us to have this complaint to compel me to take the property with a defective title and I found
10 out. And that was the only reason I objected to the property.

Q On account of the title? A On account of the title.

Q Let me read you something. I have got here a copy of your answer in the chancery suit. A Sworn to?

Q Wait a minute. You know too much law, Mr. Collins. Not sworn to, but it is an answer.
20 In that answer your solicitor says this for you: "This defendant denies that such negotiations ever resulted in entering an agreement between this defendant and the said complainant." You know that was said in your answer, don't you? A No, sir.

Q You mean to say that— A I never knowed that was said until I got a copy from the Circuit Court and those papers that you produced in this Court. That is the first knowledge I had.

30 Q You were a witness in that suit, weren't you? A I was a witness; yes.

Q When you were on the stand there, did you admit that you agreed to buy the property? A Why, I think I did.

Q Oh, Mr. Collins. A I think I did.

Q You think you did? A Yes.

Q You testified yourself; your attorney didn't testify for you, did he? A I agreed for the property by letter for which the Court of Chan-
40 cery found an agreement. That is the only way.

John Collins, cross.

Q Then you admitted in the Court of Chancery—your testimony is now that you had bought that property, didn't you? A Certainly.

Mr. Bishop. I object as leading.

Q Then, when the Vice Chancellor in his opinion said this: "Defences are: that there was no complete agreement of purchase made in writing; and statute of frauds is pleaded." When the Vice Chancellor said that he made a mistake, didn't he? A I couldn't say. 10

Q What? A I couldn't say whether he did or didn't.

Q Couldn't say about that. You do remember you said on the stand: I admit I bought the property. You remember that, don't you? A Yes. I wrote two letters I bought it. 20

Q Never mind about your letters. I want you to say—

The Court. He said "Yes," Mr. Egner.

Q You said "Yes," all right. You were in Mr. Stone's office, about a minute, is that right? A Not more than that.

Q Not more than that? A No.

By the Court.

Q Did you say to Mr. Stone you would not give up the keys or possession until you got your equity out of it? A Mr. Stone never demanded— 30

Q Did you say that, that is the question. A No; I didn't.

Q Did you say that? A No, sir; I didn't.

Q What did you go there for? A To find out where the keys were. 40

John Collins, cross.

Q Did you ask him if he had the keys A
I asked him if he had the keys of the little house,
and he said, no. Mr. Rankin at that time was
Mr. Wheaton's agent. I went over to him and he
threwed the keys down and asked me if I wanted
them. And I said, "no," and he threwed them
10 there.

By Mr. Egner:

Q Mr. Stone told you when you came there
that Mr. Rankin had the key? A He thought he
did.

Q He told you that he thought Mr. Rankin had
the key. Had Mr. Stone told you he had been
to see your son, and asked him for the keys? A
No, sir.

20 Q You remember the first fire in that big
house, don't you? A I remember there was;
and burned the roof off.

Q That was in the spring of 1912? A I
couldn't say when it was.

Q You were there shortly after the fire,
weren't you? A About a week.

Q About a week after the fire. At that time
where was your son living? A In the big house
where the fire was.

30 Q See him? A Yes.

Q Over in that house? A Yes. His piano
was in the front parlor; that part wasn't burned
off. There is two wings on the back part of it,
as I mentioned, was burned off. There was four
rooms outside of what was damaged.

Q The piano was in the front parlor; was
there any pieces of furniture over in the little
house? A No, sir.

40 Q Did you go over to see? A No, sir; never
was in the door.

John Collins, cross.

Q Never was in the door? A But once.

Q But once; when was that? A The time they fixed after they broke in and took possession.

Q You went in, did you? A I went in to find out who was working there.

Q And you found out Mr. Bell was working there? A No, sir; I went and saw a German papering and I couldn't speak to him. 10

Q Why did you go in there, by accident? A Simply to see if it was a tramp there.

By the Court.

Q Why did you care? A It wasn't anything to me.

Q Why did you go in? A I was told they were repairing this house.

Q What did you care if you did not have anything to do with it? A I didn't have anything to do with it. Only out of curiosity to know whether they were using this house in their possession and fixing it at their own expense. 20

Q What did you care about it? A They might have been fixing it at mine.

Q Why did you think they might be fixing it at your expense? A They would claim that was my house as the Court said; they could fix it unbeknown to me and charge it to me. 30

Q That is the reason you went in? A Yes, sir.

By Mr. Egner.

Q At that time you thought Dr. Wheaton was claiming it was your house? A I thought so.

John Collins, cross.

By the Court.

Q And you thought he was claiming you were in possession of it, too? A I thought he was claiming under the ruling of the Court of Chancery—

10 Q That you were in possession? A Not that I was in possession—

Q That you owned the house? A (continued) but that I bought it. The Court didn't say I was in possession, but the findings of the Court of Chancery was that I had bought the property; the whole property at what my letter said.

By Mr. Egner.

20 Q You knew that the chancery suit was dismissed, didn't you? A I didn't know that until a long time after.

Q Do you mean to say that Mr. Bradner didn't tell you the suit was dismissed? A He told me come over he wanted to see me. He wrote me a letter, and I have this letter in my pocket, but I never went to see him.

Q Mr. Bradner never told you that he had dismissed the suit? A He what?

30 Q Mr. Bradner never told you that he had dismissed the suit? A No, sir.

Q Why did you discharge Mr. Bradner and get Mr. Titus to represent you? A Because he gave Mr. Bradner fifty dollars to let him out of the hole.

Q Who gave fifty dollars? A You gave him fifty dollars to pay my costs. You were in a hole and you didn't know how to get out only to buy yourself out.

40 Q When did you find out that we bought ourselves out of that hole? Was that before— A At the time the second suit was brought.

John Collins, cross.

Q In Elizabeth District Court? A Yes, sir.

Q And at that time you knew that the suit in Chancery had been dismissed, didn't you? A I was told so.

By the Court.

Q Was it a suit brought to secure possession of the big house? 10

Mr. Egner. Yes.

Q Was that suit against you, Mr. Collins, to get you out of possession of the big house? A I was never in possession—

Q Was that a suit to get you out of the big house? A (continued) so they couldn't get me out.

Q Was that a suit to get you out of the big house? A My son out. 20

Q Not you? A No, sir; I never was in.

By Mr. Egner.

Q Do you remember the ejectment suit we brought against you and your son; here in this court? A Yes, sir.

Q You were a defendant in that, weren't you? A Yes, sir.

Q We got judgment against you, didn't we? 30
A Yes, sir.

Q And you paid it like a man? A Yes, sir.

By the Court.

Q Did you defend that suit? Did you defend the suit in Court; was it tried here? A Yes.

Q If you were not in possession why did you defend it? A I was defending my son.

Q You were defending your son? A It was brought against John I. Collins. 40

John Collins, cross.

Q You were one of the defendants, weren't you? A Yes, sir.

Q Did you say to the Court you had no interest in it, or file any pleading to that effect? A I had no counsel in the matter. It was George M. Titus, my son's counsel.

10 *By Mr. Egner.*

Q Was George M. Titus your son's counsel?

A Yes.

Q Who paid him his bill? A Who paid him his bill?

Q Yes. A I don't know whether he paid it or me.

Q Oh, yes, you do. You know, Mr. Collins; you know you paid Mr. Titus. A Mr. J. I. Collins paid for the printing of the case.

Q He is a printer and he printed the case? A He didn't. He hired someone and paid for it.

Q You paid something. A I didn't. I don't know whether the whole of it or not.

Q You went in there that day out of curiosity to find out who was repairing that house? A Yes.

Q And you found out? Did you find out anything about Mr. Bell, that he was doing the work? A I found out nothing. It was a German could not talk English; and I went downstairs and went out.

Q I see. A The doors and windows were wide open.

Q Did you find out Mr. Bell was doing the work of repairing that little house? A No, sir.

Q Never knew it, did you? A No, sir.

Q When you find out for the first time that Dr. Wheaton had gone into that little house? A I couldn't say.

40

John Collins, cross.

Q Who told you about it? A I think I went along there and saw these doors and windows wide open.

Q Nobody told you about it? A No.

Q You didn't know when he went in there?
A Didn't know anything about it.

Q Do you know who went in with him? A
No, sir. 10

Q Did anybody tell you who it was? A I was told Mr. Bell.

Q Who told you? A I think it was John's wife.

Q You think it was John's wife told you? A Yes.

Q And then you sat down and wrote Mr. Bell this letter? A Yes. 20

Q And because Mr. Bell with Dr. Wheaton entered that little house, you wrote this little letter?

The Court. Referring to what letter?

Mr. Egner. Referring to P No. 2.

(Last few questions and answers repeated by the stenographer.)

A Yes.

Q That is right? A I wrote that letter. 30

Q And that letter shows your stand, don't it?

A That is my writing.

Q You admit that is the letter? A That is my writing, yes. I wrote that to Mr. Bell, not to Mr. Wheaton.

Q You didn't write to Mr. Wheaton, you wrote to Mr. Bell? A Yes.

Q And in this letter you said "is breaking in peaceable? This State to settle." Why did you say that? A That is to be settled. We ain't 40

John Collins, cross.

settled yet. We ain't settled about the question of title.

Q Your stand— A The law says no man, not even the owner—

Q Shall enter into possession. The law says that, don't it? A Yes.

10 Q You know a lot of law, don't you? A Not much.

Q Well, some? A What I know I have learned you.

Q You wrote this letter because your idea of the law was that Dr. Wheaton and Mr. Bell had no right to enter into that possession of that property while you were making your claim? Isn't that right? A If I saw a man committed a
20 burglary I can tell you that.

(Question repeated by the stenographer.)

A They could have got their key of their agent, while they are breaking in.

(Question repeated by the stenographer.)

A That was not making claim to the property, but it was making claim that it was unlawfully getting possession.

Q It was unlawfully getting possession because somebody else was in possession; isn't that right?
30 A No.

Q If you go home tonight, Mr. Collins, and instead of using your key to get into your house, you break in, is that unlawful? A The statute reads that way, don't it?

Q Do you really think that? A No man shall enter in on any premises. Don't that include the owner?

Q That is your idea of the law is it? That if
40 you go home tonight and in getting into your own house you break down the door, you are breaking

John I. Collins, direct.

the statute, are you? Is that your idea of the law? A That is what it reads. Don't it read that way?

Q Is that your idea of the law? A I have an idea that legally and lawfully no man has a right to go and break into a house.

Q I see; all right. How often do you call on your son and visit him and his family? A I called on him possibly every two weeks; rode through there. Me and my wife. 10

Q Called on him every two or three weeks. And between the fire in the spring of 1912, and September, 1912, how often did you call on him? A Every two weeks, I suppose.

Q Every two weeks you suppose. On not one of those calls did you ever see him in the little house? A Never; never met him there. 20

Q Where did you meet him? A Always in the big house; invariably in the big house.

Q Invariably in the big house. You knew he had some of his stuff there in the little house? A No, sir.

Q You didn't? A No, sir; never was in it.

JOHN I. COLLINS, produced as a witness on behalf of the defense, being duly sworn on his oath, according to law, saith: 30

Direct examination by Mr. Bishop.

Q Mr. Collins, where do you live? A Cranford.

Q You are familiar with the two houses that have been referred to in the testimony this morning? A Yes, sir.

Q Did you ever live in either of them? A Yes, sir. 40

John I. Collins, direct.

Q When did you go into the first one that you occupied? A Why, I think it was in 1909.

Q That was the one referred to as the large house? A Yes; number twelve.

Q Did you ever occupy the small house? A Well, partly. After the fire. Some of our goods
10 were moved in the small house.

(Answer repeated by the stenographer.)

Q When was the fire? A 1912, I believe.

Q What month, do you know? A Latter part of June. I think twenty-fifth or twenty-sixth, or somewhere along there.

Q How did you come to move any of your furniture into the small house? A When I came from my place of business in Newark the furniture that was in there had been moved in. I understood my boy got through the cellar and opened
20 up the little house and put some of our furniture in there. That was after I had come back from Newark.

Q You let it stay there? A I let it stay there.

Q How long did it stay there? A Until the large house was fitted up to make it tenantable.

Q When was that? A Which was in the middle part of November; we were there partly from
30 July first until the middle of November. That is, we occupied the house—there was no water in the small house.

Q There was no water in the small house? A No water; no toilet; no fire; and we did all our cooking in the large house. And part of our things were in the old house. All of our parlor furniture was in the old house. And we did our cooking in back of the old house; that is number
40 twelve. Because there was no facilities in the small house.

John I. Collins, direct.

Q Did anybody authorize you to go into the small house? A No.

Q Did you have any conversation about it with your father, before you went in there? A No, sir.

Q Did you have, at any time, any authority to go into that small house? A No, sir. 10

Q And just as soon as the large house was made habitable you moved back your things into it? A We moved back; yes, sir.

Q In other words, in the emergency created by the fire you put— A That was the idea of it. Because the little house was vacant there, and it was all involved, and it seemed the natural thing for us to do was to move our things over there. 20

Q You never got anybody's permission? A We never got anybody's permission; in fact the firemen placed most of the things in there. As I understood it, of course I wasn't there at the time—

The Court. Only tell what you know.

Q When you come home you found they there and you let them stand then? A Yes, sir.

Q Did you ever have keys to the small house? A To the small house? 30

Q Yes. A Mrs. Collins had the house keys.

Q Do you know where she got them? A From Mr. Rankin after—or the day after the fire, I think.

Q Did anybody ever demand those keys from you? A Dr. Wheaton demanded them at one time and Mr. Stone demanded them at one time.

Q What reply did you make to those demands? A I simply said the place was still involved and 40

John I. Collins, cross.

I couldn't give up the place until the settlement was made.

Q Did anybody ever tell you to say that? A No.

10 Q Did that on your own responsibility. Didn't do that under your father's instructions? A I didn't have any instructions at any time, but that was the policy we pursued from the property.

Mr. Bishop. That is all.

Cross examination by Mr. Egner.

Q You say this policy we pursued, you mean your father and yourself? A Yes, sir.

20 Q So that your father was in accord with you on the policy in not giving up the keys? A Undoubtedly.

By the Court.

Q Why was that, Mr. Collins? A Because the place was in an unsettled condition, and I wouldn't have—

Q Did you claim you were entitled to possession? A We claimed we were entitled to possession until some settlement was made.

30 *By Mr. Egner.*

Q Both you and your father thought that until some settlement of that place had been made with your father you were entitled to remain in possession? A Yes, sir.

Q Both you and your father? A I won't say so much about him, Mr. Egner. That was my policy.

40 Q You talked to your father about this whole thing? A Undoubtedly.

Q On lots of occasions? A Yes, sir.

John I. Collins, cross.

Q And you and your father put in a defense to that ejectment suit involving the big house, didn't you? A Yes.

The Court. You claimed right of possession on that place, didn't you, Mr. Collins?

A Yes, sir; I didn't know what else we had. 10

Q You knew your wife had the keys? A To the small house?

Q To the small house? A I know she did have them.

Q And you know that time Dr. Wheaton and Mr. Bell went into possession of the small house they took some of your furniture out and you moved it into your own house? A Yes; there was some things in there, but they were toys or things you would naturally put into a cellar. 20

Q From about July first, to November, 1912, you and your family actually slept in that house?

A In the little house?

Q In the little house? A Yes, sir.

Q You said you considered that the natural thing to do? A Under the circumstances we had nothing else to do.

The Court. When was that?

Q Then, after that, you repaired the big house and went into that? A Yes. 30

Q And still left some of the furniture in that little house? A We may have left a baby wagon or some article you would put into a garret, but no furniture we wanted to use.

By the Court.

Q Staying in this small house four months, was this in pursuance of the policy you spoke about a moment ago? Your father and you insisting you were entitled— A Until settlement 40

John I. Collins, re-direct—re-cross.

had been made. We thought if we had right to the big one we had the same right to the small one.

Mr. Egner. I guess that is all.

Q Did your father know you were in the small house? A Yes, sir.

10

Re-direct examination by Mr. Bishop.

Q What was the condition of that small house? A Very bad condition; there was no toilet; no water; no heat. It was impossible for us to cook; it would have been impossible for us to have lived in the little house had it not been for the big one.

Q Do you know whether it was in the same condition when you left as when you went in? A Oh, yes, sir. We did nothing to it.

20

Q You occupied it from the latter part of June or first of July until some time in November? A From the date of the fire which was latter part of June, until the middle part of November.

Q Do you know whether it was possible under the weather conditions for the pipes to freeze during that time? A No, it couldn't have frozen at that time because the weather would not have been cold enough, from the first of July to November.

30

Q Do you know whether they were frozen when you went in? A It undoubtedly was because there was no opportunity after that.

Re-cross examination by Mr. Egner.

Q You remember the tenant that was in the little house? A Yes, sir.

Q And you remember that your father said to him he must not pay any rent to Dr. Wheaton? A I had heard he said that, but I never heard my father said so.

40

John I. Collins, re-cross

Q You heard your father say that to that tenant?

By the Court.

Q Did you ever hear your father say that? A To who?

Q Either you or the tenant? A That he must not pay rent to who? 10

By Mr. Egner.

Q To Dr. Wheaton? A No.

Q What did you hear? A I don't know that I ever heard anything on that subject.

Q It was part of your policy you were entitled to all the income from that property from May first, 1911, on? A I never knew about that. It wasn't my income, any of it. 20

Q What did you mean a minute ago when you said you had heard that your father had said to the tenant— A I didn't understand your question. I didn't mean that I had heard it.

Q What did you think I asked you at that time? A I don't remember; just ask the question again.

Q Was your answer an accident, then? A Tell me the question again.

Q Now your recollection is that you don't remember hearing anything about your father telling that tenant he must not pay any rent to Dr. Wheaton? A I don't. There was a great deal of talk about it, but I don't know that I can recollect that I had heard that he had, said of Dr. Wheaton, he must not pay any rent to him. 30

Q What is that? A I don't know that I can recollect that any such conversation ever passed.

Mr. Egner. That is all. 40

Mr. Bishop. That is all.

Dr. Edgar T. Wheaton, direct.

DR. EDGAR T. WHEATON, re-called.

Direct examination by Mr. Bishop.

Q Doctor, after you regained possession of number ten, the small house, it was necessary for you to do considerable work to put it in order,
10 was it not? A Yes.

Q What did you do? A Put new roof on it.

Q Yes; what else? A And painted it.

Q Inside and out.

Mr. Egner. He means the little house.

A Yes.

Q Put new roof on it. And you painted it?

A Yes, sir.

Q What else did you do? A Repaired the
20 plumbing.

Q Yes; repaired the plumbing; do any papering? A I think we did; yes.

Q Decorating? Had the house all overhauled, as a matter of fact? A Yes; we put it in condition to occupy.

Q It wasn't in condition to occupy? A No, the plumbing was out of order; our trouble was because of the plumbing had spoiled the paper on the wall.

30 Q The plumbing was out of order? The plumbing was out of order? A Yes.

Q And the roof was out of order and the house had to be papered? A Yes, sir.

Q And had to be painted? A Yes, sir.

Q And had a lot of work to be done on it?

A Yes, sir.

Q You couldn't rent the house until that was done, could you? A I think if the plumbing hadn't been out of order we could have done it.

40 Q You didn't rent it, as a matter of fact? A We rented it as soon as we got it fixed.

Dr. Edgar T. Wheaton, direct.

Q When did you rent it? A I think the tenant went in there in August; now I am not sure.

Q That is, August of what year. After you got possession of it? A After we got possession of it.

Q You got possession when? A Tenth of May. 10

Q Is he in there yet? A Yes, sir.

Q Did he pay rent? A No, sir; he bought the place.

Q As a matter of fact, didn't he pay rent? A Yes, sir.

Q Didn't he pay installments on the purchase price? A He paid rent for the house.

Q Didn't his rent apply on the purchase price of the property? A No, sir; I think not. I am quite sure not. I am pretty sure he didn't. 20

The Court. How is that material?

Mr. Bishop. I think it is material whether he rented or he didn't rent this house.

By the Court.

Q How much rent did you get for it?

(Question repeated by the stenographer.)

A I rented it for a nominal price. 30

By Mr. Bishop.

Q How much did you get for it? A I think twenty dollars.

Q Can't you recall exactly how much you got from this man? A What I sold it for?

Q No, how much you rented it for? A Twenty dollars. Yes.

Q Are you absolutely certain that this twenty dollars he paid didn't apply to the purchase price? A Yes, sir. 40

Dr. Edgar T. Wheaton, direct.

Mr. Egner. I object as immaterial.

Mr. Bishop. I think it is very material.

Q You said some of the monthly installments he paid applied on the price of the house? A Some of the installments?

10 Q Yes? A Later on he might have, but none of these.

Q When did they begin? A As soon as he occupied it.

Q As soon as he occupied the house it was arranged that he was to apply the monthly installments on the purchase price? A No, sir.

Q Wasn't he, as a matter of fact, given credit on account of the purchase price for everything he paid you while in there? A No, sir.

20 Q He was not? A He was not.

Q How much was he given credit for?

The Court. That is immaterial.

A I can't remember it; I can't remember it exactly.

Mr. Egner. I object.

The Court. I will overrule that.

Mr. Bishop. Prays exception.

30 Q Mr. Wheaton, on the twentieth of September, 1910, Mr. Collins paid you some money; some sixty dollars from you, didn't he? A He didn't pay it to me; he sent me that.

Q He sent you a check for that? A Yes; I don't know just the date.

40 *Mr. Bishop.* I want to offer that letter of September twentieth, this, if Your Honor please, is a letter written, the original of which has been lost. It was offered in evidence in a former suit and I have the printed record here.

Motion for Direction of Verdict.

Mr. Egner. I have no objection to the manner of proof, but I have objection to the letter.

Mr. Bishop. Purpose which I wish to offer it because this letter determines the rent for a period of six months for the large house and to, at the same time, determine that the small house wasn't worth so much. 10

This letter is admitted in evidence.

(Letter entered in evidence and marked Exhibit D. 31.)

(Mr. Bishop reads Exhibit D. 1 to the jury.)

The Court. Have you anything further?

Mr. Bishop. I want to offer Exhibit D. 2, which is a letter dated September twenty-eighth, 1910. 20

(Letter entered in evidence and marked Exhibit D. 2.)

(Mr. Bishop reads D. No. 2 to the jury.)

Mr. Bishop. If the Court please, I have here some requests for charges, and also move for direction of a verdict with respect to the first count which is, for use and occupation of number ten Seventh street. It appears, without contradiction, that whatever of possession was had, if there is any possession in the case that is referable to this defendant, that whatever it was was under a contract for the sale of the property. There never was any rent or any agreement for rent of the property, number ten. And whatever possession was had, was had under and entirely referable to the terms of this contract for sale. 30
40

Motion for Direction of Verdict.

10 Now the Supreme Court says, in the case of Donovan against Brenning, 79th, New Jersey Law, page 202: "Held: that a suit to recover for use and occupation can not be maintained unless the relation of landlord and tenant exists between the parties; and such relation cannot be said to exist where the defendant entered into possession under a provision for that purpose contained in a contract of sale, which the plaintiff, for reasons, dehors the contract, could not specifically enforce." On this contract of sale there wasn't ever any rent paid, no agreement for rent, no relationship of landlord and tenant with respect to number ten.

20 After argument by counsel.

Mr. Bishop. I take it the application is denied?

The Court. Yes.

Mr. Bishop. I take exception.

Mr. Bishop sums up for the Defense.

Mr. Egner sums up for the Plaintiff.

30

40

*Defendants' Requests to Charge.***Defendant's Requests to Charge.**

(1)

“The plaintiff is not entitled to recover for any items of repairs to the house known as No. 12 Seventh street, Cranford, because he is barred with respect thereto by the judgment in the ejectment suit recovered by him Feb. 8, 1915.” 10

(2)

“The plaintiff cannot recover anything from the defendant for use and occupation of No. 10 Seventh street unless it was used and occupied by him.”

(3)

“The plaintiff cannot recover from the defendant for use and occupation of No. 10 Seventh street unless the relation of landlord and tenant existed between them.” 20

(4)

“The plaintiff cannot recover from the defendant for use and occupation of No. 10 Seventh street if the possession thereof by the defendant was under a contract for the sale thereof to him.” 30

(5)

“The plaintiff cannot recover from the defendant for use and occupation of No. 10 Seventh street for any longer period than the same was used or occupied by him.”

(6)

“The plaintiff cannot recover from the defendant for the use and occupation of No. 10 Seventh street while the same were used or occupied by 40

Charge to Jury.

or in possession of John I. Collins, unless the said John I. Collins entered as the tenant or agent of the defendant.”

(7)

10 “The plaintiff cannot recover from the defendant for the use and occupation of No. 10 Seventh street by John I. Collins, unless the said John I. Collins was authorized to enter, use, occupy and possess the same by the defendant.”

(8)

20 “The plaintiff cannot recover from the defendant for the cost of repairing any damage caused to the premises Nos. 10 and 12 Seventh street, or either of them unless such damage was caused by the negligent act or omission of the defendant or his servants or agents.”

* * *

Charge to Jury.

The Judge charged the jury as follows:
Gentlemen of the Jury:

30 In this case there are two counts, one dealing with number ten and one with number twelve, but number twelve is eliminated, so you need not consider that at all, and the action now is to recover for the reasonable rental value of the small house.

40 The plaintiff claims the amount of \$792.00 and interest, and also for damages to the plumbing. The evidence seems to be that Mr. Collins went in under a contract of sale or purchase, and took possession of the premises, or at least he had a

Charge to Jury.

contract of sale. And your first problem is: did he take possession of the premises and retain the premises as against Mr. Wheaton, the owner.

We have had testimony on both sides; you have heard the testimony of Mr. Wheaton and Mr. Stone, as to the statements made by Mr. Collins; and you have heard the testimony of his son, and Mr. Collins himself. 10

Did he take possession of the property under a contract of sale and did he remain in possession and refuse to give it up? If you find that he did not have possession; had nothing to do with it, then, of course, there can be no recovery. But, on the other hand, if you find that he took possession, or assumed to have possession, and refused to give it up to the actual owner then he must respond to the owner for the reasonable rental value of the property. 20

The second problem is—if you find that he is responsible—what is the reasonable rental value of the property.

You have heard the testimony of the plaintiff's witnesses; one gentleman who testified that the reasonable rental value was twenty-two dollars, had not seen the inside of the premises. You have a right to weigh all the testimony and determine yourself, irrespective of what a witness says, what the fair, reasonable rental value was of that property. You have a right to take into consideration the condition of that property; the fact it had to be repaired; roof had to be put on; that it had to be painted and papered; you have a right to take all those things into consideration and determine whether the statement of the plaintiff that twenty-two dollars a month was the reasonable rental value is correct. If you find it was not 30 40

Charge to Jury.

a reasonable rental value, you must fix from all the evidence what was a reasonable rental value.

10 And then take up; secondly, what were the damages to the premises. I understand there is no dispute as to the amount, the testimony being \$36.70 on the part of the plaintiff, and no testimony to the contrary as to the amount, although there is testimony from which you might draw the inference that the damage was not done by Mr. Collins or his son, but that is for you to determine.

The plaintiff's claim is for possession of the property from the first of May, 1911, until the twelfth of May, 1914, a period of three years and eleven days.

20 So, take the case, gentlemen, and apply your good common sense as to what you think is proper between the parties.

30 There are some requests to charge. The defendant requested: "The plaintiff is not entitled to recover for any items of repairs to the house known as number twelve Seventh street, Cranford, because he is barred with respect thereto by the judgment of the ejectment suit recovered by him February eighth, 1915." I have already charged you on that point; you have nothing to do with the big house, and I repeat it.

Number two I refuse to charge; number three I refuse to charge; number four I refuse to charge.

40 Number five: "The plaintiff cannot recover from the defendant for the use and occupation of number ten Seventh Street for any longer period than the same was used or occupied by him." I so charge you.

Charge to Jury.

Number six: "The Plaintiff cannot recover from the defendant for the use and occupation of number ten Seventh street while same were used or occupied by or in possession of John I. Collins, unless the said John I. Collins entered as the tenant or agent of the defendant." I charge you that gentlemen, and add this, "or unless he entered into the premises with the acquiescence or by the consent of the older Mr. Collins." 10

Seventh: "The plaintiff cannot recover from the defendant for the use and occupation of number ten Seventh street, by John I. Collins, unless the said John I. Collins was authorized to enter, use, occupy and possess same by the defendant." I charge you that and adding, "or unless it was done with the consent or acquiescence of the defendant." 20

Eighth: "The plaintiff cannot recover from the defendant for the cost of repairing any damage caused to the premises Nos. ten and twelve Seventh street, or either of them unless such damage was caused by the negligent act or omission of the defendant or his servants or agents." I so charge you.

Mr. Bishop. I except to the Court's refusal to charge this defendant's second, third and fourth requests, and the refusal to charge the sixth and seventh requests, specifically as requested. 30

(Jury returns to the jury room.)

The Court. I understood you wanted to ask me some questions.

Foreman of the Jury. Yes, sir. The question is: Why didn't Doctor Wheaton take possession of the house number ten in 1911, instead of waiting until 1914? 40

Charge to Jury.

The Court. I suppose the plaintiff claims he couldn't get it; that the other man was in possession; that is for you to say from the evidence that is before you.

10 *Foreman.* Another question is: After the Court of Chancery gave decision that the title presented was not sufficient in 1913, why didn't the doctor take possession at once?

20 *The Court.* You are complicating yourselves, gentlemen, in the case, by thinking about those things which are practically not essential to your case. You have not anything to do with the Court of Chancery, or what the Court of Chancery did. The question is, as I submitted it to you a few minutes ago. This is an action to recover the reasonable rental value of the premises. The plaintiff claims that the defendant kept the possession of the property and would not give it up to him and he finally took it by force, by getting in. The first problem is, as I have indicated to you. And what the Court of Chancery did or didn't do you have nothing to do with that, except as it came out incidentally.

30 The first problem is: Did Mr. Collins take and keep possession of the premises unlawfully and against the owner. If he did, it is for you to say what he has to pay the reasonable value of the rental. If he was in possession in that manner, he is liable. If he was not in possession he does not have to pay anything. If he was and did not give it up, he has to pay the reasonable rental value.

Do not complicate yourselves by considering other questions, gentlemen.

Opinion of Supreme Court.

Opinion.

Filed March 5, 1917.

NEW JERSEY SUPREME COURT.

June Term, 1916.

EDGAR T. WHEATON,

vs.

JOHN COLLINS.

10

Appeal from Union Circuit Court.

Argued before Gummere, Chief Justice, and Justices Trenchard and Black.

For the appellant, John W. Bishop, Jr., and Kinsley Twining. 20

For the respondent, McCarter & English.

The opinion of the Court was delivered by Gummere, *C. J.*

The plaintiff in this case brought suit to recover reasonable compensation for the use and occupation by the defendant of certain property belonging to the plaintiff in the Town of Cranford. The trial resulted in a verdict in his favor, and from the judgment entered thereon the defendant appeals. 30

The situation disclosed by the proofs in the case was as follows: Wheaton was the owner of two houses and lots in Cranford, and entered into a contract with the defendant, Collins, for the sale thereof to him, the deed to be delivered on the 1st of April, 1911. The contract was entered into in September, 1910, and shortly thereafter—at least some time 40

Opinion of Supreme Court.

10 prior to the 1st of the following April—the defendant entered into possession of the premises. When April 1st arrived plaintiff tendered a deed for the property to the defendant, whereupon the latter refused to accept the delivery, upon the ground that the title was not marketable. He, however, continued in possession of the property. The plaintiff then filed a bill in equity against him to enforce the performance of the contract, but, as the proofs in the equity case disclosed that the plaintiff could not give a marketable title, the bill was dismissed. During all of this time the defendant remained in possession of the plaintiff's property. The present suit was then brought to recover from him the fair rental value of the premises during the period of occupation.

20 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

30 out, and the plaintiff was manifestly entitled to compensation for the deprivation 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. Laws, 1912, p. 377.

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Opinion of Supreme Court.

Next, it is argued that the plaintiff was not entitled to recover compensation for the occupation of the premises by the defendant up to the time of the making of the decree by the Court of Chancery in the specific performance suit, because during that period the defendant was in possession as an equitable vendee under the contract of sale. It may be that if the equity suit had resulted in a decree for specific performance, the defendant's occupation up to that time might be considered as not being tortious, the extent of his obligation to the plaintiff being to pay the purchase price with interest from the date when the deed was agreed to be delivered. But whether this be the legal situation, or not, under the circumstances suggested, we have no doubt that it does not lie in the mouth of the defendant to assert in one breath that he is in possession under a valid contract of sale, and therefore not liable to make compensation for his occupation of the premises, and in the next breath assert successfully that he is under no obligation to perform the contract, and is entitled to and does repudiate it.

The judgment under review will be affirmed.

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Rule for Affirmance.

Rule for Affirmance.

Entered March 8, 1917.

New Jersey Supreme Court.

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EDGAR T. WHEATON,
Plaintiff-Respondent,

vs.

JOHN COLLINS,
Defendant-Appellant.

*Appeal from
Union County
Circuit Court.*

*Rule for
Affirmance.*

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This cause having been duly argued by Messrs. Lindabury, Depue & Faulks, of Counsel with the appellant, and Messrs. McCarter & English, of Counsel with the respondent, and the Court having considered the same, and finding no error in the record or proceedings in the Union County Circuit Court,

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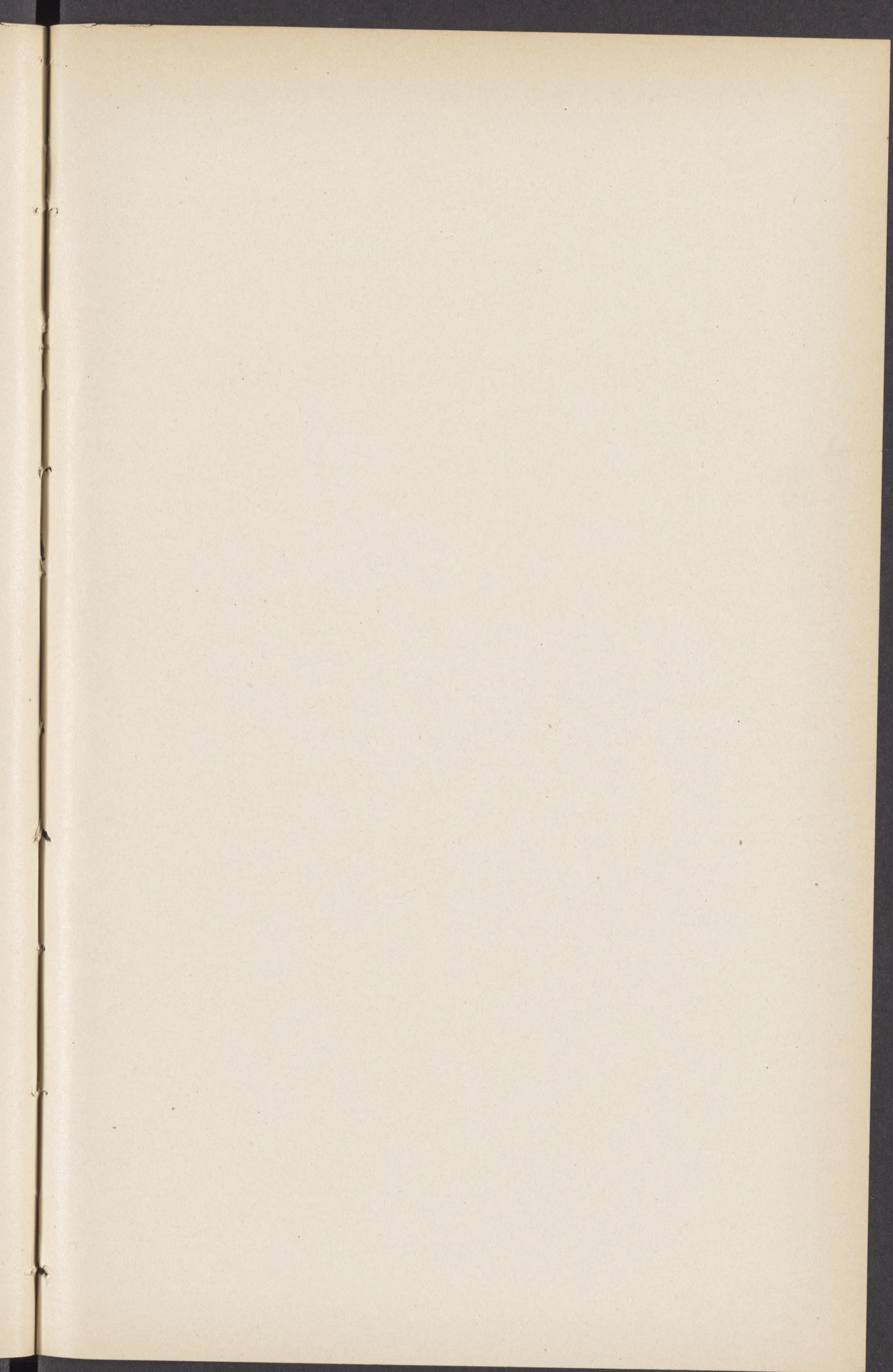
It is thereupon Ordered and Adjudged that the judgment of the Union County Circuit Court appealed from in this cause, be affirmed with costs, and that the record be remitted to the Union County Circuit Court, to be proceeded with in accordance with this judgment, and the practice of the said court.

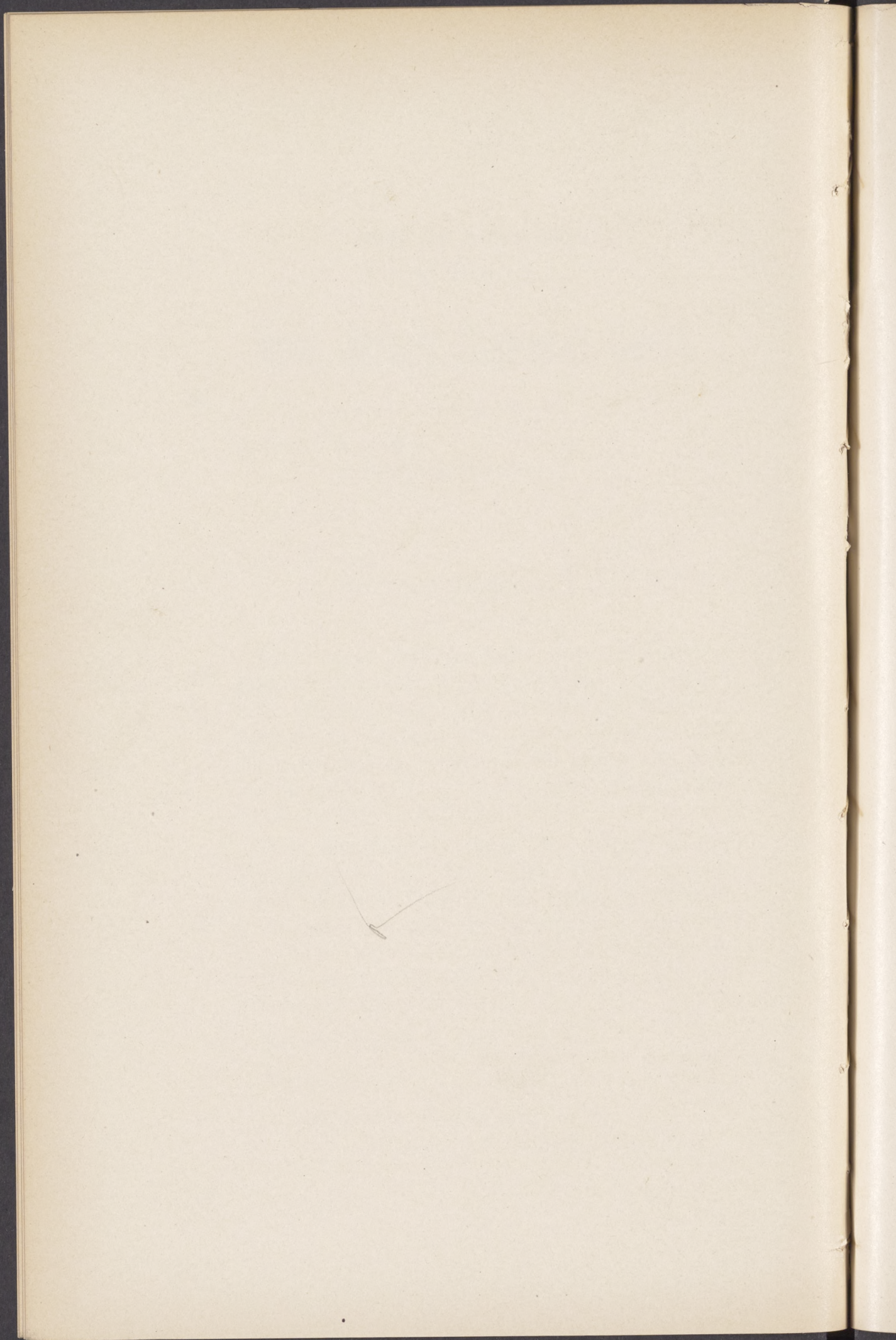
Entered March 8, 1917.

On motion of

MCCARTER & ENGLISH,
Attorneys of Defendant in Error.

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New Jersey Court of Errors and Appeals

EDGAR T. WHEATON,
Plaintiff-Respondent,

vs.

JOHN COLLINS,
Defendant-Appellant.

*Action at
Law.*

*On Appeal
from the Su-
preme Court.*

Brief for the Appellant.

Abstract of the Case.

This is an appeal from a judgment of the Supreme Court affirming a judgment of the Union County Circuit Court. The only points raised in this brief relate to the issue made upon the first count of the complaint. By that count the plaintiff sought a recovery from defendant because defendant "without right remained in the possession and use and occupation of number 10 Seventh street, Cranford, New Jersey, from May 1, 1911, to May 12, 1914."

The material facts admitted and proved are as follows: The plaintiff and the defendant entered into an agreement in September, 1910, whereby the defendant agreed to purchase from the plaintiff premises known as Nos. 10 and 12 Seventh street, Cranford, N. J., for the sum of \$6,000. The defendant paid \$600 on account of the purchase price. Title was to pass on April 1, 1911. On that date, plaintiff tendered deeds for the premises to the defendant which tender was not accepted. The plaintiff then filed his bill in chancery, praying for the specific performance of the aforesaid contract. The suit came to a hearing

and the Court held that the plaintiff was entitled to a decree of *specific performance provided the plaintiff was able to convey a marketable title*, and the suit was referred to a master. *Wheaton v. Collins*, 84 Atl. 271. The plaintiff conceived that he was unable to convey a marketable title and on March 22, 1913, *made application to have his bill dismissed, which the Court granted*. It does not appear whether or not Dr. Wheaton, the plaintiff, ever offered to convey the premises to Mr. Collins and make allowance upon the purchase price sufficient to offset the defect in the title.

From April 1, 1911, to September 16, 1911, the small house, No. 10 Seventh street, was in the possession of a tenant of Dr. Wheaton who paid rent to him up to May 1st and seems to have occupied the premises rent free from that date to September 16, 1911, when he left and delivered the key to Dr. Wheaton's agent.

The defendant has never occupied the small house and has never received any rent for it, but during the latter part of June, 1912, there was a fire in No. 12 Seventh street, which was occupied by the defendant's son, John I. Collins, and at or about that time John I. Collins and his family moved out of No. 12 into No. 10 where they remained until the middle of November, 1912, when they moved back again into the large house.

The defendant has always been willing to carry out his part of the contract if a proper allowance were made for the defect in the title. It does not appear that at any time before the commencement of this suit did the plaintiff ever offer to return the \$600 deposit. The plaintiff took possession of the small house in May, 1914.

Grounds of Appeal.

1. The Supreme Court determined that it was not necessary to decide whether the relation of landlord and tenant existed between the parties or not.
2. The Supreme Court determined that the real merits of the case had been tried out, and that the plaintiff was entitled to compensation for the deprivation of the use of his property.
3. The Supreme Court determined that the plaintiff was entitled to recover compensation for the use and occupation of the premises by the defendant up to the time of the making of the decree by the Court of Chancery in the specific performance suit.
4. The Supreme Court affirmed the refusal of the Judge of the Circuit Court, to direct a verdict in favor of the defendant.
5. The Supreme Court affirmed the refusal of the Judge of the Circuit Court to charge the defendant's request to charge, as follows: "Plaintiff cannot recover from the defendant for the use and occupation of No. 10, Seventh street, unless the relation of landlord and tenant existed between them."
6. The Supreme Court affirmed the refusal of said Judge to charge the defendant's request to charge, as follows: "Plaintiff cannot recover from the defendant for the use and occupation of No. 10 Seventh street, if the possession thereof by the defendant was under a contract for the sale thereof to him."
7. The Supreme Court affirmed the judgment of the Circuit Court.

Brief of Argument.

Point I.

THE JUDGMENT UNDER REVIEW SHOULD BE REVERSED BECAUSE THE FIRST COUNT IN THE COMPLAINT IS FOR USE AND OCCUPATION, AND PLAINTIFF IS NOT ENTITLED TO RECOVER ANY DAMAGES FROM THE DEFENDANT THEREUNDER.

The Supreme Court affirmed the refusal of the Trial Court, to direct a verdict for the defendant, and also refused to determine whether the relation of landlord and tenant existed between the parties or not, holding that it was unnecessary to determine this as the real merits of the case had been tried out.

It is true, that Rule 27 of the Practice Act permits the Appellate Courts to disregard mere technical distinctions of practice and pleading, and to examine the real merits of a case, but it does not do away with the fundamental differences between the various causes of action and the different rules of damages applicable to each. The judgment under review, it is submitted, seems to disregard the distinction between an action arising *ex contractu* and one arising *ex delicto*. The action for use and occupation is one based upon a contract expressed or implied. In *Mason v. Haurand*, 79 N. J. L., 375, Parker, J., says at page 377:

“The law is well settled that the action of use and occupation will not lie except on contract, express or implied—citing Tay., L. & T., sec. 637; *Brewer vs. Conover*, 3 Han., 214; *Stewart vs. Fitch & Boynton*, 2 Vroom, 17.”

Furthermore the contract, if it be not an express one, is one implied in fact, *i. e.* implied

from the intentions of the parties as expressed in conduct, etc., and is not an obligation imposed by the law against the will of the parties.

“That the implication is one of fact rather than of law is apparent from the consideration that the particular circumstances attending the permissive occupation, such as the pre-existing relations between the parties, may exclude the inference of a contract for pecuniary compensation.”

Tiffany, L. & T., Vol. 2, p. 1815.

Therefore, inasmuch as a consensual relationship, a true meeting of the minds must be found, in order to sustain the action, it is absolutely essential that the relationship of landlord and tenant be found to exist between the parties, and this is the universal rule.

It is also the universal rule that this relationship does not exist, in the absence of any express agreement, nor can an action for use and occupation be sustained against a person who enters into possession of land under a contract of purchase. The leading case in this state is *Brewer v. Administrators of Conover*, 18 N. J. L., 214. The Court in that case says at page 215:

“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.”

Other New Jersey cases citing and sustaining this one are as follows:

Van Valkenburgh vs. Rahway Bank, 23 N. L. L., 583.

Freeman v. Headley, 33 N. J. L., 523.

Donovan v. Brenning, 79 N. J. L., 202.

Applying the foregoing legal rules to the facts of the present suit, let us first consider what was the legal status of the defendant after April 1, 1911, when he refused to accept the plaintiff's deeds. There are two possible alternatives. First, he may be considered as a trespasser, holding possession adverse to the rights of the plaintiff. Second, he may and should be, considered as a vendee in rightful possession by virtue of the decision of the Court of Chancery, which found that a contract existed between the parties and decreed specific performance of it, provided the plaintiff was able to convey a marketable title.

If the defendant is regarded as a trespasser, still the plaintiff could not sue him for the use and occupation of the land, for use and occupation is a cause of action arising *ex contractu* in which the relations of the parties are consensual. The distinction between the two forms of action has been well pointed out in the case of *Brewer v. Conover*, 18 N. J. L., 215. In this case the defendant had entered upon land, belonging to the plaintiff's intestate, in his lifetime, under a contract of purchase and being in possession he cut wood and sold it. The plaintiff sued in use and occupation and in assumpsit for the value of the wood. The Court through Nevius, *J.*, says:

“The evidence may prove the defendant a trespasser, but *the plaintiff cannot convert a trespass into a contract*—. The cause of action, if any, was in tort and not in contract.”

The case of *Smith v. Stewart*, 6 Johns, 46—cited in *Brewer v. Conover*—even further sustains that position holding that a vendee in possession, under a contract of sale, who had defaulted and refused to pay the purchase price,

was not liable for use and occupation, but only as a trespasser.

See also *Stewart v. Fitch & Boynton*, 31 N. J. L., 17; *Thompson v. Bower*, 60 Barb., 463.

Furthermore, if the defendant is regarded as a trespasser, the rule for damages in this case *would not be the same* as that for use and occupation—for the defendant's son was in actual possession of No. 10 Seventh street, from June, 1912, to November, 1912, only, and the defendant was never in possession of that house. The plaintiff could have obtained possession of No. 10—at any time thereafter—and as a trespasser the defendant should not be liable for more than that short period during which his son was in actual possession of the small house. Consequently *it may be said that by disregarding the distinction between the two forms of action, the substantial rights of the defendant have been affected*. It should be further noted, that the period during which the defendant's son *was* in possession of the small house was before the plaintiff dismissed his bill in the chancery suit.

Point II.

THE JUDGMENT UNDER REVIEW SHOULD BE REVERSED, BECAUSE THE PLAINTIFF IS NOT ENTITLED UNDER ANY CIRCUMSTANCES TO RECOVER DAMAGES UP TO THE TIME THE BILL WAS DISMISSED IN THE CHANCERY SUIT.

The Supreme Court decided that the plaintiff was entitled to recover compensation for the use and occupation of his premises up to the time he dismissed his bill in the Specific Performance suit. This part of the decision is made the basis of one of the appellant's grounds of appeal. It brings us directly to our second alternative,

namely that until the dismissal of the bill in the chancery suit, *the defendant must be regarded as a vendee in possession under a contract of purchase—and consequently not liable for use and occupation during that period.*

The theory of the Supreme Court was, that as the defendant denied the existence of a contract in his answer in *that* suit—he cannot, therefore, claim a contract existed, for the purposes of this suit. But as the evidence in this case shows, he did not know that his answer denied the contract—and what is of greater importance—he *admitted the existence of the contract himself in his testimony in that suit.*

However, the real merit of this point is, that the Court of Chancery *decided that a contract did exist* and advised that the complainant was entitled to specific performance, provided the plaintiff was able to convey a marketable title. Consequently under this decision, the defendant's possession could not be tortious, but must have been the possession of a vendee under a contract of purchase and sale, and as such he could not be made liable for use and occupation. It should be further noted that the bill of complaint in the chancery suit was dismissed upon the plaintiff's own application. This only goes to show that the plaintiff refused to carry out the contract at that time and was really the party in default then. Nor did the plaintiff ever offer to return the deposit of \$600 which the defendant had paid to him on account.

The position of the defendant in this case is very strongly sustained by the case of *Winterbottom v. Ingham*, 7 Q. B. 6, 11, a case so closely on all fours with the present one as to be nearly identical. The facts are as follows: The defendant entered into a contract of sale and purchase of land with the plaintiff in 1835. He

paid a deposit and took possession of the land. The sale was never completed nor did the defendant pay the residue of the purchase price. The plaintiff sued for specific performance. Defendant admitted the contract, but alleged that plaintiff could not make good title. *The bill was dismissed in June, 1843.* Then the plaintiff sued for use and occupation from the time of default to 1843 when the bill was dismissed. Lord Denman, *C. J.*, says at the outset of his opinion:

“A question of considerable importance and likely to be of frequent occurrence is involved in this case; whether one who contracts for the purchase of landed property, but is prevented from completing the purchase by the vendor’s failing to make a good title, is liable to the latter in an action for use and occupation in respect of the time of his holding in the expectation that such good title would be made, and the purchase completed.”

The Court decided most strongly for the defendant and distinguished the cases of *Hull vs. Vaughan* and *Howard v. Shaw* upon which the present plaintiff relied in the Supreme Court. The defendant in the present case was exactly in the position of the party mentioned in Lord Denman’s question. He was holding the land, under the decision of the Equity Court, *in expectation that a good title would be offered* and he was entitled to so hold it as long as he had a right to that expectation. Consequently he cannot be held liable for use and occupation up to the time of the dismissal of the bill in the chancery suit.

It is therefore submitted that the judgment under review should be reversed.

PALMER BRADNER,
Attorney of Appellant.

FRANK E. BRADNER,
Of Counsel.

