

NEW JERSEY

Court of Errors and Appeals

EDWARD B. DOLTON, EXECUTOR OF
THE LAST WILL AND TESTAMENT
OF WILLIAM DOLTON, DECEASED,
Plaintiff Below,
Defendant in Certiorari,
vs.

MARIE M. SICKEL,
Defendant Below,
Prosecutor.

On Certiorari.
To Trenton
District Court.

Brief for Plaintiff Below.

STATEMENT OF FACTS.

Although the facts are set forth at length in this state of the case as settled by the Judge of the District Court, it may not be amiss to again state them briefly. The plaintiff below, Mr. Dolton, leased to the defendant below, Mrs. Sickel, an apartment in the City of Trenton, consisting of three rooms and a storage-room, under a written lease for the term of one year, to commence April 1st, 1897. Mrs. Sickel took possession and remained in possession until the latter part of June, 1898,

paying the rent to April 1st, 1898, and staying on after that date without any new agreement being made with Mr. Dolton. In the month of June, Mrs. Sickel informed Mr. Dolton of her intention to move, and was told by Mr. Dolton that he considered her a yearly tenant, and would hold her for rent of the premises to April 1st, 1899. Mrs. Sickel, however, moved out, sending the keys to Mr. Dolton by a friend. Mr. Dolton refused to receive them, but subsequently Mrs. Sickel left them with Mr. Dolton, who refused to accept them as a surrender of the premises. Mr. Dolton, on August 1st, rented one of the rooms, and later others, informing Mrs. Sickel by letter of his acts and requesting a settlement from her, to which Mrs. Sickel made no reply. Mr. Dolton deducted from the rental of the apartment for the year ending April 1st, 1899, the amount of rent received by him for these rooms during the year, and brought suit for the balance in the Trenton District Court, and recovered a judgment for the balance of \$125.00, interest and costs. In settling the case, the Judge of the District Court found (1) that the defendant, Mrs. Sickel, by holding over, became a yearly tenant and responsible for the year's rent, during a portion of which she occupied the premises; (2) that there was no surrender of the premises effected by leaving the keys with Mr. Dolton; (3) that the renting of a part of the premises did not constitute an eviction, and that the amount thus received should be credited upon the year's rent.

If the Judge of the District Court did not err in the application of the law, then the decision rendered by him should be affirmed.

POINT I.

The first reason assigned by the prosecutor for the reversal of the decision of the District Court is "that said District Court decided that a tenant for a term certain, holding over after the expiration of his term, with-

out the assent of his landlord, continues to be a tenant from year to year."

If this had been the decision of the District Court, it would have been an error in law, but reference to the state of the case will show that the District Court did not so decide. What the District Court did decide was (page 6, line 32) "that the holding over, under the circumstances in this case, was a continuation of the tenancy created by the lease, and that the tenant became a yearly tenant." The question, then, is, what were the circumstances of the case? In the state of the case (page 4, line 20 *et seq.*), the circumstances were given as follows: The prosecutor remained in the rooms until sometime in the latter part of June, 1898. During the month of June, she telephoned to the plaintiff below, asking if she could hold an auction in the rooms she occupied. The plaintiff below asked if the prosecutor was going out. She said she was, and the plaintiff below refused to allow her to hold an auction, and said: "Why didn't you say something about this before April 1st? I considered you a yearly tenant, and will hold you for a year's rent; that is, to April 1st, 1899." The prosecutor then vacated the rooms. It can be readily seen from these circumstances that the prosecutor had not remained in the rooms without the assent of the landlord, and that in this conversation just referred to she was told that her landlord considered her a yearly tenant, and would hold her for a year's rent.

The assent, then, of the plaintiff below, the landlord, having been given, it is insisted that in law the prosecutor became a yearly tenant, as the lease had been for a year. The prosecutor had no option as tenant in the matter. If the landlord desired to treat her as a tenant at sufferance by withholding his assent to the continuance of possession by the prosecutor, or as a trespasser, he had a right to do so; or, if he chose to treat her as a tenant for another year by giving his assent to the continuance of her possession, he had a right to do so. What he did do was to give his assent to the prose-

cutor's remaining in possession, electing to hold her for another year, and the Judge of the District Court did not err in holding that under these circumstances the prosecutor became a tenant from year to year.

The law in a case where a tenant holds over is well stated in *Taylor on Landlord and Tenant*, Section 22: "A tenant who holds over after the expiration of his term, without paying rent or otherwise acknowledging a continuance of the tenancy, becomes either a trespasser or a tenant, at the option of the landlord. Very slight acts on the part of the landlord, or a short lapse of time, are sufficient to conclude his election and make the occupant his tenant. But the tenant has no such election; his mere continuance in possession fixes him as a tenant for another year, if the landlord thinks proper to insist upon it."

There are numerous cases in New Jersey which hold that, on the expiration of the tenant's term, the tenant becomes a tenant at sufferance, if the landlord does not assent to the continuance of the tenant's possession. These cases are those of

Den v. Adams, 7 *Halsted* 99.

Moore v. Moore, 12 *Vroom* 515.

Condon v. Barr, 18 *Vroom* 113.

Poole v. Engelke, 32 *Vroom* 124.

In the case of *Den v. Adams*, Chief Justice Ewing said: "When the tenant whose term has expired by efflux of time, instead of quitting the premises, as he ought to do, remains in possession, holding over, as it is called, he is a wrong-doer, and may be treated as such by the owner, his landlord. By the consent of his landlord, his tenancy may be continued, and if such continuance by consent be without any fixed limit, he becomes a tenant from year to year, as it is called. This consent may be either express or implied, actual or constructive, by words or by some act recognizing or treating him as a tenant."

The positive declaration of the plaintiff to the prosecutor that he considered her and would hold her as a

yearly tenant, was an election on the part of the plaintiff, the landlord, to treat the prosecutor as a tenant, and not as a wrong-doer.

It is therefore insisted that there was no error in the Judge of the District Court holding that, under the circumstances of this case, the prosecutor was a yearly tenant.

POINT 2.

The second reason assigned by the prosecutor for the reversal of the judgment of the District Court was, "That the said District Court decided that the taking possession of a portion of the demised premises by the landlord, without the consent of the tenant, does not work an eviction." The third reason assigned for a reversal is that the District Court decided "That a landlord, without consent of his tenant, may take possession of a part of the demised premises, and re-rent the same to a stranger, for such sum as he may elect, and compel the tenant to pay for the remainder of the premises, the original rent agreed upon, less such sum as he has accepted from the stranger tenant." The third reason given is substantially the same as the second reason, and states more accurately than the second reason the decision of the District Court, so that the second and third reasons will be considered together.

The District Court found as facts (Case, page 8) that the prosecutor vacated the rooms in June, 1898, and left the keys on Mr. Dolton's desk, he refusing to accept them as a surrender of the premises; that in August, 1898, one room was rented by Mr. Dolton, and later, other rooms of the suite, and the rentals thus received were credited on the year's rent claimed by Mr. Dolton. The contention of the prosecutor is that this leasing of the rooms by Mr. Dolton, after they were abandoned or vacated by her, the renting being for her benefit, constituted an eviction, which freed her from the obligation to pay rent. The District Court held, as a matter of

law, that this renting of a part of the premises did not constitute an eviction, and did not relieve the prosecutor from the covenant to pay rent (Case, page 9).

It is not disputed that the law in this State is, that where a tenant is evicted by his landlord from a part of the premises, the rent for the whole premises during the continuance of such eviction will be suspended.

Hunter v. Reilly, 14 Vroom 480.

Morris v. Kettle, 28 Vroom 218.

But it is insisted that the act of the landlord, Mr. Dolton, in renting a portion of the rooms, after they were vacated by Mrs. Sickel, notifying her of what he had done, and applying the rent received to her credit, does not constitute an eviction.

An eviction is practically an expulsion from the premises. (See *Bouvier's Law Dict., Title, Eviction.*)

Mr. Dolton did no act which expelled or deprived Mrs. Sickel of the enjoyment of the premises. She voluntarily abandoned them. She was not forcibly expelled, nor did Mr. Dolton do anything which indirectly or constructively deprived her of the possession of the premises.

The act of the landlord, to constitute an eviction, must show a clear intention on the landlord's part that the tenant shall no longer continue to hold the premises.

Hunter v. Reilly, 14 Vroom, at page 482.

A landlord's acts, to constitute an eviction, must clearly indicate an intention on his part that the tenant shall no longer hold the demised premises.

See *Am. & Eng. Ency. Law, vol. 11 (2d Ed.), p. 461.*

It cannot be said that the renting of these rooms evinced an intention on Mr. Dolton's part to deprive Mrs. Sickel of the enjoyment of them, for she had already, in a most emphatic way, declared she no longer cared to occupy them.

There is a distinction recognized by the law between eviction and abandonment. The former relieves the tenant of the payment of rent; the latter does not.

By the common law, where the tenant abandons the premises during the term, without fault of the landlord, it is no relief from the payment of rent. The landlord may thereupon take possession, re-rent, and credit the first lessee with the proceeds. The abandonment must be voluntary on the part of the tenant, without sufficient cause and without the consent of the landlord.

Am. & Eng. Ency. Law (1st Ed.), vol. 12, p. 751.

This is the law as it is laid down in the decisions of the courts in other States.

In New Jersey, this question has never been before our courts so as to be reported in the decisions.

In the case of *Hunt v. Gardner*, 10 Vr. 530, Chief Justice Beasley held that a plea setting up that a lessee assigned his lease, and that the lessor accepted such assignee as his tenant, does not show a bar to an action of covenant for the rent on the lease against the original tenant, and that the infirmity of such a plea was that it did not show a surrender, which cannot be had without the assent, express or implied, of both the contracting parties. Further on in the opinion it says, "To warrant the inference that the original lease has been annulled, the facts ought to be of an entirely conclusive character."

In *Wallace v. Kennedy*, 18 Vroom 242, the case of *Hunt v. Gardner* is cited and made the basis of a similar decision. In the recent case of *Decker v. Hartshorne*, 31 Vr. 548, the same question was decided in the same way.

While all these cases differ from the present case in that the lessee assigned his term, while in the present case the lessor rented the premises after notifying the original tenant that he intended to do so, yet these cases do go so far as to hold that in order to relieve the original tenant of the obligation to pay rent, there must be a severance of the contractual relation, which can only be done by mutual consent, an element wholly wanting in the present case.

In Pennsylvania, in the case of *Auer v. Penn*, 99 Pa. St. 270, which is a case similar in all respects to the present case, it was held: "Where, in such case, the landlord puts a bill upon the vacated premises and rents the same to another tenant, having first notified the lessee of his intention so to do, said lessee is not relieved from liability, except for the amount of rent received by the landlord from the new tenant during the lessee's unexpired term."

Mr. Justice Paxson, in the opinion of the court, says: "There was neither a release nor an eviction here, but the surety claimed to be discharged, because, after the tenant, who was his principal, sent the keys to the landlord, the latter leased the property to another tenant. Yet there is no pretence that the landlord accepted a surrender; on the contrary, the proof is clear that he declined to do so, and notified the defendant below that he would hold him for the rent. This notice was repeated on more than one occasion when he was about to lease the property to another tenant. Yet it was urged by the defendant below that such subsequent leasing by the landlord, and the acceptance of rent from the tenant, raised a presumption of surrender. A surrender of demised premises by the tenant during the term, to be effectual, must be accepted by the lessor. The burden of proof is upon the tenant to show such acceptance. He sets it up to relieve himself from this covenant, and must prove it. When, therefore, the lessor retains the keys, and at the same time notifies the lessee that he will hold him for the rent, there is no room for the presumption of a surrender. Nor does the renting of the premises to another tenant, under such circumstances, raise such presumption, for the reason that it is manifestly to the lessee's interest that they should be occupied. The landlord may allow the property to stand idle, and hold the tenant for the entire rent, or he may lease it, and hold him for the difference, if any. It is said, in *Branckmann v. Twibill*, 8 Norris 58, that taking possession, repairing, advertising the house for rent, are all acts in

the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay rent. Much more is it to the interest of the tenant for the landlord to rent the premises; if at the same rent, the tenant is relieved; if at less, he is liable only for the difference. It is good sense, as well as good law."

In the case of *Marseilles v. Kerr*, 6 *Wharton* 500, it was held that a landlord might recover of a tenant who had left in the middle of the year and sent the keys to the landlord, who gave notice that he should continue to hold him liable for the rent, and then the landlord took possession and offered the premises for rent, and that the landlord might recover the amount of rent then accrued between the time of his leaving the house and the time that it was again rented. Rogers, Justice, says: "The landlord accepts the keys, takes possession, puts a bill on the house for rent, but at the same time apprises the tenant that he still holds him liable for the rent. This was for the benefit of the tenant, and was not intended, nor can it have that effect, to put an end to the contract and discharge him from rent. Although the tenant did not actually occupy the premises, he was at liberty to do so, and therefore liable for the action."

In *Mayer v. Smith*, 31 *Ark.* 627, it was held that "When a lessee abandons the leased premises, refuses to pay rent, and repudiates his tenancy, without any fault of the lessor, the latter may stand upon the contract of lease, and recover the whole rent; and in such case, he may take possession and re-rent the premises for the benefit of whom it may concern, and credit the proceeds upon the first lease."

In *Billamy v. Smith*, 4 *Houst. (Delaware)* 113, it was held that "If, after the tenant has left the demised premises, the landlord advertises them for sale or rent, and agrees to rent them to another, which agreement failed, and he takes possession and exercises acts of ownership over them before the expiration of the term for which they were leased to the tenant, it will not be evidence of an eviction of the tenant by him, nor even of a surrender

of the demised premises by the tenant to the landlord, with their mutual consent, either express or implied."

In the case of *Livermore v. Eddie*, 33 *Missouri* 547, it was held that "The quitting of the premises occupied by the tenant during the term, and sending the key to the landlord, who proceeds to repair and use the same, does not discharge the tenant from his liability to pay rent, unless the landlord consents to acquit the rent."

In the recent case of *Lipper v. Bowne*, 4 *Penn. Superior Ct. Reports* 432, it was held that "A surrender of the demised premises by the tenant, in order to be effectual so as to release him from liability for the rent, must be accepted by the lessor, and the burden of proof is on the lessee. The landlord is not bound, in relief of his tenant, who had abandoned the premises, to rent them to anyone who may apply, but may rent them, and hold the tenant for the difference, unless he has accepted a surrender."

In *Scheeky v. Kock*, 119 *N. Carolina* 80, it was held that "A tenant who vacates the premises before the end of his term, is not relieved from liability under the lease by the landlord's taking possession of the premises and renting the same to another person, where the lease has not been surrendered, with the understanding that it should be canceled."

The Court held, in the case of *Oastler v. Henderson*, 2 *Queen Bench* 573, decided June 6th, 1876, that where a tenant, who had leased a property for seven years, abandoned it after a short occupation of less than a year, and the keys were sent to the landlords, and the landlords occupied two rooms for the saddlery business, there was no such possession of the house, inconsistent with the defendant's term, so as to estop the landlords, who were the plaintiffs in the suit, from alleging the continuance of the term, so as to effect a surrender of the term by operation of the law.

In the case of *Redpath v. Roberts*, 3 *Espinasse N. P. Cases* 323, which was a case in assumpsit for use and occupation of apartments which the defendant had quit-

ted without giving notice, it was held that although the plaintiff had put up a bill to let the apartments, that this would not prevent his recovery. In the opinion in the case, given by Lord Kenyon, it was said that it was for the benefit of the defendant that the apartments should be let.

In no English or American case, where the landlord gave the tenant notice that he would hold him for the rent, has it ever been decided that, in the face of such a notice, a renting of the premises by the landlord, and the crediting of the amount received upon the amount due from the original tenant, where there has been an abandonment of the premises, has the original tenant been released.

POINT 3.

The fourth reason assigned by the prosecutor, for the reversal of the judgment of the District Court, is, "Because the said District Court holds and decides that a tenant holding over, after the expiration of his term, without the consent of his landlord, and without any agreement on the part of the tenant, does not become a tenant at sufferance, but may, at the election of the landlord, become a tenant from year to year."

This is substantially the same reason as the first reason assigned by the prosecutor for reversal, and was fully considered under Point 1 in this brief, so the subscriber thinks that it is not necessary to add to what has already been said upon this question under Point 1.

POINT 4.

The question presented to the District Court was a question of fact, viz.: Whether there was an eviction, or not. The Court held, as a fact, that there was no eviction. The testimony warranted such a finding, and it should not be disturbed. It has frequently been held

that the findings of fact of a District Court will not be reviewed.

Somers v. Wescott (N. J. Sup. Ct.), 49 Atlantic Rep. 462.

POINT 5.

The record in this case shows an agreed state of the case, made by the respective attorneys of the parties. It has been held that such an agreement is not a proper return, and therefore there is nothing before the court to consider.

Broosch v. Norton (N. J. Sup. Ct.), decided November Term, 1902.

For these reasons, the affirmance of the decisions of the District Court and the Supreme Court is asked.

Respectfully submitted,

FRANK S. KATZENBACH, JR.,
Attorney of Plaintiff Below.

NEW JERSEY

Court of Errors and Appeals.

EDWARD B. DOLTON, EXECUTOR, &C.,

Defendant in Error,

vs.

MARIE M. SICKEL,

Plaintiff in Error.

Contract.

On error.

BRIEF FOR PLAINTIFF IN E

We think the facts in this case, sufficient to give the Court a clear knowledge of the principles involved, may be stated as follows:

FACTS.

March, 1897, the executor leased to Mrs. Sickel, in writing, 10 three rooms in the building known as "Dolton's Block," for the term of one year from April 1, 1897, for the sum of \$13 per month, together with a storeroom.

The rent was paid in full to April 1, 1898.

Upon expiration of the lease, without any communication between the parties as to the further leasing, Mrs. Sickel held over and continued to occupy the premises until the last of June, 1898, when she informed Dolton that she would vacate the premises at once, and he replied to her that he considered her a yearly tenant, and would hold her for the year's rent. 20 Mrs. Sickel vacated the premises in accordance with her declaration.

Up to the time when Mrs. Sickel declared she would vacate the premises and Dolton informed her that he would hold her responsible for another year, nothing had been said by either party about the renting of the rooms for a new term.

Between April 1, 1898, and April 1, 1899, Dolton rented one of the rooms from August 1, 1898, to April 1, 1899.

Another of the three rooms was rented by Dolton from October 1, 1898, to April 1, 1899. The other two rooms were rented by Dolton from the 1st of March, 1899.

ARGUMENT.

From the facts thus stated the executor insists that he is entitled to recover from Mrs. Sickel the full year's rent, from April 1, 1898, to April 1, 1899, as a tenant from year to year, deducting the amount by him received for the rooms rented. This insistent is resisted by Mrs. Sickel on two grounds:—

First.—The holding over by Mrs. Sickel after the expiration of the lease did not constitute a tenancy from year to year, and she cannot be held legally liable for the payment of rent beyond the time she actually occupied.

Second.—The renting of the premises by Dolton during the year for which he seeks to hold Mrs. Sickel liable, is a complete bar to recovery.

20 Our first inquiry then is, does the holding over after the expiration of a term create a tenancy from year to year?

We think the courts of New Jersey clearly hold that the holding over by a tenant, after the expiration of his term, does not *per se* create a tenancy from year to year.

One of the earlier cases in point is that of *Decker v. Adams*, 7th Halst. 99.

In that case Decker leased to Adams, for the term of one year, for a rental of \$80. Adams continued in possession during the term and also two years and more beyond. Suit 30 was instituted to recover possession. As a defense Adams insisted that an undisturbed possession for more than two years from the end of the term till the commencement of suit changed the situation into that of a tenant from year to year, so as to require a notice to be given, which had not been done.

Chief Justice Ewing, speaking for the Supreme Court, says: "It is not controverted that if Decker had promptly commenced an action of ejectment on termination of lease he would have recovered."

“The question then is, whether silently permitting Adams to remain in possession, so changed the nature of his holding as to make him a tenant from year to year.” The Court continues (see p. 100): “As a general rule, where the term for a fixed period of time has expired, the tenancy is determined and a landlord may immediately commence an action of ejection to recover possession.”

When the tenant whose term has expired by efflux of time, instead of quitting the premises, as he ought to do, remains in possession, “holding over,” as it is called, he is a wrong-10 doer, and may be treated as such by the owner, the landlord. By consent of his landlord his tenancy may be continued, and if such continuance by consent be without a fixed limit, he becomes a tenant from year to year, as it is called. This consent may be either express or implied, actual or constructive, by words or by some act, recognizing or treating him as a tenant. But without a new contract or some act on the part of the landlord from which a renewal of the contract may be implied, the person in possession continues a wrong-doer, is liable to be treated as such, and must at-20 tribute to his original wrong and subsequent folly any inconvenience which may ensue. The mere unbroken silence and inaction of the owner will not improve or enlarge the character of the tenant’s possession. In support of his conclusions Chief Justice Ewing cites many cases, both English and American. Among such citations are:—

Doe v. Watts, 7 D. & E. 83.

Right v. Bowden, 3 East. 278.

Jackson v. Anderson, 12 John 188.

The law, as laid down in the case of *Decker v. Adams*, as 30 to the effect on the tenancy by holding over, has been repeatedly recognized by the Supreme Court of New Jersey.

Among the cases so holding is the case of *Moore v. Moore*, 12 Vr. 515. That case, too, was a contest as to whether the holding over after the expiration of the lease did not create a tenancy from year to year. In that case the Court held that the mere fact of holding over could not create a tenancy from year to year; that the admission of such a result would sweep away the doctrine of tenancy by sufferance, which tenancy is terminable without notice.

By such holding over, the tenant has only a naked possession; the tenant holds, by the laches of the landlord, and is not in privity with the landlord, and the latter can determine the tenancy whenever he pleases, without notice. It requires an assent on the part of the landlord to the subsequent occupation of the tenant to raise a relation between him and the tenant, which confers upon the latter the right of compelling notification from the landlord.

The consent may be either express or implied, actual or
10 constructive, *by words or some act treating him as a tenant.* *The mere unbroken silence and inaction of the owner will not improve or enlarge the character of the tenant's possession.*

The case of *Moore v. Smith*, 27 Vr. 446, lays down the same principles. On page 448 Justice Reed, who delivered the opinion of the Court, says: "The mere unbroken silence or inaction of the owner will not improve or enlarge the character of a hold-over tenant's possession. He continues a tenant at sufferance from the moment when his term expires."

20 Citing *Moore v. Moore*, and *Decker v. Adams*, *supra*.

One of the later cases in the Supreme Court of New Jersey is that of *Poole v. Engleke*, in 32 Vr. 124. This case was argued at the June Term, 1897, before Justices Dixon, Ludlow and Collins.

In this case the facts were that there was a lease for the month of May, 1896, with an agreement between the parties that the tenant should vacate on the first day of June, 1896. On the thirtieth day of May a fire occurred in the store, rendering it partially unfit for carrying on the business. Her
30 stock was badly damaged and she was compelled to suspend. She held over on the premises until the fifteenth day of June, 1896, without making any new express agreement in reference to the hiring or renting of the premises. The tenant remained in the store until June 15, 1896, without paying any rent beyond May. The monthly rent was \$60. For this sum the landlord brought action in the District Court and recovered a judgment therefor. On appeal to the Common Pleas judgment was rendered against the landlord and in favor of the tenant.

Justice Dixon, in rendering the opinion of the Court, said: "Upon the facts stated in the certificate of the Court of Common Pleas it is evident that on the expiration of the tenant's May term she became a tenant at sufferance, and, as the landlord did not assent to the continuance of her possession while it lasted, she remained a tenant at sufferance until she left the premises on June 15. Citing *Jackson v. Parkhurst*, 5 Johns. 128; *Den v. Adams*, and *Moore v. Moore*, *supra*; also *Condon v. Barr*, 18 Vr. 113.

The Court also held in this case that by the common law, 10 while a tenant by sufferance was bound to account for the profits of the land, he was not liable to an action for rent.

Citing *Flood v. Flood*, 1 Allen 217, and *Condon v. Barr*, *supra*.

Our contention is that these New Jersey cases show clearly and conclusively that from the moment of the expiration of her lease, April 1, 1898, Mrs. Sickel was a tenant at will or at sufferance, and that by no proper legal construction could her tenancy be construed to be a tenancy from year to year. 20

Woodfall's *Landlord and Tenant*, 13th edition, side paging 542, says: "A tenant holding over after tenancy has expired is liable for subsequent use and occupation, provided the landlord has acted so as to raise a presumption of continued tenancy and not an intention to treat the tenant as a mere trespasser; but if a party takes premises for a certain time and holds over, he does not thereby become a tenant from year to year, unless something occurs to show the existence of such new contract." On page 222 the author says: "When a tenant holds over after expiration of lease he becomes a tenant on sufferance." Citing *Decker v. Adams*, *supra* and *Condon v. Barr*, 47 N. J. L. (18 Vr.) 113.

This last case, in which the opinion was rendered by Justice Knapp, strongly supports the position taken by the tenant in this case. On page 115 Justice Knapp says: "But it is the consent of the parties, express or implied, to create a new tenancy, which is to be sought after in the circumstances which are appealed to, to convert the wrong-doer into a lawful holder. * * * * *

“At common law, one in by sufferance through the laches of the landlord, is not liable for rent. The demand was for rent at the rate agreed for the month of leasing. It certainly could not, without the consent of him who was in possession, bind him to a continuance of the term of the original lease, &c.”

In Woodfall's Landlord and Tenant, above quoted, is given the effect of holding over in the different States.

Upon the question as to whether the holding over creates a
10 tenancy from year to year or at sufferance, the Court is referred to the case of Edwards et als., Hale et als., 9 Allen (Mass.), page 462.

Second.—The renting of the premises during the year for which he seeks to hold Mrs. Sickel liable is a complete bar to recovery.

The argument would seem to be conclusive, that if the appellant was a tenant after the expiration of the original lease, then she was constructively in possession of the premises, and the taking possession of the premises or any part
20 or portion thereof, and renting the same by the landlord, would constitute an eviction.

The case of Morris v. Kattle, 28 Vr. 218, being the opinion of the Supreme Court of New Jersey, rendered by Justice Depue, is explicit upon this point. A partial syllabus of this case is as follows: “Eviction of a tenant by his landlord from part of the premises demised will effect a suspension of the whole rent during the continuance of the eviction. During that period the landlord cannot sue or distrain for the rent reserved, or any part of it; nor can he recover for use
30 and occupation, although the tenant has remained in possession of the residue of the premises demised.”

The opinion in this case is thoroughly considered by the Justice rendering the decision, and his citations are full.

We therefore submit that the holding over on the part of the appellant created a tenancy at sufferance, and not from year to year.

And, further, that whatever may have been the tenancy, the taking possession of and leasing the premises by the landlord, without the consent of the appellant, precludes the pos-

sibility of recovery of rent after the earliest renting of such premises by the landlord.

The judgment should be set aside and a new trial directed.

Respectfully submitted,

HOLT & VAN DIKE,

Attorneys for Plaintiff in Error.

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NEW JERSEY
Court of Errors and Appeals.

EDWARD B. DOLTON, EXECUTOR, &C.,
Defendant in Error,
vs.
MARIE M. SICKEL,
Plaintiff in Error. } Contract.

WRIT OF ERROR.

(Filed October 29, 1901.)

STATE OF NEW JERSEY, ss.—The State of New Jersey, 10
to our Justices of our Supreme Court, Greeting :
Because in the record and proceedings, and also
[L. s.] in the giving of the judgment in a plaintiff, which
was in our said Supreme Court, before you, be-
tween Edward B. Dolton, executor of the last will
and testament of William Dolton, deceased, plaintiff, and
Marie M. Sickel, defendant, on a certiorari issued out of our
said Supreme Court to the Judge of the District Court of the
city of Trenton directed, as is said manifest error has inter-
vened to the great damage of the said Marie M. Sickel, 20
prosecutor as aforesaid, as by her complaint we are in-
formed, we being willing that the error, if any there be,
should in due manner be corrected, and full and speedy
justice be done to the parties aforesaid in this behalf, do
command you that if judgment be thereupon given, then
you send distinctly and openly under your seal the record
and proceedings and plaint aforesaid, with all things touch-
ing and concerning the same to our Court of Errors and
Appeals, before the judges thereof, on the ninth day of
September, next, and this writ, and that the records and 40

proceedings aforesaid being inspected, we may cause to be further done thereupon what of right and according to law ought to be done.

Witness, William J. Magie, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, this twentieth day of August, nineteen hundred and one.

GEORGE WURTS,

Clerk.

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

DAVID A. DEPUE,

C. J.

New Jersey Supreme Court.

EDWARD B. DOLTON, EX'R, ETC.,
 Defendant,
 vs.
MARIE M. SICKEL,
 Prosecutor.

} On Certiorari.

CERTIORARI.

(Filed September 6th, 1900.)

NEW JERSEY, ss.—The State of New Jersey to the
 Judge of the District Court of the city of **10**
[L. s.] Trenton, Greeting:

We, being willing for certain reasons, to be certified of a certain judgment, order or proceedings given or made in our said District Court, in a certain action brought by Edward B. Dolton, executor, etc., plaintiff, against Marie M. Sickel, defendant, in an action upon contract, do hereby command you, that you send under your seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the sixth of September next, the judgment, order and proceedings aforesaid, with all things touching **20** and concerning the same, as fully and entirely as they remain in our court, before you, by whatsoever names the parties may be called therein, together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

Witness, David A. Depue, Esquire, Chief Justice of our Supreme Court, at Trenton, this seventeenth day of August, A. D. nineteen hundred.

WM. RIKER, JR.

Clerk of the Supreme Court. **30**

HOLT & VAN DIKE.

Attorneys.

Allocatur.

WM. S. GUMMERE, *J. S. C.*

NEW JERSEY SUPREME COURT.

EDWARD B. DOLTON, EXECUTOR OF THE LAST WILL AND TESTAMENT OF WILLIAM DOLTON, DECEASED, <i>Defendant in Certiorari,</i> <i>vs.</i> MARIE M. SICKEL, <i>Plaintiff in Certiorari.</i>	}	On Contract.
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In obedience to an order of the Supreme Court, made 10 in the above-stated cause on the seventeenth day of August, A. D. nineteen hundred, directing me to send to the Supreme Court, under my seal, the judgment lately made and rendered in the District Court of the city of Trenton, in an action upon contract wherein Edward B. Dolton, executor of the last will and testament of William Dolton, deceased, was plaintiff, and Marie M. Sickel was defendant, together with all orders and proceedings touching and concerning the said judgment, as fully and entirely as they remain in said court before me, by whatsoever 20 names the parties may be called therein, together with the said writ; now, therefore, I, George W. Macpherson, Judge of the District Court of the city of Trenton, do hereby certify the following to be the judgment and the evidence upon which the same was founded.

GEO. W. MACPHERSON,

Judge of the District Court of the City of Trenton.

Dated Trenton, New Jersey, September 6th, 1900.

DISTRICT COURT OF THE CITY OF TRENTON.

EDWARD B. DOLTON, EXECUTOR OF 30 THE LAST WILL AND TESTAMENT OF WILLIAM DOLTON, DECEASED, <i>vs.</i> MARIE M. SICKEL.	}	On Contract. State of Case as Settled.
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In the month of March, eighteen hundred and ninety-

seven, Mrs Marie M. Sickel, the defendant, leased of the plaintiff, Edward B. Dolton, executor, etc., certain rooms in an apartment house in the city of Trenton, New Jersey, known as Dolton's Block. The lease was a written one, executed in two parts, one of which was held by the tenant and one by the landlord. The lease is in the words following: "This is to certify, that I have hired and taken from the est. Wm. Dolton the suite of three rooms now occupied by Geo. N. Packer, and known as Nos. 19, 20, 21, with storage room in Dolton's Block, Trenton, New 10 Jersey. It is hereby understood and agreed that should the tenant wish to vacate the said rooms before the termination of the lease she has that privilege, provided she rents said rooms or they are subletted to parties acceptable to the landlord, for the term of one year, to commence the first day of April, eighteen hundred and ninety-seven, at the monthly rent of thirteen dollars, payable \$13.00 each month.

And I do hereby promise to make punctual payment of the rent, in manner aforesaid, and quit and surrender the 20 premises at the expiration of the said term, in as good state and condition as reasonable use and wear thereof will permit—damage by the elements excepted; and engage not to let or under-let the whole or any part of the said premises, and to use and occupy the same as a dwelling and for no other business or purpose whatsoever, without the written consent of the said Edward B. Dolton, exc. under the penalty of forfeiture and damages.

Given under my hand and seal the sixth day of April, eighteen hundred and ninety-seven. 30

Witness,

MARIE M. SICKEL."

This is to certify that I have this tenth day of March, eighteen hundred and ninety-seven, let and rented unto Mrs. Marie M. Sickel, the suite of three rooms now occupied by Geo. N. Packer, and known as Nos. 19, 20, 21, and storage room in Dolton's Block, Trenton, N. J. It is hereby understood and agreed that should the tenant wish to vacate said rooms before the termination of the

lease, she has that privilege, provided she rents said rooms or they are sub-letted to parties acceptable to the landlord, with the appurtenances and the sole and uninterrupted use and occupation thereof for the term of one year to commence the first day of April, 1897, at the monthly rent of thirteen dollars, payable \$13.00 each month.

Witness,

EDWARD B. DOLTON, *Exc.*

Mrs. Sickel, the defendant, began to occupy the rooms mentioned in the lease about April the first, eighteen hundred and ninety-seven. Receipts for the rent paid were given by the plaintiff and entered by him in a book kept by the defendant, which book was offered in evidence. The last written page of this book is as follows. "Received of Marie Sickel, March 7, 1898, thirteen dollars in full for rent to February 1st.

\$13.00—100.

EDWARD B. DOLTON, *Exc.*

Received of Mary Sickel twenty-six dollars in full for two months rent, to April 1st, 1898.

\$26.

EDWARD B. DOLTON, *Exc.*

20 At the time of the last payment nothing was said about a continuation of the lease or further renting of the rooms. Mrs. Sickel, the defendant, remained in the rooms until sometime in the latter part of the month of June, eighteen hundred and ninety-eight. During the month of June, 1898, Mrs. Sickel, the defendant, telephoned to Mr. Dolton, the plaintiff, asking if she might hold an auction of her furniture in the rooms which she occupied. Mr. Dolton asked Mrs. Sickel if she was going out. She said "Yes." Mr. Dolton refused to allow her to hold the auction in the rooms, and during the course of the conversation over the telephone, Mr. Dolton said to Mrs. Sickel: 30 "Why didn't you say something about this before April 1st. I consider you a yearly tenant, and will hold you for a year's rent; that is, to April first, eighteen hundred and ninety-nine." Up to this time nothing had been said by either party about the renting of the rooms for a new term subsequent to April first, eighteen hundred and ninety-eight. Mrs. Sickel then immediately vacated the

rooms. No rent was paid for occupancy after April 1st, 1898. Mr. Dolton wrote to Mrs. Sickel the following letters:

TRENTON, New Jersey, June 24th, 1898.

Mrs. M. Sickel,

The Janitor informs me you have moved out all your furniture from the rooms you rented to April 1st, 1899. Please advise me whether you desire me to rent them for you if I can.

Yours res'pect.

10

E. B. DOLTON.

TRENTON, N. J., June 28th, 1898.

Mrs. M. M. Sickel,

Yours of the 28th to hand and contents noted. Mr. Phillips merely stated that you were moving some of your furniture. I wrote you sometime ago requesting to know whether I should try and rent the rooms for you, but have had no reply. You are aware that I rent the rooms by the year, and your lease does not terminate until April 1st, 1899, consequently, you are responsible for the rent 20 to that date.

Yours res'pect.

E. B. DOLTON.

TRENTON, N. J., Nov. 1st, 1898.

Mrs. M. Sickel,

I succeeded in renting your back room to Mrs. Schick for \$2.50 per month, the first of June, but have been unable to rent the two front rooms up to the present time. As the prospects now look good for renting the other two rooms, I enclose you bill for rent to Nov. 1st, making a 30 deduction of \$12.50 for the time the other room has been rented, and if you will remit me \$78.50 as per bill enclosed, I will cancel the lease and assume control.

Yours res'pect.

E. B. DOLTON.

The bill enclosed was as follows:

TRENTON, Nov. 1, 1898.

Mrs. M. Sickel,

To Wm. Dolton, Dr.

To rent from April 1st, to Nov. 1st, 7 mos. at

\$13.50 per month \$91.00

Cr.

Back room June 1st to Nov. 1, at \$2.50—5 mos. 12.50

\$78.50

Received payment,

10 Mr. Dolton testified that in the last letter and bill there was a mistake made as to the credit, as the room rented to Mrs. Schick was not one of those vacated by Mrs. Sickel.

Mrs. Sickel then placed the matter in the hands of her attorney, W. D. Holt, Esquire. Mr. Dolton wrote the following letter to Mr. Holt:

TRENTON, N. J., Dec. 8, 1898.

Capt. W. D. Holt,

Dear Sir:—

I herewith enclose you bill of Mrs. Sickel. In looking
20 over my accounts I find that she paid her last rent on April 5th, for the month of March, and that she vacated the rooms sometime during the month of June. She took out a lease the 1st of April, 1897, and as she did not vacate April 1, 1898, but stayed a couple of months over that time I considered her a permanent tenant to April 1st, 1899. As there were good prospects of renting the rooms the latter part of October, I wrote her that if she would send me check to Nov. 1st, less the amt. for the time two of the rooms were rented, I would send her a clean receipt.

Yours truly,

30

E. B. DOLTON.

The bill enclosed in the last letter was the same as the bill sent to Mrs. Sickel in the letter of Nov. 1st, 1898. The next letter was one written to Mrs. Sickel by Mr. Dolton. It is as follows:

TRENTON, N. J., Jan. 2, 1899.

Mrs. M. Sickel,

Dear Madam:—

I was very much surprised that you should place the acct. in the hands of W. D. Holt for settlement. As he has not shown any disposition to settle the same, I shall let the matter rest until April 1st, the expiration of the lease, then will take the usual course, and proceed to collect the rent for the year. I have not succeeded in renting your rooms, but made the proposition to you, thinking that you would 10 avail yourself of the privilege.

Rsp'ct.

E. B. DOLTON.

TRENTON, N. J., March 24th, 1899.

Mrs. M. Sickel,

I herewith enclose you bill for rent of rooms leased by you in Dolton's Block. I have endeavored to have this matter amicably adjusted, but as there seems to be no disposition on your part, I shall place the same in the hands of my attorney for collection on April 1st. 20

Rspct.

E. B. DOLTON.

The following is a copy of the bill enclosed with the last letter:

TRENTON, N. J., March 24, 1899.

Mrs. Marie M. Sickel:

To Wm. Dolton, Dr.

To rent for one year from April 1st, 1898, to

April 1st, 1899	\$156.00
Less room rents	12.50 30

 \$143.50

Received payment,

The same mistake as to the credit for the renting of the room as made in the bill rendered November first, eighteen hundred and ninety-eight, was made in the foregoing bill

sent in the letter of March twenty-fourth, eighteen hundred and ninety-nine.

When Mrs. Sickel vacated the rooms in the month of June, eighteen hundred and ninety-eight, she sent the keys to Mr. Dolton by a friend, a Mrs. Walker. Mr. Dolton refused to accept them, and Mrs. Walker returned them to Mrs. Sickel. Subsequently Mrs. Sickel left the keys on Mr. Dolton's desk in his office in the presence of Mr. Dolton. Mr. Dolton refused to accept the keys as a surrender
10 of the premises.

Between April first, eighteen hundred and ninety-eight, and April first, eighteen hundred and ninety-nine, Mr. Dolton rented a room known as the store room from August first, eighteen hundred and ninety-eight, to April first, eighteen hundred and ninety-nine, at one dollar a month, making the sum of eight dollars received for this room. Room No. 20 was rented from October first, eighteen hundred and ninety-eight, to April first, eighteen hundred and ninety-nine, at two dollars and a half per month, making
20 fifteen dollars, and the rooms Nos. 19 and 21 from March first, eighteen hundred and ninety-nine, to April first, eighteen hundred and ninety-nine, for the sum of eight dollars. The rentals received from the rooms vacated by Mrs. Sickel amounted to April first, eighteen hundred and ninety-nine, to thirty-one dollars. The court finds as facts in the case, that the defendant was a yearly tenant of the plaintiff's; that she held over without any new agreement; that the plaintiff refused to accept a surrender of the premises; that the tenant removed her belongings from the
30 premises, left the keys with the plaintiff, and that he subsequently rented portions of the premises to other parties. The court holds, as matter of law, that the holding over, under the circumstances in this case, was a continuation of the tenancy created by the lease, and that the tenant became a yearly tenant and responsible to the landlord for the rent of the premises for the year, during a portion of which she had occupied the premises; that there was no surrender of the premises effected by the leaving of the keys with the plaintiff, and that the renting of a part of

the premises by the landlord did not constitute eviction; that the tenant should be credited upon the year's rent for the amount received by the landlord for the parts rented, and that judgment should be given in his favor for the remainder. The aforesaid sum of thirty-one dollars, deducted from the sum of one hundred and fifty-six dollars being the amount of rent from April first, eighteen hundred and ninety-eight, to April first, eighteen hundred and ninety-nine, left the sum of one hundred and twenty-five dollars. Suit was brought in the District Court of the city of Trenton for this sum with interest from April first, A. D. eighteen hundred and ninety-nine, and on the twenty-seventh day of July, judgment was rendered for the sum of one hundred and twenty-six dollars and fifty cents, and costs of suit amounting to ten dollars and four cents, making the total amount of the judgment one hundred and thirty-six dollars and fifty-four cents.

The receipt book, the letters and the bill statements of Mr. Dolton, were offered in evidence, also the lease, made in two parts..

20

We, the undersigned, attorneys for the plaintiff and defendant, respectively, in the above-stated case, do hereby agree that the above is the state of the case as settled by the Judge of the District Court trying the same.

FRANK S. KATZENBACH, Jr.,
Attorney for Edward B. Dolton, Exr.
 HOLT & VAN DIKE,
Attorneys for Marie M. Sickel.

NEW JERSEY SUPREME COURT.

EDWARD B. DOLTON, EXR., ETC.,	}	On Certiorari to the District Court of the City of Tren- ton.	30
<i>Defendant.</i>			
<i>vs.</i>	}		
MARIE M. SICKEL,			
<i>Prosecutor.</i>			

The said Marie M. Sickel, by Holt & Van Dike, her attorneys, comes and prays that the judgment of the District

Court of the city of Trenton, in an action upon contract, wherein the said Edward B. Dolton, executor, etc., was plaintiff, and the said Marie M. Sickel was defendant, may be reversed and set aside, for the following reasons, to wit:

1. Because the said District Court decided that a tenant for a term certain, holding over after the expiration of his term, without the assent of his landlord, continues to be a tenant from year to year.
- 10 2. Because the said District Court decided that the taking possession of a portion of the demised premises by the landlord, without the consent of the tenant, does not work an eviction.
3. Because the said District Court decided that a landlord, without the consent of his tenant, may take possession of a part of the demised premises and re-rent the same to a stranger, for such sum as he may elect and compel the tenant to pay for the remainder of the premises, the original rent agreed upon, less such sum as he has accepted from the
20 stranger tenant.
4. Because the said District Court holds and decides that a tenant holding over, after the expiration of his term, without the consent of his landlord and without any agreement on the part of the tenant, does not become a tenant at sufferance, but may, at the election of the landlord, become a tenant from year to year.
5. Because the said judgment is, in divers other respects unlawful, erroneous and contrary to law.

HOLT & VAN DIKE.

Attorneys of Plaintiff.

NEW JERSEY SUPREME COURT.

EDWARD B. DOLTON,

vs.

MARIE M. SICKEL,

Prosecutor.

OPINION.

[Filed June 10, 1901.]

1. The re-letting by a landlord of a part of leased premises to a third person is an eviction that during its continuance suspends the whole rent. 10

2. Where the tenant has abandoned the whole premises a re-renting by the landlord of all or a part for the benefit of the tenant and with his acquiescence imposes upon the landlord no penalty other than crediting the tenant with the sum earned by such re-rental.

3. The case of *Yetter vs. King Confectionery Co., Vroom, p.* — applied to this case.

Certiorari to District Court.

Argued at the February Term, 1901, before Justices Van-Syckel, Garrison and Garretson. 20

For the plaintiff, F. S. Katzenbach, Jr.

For the prosecutor, Holt & Van Dike.

The opinion of the court was delivered by GARRISON, J.

This was an action for rent brought in the District Court. The question of tenancy that is in this case is in its legal aspects identical with that passed upon in *Yetter vs. The King Confectionery Co.*, argued at the same term and decided in an opinion now filed.

The present case presents, however, a further question. The District Court found as facts, "that the plaintiff refused 30 to accept a surrender of the premises; that the prosecutor removed her belongings from the premises, left the keys with the plaintiff, and that he subsequently rented portions of the premises to other parties." Also that "there was no surrender of the premises effected by the leaving of the keys with the plaintiff, and that the renting of a part of the premises by the landlord did not constitute eviction;

and that the tenant should be credited upon the year's rent for the amount received by the landlord for the parts rented and a judgment should be given in the landlord's favor for the remainder."

We have looked at the testimony returned in response to a rule made in the cause, and find that it affords a rational support for the above findings provided the re-letting of a part of the demised premises be not *ipso facto* an eviction that during its continuance would suspend the entire rent.

10 The essence of an eviction is that it disturbs the possession of the tenant. *Meeker vs. Spalsbury, 48 At. Rep. 1026.*

The penalty for such a disturbance, if it be ascribable to the landlord, is that while it lasts he can collect no rent from the original tenant. The re-letting of a part of the demised premises by the landlord to a third person is in a legal sense an eviction.

Morris vs. Kettle, 28 Vroom, 218.

Where, however, the tenant has vacated and abandoned the premises, an eviction by such a re-letting is constructive

20 merely and should, within the reason of the rule, impose upon the landlord no penalty other than that of crediting the tenant with the sum so earned by the property during the term.

In a case that presents such circumstances the question of eviction *vel non* is a question of fact.

Such was the complexion of the present case upon the proofs before the District Court. There is in the testimony return with this writ, valid ground for the inference that the tenant had knowledge of the effort of the landlord to

30 rent for her the rooms she had abandoned and that she acquiesced in it, knowing that he proposed to hold her to her tenancy.

Under these circumstances the finding of the trial court that there was no eviction will not be disturbed.

The judgment rendered was in accordance with the fact so found, and the fact is justifiable by the proofs.

The judgment of the District Court is affirmed with costs.

But because our said Supreme Court now here are not yet advised what judgment to give in and upon the premises, a day is therefore given to the parties aforesaid, to wit: until the eighteenth day of June, A. D. nineteen hundred and one, to hear the judgment of the said court thereupon, at which day before the said court at Trenton, come the parties aforesaid, by their attorneys aforesaid, whereupon all and singular the premises being seen and by the court now here fully understood and as well the record and proceedings aforesaid, and the judgment given in form aforesaid, being diligently examined and inspected and mature deliberation being thereupon had, it appears to our said court now here that the judgment aforesaid be in all things affirmed.

Therefore it is considered that the judgment aforesaid in form aforesaid given, be in all things affirmed and stand in full force and effect, the reasons above for setting aside said judgment in any wise notwithstanding.

And it is further considered that the said Edward B. Dolton, Executor of William Dolton, deceased, do recover 20 against the said Marie M. Sickel, as well his damages aforesaid amounting to the sum of one hundred and twenty-six dollars and fifty cents, besides ten dollars and four cents, costs aforesaid, and also the sum of sixteen dollars and seventeen cents, for his costs and charges which he has sustained and expended by reason of the delay of execution of the judgment aforesaid, on pretence of prosecuting the said writ of certiorari by our said Supreme Court now here adjudged to the said Edward B. Dolton, Executor as aforesaid, and with his assent, according to the form of the 30 statute in such case made and provided, which said damages, costs and charges in the whole amount to ONE HUNDRED AND FIFTY-TWO DOLLARS AND SEVENTY-ONE CENTS.

And that the said Edward B. Dolton, Executor as aforesaid, have execution thereof.

Judgment signed this eighteenth day of June, A. D. nineteen hundred and one.

DAVID A. DEPUE,
C. J.

I, WILLIAM RIKER, JR., Clerk of the Supreme Court of the 40 State of New Jersey, do certify that the foregoing is a true

copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said court at Trenton, this twenty-
[L. s.] sixth day of October, A. D. nineteen hundred and one.

WILLIAM RIKER, JR.,
Clerk.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10 Between

EDWARD B. DOLTON, EXECUTOR, &C.,
Plaintiff below, Defendant in Error,
and

MARIE M. SICKEL,
Defendant below, Plaintiff in Error.

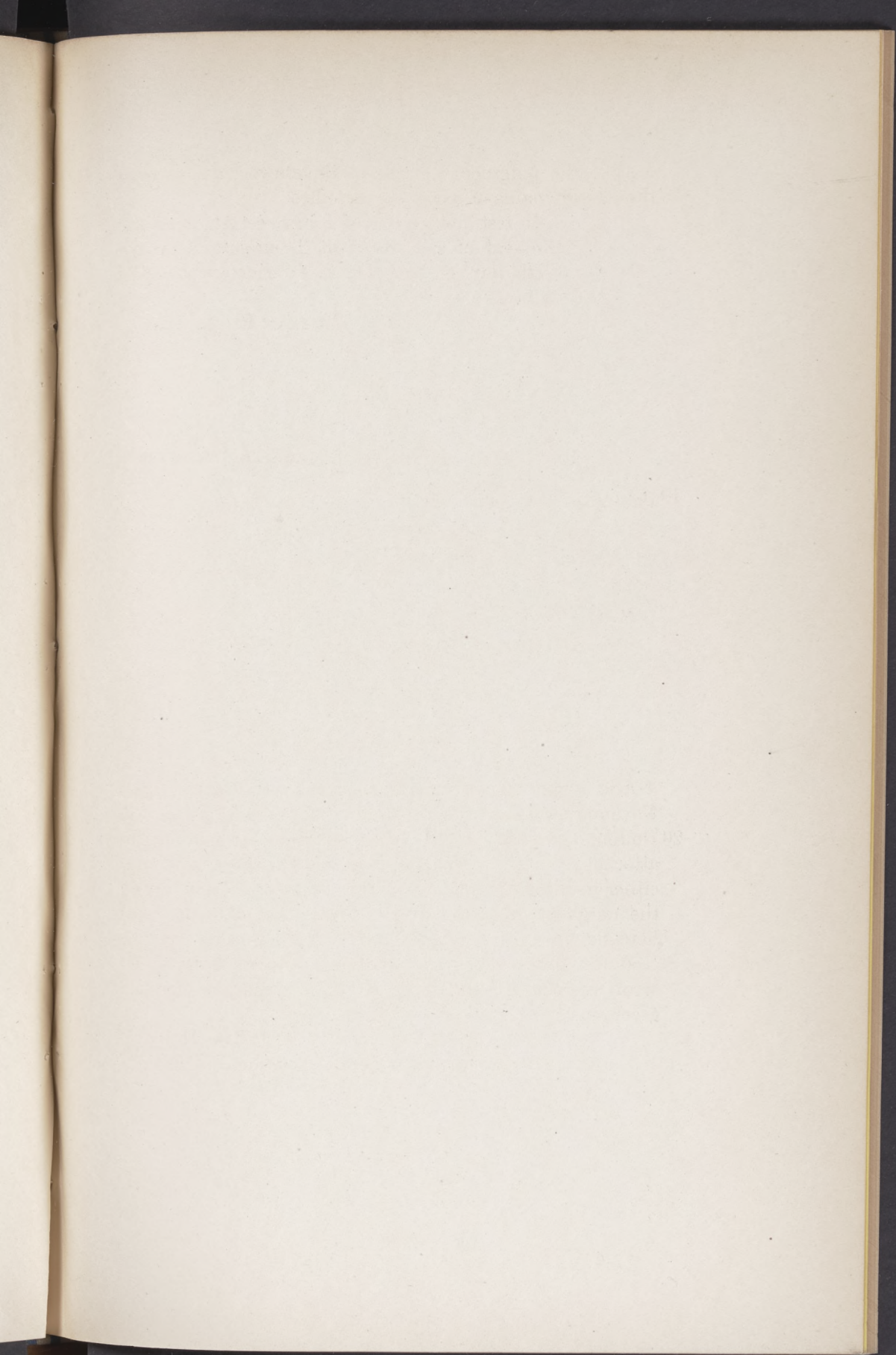
} In Error.

JOINDER IN ERROR.

[Filed February 19, 1902.]

And hereupon, afterwards, to wit, on the sixth day of November, nineteen hundred and one, the said Edward B. Dolton, Executor, &c., by Frank S. Katzenbach, Jr., his attorney, comes into court and says—that there is no error either in the record or proceedings aforesaid, or in giving the judgment aforesaid, and he prays here that the court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid in manner aforesaid given, may in all things be affirmed, &c.

FRANK S. KATZENBACH,
Attorney for and of Counsel Defendant in Error.





ERRORS IN APPLS

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AND WHICH ARE THE MOST
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