

# COURT OF ERRORS AND APPEALS.

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MARY M. DRISCHMAN,

Def't. in Error,

vs.

SARAH McMANEMIN,

Plff. in Error.

BRIEF.

G. A. BOURGEOIS,

Atty. Def't. in Error.

At the trial before the Jury there was testimony offered and admitted to prove that during the month of April, 1900, Mary M. Drischman called at the office of Down and Shedaker, real estate agents in Atlantic City, with a view of renting premises known as No. 25 S. Virginia Avenue, p. 12. The initial conversation was had between Mrs. Drischman and Everett M. Down, one of the members of the above firm. P. 12-20.

At this interview Mr. Down stated to Mrs. Drischman that the rent for the season was \$1,200, but for the sum of \$300 additional, making in all \$1,500, p. 19, the premises could be rented for one year, payable \$500 cash, \$500 July first, and \$500 August first; that the house was well heated and a good winter house, p. 20; that cooking utensils, dishes, &c, necessary to equip the premises would be furnished on or before the second day of April, the date at which the possession was to be given, p. 22. The house was rented because it was a winter house and well heated, p. 21.

Immediately thereafter Mrs. Drischman went to the premises with Mr. Shedaker, the other member of the firm of Down & Shedaker, and with him went through the prem-

ises, was satisfied with the house, and was informed by Mr. Shedaker that if she desired to secure it, it would be necessary for her to pay \$50.00 on account of the rent.

They then crossed the street to Mrs. Drischman's (then) residence, No. 24 S. Virginia Avenue, where Mrs. Drischman paid to Mr. Shedaker the sum of \$50.00, and afterwards, to wit, on the 20th day of March, 1900, she paid the remaining portion of the first payment of \$500.00, as appears by the receipt, p. 34.

The premises were leased from the 2d day of April, 1900, to the 2d day of April, 1901; Easter Sunday of the year 1900 fell on the 15th day of April; possession of said premises was to have been given on the said second day of April, 1900. Because of the premises not being in tenantable condition, owing to portions thereof being newly painted and other parts being repaired, possession was not in fact given until the 3d day of May and after the Easter season had passed.

Sometime during the month of March, after the payment of the first installment of \$500, Mrs. Drischman had a conversation with Mrs. McManemin; and before the July payment of \$500 become due, to wit, on the 7th day of April, 1900, Mrs. Drischman paid to Mrs. McManemin the sum of \$400. This \$400 was paid in advance of the date upon which it would have become due in consideration that Mrs. McManemin would immediately furnish the required dishes, cooking utensils, steam-table and sun parlor, chairs and spring, &c., for the premises, p. 16.

The possession of the premises was not delivered to Mrs. Drischman until the 3d day of May, 1900; and because of plaintiff's inability to have the possession of said premises for Easter week she was obliged to turn away 28 boarders who had previously engaged board with her for the Easter week, at prices varying from ten to twelve dollars per week; that thereby she sustained a loss of profits to the extent of \$260. P. 25.

That the dishes and chairs which were agreed to be fur-

nished were not in fact furnished, and Mrs. Drischman was obliged to expend her own money to purchase these articles in order that she might be able to use the leased premises; the money by her expended amounted to \$60.00. P. 28-29.

Said premises were rented for the entire year and that the additional sum of \$300 was paid for the rent thereof on the strength of the assertion made at the time of the lease that said premises were well heated and the house was a good winter house. The premises were not well heated; said house could not be heated in cold weather, and Mrs. Drischman was obliged to vacate it during the month of Nov. 1900, because of the cold. P. 30.

Down & Shedaker were the agents of Mrs. McManemin and Mrs. McManemin ratified the acts and statements of Mr. Down at the time of receiving the defendant's \$400 payment. Pp. 16, 17, 18-82, 87.

There was also evidence produced to rebutt much of the the testimony referred to, but the Jury found a verdict in favor of the plaintiff.

**The First Assignment of Error is to the evidence of Charles Miller, as to "whether or not the house was well heated." This testimony appears on p. 50.**

It will be seen that no objection was made to Mr. Miller so testifying until after his answer had been taken, then the objection was made to strike out the testimony already taken, and it was not error for the Judge at that time to overrule the objection, besides the testimony was in direct support of the allegation in the declaration, and Mrs. Drischman's testimony, p. 21. I do not understand that a general objection to the admission of testimony avails the party anything—otherwise every attorney at the outset of a trial would enter a general objection to the giving of any evidence by the adverse side and would then be relieved of further watching the testimony given and be relieved of the duty incumbent upon him of giving

his reasons for the rejection of the testimony to the Court, and could afterwards assign error on anything that there after occurred.

**The Second Assignment of Error is directed to the admitting of evidence by Mrs. Drischman showing the rent to be paid for the property on page 19.**

The objection was that there was a lease in writing. It had previously appeared, p. 19, that the lease referred to by defendant's counsel was a paper writing between Mrs. Drischman and John C. McManemin. It had also previously appeared that this had not been delivered to Mrs. Drischman until after the third day of May, when she was in possession of the premises, p. 14. It had also previously appeared that Mrs. Drischman had had a conversation with Mrs. McManemin relative to the renting of the premises in question, prior to the delivery of said writing, and had paid a part of the rental moneys to Mrs. McManemin, p. 16 & 17. It had also previously appeared that Mrs. Drischman's dealings were with Mrs. McManemin, and not with John C. McManemin, p. 14, hence it was not error to admit this oral conversation.

*A writing only excludes previous conversation when the writing is between the same parties.*

The rule is laid down in first Greenleaf on Evidence, Lewis Edition, section 275, as follows: "When *parties* have deliberately put their engagements in writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the *parties*, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquim between the *parties*, or of conversation or declarations at the time when it was completed or afterwards, as it would tend, in many instances, to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the *parties*, is rejected."

Again, the excluding of the lease or paper writing between John C. McManemin and Mrs. Drischman, had no legal force and effect as between Sarah E. McManemin and Mrs. Drischman.

See *Borcheling vs. Keates*, 10 Stewart. 150.

**The Third Assignment of error is directed to the admission of testimony between Mrs. Drischman and Mrs. McMenammin, which had taken place after the original conversation between Mrs. Drischman and Mr. Downs. See p. 20.**

Defendant in error insists that this was admissable, on the ground previously stated, and that the objection is not a valid one, because no reason was given why the evidence should not be received.

*Columbia Bridge vs. Guise*, 9 Vr., 39-44.

**The Fourth Assignment is directed to the refusal to strike out the conversation between Mrs. Drischman and Mr. Downs, p. 21.**

After defendant's attorney had given his reason, which was that Downs was but an agent, and that Mrs. Drischman's testimony tended to make a contract beyond the agent's authority. The extent of the agent's authority became a question of fact to be determined by the jury, and the agent's statements made at the time of the leasing of the property, could not be excluded simply because it had not at that time appeared that he had authority to make them, besides the agent's authority is presumed in law to be such as is reasonably necessary to enable him to carry out the object of his agency, and if his agency was for the renting of the premises furnished and the premises were not in fact furnished, (a question of fact to be determined by the jury), he would have the authority to agree that the necessary furniture be placed therein.

*Borcheling vs. Keates*, 10 Stewart, 150.

**The Fifth Assignment** was directed to the testimony of evidence tending to show loss of profits by reason of Mrs. Drischman not getting possession of the premises at the time agreed upon. See Exception on p. 23.

The objection was that the allegation in the declaration was not sufficiently specific to allow the proof: pp. 6 and 7.

The allegation was: "The defendant did promise to lease and surrender the possession of a certain messuage or tenement, known as No. 24 S. Virginia Avenue, Atlantic City, N. J., from th first day of April, 1900; to the first day of April, 1901, to be used as a boarding house, and that although the plaintiff hath performed and fulfilled her said agreement so to be by her performed and fulfilled and hath paid to the defendant the said sum of fifteen hundred dollars, yet the said defendant hath failed to perform her part of said agreement and did not give or surrender to the plaintiff the possession of the messuage or tenement until the third day of May, 1900, whereby plaintiff was for a long time, to wit, from the first day of April, 1900, until the third day of May, 1900, deprived of pursuing her business of conducting a boarding house and entertaining guests, to the damage of the plaintiff, \$1,500."

3 Sutherland on Damages, 151-158 -9, n.

It is insisted that this allegation is according to the legal effect of the contract made, and that the testimony introduced was such as to tend to establish the contract and breach as alleged in the declaration: and that the allegation is within the rule laid down in Kellog vs. Platt, 4 Vr. 328-335, where Justice Depue stated the law of pleading to be: "It is an established rule that all things should be pleaded according to their legal effect."

The Sixth Assignment of Error was to the admission of testimony showing the amount of money expended by Mrs. Drischman in the purchase of house furnishing articles for use of said premises. See exception, page 28.

The question was asked and answered; no motion was made to strike out the answer, and no objection was made to the question until after the answer had been given. A party cannot wait until after the answer has been given and then avail himself of the objection to the question if the answer is against him, but retain the benefit of the question and answer if it is in his favor; if he does so he will be presumed to have acquiesced in it. Further, the question admitted was an element of the damage sustained because of defendant's failure to provide an adequate supply of cooking utensils, &c., set forth in the second count of the declaration.

Fath vs. Thompson, 29 Vr., 180-187.

The Seventh Assignment was directed to the refusal of the Court to admit in evidence on cross-examination of plaintiff's witness, the paper writing or lease between John C. McManemin and Mary M. Drischman, p. 39.

Defendant in error insists that it was not error for the trial judge to exclude this writing from the evidence on cross-examination of plaintiff's witness; that it was a matter of defense, but that even if it should have been admitted, no reversible error was thereby committed, because the lease or paper writing was admitted in evidence afterwards by defendant's attorney in presenting his defense to this action, p. 61.

The Eighth Assignment of Error was to the admission of Mrs. Drischman's testimony that Mr.

**Down and Mr. Shedaker were partners. See Exception p. 57.**

Whether this testimony was relevant or irrelevant is of but little consequence, as its admission was not reversible error, and did the defendant below no harm, also because the same fact was shown by the attorney of the defendant below on direct examination of Mr. Down, a witness called on behalf of defendant below. See p. 63.

**The Ninth Assignment of Error is directed to the first exception on page 111, and to that part of the Judge's charge found on page 104.**

It will be seen from the testimony on p. 14, line 15; p. 16, line 1; p. 17, line 15; p. 18, lines 10 and 25; p. 20, line 5, and that there was evidence from which the Jury might find that Mrs. Drischman entered into possession under Mrs. McManemin. Under whom she entered was a question of fact and properly left with the Jury.

**The Tenth Assignment was directed to the second exception of page 111, which referred to that of the Judge's charge, page 104, line 30.**

Defendant in error contends that there was no error in this portion of the charge. There was testimony on part of the plaintiff below, p. line 87, that Mrs. McManemin stated that Mr. Downs was her agent. There was also testimony, p. 16 and 17, to the effect that Mrs. McManemin had ratified Mr. Downs agreement by herself agreeing to the same facts, and that upon the strength of this ratification or agreement by Mrs. McManemin, the \$400.00 advance payment had been made, and the law is well stated, that an unauthorized act of the agent afterwards ratified by the principal thereof, becomes the act of the principal.

**The Eleventh Assignment of Error was directed to the third exception of page 111, which refers to that part of the Judge's charge on page 105, line 20.**

It will be seen that this portion of the charge was against the plaintiff below, and not against the defendant. It was not sufficiently broad in that it excluded the defendant's liability, assuming that the agent's unauthorized statement had been ratified by the defendant below, it will be seen, however, that this charge was made at the request of the defendant, and the defendant cannot now assert that he suffered injury thereby. The law was correctly stated immediately following, when the Judge charged that if Downs did not make the representations, or if he made them without authority, then the Jury would inquire whether the defendant in consideration of the \$400.00 advance payment agreed to furnish the equipments.

**The twelfth assignment of error is directed to the second exception found on page 112, and relates to that part of the Judge's charge on page 106.**

All the evidence shows that the payment of \$500 was not due until the first day of July and that it was paid on the 7th day of April. The testimony of the plaintiff was that it was paid in advance in consideration of certain articles to be furnished by the defendant below. The defendant in error contends that this advance payment was a valuable consideration which would support the agreement alleged to have been made by the defendant below.

Conover vs. Stillwell, 5 Vr., 54-57.

The Thirteenth Assignment is directed to the third exception on page 112, and refers to the part of the Judge's charge at the bottom of page 106.

This is answered by the answer of the fifth assignment. If loss of profits were an element in the measure of damage then it was purely a question of fact for the Jury to determine and leaving it with them was no error.

The fourteenth assignment is directed to the fourth exception, page 112, and refers to the part of the charge on page 107.

The testimony of Mrs. Drischman, p. 16, 17, 18, was that certain articles were to be furnished. This is not denied by the defendant below but seems to be admitted to be a fact that both Mrs. McManemin, p. 76, and her son, p. 66, testified that they sent certain articles of a similar kind to Mrs. Drischman. If the agreement at the time of renting the house was that it should be fully equipped and it was not fully equipped, then the plaintiff below, after notifying the defendant below, to equip same, as appears to have been done, p. 67-68, had the right to purchase these articles and recover from Mrs. McManemin their value and it was not error to leave with the Jury what the value was.

Sutherland on Damages, 168.

The Fifteenth Assignment is directed to the specific exception on page 112, which is to the Court's charging the requests of the plaintiff below; pages 107, 108 and 109.

The charge of the Court on the first request, the defendant in error insists was correct. It is also contended by the defendant in error that the second request, page 108, was according to law, and therefore not error. Defendant in error also insists that the charge of the Court on the third

request, as charged, was correct. It is also insisted that the fourth request, on pages 108 and 109, as charged, was correct. The defendant also insists that the fifth request, page 109, was correctly charged. Defendant also insists that the sixth request, as charged, was also correct. Defendant insists that the seventh request, as charged, was correct *and that even though one or more of these requests may have been erroneous, yet if any one of them was correctly charged then the judgment cannot be reversed under this exception which is a general exception to several propositions.*

Consolidated Traction vs. Chenowith, 29 Vr. 416-418.

**The Sixteenth Assignment is directed to the first exception on page 113, which was a general exception to the Court's refusal to charge the 1, 2, 3, 4, 7 and 8, requests for the defendant below.**

The first request, page 109, was properly refused, because to have so charged would have required the Judge to find a fact which was in dispute, to wit: under whom plaintiff took possession. The second request, page 107, was also properly refused for the same reason. The third request was also properly refused for the same reason, as there was no evidence as to when the written lease was, in fact, signed, and also because there was evidence of a breach of the verbal contract made between Mrs. McManemin and Mrs. Drischman at the time of the payment of the \$400.00. The fourth request was properly charged by the Court. The seventh request was properly charged, because if the question of heating was a condition preceding to the making of the contract and was relied upon by the plaintiff, below, in making her payments of \$1,500 instead of \$1,200, then it became a question of fact for the jury to determine, and therefore was properly left to the jury. The eighth request was properly left with the jury and the instruction of the Court in leaving it to them were plain and explicit.

Broadway Ins. Co. vs. Doying, 26 Vr., 569-572.

The Seventeenth Assignment is directed to the second exception on page 113, which relates to the portion of the charge of the Court on page 111, in which the Court held that there could be no damage allowed for loss of business during the winter months, but that the Jury might make an allowance by way of abatement in the rent for the winter months.

The verdict of \$620.00 shows that the Jury allowed \$300.00 for abatement of this rent, \$260.00 for loss of profits at the Easter season, and \$60.00 for moneys expended by Mrs. Drischman in securing necessary cooking utensils, &c. The testimony of Mrs. Drischman, and also of the defendant, Mrs. McManemin, shows that the consideration for the renting of this house for the winter months was \$300.00, and the testimony of all the witnesses shows that there was no means of heating a portion of the rooms in the house ; hence, if the statement that the house was a winter house and well heated became a warrant, then the plaintiff might legally recover the money by her so made.

3 Sutherland on Damages, 158-159.

Respectfully submitted.

G. A. BOURGEOIS,  
Atty. for Deft. in Error.

NEW JERSEY  
Court of Errors and Appeals

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MARY M. DRISCHMAN,  
Plaintiff, Defendant in Error,  
vs.  
SARAH E. McMANEMIN,  
Defendant, Plaintiff in Error.

On Error.

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Brief of Plaintiff in Error.

The writ of error in this cause is to review a judgment entered in the Atlantic Circuit Court in an action on contract by *Drischam v. McManemin*, the judgment being for six hundred and twenty dollars.

The action was to recover damages for alleged breaches by defendant in not performing the conditions of a lease, and the breaches are assigned in four several counts.

The first count alleges failure to supply an adequate supply of dishes and cooking utensils.

The second alleges failure to supply an adequate supply of dining-room chairs and to build a sun-parlor.

The third alleges that the premises were not sufficiently heated with heating apparatus for heating the

same, to be used as a boarding-house during the winter months, and for lack of sufficient heating apparatus.

The fourth alleges failure of defendant to give possession and for lack of sufficient heating apparatus.

Exceptions were sealed to the Court's admitting evidence, refusing to admit evidence, his refusing to charge as requested by defendant and in charging certain requests of the plaintiff.

Error has been assigned on all of the exceptions and each of them are insisted upon as ground for a reversal of the judgment, although it may not be specifically adverted to in the brief.

It is insisted by plaintiff in error that, throughout, the case was tried without regard to the issues made by the pleadings. The first point for consideration is the admission of evidence to vary by parol a written lease and the refusal of the Court to charge that the written lease was the contract between the parties. It will be seen that the evidence, as admitted, did vary the lease (*Exhibit D*, page 118), and that it required the defendant to do much more than she had agreed by the written lease to do. The effort of the plaintiff throughout was to avoid the written lease and rely upon a verbal contract, and the trial judge submitted the case to the jury to find whether the plaintiff had entered into possession of the premises under the verbal contract or the written lease. The evidence was undisputed that she had entered under the written lease and that all of the talk and conversation between plaintiff and defendant and defendant's alleged agent, Downs, had been reduced to writing in said lease. The plaintiff admitted in her testimony, both in her direct and cross-examination, that her negotiations were with Everett M. Downs, who, she says, was agent for the plaintiff. Mr. Downs in his direct examination, at page 60, testified as follows:

"Q. Was the agreement for the leasing of the property to Mrs. Drischman finally put in writing?"

"A. Yes, sir."

The testimony shows that the agreement which was put in writing is *Exhibit D2*.

On page 43 of the testimony, the plaintiff herself in speaking of the agreement admits the existence and force of the written lease. This testimony appears on that page:

"Q. You told her, did you [meaning defendant] about the contract that Mr. Downs hand made?"

"A. Yes, sir, and she was very much pleased with me and said I could have the house.

"Q. And told you you could have the house for five years?"

"A. Yes, sir.

"Q. And you took it for the five years?"

"A. No, sir; I took it for one year with the privilege of the other five.

"Q. With the privilege of the other five?"

"A. Yes, sir; it was in the lease I could have it for five years.

"Q. In what lease?"

"A. The lease that I got after I went in the house.

"Q. What lease was that?"

"A. That was the lease that Mr. Downs gave me.

"Q. Now, I show you paper and ask whether that is the lease that Mr. Downs gave you?"

"A. Yes, sir, that is the lease I always had."

Elsewhere in her testimony she admits having received the lease, a copy of which is in evidence on the part of the defendant. An examination of *Exhibit D2* will disclose that the lease as set forth in the several counts of the declaration is in its terms the same as *Exhibit D2*, except that there are added burdens on the defendant. It is made plain throughout the testimony that plaintiff's effort was to escape from the written lease, because it had been made as between John C. McManemin, the son of the defendant, and the plaintiff. There was no pretense on the part of the

defendant that the lease in writing was not the contract for the leasing of the premises. From time to time, throughout the case, the trial judge refused to allow the written lease to be offered in evidence and admitted testimony of a verbal lease, notwithstanding the statement of counsel that here was a written lease.

Later, however, the written lease was admitted in evidence and when it was admitted there was plenary proof that the plaintiff had recognized the written lease as the one under which she entered, and Mr. Downs' testimony is conclusive on that point. It is therefore made plain that all of the evidence respecting the verbal lease and the refusal of the Court in its charge to limit the testimony to the covenants of the lease was legal error.

By the Court's charge on page 107, he permitted the jury to include in their verdict the amount of money claimed to have been expended by plaintiff in purchase of dishes and cooking utensils, and with respect to such purchase, says:

“Now, if you find that the defendant undertook to furnish these things and did not do it, and the plaintiff found it necessary to do it herself in order to carry on the business, then she would be entitled to an allowance for that sum.”

The language of the declaration is that defendant agreed to furnish an adequate supply of dishes and cooking utensils. That the defendant did furnish dishes and cooking utensils was proven by the plaintiff, and the defendant insisted that additional dishes and cooking utensils were furnished than those that were in the house at the time of the renting, and that together they made an adequate supply. In this situation, therefore, the question was one of fact for the jury to say whether, under the evidence, the dishes and cooking utensils as furnished were adequate. The question, as left to the jury by the Court, permitted the jury to find

against the defendant if the jury should find that the plaintiff thought it necessary to buy the dishes. All that the defendant did and all that was agreed to be done under the written lease was to furnish the house, complete, with adequate dishes and cooking utensils; also to provide lace curtains for the parlor, dining-room and office; also portier curtains for parlor door and to erect a suitable fire-escape on the house.

Counts two, three and four of the declaration set up covenants on the part of the defendant not included within the written lease. It is insisted that all of the testimony which undertook to support said counts was irrelevant and that the admission of such evidence was error. If, however, it can be said that there was sufficient in the evidence for the jury to say whether the plaintiff had entered under a verbal contract with defendant rather than under the written lease, it is submitted that none of the breaches alleged in said counts are proven under the testimony.

Count three declares that defendant did promise, warrant and agree with the said plaintiff that the premises were amply supplied with means for heating the same to be used as a boarding-house during the winter months. Then follows an averment that the premises were not sufficiently provided with heating apparatus for heating the same to be used as a boarding-house, etc. The only testimony which undertakes to support this count is the claimed conversation between plaintiff and one Everett M. Downs.

At page 20, the plaintiff testified as follows:

“Q. I asked him [meaning Downs] particularly whether it was a winter house and he told me yes it was well heated, and I asked him about the range because I had a bad range where I was and he said it was a good baker, etc.”

We have not been able to find any other testimony which tends to prove any promise or agreement by the

defendant which supports said third count. The allegation is that she did promise, warrant and agree that the premises were amply supplied with means for heating the same to be used as a boarding-house during the winter months. The testimony of the plaintiff is that she asked Downs whether it was a winter house. He told her yes, it was well heated. At most what Downs said was a mere expression of an opinion and did not amount to either a representation or warranty such as could be made the basis of an action. Notwithstanding this meager and unsatisfactory evidence, the trial judge permitted the jury to find damages against the defendant for failure to keep her alleged contract in that respect. He also permitted the jury to abate the rent from the first day of November, the time when plaintiff claimed she vacated premises, until the end of the rental period. The plaintiff's requests to charge on this phase of the case, to which exceptions were readily taken, was "If you find from the testimony given that the statement that the house was well heated." etc. This language appears in several of plaintiff's requests, and it will be observed that that language is not in keeping with the allegations in the declaration, nor is it supported by the proof.

Moreover, there is nothing in the case to show that the plaintiff did in fact vacate the premises because of a lack of heat. There is nothing to show that the plaintiff ever made an effort to use the heating plant that was in the house to ascertain if it was sufficient to heat the house. It was, therefore, error for the Court to charge as requested by the plaintiff with respect to this phase of the case and error in his refusing to charge defendant's request.

Objection was made from time to time to the introduction of evidence of conversation between the plaintiff and one Downs by which it was sought to impose on defendant the burden of providing the house within certain things and the doing of things not contemplated by the written lease. The Court allowed the evidence over objection and in its charge asked the jury to find

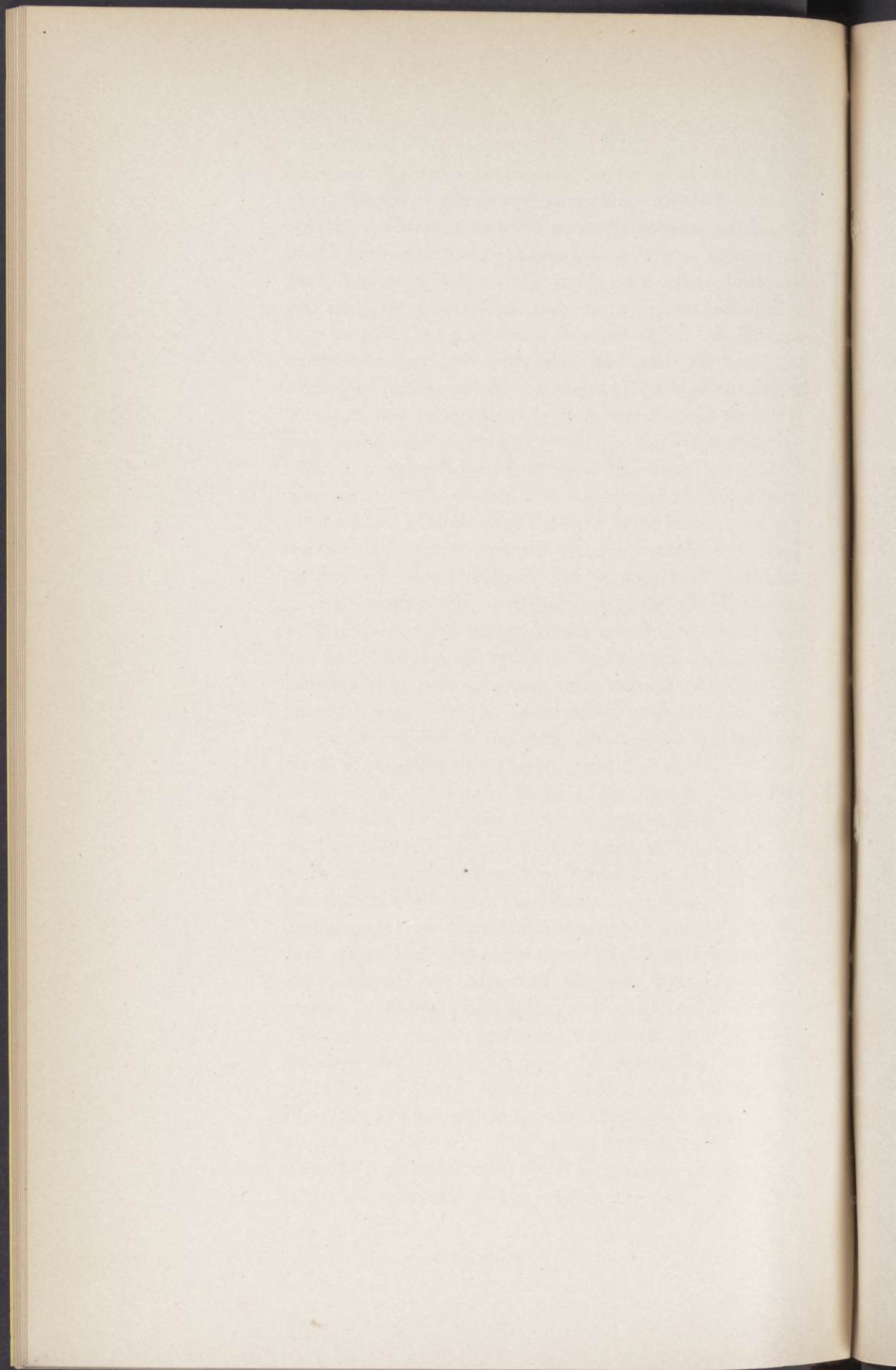
whether or not Downs had authority to make the alleged verbal agreement. There was nothing in the case to show that such authority had ever been conferred, but on the contrary Downs testified that his authority was limited to that which appeared in the written lease. The trial judge also said that if the defendant had ratified the alleged agreement between Downs and the plaintiff, she might be held, when there was no proof to show that the defendant ever knew that such a contract had been made by Downs as was claimed by plaintiff. There can be no ratification without knowledge.

Obviously, when regard is had to the amount of the verdict, the jury allowed the plaintiff a considerable amount in abatement of rent because of her having given up possession on the first day of November. There was no proof of any damage except, first, money expended for dishes; secondly, alleged loss of profit by reason of not getting possession on the first day of April and loss of premises from November 1st. The dishes, it is claimed, cost sixty dollars and the net profits of the boarders during the period it is claimed possession was not given could not have amounted to more than one hundred dollars, so that more than four hundred dollars has been given in damages by way of abatement of rent. We insist that the admission of evidence with respect to the heating does not support the allegations of the declaration, but if it did and an abatement of rent could be considered in measuring damages, then regard should be had to the value of the premises during the time the premises were unoccupied.

In his charge the Judge paid no reference to the fact that the plaintiff may have, during the time she actually occupied the premises, gotten the value of nine or ten months, and under his charge a jury might have *pro rated* with respect to months rather than with respect to value.

It is respectfully submitted that the judgment should be reversed.

THOMPSON & COLE,  
*Attorneys for Plaintiff in Error.*



NEW JERSEY, SS.



The State of New Jersey to Hon. Charles E. Hendrickson, Judge of our Circuit Court, at May's Landing, in and for the County of Atlantic.

Because in the record and proceedings, and also in the giving of judgment in a plaint which was in our Circuit Court, holden at May's Landing, in and for the said county of Atlantic, between Mary M. Drischman, plaintiff, and Sarah E. McManemin, defendant, of an action upon contract, manifest error hath intervened to the great damage of the said Sarah E. McManemin, as by her complaint we are informed, we being willing that the error if any there be should in due manner be corrected and full and speedy justice should be done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed, you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching and concerning the same to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the thirty first day of May instant, together with this writ, that the record and proceedings aforesaid being 20 inspected, we may further cause to be done for inspecting that error, what of right and according to the law and custom of the state of New Jersey ought to be done.

Witness our Chancellor and President Judges of our said Court of Errors and Appeals at Trenton, this 12th day of May, 1902.

S. D. DICKINSON,  
*Clerk.*

THOMPSON & COLE,  
*Attorneys.*

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The answer of Charles E. Hendrickson, Judge of our said Circuit Court within named. The record and proceedings whereof mention is within made with all things touching and concerning the same to the New Jersey Court of Errors and Appeals within specified, the day and place within contained, I certify in a certain schedule to this writ annexed as within I am commanded.

CHARLES E. HENDRICKSON,  
Judge of Atlantic County Circuit Court.

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ATLANTIC COUNTY CIRCUIT COURT, OF THE FIRST DAY OF  
10 OCTOBER, A. D. NINETEEN HUNDRED.

ATLANTIC COUNTY, SS.

Sarah E. McManemin, the defendant in this suit, was summoned to answer Mary M. Drischman, the plaintiff, in an action upon contract, and thereupon the plaintiff by her attorney, Herman M. Sypherd, complains :

For that whereas, the defendant, on the twentieth day of March, in the year of our Lord one thousand nine hundred, at Atlantic City, in the county aforesaid, in consideration of the sum of one thousand five hundred dollars to be paid as follows :  
20 five hundred dollars cash, five hundred dollars July first, nineteen hundred, and five hundred dollars August first, nineteen hundred, by the plaintiff to the said defendant, did promise and agree with the said plaintiff, to lease unto the said plaintiff a certain messuage or tenement, known as No. 24 South Virginia avenue, Atlantic City, New Jersey, completely furnished, and with an adequate supply of dishes and cooking utensils, for the purpose of a boarding house, with the appurtenances, from the first day of April, nineteen hundred, for the term of one year, and until the first day of April, nineteen hundred and one, and

although the said plaintiff from the time of making said agreement hath performed and fulfilled her said agreement so to be by her performed and fulfilled, and hath paid to the said defendant the said sum of one thousand five hundred dollars aforesaid, yet the said defendant, not regarding her said promise, did not furnish said boarding house with an adequate supply of dishes and cooking utensils, but wholly neglected and failed so to do, to the damage of the plaintiff one thousand five hundred dollars.

2. And for further cause of action plaintiff avers that the 10 said defendant on the twentieth day of March, nineteen hundred, did lease to the plaintiff premises known as No. 24 South Virginia avenue, Atlantic City, New Jersey, from the first day of April, nineteen hundred, to the first day of April, nineteen hundred and one, at the rental of one thousand five hundred dollars, payable five hundred dollars on the twentieth day of March, nineteen hundred, five hundred dollars July first, nineteen hundred, five hundred dollars August first, nineteen hundred; and that afterwards, to wit, on the seventh day of April, 20 nineteen hundred, said defendant, in consideration of the immediate payment of the sum of four hundred dollars, part of the sum of five hundred dollars due on the first day of July, nineteen hundred, did promise and agree with the said plaintiff that she, the said defendant, would furnish diverse other articles not contained in the said premises No. 24 South Virginia avenue, to wit: one steam table, an adequate supply of dining room chairs, and also to build a sun parlor on said house; and the plaintiff avers that she, the plaintiff, did pay the said sum of four hundred dollars immediately on said day, yet the defendant disregarded her promise aforesaid made, and although often 30 requested, did not perform her agreement aforesaid, and did not furnish said articles or any of them, and did not build said

sun parlor, to the plaintiff's damage one thousand five hundred dollars.

3. And for further cause of action the plaintiff avers that heretofore, to wit, on the twentieth day of March, nineteen hundred, at Atlantic City, aforesaid, in the county aforesaid, in consideration of the sum of one thousand two hundred dollars, defendant did promise and agree to lease unto the said plaintiff the premises known as No. 24 South Virginia avenue, Atlantic City, New Jersey, from the first day of April, nineteen hundred  
10 until the first day of October, nineteen hundred, and afterwards, to wit, on the said twentieth day of March nineteen hundred, said defendant in consideration of an additional sum of three hundred dollars making in all the sum of one thousand, five hundred dollars, did promise and agree with the said plaintiff, to lease unto the said plaintiff premises known as No. 24 South Virginia avenue, Atlantic City, New Jersey, for the period of one year from the first day of April, nineteen hundred to the first day of April nineteen hundred and one, equipped with heating apparatus sufficient to heat the same to be used as a  
20 boarding house during the winter months, and defendant, well knowing said premises were not equipped with heating apparatus sufficient to heat the same to be used as a boarding house during the winter month, did promise, warrant and agree with the said plaintiff, that the premises were amply supplied with means for heating the same to be used as a boarding house, during the winter months, and plaintiff says that in consideration thereof the plaintiff did perform said agreement by her to be performed, and did pay to the said defendant the said sum of one thousand five hundred dollars, rental moneys  
30 for the said premises, but avers that the said premises were not sufficiently supplied with heating apparatus for heating the same to be used as a boarding house during the winter months, and for lack of sufficient heating apparatus, plaintiff was and is

unable to heat said premises, and was and is unable to live in said premises, and was compelled to vacate the same, to the plaintiff's damage one thousand, five hundred dollars.

And for that whereas the said defendant on the twentieth day of September in the year of our Lord, one thousand, nine hundred in the county of Atlantic aforesaid, was indebted to the plaintiff in the sum of one thousand, five hundred dollars for the price and value of goods sold and delivered by the plaintiff to the defendant at her request; and in the like sum of money for the price and value of goods bargained and sold<sup>10</sup> by the plaintiff to the defendant at her request, and in the like sum of money for the price and value of work done and materials provided for the same by the plaintiff for the defendant at her request; and in a like sum of money for money lent by the plaintiff to the defendant at her request, and in a like sum of money for money received by the defendant for the use of the plaintiff; and in a like sum of money for money paid by the plaintiff for the use of the defendant; and in a like sum of money for interest due from the defendant to the plaintiff, for the plaintiff's having forborne moneys due from the defendant<sup>20</sup> to the plaintiff at the defendant's request for a long time then elapsed; and in a like sum of money for money found to be due for the defendant to the plaintiff on an account then and there stated between them; and the defendant, afterwards, to wit, on the day and year last aforesaid in consideration of the premises, respectively promised pay to the last several mentioned sums of money respectively to the plaintiff on request; yet the defendant disregarded her promises and has not paid any of the said moneys or any part thereof to the plaintiff's damage one one thousand five hundred dollars, and thereupon she brings<sup>30</sup> this suit, etc.

HERMAN M. SYPHERD,

Attorney for Pl'ff.

ATLANTIC COUNTY CIRCUIT COURT.

---

MARY M. DRISCHMAN  
vs.  
SARAH E. McMANEMIN

} On Contract.  
} Amendment to declaration.

And for a further cause of action the plaintiff avers that on the twentieth day of March, in the year of our Lord, one thousand, nine hundred, at Atlantic City, in the county aforesaid, in consideration of the sum of one thousand five hundred dollars to be paid as follows : five hundred dollars cash ; five hundred dollars on the first day of July, nineteen hundred, and five hundred dollars on the first day of August, nineteen hundred, by the plaintiff to the said defendant, the defendant did promise and agree to lease and surrender the possession of a certain messuage or tenement known as No. 24 South Virginia avenue, Atlantic City, New Jersey, from the first day of April, nineteen hundred to the first day of April, nineteen hundred and one, to be used as a boarding house, and that although the plaintiff hath performed and fulfilled her said agreement so to be by her performed and fulfilled and hath paid to the defendant the said sum of fifteen hundred dollars, yet the said defendant hath failed to perform her part of said

agreement and did not give or surrender to the plaintiff the possession of the messuage or tenement until the third day of May, nineteen hundred, whereby plaintiff was for a long time, to wit, from the first day of April, nineteen hundred until the third day of May, nineteen hundred, deprived of pursuing her business of conducting a boarding house and entertaining guests, to the damage of the plaintiff, one thousand five hundred dollars.

HERMAN M. SYPHERD,

Dated, Dec. 12, 1900.

Att'y of Plaintiff<sup>10</sup>

ATLANTIC COUNTY CIRCUIT COURT.

---

MARY M. DRISCHMAN  
vs.  
SARAH E. McMANEMIN

} On Contract.  
} Plea.

And now comes the defendant by Thompson & Cole, her attorneys, and says that she did not undertake or promise as alleged in either of the counts of the plaintiff's declaration, nor did she make any of the representations stated in said counts, and of this she puts herself upon the country, and the  
10 plaintiff doth the like.

THOMPSON & COLE,  
Atty's of Defendant.

ATLANTIC COUNTY CIRCUIT COURT, OF THE TERM OF SEP-  
TEMBER, IN THE YEAR OF OUR LORD ONE THOUSAND NINE  
HUNDRED AND ONE.

MAY M. DRISCHMAN,	}	On Contract.
Pltff.		
vs.	}	Verdict.
SARAH E. McMANEMIN,		
Deft.		

Judgment,	\$620.00	
Costs,	42.67	10
	\$662.67	

GEO. A. BOURGEOIS,  
Attorney.

Judgment signed and ordered to be entered against the above named defendant Sarah E. McManemin at the suit of Mary M. Drischman in an action upon contract in the Atlantic County Circuit Court for the sum of six hundred and twenty dollars damages and the further sum of forty-two dollars and sixty-seven cents, costs of suit which said damages, costs and 20 charges in the whole amount to the sum of six hundred and sixty-two dollars and sixty-seven cents, and the said defendant Sarah E. McManemin, in mercy, etc.

Judgment signed and ordered to be entered this fourth day of October, A. D. nineteen hundred and one (1901).

CHARLES E. HENDRICKSON,  
Judge.

I, Lewis P. Scott, clerk of the Circuit Court of the county of Atlantic, do certify that foregoing declaration, amended declaration, plea and judgment as filed in the cause of Drischman vs. McManemin are true copies, and that said papers is a complete record in said cause.

Witness my hand and seal of office this fourteenth day of May in the year nineteen hundred and two.

[SEAL]

LEWIS P. SCOTT,

Clerk.

ATLANTIC COUNTY CIRCUIT COURT.

MARY M. DRISCHMAN,

Plaintiff.

vs.

SARAH E. MCMANEMIN,

Defendant.

On Contract.

MAY'S LANDING, N. J., Oct. 4, 1901.

TESTIMONY.

TAKEN BEFORE HON. A. B. ENDICOTT, JUDGE, AND A JURY.

APPEARANCES:

10

For Plaintiffs, GEORGE A. BOURGEOIS, ESQ.

For Defendant, CLARENCE L. COLE, Esq.

MARY M. DRISCHMAN, sworn.

Direct examination.

By Mr. Bourgeois:

Q Mrs. Drischman, you reside where?

A At 23 South South Carolina Avenue.

Q Atlantic City?

A Yes, sir.

Q How long have you lived in Atlantic City?

A About four years.

Q Did you live in Atlantic City during the early part of 1900?

A Yes, sir.

Q Where were you living in, say, February of 1900?

A At 25 South Virginia Avenue.

10 Q Now about that time did you have some conversation with Mr. Downs relative to the renting of another house?

A Yes, sir.

Q Where was the conversation had?

A Right in his office on Atlantic Avenue.

Q Will you tell to the jury what that conversation was?

(Objected to.)

The Court: Was this in writing?

Mr. Bourgeois: No.

Mr. Cole: I do not see what Mr. Down has to do with this 20 case up to this point.

Mr. Bourgeois: I have to begin some place, and I would prefer to begin it now. Now if we fail to show that Mr. Downs was the agent of these people, then that testimony should be stricken out; simply the matter of the order of proof.

Mr. Cole: Now I would call attention, if your Honor please, at this time to the fact that there was served upon the defendant in this case interrogatories. The first interrogatory

is: "1. Was the agreement or contract referred to in the declaration in this cause in writing? If so, annex copy." The answer is, no. "2. If the contract or contracts were not in writing, with whom were they in fact made and when and where made?" The answer is: "The contract, on the part of the plaintiff, to pay the sum of fifteen hundred dollars to the defendant as rent for the use of the house No. 24 South Virginia Avenue, Atlantic City, New Jersey, for the term of one year, and on the part of the defendant to furnish the house with an adequate supply of dishes and cooking 10 utensils, and that the house was adequately supplied with proper heating apparatus to heat the building so that it could be used as a boarding house during the winter months, was made between Mary M. Drischman, the plaintiff, and Everitt M. Down, agent for John C. McManemin, agent for Sarah E. McManemin, the defendant. The above contract was made on March 20th, 1900, at the office of Everitt M. Down, 1436 Atlantic Avenue, Atlantic City, New Jersey." I want my objection to be recorded now, because, first, I do not see how Mr. McManemin, if he was the agent for Mrs. McManemin, 20 could delegate that authority. That is a well settled principle, that he cannot delegate; and right at the threshold he is met with that question, whether he can show some contract between this plaintiff with Mr. Down, who he is going to show was agent for Mr. John McManemin, as agent for Sarah McManemin.

(Mr. Bourgeois replies.)

By Mr. Cole:

Q Just a moment. Mrs. Drischman, did you have a lease in writing for the premises here in question? 30

Mr. Bourgeois: I object, unless he states between whom it was.

Q Well, I show the witness what purports to be a lease between John C. McManemin, lessor, and Mary M. Drischman, lessee, dated the 20th day of March, 1900, signed, John C. McManemin, Agent, and Mary M. Drischman, and I ask you whether, first, there was delivered to you a copy of that paper which you hold?

A No, sir.

10 Q You never had a copy of that paper?

A I had a copy of that after I was in the house, yes, sir.

Q Where is your copy?

(Paper produced by Mr. Bourgeois.)

Q The paper which you say was delivered to you after you were in the house is the paper you now hold in your hand?

A Yes, sir; that is, it was signed after that. It wasn't signed at first. We didn't know anything at all about Mr. McManemin, Mr. Downs nor I; we had dealings with Mrs. McManemin.

20 Q From whom did you receive that paper?

A Mr. Downs.

Mr. Cole: Now the paper, if your Honor please, I insist is the paper under which this plaintiff took possession of that property, and that the lease is in writing.

Q. You had this writing ever since, this lease that has been produced by your attorney?

A Sir?

Q You have had this lease that has been produced by your attorney, that was handed to you by Mr. Downs, ever  
30 since it was handed to you by Mr. Downs?

A I had it around the house and then I gave it to Mr. Bourgeois. Mr. Sypherd had it first and then I gave it to him.

By Mr. Bourgeois:

Q (Former question repeated:) Will you tell to the jury what that conversation was?

(Mr. Cole objects on the ground that, by the answer to the interrogatories, it appears that the conversation was with an agent of an agent of the defendant, and that there was a written lease for the leasing of the premises in question made by Mrs. Drischman with John C. McManemin; that this is an effort to avoid in this suit the effect of the written lease, which is destroyed, and to make an entirely new contract.)

(Mr. Bourgeois replies.)

Mr. Cole: I would like the record to show I do not object to evidence coming in here that may bear upon the contract between these parties subsequent to the execution and delivery of this lease, provided, of course, it is supported by a valuable consideration.

By Mr. Bourgeois:

20

Q (Question repeated.) Now tell to the jury what that conversation was.

Mr. Cole: I will now go further than that. Until the relation between Mr. Down and the defendant here is shown, the testimony is objectionable.

(Objection sustained. Exception to plaintiff.)

Q Mrs. Drischman, did you ever have a conversation with Mrs. McManemin, regarding a house known as No. 24 South Virginia Avenue?

A Yes, sir.

Q Where was that conversation had?

A Right in my house and in her kitchen.

Q When?

A In March.

Q Now what was the conversation you had with Mrs.  
10 McManemin?

Mr. Cole: What year?

The Witness: 1900.

Q What was the conversation you had with Mrs. McManemin?

A She told me she would put everything in shape through the house and get me dishes and glassware for the dining room and chairs for the dining room, and the spring.

Q Spring for what?

A Spring for a bed.

20 The Court: Is that prior to the leasing?

Mr. Bourgeois: That is prior to the leasing.

Mr. Cole: I want to enter an objection now, and I do not see how I can do better than to make this objection. She has already made a statement of things for the purpose of getting damages that are not claimed in this lease; for instance, counsel spoke about her getting a range that would bake. Now, no such claim is made in the declaration. So I want a general objection to any testimony going in that attempts to

raise a claim for damages not raised in the declaration. Of course this witness can tell what that is, but I suppose she will have to go on and tell, and the Court will have to exclude it at the proper time. I warn counsel now that I do not want this witness to give testimony about things that are not made part of this declaration.

Mr. Bourgeois: I anticipate if the witness testified about something that is not in the declaration it is void.

Q Now, Mrs. Drischman, proceed.

A Spring for a bed, a steam table for the serving room<sup>10</sup> down stairs.

Q Now was this before or after you had had your conversation with Mr. Downs?

A Why, it was after I had the conversation with Mr. Downs.

Q Was anything said by Mrs. McManemin relative to Mr. Downs? Was he referred to?

A Yes, sir; he was her agent.

Q And at that time did you or did you not make a payment on account of the rental money of this property? <sup>20</sup>

A Yes, sir.

Q How much?

A \$500.

Q Before you saw her?

A Yes, sir. I rented through Mr. Downs. She was in the city and when she came down she told me all this and promised me all these things if I would give her more money. She said she was short of money, and if I would give her \$500 more she would give me these things at once, and then I had to make a mortgage to get the money and I could only get<sup>30</sup> \$400, I couldn't get \$500.

Q What did she say she would do if you gave her this money?

A She would make me a sun parlor in the fall, and extend the porch on top and put carpets in the house, because there were mattings on the floor, and wardrobes in the rooms, and give me the dishes for the dining room, serving table and the glassware and the cooking utensils, which I hadn't any at all, and the bed spring, which was missing, and ten chairs for the dining room, two tables, and the steam table.

10 Q And did you give her the money?

A Yes, sir; I gave her the money.

Q How much?

A Gave her \$400, and she gave me the receipt.

Q Did she give you a receipt herself?

A Yes, sir; in her kitchen.

Q I show you what purports to be a receipt under date of April 7th, 1900, signed by Mrs. S. E. McManemin, and I ask you if that is the receipt?

A Yes, sir; that is the receipt.

20 (Receipt marked Exhibit P 1.)

Mr. Bourgeois: The receipt, if the Court please, reads as follows:

Atlantic City, April 7, 1900.

"Received of Mrs. Mary M. Drischman the sum of four hundred dollars on account of rent of house No. 24 South Virginia avenue. Balance \$600."

Q Mrs. Drischman, what was the rent of this property to be?

(Objected to, on the ground that the lease is in writing.)

Mr. Bourgeois: Now, if your Honor please, that is to be ruled on. We say the lease is not in writing; that the lease which was in writing was a lease between John C. McManemin and Mrs. Drischman and was not between Sarah E. McManemin and Mrs. Drischman. Therefore a lease in writing between other parties than the parties in suit does not exclude parol evidence of the transaction between the parties. The testimony shows that Mrs. McManemin stated that Mr. Downs was her agent. Now there is nothing in the testimony up to the present time that shows that John C. McManemin was in 10 it at all.

(Question repeated. Question allowed.)

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

A. B. ENDICOTT, Judge. [SEAL]

A From the first of April up until the first of October \$1200, and \$300 for the balance of the year.

Q And that made \$1500 for the year?

A Yes, sir.

Q And you had previously paid \$500 you say?

20

A Yes, sir.

Q Before this \$400?

A Yes, sir.

Q Now to whom did you pay that \$500?

A To Mr. Downs.

Q Now had you paid to Mrs. McManemin any money before that time personally?

A No, sir.

Q What conversation took place between you and Mr. Downs at the time of renting this property?

30

By Mr. Cole :

Q When was that?

A That was in March when I rented the property.

Q When was this conversation you say you had with Mrs. McManemin?

A That was when she was down to clean house.

Q When was it?

A That was in the latter part of March.

Q Was it before or after you had first talked with Mr. Downs?

10 A That was after I talked to Mr. Downs, because I rented the house with Mr. Downs and he told me that the house belonged to Mrs. McManemin.

Mr. Cole: Now I object.

Mr. Bourgeois: I don't understand that sort of an objection.

Mr. Cole: I am objecting to your question.

(Mr. Bourgeois' previous question repeated. Question allowed.)

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

20

A. B. ENDICOTT, Judge. [SEAL]

A I asked him particularly whether it was a winter house and he told me yes, it was well heated, and I asked him about the range, because I had a bad range where I was, and he said it was a good baker, a first-class range, and everything will be put in first-class order, and the dishes and everything by the first of April, and the first of April fell on Sunday and I didn't want the lease dated on the first, on Sunday.

Mr. Cole: Now your Honor will discover that even if he was agent, the best that can be said is that he was the agent for renting. Here he has made a contract for this defendant without anything to show that he had any such authority. He might just as well have sold the property for her and bound her to sell for less than it was worth and so on.

Mr. Bourgeois: I don't see how it can be excluded. It may be that if we do not show that he had authority it may be a proper subject for the Court to charge the jury.

Mr. Cole: You have no right to parade the testimony before 10 the jury unless you have authority. I ask that the testimony be stricken out.

The Court: I refuse the motion.

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

A. B. ENDICOTT, Judge. [SEAL]

Q Now, Mrs. Drischman, about the renting of the house for the season and for the winter; what was your first intention?

(Objected to. Objection sustained.)

Q Was the conversation had between you and Mr. Downs 20 regarding the house being a winter house had before you agreed to take the house?

A Yes, sir.

Q It was?

A I would not have taken it if I didn't have it, because I wanted a winter house.

(Objected to.)

The Court: The last part of sentence will be stricken out.

Q Now when were you to have possession of the house?

A The second day of April, because the first fell on Sunday.

Q Did you get possession on the 1st of April?

A No, sir; I didn't get it until the 3rd of May.

Q You say you didn't get it until the 3rd?

A Because the men were there putting in a fire escape, and the furniture man was there to repair the furniture, and the  
10 painters were there painting the porch on Easter Sunday, everything was covered with paint, and the chairs were all getting painted, all the rockers for the porches, and furniture being fixed up all through the house, and Mrs. McMenamin left the key with me to let the painters and men go through the house to fix the house, and told me she couldn't do any better.

Q What arrangements, if any, had you made for entertaining guests after the first of April?

A Why, I had made my arrangements before that, because  
20 I expected the house for Easter.

Q And when did Easter happen that year, during April?

A I couldn't say; it must have been in April.

Q It was after the first?

A Yes, sir; it was after the first.

Q What arrangements did you make for the entertaining of your guests at Easter, if any?

(Objected to as irrelevant.)

Mr. Bourgeois: We have alleged in the declaration because of the inability to get the house at the time agreed upon that  
80 she sustained a loss because she could not entertain guests at Easter.

Mr. Cole: I think there is no such allegation in the declaration and that it is not a measure of damages.

Mr. Bourgeois: The measure of damages is the loss of profit.

The Court: Well, ascertain whether this is in the declaration or not.

Mr. Cole: There seems to be an allegation of loss by reason of that, and since that appears we make the objection that the allegation is not specific enough to allow this proof to be introduced.

10

The Court: I will allow the question. I do not know just whether the proof may be competent to sustain this claim, but I will rule on it when it comes.

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

A. B. ENDICOTT, Judge. [SEAL]

(Question repeated.)

A. Why, I made the arrangements because I thought that I would get the house. I made the arrangements for about thirty or forty people, and I didn't have the house, and when 20 they came I had to send them elsewhere.

Q How many did you have to send elsewhere when they came?

A Mr. Robinson had a party of about twenty.

Q Who is Mr. Robinson?

A A lawyer from Baltimore, a friend of ours, a friend of the family.

Q Were you able to entertain them?

A No, sir; because I had just a small five-room house.

Q Was your inability to entertain them because of the inability to get this house?

A Yes, sir.

Q For how long a period were they to remain?

A A week to ten days.

Q None of them for a shorter time than a week?

A No, sir.

Q What was their rate?

10 A From \$10 to \$12 a week.

By the Court:

Q You stated you had made a contract with these people. You mean you would have charged that; or did you agree with them to pay that much?

A Yes, sir; I wrote to them that I would take them for that price.

Mr. Cole: Of course I want to enter objection. I do not see how we are going to meet that, letters and contracts with third parties. There is no evidence here; we cannot meet it, 20 no means of meeting, it by the allegation of this declaration.

By Mr. Bourgeois:

Q How many of them did you say there were?

A About thirty in all.

Q How many of them did you refuse that you couldn't take?

A I didn't take any. I wanted them for the large house. I just lived in the small house opposite.

Q And how many did you in fact turn away?

A I turned all of them away, all but Mr. Grubb and Mrs. Grubb.

Q Do you know that there were just thirty?

A Well, there was about twenty in Mr. Robinson's party.

Q Precisely how many were there?

A I will have to count. Well, there was about thirty in all.

Q Then you lost the business of twenty-eight; is that right?

A Yes, sir; at Easter. 10

Q And they were for at least one week each, a week to ten days, all of them?

A Yes, sir.

Q Now, Mrs. Drischman, what proportion would be the cost of entertaining guests, say thirty guests, what proportion of \$2 a day would it cost to entertain them?

A I figure on about \$3 apiece.

Q That is for the cost?

A Yes, sir.

Q Then that would make your loss \$260 on those guests? 20

A Yes, sir.

Q You have been in the boarding business how long?

A In Baltimore for about five years, and down here four years.

Q And have a knowledge of what proportion it requires to run the table?

A Yes, sir; I thoroughly understand my business.

Q Now after the 7th of April and after Mrs. McManemin had promised to put in a steam table and dishes and so on, what happened? Was the steam table put in? 30

A No, sir; there was nothing done.

Q Was the sun parlor ever built?

A No, sir.

Q Were the dishes furnished?

A No, sir; only a few.

Q Did you furnish her a list of the dishes that you required?

A Yes, sir.

Q How many dishes did you find in the house when you went there?

A You have the list there.

Q No; the ones you found?

A I found a lot of broken goblets, odds and ends, about a  
10 dozen cups and saucers and one sugar bowl, two broken tea  
pots, an old coffee pot, everything was rusty and there was just  
dishes enough to seat about twenty people.

Q How many rooms does the hotel have?

A Twenty-three.

Q How many people could you accommodate?

A I accommodated about sixty; Mrs. McManemin says  
seventy-five.

Q Mrs. Drischman, when those dishes were not furnished  
you what did you do?

20 A I kept writing to her and she wouldn't answer me and at  
last she wrote me a letter and told me I should not bother her  
any more.

(Objected to. Answer overruled.)

Q What did you do when you didn't get them?

A I put up with it the best I could and I had to send people  
off in the month of June because they wouldn't stay and wait  
for the dishes; and I had only one frying pan and I had to fry  
the meat and fish and everything in the one pan.

Mr. Cole: I object on the ground that they cannot raise  
30 damages against this defendant because there were not things

in that house to furnish it. The duty was cast upon the plaintiff to furnish the goods if they were not there and charge it against this defendant.

Mr. Bourgeois: If the Court please, where there is a special contract made to furnish those goods it was her duty to furnish them and if she does not furnish them then she is liable for whatever damage may ensue.

The Court: Isn't it the duty of this plaintiff to make those damages as small as possible?

Mr. Bourgeois: That is right; but there is no duty on the 10 part of Mrs. Drischman in this case to go out and buy the things that Mrs. McManemin had promised to buy, because the law does not raise that presumption, that Mrs. Drischman had any money to do it with. Mrs. Drischman had paid Mrs. McManemin the \$400 to do this very thing. She made a contract to do it and she is bound by her contract. So that I say that we have the right to show the damage we have sustained because she did not do this thing.

The Court: I do do not think there can be any recovery where she neglected to provide herself with the facilities needed 20 to carry on the business. It was her duty to make the loss as little as possible. She should have furnished these dishes and gone on and done business. She neglected to do it and I do not think she has any right to recover.

Mr. Bourgeois: Is that question overruled?

(Question repeated.)

A I done the best I could until Mr. Downs saw me and told me to go at once and buy them.

Q And what did you do?

A I went out and bought them and paid for them.

Q Do you remember what goods you bought?

A Yes, sir.

Q I show you what purports to be a bill of goods sold to the Hotel Sorrento, 24 South Virginia avenue, on July 21, by The Hotel & Bar Supply Company, and ask you if that is the list of the articles you purchased? (Paper shown witness.)

A Yes, sir.

- 10 Mr. Cole: We object to any proof of any goods that were bought by this plaintiff for use in that house on the ground that there is nothing in the declaration alleged that there were any such goods purchased, and we are not prepared to meet that phase of the case.

Mr. Bourgeois: We are entitled to introduce that in evidence under the first count of the declaration, which says that she had agreed to furnish these things and she did not do it. Now as to whether or not we are entitled to show what those articles are there may possibly be some question, but we have  
20 a right to show how much money we expended because she did not do this thing.

(Question allowed.)

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

A. B. ENDICOTT, Judge. [SEAL]

Q What was the amount of the dishes that you purchased?

A \$31.09. I got as little as I possibly could.

Q That is, as little as you could possibly do with?

A Yes, sir.

Q When you left the hotel, what became of those articles?

A I left them there.

Q In the house?

A Yes, sir.

Q I show you another bill, from Bell & Gorman to G. Drischman, and ask you, what was that bill for?

A That was for the chairs and the bed spring.

Q Chairs and bed spring she had agreed to get?

A Yes, sir.

Q What was the amount paid for them?

10

A \$31.50.

Q On July 19th?

A Yes, sir.

Q What did you do with them when you left?

A I sold those for \$8 because I needed the money.

Q Were you able to get more than \$8 for them?

(Objected to for the reasons stated above.)

A No, sir.

Q Now, Mrs. Drischman, you waited from the 7th day of April until the 19th day of July for Mrs. McMenammin to get these goods for you, did you?

A Yes, sir.

Q Was there any loss of business during that time that you sustained?

A Yes; the people would not wait—

(Objected to.)

The Court: Yes, I think that is practically the same question I ruled on a few moments ago.

(Exception noted for plaintiff.)

Q Now, Mrs. Drischman, how long did you stay in the house?

A I stayed there as long as I possibly could, because it was too cold and all my boarders left.

Q How long was it?

A About in November; and Mr. Everhardt was the only one that stayed.

Q You say there are twenty-three rooms in the house?

A Yes, sir.

10 Q How many of them were heated?

A About five.

Q By what?

A By the heater down in the cellar.

Q Now what arrangements were made, if any, for heating the bath room?

A None at all. We couldn't use the toilets. There was no way of heating them.

Q Did you know that at the time you went through the house?

20 A No, sir; because I took Mr. Downs' word for it. I thought the house was thoroughly heated, and Mrs. McMamin told me herself.

Q Told you what?

A That the house was thoroughly heated and a good winter house, well heated.

Q When did you leave the house?

A Left it for good?

Q Yes.

A About the middle of November.

30 Q November of 1900?

A Yes, sir.

Q And your year didn't expire until April, 1900?

A April 2nd.

Q When you went through the house first, were the windows open?

A Everything was barred up and down stairs, everything was nailed up with boards, and I couldn't see anything only with a candle, and she promised me everything after she came down if I took possession.

Q Promised you what? Did she state that it was a well-heated and a good winter house?

A Yes, sir.

Cross Examination.

10

By Mr. Cole:

Q Mrs. Drischman, whom did you first see respecting the renting of this property?

A Mr. Downs.

Q Where did you see him?

A On Atlantic Avenue.

Q Did you go to see him about this particular property?

A Yes, sir.

Q How had you your attention first called to it?

A I seen the sign up and I made up my mind about a 20 month to go see him about it.

Q What was the conversation you had with Mr. Downs when you first saw him?

A I asked him particularly—the first question of all—whether it was a well-heated house, and a good range in the kitchen, because I had a bad range where I was at and I wanted to get a good cooking stove.

Q Well, what else?

A Well, I asked him whether it was a winter house, and asked him the price of it, and he told me \$1200 from the first 30 of April to the first of October, or \$1500 by the year; and

then he told me the terms, \$500 when I took possession and \$500 the first of July, and the other \$500 the first of August.

Q Was that all at that time?

A And then I asked him who the house belonged to, because I wanted to see the lady myself. Mr. Robinson was going with me and he told me it belonged to Mrs. McManemin, a widow lady in Philadelphia; and I didn't know anything at all about Mrs. McManemin.

Q Was that all?

10 A Yes, sir.

Q When was that?

A That was in March.

Q What time of March?

A About the middle part of March.

Q When did you first go into this house?

A In March, when I looked at it. I went through it with Mr. Shedaker and Downs.

Q Was that on the same day of the conversation you have just related?

20 A Yes, sir; because I went to the office first.

Q How long was it after you had the conversation with Mr. Downs that you went through the property?

A Why, about a half an hour afterwards.

Q Did you go through the whole of the house?

A Yes, sir.

Q From the cellar to the garret?

A Yes, sir.

Q Why did you go through the house?

A Because I wanted to see if everything was all right.

30 Q How long was it after that that you again saw Mr. Downs?

A I saw him the next day.

Q Did you then have a conversation with him?

A Yes, sir.

Q What was that?

A The same conversation. I asked him about the heater and I asked him whether the dishes would be in the house and the cooking utensils and everything would be in order, and he said everything would be put in first-class order, and the dishes would be there about the first day of April.

Q When did you see Mr. Downs next?

A In his office.

Q When?

A It was the next day after I went through the house. 10

Q When again after that?

A Oh, I seen him two or three times, went backwards and forwards in the office and told him that things ain't there yet.

Q Who did you finally make your arrangements with for the renting of the property?

A With Mr. Downs.

Q And what was that arrangement? When was that, please?

A When I paid him \$500.

Q When was that?

A In March. 20

Q What time in March?

A It was just before April.

Q How long was it after you went through the house?

A I think I paid him on the 20th of March; I ain't real sure,

Q Did you take a receipt for that money?

A Yes, sir.

Q Where is the receipt?

A Mr. Bourgeois has it.

(Receipt produced by Mr. Bourgeois.)

Q That is the receipt to which you refer? 30

A Yes, sir; I think it was the 20th of March. That is \$450.

I paid him \$50 the very day I went through the house to close the bargain.

Q Did you take a receipt for that?

A I think there is a receipt there that day. He gave me a receipt.

Q He did give you a receipt?

A Yes, sir.

Q And you don't know where it is?

A No, sir; I thought I gave it to Mr. Bourgeois.

10 Q That was the day you went through the house?

A Yes, sir; that was the day I went through the house.

Q Now on the 20th of March you paid \$450, which made up the \$500, the first payment?

A Yes, sir.

Q And took this receipt?

A Yes, sir.

Mr. Cole: We offer that. (Reads as follows:)

Atlantic City, N. J. Mar. 20, 1900.

Received of Mary M. Drischman check on Balto. for four hundred and fifty (\$450) dollars on account first payment of rent for house No. 24 South Virginia avenue.

Fifty dollars cash having been paid before, making five hundred dollars paid on account, the first required payment to apply to lease of house for one year.

DOWN & SHEDAKER.

Q When was it you agreed to take the property for one year?

A When I paid the money.

Q What money?

A The \$450, because he told me it was a winter house and  
30 I wanted a house by the year.

Q When was it after you paid the \$450 that you saw Mrs. McManemin?

A As soon as she came, right after.

Q When was it?

A I couldn't tell you, Mr. Cole.

Q Where did you see her?

A I seen her over at her house.

Q You mean this property?

A No, sir; I mean right next door, 22.

Q Now you say you had some conversation with her at 10 that time?

A Yes, sir.

Q What conversation did you have with Mrs. McManemin?

A About the dishes.

Q About anything that has relation to this property?

A I asked her whether it is her property and she said of course it is, and I asked her—Mr. Robinson told me to ask her particularly whether it was her property, and she said "Of course it is." Then I said "Must I pay the other rent to Mr. Downs" and she said, "No; you can pay it to me; I have 20 taken it out of the hands of Mr. Downs."

Q When was that?

A That was when I saw her and when I paid her the \$400.

Q Was that all?

A No, sir; I told you about the dishes. She said, "If you give me some money—I am short of funds." If I give her \$500 she would give me everything right away, and then I told her I couldn't give her the \$500, I had to make a mortgage to get the \$400 in Baltimore, and Mr. Robinson hurried it through and sent it down.

30

Q Was that all the conversation at that time?

A Then she promised me the steam table and the dishes for the dining room and the glassware and the cooking utensils

and the sun parlor, which I didn't ask her about, and she would carpet all the rooms upstairs for me if I would be satisfied to use those old mattings, and put wardrobes in all the rooms which they were not in, and paper all the rooms in the fall, and give me a lease for one to five years in the fall if I proved satisfactory.

Q It was after you had made the lease and paid the \$450 to Mr. Downs?

A I didn't have the lease.

10 Q You had made the contract?

A Yes, sir.

Q And at that time she told you that Mr. Downs no longer represented her?

A Yes, sir.

Q When was the written lease signed by you and which I show you, delivered to you?

(Objected to because it has nothing to do with the case; it is irrelevant and immaterial.)

The Court: I think the objection is well taken. The lease 20 was not produced by Mr. Bourgeois at all in his direct examination.

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

Q I show you what purports to be a lease dated the 20th day of March, 1900, between John C. McManemin and Mary M. Drischman, witnessed by H. P. Shedaker, and I ask you from whose hands you received the duplicate of that lease?

(Objected to. Objection sustained.)

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

The Court: I would like to hear counsel, why I should let the testimony be produced showing the agreement between those contained the lease; I would like to hear counsel, showing what the legal agreement was.

Mr. Cole: That is what I have been objecting to all along. Here is a situation where testimony comes in that is entirely 10 at variance.

The Court: I am not sure but it may be competent to show what the agreement was.

Mr. Bourgeois: The objection to it is this: first, that it is immaterial because an agreement in writing between John C. McManemin and Mary M. Drischman cannot be evidence to preclude oral testimony of another agreement between Sarah E. McManemin and Mary M. Drischman; that is the point first. The second point is, that the defendant cannot make out his defence on cross-examination of the plaintiff's wit- 20 nesses. The proper place for it to come up is when he puts his defence in, but he cannot do it by cross-examining my witnesses. It is well established that a defendant cannot establish his defence by going outside of the direct examination on cross-examination of the plaintiff's witnesses.

Mr. Cole: Why, if your Honor please, I have always a right to show that there was a written agreement between the parties, and make a motion to show this.

The Court: You were allowed to do that in an early stage.

Mr. Cole: Precisely, and your Honor overruled it.

The Court: You do not show a lease between the parties to this suit, and I think evidence might be given of a contract between the plaintiff and the defendant in this suit, but now I feel somewhat uncertain as to whether that is true of this agreement. Although it is not necessary to sue on it, it might be the best evidence of what the real agreement is.

10 Mr. Bourgeois: There would be no presumption that the whole agreement was contained in that. If the question came up on a proceeding to dispossess Mrs. Drischman for non-payment of rent, I anticipate that the written agreement, even though made by John C. McManemin, might be given in evidence to show when the rent came due or to show the amount of the rent; it might be some evidence of what it contained in it, but would not be conclusive evidence of all the agreement. It would be shown for the purpose of refreshing the witnesses' memory. I do not think it can go further than that, because the agreement is different from the parties at suit.

20 Mr. Cole: I don't want to take the time, but the case is so clear. Suppose we wanted to get this lady out of the house for non-payment of rent, and suppose Mrs. McManemin brought suit to recover possession. Why, Mrs. Drischman would come in and say, "I hold possession of this property by written lease; Mr. McManemin is the one with whom I made the contract. I don't know Mrs. McManemin in the matter." And if Mr. McManemin brought suit under this lease she could not deny this relation. That is the case.

30 Mr. Bourgeois: In answer to that, if that situation should arise, Mrs. McManemin would file her affidavit, showing the

lease, just as Mr. Downs would say that the contract was and just as Mrs. Drischman says that it was, setting out the payment of the rent, showing there was no written lease between her and Mrs. Drischman at all; and if Mrs. Drischman came in and attempted to plead that lease between Mrs. McManemin and herself, Mrs. McManemin would simply show the Court the case that I showed your Honor, of Dayton vs. Warn and Sheldon vs. Dunlop, and the Court would have but one thing to do and say that that is not Mrs. McManemin's lease. And if it is not in the case, and if Mrs. McManemin 10 proved a verbal lease, she would get possession of the premises.

The Court: I do not think that this is competent at this stage.

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

Q Now, Mrs. Drischman, when in fact did you take possession of this property?

A On the 3rd day of May.

Q When did you close the house?

20

A The last of November.

Q The last of November?

A About the 25th.

Q How many sleeping rooms are there in the house?

A Twenty-three.

Q How many guests had you in that house on the first day of November? And by the way, have you a written record of how many guests you had on that day?

A No, sir. I had Mr. Everhardt—he is here—and my father.

Q Can he tell how many guests you had on that day.

A Only had the one, and my father, Mr. Everhardt.

Q On the first of November?

A Oh, on the first of November? I misunderstood you. On the first of November I had Mr. Hollenberger, from Philadelphia; and he left on account of the cold.

Q I asked you how many guests.

10 A About five.

Q Can you name them?

A Mr. Hollenberger and Mr. Everhardt and my father, and then one lady—I forget her name; she only stayed a couple of days.

Q How many guests had you when you closed the house?

A I had two.

Q How many guests had you the middle of October?

A Oh, I can't remember.

Q How many guests had you on the first of October? I  
20 don't want you to guess. I want you to tell if you know. You say that you had thirty or forty guests coming there at Easter time?

A Yes, sir.

Q Did you see them all?

A No, sir; I didn't see them. They wrote to me.

Q Then they were not in Atlantic City?

A Some of them was.

Q How many of them were in Atlantic City?

A I think there was about twenty.

30 Q Don't you know?

A Yes, about twenty.

Q Did you see them?

A Yes; they came to my house across the street, the small house.

Q You say you were going to charge them \$2 a day?

A From \$10 to \$12 a week.

Q Now, how long were they going to stay?

A Why, a week to ten days.

Q How do you know that?

A Because they wrote me.

Q Have you the letters?

A I destroyed them. I didn't think it necessary to keep 10 them, because I was moving them at the time, because I had no idea of bringing the suit against Mrs. McManemin, because I thought she was a square woman.

Q In making this estimate of loss of \$260 you estimate that these people were going to come with you and pay you this rate, and stay all the time they agreed to stay?

A Yes, sir.

Q Now, how many more than the twenty did you actually see there in Atlantic City, actually came to have board?

A Why, Mrs. Johnson, she came. 20

Q How many more than the twenty, I asked.

A Oh, they came and went. I didn't always go to the door. I just told the girl to tell them that I couldn't take them and that I wasn't in.

Q Mrs. Drischman, you mentioned the name of Robinson in your testimony?

A Yes, sir.

Q Robinson?

A Yes, sir.

Q Was he your agent? 30

A No, sir.

Q What had he to do with the renting of this property?

A He had nothing to do with it. He attends to my father's property and he simply advised me to see if it really was Mr. McManemin's property.

Q Did you authorize him to write to Mr. and Mrs. McManemin?

A I told him to write her a letter to give me the dishes.

Q You did authorize him to write about the property?

A Yes, sir; just about the dishes.

Q Is that all?

10 A Yes, sir; and about the steam table, the chairs and the spring.

Q What else?

A And if the property was hers.

Q What else?

A I think that was all.

Q That was after you went in the property or before you got in?

A No, sir; that was before I got in, because he was down Easter, and then he was on his way going with me to see  
20 Mrs. McManemin when he left after Easter, and he had to make the train for Indianapolis and he missed it.

Q Now, Mrs. Drischman, for how long a time did you finally rent this property?

A One year.

Q And that was under the contract that was made with Mr. Downs, I understand, at his office?

A Yes, sir, with the privilege of one to five years.

Q You had the privilege of having five years?

A Yes, sir; providing Mrs. McManemin would accept me  
30 as a tenant, providing I proved satisfactory to her at the end of the year.

Q Now, was that said?

A Yes, sir; Mr. Downs and I had that understanding.

Q Did you communicate that fact to Mrs. McManemin?

A Yes, sir.

Q Where?

A At her house when I paid her the money.

Q You told her, did you, about the contract that Mr. Downs had made?

A Yes, sir; and she was very much pleased with me and said I could have the house.

Q And told you you could have the house for five years? <sup>10</sup>

A Yes, sir.

Q And you took it for the five years?

A No, sir; I took it for one year with the privilege of the other five.

Q With the privilege of the other five?

A Yes, sir; it is in the lease that I could have it for five years.

Q In what lease?

A The lease that I got after I went in the house.

Q What lease was that? 20

A That was the lease that Mr. Downs gave me.

(Objected to as irrelevant.)

Q Now I show you paper and ask you whether that is the lease that Mr. Downs gave you?

A Yes, sir; that is the lease I always had. I don't know whether that is the lease that Mr. Bourgeois has.

Mr. Bourgeois: Oh, it doesn't matter.

Q Do you admit that is the lease you got from Mr. Downs for that property?

A I got a lease like that. 30

Q From Mr. Downs for this property?

A Yes, sir.

Mr. Cole: I want to offer it.

(Objected to and offer overruled.)

Mr. Cole: I want this marked for identification.

(Lease marked D 2 for identification.)

Mr. Cole: The witness says, if your Honor please, that she got this lease for the property from Mr. Downs, and speaks of what her rights were under it.

10 Re-direct examination.

By Mr. Bourgeois:

Q Mrs. Drischman, about how many days was it that you had your conversation with Mrs. McManemin before you paid her the \$400, the receipt for which is in evidence?

Mr. Cole: She said it was on the same date.

A I had about half a dozen conversations with her. She came backwards and forwards to my house and I went over to hers.

Q About how many days was it before the signing of that  
20 lease when you had the first conversation?

A When she came down from Philadelphia to clean the house.

Q About how many days was it, can you state?

A That was the latter part of March.

Q After you had paid the \$50?

A Yes, sir.

Q And then you paid the \$400?

A Yes, sir.

Q Now, Mrs. Drischman, I show you a receipt, dated July 5th, signed by Everitt M. Downs, for Mrs. McManemin, for \$100, and ask you, is that the receipt of the \$100 that you afterwards paid?

A Yes, sir; making paid \$500.

Q That was the money that was due on the first of July?

A On the first of July.

10

(Receipt offered in evidence and marked Exhibit P 2.)

Q I now show you another receipt dated August 7th, 1900, for \$500, which purports to be signed by John C. McManemin, agent for Sarah E. McManemin, and ask you, is that the receipt for the last \$500 rent?

A Yes, sir; that is the last one.

(Receipt offered in evidence and marked Exhibit P 3.)

Re-cross examination.

By Mr. Cole:

Q Now, Mrs. Drischman, you paid \$100 in July to Mr. 20 Downs, notwithstanding the fact that Mrs. McManemin had already told you in April that he was no longer her agent?

A Well?

Q I ask you whether you did or not?

A Yes, sir.

Re-direct examination.

By Mr. Bourgeois:

Q Here are some letters that I just discovered. When the question concerning cooking utensils and dishes, and so on, came up, did you make a list of the cooking utensils that were necessary?

A Yes, sir.

Q And send to Mrs. McManemin?

A Yes; I sent her two.

Q Did you keep a copy of that list?

A I think I did. You must have it among your papers.

10 Mr. Bourgeois: Mr. Cole, have you the original?

Mr. Cole: I never saw it.

(Paper shown witness and she is asked:)

Q Is that a copy of what you told her you would require?

A Yes, sir; they was in the house when I got there.

Q Oh, this is the list of the cooking utensils that were in the house at that time?

A Yes, sir.

Q Who made that out?

A I did.

20 Q Who was present when these were taken?

A Mr. Miller.

(Paper offered in evidence, and objected to on the ground that it is irrelevant and comes in too late.)

The Court: It certainly cannot go in evidence, but there is no objection to her using it to refresh her memory.

Q Mrs. Drischman, when was that list made out?

A When I went in the house.

Q By whom was it made?

By Mr. Cole:

Q When was that?

A When I took possession of the house. I wanted to take a list of what was there, so I knew what I needed.

By Mr. Bourgeois:

Q By whom was it made?

A By myself.

Q Look at it and tell the jury what you found there when you made the list. 10

A Why, I found a lot of old—

Q State just what.

A 2 sugar bowls, 2 egg cups, 3 cream pitchers, 8 ice pitchers for chamber,—ought to be 23,—15 breakfast plates, 30 dinner plates, plenty soup plates for house, 41 coffee cups, 49 saucers, coffee, 2 large vegetable dishes, 23 oatmeal dishes, 75 small vegetable dishes,—each person had to have 5,—25 small meat dishes—

(Objected to. Objection overruled.)

(Whereupon the defendant, by her counsel, prays a bill of 20 exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

A —28 water goblets, of all kinds, mixed; odds and ends of glassware, such as cake stands, fruit dishes, &c., 1 frying pan, 2 broken tea pots, old tin coffee pot, full of holes, 2 or 3 burnt pots, 1 bed, no springs, 2 tables in the dining room

(without chairs), no steam table, which was promised when I gave Mrs. McManemin the \$400; cooking utensils, could not at all be used, all broken, rusty and old tins.

Mr. Cole: I object to this testimony as being not only testimony of what was there, but comment of the witness as to the effect, and I ask an exception to the Court allowing it to go in evidence.

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

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ALLEN B. ENDICOTT, Judge. [SEAL]

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CHARLES MILLER, SWORN.

Direct examination.

By Mr. Bourgeois:

Q Mr. Miller, you reside at Atlantic City?

A Yes, sir.

Q And did reside at Atlantic City in 1900?

A Yes, sir.

Q Were you present at a conversation had between Mrs. McManemin and Mrs. Drischman relative to the renting of  
20 the house No. 24 South Virginia Avenue, some time about the latter part of March, 1900.

A I was, at the time of the conversation with Mr. Downs.

Q Will you tell to the jury what the conversation was between Mr. Downs and Mrs. Drischman?

A At the present time I was manager for Burkhardt's, at Illinois Avenue. I brought a piece of meat to Mrs. Drisch-

man, and Mr. Shedaker was present trying to rent the house, 24 South Virginia Avenue, and I stayed a few minutes talking about the house. So she came in and asked me about the location of the house and said it was a very nice house. I said, "It will be all right." She said, "If you want any money I will give you \$20 or \$50," and she made a bargain to pay over to Shedaker, to pay the money down that day.

Q What was said about what was to be rented, and so on? Did you hear any conversation between Downs and her?

A Well, the next day, Mrs. Drischman sent up to the store<sup>10</sup> and wanted to meet me at once at Downs' office, and I didn't know what she wanted me at the office for. She asked me about the house, and I was a witness at the time, and he said, "If you rent the house, it is a nice house for summer and winter;" he said, "The summer months rate is \$1200, and winter months they will be \$1500. It is a nice heated house. It will be a nice house for winter." That is the conversation between Mrs. Drischman and Mr. Downs.

Q Were you present at the time Mrs. Drischman paid the \$400 to Mrs. McManemin? 20

A I was there.

Q Did you hear the conversation?

A I was in the alley between the two houses.

Q Did you hear the conversation?

A Heard a conversation with Mrs. Drischman and Mrs. McManemin.

Q What was the conversation?

A The conversation was,—I stood right in the door; it was right in the kitchen—Mrs. McManemin asked Mrs. Drischman for \$400. She wanted \$500. She wanted to buy the 30 dishes and chairs and bed springs and fix the range for the house and everything what is right.

Q What did Mrs. McManemin say she would do, if anything, if Mrs. Drischman would pay the \$400?

A She would get her everything what belongs—

Q What was everything?

A Complete the dishes and the chairs for the dining room, and the cooking utensils and the sun parlor and the steam table.

Q Now, were you the cook for Mrs. Drischman during that summer?

10 A Yes, sir.

Q Was the steam table ever furnished?

A No, sir.

Q Were the chairs ever furnished?

A No, sir.

Q Were the dishes ever furnished by Mrs. McManemin?

A No, sir.

Q Was the sun parlor ever furnished?

A No, sir.

Q Do you know whether or not the house was well heated  
20 for winter?

A Well, I tried to heat it.

Q Did you run the heater?

A Yes, sir.

Mr. Cole: I object to all the proof respecting the heating of the property, on the ground that there is no evidence to show a contract to heat the house. The proof is that there was a representation that this was a well heated house. This is an action on contract; and if there could possibly be a recovery at all it must be an action in tort for false representation. The  
30 action would be a joint action in tort and an action in contract, and this is not one of those cases where you can waive the action in contract and sue in tort.

(Mr. Bourgeois replies.)

(Question allowed.)

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

(Question repeated.)

Q Now how many rooms were there in the house?

A Twenty-three rooms.

Q How many of those rooms had registers in them connected with the heater?

10

A Five.

Q Was it possible to heat twenty-three rooms from those five registers.

A No, sir.

Q Was there any heat in the bath rooms?

A No, sir; no registers in the bath rooms.

Q Was there any heat in the rear portion of the house.

A No, sir.

Q How many rooms were there in the rear portion of the house where there was no heat?

20

A Why, nineteen.

Q Eighteen, I guess.

A Eighteen, that is right—twenty-three.

Q Were you able to heat the house comfortably up to the time you moved out, the middle of November?

A No, sir.

Q Do you know anything about whether Mrs. Drischman lost business for the Easter season, of your own knowledge? Tell me if you do, of your own knowledge.

A There was letters came, she told me.

The Court: Answer she question yes or no.

A Yes, sir.

Q Did you see the letters?

A Yes, sir.

Q What business, if any, did she lose, that is, to your knowledge?

(Objected to. Objection sustained.)

Q Do you know whether or not any of Mrs. Drischman's  
10 boarders left because of the inability to serve them because of  
insufficient dishes?

Mr. Cole: They would be the ones to tell about that, I  
think. I object.

(Objection sustained.)

Cross Examination.

By Mr. Cole:

Q When was it you were in Mr. Downs' office?

A In March.

Q What time in March?

20 A Why, I can't remember.

Q How many times were you there?

A I was there twice.

Q Who was there the first time you were there?

A Mr. Downs and Mr. Shedaker.

Q Was Mrs. Drischman there?

A Yes, sir.

Q When was that?

A It was in March.

Q How far apart were the days, the time you were there first and the last?

A The first day she paid the \$50 and the next day she paid the balance of the \$450.

Q Were you there when she paid the \$50?

A I give her the \$50.

Q You were there when the \$50 was paid?

A No, sir.

Q Were you there when the \$450 was paid?

A Yes, sir.

10

Q What conversation took place between the parties at that time—that is, Mr. Down and Mrs. Drischman—when the \$450 was paid?

A \$400. Why, the conversation of Mr. Downs and Mrs. Drischman, they paid the money for the house on 24 South Virginia Avenue, they take it on the second of April; it would be furnished, all the things was necessary for Mrs. Drischman for the needs of the house; the chairs and the bed spring was missing and the dishes what was necessary on the table. She asked if the range was a good baker, and Mr. Downs said, "Yes, it is a fine baker;" and about the heater, Mr. Downs said, "Yes, it is a good heater;" and she asked about the sun parlor and so forth.

Q What do you mean by "so forth"?

A That is all at the present time.

Q That is all at the present time?

A Yes, all the conversation had at that office.

Re-direct examination.

By Mr. Bourgeois:

Q Now, Mr. Miller, which conversation is it that you just related, the conversation had with Mr. Downs when the \$50

was paid or the conversation that was had with Mrs. McMamin when the \$400 was paid?

A Why, the conversation with Mrs. Drischman and Mr. Downs at the time that they paid the \$50.

Q And the other conversation was at the time that the \$400 was paid?

A Yes, sir.

Re-cross examination.

By Mr. Cole:

10 Q You say that you were present when the \$50 was paid?

A I didn't see Mr. Downs. I give her the money right in the kitchen and they paid it in the dining room.

Q You mean in the kitchen of this house?

A The kitchen of 25 South Virginia Avenue.

Q Who was present at that time?

A Mrs. Drischman and Mr. Shedaker.

Q Mr. Downs wasn't present?

A No, sir.

Q Now, that is when the \$50 was paid?

20 A Yes, sir.

Q And that is when the agreement was made for leasing the property?

A The leasing of the property. The \$50 was paid so Mrs. Drischman would get the house.

Q How long was she getting it for?

A For the summer and winter.

Q How much was she to pay for it?

A \$1200 for the summer, \$300 for the winter.

Q That happened while you were there at 25 Virginia  
30 Avenue?

A That happened when she paid the \$50.

Q Now, who was it paid to?

A Mr. Shedaker.

Q Now, what was the conversation between Mr. Shedaker and Mrs. Drischman at that time?

A I don't know what. She asked me—

Q I didn't ask you that. What was the conversation between Mr. Shedaker and Mrs. Drischman at that time?

A I couldn't tell you.

Q Didn't you hear it?

10

A No, sir.

Q Then you don't know what it was?

A No, sir.

Q But that was the time the property was leased?

A That was the time she paid down the \$50 for the property.

Q Did she get a receipt?

A She brought me in a receipt and showed it to me.

Q Did you read the receipt?

A I read the receipt.

20

Q What did the receipt say?

(Objected to.)

Re-direct examination.

By Mr. Bourgeois:

Q Now let me get these visits straight. You first went with Mrs. Drischman down to Downs & Shedaker's office?

(Objected to as leading; question overruled.)

Q Mr. Miller, you stated that you saw Mr. Downs and

Mr. Shedaker in their office. When was that that you saw them there?

A It was in March.

Q In March?

A Yes, sir.

Q Was it before Mr. Shedaker was up in the kitchen of 25 South Virginia Avenue?

A That was afterwards.

Q It was after?

10 A That was afterwards. I saw Mr. Downs and Mr. Shedaker in his office.

Q And then you saw Shedaker afterwards up at 25—

Mr. Cole: He didn't say that.

(Objected to as leading.)

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MRS. MARY M. DRISCHMAN, re-called.

Direct examination.

By Mr. Bourgeois:

Q Mrs. Drischman, will you state to the jury just the order in which these visits were made by you to Downs and  
20 Shedaker?

(Objected to on the ground that the witness has related this several times.)

Mr. Bourgeois: I re-call her for the purpose of showing just exactly the order in which the visits were made to Downs & Shedaker's office as regards the payment of the \$50 and then the further payment to Mrs. McManemin.

A I went to Down & Shedaker's to see Mr. Downs about the house, and Mr. Shedaker took me through the house, and after I went through I came back to my former house opposite, 25, and then Mr. Miller came in with some meat and I didn't have the money to pay him just then, and he said I would have to pay \$50 to bind the bargain; and I asked him about the winter house and I paid him \$50 to bind the bargain.

Mr. Cole: I object and ask that it be stricken out, and all the testimony that was had between Mr. Downs, because it 10 appears that the whole transaction was closed upon the payment of \$50 to Mr. Shedaker, and there is no proof that Mr. Shedaker had any authority to bind Mrs. McManemin in this case.

(Mr. Bourgeois replies.)

(Motion refused.)

Q Do you know whether or not, at the time you went to Downs & Shedaker's office and at the time that Mr. Shedaker went up and showed you the house, that Mr. Downs and Mr. Shedaker were partners? 20

(Objected to as irrelevant. Question allowed.)

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

Q Do you know?

A Yes, sir.

Q Were they or were they not?

A Yes, sir, they were; but I made my arrangement with Mr. Downs.

Re-cross examination.

By Mr. Cole:

Q Well, you paid the \$50 to Mr. Shedaker?

A Yes, sir; but I made all my arrangements with Mr. Downs. Mr. Downs told me if I wanted the house to pay him.

Q And you paid Mr. Shedaker in your own home, 25 South 10 Virginia avenue?

A Yes, sir.

Q And Mr. Downs wasn't there?

A Yes, sir.

Q Then you had some conversation with Mr. Shedaker about renting the property?

A No, sir; I had it all with Mr. Downs.

Q Then you didn't have any conversation with Mr. Shedaker?

A Only at the house.

20 Q At what house?

A At 25.

Q What conversation had you there with Mr. Shedaker?

A I asked him if Mr. Downs would agree to all of this and whether he was the agent, and he said yes, he and Downs were partners.

Q So you did close the transaction with Mr. Shedaker when you paid the \$50?

A No; I had it all with Mr. Downs. I only asked him if they were partners.

30 Q How do you know they were partners?

A Mr. Shedaker told me.

Q Is that the way you know it?

A Yes, sir.

Q Because Mr. Shedaker told you?

A Yes, sir.

Plaintiff rests.

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### DEFENDANTT'S TESTIMONY.

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EVERITT M. DOWNS Sworn.

Direct Examination.

By Mr. Cole:

10

Q What is your business?

A Real estate business.

Q Were you in that business in March, 1900?

A Yes, sir.

Q Do you know John C. McManemin?

A Only slightly acquainted with him.

Q I didn't ask you that. I asked you if you knew him?

A Yes, sir; that is the gentleman there. (Indicating.)

Q Did you know him on the 20th day of March, 1900?

A About dates, Mr. Cole, I would not be positive. I met 20 with the gentlemen in my office, but at what time, I wouldn't like to swear that I had met him at that time.

Q Was it before or after the leasing of the premises 24 South Virginia avenue to Mary M. Drischman?

A I never saw the gentleman to my knowledge, to the best

of my belief until after the leases were signed by him.

Q You know Mary M. Drischman?

A We had corresponded together, but not to know him personally.

Q You know Mary M. Drischman?

A Yes, sir.

Q Was the leasing of the property in question, 24 South Virginia avenue, done through you?

A There had been a great deal of conversation between 10 Mrs. Drischman—Mrs. Drischman came to me and looked to me, she said,—

Q Was the leasing done through you?

A Practically the verbal conversation was between me, but the money transaction, the first money transaction if I remember rightly, was paid to Mr. Shedaker, I am positive, the first time, with my approval.

Q Was the agreement for the leasing of the property to Mrs. Drischman finally put in writing?

(Question objected to; question allowed; exception noted for 20 plaintiff.)

A Yes, sir. Who drew the lease I don't remember.

Q That is answered. Now I show you what purports to be a lease to Mary M. Drischman for the property, and I ask you whether that is the agreement that was finally put in writing for the leasing of the property?

(Objected to; question allowed; exception noted for plaintiff.)

A I drew this lease myself, and under the best of my ability

and judgment at that time drew it purporting for the owner and acting as agent for the owner.

Q (Question repeated.) Answer that yes or no, won't you?

A Yes, sir; it was.

Mr. Cole: I offer this in evidence.

(Objected to; objection overruled; exception noted for plaintiff.)

(Lease marked Exhibit D 2.)

Q Do you know where this lease was executed by Mary M. Drischman? 10

A I drew the lease in my office. I drew that lease in my office.

Q I ask you if you know where it was executed by Mrs. Drischman?

A Let me see it and maybe I can identify it. Mr. Cole, I wouldn't swear to that, because I see Mr. Shedaker has witnessed that.

Q Then you don't know?

A I don't know definitely; I think it was in my office; I would not be sure of that. 20

Q Do you know what became of the duplicate of that lease?

(Objected to as irrelevant and immaterial; question allowed; exception noted for plaintiff.)

A The duplicate of that lease? Well, put me on my oath and I wouldn't be able to say what became of it. It was presumed to have been delivered to Mrs. Drischman. 30

Q Do you know whether a copy of that lease was delivered to Mrs. Drischman?

A I wouldn't be able to swear to that, because I don't remember whether I delivered it or Mr. Shedaker did. I knew I drew a copy of that and it was to be delivered, but who delivered it I couldn't say. I haven't the knowledge of whether I delivered it myself or whether Mr. Shedaker did.

Q How came you to draw that lease?

A I drew that lease from instructions, as I thought, to the  
10 best of my knowledge and belief, as coming from the owner directing me to draw that lease, by letter.

Q That is, the owner of the property, you mean?

A So represented to me at the time, at least I understood that way; I didn't learn differently until later on.

Cross-examination.

By Mr. Bourgeois:

Q Mr. Downs, who did you understand to be the owner of that property at the time you drew the lease?

A I understood that Mr. McManemin was. I had heard  
20 both names connected with it. I first had heard Mrs. McManemin's name. Whether she was a widow or married lady I didn't know at the time.

Q And at the time you drew the lease you understood that John C. McManemin was the owner?

A Yes, sir; at the time. How I got that inference I don't know, but I understood so because all our correspondence had been made with Mr. John C. McManemin.

Re-direct examination.

By Mr. Cole:

Q Now, Mr. Downs, do you know whether the leases were signed by Mrs. Drischman before or after they were signed by Mr. McManemin?

A I think they were signed by Mr. McManemin first. If my memory served me correctly, Mr. Shedaker went all the way to Philadelphia to get Mr. McManemin's signature to those leases first, and I had to have his signature first to meet with his approval as owner.

Q I show you a letter dated at Atlantic City, March 20th, 1900, from Downs & Shedaker, addressed to Mr. John C. 10 McManemin, and ask if that letter went through your office.

A I think so. At the same time I never saw the letter before. I recognize this as being Mr. Shedaker's writing.

Q He was your partner?

A Yes, sir.

Q It is on your letter head?

A Yes, sir. Mr. Shedaker wrote that letter.

Q After reading it do you want to change your testimony as to the execution of the leases?

A No, sir.

20

Q Why, not?

A I say, if my memory serves me correctly, he went there.

Q Do you know whether Mr. Shedaker went to Philadelphia or not?

A He told me so.

Q Is that the only way you know?

A That is the only way.

Q Don't give us testimony of what somebody tells us.

A He is my partner.

Q He cannot make hearsay testimony.

30

A He went up to Philadelphia and took the money and brought the receipts back and showed me, and I have the re-

ceipts on file where Mr. McManemin received the money, unless he forged the receipts.

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MRS. MARY M. DRISCHMAN, re-called.

Direct examination.

By Mr. Cole:

Q From whom did you get the lease, written lease, for the property, 24 South Virginia Avenue?

(Objected to because there is no written lease between the plaintiff and defendant for that property, and any other written lease has no bearing on the case. There has been no written  
10 lease shown in this case between the plaintiff and defendant for that property.)

The Court: I will allow him to show from whom she received that paper.

(Exception noted for plaintiff.)

A I received it from Mr. Downs at his office.

Q Did you go to Mr. Downs' office to get it?

A Yes, sir.

Q Where did you sign your name to that lease?

20 A Mr. Downs' office.

---

No cross-examination.

JOHN C. McMANEMIN, sworn.

Direct examination.

By Mr. Cole:

Q Mr. McManemin, are you the John C. McManemin named in the lease marked Exhibit D 2?

(Objected to because Exhibit D 2 is between parties different from those in this suit, and whether he is or is not the person is immaterial and irrelevant. Question allowed. Exception noted for plaintiff.)

A That is my signature.

Q Can you say whether the lease had been executed by 10 Mary M. Drischman, the plaintiff, before it was executed by you?

(Objected to, because the question is about a lease between parties other than those in this suit, and therefore it is immaterial and irrelevant as to when it was signed. Objection overruled. Exception noted for plaintiff.)

A That lease was executed before I signed.

Q That is, executed by Mary M. Drischman?

A Yes, sir.

Q Where did you execute it?

20

A In Downs & Shedaker's office.

Q And did you deliver the lease there?

A I delivered the lease to Mr. Shedaker.

Q Did you, at the time of the delivery of the lease, receive any money from Down & Shedaker on account of the renting of the property?

(Objected to as irrelevant and immaterial.)

A I did not, at the time.

Q Mr. McManemin, did you have to do with the purchase of goods for use in 24 South Virginia Avenue while Mrs. Drischman was in possession?

(Objected to; question allowed; exception noted for plaintiff.)

A Yes; I purchased goods.

Q Do you know what goods you purchased?

A I have a list of them.

Q Will you produce that list?

10 (Paper produced by witness.)

Q From whom, if any one, did you get a list of articles required for the property?

A From Mr. Downs. Mr. Downs wrote me a personal letter from the Hotel Edison.

Q Then the goods that were procured were procured under the request made by him?

A Yes, sir.

Q Now, I hold in my hands some bills, a list of articles, and I ask you what they represent.

20 A Why, they represent some cooking utensils and things that were sent down there.

Q Down where?

A Down to Hotel Sorrento, 24 South Virginia Avenue.

Q Do you know when those goods were sent?

A No; I couldn't tell that. When I purchased the goods I asked her to send me an acknowledgment of the receipt of the goods.

Q Did you write her a letter about the goods?

A I wrote her a letter about these goods here, Wana-  
30 maker's goods.

Q Will you produce that letter?

(Letter produced.)

Q I show you what purports to be a letter from you to Mrs. Drischman, and ask you whether that is the letter that you referred to about the Wanamaker goods?

A That is the letter.

(Letter offered in evidence and marked Exhibit D 3.)

Mr. Cole: The letter reads:

“July 9th, 1900.

Mrs. Geo. Drischman,

10

No. 24 So. Virginia Avenue,

Atlantic City, N. J.

Dear Madam:—

I have ordered of John Wanamaker this day, to be delivered to you at Hotel Sorrento, a list of dishes and cooking utensils, furnished by you to Mr. Down, to wit:

7 doz. individual vegetable dishes,	
5 “ “ meat “	
5 “ “ butter “	
6 “ glass goblets,	20
1 “ glass sugar bowls,	
2 “ glass salt cellars,	
2 “ glass pepper shakers,	
2 “ cups,	
2 “ saucers,	
15 breakfast plates,	
10 dinner plates.	

KITCHEN UTENSILS, VIZ:

- 1 large coffee pot (6 qt.),
- 1 " tea " (5 qt.), this is largest made.
- 1 " frying pan,
- 1 oyster fryer,
- 1 collender,
- 1 rolling pin,
- 2 soup pots (4 ½ gal. each).

The chairs, bed spring and vinegar cruets will be delivered  
10 the latter part of this week.

Kindly communicate with me immediately upon the receipt  
of goods, informing me as to breakage, etc.

Yours truly, JOHN C. McMANEMIN.

Q Have you the list you secured through Mr. Downs?

(Paper produced.)

Q Is the paper you hand me what you received from Mr.  
Downs?

A From Mr. Downs, yes, sir.

Q Do you personally know where and how Mr. Downs  
20 secured this list?

A Why he says in his letter here that he secured that from  
Mrs. Drischman.

Q Do you know from your own knowledge?

A No; not other than what he told me.

Q Did you secure and send the articles as comprised in this  
list?

(Objected to; objection overruled. Exception noted for  
plaintiff.)

A There was some little irregularity in the quantity of things

when the list was made up; there was only a matter of two or three to make the dozens even.

Q Can you at this time state in just what particular there was a change between the list as sent and the list as required by Mr. Downs?

(Objected to, as it is not a question of what was sent, but what was delivered.)

Q What do you know about the delivery of these goods?

A I know nothing at all about it. As I say to Mrs. Drischman, "Kindly communicate with me immediately on receipt of goods as to breakage, etc.," I judge from no answer that she received all.

Q In what number, if any, was there a variance between the list as they appeared in the letter that you sent to Mrs. Drischman and the list as shown on the slip from Mr. Downs?

(Objected to on the same grounds as before; objection overruled. Exception to plaintiff.)

A Why, just changes like where they would have seventy-five articles we would just make it seventy-two or seventy-eight to make the even dozen or dozen and a half. 20

Q For instance, twenty dining room chairs, were they sent?

A No; they were never sent. It was one of the things on the list that were not delivered.

Q Will you please state what they were?

A Well, dining room chairs and one bed spring for servant's bed in the basement; they were not sent.

Q What else, if anything?

A That is all I can see on that.

Q Mr. McManemin, did you ever have a demand from Mrs. Drischman for goods to go in that house after you had written 20

the letter that has been offered in evidence?

A I couldn't say that for certain.

Q You don't know personally?

A I don't know personally.

Q Did you ever have any conversation with Mrs. Drischman about the terms upon which this property was rented?

A No; Mr. Downs had that in charge. I had him to represent me in Philadelphia. I have charge of the estate in Philadelphia and in Atlantic City and I just got him to represent  
10 me here on account of being on the premises.

Q Did you put this property in Mr. Downs' hands?

A I had the property in Mr. Downs' hands.

Q Did you give to Mr. Downs or to Downs & Shedaker any authority to make for you a contract of letting other than the written contract here in evidence?

(Question objected to. Objection overruled. Exception noted for plaintiff.)

A No; they were authorized to just make up the simple form of lease. If there was any special contract to be embodied in  
20 it it was to be submitted to me. The lease has some written contracts in it as to some clauses.

(Objected to as irrelevant and not responsive.)

Q Now were there other articles furnished for the property while Mrs. Drischman was in possession other than those which were sent from Wanamaker's?

(Objected to. Objection overruled. Exception noted for plaintiff.)

A Yes; there was a list of articles purchased by my mother.

Q Have you personal knowledge of that purchase?

A No; I have not.

Q Your mother knows about that?

A Mother knows about that.

Q Do you know anything about their delivery?

A No; I do not.

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Recess till 1.45 P. M.

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Trial of the cause resumed at 1. 45 P. M.

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JOHN C. McMANEMIN, Resumed.

Direct examination. (Continued.)

10

By Mr. Cole:

Q Mr. McManemin, how is this house heated?

A Why, it is heated by hot air.

Q What is the size, if you know, of the heater?

A Why, I couldn't say.

Q Do you know how many rooms are heated? That is, how many rooms where the hot air goes in through the registers?

A No; I really could not say that.

Q Do you know when Mrs. Drischman secured the keys of 20 this property?

A No: Downs & Shedaker, I believe, got a permit to open the door to show Mrs. Drischman the property.

Q Well, do you know whether she had the keys on the 1st of April of 1900?

A No; the lease was the 2nd of April.

Q Do you know whether she had the key on that day or not?

A No; I couldn't say that.

Q Now did you have any conversation with her or did you overhear any conversation by her respecting her going in possession on the 2nd of April.

A Well, as I understand from the correspondence that Messrs. Downs & Shedaker and I had—

10 (Objected to.)

Q I don't care about that. What she said, if anything, about going into possession.

A I was leading up to that by saying she wanted to go into that by the 2nd of April.

(Objected to.)

Q Can you tell what you heard her say?

A She said she had wanted to get in there to open for the Easter season, but that she had changed her mind, and that she would get in as soon as the house was—the paint was—  
20 dry, and different things of that sort.

Q Where was it she said this?

A She said that to me as I was going in the house next door. That was before Easter.

Q That is, in Atlantic City.

A In Atlantic City.

Q At that time what was being done to the property?

A Why, the house was being painted, front of the house.

Q Had the painting been finished at that time?

A I think the painting had been finished then, because the

boards were up to allow the people to walk in the front of the house.

Q Was there any reason why she should not have gone into possession at that time if she had wanted to?

A No, sir; none that I know of.

Q Was there any act on your part or on the part of your mother, as far as you know, to keep her out of possession?

A Not any.

Q When did you first hear of the claim by her for damages because she did not get possession on the 2nd of April? 10

A About the first week in August.

Q Was it before or after the institution of the suit?

A Why, that was the first I heard of it; I got a letter from Mr. Sypherd.

Q The attorney?

A Yes, sir; and I called at his office and he talked to me of a settlement on account of losses sustained by Mrs. Drischman, and I said I couldn't recognize any loss at all in the matter, that is, to the sum that he specified.

Q Had you, at that time, any claim or demand from her for 20 damages by reason of not getting into possession on the 2nd of April?

A No word of it at all. There was only one thing and that was a letter from her—well, that is not to me.

Cross-examination.

By Mr. Bourgeois:

Q Mr. McManemin, where were you when Mrs. Drischman stated to you that she had changed her mind about going in before Easter?

A I was just about going in the house, 22 South Virginia 30

Avenue, just right next door to the property that she occupied.

Q When was Easter of that year?

A Well, I couldn't tell that.

Q But you know about when, don't you?

A It was in the first part of April.

Q First part?

A Yes.

Q Isn't it the 15th of April?

A I do not remember the date at all.

10 Q When did you first meet Mrs. Drischman?

A I don't recall that.

Q Where did you first meet her?

A I think I first met her at the property, 24 South Virginia Avenue.

Q Do you know when she went in 24 South Virginia Avenue?

A No, I do not; not permanently. She was in there, off and on, before that.

Q What do you mean by saying that the house could have  
20 been occupied by her and there were boards up there?

A Why, in painting the porch, so the parties would not have to step on the paint, they put two blocks down and a board across for the parties to step on.

Q In order to pass over the newly-painted porch?

A Yes, sir.

Q Mr. McManemin, I call your attention to what purports to be a letter to you from Mr. Downs, and show you the front page of it, and ask you if that is the list from which you were testifying in your direct examination.

30 A No; the list I testified from was the typewritten list.

Q Did you testify from that list in your direct examination?

A I stated that that was what I made up my list from.

Q And Mr. Cole examined you from that list, didn't he,

and asked you if the twenty chairs had been delivered?

A Yes, sir.

Q The list that I show you is on page 3, and it is a part of the letter of July 5th, isn't it?

A It is a part of the letter.

Mr. Bourgeois: I offer in evidence this letter of July 5th.

(Offer objected to. Objection sustained. Exception noted for plaintiff.)

Mr. Bourgeois: I ask to have it marked for identification.

(Letter marked P. A. for identification.) 10

Q Were you ever present when some articles were delivered at Mrs. Drischman's place in the summer of 1900?

A No; I was there in the spring and ordered some goods that Mrs. Drischman desired.

Q Were you ever there about July when some articles were brought there?

A No.

By Mr. Cole:

Q What goods were delivered in the spring when you were there? 20

A Why, there was a list of goods. I think I have the list here.

Q You mean goods furnished by you?

A They were goods I purchased in Atlantic City and had delivered there by the men whom I purchased them from, and Mrs. Drischman refused to receive them.

Q Was she then in possession?

A Yes, sir.

Q Why did she refuse?

A She said they were not all that she wanted and she refused to take any part, she wanted the whole or nothing.

Q Then she wouldn't accept them?

A She wouldn't accept the goods at all.

Q Have you a list of those goods?

A I think I have here. This is the list here. (Producing paper.)

10 Q Did you have a bill for them?

A No; there was no bill made out.

Mr. Cole: We offer the list in evidence.

(Paper marked Exhibit D 4.)

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SARAH E. MCMANEMIN, Sworn.

Direct examination.

By Mr. Cole:

Q Mrs. McManemin, did you buy some goods, cooking utensils, that were furnished to the property, 24 South Virginia Avenue, while Mrs. Drischman was in possession?

20 A I did, sir.

Q Where did you buy them?

A I bought them at Marks'.

Q Philadelphia?

A Yes, sir.

Q And what became of them after you bought them?

A I bought also some articles for myself which were directed—what was to be given to her was directed—to 24

South Virginia Avenue, and what was to me was to go to 19 South Presbyterian in care of one of the tenants. I never got mine; I don't know where they were, and I could never understand how the thing was managed.

Q Did you get a list of the goods that you bought for Mrs. Drischman?

(Objected to on the ground that it is not a question of what was to be done; it was a question of what was delivered.)

Q I ask you whether you had a list of the goods that you bought to be delivered to the premises, 24 South Virginia 10 Avenue, while Mrs. Drischman was in possession?

A Yes, sir.

Q Now I show you a list of goods appearing on three sheets of paper, and ask you what list this is.

A These, I think, were what was intended for her.

By Mr. Bourgeois:

Q You said you think?

A Yes, sir.

By Mr. Cole:

Q Does that apply as well to the three pages or only to 20 one?

A I will look over them. (Examines papers.) I think these were all for her; I would not be positive.

Q That is, you mean the articles appearing on the three sheets that you have been shown?

A I think they was.

Q Can you say why those sheets that you have handled were separate from the other sheets, which are longer?

(Objected to as irrelevant, incompetent and calls for a matter of judgment.)

Mr. Cole: It may explain.

Mr. Bourgeois: It is irrelevant anyway.

Mr. Cole: The witness says she bought goods both for Mrs. Drischman and herself, which were ordered sent to 24. Now it may be that the articles were placed on separate pieces of paper in order to distinguish them from her own goods. Now, if that is a fact, I have a right to show it.

10 The Court: Were those bills made out at the store?

Mr. Cole: They were all made out at Marks' Brothers.

The Court: How can she tell then?

Mr. Cole: I don't know; maybe she can.

The Court: You may ask if she knows.

Q Do you know who made these lists up?

A I suppose the manager of the department; I don't know.

Q You don't know then?

A No, sir; I do not.

Q When you bought the goods did you give instructions  
20 specifically as to what goods were to be sent to Mrs. Drischman and what to you?

(Objected to and asked to be stricken out. Objection sustained.)

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

Q Mrs. McManemin, did you know the size of the heater that is in this property?

A It is a large-sized heater; I couldn't tell you the number. It is a very nice heater, and there are seven rooms that are heated by it.

Q You don't know the number of it?

A I couldn't tell you the number of it. I did hear, but I 10 have forgotten.

Q How many rooms were heated?

A Seven rooms—bedrooms.

Q How many rooms?

A Four on one and three on the other.

Q How many rooms, other than bedrooms, were heated?

A There was the two in the reception room and one in the little parlor and one in the dining room.

Q Were they all the rooms on the first floor?

A Yes, sir.

20

Q Was that all of the rooms on the first floor that were heated?

A First and second, with the exception of two additional bedrooms that were built very lately.

Q Had they been built at the time Mrs. Drischman took possession?

A Oh, no, before that.

By the Court:

Q You can't say of the second except two bedrooms?

A Yes, sir; that is, not the bath. That was the new addi- 80

tion on the second floor, but there was two bedrooms that were not heated, but the private bathroom and the toilet room wasn't heated, as it was one of the new additions.

By Mr. Cole:

Q What we want to know is just how many bedrooms on the second floor were heated.

A All but the two.

Q Now, do you remember the occasion when Mrs. Drischman paid you \$400?

10 A I do, indeed. I didn't ask her for the money.

Q Did you, at that time or any other time, agree with her—

Mr. Bourgeois: I object, as the question is leading.

Mr. Cole: No, it is not. It is a direct answer to your question.

Mr. Bourgeois: That don't make any difference. He is not cross-examining my witness.

Q Did you, at the time of the payment of the \$400 or any time prior, agree with Mrs. Drischman that you would put in a steam-table and build a sun-parlor to the premises?

20 A I did not.

Mr. Bourgeois: I object. Will you instruct the witness to simply keep quiet until you rule?

The Court: Madam, when the question is asked and objected to by the other side, just wait until the Court decides before you answer.

Mr. Bourgeois: I object to it because it is leading.

(Objection sustained.)

(Whereupon the defendant, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

Q Did you make any agreement with Mrs. Drischman respecting the leasing of the property at or before the time when the \$400 was paid?

A I did not.

Q Did you say to Mrs. Drischman, either at the time that the \$400 was paid you or before, that Mr. Down was your agent and that whatever he did he had authority to do?

(Objected to as leading. Question allowed.)

A I did not.

Q Did Mrs. Drischman, either at or before the time that she paid the \$400 to you, tell you that Mr. Down had rented the property to her for you, and that he had agreed to completely furnish it and provide chairs and articles of that character, cooking utensils, and that the house was a winter house?

A No; we had no conversation of that kind. 20

Q Did you ever say to Mrs. Drischman that the house was a winter house?

A I said there was a heater there, and had never been rented in winter before.

By the Court:

Q You mean never rented for winter use before?

A No.

By Mr. Cole:

Q What contract or agreement, if any, did you personally make with Mrs. Drischman respecting the leasing of the property?

A None at all. I had nothing to do with it.

Q Had you ever had any conversation with Mr. Downs respecting this property, the leasing of it?

A No, sir, not until I received the letter from the lawyer and then went down to give him the letter. My son here  
10 had—

Q Did you, at or before the time when this property was leased by Mr. Downs, give him any authority to make representations as to this property being a winter house or as to what was going to be furnished by you for the tenant?

A No, sir.

Q In whose hands did you leave this property?

A I gave it into the hands of my son and he employed the agent.

Q So you personally had no relations or dealings with Mr.  
20 Downs at all?

A No, sir; I had not.

Q Did you have a conversation with Mrs. Drischman respecting her possession of the property on the second of April?

A Mrs. Drischman came over to my house, and I was then preparing the house for occupancy. I told Mrs. Drischman, "I am very sorry, I am afraid I won't be able to give you—although you are to go in the house I won't be able to get the house entirely clean for you at the specified time." She said  
30 to me, "You needn't worry about that, because I don't expect to go in here yet, but in case I have any boarders I will place them—as the rooms are ready for them I will place them—

here to sleep, and they can eat over at the other house." That was her words to me.

Q Who, at that time, had the keys to that property?

A Why, I had them, but then it was me that gave her possession when I left on Saturday night; I gave them to her.

Q When was that?

A Well, I can't exactly tell the date, but I think my son would have remembered that on account of that incident that happened, you know.

Q Can you tell how long it was before she actually went 10 into possession?

A It was some time before Easter.

Q That you gave her the keys?

A Yes, sir.

Q Now, was the house in condition for her to go into it at the time she said she didn't care to go in?

A Yes, sir; it was. She had six tables with eight chairs, and plenty of chairs that she could have taken out of the room upstairs that the rooms weren't large enough for three chairs —and I thought by making a makeshift until she had really 20 got boarders for the season; and if she had come to me sooner I certainly would have supplied them.

Q Did she ever come to you before the time when she took possession of this property, and complain that she had guests that she had to turn away because she couldn't get possession?

(Objected to as irrelevant. Question allowed. Exception noted for plaintiff.)

A No, sir; she did not.

Q Did you, or any one for you, or was there provided 30 under the lease, lace curtains for the dining room?

A Mrs. Drischman asked me about that, and I said to her, "Mrs. Drischman, don't you think that it would be better not to have them, because you need all the air, because there are screens there," and she said, "I want them and I suppose I will have to buy them," and I said, "No, you needn't," and I supplied them.

Q How about for the parlor and office?

A The same were supplied.

Q And the portiere for the parlor door?

10 (Objected to. Question withdrawn.)

Cross-examination.

By Mr. Bourgeois:

Q Mrs. McManemin, were the goods that you purchased from Marks' Brothers, that you had intended to have sent to you on Presbyterian Alley, received by you?

A No, sir; not an article was received.

Q Do I understand you to say that you did not ask Mrs. Drischman to pay you the \$400 in advance?

A I did not.

20 Q How did it happen that she came to pay you?

A She came over, and we were getting the curtains and things ready for the house, and I was bothered and worried, and she spoke about the different improvements that had been made, and so on, and I said there were lots of things to be done, and I said, "Really, I am rather embarrassed and there are lots of things I want to do," and I said, "I would like to have a little steam table in the serving room and also make the porch up over the piazza and make it into a sun-parlor," and I said, "But I really couldn't do it now, not this year, and

maybe not next, and dear knows when, because I don't want to incur any further expense," and then we were talking over that this day and I was speaking about getting the place ready, and she said not to worry. So the next day she came over and she said, "I have \$500 in the saving fund now, that is, for my next payment, and you might as well have it," and I said, "Oh, I thank you very much, and I am not asking you for money, but I couldn't really do these things at all," but she said, "You might as well have the money now, as it is lying in the bank; you might as well have the benefit of it as the 10 bank." That is the words she said. And I said, "I am perfectly willing to receive the money when it is due." So the next day she came over. There was nobody in the house—not a person. This man that was testifying this morning was not about at all.

Q You are kind of getting off the track.

A No, I am not. And she came in and she said, "Mrs. McManemin, I have brought you the money." I said, "Oh, Mrs. Drischman, you are extremely kind and I really didn't ask you to do that," and she said I might as well have it, "I cannot give you \$500; I will give you \$400." I took the money and gave her a receipt.

Q And when did you give her the receipt?

A The very day she gave me the money.

Q At the same time?

A That is right.

Q Sure?

A Yes, sir.

Q Now let me call your attention to something; then if you are wrong you want me to correct you.

20

A I am not wrong.

Q Didn't she go over home and come back again and say, "Mrs. McMenamin, I would like to have a receipt for that

\$400," and didn't you say, "Now, there is no use of a receipt, there is no use of it at all," and then didn't she come back again and insist on you giving her a receipt, and then you gave her a receipt which is torn out of a book?

A No, sir. Did you expect her to give me \$400 without giving a receipt? I would consider that very foolish.

Q Isn't that the receipt that you gave her?

A That is the receipt.

Q And torn from a little pass-book?

10 A I did give her that receipt.

Q And on the evening of the day on which the money was paid?

A Not in the evening, but directly she gave me the money.

Q What time of the day was the money paid?

A I didn't look at the clock; it wasn't evening, though.

Q What time?

A I couldn't tell you that, sir.

Q In the morning or afternoon?

A That I couldn't exactly tell you.

20 Q Who was present when it was paid?

A A girl that I had at that time.

Q Where is she?

A She is in Europe now, visiting her mother.

Q Do you know whether it was morning or afternoon that it was paid?

A I told you I didn't remember.

Q You are sure this was given at the same time?

A I am positive of it.

30 Q Now, who was present when Mrs. Drischman came in to you and said, "You should not worry about your not getting her the place"?

A This same girl.

Q And she is in Europe.

A Yes, sir.

Q How long has she been there?

A I don't know whether she has been there a month or not. I expect her back again shortly.

Q Now, you say you gave her the keys some time before Easter?

A I did, indeed.

Q When was Easter?

A I can't tell you the day of the month, but I know there was Easter Sunday and Easter Monday. 10

Mr. Bourgeois: Will you agree that it was the 15th of the month that year?

Mr. Cole: I don't know. I will agree to it if it is a fact.

Q Mrs. Drischman, you got the whole \$1500 for the rent?

A Yes, sir; we got our rent.

Q And you got how much of it direct, yourself?

(Objected to as not cross-examination.)

A \$400 paid.

Q Did you get the last payment yourself?

A I did not. 20

Q Didn't your son get it?

A He certainly did, because I had given him power of attorney to do it.

Q And the \$500 came through Mr. Downs?

A I don't know where it came from, but I know it was received—\$425. He received his \$75 for commission.

Q What was the rental for the year?

(Objected to.)

The Court: She says \$1500, and she said she got it.

Q What was the rental price had for the season?

A I had expected to get \$1200.

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Mr. Cole: I want, at this time, to offer in evidence a file of this court in the case of Mary M. Drischman vs. Sarah E. McManemin, begun by summons attested the eighth day of August, 1900.

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MRS. SUE LAIRD, Sworn.

Direct examination.

10 By Mr. Cole:

Q Mrs. Laird, where do you live?

A 24 South Virginia Avenue.

Q In the premises that are in question in this suit?

A I do.

Q When did you get possession?

A The first day of April.

Q Of this year?

A This year, yes sir.

Q How long was that after Mrs. Drischman had surrendered  
20 possession, if you know?

A Well, I guess about two or three hours.

Q How did you find this house with respect to the sufficiency of dishes and cooking utensils?

A The house is fully equipped.

Q Was it at the time you took possession?

A With the exception of a very few articles.

Q What were they?

A The dishes—

(Objected to on the ground that the jury is not obliged to take this witness's opinion as to what amounts to the full equipment of a house.)

Q Can you tell the jury what you found in the house in the way of furnishings and cooking utensils when you took possession?

A As far as the dining room was concerned everything was there; in regard to chairs and tables and cooking utensils, there has not been anything bought for me at all.

(Objected to and asked to be stricken out as not responsive.)

Q Don't tell if anything has been bought for you; but tell what was there.

(Objected to.)

A Everything was there excepting a few dishes that have been supplied since.

Q What about the bedrooms?

A Everything is complete.

Q Do you know what the size of the heater is?

A I can't tell you.

Q Do you know how many rooms are heated?

A Seven rooms.

Q And what about the down stairs?

A The dining room and the office and exchange and the parlor.

Q Is that all of the rooms on the first floor?

A That is all.

Cross-examination.

By Mr. Bourgeois:

Q How many of those rooms have registers in them?

A Seven sleeping rooms.

Q How many rooms are there in the house?

A Twenty-three.

Q How many rooms on the third floor?

A Eleven.

Q How many rooms on the third floor have registers in them?

10 A Not any.

Q Have you had any fire in the heater this year?

A In the early spring.

Q Not this winter, not this fall?

A No.

Q Been any occasion for it?

A No.

Direct examination (Continued.)

By Mr. Cole:

Q Mrs. Laird; just come here again; I omitted to ask you a  
20 question or two. After you had taken possession of this  
property did you find any cooking utensils anywhere other  
than in the kitchen?

A There was quite a number stored in an outside box.

Q Where was the box?

A Outside in the back yard. That box was piled com-  
pletely full.

Q Of cooking utensils?

A Yes; just threw in and only rusty.

Q What did you do with them?

A Just left them remain there. I had no use for them. I had sufficient without.

Q You don't know, of course, how they got out there?

A I can't tell you that.

By The Court:

Q Where did you say they were, outside?

Q In a box outside of the yard, in the scrap-box.

By Mr. Cole:

Q Did you examine them with any care to learn their condition? 10

A They were not any use at all; there was rusty water standing in them. Some had been thrown in there and the water stood in them and rusted them, a great many things that appeared to me to be good when they were thrown there.

Q Did you find any dishes out in the yard; broken dishes?

A Yes, sir.

Q How many?

A Well, I couldn't tell you how many. There were different broken things in that box, different broken dishes.

Cross Examination. (Continued.) 20

By Mr. Bourgeois:

Q Do you know how long these cooking utensils had been out in the box?

A Well, I can't tell you that.

Q Did you find anything else around the yard excepting the cooking utensils and the dishes?

A No.

Q Didn't find any heater?

A No.

Q Nor registers?

A No.

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MRS. EMILY STEHLE, Sworn.

Direct examination.

By Mr. Cole:

Q Where do you live, Mrs. Stehle?

A 21 Presbyterian avenue.

10 Q How is that related to 24 South Virginia avenue?

A Adjoining yards.

Q Your house in the rear?

A My house in the rear, yes, sir.

Q Did you live there during the time that Mrs. Drischman was living at 24 South Virginia avenue?

A I did.

Q Have you ever been in 24 South Virginia avenue?

A I have.

Q Do you know anything about the size of the heater that  
20 is in that house?

A No, I do not.

Q Now while Mrs. Drischman was there did you have any occasion to observe cooking utensils or dishes that were brought out of the kitchen into the yard?

A I never saw any dishes brought out but I did see cooking utensils thrown away.

Q While she was in possession?

A Yes, sir.

A Was it done by her, do you know?

A Well, yes, I think sometimes there was. I saw her one day throw away a large coffee pot.

Q Did you ever see any broken dishes out in the yard?

Q Well, I couldn't say about broken dishes. I saw broken slop bowls in the barrels that were in the alleyway.

A That came out of that house?

A Came out of that house I suppose, yes; sir.

Cross-examination.

By Mr. Bourgeois:

10

Q Mrs. Stehle, what is it customary to do with broken slop bowls?

A Throw them away; I do.

Q And with old cooking utensils the same thing?

A Well; if I can't use them I throw them away. But those things I should have supposed I could have used.

Q But you didn't have an opportunity of examining them?

A I did.

Q How close were you to them?

A I saw them in the box that the other lady spoke about? 20

Q How close were you?

A I had them in my hand.

Q What did you have in your hand?

A Dinner boilers, three or four, four or five; tinware, jam dishes, flesh-forks, spoons—but I couldn't enumerate, the box was so full.

Q Do you know where they came from?

A Why, of course I didn't see her put them there—I didn't see anybody put them there.

Q You are a tenant of Mrs. McManemin?

80

A I am,

JOHN C. McMANEMIN, recalled.

Direct Examination.

By Mr. Cole:

Q Mr. McManemin, had you a conversation with Mrs. Drischman relative to goods that were supposed to have been shipped from Marks Brothers, Philadelphia, to 24 South Virginia avenue?

A Yes, sir; I was down there talking to her one time.

Q About when was that, if you know?

10 A Why, I couldn't say definitely the time. I go down to Atlantic City quite frequently during the year.

Q Where was the conversation?

A The conversation was held in her dining room.

Q What was it?

A It was to the effect that there had been a lot of goods sent there. I asked her if she had received it, and she said yes, there was a lot of stuff there that was useless as far as she was concerned. I mentioned the fact then that they were not for her own use, and she said the two boxes came in there  
20 and she opened them and she found a lot of stuff there that there was too much of the same kind.

Q Did she return the goods?

A No, sir; nothing of the kind.

Q You never got the goods back?

A No, sir.

Q Did she tell you what she had done with them?

A No, sir; just used them there, I guess.

Cross examination.

By Mr. Bourgeois:

Q Did you look around the premises, around the yard anywhere around there, after she left, to find out if those boxes were there?

A No, I did not.

Q Did you have any of your other tenants to look around to see if she could find them?

A No, I didn't have anything to do with it.

Q Did you look through the house to see if they were there?

A Yes, sir; the house was looked through and there was a 10 lot of articles that were not there.

Q Did you find any of the articles that you sent?

A Yes, some of the articles were there that we sent.

Q What articles did you find were not there?

A Really, I couldn't tell you that.

By Mr. Cole:

Q Could you tell by looking at the list?

A No, I am not very conversant with such articles, house utensils and things of that sort.

Defendant rests.

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#### PLAINTIFF'S TESTIMONY IN REBUTTAL.

MRS. MARY M. DRISCHMAN, recalled.

Direct Examination.

By Mr. Bourgeois:

Q Mrs. Drischman, Mrs. Stehle and another lady have just

testified that they discovered some broken cooking utensils and broken slop bowls in a box in the back yard. Do you know how those articles came there?

A Yes, sir.

Q How?

A I put them there myself.

Q Where did they come from?

A Came from my house opposite.

Q Which house?

10 A 25 South Virginia avenue.

Q Then you had them when you went there?

A Yes, sir; I used them as much as I could and after I bought the new ones I threw them away, and I had the yard all cleaned up and the man didn't take them away.

Q Did you throw away any of the cooking utensils or dishes that were in the house of Mrs. McManemin, that were there?

A No, sir.

Q Or that were ever sent there?

20 A No, sir.

Q Now Mr. McManemin has testified that he purchased a list of goods and they were sent to you and you refused to accept them—10½ dozen hotel vegetable plates, 5 dozen butter plates, 4½ dozen individual meat plates, 2½ dozen dinner plates, 4½ dozen salt cellars, 2 dozen goblets, ½ dozen vinegar cruets, coffee pot and tea pot. Will you state to the jury whether or not these articles were sent to you?

A A little boy came in with a small basket of dishes, with a coffee pot of one quart and a teapot of one quart, and the  
30 little boy said, "Here is dishes," and I said, "What is the name?" and he said, "I have no name." And Mr. McManemin said, "Why wouldn't you accept those dishes?" I said, "I won't accept of such a thing. I want the dishes I sent you a

list for or I want none. I can't use a teapot of one quart when I have sixty people in the house, or expect to have, to make that rent."

Q Did you have a conversation with Mr. McManemin, sometime before you went into the premises, I think, in which you said to him that you had changed your mind about going in before Easter?

A I never saw the gentleman until after I had been in the house maybe two or three weeks. He said, "I am Mr. McManemin and my mother sent me to see you about the 10 dishes."

Q Then this conversation that took place before you went into the house was with some other Mrs. Drischman?

A Well, I am the only Mrs. Drischman on the island.

Q And it was not with you?

A No, sir.

Q Mrs. McManemin also says she had a conversation with you on the second day of April in which she says you said she need not worry about having the house ready for you, that you could take the boarders and room them in 24. and 20 they could eat in 25.

A Mr. Bourgeois, I am too poor a woman to do that; I work too hard for my money.

Q Did you ever have such a conversation?

A No, sir; I wouldn't have made a mortgage on my property in Baltimore—

The Court: No; don't say that.

Q They have testified that a lot of things were ordered sent to you down there. What goods did you receive?

A Why, there were two boxes came there, and Mr. Miller 30 opened them and I found things in there that I didn't send

for, and I knew it wasn't my property, and I sent word to Mr. Robinson whether I should keep those things and use them, and I left them there in the cellar. They were there when I left.

Q And if they were intended for you, you never knew it?

A No, sir.

Q Now the statement is made that you received the keys for this property about Easter time. What was said to you when the keys were handed over to you?

10 A Mrs. McManemin said the house wasn't ready for me, but she would leave the keys with me to leave the painters go there and the men with the fire escapes and the men to fix the chairs.

Q What did you do with the keys in November?

A I gave them to Mr. Sypherd.

Q For what purpose?

A He told me to leave them there.

Q Mr. Sypherd's office is with whom?

A Mr. Downs.

20 (Objected to. Objection sustained. Exception noted for plaintiff.)

By the Court:

Q She said she left in November, and another of the witnesses spoke of her leaving April 1st. Did you go back again in the spring?

A No, sir; I never went near the house.

By Mr. Bourgeois:

Q Now Mrs. Drischman, Mrs. McManemin stated that you came and paid her \$400 voluntarily, that she did not ask you

for that money at all; was that true?

(Objected to. Objection sustained.)

Cross-examination.

By Mr. Cole:

Q What did you tell Mr. Sypherd, your attorney, when you delivered the key of these premises to him?

A I told him nothing. I simply gave him the key and told him I was going to Baltimore.

Q Do you know how the keys got back to Mrs. McManemin? 10

A I think he delivered them to Mr. Down?

Q Well, do you know?

A No, sir.

Q Don't you know that he didn't deliver them until April 1st?

A He didn't deliver them until April 1st, because I had my sign up, and kept my sign up, and I waited until the 1st to take it down, and I didn't take it down until the 2nd.

Q So you had your sign up there until the 2nd of April, 1901? 20

A Yes, sir.

Q Didn't you tell Mr. Sypherd, when you left possession, not to give up the keys until your lease was up?

A No, sir; I didn't tell him anything.

Q Then you had no conversation with Mr. Sypherd at all when you left the keys with him?

A No, sir. I had a conversation with him; he asked me where I was going and I told him I was going home, Baltimore.

Q Did you tell him when your lease expired?

A Yes, sir; the 1st of April.

Q Why did you tell him that?

A He asked me.

Q You didn't expect him, did you, to deliver the keys before your lease expired?

A I didn't know what he would do with them.

Q You didn't care, did you?

A The house was no good to me; I couldn't use it.

10 Q But you instructed him to deliver the keys up to Mrs. McManemin?

A No, sir; I didn't tell him to do a thing.

Q Mrs. Drischman, why didn't you answer the letter that Mr. McManemin sent you about the goods from Wana-maker's?

A I don't remember receiving any.

(Letter shown witness, Exhibit D 3.)

A Why, I did send him an answer to that.

Q Where did you address the letter?

20 A I addressed it to his office. I forget his address. I answered it the same day.

Q You answered it yourself, did you?

A Yes, I answered it myself, because all those things didn't come.

Q What did you say in the letter?

A Oh, I can't remember now. I simply told him one-half of the goods didn't come, and I told him what I received in the letter, which I told him about at Mr. Sypherd's office when I paid him the last \$500.

30 Plaintiff rests.

DEFENDANT'S TESTIMONY IN SURREBUTTAL.

JOHN C. McMANEMIN, re-called.

Direct examination.

By Mr. Cole:

Q Mr. McManemin, did you have a conversation with Mrs. Drischman about the letter you had sent respecting the goods from Wanamaker's, after you had sent the letter?

A I met Mrs. Drischman at the corner of North Carolina and Atlantic Avenues one evening, and I stopped and talked  
10 with her, and I asked her why she didn't reply to my letter; and she would give no excuse, and finally I asked her if she had received all the goods, and she said no, she hadn't, there were some goods missing; and I asked her for a list of them so I could make a complaint to Wanamaker's about it, and I have never received any list as yet.

Q Did she tell you why she hadn't answered the letter?

A No, she gave no reason for it at all.

Q Did she say, at that time, that she had answered the letter?

20 A She didn't make any assertion of that kind at all.

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No cross-examination.

Defendant rests.

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MARY M. DRISCHMAN, re-called.

Direct examination.

By Mr. Bourgeois:

Q Mrs. Drischman, I show you a receipt for \$400, which you paid to Mrs. McManemin, and ask you, did you receive that receipt from her immediately after you gave her the money?

A No, sir; I did not.

Q Where did you pay the money to her?

A In her kitchen.

Q And what did you then do?

10 A Then I went home.

Q What did you do when you went home?

A I thought about it and went back and asked if I got the receipt.

Mr. Cole: I object, on the ground that it is undertaking to rebut immaterial matter brought out on cross-examination.

The Court: I cannot allow it at this time except by consent.

Mr. Bourgeois: To contradict what his witness testified to on the stand?

20 The Court: You closed your rebuttal and Mr. Cole has gone in to rebut that, and at this stage of the case I cannot allow this witness to testify.

Mr. Bourgeois: I will ask for the privilege of showing by this witness, and by another witness, that the testimony offered by Mrs. McManemin, in which she stated that the receipt was given precisely at the time the money was paid, was untrue.

The Court: Do you want to consent to that, Mr. Cole?

Mr. Cole: My objection is there and the reasons for it not going in.

The Court: I will sustain the objection.

(Exception noted for plaintiff.)

Both sides rest.

#### CHARGE OF THE COURT.

This suit, gentlemen, is brought by MARY DRISCHMAN against SARAH E. McMANEMIN, to recover damages for the alleged failure of the defendant to furnish an adequate supply 10 of dishes and kitchen utensils for the use of a boarding house alleged to have been rented by the plaintiff of the defendant, and for the failure to provide a steam-table and a sun-parlor at said boarding house, and for the failure to deliver the same to the plaintiff on the second day of April, 1900, and for the failure to properly heat said house.

Plaintiff alleges that she rented the house in March, 1900, through the agency of Down & Shedaker, and that they, as the agents of defendant, agreed that the house should be furnished, delivered and heated as above. 20

Plaintiff alleges that the house was not delivered until May 3rd, that it was not fully furnished and equipped, and that it was not properly heated as the agents had promised it should be. She claims that, because of her failure to get the house on the second day of April, she lost twenty-eight boarders, who, she says, would have remained with her a week or ten days and would have paid her from ten to twelve dollars per week, and that she thereby lost the profit which would have resulted from said business.

She claims that afterwards the defendant, in consideration of the plaintiff's paying \$400 rent in advance of its maturity, agreed to provide the steam-heating table, the sun-parlor and the dishes and kitchen utensils above referred to, and that because of the failure to provide these things it was necessary for her to purchase dishes and cooking utensils at an expense mentioned by her in her testimony.

The plaintiff alleges also that, because of the house not being properly heated, she was obliged to close the same in  
10 November, several months before her term of one year had expired.

The defendant insists, first, that the property was rented by the plaintiff of John C. McManemin and not of her; and as proof of this the defendant introduced in evidence a lease in writing, dated March 20th, 1900, between John C. McManemin and the plaintiff, wherein the said John C. McManemin did grant and demise the property in question to the plaintiff for the term of one year from the 2nd day of April, 1900, for the rental of \$1500.

20 Now the primary question is, did the plaintiff lease the property in question of John C. McManemin and enter into possession thereof as his tenant under the lease in evidence. If so her contract was with him and her remedy for any failure to provide for the provisions and covenants of that lease must be against him and not against the defendant in this case.

If, however, you find that the plaintiff did not enter into possession of the said premises under that written agreement, but did enter by virtue of a verbal agreement with Downs & Shedaker, and that the defendant, Mrs. McManemin subse-  
30 quently ratified and confirmed the lease made by said agents by accepting the plaintiff as a tenant and receiving the rent, and that the defendant, in consideration of the payment of \$400 rent before its maturity, agreed to equip the house in the

manner claimed by the plaintiff, and that she failed so to do. then your inquiry will be, what damages, if any, has the plaintiff suffered because of such failure.

Plaintiff claims that the first agreement to fully furnish and equip the house as above mentioned was made by Mr. Downs, of the firm of Downs & Shedaker, who she says was the agent in the leasing of said premises. The witnesses for the defence deny this, and say that no such authority was ever given to Mr Downs to make such promises. If Downs had authority to lease this property to the plaintiff, he had no au- 10  
thority to promise additional improvements, unless expressly authorized so to do by the owner or her authorized agent, and I charge you as a matter of law, as requested by counsel for the defence, that third parties dealing with an agent are put upon their guard by the very fact, and do so at their own risk. They cannot rely upon the agent's assumption of authority, but are to be regarded as dealing with the power before them, and they must, at their peril, observe that the act done by the agent is legally indetical with the act authorized by the power.

So that if you find that the plaintiff entered into possession 20  
of this property under a verbal lease from the plaintiff, through the agency of Downs & Shedaker, you must inquire next whether Mr. Downs made the promises for the equipment of the house which the plaintiff alleges that he made; and if you find that he did make the representations alleged by the plaintiff as to the equipment of the house, as to what would be provided, and so forth, then you must next decide whether he was authorized by the owner to enter into such an agreement; because if he was not so authorized, then the plaintiff in this suit cannot recover against the defendant for the promises made by Downs. 30

If you find that Downs did not make, or that he made such representations without authority, then your next inquiry will be whether the defendant, in consideration of the payment of

\$400 rent before its maturity, agreed with the plaintiff to furnish such equipment.

I believe the testimony of the plaintiff as to the promises of the defendant at this time when the \$400 was paid is substantially the same as those said to have been made by Downs before the renting.

The plaintiff alleges that the defendant did make substantially the same promises that she says Downs had previously made and that the consideration of said promises was the payment  
10 by her of \$400 of the rent reserved some two months before it was due. The defendant denies this. She says there was some conversation about a steam table and a sun parlor; that while she said she would like to supply them, she could not do so for a year or two. She says that she told the defendant what rooms could be heated, and that the house had never been used as a winter house before.

Before there can be a recovery for the plaintiff, you must find, first, that she did not enter under the written lease in evidence, but as a tenant of the defendant, and that the agree-  
20 ment to equip was made by Downs with authority from the owner, or that if not so made, that the defendant herself afterwards, for a new consideration, namely, a payment of \$400 before its maturity, made the contract alleged by the plaintiff and that she failed to perform it.

If you shall resolve all of these points in favor of the plaintiff, then the next inquiry will be, what damages, if any, has the plaintiff suffered. She claims, first, loss of profit for twenty-eight boarders, for a period of seven or ten days, at the rate of \$10 or \$12 a week.

80 Now, if you find that she is entitled to recover, then it is for you to say what would have been the profit—the net profit from the boarders—for that period of time at the specified rate; remembering also, in considering that question, that the testi-

mony of the defendant's witnesses is that there was, in effect, a waiver of this right to enter on April 2nd. The plaintiff claims that she did not do that, and that she was entitled to the house then, and the defendant says that plaintiff said she did not care and decided not to open the house so soon. And before an allowance for a loss of profits on those boarders for that period can be made, you must decide first whether or not she had waived the right to take the house on April 2nd.

They claim also that there was an expenditure by the plaintiff of something like \$60—you will remember the sum for 10 dishes and cooking utensils, which the plaintiff says she had to furnish because of the neglect of the defendant to furnish them. Now, if you find that the defendant undertook to furnish these things and did not do it and the plaintiff found it necessary to do it herself in order to carry on the business, then she would be entitled to an allowance for that sum; remember also in deciding whether or not she is entitled to it, the testimony of both sides—because it is claimed by the witnesses for the defence that they did provide all that they had agreed to provide, I think, except one or two articles, a few 20 dining room chairs, I think, and some other things.

The plaintiff claims also a rebate of the rent paid from November 25th to April 2nd, because the house was not properly heated. What I have to say on that subject will appear from the requests to charge, which I will now consider.

The Court is asked by the counsel for the plaintiff to charge you:

1. If you find from the testimony given that the statement, "that the house was well heated and a good winter house," was made, and if you find that the said statement was a condi- 30 tion between the parties on which said leasing was based, then it becomes a warranty, and if not fulfilled the plaintiff is en-

titled to damages for its breach.

I charge that if those promises were a condition upon which the plaintiff entered, and if they were made by Downs by authority of the defendant, or if they were made by Mrs. McManemin, upon sufficient consideration, then that would be true.

2. If you find, from the testimony given, that the statement, "that if Mrs. Drischman would pay the four hundred dollars in advance, that Mrs. McManemin would put in a  
10 steam-table, build the sun-parlor, furnish the dishes and utensils," was made, and that the four hundred dollars was thus paid, then that would be a covenant, and if the defendant failed to perform her part of it, either in whole or in part, the plaintiff is entitled to recover.

I charge you that.

3. If you believe possession was to be given on April 1, 1900, and, through the fault of the defendant, possession was not given on that day, plaintiff is entitled to recover such damages or loss as she actually sustained during the time she was  
20 kept out of possession by defendant.

I so charge you, unless you find there was a waiver of the right to enter on April 2nd, as testified to by some of the witnesses.

4. If you find that the statement, "that the house was well heated and a good winter house," was made, and that said statement was a condition relied upon by the plaintiff when she entered into the lease, and you further find that said statement was untrue, then the plaintiff, upon learning the truth of the statement, has a right to rescind the contract and recover the  
30 money, or proportionate part thereof, paid upon the faith of

said false statement, or damages for breach of warranty.

I charge you that, if you find that these statements were made by defendant or by her authority.

5. The measure of damages is the actual loss sustained by the plaintiff, as proven to you.

I so charge you.

6. The lease between John C. McManemin and Mary M. Drischman does not preclude plaintiff from showing a contract between plaintiff and defendants, nor does it in any manner control or affect a contract made between plaintiff and defend-10  
ant.

I charge you that.

7. That former suit has no bearing on this suit, or on the right of the parties in this case.

I so charge you.

I am asked by counsel for the defence to charge you:

1. Since it appears that the plaintiff took possession of the premises under a written lease, all testimony relative to the contract of leasing by parol, before and at the time of the execution of written lease, must be eliminated.

20

That I refuse to charge you, because I have left it for you to say whether the entry was under that written lease or whether it was by virtue of a parol agreement, which is claimed by the plaintiff.

2. Since it appears that the lease under which plaintiff took possession was between plaintiff and John C. McManemin there can be no recovery against defendant for any breach of the contract of letting unless such breach was of a contract made

between the parties hereto after the written lease based upon a valuable consideration.

I refuse to charge that except as I have above stated.

3. Since it appears there is no evidence of any damage by reason of any breach of a verbal contract with defendant made after the written lease there must be a verdict for defendant.

That I decline to charge.

4. There can be no damages awarded by reason of a failure to provide dishes and cooking utensils.

10 I charge that except as to the actual expense of providing them. If you find that it was the duty of the defendant under her agreement to furnish such dishes and cooking utensils, and she failed to do it, then I charge you that she, the plaintiff, had a right to supply them at her own expense and recover the amount of such expense from the defendant.

5. There can be no damage awarded by reason of a failure to provide a steam table or sun parlor, because of want of testimony.

I so charge you. There has been no evidence in this case  
20 that I can recall that there was any damage suffered because of the lack of a steam table or sun parlor.

6. There can be no damages awarded by reason of the claim of lack of heat, because there is no evidence of damages.

I charge you that.

7. There can be no damages awarded by reason of the lack of heat, if proved, because there is no evidence of a contract of heating.

I decline to charge that. I will leave that for you to say, whether there was a contract to heat or not.

30 8. There can be no damages awarded by reason of lack of heat, if proved, because the testimony of plaintiff amounts to a mere expression of opinion or representation, in either of which events there could be no recovery.

If you should find that there was a mere statement or representation by the plaintiff as to the sufficiency of the heating apparatus that would be true.

Perhaps, gentlemen, the Court has not been as clear as it should be in the charge to you about any damages for failure to heat during the winter months and as connected with the subject of the statement of rent. I meant to charge you that if you shall resolve in favor of the plaintiff all points which I have raised, then in awarding damages; in assessing damages, there could be an allowance for, an abatement of rent, but 10 there should be no damages awarded for loss of business on that account during those winter months.

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#### DEFENDANT'S EXCEPTIONS.

The defendant excepts to so much of the charge of the Court as allows the jury to say under whom the plaintiff entered.

(Which exception is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

The defendant also excepts to so much of the charge of the Court as leaves it to the jury to say whether the defendant 20 ratified the agreement verbally claimed to have been made by Downs.

(Which exception is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

The defendant also excepts to the Court's allowing the jury to say whether Downs had authority, as there was no evidence of such authority and there was evidence that there was no

authority, and that evidence, not being impeached or contradicted, is conclusive in law.

(Which exception is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

The defendant also excepts to the Court's allowing the jury to take at all into consideration the question of the payment of the \$400, and as to whether that may not have formed a new consideration for the contract sued upon.

(Which exception is hereby allowed and sealed accordingly.)

10 ALLEN B. ENDICOTT, Judge. [SEAL]

The defendant also excepts to the Court's leaving to the jury to determine the damages by loss of profits.

(Which exception is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

The defendant also excepts to what the Court said respecting the expenditure for the dishes if the plaintiff thought it was necessary to carry on business, that it was a question for the jury to say whether it was necessary under the facts of the case.

20 (Which exception is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

The defendant also excepts to the Court's charging the plaintiff's first to seventh requests inclusive.

(Which exception is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, Judge. [SEAL]

The defendant also excepts to the Court's refusal to charge the first, second, third, fourth, seventh and eighth requests for the defendant.

(Which exception is hereby allowed and sealed accordingly.)  
ALLEN B. ENDICOTT, Judge. [SEAL]

The defendant also excepts to all that the Court said to the jury respecting the abatement of rent, after counsel had called his attention to what, to his mind, was a clear inconsistency in his previous charge.

(Which exception is hereby allowed and sealed accordingly.) 10  
ALLEN B. ENDICOTT, Judge. [SEAL]

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PLAINTIFF'S EXCEPTIONS.

The plaintiff excepts to the Court's charging the fourth, fifth and sixth requests of the defendant as charged.

ALLEN B. ENDICOTT, Judge. [SEAL]

NEW JERSEY COURT OF ERRORS AND APPEALS.

MARY M. DRISCHMAN,  
Plaintiff-Defendant in Error.

vs.

SARAH E. McMANEMIN,  
Defendant-Plaintiff in Error.

On Error.

Assignments of Error.

Plaintiff in Error makes the following assignments:

1. Admission of the evidence of Charles Miller as to whether or not the house was well heated.
- 10 2. Admission of the evidence of Drischman as to the rent of the property.
3. Admission of the evidence of Drischman as to her conversation with one Downs, respecting the renting of the house.
4. Refusal of the Court to strike out the testimony of Drischman respecting her conversation with Downs as to the character of the house, the condition of the range, etc.
5. Admission of testimony as to loss of profits by reason of not having possession of the property at the time alleged to  
20 have been agreed upon.
6. Admission of evidence as to the amount of money ex-

pended by plaintiff in the purchase of goods for use in the premises.

7. Refusal of the Court to admit lease between McManemin and Drischman.

8. Admission of evidence as to the partnership between Downs & Shedaker.

9. Statement of the Court to the jury, which allowed them to say under whom plaintiff entered into possession of the premises.

10. Statement of the Court to the jury, permitting them to say whether or not the defendant ratified the agreement verbally claimed to have been made by Downs.

11. Statement of the Court to the jury which allowed them to say whether Downs had authority to make the contract alleged to have been made.

12. Statement of the Court to the jury, allowing them to at all take into consideration the payment of the four hundred dollars as to whether or not they may have formed a new consideration of the contract.

13. The charge of the Court, leaving to the jury to determine the damages by reason of loss of profits.

14. The charge of the Court, which left the jury to find damages if they found the plaintiff thought it was necessary to purchase dishes to carry on business.

15. The Court's charging from the first to seventh requests, inclusive, of plaintiff.

16. The refusal of the Court to charge the first, second, third, fourth, seventh and eighth requests of defendant.

17. To what the Court said to the jury respecting abatement of rent after attention was called to his previous inconsistent statement.

THOMPSON & COLE,  
Attorneys Plaintiff in Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MARY M. DRISCHMAN, Plaintiff-Defendant in Error, vs. SARAH E. MCMANEMIN, Defendant-Plaintiff in Error.	} } On Error. } Joinder in Error.
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And hereupon comes Mary M. Drischman, the defendant in error, and says that there is no error, either in the record and proceedings aforesaid or in the giving of judgment aforesaid, and it prays the Court may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid may in all things be affirmed. <sup>10</sup>

G. A. BOURGEOIS,  
Solicitor and of Counsel with Defendant  
in Error.

EXHIBIT D 2.

LEASE.

John C. McManemin to Mary M. Drischman.

Dated March 20, 1900.

[Revenue Stamp.]

THIS INDENTURE, made the Twentieth day of March  
A. D. nineteen hundred

BETWEEN John C. McManemin, of the City of Philadel-  
phia, of the State of Pennsylvania, of the first part, and Mary  
10 M. Drischman, of the City of Baltimore, in the State of Mary-  
land, of the second part,

WITNESSETH, that the said party of the first part hath  
let and by these presents does grant, demise, and to farm let  
unto the said party of the second part, a certain furnished  
boarding house, known by the name of San Antonio, situate  
at No. 24 South Virginia Avenue, Atlantic City, New Jersey,  
with the appurtenances, for the term of one year, commenc-  
ing on the second day of April, 1900, A. D., and if, at the  
close of this year's lease, the tenant proves satisfactory, Mrs.  
20 Drischman has the privilege of perpetuating this lease from  
year to year for five straight years, at the rent or sum of  
Fifteen hundred (\$1500) dollars per annum, to be paid as fol-  
lows: Five hundred (\$500) dollars cash, Five hundred (\$500)  
dollars on the first day of July, 1900, Five hundred (\$500)  
dollars on the first day of August, 1900 A. D.

PROVIDED, that if any rent shall be due and unpaid, or  
if default shall be made in any of the covenants herein con-  
tained, then this lease shall be void, and it shall be lawful for

the said party of the first part, without notice and without any demand for said rent, to re-enter the said premises, and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof, or otherwise, however.

AND the said party of the second part does hereby covenant and agree to and with the said party of the first part, to pay the said rent in the proportions and upon the conditions aforesaid; and not to assign this lease and not to underlet said premises, or any part thereof, nor permit any person or persons to occupy the same, or any part thereof, nor use or 10 permit any part thereof to be used for any other purpose than a boarding house,

Designating to the said lessee the privilege of using the name Sorento instead of San Antonio, nor make or suffer to be made any alteration therein, without the written consent of the said party of the first part; and also at the expiration of the said term, to yield up and surrender the possession thereof with the appurtenances, in as good a state and condition as the same are now, or may be put into by the said party of the first part, reasonable wear and tear thereof and accidents hap- 20 pening by fire or other casualties excepted.

AND said lessor covenants to furnish the house complete, with adequate dishes and cooking utensils, also to provide lace curtains for dining room, parlor and office, also portier curtain for parlor door.

AND to erect a suitable fire escape on house.

AND the said party of the first part does covenant that the said party of the second part, on paying the said rent, and performing the covenants aforesaid, shall and may peaceably and quietly, have, hold and enjoy the said demised premises for 30 the term aforesaid.

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

SIGNED, SEALED AND DELIVERED }

IN THE PRESENCE OF

JOHN C. MACMENAMIN, Agent. [SEAL]

MARY M. DRISCHMAN. [SEAL]

WITNESS TO BOTH SIGNATURES: }

H. P. SHEDAKER,  
Witness.

10 IN CONSIDERATION of the letting of the premises described in this Lease, and of the sum of one dollar to in hand paid, do hereby become security for the punctual payment of the rent and performance of the covenants mentioned in said Lease, to be performed by and if any default shall be made therein do hereby promise and agree to pay unto the said such sum or sums of money as will be sufficient to make such deficiencies, and fully satisfy the conditions of such Lease, without requiring any notice of non-payment, or proof of demand being made.

GIVEN under hand and seal this  
day of 190 .

SIGNED, SEALED AND DELIVERED }

IN THE PRESENCE OF }

