Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

MICHAEL F. O'NEIL,
Plaintiff-Appellee,
vs.
FREDERIC M. P. PEARSE,
Defendant-Appellant.

On Contract.

Brief for Defendant-Appellant.

I. Eviction.

This is an appeal from a judgment of the Supreme Court affirming the judgment of the District Court of Newark on suit brought by the landlord against the tenant to recover rent.

The Defendant-Appellant claimed in the court below and in the District Court that by reason of his eviction from the premises and also by his surrender of the premises to the landlord he was not liable for the rent.

The State of Case on the appeal from the District Court was settled by the judge of the District Court and this State of Case appears on page nine of the present State of the Case on Appeal. On the facts, relating to the eviction claimed by the Defendant-Appellant, it appears that the Defendant-Appellant rented a portion of the building used by the Plaintiff-Appellee as a garage, namely a corner of a part of the building inclosed with a partition for a machine shop, and also the other corner immediately in front of the machine shop for the storage of automobiles. This space is noted in the diagram attached to the State of the Case as "A" and "B."

The Defendant-Appellant also had the right of ingress and egress to and from the machine shop and the portion used for the storage of automobiles at all times during the day and night. The Defendant-Appellant proved that another tenant encumbered the space used for the storage of automobiles leased by the Defendant-Appellant with tackle, blocks and falls, automobile trucks and vans in such a position near the entrance that the customers and agents and employees of the Defendant-Appellant were unable to bring in automobiles for repair, because of the congested condition. The Court also found that the Defendant-Appellant objected to the landlord about the conditions and that by reason thereof it was impossible for him to conduct his business.

While we recognize the rule set forth in the opinion of the Supreme Court, that the landlord is not responsible for acts committed by trespassers, we still contend that when these matters are brought to the attention of the landlord he is in a position to prevent such acts and does not then such interference become the act of the landlord and he is responsible.

There are a number of cases on this subject and we submit the following:

Edwardson v. *Lowry,* 17 L. R. A. 275, where it holds that

> "Any act done in violation of the right of the tenant without his consent, which deprives him of the beneficial use and enjoyment of a material part of the premises leased, will amount to an eviction. It is not necessary that the acts done should be of a permanent character only that the act shall consist of depriving the tenant of the full enjoyment of the premises or a part of it, or any appurtenances pertaining thereto."

See also *Weiler* v. *Pancoast,* 71 N. J. L., 414:

"According to decided cases, if a landlord lets apartments in his building to a tenant as a dwelling and then knowingly permits another part to be used for lewd purposes which render the tenant's apartments unfit for occupancy by a respectable family when he has legal power to prevent such use, and for that reason the tenant moves away, the conduct of the landlord becomes evidence of an eviction in answer to his claim for rent accruing after such removal."

And also citations quoted.

J. C. McCurdy v. *Wickoff,* 73 N. J. L., 368.

The obligation of the tenant to pay rent is set forth in *Taylor on Landlord and Tenant,* 6th Edition, Section 378, as follows:

"Rent is something given by way of compensation to the lessor for the use of the land and consequently the landlord's claim for rent depends upon this for a tenant ought not to make a return for a thing which he has not, but if the landlord wrongfully deprives the tenant of the whole or part of the premises, the tenant is discharged of the whole rent until the possession is restored."

Of course, the covenant of quiet enjoyment is always implied and as we see it, it is the duty of the landlord to give this to the tenant. If, through no fault of the landlord, a trespasser should interfere with the occupation by the tenant of the premises this interference, of course, can not be charged to the land, but if one of the other tenants, as is the situation in this case, interferes with the occupation of part of the premises by another tenant the duty is certainly upon the landlord to see that such interference is stopped, after

he has been notified. It appears in this case that the landlord was notified.

At the top of page ten of the State of the Case the following quotation is made from the facts found by the District Court:

> "The plaintiff rented the rest of the floor outside of the machine shop and space rented to the defendant to another person, who used the same for the storage of moving vans and delivery automobiles, when such vans and automobiles were not in use in their regular business, subject to the rights of the plaintiff and landlord to use such space for ingress and egress to the parts occupied by them respectively."

It appears from this that not only the Defendant-Appellant but also the landlord was in occupation of a part of the premises and necessarily the landlord had supervision over the manner in which the other tenant used the premises, so therefore it cannot be said that anything, which this other tenant did to interfere with the free right of ingress and egress by the Defendant-Appellant, was not within the knowledge or supervision of the landlord and we contend that it was his duty to see that our rights were protected.

See 71 N. J. L., 414, *supra.*

We also quote from *Ogden* v. *Sanderson,* 3 E. D. Smith, 166, New York, where it was held that

> "There is an eviction of the tenant when there is an interference with his possession of the premises or some part thereof by or with the consent of the landlord, by which the tenant was deprived of the use and free and full enjoyment without his assent."

The same principle is also discussed in the case of *Edgarson* v. *Page,* 14 How. Pr. 116.

Of course, the Court will realize that the State of Case was settled by the judge of the District Court and not by agreement between the parties and unfortunately no stenographer was present to take the testimony but we think that the Court will be able to glean from the meager facts set forth in the State of Case that there certainly was sufficient evidence to prove to the satisfaction of the District Court that the enjoyment by the Defendant-Appellant of the premises was materially interfered with, and that the Defendant-Appellant notified the landlord that the conditions were such that he, or his agents, were unable to conduct business in the premises.

The principle, which we have already set forth, is perhaps more clearly set forth in 24 Cyc. 1146 D.

> "Any interference by the landlord with the tenant's right to the enjoyment of the premises to the full extent secured by the lease, authorizes the tenant to abandon the premises and exonerates him from paying rent."

Taylor on Landlord & Tenant, Section 379, sets forth as a principle that

> "If the landlord, without the consent of the tenant, uses privileges appurtenant to the premises and which are not reserved in the lease, he is not entitled to collect rent."

See also 17 L. R. A. 275; 34 L. R. A. 550.

As authority for the contention that the tenant is entitled to quiet enjoyment of premises, we quote the following:

Taylor on Landlord & Tenant, 6th Edition, page 370a, Section 304, and cases cited.

While the citations from Cyc. apparently only refer to the acts by the landlord himself, we still

insist that by reason of his knowledge of the purposes, for which the building are used and his personal presence on the premises he comes within the rule as laid down in 3 E. D. Smith, supra. See again 71 N. J. L., 414.

24 Cyc. 1152, in the foot-note, on the question of the landlord preventing or obstructing the use of an easement says that

> "Such obstruction amounts to an eviction, which will suspend the payment of rent."

See also 38 Mo. App. 681; 39 L. R. A. 156; 22 L. R. A. 544.

Actual physical expulsion is not necessary to constitute an eviction, but any interference with tenant's beneficial enjoyment will amount to an eviction in law.

17 L. R. A. 275; *Dorand* v. *Chase,* 2 W. N. W. C. 609; *Briggs* v. *Thompson,* 9 Pa. 340. *Kelly* v. *Miller,* 94 Atl. 1055; 48 N. E. Rep. 781; 95 N. W. Rep. 688; 14 N. Y. St. Rep. 82.

In the case of *Metropole Construction Co.* v. *Hartigan,* 85 Atl. Rep. 313 (New Jersey), the following appears:

> "This Court has held that the fact that the tenant continued in possession of the demised premises after the commission of the alleged acts of eviction does not preclude him from setting up the claim of a constructive eviction in answer to the landlord's demand for rent."

Morris v. *Kettle,* 57 N. J. Law 218.
Meeker v. *Spalsbury,* 66 N. J. Law 60.
Hunter v. *Reilly,* 43 N. J. Law 480.

We think also that the Supreme Court in its opinion (page 15, line 15, et seq), erred when it considered that it could not disturb the findings of the District Court. The finding by the District Court "that there was no eviction by the land-

lord'' is a conclusion of law and not a finding of fact. A leading case on this subject is *Skally* v. *Shute,* 132 Mass. 367-370, which criticises *Upton* v. *Townsend,* 17 C. B. 30, and quoted in the Supreme Court opinion

> ''Generally the question whether the acts of the landlord in consequence of which the tenant abandons the premises amount to an eviction, is a question of law and includes the question whether they constitute proof of the intent.''

Another point, which seems to have been overlooked by the Supreme Court, is that there was nothing in the letter whereby the premises were lease (State of Case, page 5) which gave the landlord the right of re-entry. He did so however (State of Case, page 10, line 30).

Having re-entered, the tenant was relieved from further payment of rent.

The authority for this statement is found in the following cases:

Bockover v. *Post,* 25 N. J. L. 285-292.
Ocean Grove &c. v. *Sanders,* 68 N. J. L. 631.
Miller v. *Forman,* 37 N. J. L. 55.

II. Surrender.

The Defendant-Appellant went into the possession of the leased premises on the fifteenth day of March, nineteen hundred and fourteen, and paid the rent for the month of March and for the month of April. There was no rent due until the tenth day of May under the terms of the agreement between the parties (State of Case page 5).

The landlord, after the tenant left the premises, endeavored to rent the premises to someone else but was unable to do so. (State of Case page 9, line 35.) It does not appear in the facts found

by the District Court that the endeavor on the part of the landlord was made for the benefit of the tenant, and it must therefore be concluded that the efforts were made on his own behalf.

Furthermore, after the defendant had moved his material from the premises, the landlord himself took possession and requested one of the servants of the tenant to replace a work bench in the shop, which was done, and also to place a vize, which belonged to the landlord, on the bench, which thereby restored the premises to the same condition as they were before the tenant took possession (State of Case 10, line 30) because it also appears from the facts that the tenant took out the landlord's work bench when he moved in and put in another one belonging to him.

Our contention is that under these two circumstances, even though the facts set forth in the State of the Case are meager, it must be considered that the landlord consented to the tenant moving out, and this action on the part of the landlord, combined with the actions of the tenant in getting out, shows conclusively that a surrender of the lease was contemplated and was a matter of law agreed upon.

If it had appeared in the case that the landlord, after notifying the tenant, attempted to relet the premises on account of the tenant's liability for rent a different situation and legal proposition might arise. This, however, is not the fact.

We consider that the language used by the District Court that "there was no eviction by the landlord, nor was there any surrender by operation of law, as purely argumentative and not binding on the higher court as a finding of fact.

We understand that under the practice where the Court above reviews the decisions of the Court

below, that Court is only bound by the facts as actually found by the judge sitting as a jury, and that his conclusions of law are not binding.

"A landlord, who, after the abandonment of the premises by the tenant, re-enters and takes possession for himself without indicating to the tenant a purpose to hold him liable for the rent, accepts the abandonment as a surrender of the lease."

89 N. W. Rep. 196, Supreme Court of Iowa, 1902,

Armour Packing Co. v. *Des Moines Pork Co.*

"Resumption of possession by the lessor of the thing leased operates as a surrender of the lease and puts an end to the lessee's liability for future installments of rent, unless otherwise plainly provided."

114 Fed. Rep. 639, Circuit Court of Appeals. 6th Circuit 1902, *Lamson Cons. Store Serv. Co.* v. *Bowland;* and cases therein cited.

"It can hardly be questioned that the posting of a notice 'To Let' on the premises in the occupation by the defendant under the circumstances would be incompatible with the existing state or term. The plaintiff by posting a notice that the same was for rent thus by an affirmative act assumed dominion over the premises and must have deemed to have accepted the surrender."

80 N. Y. Sup. 747, Supreme Court 1903, *Crane* v. *Edwards.*

The following appears in the case of *Gay* v. *Peake,* 63 S. E. Rep. 650, Court of Appeals (Georgia) 1909:

"In this case the tenant expressed his dissatisfaction to the landlord and that they were going to move, to which the landlord replied

that 'They might do as they pleased, but that he would hold them for the rent.' Tenant left and the landlord allowed his son to move upon the place and charged him no rent."

In the case of *Kean* v. *Rogers,* 123 N. W. Rep. 754, Supreme Court of Iowa 1909, the following appears:

"It is also the general rule that an absolute and unqualified taking of the possession by the plaintiff shows an acceptance, unless the landlord indicates to the tenant at that time his purpose to hold him liable for rent. In this case the plaintiff's agent took such possession without a word to the defendant. It is true that several months thereafter he notified defendant that he intended to hold him for rent but when a complete surrender has taken place a lease cannot be revived by the action of only one party thereto."

It was held in the case of *Schmidt* v. *Vahjen,* 127 N. Y. Sup. 1038, Supreme Court 1911, that

"In the absence of an agreement, express or implied, to let on the tenant's account, the landlord can neither enjoy the use of the property nor donate it to another. He could not assume dominion, not delegated by the tenant, without impairing the tenant's right of enjoyment. The tenant, if obligated to pay the rent, was entitled to such sole control and beneficial use of the premises as flowed in the terms of letting."

In the case of *Buckingham Apartment House Co.* v. *DaFoe,* 80 N. W. Rep. 974, it appears that

"The tenant turned over the keys and the agent of the landlord attempted to re-rent the premises. These facts amounted to an acceptance of the surrender."

It appears in the case of *Gaffney* v. *Paul,* 61 N. Y. Sup. 173, that

> "It is a well established principle that the right to re-let after abandonment by the tenant rests in contract and does not flow from the mere relation of landlord and tenant."
>
> "Without an agreement either express or implied a landlord has no right to re-let demised premises and if he does so he cannot hold the lessee responsible for any loss of rent. He may accept or refuse to accept the surrender but, if he relets without the sanction of an agreement, the tenant cannot be held liable for future rent."

See also *Sedsinger* v. *Burke,* 38 S. E. Rep. 313 on attempted re-letting.

In the last paragraph of the opinion in the Supreme Court it states "If there had been, which there was not, evidence that the landlord attempted to re-let on his own account, the question would have been more difficult." The landlord certainly had no right to re-let for the account of the tenant as there is nothing in the lease, which authorizes him to do so.

It must therefore be presumed that his attempt to re-let the premises was done on his own account. All the cases seem to hold this and if there is any re-letting by the landlord without an agreement, it is on his own account. The following case in New York, recently decided, seems to sustain this proposition:

> "The lease from plaintiff to defendant was not introduced into evidence and we do not know whether or not it contained a clause providing that on defendant's default the plaintiff might re-enter into possession and re-lease the premises on defendant's account holding the latter responsible for any loss of

rent until the end of the term. We cannot assume that plaintiff re-took possession and released the premises under such an arrangement without any proof to that effect."

Barkley v. *McCue,* 55 N. Y. Sup. 608.

Counsel for the Plaintiff-Appellee has contended that the recoupment filed by the Defendant-Appellant is not permitted. The case of *Murphy* v. *Patten*, 85 Atl. Rep. page 56 is an authority to the contrary.

All of the authorities, which have been cited in this brief, have been examined and we feel that they sustain the contention on the part of the tenant that he was evicted from the premises and that he also surrendered the premises and that the landlord accepted the surrender.

We respectfully submit that judgment of the Court below should be reversed.

BURTON L. R. HARE,
Attorney for Defendant-Appellant.

FREDERIC M. P. PEARSE,
Of Counsel pro se.

New Jersey Court of Errors and Appeals

MICHAEL F. O'NEIL, Plaintiff-Appellee, vs. FREDERIC M. P. PEARSE, Defendant-Appellant.	On Contract.

BRIEF FOR PLAINTIFF-APPELLEE

The facts in the case are simple and require no elaboration.

We submit that the facts amply warrant a finding for the plaintiff-appellee as this is merely a case of an ordinary lease between landlord and tenant, the performance of the terms of the same by the landlord, and the failure to comply with the requirements of these on the part of the tenant.

From the facts as presented it is apparent that there was no eviction. A leading case on the subject in New Jersey is *Morris v. Kettle*, 57 N. J. Law, 218, in which the Court said, quoting the language of Jervis, C. J., in *Upton v. Townsend*, 17 C. B., 30,

> "the eviction must be not a mere trespass, but something of a grave and permanent character done by the landlord with

> the intention of depriving the tenant of the enjoyment of the demised premises;"

and it is also defined as an

> "act of a permanent character done by the landlord in order to deprive, and which had the effect of depriving the tenant of the use of the thing demised, or a part of it." (See also Cyc., 1366.)

Where the tenant, not under compulsion, but voluntarily, abandons the premises, there is no eviction.

> 24 Cyc., 1130.
> Peck v. Knickerbocker Ice Co., 18 Hun (N. Y.), 183.

Where a tenant continues to occupy the premises after the acts which constitute a constructive eviction, is a waiver of the eviction.

> Boston etc., a corporation v. Ripley, 13 Allen (Mass.), 421.

> "If, however, the tenant makes no surrender of the possession, but continues to occupy the premises after the commission of the acts which would justify him in abandoning them, he will be deemed to have waived his right of abandoning them and he cannot sustain a plea of eviction by showing that there were circumstances which would have justified him in leaving the premises. Hence, it has been held that there cannot be a constructive eviction without a surrender of possession. It would be unjust to permit the tenant to remain in possession, and then escape the payment of rent by pleading a state of facts, which, though conferring a right to

abandon, had been unaccompanied by the exercise of that right."

Lifferman v. Osten, 39 L. R. A., 156.

A surrender is the yielding up of the estate to the landlord, so that the leasehold interest becomes extinct by mutual agreement between the parties.

24 Cyc., 1366.

In order to constitute a surrender by act or operation of law the minds of the parties to a lease must unite in an intent to relinquish the relation of landlord and tenant, and they must execute this intent by acts equivalent to a stipulation to put an end thereto.

Dennis v. Miller, 68 N. J. Law, 320.

It is only when the minds of the parties to a lease concur in the common intent of relinquishing the relationship of landlord and tenant and execute this intent by acts which are tantamount to a stipulation to put an end thereto, there at once arises a surrender by act and operation of law.

Payne v. Hall, 82 Atl., 518, and cases cited.

Recoupment is not permitted as between landlord and tenant.

14 Vr., 480.

We submit that we have sustained our case and that judgment should be affirmed.

WILLIAM J. McFADDEN,
Attorney of Plaintiff-Appellee.

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Notice of Appeal.

(Filed June 16, 1915.)

New Jersey Supreme Court.

MICHAEL F. O'NEIL, *Plaintiff-Appellee,* *vs.* FREDERICK M. P. PEARSE, *Defendant-Appellant.*	*On Appeal from District Court of Newark.* *Notice of Appeal to the Court of Errors and Appeals.*

To William J. McFadden,
Attorney of the Plaintiff-Appellee:

TAKE NOTICE that the defendant-appellant appeals from the whole of the judgment on appeal entered in the New Jersey Supreme Court on the eighth day of June, Nineteen hundred and fifteen, to the Court of Errors and Appeals.

BURTON L. R. HARE,
Attorney of Defendant-Appellant.

FREDERIC M. P. PEARSE,
Counsel for Defendant-Appellant pro se.

Dated June 14th, 1915.

Grounds of Appeal.

(Filed July 1, 1915.)

Court of Errors and Appeals.

MICHAEL F. O'NEIL, *Plaintiff-Appellee,* *vs.* FREDERICK M. P. PEARSE, *Defendant-Appellant.*	*On Appeal from New Jersey Supreme Court to the New Jersey Court of Errors and Appeals.* *Grounds of Appeal.*

The following are the grounds of appeal in the above entitled action on the appeal by the defendant-appellant to the New Jersey Court of Errors and Appeals from the judgment of affirmance of the New Jersey Supreme Court entered on the appeal to the said Court by the defendant-appellant from a judgment of the First District Court of the City of Newark:

I. The Supreme Court erred in that it did not direct a reversal of the judgment of the District Court for the following reasons:

a. The judgment of the trial court was contrary to the weight of the evidence.

b. The judgment of the trial court was contrary to law.

c. There was sufficient evidence to show an eviction of the defendant-appellant.

Grounds of Appeal.

d. There was sufficient evidence to show a surrender by the defendant-appellant and an acceptance by plaintiff-appellee.

e. The trial court in failing to allow the amount claimed by the defendant-appellant in his recoupment.

BURTON L. R. HARE,
Attorney for Defendant-Appellant.

FREDERIC M. P. PEARSE,
Counsel for Defendant-Appellant pro se.

Dated June 28th, 1915.

Judgment Record.

NEW JERSEY SUPREME COURT.

MICHAEL F. O'NEIL, *vs.* FREDERIC M. P. PEARSE.	*Judgment Record.* *On Appeal.* *Affirmance.*

William J. McFadden, Attorney.

Pursuant to the statute in such case made and provided the said defendant, Frederic M. P. Pearse, appeals to the Supreme Court from the judgment entered against him in favor of Michael F. O'Neil, the transcript of judgment and state of the case agreed upon being in the words and figures following, to wit:

The plaintiff demands of the defendant the sum of five hundred dollars, for whereas the plaintiff and the defendant entered into a contract lease dated March first, 1914, a true copy of which is hereto annexed and made a part hereof, wherein and whereby the plaintiff leased to the defendant on the first day of March the north end of the building situated at Nos. 258-260 Halsey Street being the portion now partitioned off, and the remaining space to the front of the building, also the right of egress and ingress to any part of the building, and additional space for cars which may be brought in by the defendant or his agents or assigns for repairs, if any space is available, for a period of six months; that the defendant on or about the first day of June without good cause or justification, left the building, thereby causing a breach of the tenancy. This action

is brought to recover the rent due under the lease for the months of May, June, July and August, being two hundred and forty dollars, at the monthly rental of sixty dollars.

To the above named defendant:

Please take notice that judgment will be claimed for the sum of two hundred and forty dollars, together with lawful interest and costs of this suit.

WILLIAM J. McFADDEN,
Attorney for Plaintiff.

Dated October 14, 1914.

March 1, 1914.

Frederic M. P. Pearse, Esq.,
738 Broad Street,
Newark, N. J.

My Dear Sir:—

I hereby sub-let to you for a period of six (6) months from the date hereof, with the privilege of renewing for a further period of six months, at the same terms as herein specified, that portion of the building known as 258-260 Halsey Street, rented by me from Job DeCamp, Inc., and described as follows:—

The north end of said building, being the portion now partitioned off, and the remaining space to the front of the building; also the right of ingress and egress through any part of the building, and additional space for cars which may be brought in by you or your agents or assigns for repairs if any space is available. The gasoline tank now located in said space shall be under the direction of you or your agents or assigns, excepting that I shall have the right to take gasoline from the same upon paying the market price without profit to you or your agents or assigns, and you shall not enter into the business

of supplying gasoline or other automobile supplies without my consent.

I agree to supply all heat, electric light and electric power for running the machinery to be established in the space which you have rented, and you or your agents or assigns are to do all automobile repair work required by me, and I shall pay for the same the sum of Fifty (.50) cents per hour. If any work is brought into the shop by me from my customers, there shall be paid to me ten (10%) per cent of the amount received from any particular job, excepting that no percentage shall be allowed to me on the cost of parts which may have to be furnished, and the price for doing said work shall be fixed by you, your agents or assigns.

The rental for said space, including the other privileges hereby given, shall be the sum of Sixty ($60.) dollars per month, and the rent is to commence on the fifteenth day of March, nineteen hundred and fourteen, and a half months rent shall be paid up to the first of April, and thereafter the rent shall be paid monthly between the first and tenth day of each month.

You shall also have the privilege of an extension to the telephone and I will execute all necessary papers in order to have the name of your concern listed under the number. You shall pay the sum of Two dollars and fifty ($2.50) cents per month for local service, including the extension, and a strict account shall be kept of all out-of-town calls and the same to be paid monthly at subscription rates.

Yours truly,

MICHAEL F. O'NEIL.

I hereby consent to the above.

FREDERIC M. P. PEARSE.

First District Court of the City of Newark

MICHAEL F. O'NEIL,
Plaintiff,
vs.
FREDERIC M. P. PEARSE,
Defendant.

On Contract.
Recoupment.

The said defendant by way of recoupment claims of the plaintiff the sum of Five hundred ($500.) dollars, for that whereas the said plaintiff by reason of his failure to perform the terms of the agreement between the plaintiff and the defendant for free and uninterrupted ingress and egress to the machine shop rented by the defendant from the plaintiff interfered with the customers, workmen, and agents and employees of the defendant in bringing in and taking out automobiles which were to be repaired, and by reason of the said plaintiff blocking the entrance way to said machine shop with automobile vans and trucks, the said defendant, his agents and employees were unable to conduct the business of said machine shop and were compelled to seek other quarters and were unable to find any accommodations either on Halsey Street or in the vicinity of Halsey Street, the automobile district of the City of Newark, and were compelled to remove their machinery and other apparatus to a place in the City of Newark outside of the automobile district, thereby losing the advantage of being in the automobile district and the trade which would naturally be brought to them.

To all of which wrong doing on the part of the plaintiff the defendant asks damages as aforesaid in the sum of Five hundred ($500.) dollars.

BURTON L. R. HARE,
Attorney for Defendant.

November 5th, 1914. The plaintiff and the defendant appearing, the cause was tried and determined at this time.

Plaintiff, Charles Herman and James D. Lupo, sworn.

Defendant, Philip Beisel and Henry Robinson, sworn.

Decision reserved.

The evidence being closed the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of Two hundred and forty dollars ($240.) damages, with costs. Whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of Two hundred and forty dollars ($240.) damages, with costs.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

MICHAEL F. O'NEIL,	*On Contract.*
	On Appeal.
vs.	
FREDERIC M. P. PEARSE.	*State of the Case.*

This case was tried before me without a jury, and the parties being unable to agree upon a state of the case to be used on appeal, have requested me to prepare such a state of case.

The action is brought to recover for rent of premises described in the lease, a copy of which is hereto annexed. A diagram of the premises was used at the trial as an exhibit. The portion let to the defendant is marked A. and B.

The facts are as follows:

The machine shop was located in the rear of the entire building and was separated from the rest of the garage by a wooden partition. The defendant had the right of ingress and egress to the machine shop and the other space rented by him at all times during the day and night, both for his agents and employees and automobile customers.

The defendant went into possesion of the leased premises, on or about the fifteenth day of March and left the premises on the fourth day of May, nineteen hundred and fourteen. The rent was payable between the first and the tenth of each month, but no rent was paid after the month of April. After the defendant left the premises, the plaintiff used proper effort and diligence to rent the premises but was unable to do so. The plaintiff rented

the rest of the floor outside of the machine shop and space rented to the defendant to another person, who used the same for the storage of moving vans and delivery automobiles, when such vans and automobiles were not in use in their regular business, subject to the rights of the plaintiff and the landlord to use such space for ingress and egress to the parts occupied by them respectively.

The tackle, blocks and falls, rope and wooden horses of this other tenant were some times placed in the space rented by the defendant from the plaintiff outside of the machine shop and the employees and agents of the defendant were occasionally put to slight inconvenience in getting by trucks and vans standing outside of the defendant's garage in order to get into the machine shop. The defendant complained to the plaintiff on one occasion that the conditions aforesaid were such that it was impossible to conduct business. The defendant filed a recoupment for damages and testified that the expenses connected with the moving and re-establishment of his machine shop in the barn on the property occupied by the man who had managed the machine shop outside of the automobile zone in the City of Newark, was the sum of Sixty dollars, and that he was unable to rent a shop in the automobile zone.

When the defendant first took possession of the premises under his lease, there was in the shop a work bench belonging to the plaintiff which the defendant put out of the shop and placed his own work bench in the shop in the place of the plaintiff's bench; when the defendant finally left the premises and on the morning when the defendant left, the plaintiff requested one of the servants of the defendant to replace plaintiff's bench in the shop; this was done and plaintiff placed or had placed his own vice on his own work bench.

I find that the interference with the defendant was slight and such interference was that of a third per-

son and not of the landlord. There was no eviction by the landlord, nor was there any surrender by operation of law. The defendant left during a month for which the rent was paid. The landlord, mistaking his rights, attempted to prevent the defendant from moving. Judgment was given against the defendant and for the plaintiff for the sum of Two hundred and forty dollars, being the amount of rent due when the suit was brought.

Respectfully submitted, December thirtieth, nineteen hundred and fourteen.

CECIL H. McMAHON,
Judge.

The defendant-appellant specifies the following grounds, upon which he bases his appeal on the judgment of the First District Court of the City of Newark, rendered on the seventeenth day of November, nineteen hundred and fourteen:

First:—The judgment of the trial Court was contrary to the undisputed evidence in said cause.

Second:—The judgment of the trial Court is contrary to law.

Third:—The Court, in deciding said cause, failed to consider evidence showing a surrender by the defendant of the premises in question and the acceptance of such surrender by the plaintiff.

Fourth:—The trial Court failed to consider the recoupment filed by the defendant for the sum of sixty dollars ($60.), and even though the same was proven to allow the same.

BURTON L. R. HARE,
Attorney of Defendant-Appellant.

Judgment Record.

This cause was heard before our Supreme Court at the February Term, 1915, and judgment of affirmance was rendered in favor of the plaintiff June 4, 1915.

Whereupon it is adjudged that the said plaintiff, Michael F. O'Neil, do recover against the said defendant, Frederic M. P. Pearse, the sum of two hundred and fifty-eight dollars and ten cents, damages and costs below; and also the sum of twenty two dollars and fifteen cents, for his costs in the Supreme Court, making in the whole the sum of two hundred and eighty dollars and twenty five cents.

$258.10	Damages & Costs below.
22.15	Costs Sup. Ct.
$280.25	

Judgment entered June 8, 1915.

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

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and seal of said Court at Trenton, this twenty-first day of August, A. D. nineteen hundred and fifteen.

WILLIAM C. GEBHARDT.

[SEAL] *Clerk.*

Opinion of Supreme Court.

(Filed June 4, 1915.)

FEBRUARY TERM, 1915.

MICHAEL F. O'NEIL,
Plaintiff and Appellee,
vs.
FREDERIC M. P. PEARSE,
Defendant and Appellant.

Submitted March 18, 1915; Decided June 4, 1915.

Syllabus.

1. An eviction is an act of a permanent character done by the landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the thing demised, or a part of it.

2. Facts found by the District Court judge, sitting without a jury, will be presumed to rest on competent proof when nothing appears to the contrary.

3. A mere trespass upon the demised premises resulting only in slight interference with the tenant, does not constitute a constructive eviction as a matter of law.

4. Trespasses, or other acts of third persons, impairing the usefulness or enjoyment of the demised premises do not amount to an eviction by the landlord, unless acts from which an eviction is asserted to result were committed under the direction of or at the instance or with the consent of the landlord.

5. It is only when the minds of the parties to a lease occur in the common intent of relinquishing the relation of landlord and tenant, and execute that intent by acts tantamount to a stipulation to put an

end thereto, that a surrender by act and operation of law arises.

6. When, from the evidence, it is open to the trial judge, sitting without a jury, to find that the minds of the parties did not concur in a common intent to relinquish the relation of landlord and tenant, his finding that there was no surrender by operation of law will not be disturbed.

7. The mere fact that a landlord, after his tenant had abandoned the premises against the will of the landlord endeavors unsuccessfully to re-let the premises, does not constitute, as a matter of law, an acceptance of an alleged surrender of the term.

On appeal from the First District Court of the City of Newark.

Before Justices Trenchard, Bergen and Black.

For the appellant, Burton L. R. Hare.

For the appellee, William J. McFadden.

The opinion of the court was delivered by

TRENCHARD, *J.*

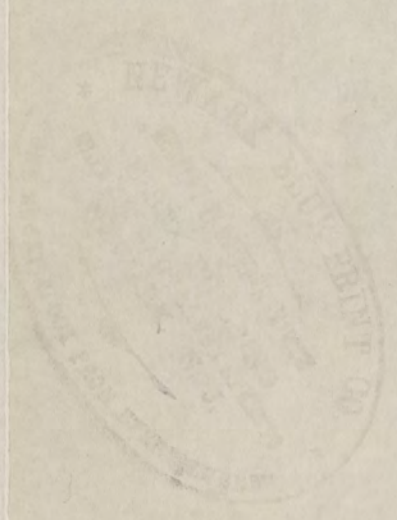
The plaintiff below demised to the defendant a part of a one story building separated from the remainder by a partition, with right ingress and egress to the defendant, his employees and customers. Other parts of the premises were demised to another tenant, subject to the defendant's right to ingress and egress.

The demise to the defendant was for six months. Before the end of the term the defendant vacated the premises and this suit was brought to recover the rent for the remainder of the term.

We are of the opinion that the judgment for the plaintiff rendered by the trial judge, sitting without a jury, must be affirmed.

Without stopping to consider whether, technically, any legal question is properly presented by the rec-

Oneil
Office
Machine Shop
"A"
Partition
Sliding door
Entrance to shop
70'-0"
Space used by Trucks & Vans
Open space
"B"
Imaginary Line
O'NEIL GARAGE
Window
15'-0"
DOOR
DOOR
60'-0"
15'-0"
ENTRANCE
FRONT
Located at
Halsey St.
Newark, N.J.



ord, we have examined the questions argued and find no merit in them.

It is first said that there was an eviction resulting from intereference with the enjoyment of the premises. But that question, under the evidence in the case, was for the judge sitting without a jury.

An eviction is an act of a permanent character done by a landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the thing demised, or a part of it. Upton *vs.* Townsend, etc., 17 C. B. 30.

The trial judge found as a fact "that the interference with the defendant was slight and such interference was that of a third person and not of the landlord" and further found "that there was no eviction by the landlord."

That finding we cannot disturb. It is true that the evidence taken at the trial is not set out in the state of the case, but the rule is that facts found by the district court judge, sitting without a jury, will be presumed to rest upon competent proof, when nothing appears to the contrary. Home Coupon Co. *vs.* Goldfarb, 78 N. J. L. 146.

Now a mere trespass upon the demised premises, resulting only in slight interference with the tenant, does not constitute a constructive eviction as a matter of law. Meeker *vs.* Spalsbury, 66 N. J. L. 60.

Moreover, trespasses, or other acts of third persons, impairing the usefulness or enjoyment of the demised premises, do not amount to an eviction by the landlord, unless the acts from which the eviction is asserted to result were committed under the direction of or at the instance or with the consent of the landlord. 24 Cyc. 1132. Whether, under such rule, the landlord, in the present case was responquestion.

The defendant next contends that there was a surrender by act and operation of law. But it is only when the minds of the parties to a lease concur in the common intent of reliquishing the relation of landlord and tenant, and execute that intent by acts tantamount to a stipulation to put an end thereto, that a surrender by act and operation of law arises. Home Coupon Exchange Co. *vs.* Goldfarb, 78 N. J. L. 146. It is contended that the evidence conclusively establishes such intent. We think not. On the contrary it was clearly open to the trial judge, sitting without a jury, to find that the minds of the parties did not concur in a common intent of relinquishing the relation of landlord and tenant. Hence the judgment cannot be disturbed upon that ground.

Lastly, it is contended that the landlord by endeavoring to re-let the premises is to be deemed as a matter of law to have accepted such alleged surrender. We think not.

The mere fact that a landlord, after his tenant has abandoned the premises against the will of the landlord, endeavors unsuccessfully to re-let the premises, does not constitute as a matter of law, an acceptance of an alleged surrender of the term. If there had been, which there was not, evidence that the landlord attempted to re-let on his own account, the question would have been more difficult. See 24 Cyc. 1375 and cases there cited.

The judgment below will be affirmed, with costs.