INDEX.

	Page.
Complaint	1
Answer	3
Rule to Show Cause	4
Conclusions	5
Notice of Appeal	7
Grounds of Appeal	8

TESTIMONY.

For Plaintiff:

David Galloway:	
Direct	10
Cross	12
Recalled:	
Direct	88
Cross	91
Re-Direct	109
Re-Cross	112
Recalled:	
Direct	117
Cross	117
Mrs. Helen Levenson:	
Direct	13
Cross	27
Re-Direct	48
Re-Cross	51
Horace A. Bernstein:	
Direct	57
Cross	58
Re-Direct	70
Re-Cross	72

Page.

WILLIAM BORNSTEIN:

Direct 74
Cross 76

MORRIS LEVENSON:

Direct 77
Cross 79
Re-Direct 84

Recalled in rebuttal:

Direct 149
Cross 150

Motion for Non-suit 84

FOR DEFENDANT:

JOSEPH GATTI:

Direct 112
Cross 114

EGBERT H. FARR:

Direct 116

Resumes stand:

Direct 118
Cross 119

ALWARD J. HUGGERD:

Direct 123
Cross 124
Re-Direct 131

PETER GIOTALE:

Direct 132
Cross 134

DOMINIC CAPORENE:

Direct 143
Cross 144

Page.

JAMES H. CULLEN:

Direct 147

Motion to Direct Verdict 152

Charge 153

Defendant's Exceptions 163

Defendant's Requests to Charge 163

PLAINTIFF'S EXHIBITS.

P-1—Lease. Admitted in evidence at page 12 printed at 164

P-2—Letter, dated July 1, 1914. Admitted in evidence at page 23; printed at 171

P-3—Letter of July 2, 1914. Admitted in evidence at page 24; printed at 171

P-4—Letter of July 7, 1914. Admitted in evidence at page 25; printed at 172

P-5—Letter of July 9, 1914. Admitted in evidence at page 25; printed at 172

P-6—Letter of July 10, 1914. Admitted in evidence at page 25; printed at 173

P-8—Estimate. Admitted in evidence at page 77; not printed.

Complaint.

(Filed June 18, 1915.)

HUDSON COUNTY CIRCUIT COURT.

LEVENSON WRECKING COMPANY, a corporation, *Plaintiff,* *vs.* GATTI-McQUADE COMPANY, a corporation, *Defendant.*	Action at Law.

Plaintiff, Levenson Wrecking Company, a corporation of the State of New Jersey, complaining of the defendant, says:

(1) That prior to July 1st, 1914, plaintiff, a corporation of the State of New Jersey, entered into an agreement with the defendant corporation whereby the said plaintiff rented to the said defendant corporation all those two certain stable buildings with the shed in the rear of the same, known as street numbers 1415 and 1417 Grand Street, in the City of Hoboken, Hudson County, New Jersey, for the term of one year from the first day of July, 1914, at the yearly rent of Twelve hundred dollars, payable in monthly payments of One hundred dollars each on the first day of each and every month in advance.

(2) The said Gatti-McQuade Company, the defendant herein, rented said premises of said plaintiff, Levenson Wrecking Company, and agreed to pay the rent aforesaid.

(3) Defendant corporation continued in possession of said demised premises after the making of said lease and up to July 31st, 1914.

(4) The defendant in pursuance of the terms of said lease and on or about July 1st, 1914, paid to the said plaintiff the sum of $100.00, in payment for the first month's rent under said lease for the month beginning July 1st, 1914, and ending July 31st, 1914.

(5) On said 31st day of July, 1914, the defendant without the consent of plaintiff vacated the premises aforesaid, and has since that time refused and neglected to pay rent for said premises for the months of August, September, October, November and December, 1914, and January, February, March, April, May and June, 1915.

Plaintiff demands of defendant, Gatti-McQuade Company, a corporation, Two thousand dollars damages.

WELLER & LICHTENSTEIN,
Attorneys of Plaintiff.

Answer.

HUDSON COUNTY CIRCUIT COURT.

LEVENSON WRECKING COMPANY, a corporation, *Plaintiff,* *vs.* GATTI-McQUADE COMPANY, a corporation, *Defendant.*	Action at Law.

The defendant says:

(1) It denies each and every allegation in paragraph 1 of the complaint.

(2) This defendant denies each and every allegation in paragraph 2 of the complaint.

(3) This defendant admits that it continued in possession of the premises known as 1415 and 1417 Grand Street, Hoboken, New Jersey, until July 31st, 1914, but it says that its possession was not under any such lease as is mentioned in the said complaint, but defendant's possession was under a lease made between plaintiff and defendant in writing dated August 1st, 1912, which expired August 1st, 1913, and which was verbally renewed for one year, additional time expiring August 1st, 1914, and prior to which last mentioned date defendant quit the said premises.

(4) Defendant admits that on or about July 1st, 1914, it paid plaintiff the sum of $100.00, but defendant denies that the said sum was in payment of any rent under any lease alleged to have been made for the year commencing July 1st, 1914, but defendant says, however, that said payment was for the rent due for the month of July, 1914,

pursuant to the lease made between plaintiff and defendant during the year 1913, and which said mentioned lease expired August 1st, 1914.

(5) Defendant admits the allegations in paragraph 5 of the complaint.

McDERMOTT & ENRIGHT,
Attorneys of Defendant.

Rule to Show Cause.

(Filed Feb. 8, 1917.)

HUDSON COUNTY CIRCUIT COURT.

LEVENSON WRECKING COMPANY, a corporation, *Plaintiff,* *vs.* GATTI-McQUADE COMPANY, a corporation, *Defendant.*	Action at Law.

Counsel for the defendant applying for this rule within time,

IT IS on this eighth day of February, 1917,

ORDERED that Levenson Wrecking Company, plaintiff in the above entitled cause, show cause before the Hudson County Circuit Court, at the Court House in Jersey City, on Friday, the ninth day of March, 1917, at ten o'clock in the forenoon, why the verdict in the above entitled cause rendered February 7, 1917, in favor of the plaintiff for $1100.00 and against the defendant should not be set aside and a new trial granted.

FURTHER ORDERED that the exceptions of the defendant to the Court's refusal to permit de-

fendant to amend its answer for the reason that the matters sought to be pleaded in the answer as amended did not constitute in law a defense, and the exception of the defendant to the Court's refusal to direct a verdict in favor of the defendant, and exception of the defendant to the Court's refusal to allow in evidence the deed from the Levenson Wrecking Company to the Levenson Lumber Company, and the exceptions to the Court's refusal to charge the defendant's requests to charge, be and they hereby are expressly reserved as reasons for appeal.

Let this rule be entered.

LUTHER A. CAMPBELL,
Judge.

Conclusions.

(Filed Feb. 16, 1918.)

HUDSON COUNTY CIRCUIT COURT.

LEVENSON WRECKING COMPANY, a corporation, *Plaintiff,* vs. GATTI-McQUADE COMPANY, a corporation, *Defendant.*	Action at Law. On Rule for New Trial.

WELLER & LICHTENSTEIN, ESQS., for Plaintiff.
McDERMOTT & ENRIGHT, ESQS., for Defendant.

CONCLUSIONS.

CAMPBELL, J.

Five reasons are assigned by defendant why the rule to show cause why the verdict should not be set aside, should be made absolute, viz.:

Conclusions.

1. Because the verdict was contrary to the weight of the evidence.

2. Because the verdict was excessive.

3. Because the verdict was contrary to law; and

4. Because the court erred in refusing defendant's motion to non-suit the plaintiff, and

5. Because defendant exacted formal proof of the plaintiff which was not supplied, that plaintiff owned the lands and premises mentioned in the complaint, and because there was no legal proof that the plaintiff owned the lands and premises in the complaint mentioned.

Defendant has urged and argued all of these reasons and I have considered them all, and I have concluded that the rule should be dismissed.

The rules governing the consideration of reasons 1 and 2 are too well known to require any statement of them herein.

As to reasons 3, 4 and 5, I have not had presented to me nor have I been able to find anything which has caused me to change my mind as to the law applicable to the cause or that other and different principles than those applied at the trial should have been applied.

The rule may, therefore, be dismissed with costs.

Dated, February 16, 1918.

LUTHER A. CAMPBELL,
Judge.

Notice of Appeal.

HUDSON COUNTY CIRCUIT COURT.

LEVENSON WRECKING COMPANY, a corporation, *Plaintiff,* *vs.* GATTI-McQUADE COMPANY, a corporation, *Defendant.*	Action at Law.

To MESSRS. WELLER & LICHTENSTEIN,

TAKE NOTICE that the above named defendant hereby appeals to the New Jersey Court of Errors and Appeals from the judgment of the Hudson County Circuit Court in favor of the above named plaintiff and against the above named defendant for Eleven hundred dollars damages and costs.

Dated, February 26th, 1918.

McDERMOTT & ENRIGHT,
Attorneys of Defendant.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LEVENSON WRECKING COMPANY, a corporation, *Plaintiff-Respondent,* *vs.* GATTI-McQUADE COMPANY, a corporation, *Defendant-Appellant.*	On Appeal from Hudson Circuit Court.

Gatti-McQuade Company, a corporation, appellant in above entitled cause, does hereby assign the following as its grounds of appeal in the above entitled cause:

(1) Because the Court refused to grant the motion of defendant's counsel to direct a verdict in favor of defendant.

(2) Because the Judge of the Hudson County Circuit Court, before whom said cause was tried, refused during the trial the motion of defendant's counsel to add an additional defense to the defenses interposed in defendant's answer, so as to plead that "plaintiff, a New York corporation, conveyed to the Levenson Lumber Company, a New Jersey corporation, by deed dated May 4, 1914, recorded May 5, 1914, in Liber 1183 of Deeds, page 133, the lands and premises on which the stable mentioned in plaintiff's complaint was located, and that the plaintiff did not have title to these lands and premises at the time the alleged lease was alleged to have been made, and at the times mentioned in plaintiff's complaint".

The trial court refusing to permit the amendment not on discretionary grounds, "but solely on the

ground urged by Mr. Tiffany that the rule is against you and that you (the defendant) cannot raise the question of your landlord's title".

(3) Because the Judge of the Circuit Court before whom said issue was tried erred in refusing to allow in evidence a deed dated May 4, 1914, from the Levenson Wrecking Company, a New York corporation, to the Levenson Lumber Company, a New Jersey corporation, conveying the lands and premises mentioned in plaintiff's complaint, and being the premises alleged to have been leased by plaintiff to defendant, recorded in Liber 1183 of Deeds for Hudson County, page 133.

(4) Because the Court refused to charge defendant's second request to charge.

(5) Because the trial court refused to charge defendant's third request to charge.

(6) Because the trial court refused to charge defendant's fourth request to charge.

(7) Because the trial court charged the jury: "If there is a verdict at all, the verdict can only be for the period of eleven months, at $100.00 per month."

(8) Because the Hudson County Circuit Court entered judgment in favor of plaintiff and against the defendant for the sum of $1100.00, whereas by the law of the land the judgment of the said Hudson County Circuit Court should have been for the defendant.

McDERMOTT & ENRIGHT,
Attorneys of Appellant.

We acknowledge receipt of a copy of the within grounds of appeal and consent to the filing hereof as within time.

WELLER & LICHTENSTEIN,
Attorneys of Respondent.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

LEVENSON WRECKING COMPANY, a corporation,

Plaintiff,

vs.

GATTI-McQUADE COMPANY, a corporation,

Defendant.

Action at Law.

WELLER & LICHTENSTEIN, ESQS. (Mr. Tiffany), for Plaintiff.

McDERMOTT & ENRIGHT, ESQS. (Mr. Carpenter), for Defendant.

The above case tried before Judge LUTHER A. CAMPBELL, and a jury, Tuesday, February 6, 1917.

Plaintiff's Testimony.

DAVID GALLOWAY, sworn.

DIRECT EXAMINATION BY MR. TIFFANY:

Q. Mr. Galloway, you are connected with the Gatti-McQuade Company, the defendant in this suit? A. Yes, sir.

Q. In what capacity? A. Secretary.

Q. Do you know Mr. Gatti-McQuade? A. There is no such person.

Q. Do you know Mr. Gatti, I should say? A. I do.

Q. Who is he? A. President and treasurer of the Gatti-McQuade Company.

Q. Were you the secretary of this company in 1914? A. Yes, sir.

Q. You have held that position for about how long? A. Ten years.

Q. Did you negotiate the terms of a certain lease made with the Levenson Wrecking Company under which you held possession of the premises 1415-1417 Grand street, Hoboken?

MR. CARPENTER: I object, unless the lease itself is shown.

MR. TIFFANY: I did not ask him that. I asked him if he negotiated the terms of the lease. I did not ask him the terms of the lease.

THE COURT: You refer to the written lease?

MR. TIFFANY: A prior lease to the company.

THE COURT: He is not asking the terms, but he is asking if he entered into negotiations.

A. Yes, sir.

Q. By the authority of the president and treasurer of your company? A. Yes, sir.

MR. CARPENTER: I object to it on the ground it calls for a conclusion.

THE COURT: Not if he knows. He was the secretary of the company and I suppose he was the official in whose possession naturally would be the record of their proceedings, and I suppose he has intimate knowledge, or would be assumed to have it. The answer may stand.

MR. TIFFANY: Any objection to this being offered?

MR. CARPENTER: No.

Q. I show you a lease between Levenson Wrecking Company and Gatti-McQuade Company, dated August 1, 1912, and ask you if you signed that in behalf of your company? A. Yes.

Q. Were you authorized to sign this paper? A. Yes.

Q. By whom? A. By Mr. Gatti.

(Paper purporting to be lease marked Exhibit P-1.)

CROSS EXAMINATION BY MR. CARPENTER:

Q. How did Mr. Gatti give you authorization to execute the lease of 1912? A. Well, I explained to him the terms of the lease and he told me all right, to sign it up.

Q. I see. Was this a verbal authorization? A. Yes.

Q. Do you know whether there was a minute entered on the records of the corporation giving you the power or authority to execute the lease of 1912 for your corporation? A. There was not.

MR. TIFFANY: I object to that and ask to have it stricken out, on the ground that the testimony now stands that they ratified by taking possession under their lease, so the way in which he obtained his authority is immaterial. They have ratified.

THE COURT: Well—

MR. CARPENTER: I am not trying to impeach that lease at all. I am simply trying to find out how he got authority on that occasion to execute that particular lease .

THE COURT: He has told us.

MR. TIFFANY: I withdraw the objection.

THE COURT: He told us by authorization, oral authorization of the president and treasurer of the company.

Q. After that date and after the lease of 1912 was executed by you with the Levenson Wrecking Company were you authorized in 1914 to execute on behalf of the Gatti-McQuade Company any lease with the Levenson Wrecking Company?

MR. TIFFANY: I object to it as not being proper cross-examination. I asked him nothing in regard to a lease in 1914.

THE COURT: He has not gone into that.

MR. CARPENTER: Mr. Tiffany's object in asking the questions he did was to get the groundwork for testimony which he will subsequently endeavor to introduce to indicate that Mr. Galloway by virtue of having executed the prior lease had authority to execute or enter into a subsequent lease.

THE COURT: I do not think I am going to follow him very far in that, because he has not brought that out at all.

MR. CARPENTER: All right, that is all.

THE COURT: He has confined himself entirely to negotiations leading up to the execution of the lease Exhibit P-1.

MRS. HELEN LEVENSON, sworn.

DIRECT EXAMINATION BY MR. TIFFANY:

Q. Mrs. Levenson, you are an officer of the Levenson Wrecking Company? A. Yes.

Q. What position did you hold in 1914? A. Vice President.

MR. CARPENTER: Not looking at any notes, are you?

THE WITNESS: Beg pardon?

MR. CARPENTER: Not looking at any notes?

THE WITNESS: Looking at my hands.

Q. Did the Levenson Wrecking Company at that time own any property in Hoboken? A. Yes, sir.

MR. CARPENTER: I object to that, that is a conclusion of law. I ask that the deeds be proved.

MR. TIFFANY: I submit at this time the objection comes too late; it has been answered.

MR. CARPENTER: Almost instantly. It is material in this case.

MR. TIFFANY: It only amounts to just this, if you stand on that technical objection I will send down stairs for the records to show we own these premises.

MR. CARPENTER: I want you to do that.

THE COURT: I understand the formal proof is exacted, and I will not strike this out at present, but wait and see.

MR. TIFFANY: I submit they cannot question our title to the land. The lease is in evidence, come to think of it.

MR. CARPENTER: You are asking about a subsequent lease of 1914.

MR. TIFFANY: Your lease, which is in evidence now, shows that they were in possession of the premises, and on his opening they were in possession until July 1st of 1914. It is a well known principle of law that the tenant cannot question the title of the landlord.

MR. CARPENTER: There are exceptions to that, one of them being that where the landlord seeks to recover rent from the tenant it is a condition precedent that he shall own the premises. He must do that as part of his prima facie case.

THE COURT: Why let us waste time about it? Mr. Tiffany says he will produce the records.

MR. TIFFANY: I do not want to be bothered to subpoena the Register. They know as a matter of fact under the evidence they cannot question the landlord's title where they make a lease with him. That is not an exception.

MR. CARPENTER: I am not questioning the title as of the date the lease was executed, but I do say that subsequent to that date they conveyed their title to someone else, and before the date came around when you are suing for rent.

THE COURT: I will leave the answer stand at present, and see what the further development is.

MR. TIFFANY: I might say that is not part of their defence, either. It is not part of the pleadings and it is a surprise to the plaintiff to have such an allegation asserted.

THE COURT: I do not remember it being raised.

BY MR. TIFFANY:

Q. These premises at 1415 and 1417, were there stables erected on them? A. Yes, sir.

Q. Were they the stables that the Gatti-McQuade Company occupied under this lease on the first day of August, 1912? A. Yes, sir.

Q. You were the subscribing witness to this lease? A. Yes.

Q. With whom did you make the arrangements for this lease? A. Mr. Galloway.

Q. This gentleman who was just on the stand? A. Yes.

Q. Do you know how long the Gatti-McQuade Company stayed in the premises? A. They were there for two years.

Q. They had a written lease for part of that time? A. For one year, I believe.

Q. Did you ever receive a copy of that lease? A. No, sir, I never did.

Q. I am referring now to Exhibit P-1? A. No, sir, never received a copy of it.

Q. How many copies did you sign?

MR. CARPENTER: I object to it as immaterial. What is the use?

THE COURT: I do not know the materiality.

MR. TIFFANY: I will withdraw it.

Q. You are quite sure you never received a copy of the lease? A. I am quite sure.

Q. When was the first time after signing this lease that you saw a copy of it? A. The last time we tried the case.

Q. When did they vacate the premises mentioned in this lease? A. They took their horses out on the 31st of July, 1914.

Q. Yes? A. But they left harness, wagons, on our premises, and oat box, several other articles.

Q. Until when? A. Oh, about two or three days it took them to take it out of there.

Q. After the first of August, 1914? A. Well, after the 31st of July, 1914.

BY THE COURT:

Q. They left them remain there about two or three days? A. About two or three days, yes.

Q. Do you recall any conversation with Mr. Galloway about the first part of August, 1913? A. I recall a conversation with him in the latter part of June, 1914.

Q. Will you just state what that conversation was?

MR. CARPENTER: I object, unless the authority of Mr. Galloway to make a lease for and on behalf of the defendant at that time is shown.

MR. TIFFANY: I submit, if the Court please, there is abundant authority before the Court now that he did execute a lease. Now we have another conversation. I submit there is an abundance of authority before this Court to have this for the jury to determine. He said he had verbal authority on the first occasion.

THE COURT: Yes, that is all. That is all he testified to.

MR. TIFFANY: There is no question about that, but he also testified he was secretary of that corporation.

THE COURT: Yes.

MR. TIFFANY: And that he made this lease. We have a right to presume his authority where there are such facts as have been brought out to show he did have the authority. He testified he was secretary of this corporation.

THE COURT: Yes, but I also have in mind what he says, that he exercised that authority and it was consummated after the consent obtained from Mr. Gatti, wasn't it, the president of the corporation, and he has not in his examination said it was entirely on his own authority; he had had charge of the negotiations, but the execution of them finally was with the approval of the president of the corporation.

MR. TIFFANY: We know nothing about the approval of the corporation. It is not part of our case. We show we had all of the dealings with the man Mr. Galloway.

THE COURT: I am going to let you proceed and show what you can by this witness, Mr. Tiffany, and of course unless you get yourself in that position where it becomes a

jury question or where you can show positively he had the authority, why, of course that testimony will be of no value.

MR. CARPENTER: I ask an exception be noted.

THE COURT: You may have it. Now upon that condition, that you realize these things cannot be brought out from one witness. He may be able subsequently to show the authority or show that situation which would leave it as a question of fact. If he does not, then I will deal with it.

Q. Who were all your dealings with—I will withdraw it for this time. Who were all your dealings with in regard to these premises that you have testified to?

MR. CARPENTER: I object, unless the time be shown.

Q. From the time of the making of this lease until July 31, 1914? A. Mr. Galloway.

Q. The gentleman who was on the stand? A. Yes.

Q. Was he the only one? A. The only one.

Q. With whom did you have all your dealings with reference to the renting or occupancy of these premises prior to the 31st of July, 1914? A. Mr. Galloway.

Q. Was he the man that you originally— A. Yes.

MR. CARPENTER: I object.

Q. Just one more. Did you during the entire time that they were in possession of these premises have conversations regarding the renting of the premises with anyone representing the Gatti-McQuade Company, other than with Mr. Galloway? A. No, sir.

Q. Who paid the rent? A. I received it from Mr. Galloway.

Q. Did you, during the course of these two years, have any conversation—I will withdraw it. Now you say you had a conversation during June, 1914, with Mr. Galloway, concerning these premises? A. I had several conversations, at all times, because there were several repairs to be done at all times in the stable.

THE COURT: You are asked in June, 1914.

A. Yes.

Q. Where did this take place? A. He called up first—

Q. Called up where? A. Called up our office.

Q. In Hoboken? A. In Hoboken, yes, sir.

Q. Did you speak to him personally? A. I did.

Q. When was that? A. The latter part of June, 1914.

Q. Had you spoken to him before over the telephone? A. Oh, on several occasions.

Q. Know his voice? A. Yes, indeed.

Q. What was the gist of that conversation? A. When do you mean, June?

Q. Yes. Over the telephone, when he called you up? A. He said to me, "Mrs. Levenson, if you care to have our people stay another year you better get busy on a sewer." I said, "All right." And he said, "There are several other repairs, but I would have to come over and show you what is to be done." I said, "All right, you could do that." Then he came over the following day and he said to me, "You come down to the stable with me and I will show you what is to be done," and I did go down, and there was a leak in the roof, some glass was broken in the stalls, and some of the wainscoting was ripped, and he also wanted a sewer, and I said, "All right, we will take care of

it immediately," and he said, "All right, if you do that we are going to stay another year," and I promised we would get busy at once, and we did. That was the last conversation I had with Mr. Galloway.

Q. You went down to the stable with him? A. I went down to the stable with him.

Q. And he pointed those things out to you? A. Yes.

Q. In June, 1914? A. Latter part of June, 1914.

Q. Was anything said at the time about concreting any portion? A. Yes; he wanted the—I said we would concrete it for him.

Q. That is, the stalls? A. The stalls, yes, the floor.

Q. This wainscoting that you spoke of as broken off, do I understand that the stalls where the horses kicked it out? A. Yes; where the horses kicked it.

Q. And he said if these things were done he would renew for another year? A. He would stay another year.

Q. What did you say? A. I said, "Yes, we would take care of it immediately."

Q. Is that the last conversation you had with him about these facts? A. Yes, of those facts.

Q. What did you do after this conversation in reference to these premises? A. I immediately sent a letter to our plumber and got an estimate.

Q. Did you have the work done? A. Yes, indeed.

MR. CARPENTER: I object to it as immaterial.

MR. TIFFANY; It is very material as to whether they had the work done or not under the pleadings.

THE COURT: Well, I will overrule the objection.

MR. CARPENTER: Note an objection.

Q. Did you do everything that he asked you to do at that time?

MR. CARPENTER: I object.

Q. Or did you have it done?

MR. CARPENTER: I object.

Q. I will reframe the question. Do you of your own knowledge know that everything that he pointed out to you as having wanted done was done?

MR. CARPENTER: I object to it as calling for a conclusion of the witness.

THE COURT: Why don't you put your question another way and ask her to tell us just what was done to her own knowledge?

MR. TIFFANY: All right.

Q. You have testified as to things that he asked you to do. Now I ask you of your own knowledge whether or not they were done? Do you know? A. Yes; everything was done that he pointed out that was to be done.

MR. CARPENTER: I object and ask to strike it out as stating a conclusion.

THE COURT: Now, Mr. Carpenter, the question was practically the same as the other question, but you did not object to it until after the answer, you see.

MR. CARPENTER: It was the answer that was objectionable, not the question.

MR. TIFFANY: I submit he is not the one to object to the answers.

THE COURT: I suggested to Mr. Tiffany that he put the question in another entirely

different form, which he did not seem to do, and it was in practically the same form as you objected to, but there was no objection placed to this question, and no objection until after the answer was given. I will not strike it out.

MR. CARPENTER: I ask an exception.

THE COURT: You may have it.

Q. Now tell us what you did—what you had done? A. I could answer that?

Q. Yes; tell us what you had done? A. We put in a sewer, concreted the floors, repaired the stalls, repaired the skylights, and put all the glass into the windows.

Q. Was anything done to the roof or anything of that kind? A. The skylight, there was a leakage around the skylight.

Q. When was that work completed, by what date, do you know? A. It was completed the early part of July.

Q. Were they still in possession, Madam? A. Oh, yes.

Q. Had they paid the rent for the month of July, 1914? A. Yes.

Q. Who paid that? How was that rent sent to you, by cash, or check? A. By check.

Q. Delivered or mailed? A. That I couldn't remember.

Q. You say immediately after you started in to get estimates for the work, after this conversation? A. Yes, after that conversation.

Q. Can you tell us about what date that conversation was? A. It would be very hard, Mr. Tiffany; it is two years ago. I know it is the latter part of June.

Q. Tell us who did the work? A. Mr. Bornstein—William Bornstein & Son.

Q. Of New York? A. Of New York, yes.

Q. I show you a letter dated July 1, 1914, addressed to the Levenson Wrecking Company, and ask you where that came from? A. Mr. Bornstein.

Q. Is that the Mr. Bornstein you had do the plumbing work? A. Yes, sir.

MR. TIFFANY: Any objection?

MR. CARPENTER: Yes; I object to it as incompetent, irrelevant and immaterial.

(Paper marked Exhibit P-2 for identification.)

MR. CARPENTER: No; I have no objection. Mr. Tiffany stated he had a witness that he could not get in the state, and that he would read his testimony.

MR. TIFFANY: I offer this in evidence.

(Paper now marked Exhibit P-2, and Mr. Tiffany read the same to the jury.)

Q. I show you a letter dated July 2, and ask you if you wrote that letter or caused it to be written? A. Yes.

MR. TIFFANY: This is the acceptance, Mr. Carpenter. Any objection?

MR. CARPENTER: I object to it as immaterial, but not as to the manner in which it is proved.

MR. TIFFANY: This is to show—

THE COURT: Objecting, are you, to Exhibit P-2?

MR. CARPENTER: Yes, but not as to the way it is proved, because Mr. Tiffany's witness is absent. That is what they are doing now, they are proving all these letters that they received, offers from mechanics to do certain work in the stables.

MR. TIFFANY: Which we claim was part

of our contract. We are showing the agreement, we are not producing the men, but we are showing that we did this work, and we carried out our part of the contract of the renewal.

THE COURT: I will overrule the objection. In the general wash-up it may or may not be of any consequence.

(Paper marked Exhibit P-3 and read to the jury.)

Q. Now, did Bornstein & Son do the work under that contract? A. Yes.

Q. That was the sewer and the cement floors? A. Yes.

Q. When was that completed by them?

MR. CARPENTER: If you know.

Q. About? A. I couldn't remember that. It didn't take very long.

Q. How long after the acceptance of that contract as per P-3, was it that they started, do you know? A. As soon as they received their material.

Q. About how long was that? A. That would be a day or two afterwards.

Q. Was the work completed before August 1st, 1914?

MR. CARPENTER: I object. She didn't know.

Q. If you know? A. Why, I don't know how many days after July 2nd—

Q. No; I asked you before that date? A. Yes.

Q. I show you letter dated July 7th, on the letterhead of the Gatti-McQuade Company, and ask you if that letter was received by you? A. I do not remember receiving it.

Q. Have you ever seen that letter before? A. I may have seen it the last trial.

Q. You do not ever remember receiving it? A. I do not remember receiving it, no.

MR. TIFFANY: Will you let me have the letter of July 7th, 1914?

MR. CARPENTER: No; we wrote it to you.

MR. TIFFANY: We have the original.

MR. CARPENTER: You wrote us on the 18th. You want the next letter?

MR. TIFFANY: July 9th, I should say; Weller & Lichtenstein for the Gatti-McQuade Company. I have a copy of that letter.

MR. CARPENTER: We produce a letter written by Weller & Lichtenstein of Hoboken, to Gatti-McQuade Company, dated July 9, 1914, pursuant to call.

MR. TIFFANY: Any objection to these two going in?

MR. CARPENTER: No.

MR. TIFFANY: We offer without objection letter of July 7th, on the letterhead of Gatti-McQuade Company, addressed to Levenson Wrecking Company.

(Letter marked Exhibit P-4 and read to the jury.)

MR. TIFFANY: On July 9, 1914, on the letterhead of Weller & Lichtenstein, Counsellors-at-Law, to the Gatti-McQuade Company.

(Letter marked Exhibit P-5 and read to the jury.)

MR. CARPENTER: Will you read this one?

MR. TIFFANY: Yes; offered by the defendant out of order—don't you think it would be wise to have this come in as it comes in?

MR. CARPENTER: Yes, it follows that one. I will mark it as my exhibit.

MR. TIFFANY: I think it would be better to have it later.

MR. CARPENTER: All right. Have the original of it?

MR. TIFFANY: That is on the letterhead of Smith & Bowen? Yes.

BY MR. TIFFANY:

Q. Mrs. Levenson, did you or any one for you or the Levenson Wrecking, Company, to your knowledge receive the rents for the month of August, September, October, November, December, 1914, January, February, March, April—

MR. CARPENTER: I will admit we did not pay any rent after the first day of August, 1914.

MR. TIFFANY: All right.

THE COURT: They admit that in their answer.

Q. You did not get the rent for the month of August and subsequent months, 1914? A. No, sir.

Q. Do you know of your own knowledge whether or not this work that Mr. Galloway asked you to do, as you have testified, was begun prior to the receipt by you of exhibit P-4, of July 7? A. I stated before I do not remember receiving that letter, but I know we started to work right after the second of July and may have been completed by the middle of July—

MR. CARPENTER: I object to what may have been. That is only a conclusion.

THE COURT: No; the question is when was this work begun?

MR. TIFFANY: I will consent that what may have been be stricken out. I will prove it by other witnesses.

Q. Do you know of your own knowledge wheth-

er or not all of this work that Mr. Galloway asked you to do or have done was completed before August 1, 1914? A. Yes, I will swear to that.

Q. I think that is all.

CROSS EXAMINATION BY MR. CARPENTER:

Q. What was the date that it was finished, Mrs. Levenson? A. I said that I cannot remember the date, but I know it was finished way before the first of July—the first of August, rather.

Q. How long before; was it one day before—? A. Well, it may have been completed the middle of July, say around the 15th or the 16th.

Q. I want to know when it was, not when it may have been? A. I couldn't remember that Mr. Carpenter; this happened two years ago, you know.

Q. You are the wife of one of the officers, aren't you? A. I am.

Q. Which one, Jacob or—? A. Mr. Morris.

Q. Morris Levenson? A. Yes.

Q. What office do you hold in the Levenson Wrecking Company? A. Vice president.

Q. Anything else? A. No.

Q. Are you a director? A. I am.

Q. Are you an officer in any other corporation?

MR. TIFFANY: I object to it as immaterial, irrelevant and incompetent in this case; she may have been in a million other companies.

THE COURT: How is it relevant?

MR. CARPENTER: If it is objected to I will withdraw it.

Q. Well, when you had conversations with Mr. Galloway who were you representing? A. Levenson Wrecking Company.

Q. Yes; you were not representing anyone else,

were you? A. Well, he had dealings with Levenson Wrecking Company.

THE COURT: That is not the question. You are asked in these dealings that you had with Mr. Galloway who were you representing?

A. Levenson Wrecking Company.

Q. Were you representing anyone else? A. I was representing the Levenson Wrecking Company.

Q. Alone? A. At that time.

Q. Nobody else? Why do you hesitate? A. I am not hesitating. I said I represented the Levenson Wrecking Company.

Q. I say did you represent anyone else at that time?

MR. TIFFANY: I object. I do not know as I understand the purport of the question. Do you mean prior transactions?

MR. CARPENTER: Yes.

THE COURT: With respect to the negotiations she has spoken of, you mean does she represent anybody else except the Levenson Wrecking Company?

A. No, sir.

Q. Now then, when was it that you first had a conversation with Mr. Galloway in 1914, about those premises? A. Latter part of June.

Q. What do you mean by the latter part of June? A. Well, it may have been the 15th or the 16th; I know it was not the first or second.

Q. Well, from the 16th of June on? A. It may have been the 20th.

Q. You are not very clear about the date, are you? A. I say the latter part of June.

Mrs. Helen Levenson—Cross.

Q. You are not very clear about the date, whether it was the 15th of June, or the—? A. No, I am not very clear on the date.

Q. Did you spend all of your time in the office of the Levenson Wrecking Company? A. I did

Q. Every day in the week? A. Every day in the week.

Q. How did you come to know that Mr. Galloway wanted to have any work done in the stable? A. Mr. Galloway called me up on previous occasions. If the glass would be broke or he wanted to have anything done, Mr. Galloway would take care of it. He would notify me.

Q. Had he done that before June, 1914? A. Well, there was several times the glass was broke and he would let me know he wanted glass put in

Q. Did he complain also about the condition of the sewer before June, 1914? A. No, he did not.

Q. You knew the sewer—that the floor was wet and damp, didn't you; high tide the water came up in the stable? A. First I heard of it was in June when he told me he would want to stay another year.

Q. Mr. Galloway told you? A. Yes.

Q. Aren't you mistaken about that; didn't he say he would not want to stay another year? A. No sir; I am positive about that, he said he would stay another year if I would do all that work.

Q. Did he say anything about what he would do if you did not do that work? A. He said that if I would put a sewer in he would stay for another year.

Q. Is that what he said? A. Yes.

Q. That is all he said? A. Is that all he said?

Q. Yes? A. If I would do the work, yes.

Q. I am asking for your conversation with him, and you have just said that he told you that if

you would put the sewer in he would stay for another year? A. Yes.

Q. Is that all he said? A. And all other little repairs that were to be done.

Q. What's that? A. And all other little repairs that were to be done.

Q. Are those his words? A. Beg pardon?

Q. Are those his words? A. Yes.

Q. Now did he tell you that by telephone or face to face when he saw you? A. At first when he called up and the following day he appeared personally.

Q. What did he say when he called you on the telephone? A. He said, "Now, Mrs. Levenson, if you want us to stay for another year, you will have to do repairs, but I better come over and show you what is to be done." I said, "All right", and he told me he was busy that day but he wlll be over the following day and he did come over the following day.

Q. And he came over to show you what had to be done? A. Yes; he came over to our office to take me down to the stable to show me what was to be done with the stalls.

Q. How far was your office from his office? A. Oh, just about—from his office to ours?

Q. Yes? A. About two blocks.

Q. Do you know what day of the week it was he called you up? A. No, I do not.

Q. Now when he came over the next day do you know what day of the week that was? A. No sir, I wouldn't remember.

Q. What did he say that time? A. When he came to the office?

Q. Yes? A. He says, "You come down and I will show you the bad condition the stalls are in, and what is to be done, and also the sewer."

Q. Did he say, "What is to be done", or "what ought to be done"? A. What is to be done if he was to stay another year.

Q. Then what did you do? A. I went down with him.

Q. What time of day did you get there? A. Oh, I generally got there about nine.

Q. No, this day. This day what time did you get there at this stable that he rented of you, do you know?

BY THE COURT:

Q. What time of day was it, I understand the question was, when you and Mr. Galloway got at the stable? A. It was some time during the day.

Q. I know, but what time of the day? A. It is awful hard to say.

Q. Morning or noon, and if the morning what part of the morning, the fore part or middle? A. I wouldn't remember that, your Honor.

BY MR. CARPENTER:

Q. Can't tell? A. No, I can't tell. I don't remember.

Q. Can't tell what time of day he got there? A. It was during the day, but what time of the day I don't remember.

Q. You don't know what day of the week it was? A. No, I don't remember that either.

Q. You don't know what week it was? A. I know it was the latter part of June—June.

Q. Might not it also have been the first week in July? A. No, it couldn't have been the first week in July, because I wrote the letter to Bornstein around the first week in July, so it must have been the latter part of June.

Q. That is the only way you can tell? A. That is the only way I can tell.

Q. Did anybody come up to his place of busi-

ness with you? A. I didn't go over to his place of business.

Q. I thought you went to his place of business? A. Then you misunderstood me. I said I went down to the stable with him.

Q. That was his place of business? A. Oh, no.

Q. You went down to the stable with him? A. Down to the table.

Q. Did anybody go with you? A. He and myself.

Q. Anybody else? A. No, sir.

Q. Anybody else hear any of these conversations? A. Yes.

Q. Who? A. Our bookkeeper.

Q. What was his name? A. Bernstein.

Q. Did he hear the conversation with Mr. Galloway when he called you on the telephone? A. The conversation that was held in the office? that was held in the office?

Q. Well, I understand that when Mr. Galloway came down to your office the day after the telephone conversation you immediately went up to the stable? A. He had to say a few words, didn't he?

Q. I don't know? A. In the office, yes, he did.

Q. What did he say? A. He said to me, "You come down and I will show you what is to be done."

Q. Then what did you say? A. "All right; I will go down with you."

Q. What did he say? A. We went down.

Q. That is all that was said at that time? A. At that time, and he did say if he would—if we would do that for him he would stay for another year.

Q. He said that? A. In the office—he said that all the time.

Q. Just a minute, did he say that the day after the telephone conversation? A. He said it over the telephone and he said it in our office.

Q. He kept repeating it to you? A. Yes, he kept repeating if we would do the work he would stay another year.

Q. When you called him up—when you were talking with him over the telephone and he told you that if you would fix up the sewer he would stay another year, what did you say? A. I said we would. We would only be too pleased to do it for him.

Q. Well, did you ask him what it would cost? A. No, I did not. I didn't know myself how much it would cost.

Q. Did you know what he had in mind to do? A. No, I did not.

Q. Did you know how extensive a job it was? A. No, I did not.

Q. But just as soon as he said he wanted a lot of repairs made you said, " All right, we will do it"? A. Yes; wouldn't you rather do that than lose a tenant?

THE COURT: The question is what you did and what you said.

A. I said we would do it.

Q. I see. How long before that had you been to the stable—before the telephone conversation? Had you been there within six months? A. No, it was not my habit to go down to the stable.

Q. I thought not. How long since you had been there, a year? A. I said before that I never went down. They occupied it and I had no business there.

Q. The first time you had ever been there since they executed the lease in 1912? A. Well, the

first time since he said he would show me what is to be done.

Q. Then it is your claim now, as I understand it, that this agreement you made with Mr. Galloway for this defendant, was made on the day he called you on the telephone; is that true? A. About the sewer, do you mean?

Q. About this new lease? A. Yes.

Q. You are sure it was made on the day he had the telephone conversation with you? A. Over the telephone and the following day that he came to the office.

Q. Which day—on which day was the agreement made? A. Well, they were made on both days.

Q. Well now on the next day—you have told us all that was said on the day that you had the telephone conversation have you? A. That is that he would—as I said— what I said before.

Q. You have told everything that took place that day? A. Yes.

Q. Now the next day when he came into the office was he alone? A. He came alone.

Q. Were you alone? A. No, sir.

Q. You went directly out to the stable? A. Yes; when he asked me to.

Q. When you got up there what part of the stable did you go into first? A. Well, there was only one—Well, two parts of the stable.

Q. What part did you go into first? A. Where the stalls are.

Q. What took place there? A. He showed me some of the wainscoting that was kicked by the horses and he was afraid the horses would tear their flesh off.

Q. What did Mr. Galloway say to you? A. I am telling you that he wanted the wainscoting

repaired, he wanted his sewer, and he showed me the skylight, there was a small leakage and there was some glasses to be repaired, some broken glass.

Q. He said they were to be repaired? A. Yes.

Q. Well, just what did he say? Tell us everything that he said to you? A. Well, he didn't mind the glass and all that so much as the sewer. He said if we put a sewer in and concreted the floor, he would stay for another year, and I said, "Yes, we would do it."

Q. Did you know at that time what it would cost to do it? A. I said before that I did not know what it would cost.

Q. Well, you did not know at that time? A. No, I did not know at that time how much it would cost.

Q. Did you tell him that you would fix up the skylight? A. I did.

Q. And you put in the broken panes of glass? A. All the necessary repairs.

Q. Did you tell him that you would fix up the sewer? A. I did.

Q. And put a concrete floor in? A. Yes, sir.

Q. That was when you were still in the stable? A. Yes, sir.

Q. Do you remember what he said after you told him that you would do it, make all necessary repairs? A. He said he would stay another year.

(Objected to as repetition. Question permitted.)

Q. What did you say to that? A. When he said he would stay another year?

Q. Yes? A. We would have it all done for him.

Q. Did you tell him you would have it all done for him? A. Yes; we would have it all done for him.

Q. Did you tell him within what time you would have it done? A. Well, he didn't—I didn't know how long it would take.

Q. Then you did not tell him? A. I said we would have it done for him; we would do it for him.

Q. When you got back to your office on that same day did you speak to Mr. Levenson about the—? A. I did.

Q. About the proposition? A. I did.

Q. By the way, you said the number of this stable was what? A. 1415 and 1417 I believe the numbers are.

Q. Grand Street? A. It is on the lease, yes, sir.

Q. There are really seven lots, aren't there, in those two properties; the stable is on seven lots? A. Oh, no sir.

Q. What's that? A. No, sir.

Q. How wide is the frontage? A. Fifty by one hundred.

Q. I see. Are you the secretary for the Levenson Wrecking Company? A. No, sir.

Q. Were you the secretary in 1914? A. No, sir.

Q. Just vice president only? A. Yes.

Q. Now then you remember testifying in the Second District Court of Jersey City, in the suit of your company against the Gatti-McQuade Company? A. I may not remember word for word, but—

Q. Do you remember testifying there that Mr. Galloway said to you over the telephone, "Mrs. Levenson, if you want us to renew the lease for a whole year you had better hurry and fix the stable up for us." I said, "What do you want done?" He said, "We want a sewer put in and also some of the stalls should be repaired", and I said we would do it.

Q. Is that what was testified to, or what you have said here to-day? A. I said before that I can't remember what I have testified two years ago word for word. I testified to-day the nearest to my recollection.

Q. Do you know of any other conversation that took place nearly three years—two years and a half ago? A. This is what I said. What he wanted done I couldn't remember word for word. I only knew he wanted to have a sewer put in and wanted the skylight repaired, and I remembered it because he wanted it, but I don't remember what I said.

Q. You don't remember just the words that he used? A. I do, because I knew what he wanted done.

Q. Now did he say to you, "Mrs. Levenson, if you want us to renew the lease for a whole year you had better hurry and fix the stable for us", or did he say to you over the telephone what you have told us here to-day? A. Well, if I testified that way at that time he said it that way.

Q. Your recollection in January, 1915, would be clearer—? A. It would be clearer, because it only happened a few months prior to that.

Q. Now then you remember being asked certain—is that your signature to an affidavit—answers to interrogatories? A. Yes, sir.

Q. Do you remember being asked in the interrogatories in the Second District Court of Jersey City: "Fifth Interrogatory. Where was the alleged agreement above mentioned entered into?" That is the agreement or lease, and you remember answering, "Fifth. On the premises of the plaintiff company in the City of Hoboken." A. Yes, sir.

Q. And the Eighth Interrogatory: "What

stating them in full, are the terms and conditions of the said alleged lease mentioned in the state of demand," that is, the same lease here mentioned, and the answer was, "The plaintiff agreed to rent unto the defendant, and the defendant agreed to hire of the plaintiff the stables at that time occupied by the defendant on the premises of the plaintiff in the City of Hoboken, for a further term of one year after the expiration of the defendant's then existing lease of said stables under the same terms and conditions as in said existing lease mentioned". That was the answer that your company made to that interrogatory, was it not? A. I believe it was, if you have it there.

MR. CARPENTER: That is right, isn't it?

MR. TIFFANY: You read it. I am perfectly satisfied with it.

Q. Now then, did the Levenson Wrecking Company own any other property—

MR. TIFFANY: I object it is immaterial.

Q. —on Fifteenth Street or on Garden Street in Hoboken, except that which was rented to the Gatti-McQuade Company?

MR. TIFFANY: I object to it as immaterial.

THE COURT: What is the materiality?

MR. TIFFANY: What is the purpose?

MR. CARPENTER: I suppose at this time it is—I will withdraw it.

Q. When was the next time, Mrs. Levenson that you went to the stable which you had rented to the Gatti-McQuade Company after this day you went there with Mr. Galloway? A. I did not go again. I did not have to go again any more after he showed me what was to be done.

Q. You did not go there within the next three months, did you? A. Oh, I go down the yards. You see our yards and offices are right near the stable. I could just look out of the window and see everything that was going on there.

Q. When did you next go into the stable? A. Go into it? I don't think—I was always afraid to go into that alone.

Q. You never went down there? A. Afraid of rats.

Q. Never down there since? A. Have I been there since? Oh, it is torn down now.

Q. Have you ever, from the time you went there with Mr. Galloway up to the present time, been inside the stable? A. Oh, yes. I said I wouldn't go alone.

Q. I didn't ask you that.

THE COURT: The question is have you ever been there since this time when you were there with Mr. Galloway, when he was showing you what things ought to be done?

A. Yes, I was in there the first, seecond and third of August.

Q. What year? A. 1914.

Q. Did you see Mr. Galloway there on the first, second and third and fourth of August, 1914? A. No, I did not.

Q. Who did you see there? A. Oh, his drivers.

Q. Who? A. He had—why, I believe he had a watchman or driver living upstairs with his wife and child.

Q. Are you sure you went there on the first of August, 1915? A. Am I?

THE COURT: 1914.

A. 1914.

Q. 1914. Are you sure you were there that day? A. The second—the first of August?

Q. The first of August, 1914? A. I wouldn't know if I was there the first. I was around there.

Q. Were you in the stable on the first of August 1914? A. I must have been there because I knew that they didn't take all the things out.

Q. Now I want to know whether you were there or were not? A. I believe I was.

Q. Is that the best you can tell us? A. That is the best I could tell you.

Q. What day of the week was it? A. I don't know.

Q. Was it Saturday or Sunday? A. I don't know.

Q. Were you there on Sunday? A. I was not there on Sunday, no.

Q. Were you there on Saturday? A. Yes, I was there Saturday. I was there every day in the week with the exception of Sundays.

Q. Were you there on Monday? A. There every day in the week.

Q. What day was Monday? A. That I don't know. I did not look up the calendar.

Q. When you went there the first of August what did you see there? A. I don't want you to misunderstand me. I may not have been there on the first of August and I may have been there the third or the second. If the first of August fell on Sunday I was not there. Then I was there the following day. I saw his trucks, saw some of the harness upstairs, and I saw the oat-bin downstairs —where they kept their oats.

Q. How many trucks did you see there? A. I saw some trucks; must have been more than one.

Q. What part of the stable were they in? A. They were right outside, back of our office.

Q. In the yard? A. In the yard, yes.

Q. Was anyone near when you went around there on the first or second of August? A. In the yard? Oh, no, I would go around the yard alone.

Q. When you went in the stable on the first or second of August did you go alone or was some one with you? A. I must have gone in with someone, because I would have been afraid to go in alone.

Q. You don't know who went with you? A. No, I don't remember that.

Q. Did you go there after the third of August? A. As I said before our office is right there. I couldn't help but going down the yard right near the place.

Q. It is not two blocks away then, is it? A. Not the stable, no. His place of business is two blocks away.

Q. Now your company was paid the rent of one hundred dollars for the month of July, 1914, wasn't it? A. Yes, sir.

Q. And you knew, did you not, that the lease which they held expired the 31st of July, 1914? A. No, not after Mr. Galloway's arrangements with me.

THE COURT: No, no; you knew that the lease you then had, that is, at the time these conversations, expired July 31, 1914?

A. Yes, I knew that.

Q. You did not make any memorandum, did you, of what Mr. Galloway said to you, either when he called on the telephone or the next day? A. No, sir.

Q. You are testifying to that solely from recollection, aren't you? A. Yes, sir.

Q. Did you know when Mr. Galloway called you up on the telephone that there had been a

leak in the stable for a long time? A. No, sir; it was the first I heard of it.

Q. There was not any lease signed at all on the day of that telephone message or the next day, was there? A. No, sir.

Q. Did you ask him to sign a lease that day? A. No, sir, I did not.

Q. Did you ask him to go down to your attorney's office that day? A. I did not.

Q. Had you made any repairs at all to this stable during the year preceding the 31st of July, 1914? A. Well, sometimes glass would be broke.

Q. Is that all the repairs you made, just repair the broken glass? A. I guess that is about all, and whatever they asked us to do right along we would do it for him.

Q. I didn't ask you that. I ask to strike that out.

THE COURT: Yes, it may be.

Q. Do you remember any item of repairs in 1914 before the 31st of July, that you did for these people? A. Well, I can't remember exactly what was rone.

Q. Do you remember the date when the first repairs to the skylight were started? A. The following day that Mr. Gatti was there—Mr. Galloway was there.

Q. The day after he was where? A. The day after he complained about it, told us the horses would get sick, the rain was coming in.

Q. Do you remember the day when they started to cement the floor? A. Right after the first of July.

Q. Well, how long after? A. Right after—the following day—the third day—as soon as they got the material. We had to get the cement and sand and they started in.

Q. When did they start to repair the sewer—put the sewer in? A. Just what I said. Right away.

Q. Right away? A. Two or three days, yes.

Q. Did they put the concrete floor down first? A. No; they put the sewer in first.

Q. How long did that take them to do that, if you know? A. I don't know.

Q. How long did it take to put the concrete floor down, if you know? A. I don't know. They did it right along.

Q. You were not in there looking at that job at all, were you as your repairs went on? A. No; I didn't have to do that, because it was a contract.

Q. You did not go into the stable to see at all? A. Not while they were doing the work, no.

Q. Were you in the stable between the first day of July and the 31st day of July, 1914? A. Was I in the stable?

Q. Yes? A. Mr. Carpenter, that would be a terribly hard question for me to answer.

Q. I know, but you are making us go to a terrible lot of work to meet your case too? A. I know, but going down to the stable—I don't know whether I did. I never had occasion to, because this was a contract, you know. I didn't have to watch the laborers or the contractors. I had a contract and he was to do it in a certain time.

Q. What were your duties for the Levenson Wrecking Company? A. I was a stenographer.

Q. Stenographer? A. And bookkeeper, yes.

Q. Did you have any other duties? A. Did I have any other duties?

Q. Yes? A. Just taking care of the place, the office work.

Q. You did not attend to the performance of the contracts, did you? A. Oh, well, I would dictate letters to the other stenographer.

Q. Didn't you write out the letters yourself? A. Sometimes I would and sometimes I didn't. It all depends how I felt.

Q. You had other stenographers in the office, didn't you? A. That bookkeeper, he used to do the typewriting and bookkeeping too.

Q. When it was necessary to do it you did it? A. Not always.

Q. You did not go out and superintend work, did you? A. No, I didn't do that.

Q. You did not do estimating for work, did you? A. No, I did not.

Q. Did not know the cost of work, did you? A. No, I did not.

Q. So when Mr. Galloway asked you to make extensive repairs on the stable you did not have any idea of your own knowledge what that would cost, did you? A. No, sir, I did not.

Q. I think that's all.

BY THE COURT:

Q. Mrs. Levenson, I want to ask you a question or two. You have told us that Mr. Galloway said this, or practically this, to you: "If you want us to stay another year you will have to make these repairs, or some repairs". Is that correct? Is that one of the things? Did he say that to you? A. Did he say that to me, yes sir.

Q. Now when did he say that to you? On more than one occasion? What occasion was it? A. It was over the telephone.

Q. Any other occasion after that did he say that same thing to you? Now what I am saying then is this: "If you want us to stay another year you will have to make repairs or these repairs, or some repairs,—" I don't know just exactly what your language was. A. Yes, sir.

Q. Did he say that on more than this one tele-

phone occasion? A. Well, when he came over the following day he said, "We would stay another year if you would put the sewer in and do all these necessary repairs."

Q. That is what I mean. That is what I was coming to next. You have used both of those—you have repeated both of those alleged conversations. The first you said on cross examination was what I have just said: "If you want us to stay another year you will have to make repairs or do these repairs." I want to find out when he said that. You say over the telephone? A. Yes.

Q. That is all he said about the subject over the telephone, was it? A. Then he said the same thing when he came to the office again.

Q. When he came to the office next morning, then again did he say, "If you want us to stay another year you will have to make repairs." Is that what he said? A. He said if we would do it.

Q. That is what I want to get at? A. Yes; he said if we would do that he would stay another year.

Q. Let me see if I understand you. Over the telephone he said to you substantially this: "If you want us to stay another year you will have to make some repairs," or something of that sort? A. Yes.

Q. Then it was suggested that he call and see you next morning; is that correct? A. Yes.

Q. Which he did do and came to your office? A. Yes.

Q. And then when he came to your office what did he say about the subject? A. He said, "You come down and I will show you what is to be done," and he said, "The stables is in bad condition on account of no sewer, and if you want us

to renew the lease for another year put a sewer in."

Q. Where was it he said that: "If you want us to renew the lease for another year you will have to put the sewer in", was that in your office? A. He said that down in the stable and he said it in the office, he said, "If you want us to stay another year," he said, "you better do that".

Q. That is three occasions when he used the expression: "If you want us to stay another year then you will have to make repairs," or, as on one occasion or two occasions you have said, "You will have to put the sewer in". That is correct? A. That he said over the telephone, but after he showed me what is to be done, he said, "If you do that we will stay."

Q. All right. When was that, and where was that he said that? A. In the stable.

Q. Now then tell me exactly or as nearly exactly as you can, what Mr. Galloway said at that time about staying? A. He said, "You do all this work for me and we will stay another year," and I said, "Well, I will do it as quick as I possibly can," and when Mr. Levenson came home or to the office I told Mr. Levenson what they wanted to do, and he said, "Write a letter to Mr. Bornstein"—

MR. CARPENTER: I object.

Q. Never mind that part. At this time at the stable when you said Mr. Galloway said, "We will stay another year if you do this for us," was there anything further said about the terms of that lease or the manner in which he would stay? A. He said he would stay another year.

Q. Anything said about the amount of rent? A. The same rent.

Q. Did he say that? A. I don't know whether he said that.

Q. I want you to remember? A. Same condition, he said.

Q. Oh! I am going to give you one more chance. A. All right, sir.

Q. You can see from my interrogating of you that it must be of great importance, and of course it is; it being alleged to be of a verbal agreement, it is important that you should convey to us as nearly as possible the language used by both Mr. Galloway and yourself. Now again tell us, after he had shown you these things which he said it was necessary should be done, that is, the ordinary repairs, the sewer and the concreting—tell us now just what he said to you and what you said to him, and everything that you said to him and he to you about the staying? A. As near as I can remember—

Q. As near as you can remember now, using your language as nearly as you can, and his language as nearly as you can? A. Yes, we went down to the office and he showed me the stalls, the wainscoting was ripped out and he said, "That is to be done," and he showed me a leak in the skylight, and he said, "That is to be done," and then he showed me some glass around the stalls, and he said, "The glass is to be put in," and he said, "The principal thing," he said, "is the sewer," he says, "that is to be done." I said, "All right, we will do it." He said, "Provided you do all that for me we will stay under the same conditions as we did before," and I said, "All right, I will take care of it". And he went away.

Q. I am going to give you still another chance. You say now, "We will stay under the same conditions as before," something to that effect. Pre-

viously you said that he said he would stay another year. Which is correct? A. Another year.

Q. Now be-? A. He will stay another year and pay the same rent, that is, a hundred dollars a month. That is what I meant by conditions.

Q. I understand that, but what I was getting at, you first said he said, "We will stay another year provided you will do these things." And then you changed it somewhat. I wanted to give you a fair opportunity to be sure to state exactly what he did say? A. He said he would stay another year providing we would do all the work, and he pay a hundred dollars a month the same as he did the two years previous.

Q. To that you said? A. I said, "Very well."

Q. Then you reported that to Mr. Levenson? A. To Mr. Levenson.

Q. All right. What he said I do not want to hear and it is not proper.

RE-DIRECT EXAMINATION BY MR. TIFFANY:

Q. Then you did the work? A. Yes, sir.

Q. Had the lease for the preceding year been in writing or had it been a verbal lease? A. It is upon a verbal——

Q. Yes. Did he use the word "renew" at any time in the conversation? A. No, sir. The previous year was a verbal too.

Q. You didn't understand my question. Did he during that month of June say he would renew the lease? A. No, sir.

MR. CARPENTER: I object to it as leading.

MR. TIFFANY: All right, I will withdraw it.

Q. This was in 1914, in June, almost three years, these conversations took place? A. Yes, three years ago.

Mrs. Helen Levenson—Re-Direct.

Q. You testified a man by the name of Bornstein and a man named Bernstein—Bornstein was the plumber and Bernstein was the bookkeeper? A. Yes.

Q. Two different people? A. Yes.

Q. Was any time set by Mr. Galloway in which these repairs were to be made? Did he say they would have to be made before a certain date?

MR. CARPENTER: I object to it as leading.

MR. TIFFANY: Withdraw it.

MR. CARPENTER: I think if there is anything of that kind it ought to be brought out by the witness.

Q. Was anything said by Mr. Galloway in which he placed a time in which these repairs were to be made?

MR. CARPENTER: I object to it as leading.

THE COURT: How is that objectionable, Mr. Carpenter?

MR. CARPENTER: The witness has several times, both to your Honor and me and Mr. Tiffany, given those conversations in full.

THE COURT: I know that, Mr. Carpenter, and I realize that, and of course the jury have ears the same as we have, and they will probably take that into consideration.

MR. TIFFANY: Mr. Carpenter has brought out there might be some question these were to be done by a certain time.

THE COURT: I will overrule the objection. You may answer yes or no.

A. No.

Q. You have testified that you wrote Bornstein and that this letter, exhibit P-8, was in answer to that letter. I show you a letter dated——

THE COURT: P-8 is not our mark.

Q. P-2. I show you a letter dated June 27, 1914, and ask you if that fixes in your mind—— A. Yes.

Q. ——about when you had the conversation with Mr. Galloway? A. Well, that would be the very same day.

Q. Then it was—— A. The 27th of June that I had the conversation with Mr. Galloway.

MR. TIFFANY: Any objection to that letter as fixing the time?

MR. CARPENTER: No, sir. It is a self serving declaration.

THE COURT: It was only used for the purpose of refreshing her recollection. It is only something that is of substance and actually exists, and which she had acknowledged at the time in order to be available to her to refresh her recollection.

MR. TIFFANY: To call her attention that she wrote to Bornstein to figure on June 27th.

THE COURT: She identifies that letter written by her.

Q. Just immediately after the conversation? A. Yes, immediately after the conversation.

THE COURT: All right; and by reference to it it does refresh your recollection as to the date when you had this conversation or this talk with Mr. Galloway?

THE WITNESS: Yes, sir.

THE COURT: It doesn't need to go in evidence and it is not in fact evidential unless consented to.

Q. Now on cross examination you told Mr. Carpenter that you saw trucks in the yard. What yard do you mean? The yard of the Levenson Wrecking Company or the Gatti-McQuade yard?

A. Gatti-McQuade yard.

Q. Was that part of the premises which they rented? A. Yes.

Q. Do you know when the family of this watchman or stableman that was upstairs, moved out? Do you know when they moved out? A. They didn't move out on July 31st; they moved out a day or two afterwards.

Q. Were they employees of the Levenson Wrecking Company? A. No, sir; they were employees of Gatti McQuade.

Q. They rent the whole premises occupied by these people as well as the stable? A. Well, I don't know what arrangements they had with Gatti-McQuade.

Q. No, did the Gatti-McQuade rent from the Levenson Wrecking Company all the premises in which these people were? A. Yes.

Q. Now would you have had the floors cemented and fixed as he directed, had it not been for the fact that he said that he would renew if he could have those things done? A. No, never.

RE-CROSS EXAMINATION BY MR. CARPENTER:

Q. Whereabouts on Grand Street is this stable, Mrs. Levenson? A. 1415 and 1417.

Q. I know, but how far—— A. It is Grand Street between 15th and 14th Street.

Q. How far from the corner of 14th Street? A. A block is about two hundred feet, isn't it?

Q. I don't know. A. Well, the average block. I don't know; it is about in the middle of the block.

Q. The number is 1415 to 1417? A. I believe it is.

Q. Is that part of the block between 14th and 15th, and Grand and Clinton? A. Block between 14th and 15th and Grand and Clinton. Yes, sir.

Q. That is the only property on that block that the Levenson Wrecking Company owns; is that it? A. That particular lot that the building was on.

Q. Well, that plot? A. Oh, no, that plot is only 50 by 100.

Q. You own land next to it? A. Yes, sir.

MR. TIFFANY: What is the materiality of that?

Q. Isn't that the property that the Levenson Wrecking Company brought from Cassidy?

MR. TIFFANY: I object.

MR. CARPENTER: To identify that, to show that the property has been conveyed by the Levenson Wrecking Company to another corporation before the middle of June, 1914. I want to identify the property.

MR. TIFFANY: It is not part of the pleadings.

THE COURT: In the first place, I do not see that you have pleaded it, and second, can you attack the title of your landlord?

MR. CARPENTER: I am not attacking his title, and I simply say as a matter of law the rent goes to the reversion, and since they have not the title they cannot collect the rents.

MR. TIFFANY: If he knows that, he ought to have alleged it so we would have an opportunity to defend.

MR. CARPENTER: I learned this only a short time ago, and I ask permission, if that be necessary, to amend my answer by having a separate and distinct answer.

* * * * * * * *

I now ask permission of the Court to add as an additional defence, that the Levenson Wrecking Company, the plaintiff in this ac-

tion, conveyed to the Levenson Lumber Company, a New Jersey Corporation—the former, the Levenson Wrecking Company, being a New York corporation—by deed dated May 4, 1914, recorded May 5, 1914, in Liber 1183 of deeds, page 133, for Hudson County, the lands and premises on which the stable mentioned in plaintiff's demand is located, and that the plaintiff did not have title to those lands and premises at the time the alleged lease was alleged to have been made, and at the times mentioned in the plaintiff's complaint. I ask that permission because I did not learn until very recently that there was a conveyance, and I supposed when the answer was filed that the plaintiff did have title, and I did not disclose it before, because I assumed that in my answer I had already raised title and he would have to prove that as part of his case.

* * * * * * * *

MR. TIFFANY: I now offer my objection to the amendment. I realize it is discretionary with the Court to permit such an amendment, but I argue as a matter of law that even with that amendment they do not overcome the rule that a tenant cannot question the landlord's title.

THE COURT: Well, as to your first objection I do not see anything in it, Mr. Tiffany, because it is a matter of discretion, and I have, by what I have already said, fully taken care of it. If I did not make myself plain I will now, that if the amendment is permitted I will give you ample opportunity to make whatever reply by way of pleading that is necessary to take issue upon it, and if you say that you are surprised because of the

lateness of the amendment and unable to supply proofs which you otherwise could, I will then take such steps as will not force you on to your proofs at this time, to give you ample opportunity to do it. So therefore I say that the first reason ought not to be obeyed. The other one raises a more serious question, as I have already suggested, raises a question which may control the question in this case. I do not know whether it will or not, because it may be that you will be able to supply the proofs which put you back in the same position as you were at the start, but it does leave open another question, and that is upon whom the burden rests in the first instance to make that proof, whether upon your opponent and by way of defence because he raises it by plea, or whether it places the burden upon you and only leaves him in position then to answer anything that he may bring forth by his plea.

* * * * * * * *

THE COURT: I am going to do this, Mr. Tiffany. You are so insistent, I am going to deny the amendment, and I am going to take your ground, but at the end of the whole case, if the judgment goes against the defendant, I will immediately grant a rule to show cause.

MR. TIFFANY: Satisfactory to me, if your Honor feels you ought to rule that way.

THE COURT: Well, there is so much doubt about it, so much uncertainty upon the part of all concerned, I think that is the way to do. But I admit that there is a great deal of uncertainty as to whether there is an available defence or not.

MR. CARPENTER: At any rate, I understand it, you allow my answer to stand—or you allow me to amend the answer?

THE COURT: Oh, no; if I allow you to amend, that ends this whole question. You see your opponent attacks it; he says if I exercise my discretion and allow you, as far as the question of time is concerned, to make the amendment and you do make the amendment in the way you propose, that even then such an amendment does not make for a legal defence.

MR. CARPENTER: Then that leaves me high and dry. This is where it leaves me. It leaves me with an application for leave to amend as overruled. If your Honor allows the amendment but sustains the motion to strike it out on the ground that it sets up no defence, that leaves me something I can appeal from, but I cannot do it if your Honor allows the amendment to stand. If you allow the amendment and then strike it out because it is insufficient in law, then I have got a record.

THE COURT: It would be fallacious for me to say I permit it and then afterwards upon motion to strike it out immediately following I strike it out. I think your record is perfectly clear when I said what I have, and which does not appear on the record, that as far as the first ground urged by Mr. Tiffany, that is, that I should not exercise my discretion under the circumstances, to permit you to amend at all, I said I would not consider that, because I had made a statement which shows I am willing to make a proper position for Mr. Tiffany to take if he be surprised because of it, so therefore he cannot quarrel with that ruling permitting the amendment. Then he immediately urges the second ground, and that is that after I have said I will per-

mit the amendment, he then says the amendment ought not to be permitted, not upon the first ground of discretion, but as a matter of law, and he says even if I did use my discretion and you were to be permitted to amend, in law that does not amount to a defence under the circumstances of this case.

MR. CARPENTER: So it is overruled solely on the question of law?

THE COURT: The attack upon your landlord's title cannot be urged as a defence, and it is upon that ground that I deny the motion to amend, not upon the ground of discretion, because I fully agree with you if I deny it upon that ground it would not leave you in any position to have the correctness of that ruling tested. I deny the motion and the application to amend solely on the ground urged by Mr. Tiffany that the rule is against you and that you cannot raise the question of your landlord's title.

MR. CARPENTER: I ask an exception to the ruling.

MR. TIFFANY: Does your Honor overrule the question?

(Question repeated by stenographer.)

THE COURT: The purpose of that question was merely to identify the property under the lease?

MR. CARPENTER: That is right.

THE COURT: I suppose that doesn't go formally to the question.

MR. TIFFANY: No, but I saw what they were after.

THE COURT: I think as far as that present question is concerned I do not see its relevancy, of course, except for the purpose of identifying the property, if that need be. I

do not know but what the defendant may come in and say while I did agree to a lease for another year it was not the property described in this complaint at all.

MR. TIFFANY: Yes, of course, but you can't do that under the pleadings, because we identified the property and they do not raise the question that it was another piece of property.

MR. CARPENTER: We deny that we made any such lease. That is a categorical denial. At any rate, that is not the question we are litigating.

MR. TIFFANY: No.

MR. CARPENTER: That is all.

MR. TIFFANY: That is all.

HORACE A. BERNSTEIN, sworn.

DIRECT EXAMINATION BY MR. TIFFANY:

Q. Mr. Bernstein, where do you live? A. 1326 Southern Boulevard, New York City.

Q. Were you in the employ of the Levenson Wrecking Company at one time? A. I was.

Q. In what capacity? A. Bookkeeper and salesman.

Q. When were you there? A. In the year 1913 and 1914.

Q. Were you there in June, 1914? A. I was.

Q. Whereabouts were you employed by these people? A. In the office.

Q. Whereabouts is their office? A. 14th and 15th Streets, Hoboken, Grand and Clinton Streets.

Q. The Wrecking Company? A. Wrecking Company.

Q. Do you know Mr. Galloway? A. Yes.

Q. Do you recall meeting Mr. Galloway at the office of the Levenson Wrecking Company in June, 1914? A. Yes, I do.

Q. Do you recall a conversation he had with Mrs. Levenson? A. I do.

Q. Tell us as near as you can remember what that conversation was? A. Mr. Galloway came into the office and asked for Mrs. Levenson, and I told him Mrs. Levenson was in and then he spoke to Mrs. Levenson and asked her how about the repairs, or the—rather, the sewer and the concrete floor of the stable which they wanted to have done, because the lease—because they wanted to stay there, and therefore wanted to have that done.

Q. Did you hear him say anything about what period of time they wanted to stay there?

MR. CARPENTER: I object to it as leading.

MR. TIFFANY: Oh, no, I direct his attention

I don't ask him for a certain time.

A. For another year.

Q. What did Mrs. Levenson say to him if any thing? A. That she will attend to that and have it done.

Q. Did you see Mr. Galloway after that? A. I don't remember that.

CROSS EXAMINATION BY MR. CARPENTER:

Q. What day was this that this happened? A. It was in the latter part of June, I can't tell you the exact date at this time.

Q. Why can't you? A. Well, because it is such a long time that has elapsed since the actual occurrence.

Q. Well, what day of the week was it? A. I really can't say.

Q. Was it in the morning or afternoon? A. I

think it was in the afternoon, I am not sure.

Q. What makes you think that? A. I beg pardon?

Q. What makes you think it was in the afternoon? A. Because Mrs. Levenson sometimes—when she comes to the office it is usually—when she did come at that time it was around eleven o'clock, or say ten or eleven o'clock in the morning and she had been there I believe through—what I am recollecting now, quite a little while before Mr. Galloway had appeared, but it was I know some time in the early part of the afternoon, in the latter part of June, what particular day I can't just now say.

Q. You remember testifying on another trial, do you? A. I remember, yes.

Q. Do you remember saying at that time that this conversation was in the latter part of July, 19—— A. The latter part of June.

Q. Do you remember being asked this question: "Q. Do you recall seeing Mr. Galloway at the office in the latter part of July, 1914?" And didn't you answer: "I do"? A. The latter part of June or July?

THE COURT: No; you are asked if you remember this particular question being put to you in the other trial and the answer which has been read to you made by you?

A. I remember the question being put to me whether I had seen Mr. Galloway in the latter part of June.

Q. Said July, 1914? A. Then I must have misunderstood the question, because if I did say July I meant June, for the simple reason that the other work that was to be done with reference to the stable was completed by the middle of July.

Q. You were a salesman, weren't you? A. Sales-

man and bookkeeper and general factotum in the yard and in the office.

Q. General majordomo? A. Yes, just as you say.

Q. Is that right? You are under oath? A. I beg pardon?

Q. You are under oath? A. I say I was salesman and bookkeeper and had general charge of the place.

Q. Did you give directions or did you take directions from somebody else? A. I took directions from the—Mrs. Levenson, she being the proprietor, and I very rarely had occasion to give directions.

Q. This particular day your principal job was listening, wasn't it? A. This particular day my principal job was staying in the office.

Q. Is that all you know about this transaction? A. I know that I had——

Q. Just yes or no; is that all you know? A. Know more.

Q. What? A. More.

Q. You know more about it? A. Yes.

Q. Was anybody with Mr. Galloway when he came? A. No, sir.

Q. Who was in your office when he came? A. Myself and Mrs. Levenson.

Q. What were you doing? A. I was at the desk.

Q. What were you doing, working, or—— A. Doing the necessary work that was then to be done; I don't recall just what particular——

Q. Do you remember this occurrence distinctly? A. I remember this particular occurrence distinctly, because——

Q. Then tell me what you were doing there at the desk? A. I was at the desk.

Q. What were you doing there? A. Sitting there at the desk waiting for a telephone call for some work—waiting for a call from the yard.

Q. Who was that telephone call from that you were waiting for? A. For business.

Q. Who was the man that was going to call you up? A. Anybody. The telephone call—the telephone was there for business, and I was at the desk at that time as any other time waiting for business either by telephone or by a call from the yard.

Q. Well, what was Mrs. Levenson doing? A. She was in the office as well.

Q. What was she doing? A. Likewise.

Q. What is that? A. Well, I can't—I don't remember.

THE COURT: You mean likewise waiting for business?

A. Waiting for business, because I had to refer sometimes—there were things to be done that I had to refer to Mrs. Levenson that I couldn't do in my own discretion.

Q. Was this office on the ground floor or upstairs? A. One flight up.

Q. Didn't have an elevator there? A. No, no elevator.

Q. When Mr. Galloway came in who was the first one to speak? A. I beg pardon.

Q. Who was the first one to speak when Galloway came in? A. I was.

Q. What did you say? A. "Whom do you wish to see?"

Q. Yes. Did you know who it was? A. Yes, sir.

Q. You knew this was Mr. Galloway? A. Yes.

Q. Then what did he say? A. Wanted to see Mrs. Levenson.

Q. She was right there wasn't she? A. There was a partition right there. The office was divided. Mrs. Levenson was in the front office and I was alongside of the other office.

Q. He walked into your office? A. Yes; the entrance to the inner office was through my office.

Q. What did you say then when he said he wanted to see Mrs. Levenson? A. "Mrs Levenson, here is Mr. Galloway," that is all.

Q. Did he say what he wanted to see her about? A. No; I don't think I asked him about that.

Q. Is that all that Mr. Galloway said at that time? A. To me that was all.

Q. Did he say anything at that time about this stable? A. Yes.

Q. What did he say? A. To Mrs. Levenson?

Q. Well, what did he say, if anything, to you about the stable? A. To me, no.

Q. Did he say what he wanted to speak to Mrs. Levenson about? A. No; wanted to see Mrs. Levenson.

Q. Do you remember testifying on this other trial as follows: "I said 'Here is Mrs. Levenson.'" You have just related that? A. Yes.

Q. You were asked: "Q. What did Mr. Galloway say?" and did you then answer, "He said that he came there to see her with reference to the stable and he wanted the sewer fixed, he wanted some stalls fixed." A. Yes, right.

Q. And he wanted some other things done there? A. Yes, sir.

Q. And if they were done he would stay there another year? A. Yes, that is right.

Q. That was it? A. Yes, he said that.

Q. Said that to you? A. No, not to me, to Mrs. Levenson. That is what I heard him say to Mrs. Levenson.

Q. You didn't say that before when you just related it? A. That is what I implied. It did not address itself directly to me about those things, but I heard him say that to Mrs. Levenson, because the offices are adjoining and I was there.

Just then there was no business being transacted by me otherwise, and I was in the office and heard that.

Q. Did you testify to this at that other trial, what I have just read? A. Yes, sir.

Q. Well, when you saw Mr. Galloway first, all he did was ask for Mrs. Levenson, he didn't go ahead and tell you that he wanted to see her about the stable and wanted to have the sewer fixed; he didn't tell you that at all, did he? A. No, not me. Told Mrs. Levenson.

Q. Did you usher him into the next room where Mrs. Levenson was? A. Yes.

Q. Shut the door? A. No, sir.

Q. Left it open so you could hear? A. Left—always the door was open. The door was always open.

Q. I see. Now then when he entered this room where Mrs. Levenson was did you give him a seat? Did he sit down? A. That I can't remember now whether I gave him a seat or not. There were chairs in the office and I believe he sat down; I can't tell you that.

Q. Did you stay in there with him? A. No; I didn't stay in with him, but I sat outside in the other office just probably about three feet away.

Q. Just around the corner, eh, out of sight? A. Around the corner—no, it wasn't the corner office, it was one room divided off by partitions with a door in the center, and the desk was at the center of the room right near the door.

Q. Did you hear the conversation? A. I heard the conversation.

Q. After Galloway got there? A. Yes.

Q. What was the first thing that was said? A. I can't say at this date what the first thing was said or the second thing. I can only say that my reply the first time I testified was substantially the same as you read it from the book.

Q. What did Mrs. Levenson say? A. That she would have that attended to; that she would do it.

Q. Was that all that you heard said? A. That is all.

Q. You are quite friendly with Mr. and Mrs. Levenson, aren't you? A. Yes.

Q. Socially as well as in a business way? A. Socially—business.

Q. When you went out of the court room here at noon you carried along the copy of the testimony that was given by you at the other trial? A. I carried the testimony? Carried no testimony.

Q. Did you this noon read the testimony that you gave in the Second District Court before Judge Blair on the 22nd of January, 1915? A. I did, yes, sir.

Q. Then did you talk to her about your testimony or with anybody? A. Not to any extent. Why, I know when I come down here it was to testify. Naturally I had to think over what I had to say. It was such a long time ago.

Q. Did you make a memorandum of this important conversation you heard in Mrs. Levenson's presence? A. No memorandum whatsoever.

Q. Neither of the date or what you said? A. No, sir.

Q. All you are testifying to is recollection? A. Recollection.

Q. Don't you know as a matter of fact that Galloway was not in that office at any time in 1914 when you were there or when Mrs. Levenson was there? A. No, sir.

Q. You didn't think there was anything significant about that conversation which you heard at that time, did you in 1914? A. Why, yes.

Q. Why didn't you make a note of it then? A. The very fact that I afterwards—right subsequently, was told to send a letter to the plumber to come and to fix the thing.

Q. I move to strike it out.

THE COURT: Oh, no, answer the question.

MR. TIFFANY: I submit that answer is proper. Just let me see where that brings us. The question, as I understand it, is why didn't you make a memorandum of this important conversation. Because immediately afterwards I was directed to write a letter in regard to it.

MR. CARPENTER: He said he did not make a memorandum.

THE COURT: He did not finish the answer. Go on and finish the answer.

A. Subsequently to Mr. Galloway's departure, I had, under the direction of Mrs. Levenson, sent a letter to the plumber to come ahead and fix—get his bid for repairing the sewer and the concrete floors of the stable.

Q. Just as soon as Galloway left? A. Practically as soon as he left.

Q. He went out and Mrs. Levenson immediately told you to write this letter? A. Immediately? Just as soon as I could do it, that is immediately as far as that is concerned.

Q. Can you say whether it was before Galloway went back—had reached his own office? A. I don't know where Mr. Galloway went after he left our office.

Q. Was it within five minutes or within a half hour? A. It was within the next twenty-four hours.

Q. Just a minute. Was it within a half hour after Mr. Galloway left your office? A. No, I can't say it was within a half hour, no, sir.

Q. You didn't have anything else to do when Galloway and Mrs. Levenson were talking, did you? A. At that time, no.

Q. Now do you remember testifying before Judge Blair as follows: "Q. You wouldn't be sure as to what happened between these two people? A. No, I was busy." Did you testify that way? A. If it says there I testified that.

Q. You did testify that? A. Yes, if it says there.

Q. Which is right, that you were busy when those two people were there, or that you didn't have anything to do? A. Well, busy, being occupied at the desk and doing some small clerical work which would not affect my hearing anything within three feet of me.

Q. Busy with general bookkeeper's work? A. That is busy.

Q. Then you were busy? A. Busy to that extent.

Q. Busy with your work that you were paid to do, weren't you? A. Yes, certainly; that is what I was there for.

MR. TIFFANY: Now, if the Court please, I am going to object to counsel taking extracts from the testimony of a certain speech and not giving the rest of it, as unfair to the witness and unfair to the jury, except for the purpose of contradicting him. Now then he comes in here and asks a question, "Did you say this," and then follows it up with other statements that are not in that testimony. I say that is an injustice to the witness, and it goes to the jury; that if he is going to take a portion of the testimony on that particular point, he shall read the following questions and answers and not make the witness appear in an untruthful light.

THE COURT: That is not a prime necessity, Mr. Tiffany. If the particular question and answer standing alone does not convey that which the witness did convey by a series of

questions and answers, of course upon bringing that to the Court's attention the Court will say to him then present him with all of the questions and all of the answers upon that particular copy, otherwise you have a remedy upon cross examination by calling his attention to the succeeding or directly preceding questions asked him.

MR. TIFFANY: Now that is the purpose of the objection exactly, that it is followed by "Were you busy all the time," and it is answered more at length telling how he was busy, and I submit in fairness that he ought to read the rest of it. I have no objection to his cross examination.

THE COURT: That is very difficult for me to control, when I have not a copy of the testimony before me. Of course I will leave it entirely to you, as you have a copy, to reach that same point by presenting the questions.

Q. Of course you did not know when Mr. Galloway came in what he was coming in for, did you? A. No.

Q. What part of the day did you say this was that they had this talk? A. Some time in the latter part of the forenoon or the first part of the afternoon. It was about, to the best of my recollection, at this time around eleven o'clock until twelve, or ten, I can't tell you what particular time in the middle of the day.

Q. Well now do you remember being asked this question before Judge Blair: "You can tell us everything that she said yet you cannot tell us what time of day it was?" A. Yes.

Q. And did you answer, "No sir"? A. Yes, I answered that.

Q. Now you are able, almost a year after that other trial—— A. Yes.

Q. ——almost two years after, to give us the information that you know when it was? A. I beg your pardon?

Q. You are able now to tell us that it was about the middle of the day? A. Yes, sir.

Q. And two years ago, when this case was tried before Judge Blair—a little over two years—you were not able to tell what time of the day this conversation took place. You say that you have refreshed your recollection? A. For the simple reason that at this time I could look back, so to speak, and think about just what time Mrs. Levenson used to come and what time Mr. Galloway had to come there, because I happened to think it was about that time. Even then the reply —my reply at that time would have embraced the same time if I had probably been given time to give a leisured answer, because they usually about that time, about ten or eleven o'clock—about that time when Mrs. Levenson came; them people saw her at that time. She never was in early in the morning—that could be easily understood—she was never in late, always about the middle of the day. Anybody coming to see Mrs. Levenson it would be about that time, and the answer two years ago would embrace what I am saying now.

Q. That is your reason for it? A. I beg your pardon?

Q. That is your reason for knowing now, two years after you had already forgotten; is that right? A. I don't understand the question.

Q. Now then tell us just what it was that Mr. Galloway said to Mrs. Levenson? I want it in your own words as near as you can remember that conversation? A. He asked Mrs. Levenson about the sewers and about the concrete flooring and the stalls and the stable, because they wanted to stay there another year; how about getting them fixed up.

Q. That is what you remember? A. That is what I remember.

Q. And what did Mrs. Levenson say? A. That she would have that attended to—she would certainly do it—she would do that—she would attend to it.

Q. Did she say when she would have it done? A. Right away, I believe she said.

Q. Now did she say—I said did she say when she would have it done? A. Right away.

Q. Did she say he would do it? A. She will do it.

Q. She said that? A. Yes; "We will attend to it right away."

Q. Did she say within what time it would be done? A. Didn't specify the time, but right away I suppose would mean—would give sufficient idea as to when it would be done.

Q. Did she ask him how much it would cost? A. Ask Mr. Galloway how much it would cost?

Q. Yes. A. I don't remember hearing that.

Q. Did he tell her how much it would cost to make those repairs? A. That I don't remember.

Q. Was there anything said about the rent for the next year? A. About the amount of rent?

Q. Yes. A. I think——

Q. Remember, you are on oath, and giving the substance of a conversation. Was there anything said about rent at that time? A. About rent? I think so, but I can't tell about how much or what —I think there was some things about rent. I think so.

Q. Who left the office first, that—Mr. Galloway go out alone, did he? Mr. Galloway went out alone right after that conversation? A. I think so.

Q. You are pretty clear and you can visualize

that and you can see him going out alone, can't you? A. I think they both went out together.

Q. What makes you think that? A. I think so, because of the question of sewers, and what you call it—and stalls; I think Mrs. Levenson was going to show what would be done or where it would be done, or how it would be done. I think they both went out together.

Q. That is your best recollection? A. Best recollection.

Q. You are not sure of that? A. I am not positive.

Q. If they went together you don't know who walked out the door first or anything? A. No, that I can't remember.

Q. Was this a rainy day he was there or a clear day? A. I believe it was a clear day.

Q. Cold or warm? A. June—latter part of June naturally would be warm.

RE-DIRECT EXAMINATION BY MR. TIFFANY:

Q. After you answered that question Mr. Carpenter propounded to you as having asked and answered at the former trial, were you also asked: "Were you busy all the time," and did you answer, "No, not all the time, I was staying there waiting for other customers to come, because I was a salesman as well." A. Yes, sir.

Q. How did you know it was Mr. Galloway? Had you ever seen him before? A. Yes, I saw Mr. Galloway before.

Q. Where and under what circumstances? A. When I went to collect rent.

Q. Who paid the rent to you? A. The gentleman in the office there, in the Gatti-McQuade's office.

Q. Who was there when he paid it? Whose di-

rection was it paid, do you know? A. At Mr. Galloway's directions.

Q. You say that you wrote this letter of the 27th of June——

MR. CARPENTER: He didn't either.

Q. I am asking him whether he did say it or not? I show you a letter dated June 27th, 1914, and ask you if you wrote that and if so at whose direction? A. Yes, I wrote that.

Q. At whose direction? A. Mrs. Levenson's direction.

Q. How do you know? A. "H. L." on the side.

Q. Is this the letter that you refer to as knowing that it was in the latter part of June that you saw Mr. Galloway? A. Yes, that is the letter to the plumber.

MR. TIFFANY: I offer the letter—it is in evidence already.

THE COURT: I know we had a discussion about it and I said unless by consent, it was not evidential, it was simply used for the purpose of refreshing the recollection.

MR. CARPENTER: That is my recollection of it.

MR. TIFFANY: It is in to the best of my recollection for the purpose of refreshing the—or fixing the date.

THE COURT: If it is there for the purpose of fixing the date it is evidential for that purpose.

MR. TIFFANY: I understand that, but if I am wrong——

THE COURT: I understood you were using it simply for the purpose of having Mrs. Levenson refresh her recollection, and upon that theory it would not be be evidential, but for the purpose of fixing the date, for that alone it would be evidential.

MR. TIFFANY: I understand this other letter is in evidence. I think that is all.

RE-CROSS EXAMINATION BY MR. CARPENTER:

Q. Who actually wrote that out on the typewriter; did you or Mrs. Levenson? A. I wrote it out on the typewriter.

Q. How do you know you did? A. Because I did all the typewriting—pretty near all the typewriting.

Q. Did not Mrs. Levenson ever do any? A. She did sometimes, yes.

Q. How do you know she did not do this? A. Because I know I did it at that time, because otherwise——

THE COURT: Pardon me; is there anything in the paper itself that indicates, or is it simply your recollection?

Q. Do not those initials H. L. indicate that she herself did it? A. No, not necessarily.

BY MR. TIFFANY:

Q. What does that indicate to you? A. That Mrs. Levenson dictated it.

Q. Are you still employed by the Levenson Company? A. No, sir.

BY THE COURT:

Q. You told us that Mr. Galloway came into the office and asked for Mrs. Levenson and you showed him in the room, and you told us about speaking about a sewer and concrete floor and things of that character? A. Yes.

Q. And then you have told us what he said about the property. Now I want you to consider well and then tell me what it was he said to her, whether he said, "We want to stay in another year", or did he say, "We will stay another year?"

The reason I am asking you, to be perfectly fair with you, is that you have used both expressions. A. Oh, I see.

Q. I want you to give it careful thought and tell us which of those two things it was that he said, or which of those two expressions he made use of, "We want to stay another year," or, "We will stay another year". A. I believe he said he wanted to stay another year. I believe so.

Q. Well now will you tell us just in what connection that was used. Just go over that situation once again for the time he went into the office where Mrs. Levenson was, and tell us just as near as you can now, in the language he used, of you can, if not as near as you can, what he said to her leading up to that expression and then using the expression? A. Just in accordance with your directions, your Honor, here is what it sounds like to me at this sitting, "We want to stay —we want to stay another year, but we want this —these things done to the stable", and specifying the concrete flooring and stalls and sewer, and so on.

Q. Taking then as being your version of what happened there, you say it was this. What Mr. Galloway said was, "We want to stay". A. Yes.

Q. But these things, enumerating them, have got to be done, or have to be done; is that right? A. Yes, that is right; you have it.

Q. I want to be sure of it, that is all. I want to give you a fair opportunity to reconsider it, that is all.

By Mr. Carpenter:

Q. Where are you working now? A. In New York now.

Q. Who are you working for? A. Boulevard Brass Bed Manufacturing Company.

Q. Mr. Levenson interested in that? A. Why, no.

Q. When you were over on this case in 1915 you were a salesman for the United Fancy Leather Company? A. Yes.

Q. Leave them? A. Yes.

Q. How many places have you worked since?

MR. TIFFANY: I object to it as immaterial.

MR. CARPENTER: All right. Go on.

BY MR. TIFFANY:

Q. When was it you left Mr. Levenson's employ, the Wrecking Company, or the Lumber Company? A. It was around the first of September.

Q. 1914? A. 1914.

MR. TIFFANY: Now shall we read this testimony? By consent, if the court please, we are to read the testimony of William Bornstein, the plumber, who is out of the jurisdiction of the court:

WILLIAM BORNSTEIN, sworn.

DIRECT EXAMINATION BY MR. LICHTENSTEIN:

Q. Mr. Bornstein, what business are you engaged in? A. Plumbing.

Q. Are you a member of the firm of E. M. Bornstein & Son, doing business at 1422 Madison Avenue, New York City? A. Yes, sir.

Q. I show you a letter dated June 27, did you receive that letter from the Levenson Wrecking Company? A. Yes, sir.

Q. And did you thereafter receive from them their acceptance of your bid? A. Yes, sir.

Q. And did you do any work pursuant to any communications on the stables in their yard? A. Yes, sir."

MR. CARPENTER: I object to that on the ground that it is incompetent, irrelevant and immaterial, whether he did any work on their stables in their yard. That is after the letter of June 27th.

MR. TIFFANY: The purpose of that question at that examination is to show in pursuance to this agreement, that if we would do certain work that they would renew, upon certain work being done, we completed that, we completed this work.

THE COURT: In other words, you are trying to show a consideration for this alleged agreement of the renewal of the tenancy.

MR. TIFFANY: Certainly.

MR. CARPENTER: I say you have not set forth any agreement that you performed, that would constitute a lease.

THE COURT: That is another question. It may be that he may be able to show very clearly a consideration for the agreement, but cannot show that he ever made the agreement. He would be just as badly off as if he had reversed it and shown the agreement in every point except consideration, and fails to show his consideration. I will overrule the objection.

MR. CARPENTER: Allow me an exception.

A. Yes, sir.

Q. How soon after the 2nd of July, 1914, did you start in to do the work? A. I went and ordered the material, and I started in two days after that.

Q. What work did you do? A. I laid a sewer.

Q. And did you do the concrete work there? A. I did.

Q. And did you do some roof repairing there? A. Yes, sir.

Q. Was this all done under this estimate? A. No, the sewer was put in under this estimate.

CROSS EXAMINATION BY MR. CARPENTER:

Q. Were you ever in Hoboken while this work was being done? A. Yes, sir some of it.

Q. Was this work done under your supervision? A. Yes, sir.

Q. Did you dig the trench for the sewer? A. No, sir.

Q. Were you there when this was done? A. Yes, sir.

Q. When was that done? A. Immediately after my receiving the acceptance of the contract.

Q. It does not say what was to be done? A. It specifies that for a certain sum we were to do a certain amount of work.

Q. Is that all the contract there was there? A. That is all the contract.

Q. Do those two letters show all the contract that there was between Levenson and you? A. Yes, excepting the estimate that I sent them.

Q. That estimate is not here? A. I do not know.

Q. Have you been paid for that work? A. Yes, sir.

Q. When did you get that work finished? A. Possibly by the 15th of July.

Q. You did not do anything except put in the sewer? A. Yes, and I repaired the roof.

Q. How much of a job was that? A. About fifteen dollars.

Q. Mrs. Levenson said it was just to patch the roof? A. There were several of them; I examined the roof thoroughly.

Q. Did it leak pretty badly? A. No, sir.

Q. Well, it leaked in several places? A. Where

we fixed the roof we overhauled it thoroughly and whenever we thought it was necessary we fixed it.

Q. What other work did you do there? A. I had a man do the concreting on the floor.

Q. Do you know when he finished that? A. Possibly by the 20th of July, because he would only do the work a little piece at a time.

Q. Why could he not do it all at once? A. Because the stable was being used and he had to let the concrete dry before he let the horses go over it.

Q. About how many horses did they have in that stable? A. Possibly twelve.

Q. You had submitted an estimate? A. Yes, sir.

Q. I show you a typewritten estimate dated July 1st, 1914, signed Bornstein & Son, is that the estimate you submitted? A. Yes, sir.

Q. And that is the one you say was with reference to the drain? A. Yes, sir.

Q. And the other work that you did was outside of this estimate? A. Yes, sir.

(The estimate was admitted in evidence without objection, and marked Exhibit P-8).

MR. TIFFANY: Have you that estimate?

MR. CARPENTER: No; that is yours. I think that is already in.

MR. TIFFANY: Yes, it is the letter of July 1st—in this case Exhibit P-2. That was the end of that examination.

MORRIS LEVENSON, sworn.

DIRECT EXAMINATION BY MR. TIFFANY:

Q. Mr. Levenson, you are president of the Levenson Wrecking Company? A. Yes.

Q. Did you make a contract with Bornstein & Son, to do work on your stable in July 1914? A. Yes.

Q. Were you about the premises when the work was being done? A. I am at the yard every day.

Q. The agreement was made on the 2nd of July; how soon after that was the work started? A. A few days.

Q. Do you recall receiving this letter of July 7th from Gatti-McQuade Company, showing the witness exhibit P-4? A. Yes, sir.

Q. That is the letter by which they advised you that they would not be there after the 31st of July? A. Yes, sir.

Q. Did you go to see them? A. I went with that letter the next day.

Q. Did any one come to see you before you went to see them? A. No, sir; I went to see and I spoke to Mr. Galloway.

Q. Whereabouts did you see him? A. At their place of business, about two blocks away, in Hoboken, on Garden Street.

Q. Who did you see, Mr. Galloway? A. Saw Mr. Galloway, yes.

Q. Tell us as near as you can recall at this time what the conversation was that you had with him. Before you come to that, whereabouts was it that you saw him, in the office? A. Outside the door in the hall.

Q. Did he take you into the office? A. No, sir.

Q. Now tell us what he said as near as you can state? A. I came in and I said "Did you send that letter? I am surprised to get that letter after you arranged with us to fix the stable and spend about three hundred dollars expense on it, and now you send that letter". Well, he says to me that the work was not done fast enough and

that is why the horses had been dragged around from one day to another to other places, and that is why he—they want to secure another place that was bigger——

MR. CARPENTER: What is that?

A. Secure another place, I think it was Bigley—I don't think they told me the name, but secure another place.

Q. Did he tell you whether or not he had signed a lease with the other people? A. No; he said he had not signed up yet, but he said he would talk it over with Mr. Gatti, I think, and somebody in the office, and he said he would see if they could get out of the other lease.

Q. How much was the rent for the premises which he was to pay? A. A hundred dollars——

MR. CARPENTER: I object to it as calling for a conclusion, and as leading.

MR. TIFFANY: It is on the direct. I will withdraw it. Take the witness.

CROSS EXAMINATION BY MR. CARPENTER:

Q. What time of the day was this? A. I went there in the morning about ten o'clock I should judge.

Q. Just as soon as you got the letter you went around? A. I went over there, yes, the next day.

Q. You went in the office of Gatti-McQuade Company? A. Yes, I went in the office.

Q. Who did you see there? A. Well, there is a girl, a telephone operator there first, and I spoke to her and said "I want to see Mr. Galloway".

Q. A conversation right in the office? A. No, out in the hall—at the stairs there.

Q. Anybody there but you? A. There was another fellow there, I think his name was Gatti,

I don't know, but he called him out afterwards.

Q. Then you and Mr. Galloway were there when you started to talk? A. At the beginning, yes.

Q. You told him that you were surprised? A. I told him I was.

Q. What did he say? A. He said we didn't do the work fast enough.

Q. What did you say? A. I said we couldn't do it because the place was occupied and we got to get the concrete to dry up at least twenty-four hours before the horses can walk over it. In the morning we started to do the work and at night the horses used to come and used to plank over planks, and before they go over the next morning the concrete was broke up again.

Q. The concrete floor had not been put in at that time, had it? A. What's that?

Q. The concrete floor was not up at that time? A. The concrete was being put in at that time.

Q. Was being put in? A. Yes.

Q. How much was done? A. Probably half of it was done.

Q. You say probably half? A. It is a big place. I don't know how much was done. They had twenty-eight or thirty head of horses in that place.

Q. Is that all? The sewer? A. Well, the sewer being connected and we followed right up with the concrete.

Q. Don't you know that none of that had been put in up to the 8th of July? A. I was there on the 9th or the 8th. (Looking at letter). There was plumbers working there. We had the plumbers working there.

Q. Nothing had been done? A. Well, you see the drainage started from the center of the stable, and the meantime as they came to the center they were concreting already, taking from

one side. The drain will run off the water, was right in the center of the stable, and they started from this end until they reached that point. By that time the plumber was in already.

Q. As a matter of fact you don't know what had been done to the sewer up to the 8th of July? A. That sewer had been put in. The plumbers had to work there and the concrete was being put in.

Q. How many days did they work there? A. They worked there two or three days practically.

Q. You are sure Mr. Gatti was there? A. I don't know if it is a driver. It was a fellow there with overalls. He said he was Gatti. He called him over, and he said, "Is there any way we can get out of that lease, that Bigley lease?" He says, "Levenson is kicking about it", and he says, "Well, we will let you know in a few days". I said, "The work is getting done, I have given all the contracts out". He says, "I see it being done", and I even allowed them to keep horses in my stable across—for the time being, while it was getting fixed up. They knew it was getting done.

Q. He told you that he had already made an agreement with somebody else for the place for the next year? A. No, he was negotiating. He had made no agreement yet. Nothing was signed up. That is what he told me.

Q. You did not consider Gatti-McQuade Company very good tenants of yours, did you?

MR. TIFFANY: I object to it as immaterial.

THE COURT: I do not see the materiality.

MR. CARPENTER: Why, I can see it is very material.

MR. TIFFANY: I will withdraw the objection.

(Question repeated).

A. Well, they paid their rent. Sometimes they were late in paying it, sometimes paid two months together; they were behind a month and then gave me two hundred dollars at one time.

Q. You didn't consider them very good tenants? A. As long as they didn't owe us any money.

Q. Did they owe money on the 8th of July? A. They owed us money for the month's rent. I got the check about the 15th. I guess you got the check there.

Q. Didn't you ask him when you got down there if you wouldn't reconsider that letter? A. I didn't ask him to reconsider at all. I told him our arrangement was made and we are doing the work and he knows it.

Q. I am asking you now if you did not tell him? A. I did not.

Q. That you would like him to reconsider it? A. No; he says he will consider the other proposition, but he will talk it over, and I didn't say I will reconsider. He says he will consider with the other proposition.

Q. What did you go around there to see him for? A. Because we got that letter after we done three hundred dollars worth of work and we got the letter and he wouldn't stay there.

Q. You were around there for the purpose of getting him to sign up a lease for another year? A. The lease was already renewed. We wouldn't have given out the work and spent three hundred dollars on your stable.

Q. You were not present at any conversation? A. Mrs. Levenson told me the arrangement she made with him.

Q. All you knew was what Mrs. Levenson told you? A. The Misses told——

Q. Answer the question. Isn't it true that all

you knew about it was something that your wife had told you? A. Yes.

Q. Of your own knowledge you didn't know whether you had a lease with Galloway or not, did you? A. Well, Judge——

Q. Just answer yes or no. A. I understood the lease was made with her.

Q. When you went around there didn't you ask him if he would sign up a lease? A. I didn't ask him to sign up, because he didn't sign up the previous year. It was on the same arrangement. Just came over and said stay another year. We understood that.

Q. So that when you went around there that morning you did not have any idea about getting him to sign it up for another year? A. I didn't have any idea that they were going to write such a letter.

Q. Just answer the question? A. No. They didn't sign the first year—the second year they didn't sign. They were on a verbal lease.

Q. How long did you men continue to work in the stable after the 8th of July? A. On about the 15th or 18th of July everything was completed for him.

Q. Were you in there every day? A. I have been there every day.

Q. You were inside the stable? A. I supplied the cement and sent for the fellow that done the concrete work.

Q. Do you mean to say you went inside the stable every day? A. Positive.

Q. What? A. Yes, sir. The yard goes right to the stable. They drive through our yard. The horses and trucks go through the yard.

Q. When was the last time you were there in July or August? A. Well, I have been there often

enough, I guess, but I can't say the last time, but I have been there when they moved out, I have been there. I have been there around the 4th of August, they were there yet.

RE-DIRECT EXAMINATION BY MR. TIFFANY:

Q. You testified that some times they paid you two hundred dollars; that is for two months rent? A. For two months rent.

Q. And Mr. Carpenter asked you what you knew about this lease was through Mrs. Levenson? A. Yes.

Q. Were you satisfied with the terms? A. Yes.

MR. CARPENTER: I object to it as calling for a conclusion, and as incompetent, irrelevant and immaterial.

THE COURT: He is only asking whether the terms as given by Mrs. Levenson to him were satisfactory to him. He is not asked what the terms were.

MR. CARPENTER: What difference does it make?

THE COURT: Shows ratification upon his part as one of the officers.

MR. TIFFANY: That is what I added, as president of that company.

THE COURT: I didn't hear you.

A. Yes.

PLAINTIFF RESTS.

MOTION TO NON-SUIT.

MR. CARPENTER: If your Honor please, I move for a nonsuit on several grounds:

First is, that plaintiff has not proved its case;

secondly, on the ground that they have not proved that there was a lease between the plaintiff and the defendant; third, they have not properly proved the damages, they have not proved what they were damaged at all. They have not proved that the plaintiff was the owner of these premises on the first of August, 1914, and continuously thereafter until the end of the year, which would end the 31st of July, 1915. They have merely sought to prove a verbal arrangement made between, or alleged to have been made between Mrs. Levenson and Mr. Galloway of the defendant company. They have not proved that Mr. Galloway had any authority to make any contract with Mrs. Levenson. The proof is that the defendant was a corporation, and it can only be bound by its duly authorized agents, authorized for the particular purpose for which the agreement was made. They have not proved any such agreement. They have proved that two years before Mr. Galloway made a contract of lease and that he was specifically directed by Mr. Gatti, the president of the defendant company, to make that particular lease. No general authority to make such a lease. In the absence of any authority they cannot recover an any contract such as that. It is not even a lease. It is only a contract to get a lease. They cannot on their own showing recover the rents. They can only prove damages for breach of this alleged contract. It is not specific. It is uncertain. The plaintiff's witnesses disagree as to the terms of it, and I submit they have not made out a case. They have not proven they owned the premises, that they had a

right to lease, which they must show as part of their case. They have not even proved that they did not have somebody else in there, in those premises, for the year, or that some one was not in there paying rent. They have not proved their case in damages at all. Simply that we did not continue and hold over.

THE COURT: Now let me stop you right there. Let us examine these one at a time. Of course your first reason is a general reason, and amounts to nothing, because you may as well have left it out as a reason, because you have particularized your reasons. You said they have not proved their case, and that means everything. The first reason is they have not proved a lease as between these parties. I presume that you mean the testimony even admitting for the purpose of this particular reason that the parties who were the parties principal or the active participants, which is another way to put it, were neither one of them authorized to enter into any lease —having that out of consideration, because you raise that by another reason,—I presume you mean by this reason that taking the evidence and giving to the plaintiff the best that there is in it at this time he has not shown those facts which go to make for an agreement.

MR. CARPENTER: That is right.

THE COURT: I am inclined to think there is that in the testimony which would prevent me from nonsuiting upon that ground. There is a contrariety of testimony on the part of the plaintiff; I brought out some of it myself. Some was, under some circumstances, what was said was, "I will take it, or we will take it for another year", and other expressions

being, that, as Mr. Bornstein says, "We want to stay another year, but these improvements must be made". Something similar was said by some of the other witnesses, Mrs. Levenson, for one. I would say if that is all there was to the case your motion ought to be granted.

MR. CARPENTER: There is one other reason I want to add.

THE COURT: Let me have all your reasons.

MR. CARPENTER: That if this conversation which was testified to by Mrs. Levenson and Bornstein were made, if all those facts are true then this was a lease not to be performed within one year from the making of it; it was a lease for one year to begin at the first of the next August and to continue for a year. Now the lease exhibit P-1 provides that the contract shall be one year, that is from the first of August, 1912 to the first of August 1913, and then there was a holding over for the next year. Now the law is that if a written lease for a year is continued over it becomes a lease for another year by operation of law with the consent of the parties. The only evidence of the continuation of the tenancy is after the expiration of this year. The Gatti-McQuade company paid the rent.

THE COURT: Your contention was that it was an entire, new agreement, a continuation for another year. The plaintiff has traversed as I understand his theory of the case, upon an entirely new agreement as it were.

MR. CARPENTER: That is to be performed beyond the expiration of the year—not to be performed within one year from the date of the making thereof, and if so, it was made sometime the latter part of June, and if not to be

performed within one year from the date of the making of it it is void under the statute of frauds.

(Discussion).

THE COURT: I shall decline to nonsuit.

MR. CARPENTER: I ask an exception.

DEFENDANT'S TESTIMONY.

DAVID GALLOWAY, recalled.

DIRECT EXAMINATION BY MR. CARPENTER:

Q. Mr. Galloway, you are secretary of the defendant corporation? A. Yes, sir.

Q. What is the company's business? A. Dealer in paper mill supplies.

Q. Have you a plant in Hoboken now? A. Yes, sir.

Q. Whereabouts? A. Fifteenth and Garden Street.

Q. The Gatti-McQuade Company that you are connected with is the lessee in this written lease Exhibit P-1, isn't it? A. Yes.

Q. That was executed in 1912? A. Yes, sir.

Q. Now then at the end of that term, the 31st of July, 1913, did your company go out or did you continue on? A. We continued on.

Q. For how long? A. For another year.

Q. When did you vacate? A. July 31, 1914.

Q. Mrs. Levenson has testified that there were some carts and some harness left in the premises on August 1st, 2nd and 3rd, 1914. Do you know whether there was anything left there? A. There was nothing in the stable whatever.

Q. How do you know? A. I went there myself on July 31st at 5:30, between 5:30 and 6 o'clock,

on instructions of my attorney, to see that everything was removed from those premises.

Q. Was everything of yours removed from those premises? A. Yes.

Q. Was there any harness of the Gatti-McQuade Company in the premises at all? A. No, sir.

Q. Or any trucks on the premises? A. No, sir.

Q. In the stable or outside the stable? A. Nowhere.

Q. Where had they been removed? A. To the new stable we had rented on Willow Avenue.

Q. Now then Mrs. Levenson also says that in the latter part of June, 1914, you called her on the telephone and told her that if certain repairs were made to the stalls, the skylights and windows, the sewer and the floor, that you would execute a lease for another year, or something to that effect; is that true or not? A. No, sir.

Q. She says that the next day, which was also the latter part of June, 1914, you went to her office, or the office of the Levenson Wrecking Company, and there said that if repairs were made to the stable that you were occupying, to the sewer, floor, partitions, skylight and windows, that you would stay for another year, or something to that effect; is that true? A. No, sir.

Q. Did you go to her office? A. No, sir.

Q. Mr. Bornstein says that he was the bookkeeper for the Levenson Wrecking Company, and that he let you in the office or saw you when you came in and took you in to where Mrs. Levenson was; is that so? A. No, sir.

Q. Did you make any agreement with the Levenson Wrecking Company for the new lease of those premises you had been occupying from the 1st of August, 1914, for one year further? A. No, sir.

Q. Did you write the letter of July 7, 1914, to

the Levenson Wrecking Company that the Gatti-McQuade Company had made other arrangements regarding the stable, or was it written by somebody else? A. It was written by me.

Q. That letter was written by you? (Showing witness a letter). A. Yes.

Q. Prior to that had you told them or the Levenson Wrecking Company, or anybody for them, your company would continue over for another year or make a new lease with them? A. No, sir.

Q. What was the condition of the stable at the time this letter was written and before that? A. Very unsanitary.

Q. In what respect? A. There was no sewer in there and water came up and the horses were always wet at night.

Q. Is that good for the horses' health? A. No, sir; our veterinary advised us——

MR. TIFFANY: I object to what the veterinary advised.

Q. How about the repairs to the stalls of the stable; had they been repaired that winter? A. They were repaired in the early part of the winter, January and February.

Q. Were they repaired in July, 1914? A. Not that I know of.

Q. It is said that there was a new concrete floor put in the stable in July, 1914, and a new sewer put in; do you know anything about it? A. The sewer was put in.

Q. Was it put in at your request or not? A. Not at my request, no, sir.

Q. Was it put in at the request of anybody of your company to your knowledge? A. No, sir.

MR. TIFFANY: Why——

Q. To your knowledge. When did you rent the premises that you said you had or had in mind

on the 7th of July, 1914, when you wrote this letter?

MR. TIFFANY: I object to what they did about renting their premises.

MR. CARPENTER: I won't press it if he objects.

THE COURT: All right.

Q. On the 8th of July, the day after you had written this letter to Mr. Levenson, Mr. Levenson says he came to see you? A. Yes, sir.

Q. Did he see you? A. Yes, sir.

Q. Whereabouts? A. In my office.

Q. In Hoboken? A. Yes.

Q. What did he say? A. He said he was surprised to get that letter and wanted to know if we would not reconsider it.

Q. What did you say? A. I told him no, that we had made other arrangements.

Q. What did he say? A. Well, he said he would have to see his attorney.

Q. Did he at that time say anything to you about having already made a lease with you for the new year? A. No, sir.

Q. Or for the year following? A. No, sir.

Q. Did he claim that you were tied up to him with a new lease for another year? A. No, sir.

Q. Say anything about that? A. No, sir.

CROSS EXAMINATION BY MR. TIFFANY:

Q. You did have the telephone conversation with Mrs. Levenson as she testified to? A. Not as she testified to.

Q. On that day, I mean? A. Yes, I did, about June 15.

Q. You did carry on the negotiations for the leasing of these premises in 1912 and 1913 and staying in there? A. Yes.

Q. And you did have charge of the premises for the Gatti-McQuade Company? A. Yes.

Q. You knew you were talking to Mrs. Levenson on the telephone, did you? A. Yes.

Q. When was that conversation? A. About the middle of June.

Q. When did you next see Mrs. Levenson? A. In court.

Q. Never saw her between those two times? A. Not Mrs. Levenson, no.

Q. You saw Mr. Levenson when? A. On the 8th of July.

Q. At your place? A. Yes.

Q. Whereabouts in your office? A. Up at the head of the stairs.

Q. Not inside your office? A. Not in the office, no.

Q. You have a general office there? A. We have a general office and two——

Q. How is it you did not take him inside? A. The general office is not for outsiders. If we want to take anybody in the private office we do so, otherwise we talk to them at the head of the stairs where we have a place there to talk to people.

Q. He came there after that letter had been received, and your reception was at the outside, at the head of the stairs? A. Yes, sir.

Q. You did not take him in the private office? A. No, sir.

Q. You and he were the only people present at the conversation? A. Yes, sir.

Q. Now what was the conversation with Mr. Levenson? A. He said he was surprised—to get that letter.

Q. What else? A. That is all he says, he says he was surprised getting the letter.

Q. What did you say to him? A. And he asked

me if we could not reconsider the matter.

Q. Yes. A. I told him no, it was too late we had made other arrangements.

Q. Had you other premises at that time? A. Yes, sir.

Q. Signed the lease? A. Had not signed the lease; the lease was drawn up, but not signed.

Q. Where was it drawn up? A. Smith and Bowman, 21 Park Row, New York.

Q. When? A. July 5th.

Q. You did not sign the new lease? A. Not until later on.

Q. About how far are the new premises, the premises which you had leased, from the stables? A. One block.

Q. About a block away? A. Yes.

Q. Did you have in your possession the lease at that time? A. Did I what?

Q. The copy of the new lease in your possession at that time?

THE COURT: At the time of this conversation?

A. No, sir, I did not.

Q. Had all the terms been agreed upon? A. Yes, sir.

Q. The leases were awaiting signature? A. Yes, sir.

Q. But these repairs were made in this stable to the stalls? A. There were some repairs made to the stalls in January and February.

Q. I am not talking about January and February; I am talking about June and July. A. I don't know anything about repairs to the stalls in June and July.

Q. Didn't you find the base of the stalls, that is, the flooring, all cemented when you were there on the 31st of July? A. I don't think so.

Q. Well, will you swear as a matter of fact, sir, that they were not? A. I will not.

Q. You will not. You know as a matter of fact, that the sewer was connected, don't you? A. I do not know that it was connected; it was torn up.

Q. They were working there during the month of July? A. They were working there putting in the sewer, yes.

Q. When you spoke to Mrs. Levenson over the telephone you did not tell her that you had or were making other arrangements for other premises, did you? A. I did not.

Q. What was the purpose of calling her up? A. To notify her we did not want the stable for another year.

Q. Why was it necessary to notify her at that time that you did not want it for another year? A. Gave her over thirty days' notice.

Q. Why didn't you write her? You wrote her later? A. Yes, I wrote her later.

Q. Why did you notify her on the telephone to give her notice, and then write her on or about July 7th? A. Because she said she wanted to have her husband come around and see me and I waited for her husband to come around and he didn't come and I wrote him a letter.

Q. That is the reason you wrote the letter? A. That is the reason I wrote it.

Q. Because you had been waiting to see him? A. And had not come around.

Q. What did Mrs. Levenson say to you when you told her you were going to give up the premises? A. She asked me why and I told her that our veterinary had advised us not to re-rent the premises on account of the unsanitary condition.

Q. I want to ask you if you remember testifying to a statement in the District Court action: "Now you did, on your direct examination state, in an-

swer to a question by counsel, that you told Mrs. Levenson that you didn't want to renew your lease—" A. Uh-huh.

Q. —"on account of the sanitary condition and that you were advised not to have your horses there." And you answered, "I do not recollect saying that. Q. You did say that in your direct examination; now I ask you whether you did say that to her over the telephone? A. I don't remember that." Is that so? A. Possibly, if it is there it is so.

Q. Then why is it now that you say you did tell her it was for that reason that you wanted to give her thirty days' notice? A. Because I know it is so.

Q. You have read this testimony over? A. No.

Q. You have not seen it? A. No, sir.

Q. Since the last trial? A. No, sir.

Q. Gone over it with your attorney? A. No, sir.

Q. Talked it over with Mr. Gatti? A. I talked it over with Mr. Gatti; yes.

Q. Well, if you did say that in the former trial, the matter being somewhat clear at that time, it is probably correct, isn't it? A. May be.

Q. Yes; and I ask you, on page 56, "Q. Will you say that you did tell Mrs. Levenson that you were not going to stay in the building because of the condition that existed there? A. No, I won't say that. Q. You won't say that? A. No, sir, I will not say that—I will not." Then that probably is also the true condition of affairs? A. Will you kindly repeat that question?

Q. Yes. "Will you say that you did tell Mrs. Levenson that you were not going to stay in the building because of the condition that existed there? A. No, I won't say that. Q. You won't say that? A. No, sir, I will not." That is prob-

ably correct testimony, if it appears here? A. If I said it there that is proper testimony, yes.

Q. Didn't you tell her that you had made other arrangements and that you were not going to keep the premises, and that was all? A. I didn't tell her I had made other arrangements, no, sir.

Q. But you had made other arrangements at that time? A. Not at that time.

Q. You considered making other arrangements? A. I considered that, but I had made no arrangement then.

Q. Whatever arrangements you make—you are authorized to hire premises over there for the Gatti-McQuade Company?

MR. CARPENTER: I object.

A. No, sir.

MR. CARPENTER: I will withdraw the objection.

Q. You made all the leases? A. No, sir.

Q. You made the re-letting as you testified to? A. I made one lease only since I have been with the company.

Q. You stayed in there in possession after the first lease, did you not? A. Yes, sir.

Q. You were in charge of the Hoboken stables? A. Yes, sir.

Q. Were the representative of the company in this department, in this state? A. Yes, sir.

Q. Isn't it a fact that these things are all referred to you? A. No.

Q. Concerning the stables? A. No, sir.

Q. You have charge of them, sir? A. I haven't charge of the stables at all. That is not my special work.

Q. Then if it was not your special work why did you go there on July 31st to see if all your

firm's things were out of the stables? A. I was authorized to do so.

Q. You were authorized to represent the company in that respect here in this state, weren't you, in regard to the stables? A. Not especially. I usually take care of the stables, but I am not specially authorized to do so.

Q. Then if you were not authorized, why did you write the letter to Mr. Levenson that you would not take the stable for another year? A. I wrote it on instructions of my attorney.

Q. What right has your attorney to instruct you when it is a matter of Gatti-McQuade's? A. We take our attorney's advice, and we drew up a new lease, and he told me to write to the Levenson Wrecking Company to inform them.

Q. Why did you have to go to an attorney? A. That is a proper thing in a case like this.

Q. That is, you wanted advice on— A. I went to the other man to draw up a new lease and I told him I had notified the Levenson Wrecking Company by telephone and he told me to write a letter.

Q. You had not drawn the lease at the time of this writing of this letter? A. Yes; it had been drawn the 5th of July; that letter was written on the 7th.

Q. That letter was written on the 7th. Why didn't you sign the lease if you had drawn it on this day, on this morning with him? A. The lease says when they should build the shed for the trucks.

Q. They were to do something? A. He was to build the shed for the trucks.

Q. You didn't sign the lease until September, did you? A. No, sir, not until the shed was completed.

Q. Yet you went in there on the first of August, you say? A. Yes.

Q. Now why was it when Mr. Levenson called on you on the 8th of July to see you, if you had no authority to govern these matters, that you did not refer the matter to the home office of this company where Mr. Gatti was? A. He called at the home office; Mr. Gatti was not there.

Q. You do not know that of your own knowledge, do you? A. Absolutely.

Q. Did you speak to Mr. Gatti concerning the making of this new lease? A. I did not.

Q. I call your attention to testimony by you on page 56, "You made up your mind not to stay there? A. Yes, on consultation with Mr. Gatti." So you did consult with Mr. Gatti regarding that? A. Yes, but not when Mr. Levenson was in the office.

Q. Mr. Gatti was not in your office? A. Not at the time Mr. Levenson was in there.

Q. His office in New Jersey? A. It is in Hoboken.

Q. There is no New Jersey office of your company? A. Yes, sir.

Q. There is no New York office of your company? A. No, sir.

Q. Haven't you a desk office over in New York? A. No, sir.

Q. No office at all? A. No, sir.

Q. I was under the impression that you had? A. Philadelphia and Boston.

Q. Philadelphia, yes; I thought it was New York. You are a New York corporation? A. Yes.

Q. You have a registered office in New York, being a New York corporation? A. Yes, we have a registered office.

Q. Where is that office? A. 21 Park Row.

Q. Who is in charge of it? A. Smith & Bowman.

Q. Your attorneys? A. Yes.

Q. Then you have a New York office? A. We have a registered office. We have no regular office that Mr. Gatti attends to or anything else.

BY THE COURT:

Q. You mean you have no business office? A. No business office at all.

Q. Just there, being a New York corporation? A. Yes, sir.

BY MR. TIFFANY:

Q. Are you a director in the company? A. Yes, sir.

Q. You were in 1914? A. Yes, sir.

Q. Now will you tell us once more, please, what conversation you had with Mrs. Levenson on the telephone? A. I called her on the telephone, to the best of my knowledge, and told her we did not want to re-lease the premises, that our veterinary had advised us not to do so.

Q. Yes, what did she say? A. She wanted to know if we would not reconsider the matter, and we told her she could have Mr. Levenson come around and see me.

Q. Anything else? A. Nothing further that I remember.

Q. Might have been something else, might there not? A. Possibly.

Q. Something about making repairs? A. No, sir.

Q. Nothing said about that? A. No, sir.

Q. Now I call your attention to page 57, "You have not explained why you asked Mrs. Levenson to ask Mr. Levenson to come up to see you, if you were not going to renew the lease? A. Mrs. Levenson asked me what was the matter with the premises and I told her there was no sewer there and it was in a very bad condition and she said, 'Suppose we make the repairs.' I said, 'Tell Mr. Levenson

to come around and we can talk it over.'" Then there was a conversation regarding repairs? A. Not by me.

Q. In that conversation? A. Mrs. Levenson spoke about repairs, but I did not mention repairs.

Q. That is the way you differentiate the conversation, saying that she said so and you did not? A. I didn't say anything about repairs; I told her she could have Mr. Levenson come around and see me.

Q. When did you start to negotiate this new lease that Smith & Bowman kept until September before it was signed? A. About the first of July.

Q. If you were still waiting for Mr. Levenson to come around on the 7th of July— A. I wasn't going to wait indefinitely.

Q. Why didn't you write him when you were making negotiations for a new place, why didn't you write and tell him it was all off? A. I had not closed it—settled the thing then.

Q. Then it was open in your mind at the time whether or not you would rent a new place? A. It was not open; we had made up our mind to rent a new place.

Q. When? A. Before I called Mrs. Levenson.

Q. Why did you want to wait until Mr. Levenson could come around to see you? A. I didn't wait until he came around; I went and looked for a new place.

Q. You spoke to her about the middle of June? A. Middle of June.

Q. You say you went to look for a new place about the first of July? A. Yes, sir.

Q. Why did you wait that length of time? A. That was plenty of time.

Q. Isn't it a fact, sir, that you waited for Mr. Levenson to see if new terms could be made? A. No, sir.

Q. That is not a fact? A. No, sir.

Q. What was the reason, then, for your waiting? A. I didn't wait. We were looking around and about the first of July I got in touch with a party that had another stable in the neighborhood, and we—

Q. Now what effort did you make in looking around between the time you spoke to Mrs. Levenson on the telephone and the first part of July? A. I looked all around the neighborhood there. I had two or three different people that had stables to rent and looked at them.

Q. Who were they? A. Lawrence, he had one; another one down on Willow Avenue near Eleventh Street.

Q. When did you see those stables? A. Between the 15th of June and the first of July. Mr. Fall, the real estate man, took me around.

Q. Then if you were doing that, why didn't you write Levenson that it was off? A. Because I had notified him by telephone it was off.

Q. When did you say you commenced to negotiate for this new lease? A. About July 1st.

Q. July 5th? A. No, it was—I took Bigley to our attorney on July 5th, and the lease was drawn up then. I started negotiations about the first of July with that matter.

Q. That was when you first began to look around? A. No, I looked around before that, looked at other stables, but they didn't suit me; they were too far away from my warehouse.

Q. Page 58, "When was it that you started to negotiate for this new lease? A. I started on the 1st of July to look around. Q. On the 1st of July? A. Yes, sir. Q. That is before you wrote the letter? A. Yes, sir. Q. When was it that you commenced negotiating for this new lease? A. About the 5th of July. Q. Just two days before

the 7th? A. Yes, sir. Q. With whom did you negotiate? A. Mr. Buckley."

MR. CARPENTER: Where are you going?
MR. TIFFANY: Page 59.

"A. About the 5th of July, which is two days before the 7th."

MR. CARPENTER: It doesn't run along right.

Q. "Q. Just two days before the 7th? A. Yes, sir. Q. With whom did you negotiate? A. Mr. Buckley. Q. Just to talk over the premises? A. No, I went over to look over the premises and talk over the price, and then I took him to my attorneys. Q. When was it that you took him to your attorneys? A. About the 5th of July." A. 5th of July.

Q. You didn't wait at all for Mr. Levenson to come down? A. Didn't wait at all.

Q. No. A. Not any length of time. I went out and looked around in the meantime.

Q. When was that shed built in these new premises? A. During the month of August.

Q. How many times did you go to the stables of Gatti-McQuade Company that belonged to the Levenson Wrecking Company? A. Probably a half a dozen times.

Q. Didn't you go there and show Mrs. Levenson just what was needed? A. No, sir.

Q. Complain to her about the skylight? A. No, sir.

Q. Complain to her about the stalls and horses scratching themselves? A. No, sir.

Q. Did you send anybody to go with her? A. No, sir.

Q. Mr. Gatti has a brother by the name of Gatti, hasn't he? A. Yes.

Q. He does some work for the Gatti-McQuade Company in Hoboken? A. Yes.

David Galloway—Cross.

Q. How many times did you ever speak to Mrs. Levenson about repairs in the stable? A. Three or four times.

Q. When was the last time? A. The winter of 1914, that is, in January and February.

Q. Not since that time? A. Not that I remember.

Q. Now Mr. Levenson's bookkeeper used to come to your place, the gentleman on the stand? A. Yes, sir.

Q. He had seen you a number of times? A. Yes, sir.

Q. It is a fact, isn't it, that the Levenson's office is separated by a partition? A. I don't know, I am sure.

Q. You don't know? A. No, sir.

Q. Even been in there? A. Once.

Q. When did you start complaining about this sewer? A. About nine months or so before we moved out; during the winter of 1914.

Q. It was about in the month of July, the last month of your lease? A. Yes, sir.

Q. Do you know why they put in that sewer in the last month of your tenancy if you notified this woman that you were going to move out? A. I don't know why they put it it. They knew we had been complaining about it all winter.

Q. Now you have seen Mr. Bernstein come to your place for rent, haven't you? A. Yes.

Q. But you never permitted him into your private office? A. No, sir.

Q. I want to call your attention to page 66: "Did you ever see this young man when he came to collect rent once? A. No." A. Bornstein? I saw him lots of times.

Q. That is a mistake? A. Must be a mistake, certainly.

Q. Now when people come to buy goods, that is, to see you, you take them into the inside of your office and speak to them, don't you? A. If they come to buy stock, yes, sir.

Q. But you wouldn't take Mr. Levenson in there? A. Well, it wasn't necessary.

Q. You just wanted to get rid of him as quickly as you could? A. No, that is not the question. I speak to lots of people outside the office.

Q. Why was it, if they were willing to make these stables where all your horses and all your material was, and your oat-bin, if they were to put them into condition, why didn't you want to remain there another year? A. On the advice of our veterinary.

Q. But they were going to change it. They were going to make it sanitary? A. They had made lots of promises and did not fulfill them.

Q. Knew they were doing the work? A. That I had nothing to do with it.

Q. Didn't you tell them it wasn't done quick enough? A. No, sir.

Q. Why did you renew your lease the second time and stay there the second year if these conditions were so unsanitary? A. We had not had the complaint the first year.

Q. Premises just the same, weren't they? A. Yes, sir.

Q. Then why is it you renewed them? A. We hadn't been looking for any other place, had no other place around, and we stayed there.

Q. You hadn't been any other place and you didn't have any other place, and you were satisfied to stay there? A. Yes, sir.

Q. But when you were satisfied with another place you decided to get out? A. No, before.

Q. What did you mean that you had not been looking for any other place? A. Through the first

year I had been looking for no other place. We just moved over there, we wanted to stay where we were for a year.

Q. You spoke to Messrs. Smith & Bowman about the conversation you had with Mrs. Levenson? A. I certainly did.

Q. When was that you spoke to them about it? A. When I got the letter from Weller & Lichtenstein or Lichtenstein & Weller, or whatever it was.

Q. Was not until you got our letter that you spoke to your attorneys? A. Oh, no; I spoke to our attorneys when I took the new—the owner of the new stable over.

Q. Didn't you tell him what conversation you had with Mrs. Levenson at the time? A. I did. I told him I had notified him by telephone and he said, "You better write her a letter."

Q. Then why did you notify her that you were not going to be there another year if you didn't have a lease for the other year? A. Because I was making a new lease with the other party.

Q. You didn't consider you had any lease with them, did you? A. No, I considered our lease expired on July 31st.

Q. Why was it necessary, if your lease expired, to tell them that you were going to stay after that date? A. It was only natural to give thirty days' notice.

Q. Why didn't you wait until the 31st of July instead of doing that in the middle of June? A. No particular reason; I only at that time called her up and told her.

Q. Isn't it a fact that you called her up to tell her that she ought to make those repairs and if she would your company would stay there? A. No, sir, it was not.

Q. Why did you think it was necessary to go ot your attorney and tell him the conversations

you had with Mrs. Levenson over the telephone after you received our letter? A. Well, that is only natural thing to do when you get a letter from a lawyer to go to your own lawyer and get advice.

Q. There is nothing in this letter about renewing of a lease, is there? A. I don't know what is in the letter. I turned it over to my attorney. I don't know what is in it.

MR. CARPENTER: I notice you didn't say anything about when the new lease began or anything about it.

Q. There is nothing about this telephone conversation in there that you should speak to them about, is there? A. My lawyer couldn't answer that letter unless I told him the conversation I had. All the transactions I had with Mrs. Levenson.

Q. You told him that conversation just as you have told us here? A. Yes.

Q. You didn't tell him that you told Mrs. Levenson that if they would make those repairs you would stay there for another year? A. No, sir, I did not. I did not tell her.

Q. Your attorney advised you just what to do in regard to the matter? A. Yes.

Q. You followed those instructions? A. Yes.

Q. And they culminated in the writing of that letter to Mr. Levenson? A. Yes, sir.

Q. And after that Mr. Levenson came to see you? A. Yes.

Q. Now then you went over there to see your attorney about the 10th of July, too, didn't you? A. Several times after that.

Q. About this matter? A. And other matters.

Q. You asked him concerning the reply to this

letter, if he had received any reply? A. I don't remember that I did. Probably did, though.

Q. And he showed you our letter then, did he not? A. Yes.

Q. Now how many watchmen did you have on this place? A. Two.

Q. They lived there, did they not—one of them with his family? A. Yes. That is not a watchman. The watchman did not live there. Our head stableman lived there.

Q. Had his family in the premises? A. Yes, sir.

Q. You don't know of your own knowledge when they moved out of there, do you? A. About two daye before July 31st.

Q. Well, did you see them move? A. I didn't see them move, no.

Q. You don't know of your own knowledge when they moved? A. I do. The man told me.

Q. Aside from that, what he told you. A. I went in the stable myself on July 31st at the instructions of my attorney and saw that everything was taken out of there. There was nothing left there.

Q. Did you go upstairs? A. Yes, sir.

Q. Went in the apartments occupied by this man? A. Yes, sir.

Q. There wasn't anything in there? A. No, sir.

Q. How many rooms were there? A. I don't know, two or three rooms.

Q. Wasn't there any more than that? A. Not that I know of.

Q. How many rooms are there downstairs? A. Stable room and our harness room downstairs.

Q. Some oat bins in there that belonged to your company? A. Yes.

Q. Weren't they there when you were there that night? A. No, sir, they were not.

Q. Did you supervise the moving out of the place? A. I did not supervise; I went there after they had moved out.

Q. You say this bin was not there after the 31st of July? A. No, sir.

Q. Of your own knowledge, personally? A. Of my own personal knowledge.

Q. You say that after having examined it about six o'clock that night? A. Six o'clock that night it was in Bigley's stable.

Q. All of it? A. All of it.

Q. You don't know whether the watchman was out or not? A. I don't know anything about the watchman after six o'clock; I was not supposed to be there.

Q. Well, he stayed there all night, didn't he? That was his duty to stay there at night? A. Yes.

Q. At a place provided for him? A. Yes.

Q. Don't know whether he was out that night or not, do you? A. He did not sleep there that night.

Q. You don't know of your own knowledge? A. I know from what he told me.

Q. You don't know what he told you, sir. Is he here to-day? A. No, sir.

Q. Is the man here that was your stable man? A. No, sir.

Q. Have you got any men here that took out the bin? A. No, sir.

Q. Don't you remember answering this question: "You did not know if the bin was out, of your own personal knowledge? A. I saw it in the new stable on July 31st, I could not say whether the watchman was out or not, but the bins and everything else were removed." A. That is just what I testify to just now.

Q. You don't know that the watchman was out? A. His furniture was out.

Q. He didn't have any furniture there, did he? A. Yes, he did. He used to live there, yes. When he lived there he had furniture there.

Q. Isn't that the stable man? A. No; that was the head stable man had charge of all the horses, and he lived upstairs.

Q. How many families did you have living there? A. No family. Only the family of this stable man and two night watchmen.

Q. They all lived there? A. The night watchman slept there at night, and they got up early in the morning and cleaned the horses.

RE-DIRECT EXAMINATION BY MR. CARPENTER:

Q. Mr. Galloway, I want to ask you one other question about when you were in Mr. Levenson's office. You testified in your answer to Mr. Tiffany's question that you were once in Mr. Levenson's office? A. Yes.

Q. About when was that? A. Why, it was in the winter of 1914.

Q. You were not there— A. —when I went to complain about the stable, about the skylight leaking and water coming on the horses.

Q. Were you there at all in June, 1914? A. No, sir.

Q. Or July, 1914? A. No, sir.

Q. And you did not, as I understood you to say to Mr. Tiffany, go through your stable with Mrs. Levenson at all in 1914? A. No, sir.

Q. Now, then, I show you a lease between Bridget Bigley, wife of William Bigley, as landlord, and the Gatti-McQuade Company, a New York corporation, as tenant, filled in the 3rd of September, 1914, and ask you if that is the lease

that you say was agreed to on the 5th of July, 1914, and was not actually executed until the 3rd of September, 1914, and if that is a lease for the premises that you moved to from the premises you had been renting from the Levenson Wrecking Company?

(Objected to as immaterial, incompetent and irrelevant, and not the proper way to produce a lease.)

Q. Has it been recorded? A. I do not think it was recorded.

Q. Not by you? A. No, I am not sure. It may have been.

THE COURT: What do you say you offer it for?

MR. CARPENTER: Well, some corroboration of the testimony. It shows the rent was the same as they were paying the Levenson Wrecking Company, indicating there would be no incentive to go to another place at a cheaper rent or greater rent, the size of the premises and everything else.

MR. TIFFANY: I submit it is not proper, and it has no bearing in the case, what they did with some one else.

MR. CARPENTER: I do not think it is of sufficient importance to urge it.

THE COURT: I think I will sustain the objection.

Q. You testified earlier in the case that Mr. Gatti told you to execute a lease with the Levenson Wrecking Company in 1912? A. Yes, sir.

Q. Did you get any instructions as to whether to execute or not to execute any lease after the one expired on the 31st of July, 1914.

(Objected to what his instructions were, as being immaterial, incompetent and not binding on the plaintiff. Objection overruled.)

A. Mr. Gatti instructed me to look around and see if I could find another stable.

(Question repeated by stenographer.)

THE COURT: With the plaintiffs in this action.

Q. With the plaintiffs in this action? A. Yes, sir.

Q. What were the instructions? A. Mr. Gatti told me to look around and find a new stable.

Q. Did he say anything about continuing a lease for another year with the Levenson Wrecking Company? A. We had decided not to—

MR. TIFFANY: I object, if the Court please, to what they said between themselves, as not being proper. It is a conversation between third parties, certainly.

MR. CARPENTER: I am willing to forego it.

THE COURT: You started to say something about deciding. Do you mean that you took any formal action?

THE WITNESS: No, sir, no formal action of the board of directors, only Mr. Gatti and I talked it over, and on the advice of the veterinary he said not to take it ourselves, and he said look around and see about another stable.

Q. That is all that took place in regard to this lease? A. Yes.

Q. Not to take it, but to look around for another? A. Yes, sir.

Q. When was it? A. That was in June, around the middle of June.

RE-CROSS EXAMINATION BY MR. TIFFANY:

Q. That is the way you did business, you and Mr. Gatti would talk it over and decide what was right and execute your ideas? A. Yes, sir.

Q. No action was taken by the board of directors. How many directors were there? A. Three.

Q. You and Mr. Gatti and who else? A. Mr. Arford.

Q. Where is he? A. He is not here.

Q. Where is he located? A. He is located several different places; he is mostly at New London, Connecticut, and another one Bogota, New York, and another in Massachusetts.

Q. But you and Mr. Gatti transacted the business of the corporation? A. Yes, sir.

JOSEPH GATTI, sworn.

DIRECT EXAMINATION BY MR. CARPENTER:

Q. Mr. Gatti, you are the president of the Gatti-McQuade Company? A. Yes, sir.

Q. Any other office you hold? A. Treasurer.

Q. You hold the money. Mr. Levenson has testified that you were present at a conversation—

MR. TIFFANY: No, he didn't.

MR. CARPENTER: That Mr. Gatti was present.

MR. TIFFANY: Not this Gatti. His testimony was that there were two Mr. Gattis.

MR. CARPENTER: Which one do you say?

MR. TIFFANY: I am not testifying.

THE COURT: He was a man in overalls.

MR. TIFFANY: Yes, it was not Mr. Gatti.

THE COURT: He said he was a man in overalls.

MR. TIFFANY: That is right.

Q. Is there any other Gatti connected with the Gatti-McQuade Company? A. No, sir.

Q. Were you present at a conversation on the 8th of July, 1914, with Mr. Galloway and Mr. Levenson in the Hoboken stable? A. No, sir.

Q. Was Mr. Galloway authorized in 1914 to execute a new lease—

MR. TIFFANY: I object.

Q. —to run from the expiration of your then existing lease one year?

MR. TIFFANY: I object.

A. I didn't get that.

MR. TIFFANY: Just a minute. It is not proper cross examination. It is not the proper way to prove authorization or lack of authorization where they have it within their own knowledge; they can prove it by the minutes of the firm.

THE COURT: I will overrule the objection.

A. With the Levenson Company?

Q. Yes. A. No, sir.

Q. He had executed a lease in 1912 for one year and then there was a renewal of that for another year? A. Yes.

Q. That was with the consent and authority of the corporation? A. Yes, sir.

Q. Now you have seen the stable that you had, of course, that you rented from the Levenson Wrecking Company? A. Once.

Q. Did you observe what the condition of the floor was; was it wet at all at that time? A. When we first moved in I noticed it at that time. I never went there after that.

Q. Were you there on the last day, or on the 31st of July, 1914? A. No, sir.

CROSS EXAMINATION BY MR. TIFFANY:

Q. You have a brother, haven't you? A. Yes, sir.

Q. And he works for the Gatti-McQuade Company? A. Yes.

Q. Did he work for it in June, 1914, and July? A. Yes, sir.

Q. Does he ever wear overalls? A. He works in the shop, yes.

Q. In Hoboken? A. Yes.

Q. Not as fortunate as his brother. Now when you would make a lease of premises you would not call together the board of directors and take formal action, would you? A. No.

Q. You and Mr. Galloway managed the affairs of this corporation? A. Yes, sir.

Q. He being the secretary and you the president and treasurer, and the other director was out on the road at the mills? A. Yes, sir.

Q. What were your duties as president; what did you do? A. Why, just run the company.

Q. Did you run it or did Mr. Galloway run it? A. No, he run it on my instructions.

Q. You instructed him to look around for a new place? A. Yes.

Q. Knowing that he knew what was wanted? A. I knew what we wanted; we wanted a better stable than we had.

Q. Wanted a better stable than you had, because of the fact it was unsanitary, as your doctor told you? A. Yes.

Q. You wanted it made sanitary, you knew you wanted a sanitary stable? A. Yes.

Q. Were you always present at the Hoboken office? A. Yes.

Q. Were you there on the morning Mr. Levenson called? A. Beg pardon; always there?

Q. Yes. A. Sometimes not.

Q. Go out on the road and go to the Philadelphia office? A. Yes.

Q. Go out to the mills? A. Yes.

Q. In fact, you travelled quite a little? A. Yes.

Q. In your absence Mr. Galloway had charge of the business? A. Yes.

Q. In fact, at the last trial you were in Boston? A. Yes.

Q. You go away for quite extended periods of time? A. Couple of weeks sometimes.

Q. During that time Mr. Galloway is the one in charge of the affairs of the company at home? A. Yes.

Q. When would you go away? When do your trips commence? A. Oh, depends, if their business requires.

Q. You were not at your office in about the 8th of July, 1914? A. I may have been; I couldn't say.

Q. Do you remember, Mr. Levenson, being there that day? A. No, sir.

Q. You were not there that day? A. I never saw Mr. Levenson.

Q. Do you remember Mr. Galloway talking to you about that? Were you over here and also in Smith & Bowman's office? A. I sent Mr. Galloway over there.

Q. Sent him over there to take charge of the matter? A. Yes.

Q. He had charge of the leasing of the stables? A. Yes.

EGBERT H. FARR, sworn.

DIRECT EXAMINATION BY MR. CARPENTER:

Q. Mr. Farr, where do you live? A. Philadelphia, 3412 Wallace Street.

Q. You are connected with the Gatti-McQuade Company? A. Yes.

Q. What capacity? A. Manager of the Philadelphia office.

Q. You sometimes visit the Hoboken office? A. Very often, sir.

Q. Were you there in the month of June, 1914, one time when Mr. Galloway was talking over the telephone? A. I was.

Q. Do you remember him saying anything over the telephone about the lease for the next year for the stable that the company was occupying of the Levenson Wrecking Company?

MR. TIFFANY: I object. They may have telephoned a hundred and one different people. Who were they telephoning to?

MR. CARPENTER: Telephoning to Mrs. Levenson.

THE COURT: Does he know that the telephone message was to Mrs. Levenson?

THE WITNESS: I was told it was, yes.

MR. TIFFANY: I object, and ask that the telephone conversation be stricken out.

THE COURT: I do not see why it should not be, then, Mr. Carpenter, unless this witness has some way of showing that he has knowledge of the fact that the message was to Mrs. Levenson.

MR. CARPENTER: I will call Mr. Galloway back and tie it up. Take the stand, Mr. Galloway. Just stand right over there, Mr. Farr.

DAVID GALLOWAY, recalled.

DIRECT EXAMINATION BY MR. CARPENTER:

Q. Mr. Galloway, at the time you talked with Mrs. Levenson over the telephone and told her that you would not execute her lease with her for another year, or with the Levenson Wrecking Company, for another year, was anybody present in the office? A. Yes.

THE COURT: He refers to the conversation we are speaking of as having taken place June 15th.

THE WITNESS: Yes.

Q. Who was present? A. Mr. Farr.

Q. This gentleman here? A. Yes, and Mr. Matthews, our bookkeeper.

CROSS EXAMINATION BY MR. TIFFANY:

Q. When was this conversation? A. About the 15th of June.

Q. Was that before or after you went to the Levenson Wrecking Company, as you testified you were there once? A. Oh, it was considerably after.

Q. Who did you see when you were there the first time? A. Mr. Levenson.

Q. Mr. Levenson? A. Yes, sir.

Q. What was it about? A. About fixing the roof and the skylight.

Q. Sure it was Mr. Levenson? A. Yes.

Q. Anybody else there? A. No, sir; some workmen on the plant.

Q. Whereabouts was this conversation, Mr. Galloway, in your private office or in the outer office? A. In the general office.

Q. Where was Mr. Farr? A. Mr. Farr was standing right alongside of me.

Q. Standing there? A. Standing there alongside of the desk.

Q. This conversation was not in your private office? A. No, sir, it was not; it was in the general office.

Q. And you had been talking to Mr. Farr about the stable matter? A. Had I talked to Mr. Farr about it?

Q. Yes. A. No, I had not.

Q. How did he come to be standing alongside of you when this conversation took place? A. We were talking on some other matter and I called up Mrs. Levenson, and he happened to be standing there.

Q. Were you engaged in other matters foreign to your call for Mrs. Levenson right then? A. Just happened to occur to me at the time. It was nothing special should cause me to call her up.

EGBERT H. FARR, resumes.

FURTHER DIRECT EXAMINATION BY MR. CARPENTER:

Q. You said you were present in the office of the Gatti-McQuade Company one day in 1914, in June? A. Yes.

Q. When Mr. Galloway called somebody on the telephone and spoke about a lease? A. Yes, sir.

Q. What did you hear him say? A. I heard him say, "We will not renew the lease."

Q. Hear anything else said? A. Nothing further.

Q. That is all you remember being said? A. That is all I heard said.

Q. Did you inquire afterwards who he was talking to? A. He told me afterwards.

MR. TIFFANY: I object to what he told Mr. Farr.

MR. CARPENTER: All right. Cross examine.

CROSS EXAMINATION BY MR. TIFFANY:

Q. How long were you there that day? A. I guess I was there all day. I came over in the morning.

Q. What is there about this one particular conversation that calls to your attention this fact? A. I didn't quite understand your question.

Q. What is there about this particular telephone conversation that you remember so vividly after over three years or two years—— A. I was a witness on this case two years ago.

Q. That is what recalls it to your mind? A. No; when the case was brought up that is I was asked what I knew about it and I recalled that conversation.

Q. How many conversations—telephone calls—do you recall being made on that day? A. Only the one.

Q. What is there about that that refreshed your memory for a year, that enabled you to testify the last trial? A. I don't understand what you mean by refreshing my memory.

Q. What is there about the conversation that is so unusual that you should remember it for a period of a year at least? A. Why, when this case was coming up I recalled the conversation.

BY THE COURT:

Q. What was there about it that caused you to recall it or remember it? A. When the case was brought to trial, they said it was going to be brought here to trial.

Q. Speaking of the first trial, which you said was the one which causes your remembering it. You say you remembered it and testified to it at

the first trial. Now, what was there that caused you to remember this particular telephone message so that you were able to testify to it at the previous trial? A. That is the one thing I knew about it.

Q. The only thing you knew about the case? A. Yes.

By Mr. Tiffany:

Q. How did you know from your knowledge that this referred to this case? A. I was told that the conversation was with her at that time.

Q. What was there about it—how did they come to tell you what the conversation was about? A. I don't know why that should have been said. I might have asked the question at the time. That I don't remember.

Q. Who was there at the time? A. Mr. Galloway was the one that telephoned.

Q. Do you know Mrs. Levenson? A. No, sir.

Q. Never met her before? A. No, sir.

Q. Where did this telephone conversation take place? A. In the general office.

Q. How long had you been in the general office? A. I suppose all day, as far as I recall.

Q. Have a number of telephone calls there, don't they? A. Yes.

Q. You remember this one in particular? A. I say I was there when this one happened, yes.

Q. Can you tell me any other telephone calls that came in that day? A. I cannot, no, sir.

Q. You are still working for the Gatti-McQuade Company? A. Yes.

Q. What capacity? A. Philadelphia manager.

Q. What else was said over the telephone besides that as you have telephoned to,—"We will not renew the lease"? A. Don't recall another thing.

Q. You don't recall anything but those words? A. That is all.

Q. How long were they talking on the telephone? A. That I can't say.

Q. What say? A. That I can't say.

Q. You don't know how long the 'phone took? A. No, sir.

Q. Don't know anything else was said? A. I just heard that and that is all.

Q. Isn't it possible that all you heard was, "We will renew the lease"? A. "We will not renew the lease."

Q. What is there about that that makes that word "not" so positive in your mind? A. Well, I can't remember anything different from what I heard; it would be foolish.

Q. I don't want you to remember anything else from what you heard. I want to know why it is you say under oath this conversation contained the word "not." A. Because it did.

Q. What is there about it that out of that whole mass of work that day you remember this one little statement and nothing else? A. I don't know why that should be, simply that thing, and that is what is brought to one's attention, they would recall probably that conversation; you can't remember something different.

Q. Who was it told you that was the conversation? A. I heard the conversation.

Q. Did you go over it again with anybody before the last trial? A. No, sir.

Q. Never spoke to anybody about it? A. No, there was nothing said about it.

Q. Didn't go over it with the company's attorneys? A. No, sir.

Q. Then how did they know what you were going to testify? A. I don't know, but I did stop in the office of Mr. Carpenter on the morning of the trial, that is true.

Q. How did they know how to bring you to Mr.

Carpenter if they didn't know what you were going to testify to? A. I told Mr. Galloway what I had heard over the telephone.

Q. When did you tell him that? A. That is when this was going to be brought up for trial two years ago.

Q. How did he come to ask you if you had heard it? A. I don't know more than he wanted to get witnesses on the case.

Q. He was out looking for witnesses on the case? A. That I don't know, I suppose.

Q. I don't want your supposition. Now you remember testifying at the last trial, don't you? A. I do.

Q. Do you remember Mr. Lichtenstein asking you this question: "That is all you heard over the telephone, 'I won't renew the lease.' A. Yes, and he said, 'I will be here.'" A. I don't recall that now.

Q. Well, is that a fact? A. It must have been, if it is there.

Q. Did he say, "We will not renew the lease," or, did he say, "I won't renew the lease"? A. That I can't say positive. It represents the big thing, either I or we.

Q. Is that all the conversation, you are sure? A. Yes, sir.

Q. Then I ask you if he didn't ask you as follows, "He didn't say that he would be here over the telephone?" A. That I don't remember.

Q. "A. Yes, that is the reply he made, 'I will be here.' He picked up the receiver and said, 'I won't renew the lease, I will be here.' A. That is all." Was anything else said? A. Not that I know of.

Q. Then the only thing he did was to pick up that receiver and say, "I will not renew the lease, I will be here," and hung up? A. I simply recall

that part of the conversation, "I will not renew the lease."

Q. You were not paying any particular attention? A. No, I heard that much.

ALWARD J. HUGGERD, sworn.

DIRECT EXAMINATION BY MR. CARPENTER:

Q. Mr. Huggerd, where do you live? A. Mount Brook, Connecticut.

Q. Are you in the employ of the Gatti-McQuade Company now? A. No, sir.

Q. What is your business now? A. I am manufacturing paper tubes.

Q. For yourself? A. For myself.

Q. Were you in the employ of the Gatti-McQuade Company in 1914? A. Yes.

Q. What was your connection with them, what capacity? A. Shipping clerk.

Q. Whereabouts were you employed in say, June and July, 1914—the Hoboken office? A. Yes.

Q. Do you remember the day when the Gatti-McQuade moved from the Hoboken stable to the new stable? A. Yes.

Q. Tell the jury what you know about that—do you know when everything was out? A. Everything was out July 31st.

Q. How do you know that? A. I went over and saw that everything was out.

Q. What time of day did you go there? A. About two o'clock. I couldn't say positive; around two o'clock, and everything was removed.

Q. Where had they been moved to? A. They were removed to the new stable, about a block away; I think it was Mr. Berkley's.

Q. Mrs. Levenson says there were some trucks standing out in the yard and a lot of harness up-

stairs? A. There was no trucks or any harness at this time.

Q. Everything had been taken? A. Everything was out of the way that belonged to Gatti-McQuade.

Q. Who had full charge of the horses and trucks in the stable? A. I had full charge of running the trucks, but not the stable.

CROSS EXAMINATION BY MR. TIFFANY:

Q. Who had charge of the stable? A. There was another man.

Q. Who was he? A. He was head stable man had charge.

Q. You were under orders from Mr. Galloway? A. Yes, sir.

Q. Now your trucks worked in the day time, didn't they? A. Yes, sir.

Q. You put them up there at night? A. Yes, sir.

Q. Now where did they keep—where were the trucks when they didn't have any sheds down in the new place? A. In the new place? They kept them outside.

Q. Without any sheds to cover them? A. Lots of times they were kept at the warehouses, lots of times, loaded.

Q. Did they keep them down at the place you rented, Buckley's place, or did you keep them in the warehouse? A. They kept most of them at the warehouse. They would come in loaded at night and were unloaded through the night,—that is the majority of them, not all.

BY MR. CARPENTER:

Q. Where was this warehouse? A. 14th and Garden—15th and Garden.

By Mr. Tiffany:

Q. What time did you quit that day? A. Well, around six or seven o'clock.

Q. Your wagons sometimes come in quite late at night, do they not? A. Yes.

Q. Yes; they come in as late as nine and ten and eleven o'clock at night? A. Yes, sir.

Q. You don't know where they were that night on the 31st of July, 1914? A. I did not—I did not see.

Q. Of your own knowledge, sir? A. I didn't see where they went that night.

Q. You cannot say on oath, of your own knowledge, they were not kept at the yards of the Levenson Wrecking Company, at their stables, 14th and 15th, can you? A. I didn't see them there.

Q. I didn't ask you that, sir? A. No.

Q. Can you tell us, so we will know, what sort of examination you made, what the examination consisted of? A. Beg pardon?

(Question repeated by stenographer.)

The Court: At two o'clock.

A. I had instructions to go over and see that the trucks and harness and all things——

Q. Never mind your instructions. Tell us what you did?

The Court: You had instructions to do something. Tell us what you did.

A. I went over to the stables and looked all through the stables to see that everything was removed that was owned by the Gatti-McQuade Company. That is all I did.

Q. In pursuance to that what did you do. What part of the building did you go into? A. I went through the stables and through the rooms upstairs.

Q. What was upstairs? A. There was nothing.

Q. No harness up there? A. No harness.

Q. There were some small straps of harness there? A. Not that I saw.

Q. Not very light, is it, up there; the daylight is not very strong upstairs? A. Well, it was light so you could easily see.

Q. You could? Look in the harness closets? A. There was no harness closet. There was a room where they kept the harness.

Q. Did you go in there? A. I went in there.

Q. No harness there? A. No harness.

Q. And how about the oat box? A. I am not—I wouldn't say about that. I wouldn't say whether it was there or not, because I am not positive.

Q. You are sure part of it was there, aren't you? A. I am not. I don't know anything about it. I wouldn't say anything about the oat bin.

Q. You were there for the purpose of seeing that it was all out? A. I went there to see that all the harness and trucks and things belonging to Gatti-McQuade—I didn't know the oat bin belonged to him, and I couldn't say whether it was there or not at that time.

Q. Then you only went there to see that the articles that you knew of were out, that belonged to Gatti-McQuade? A. The things that I knew—that I thought belonged to Gatti-McQuade.

Q. How many times did you go in there to make the examination? A. That day?

Q. Yes. A. Once.

Q. How long did it take you? A. Probably ten or fifteen minutes.

Q. How large a place is it? Quite a stable, isn't it, quite a large stable? A. Well, not very.

Q. How many stables? A. We have something like twenty-five I think, or thirty.

Q. How many rooms on the ground floor besides

the stalls? A. There was just the one room and the shed, I think, for the trucks, as I remember it. It is a long while ago. I don't remember very well now.

Q. How many on the second floor? A. There was three or four on the second floor.

Q. What were they used for? A. I wouldn't be positive which. There was a family lived in one, the head stable man.

Q. Well, I know, but did you go in those rooms? A. I went in there.

Q. Went through all the rooms? A. All the rooms.

Q. What did you see in there? A. There was nothing.

Q. Nothing at all? Nothing at all? A. Nothing.

Q. Were not the doors of those rooms locked? A. The doors were open.

Q. You went into the rooms? A. I went into every room up there.

Q. Who was there at the time? A. Nobody.

Q. How many bins were there there? A. What?

Q. Oat bin? A. There was only one, I think. I didn't pay much attention to the oat bin, because I thought it belonged to the stable.

Q. Did you go through all the rooms of that apartment there? A. All the rooms on the top? I did.

Q. What are those rooms? Just tell us what they are? What they are used for? What is the stationary furniture? A. I couldn't tell what furniture there was in them now.

Q. Can you tell us which room is the kitchen? A. There are two rooms—the room on the left as you went up the stairs is the kitchen. Right at the left of the stairs as you went up, was used for a kitchen, as I remember.

Q. Were you in the sleeping rooms? A. Sleeping room, they used one right off of that for a sleeping room.

Q. Were you in there? A. Yes, sir.

Q. On this particular day? A. On that particular day.

Q. What did you find in there? A. There was nothing that I remember.

Q. Remember the other sleeping room and another little room? A. The other sleeping rooms?

Q. Yes. A. There was another room that they used for a sleeping room.

Q. Wasn't there something in that? A. No, sir.

Q. I call your attention to this question asked you at the former trial: "There was another little room——" have you told us all the rooms? A. I don't just remember now how many rooms there were.

Q. Was there anything in any of the rooms? A. There was nothing in any of the rooms that I remember of.

Q. I ask you this, did you answer as follows: "There was another little room; I don't know what you would call it, or what it is used for. Q. What was it used for? A. There was a sofa in there." Do you remember testifying to that effect? A. No, I do not.

MR. CARPENTER: "When the sofa was in there——"

MR. TIFFANY: Now, Mr. Carpenter!

MR. CARPENTER: Where are you?

Q. This question was: "That was the kitchen? A. No, I would not call it a kitchen; there were five rooms there as I remember." If that was testified to at the other trial that is probably the fact? A. Probably, yes, sir.

Q. There weren't any horses or wagons there? A. No, sir.

Q. Or no men, or implements used on your wagons? A. Which?

Q. Or implements used on your wagons? A. No, sir.

Q. Weren't any piles of paper there? A. No, sir.

Q. Never kept in there? A. No, sir.

Q. What did you go in there for? A. I went to see that everything was removed that belonged to the Gatti-McQuade Company.

Q. You knew it had been, didn't you? A. I knew it had been?

Q. Yes, sir. A. No, sir.

Q. In the kitchen did you see anything? A. No, sir.

Q. No chairs? A. No, sir.

Q. No tables? A. Not that I could remember now.

Q. Might have been there as far as you now know? A. Well, I think not.

Q. Will you testify absolutely that they were not there? A. Any what? Any chairs or tables?

Q. Chairs or tables in the kitchen? A. No, sir; there was no chairs and table in the kitchen.

Q. You are willing to swear now as a matter of fact that they were not there? A. They were not there.

Q. I call your attention to page 89: "In the kitchen what did you see; chairs? A. I don't remember. Q. Tables? A. There might have been things there." Which is right, were there any things there or might there have been things there?

MR. CARPENTER: Where is that?

MR. TIFFANY: Page 89: In the kitchen what did you see there? Chairs? A. I don't remember. Q. Tables? A. There might have been things there.

THE COURT: I have just about a quarter of one minute more.

MR. TIFFANY: I am trying to finish with this witness.

MR. CARPENTER: It is different from what I have got. He swears what there was not in there.

MR. TIFFANY: I have got what you got on page 90.

THE COURT: You may proceed to where there is an objection, and then we will immediately have to stop until ten o'clock in the morning.

Q. Didn't you testify: "Q. Will you say that there were no objects in that kitchen? A. I won't say so. Q. Will you swear that there were not any other things in that kitchen? A. No." Does that refresh your memory any as to what was in the kitchen? A. As I remember there was nothing in the kitchen.

Q. Remember testifying, on page 90, as follows: "How did you know that it was a bedroom? A. How did I know? Q. Yes. A. Because I saw some people sleeping in it, that is a pretty good reason. Q. Who was sleeping in there? A. I saw the man that was sleeping in the bed." Now you testified to that fact? A. Yes, sir.

Q. Now if you were wrong in any of your testimony to-day or at the last time you may be in error now, may you not? It is some time ago. A. Possibly.

Q. You are not exactly certain as to all of your testimony? A. How is that?

Q. You are not exactly certain as to all of your testimony? Are you positive of all your testimony to-day? A. To-day, yes.

Q. Which is correct, the testimony on to-day's

trial, or the testimony of the last trial? A. I do not think they vary much, do they?

Q. That is for the jury to say.

MR. CARPENTER: I object to that. Well, I will withdraw the objection.

Q. Isn't it likely that the testimony on the last trial is the proper testimony, having occurred shortly after the occasion, rather than this trial? A. Possibly.

Q. Now you remember this bin quite distinctly, don't you? A. How is that?

Q. You remember this oat bin quite distinctly, don't you? You remember the oat box quite distinctly? A. Yes.

Q. As to what fastened it to the floor? A. Yes.

Q. Don't you remember seeing it on that day? A. I wouldn't be positive it would be there or not.

Q. Had you ever seen it before? A. Not in particular. I have been there and probably noticed it, but not in particular.

Q. Do you know how it was fastened to the floor? A. No, sir.

Q. Know how big it was? A. No, sir.

Q. You did not make a very careful examination; you walked through, didn't you, to see? A. Yes, I didn't make any examination of the oat bin whatever; I just simply walked through and saw that everything was cleared out of the rooms.

Q. That is all.

RE-DIRECT EXAMINATION BY MR. CARPENTER:

Q. Mr. Tiffany has referred you to certain testimony, and you were asked, "Was there a chair or chiffonier?" and did you answer, "So far as I can remember there was nothing of that nature there." A. To-day I answered, yes.

Q. And you swore that at the other time? A. Yes, sir.

(Adjourned to February 7, 1917, 10 A. M.)

Jersey City, N. J., February 7, 1917, 10 A. M.

PETER GIOTALE, sworn.

DIRECT EXAMINATION BY MR. CARPENTER:

Q. Peter, where do you live? A. Well, where I live now or where I lived before?

Q. What street? A. Live in Jefferson Street now.

Q. Who do you work for? A. Working for Gatti-McQuade Company.

Q. How long have you been working for them? A. Seventeen years.

Q. What is your position? A. Truck driver.

Q. What was your job in July, 1914? A. Well, truck driver, meantime a stable foreman.

Q. Do you remember the stable that they had which they hired of the Levenson Wrecking Company? A. Yes, sir.

Q. That was on Grand Street, Hoboken, wasn't it? A. Yes, sir.

Q. Do you remember when the Gatti-McQuade Company moved out of that stable? A. Yes, sir.

Q. When was it? A. July 31.

Q. 1914? A. 1914.

Q. Were you there that day? A. Yes, I was.

Q. What did you do that day? A. Moving out of there.

Q. You helped move out? A. Yes; I was the one moving everything out of there.

Q. Who had charge of the moving? A. I had the charge and Mr. Galloway told me to move.

Q. You had charge of the moving under Mr. Galloway's direction? A. Yes.

Q. What was the last time that day—what hour? A. Five o'clock.

Q. What's that? A. Five o'clock in the night.

Q. You were through at five o'clock? A. Yes.

Q. Tell the jury there whether there was anything in that stable? A. No, sir.

Q. When you left there that evening? A. At five o'clock I called Mr. Levenson's foreman and I said, "Here is the key——"

MR. TIFFANY: I object.

THE COURT: No, the question is whether there was anything in that stable when you left there that evening?

A. No.

Q. Who had the keys for the stable? A. I had the key and I turned it in.

Q. Who did you give them to? A. Gave to Mr. Levenson's foreman.

Q. What is his name? A. I couldn't tell you his name. He used to be named Yellow; he used to be around the yard all the time.

Q. Yellow? A. That is what we used to call him. I don't know what his name is or anything else.

Q. What time did you give the keys? A. Five o'clock or a little later, I couldn't tell you.

Q. You know there was nothing else in there after that time? A. Nothing else; everything was out of it.

Q. Did you live upstairs in the stable? A. Yes.

Q. Did your wife live there? A. Yes, sir.

Q. When did you move out of there? A. I moved out of there the same day.

Q. All your stuff taken out? A. Everything was out of there July the 31st.

Q. Everything belonging to you or the Gatti-McQuade Company? A. Everything was clear.

Q. You mean there was nothing belonging to you or the Gatti-McQuade Company left in there? A. Nothing was left there.

Q. Now do you remember when any repairs were made to the stalls? A. Well, there wasn't much repair made to the stall.

Q. When was that? A. Oh, might be—I couldn't tell you that. We used to do all our repair pretty near everything. Some time board off the stall, we used to put it in. He didn't used to do any repair. We made a repair on the skylight, it was in the winter time, because it leaked, coming through the roof.

Q. When was that done? A. In the winter time. We don't care much about the summer time.

Q. You did that in the winter time? A. I don't know. I think it was Mr. Levenson done that.

MR. TIFFANY: I object. Never mind what occurred then.

CROSS EXAMINATION BY MR. TIFFANY:

Q. You did not testify at the last trial, did you? A. What?

Q. You did not testify at the last trial? A. What for?

MR. CARPENTER: No, he did not.

MR. TIFFANY: I think I have a perfect right to ask him.

MR. CARPENTER: You quit before he was called.

MR. TIFFANY: Are you through with your examination?

Q. You did not testify at the last trial, did you? A. No, sir.

Q. You have been in their employ for seventeen years? A. Yes, sir.

Q. Were in their employ in 1915 and 1914? A. 1914.

Q. What time was it on the 31st of July—what year was it? What year was it you quit there on the 31st of July, what year? A. What years?

Q. Yes? A. Well, two years ago.

Q. Two years ago, that would be 1915? A. Three years ago.

Q. 1915? A. Three years ago.

Q. Was it two or three? A. Eh?

Q. What year was it? A. We moved out of there July 31st.

Q. What year? A. 1914.

Q. You are sure of that? A. Yes.

Q. All right, sir. What time of day was it when you moved the last of the stuff out? A. The last of the stuff was around five o'clock.

Q. Around five o'clock, sure of that? A. Yes, I am sure.

Q. Your wagons are out in the daytime and come back at night, do they not? A. Eh?

Q. Your wagons are out in the daytime and come back at night? A. Yes, but there was none came back there.

Q. What time did you leave there? A. Five o'clock.

Q. Sometimes your wagons come in as late as nine and ten o'clock? A. No.

Q. Sure of that? A. No; all the wagons are supposed to go to the other place, they don't go there.

Q. As a matter of fact don't they come back after six o'clock at night? A. Yes, they go back but they don't go back there.

Q. Were you there? A. Yes, sir.

Q. I thought you said you left at five o'clock? A. We left everything out of there. We clean everything out of there by five o'clock.

Q. You don't know whether the wagons went back at nine o'clock? A. There was no wagons there.

Q. You don't know that of your own knowledge? A. Sure I know.

Q. How do you know it? A. Because I was there.

Q. After five o'clock? A. Sure I was in our own place.

Q. Whereabouts in your own place? A. In the new stable we went in.

Q. That is a block away? A. Well, yes.

Q. What time did you leave there? A. About eight o'clock in the night.

Q. You don't know what happened after that in reference to the Levenson stables? A. I couldn't tell you, no.

Q. No. Now didn't you go to Mr. Levenson about the 2nd or 3rd of August, and ask him if you could not remain in the place and pay him rent? A. No sir.

Q. Did you speak to Mrs. Levenson about that? A. No, sir.

Q. Isn't it a fact that your goods, your household goods, were not out of that place on the 31st of July? A. Eh?

Q. Isn't it a fact that your household goods were not out of that place on the 31st of July? A. We were out of there the 31st.

Q. Didn't you go to Mrs. Levenson at the Levenson Wrecking Company's office and ask her to let you remain there with your family? A. Yes, I went there before we moved out of there.

Q. What day was it you went there? A. I couldn't tell you; I went before we moved.

Q. How long before you moved? A. Oh, maybe two or three days before I moved.

Q. What did you say to her? A. I said, "I will pay the rent if he wanted me to stay there."

Q. Yes? A. In the house where I live in.

Q. What did they tell you? A. They said no.

Q. Did they tell you to pay the Gatti-McQuade Company? A. He says, no, he wouldn't take no rent off of me, I had to get out.

Q. Said you had to pay the Gatti-McQuade Company, didn't he? A. Eh?

MR. CARPENTER: I object to it as not cross examination.

Q. What time did you say you got the last of the Gatti-McQuade's property out of there? A. About five o'clock.

Q. You know Mr. Huggard, don't you? A. Yes, I know him.

Q. What is his position there, do you know? A. He used to be shipping clerk.

Q. How many days did it take you to move out of there? A. It takes me one day to move.

Q. One day? A. Yes.

Q. If Mr. Huggard says they were moving for several days he may be mistaken? A. Well, several days. It took me one day to take all the horses out of there and everything else.

Q. How many days did it take you to move everything out of there? A. We moved out of there July 31st, we got everything out of there.

Q. When did you start moving out? A. I couldn't tell you what day we started to move.

Q. Can't you tell us about how many days it took you? A. Well, about—I couldn't say how

many days we were moving, but there was everything out of there July 31st.

Q. When did you take the oat box out? A. We take it out of there two or three days before we had moved out of there.

Q. Where did you keep your oats if you took your oat box out two or three days? A. We keep them in the bag and feed the horses in the bag.

Q. Don't you know the oat box remained there until August and still remained there until the place was torn down? A. Yes.

Q. That is not the fact? A. Yes.

Q. You disagree with Mr. Huggard, do you? A. Yes, Mr. Huggard was there.

Q. If Mr. Huggard says it was there you disagree with him?

MR. CARPENTER: I object.

THE COURT: That naturally would follow.

MR. TIFFANY: I think I have a right to test his credibility by showing his statements contradict that of Mr. Huggard.

MR. CARPENTER: Mr. Huggard did not say—

THE COURT: You have Mr. Huggard's statement in already.

MR. TIFFANY: Yes.

Q. You are quite sure you took it out two or three days before? A. We took the oat box before.

Q. Did you take all the furniture out of your rooms before? A. Yes.

Q. Took the sofa out? A. We took my stove out.

Q. Not the stove, the sofa? Take that out? A. Yes.

Q. Wasn't anything left in there? A. Nothing left.

Peter Giotale—Cross.

Q. What time was it when you say you gave the keys to Mr. Levenson's man? A. It was around five o'clock.

Q. How many keys were there? A. One key.

Q. What was that key to? A. That is the hallway to go up to the house.

Q. Yes? How about the keys to the stables? A. Well the stables all be closed inside and when we got the key we closed the whole business.

Q. There is only one door and that is the hallway? A. The other place we can close on the inside.

Q. There are keys to it? A. Yes.

Q. Where—? A. There was no key; just put a bar on, that is all.

Q. You didn't have any keys to them? A. No, sir.

Q. Who did you give these keys to? A. I gave it to the foreman.

Q. What was his name? A. The name was Yellow, that is what we used—

Q. Yellow? A. Yes.

Q. Where did he work? A. He used to work for Mr. Levenson there.

Q. In the yard? A. Yes, a yard man around the place.

Q. Why didn't you take them right upstairs and give them to Mrs. Levenson? A. I didn't know anything about it; called the foreman and give it to him.

Q. You know Mrs. Levenson's office was right there? A. Yes.

Q. Why didn't you take it up and give it to her? A. Well, he was the man that had charge around there.

Q. Is not Mrs. Levenson in charge? A. I mean this fellow is the man had charge of the

place around there. Anything we want done we used to give to him.

Q. You know Mrs. Levenson was there everyday? A. I know.

Q. Don't you know that she was in charge and that it was her husband that had the place there? A. Yes.

Q. Why didn't you take the keys up to Mrs. Levenson? A. Well, I thought there was—give it to him was the same thing.

Q. Where did you move to after you left the Levenson place? A. Where did we move to?

Q. Yes, your family? A. Oh, my family? We moved to 615 Monroe Street.

Q. And who is your landlord? A. I couldn't tell you his name now.

Q. Well, think. You were there? A. I know, but I never—

Q. What floor did you have? A. Third floor.

Q. What side? A. Left.

Q. How much rent did you pay? A. Thirteen dollars.

Q. When did you move in there? A. July 31st.

Q. 615 Monroe Street, Hoboken? A. Hoboken.

Q. Moved in there on July 31st? A. Yes, in the night.

Q. At night? A. Yes.

Q. What time of the night? A. Well, at night, when we left Mr. Levenson's place.

Q. About what time did you move in, sir? A. It must have been around six o'clock when I brought in the furniture.

Q. Who did you have the conversation with there? A. I ain't catch you?

Q. Who did you make your arrangements for 615 Monroe Street? A. The fellow that owns the house?

Q. Who is he? A. Well, I couldn't tell you his name.

Q. How long did you live there? A. Well, I have lived there two years.

Q. You don't know your landlord's name? A. Well, I couldn't tell his name now.

Q. I want you to think of it.

MR. CARPENTER: I object.

A. If you will let me go down and get his name I will come here again.

MR. CARPENTER: I object. They admit in their pleading we left their place on the 31st of July.

MR. TIFFANY: We don't admit anything of the kind.

A. I don't see what he wants my landlord's name for.

THE COURT: Wait a minute.

MR. CARPENTER: You said in your complaint, "Defendant continued in possession up to July 31, 1914." Paragraph 3.

MR. TIFFANY: Paragraph 5 is better for you. You vacated the premises on that day.

THE COURT: Yes, you say so on the—

MR. TIFFANY: I see that.

THE COURT: All this seems to have been to no very great purpose.

MR. CARPENTER: You said on the 31st of July the defendant vacated the premises.

MR. TIFFANY: I concede it. There is no need to read it again.

Q. Who moved your furniture? A. I moved it with our own trucks.

Q. With your own trucks? A. Our own trucks, the Gatti-McQuade Company.

Q. The Gatti-McQuade truck. Did you say you did not go to see Mrs. Levenson or Mr. Levenson in reference to renting that place? A. Not after the 31st.

Q. What day of the week was the 31st of July? A. I couldn't tell it now. I didn't know—two years from now—three years from now, I can't

10 Q. How do you know it was the 31st of July? A. I know it was the 31st, because that was our orders, to move out of there on the 31st.

Q. You were ordered to move out on the 31st? A. Yes.

Q. By Mr. Galloway? A. By Mr. Galloway.

THE COURT: Now let me ask you gentlemen. Mr. Tiffany, that being your undoubted allegation, is there any warrant for us in

20 spending time in testimony going to the contrary?

MR. TIFFANY: Simply strengthen that they vacated.

THE COURT: You have positively stated that they vacated on the 31st of July, 1914, and now come back and say that is not so.

MR. TIFFANY: If we can show, while they took out part of their stuff, they left certain of their materials there it would certainly

30 bear out our story that there was a renting. They are denying the renting, and if we show the fact that they did have material in that place it certainly would show they remained under the lease.

MR. CARPENTER: You cannot remain under the letting and vacate before.

MR. TIFFANY: We may show they vacated but if we show they had materials in there, it certainly confirms our contention that they

40 did remain, they had their stuff in there.

THE COURT: All right; I will let you go along.

DOMINIC CAPORENE, sworn.

DIRECT EXAMINATION BY MR. CARPENTER:

Q. Where do you live? A. I live in the stable.

Q. How long have you been working for the Gatti-McQuade Comany? A. Four years.

Q. What is your position? A. Stableman.

Q. Stable manager? A. Stableman.

Q. Whereabouts did you live in the month of July, 1914? A. In the stable.

Q. The stable that the Gatti-McQuade rented of the Levenson Wrecking Company? A. Yes.

Q. When did you move out? A. On the 31st of July, 1914.

Q. What year? A. 1914.

Q. What time of day did you move? A. About night time, about five or six o'clock.

Q. Do you know that when you left those premises on the 31st of July, 1914, that everything belonging to you was out of there? A. It was out of there.

Q. And you and your wife lived there, didn't you? A. I ain't got no wife.

Q. You didn't live there with your wife? A. Single.

Q. Everythng belonging to you was out? A. Yes.

Q. Was there anything of the Gatti-McQuade Company left in there? A. No.

Q. Everything taken out? A. Yes.

Q. You are the head stableman that has been referred to? A. Yes.

Q. Now then do you know anything about repairs to the stalls and the skylight in the stable? A. Well, he used to repair, yes.

Q. When were repairs to the stalls made? A. Repairs to the stalls—any time we needed repairs.

Q. Were there any repairs made in the winter time by the Levenson Wrecking Company? A. Yes.

Q. What repairs were made in the winter time by them? A. Why, repaired the stalls and skylight.

CROSS EXAMINATION BY MR. TIFFANY:

Q. Remember any repairs being made in July there? A. In July? Well, I don't remember.

Q. Never made any repairs in July? A. I don't remember any; it was about three years ago.

Q. You remember them in January, six months before July, three years ago, but can't you remember July? A. Well, I don't remember if they repaired any more.

Q. Didn't they put concrete floor in the stalls? A. They started and fixed the sewer that is all.

Q. In July? A. In July.

Q. Fixed the sewer and put in a concrete floor? A. About two or three days before we moved from there I see them started to fix it up.

Q. Were you there every day? A. I was there every day.

Q. Wasn't it in the early part of July, about the 5th of July, that they started to put in the sewer and the concrete? A. About the 15th of July.

Q. 5th of July—the first part of July? A. The first part. About two or three days when I moved from there.

Q. Two or three days before you moved away? A. Yes.

Q. Sure of that? A. That is the way I remember.

Q. Isn't it a fact that it was nearer the 4th of July? A. I don't know. I remember it is three years ago.

Q. Will you swear it was not at the first part of July? (No answer.)

Q. Now you often made repairs to the stables yourselves, didn't you, when they needed repairs? A. Well, summer time when we want a few things I could do it myself.

Q. Other times they would send to the Levenson people and they would make repairs? A. Yes, sir.

Q. You have been in the employ of the company ever since that time, haven't you? A. Yes.

Q. You did not testify at the last trial, did you? (No answer.)

Q. Who did you go over this case with Mr. Galloway? Did you talk to Mr. Galloway about this case? A. I talked to the foreman.

Q. You talked to the foreman about the case? A. Yes.

Q. When, last night? A. Oh, you mean this case—to-day?

Q. Yes? A. Yes, last night.

Q. What day was it when you moved out? A. Well, night time.

Q. Who moved you? A. Who moved me? Nobody moved me. Horse and truck.

Q. Whose horse and truck was it? A. Gatti-McQuade's.

Q. Who drove it? A. Drove it? The drivers.

Q. Naturally. Who were the drivers? A. Drivers. Well, the foreman over there put everything in the truck.

Q. Nobody else? A. No, sir.

Q. Where did you move to? A. Where did I move? Mr. Bickley's stable.

Q. That is where you lived? A. Yes.

Q. You lived in Bickley's stables? A. Yes.

Q. And took your furniture there? A. Yes.

Q. Where did this other man move his furniture to? That is on the same truck? Cordele, where did he take his furniture to? A. My furniture.

Q. No, no; Cordele? A. Oh, Caporene? He moved at the same time, same day.

Q. Where did he go? Where did he take his furniture? A. I don't know where he was going.

Q. Didn't you go with him? A. None of my business to go.

Q. Didn't you say you moved with him—moved your stuff out with him? A. I moved him, yes, in the stable, with the other stuff.

Q. What did he say, with the other stuff? A. My stuff.

Q. No; what did Cordele do with his stuff? A. He moved to the house, I don't know where.

Q. Whereabouts was the house? A. Well, it is on Marone Street.

Q. Whereabouts on Monroe Street? A. I think it is 615.

Q. Did you go down there with him? A. No, I never go down.

Q. When did he tell you they moved down there? Meet him here this morning? A. No, after. I asked him where he lived and he says on Monroe Street.

Q. On Monroe Street, I see. What time of night was it you moved out of there? A. Mr. Levenson's stable? Night time, about five o'clock or six.

Q. Around five o'clock? Sure of that? A. Yes.

Q. In July? A. July.

Q. Dark? A. Was it dark? No, it is light that time in July.

JAMES H. CULLEN, sworn.

DIRECT EXAMINATION BY MR. CARPENTER:

Q. You are a clerk in the Register's office of the county? A. Custodian's office.

Q. Have you produced, pursuant to subpoena, Liber 1183 of Deeds for Hudson County? A. Yes. sir.

Q. Page 133——

MR. TIFFANY: I object to the offering of records of any title.

MR. CARPENTER: Wait until I offer it.

MR. TIFFANY: I know what you are coming to, but there is no use of wasting time. We might as well shorten it up.

MR. CARPENTER: I make my offer in the formal way, as I have a right to do.

Q. This is the original record of the Register's office? A. Yes.

MR. CARPENTER: I now offer in evidence the record of a deed dated May 4, 1914——

MR. TIFFANY: I object. At this time it is simply an offer to get before the jury the contents of that book.

THE COURT: Gentlemen of the jury, you may go to your room. I will hear the argument.

(The jury retires).

MR. CARPENTER: I offer in evidence a deed dated May 4, 1914, recorded at page 133 of this book, from the Levenson Wrecking Company, a corporation of the State of New York, to the Levenson Lumber Company, a corporation of the State of New Jersey conveying all those certain lots, tracts, pieces or parcels

of land and premises, situate, lying and being in the City of Hoboken, and which on a map entitled, "Map of property situated at Hoboken, Hudson County, New Jersey, belonging to the Estate of John G. Koster, deceased—" conveying the premises in question.

THE COURT: Is there any doubt about what he is saying it includes the premises in question?

MR. TIFFANY: It includes the premises in question.

THE COURT: There is no use of reading it.

MR. CARPENTER: I also call to the Court's attention the fact that the deed conveyed to the Levenson Lumber Company all the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity, of the party of the first part, of, in and to the above described premises, and every part and parcel thereof with the appurtenances. This deed being acknowledged the 4th of May, 1914, before Bernard M. Lichtenstein, Commissioner of Deeds for New Jersey, and recorded May 5, 1914 in Liber and page referred to.

MR. TIFFANY: We object to it, of course, on the ground that it is immaterial, incompetent and irrelevant, that the title cannot be impugned by the tenant.

(Discussion).

THE COURT: I will sustain the objection.

MR. CARPENTER: Your Honor will allow me an exception to your Honor's ruling?

THE COURT: You may have the exception.

MR. CARPENTER: I am going to rest my case now.

PLAINTIFF RESTS.

(The jury returns to the court room).

PLAINTIFF'S TESTIMONY IN REBUTTAL.

MORRIS LEVENSON, recalled.

DIRECT EXAMINATION BY MR. TIFFANY:

Q. Mr. Levenson, how long did these premises remain vacant after the 1st of August, 1914? A. Until January last year.

Q. January of last year?

MR. CARPENTER: I object. This is not rebuttal.

MR. TIFFANY: I just asked you if you had any objection to my calling him.

MR. CARPENTER: Well, go ahead. You didn't tell me.

Q. Now, Mr. Levenson, Peter Ordello, you heard him testify—did he come to you after the 1st of August in reference to occupying the premises that you had leased to Gatti-McQuade Company?

MR. CARPENTER: I object to it as immaterial.

THE COURT: I will allow it.

A. Yes.

Q. What was the conversation that you had with him? A. He came over and he offered me fifteen dollars a month rent for that floor upstairs, and I

told him that I would not accept any rent, he should go to Gatti-McQuade—to Mr. Galloway—and make an arrangement with him.

Q. What part of August was this? A. Well, it was the 3rd or 4th of August.

Q. That's all. A. He told me he spent about forty dollars fixing the place up and he wouldn't like to get out of there.

CROSS EXAMINATION BY MR. CARPENTER:

Q. Then, as I understand your position, you would not have rented this place to anybody else if they had come along, would you? A. No; we had arrangements made to Gatti-McQuade.

Q. That is the reason? A. Unless somebody came along and give a hundred dollars, but not the rooms upstairs—gave us the full amount of the stable—we would rent it.

Q. If they offered you ninety dollars you wouldn't take it? A. I didn't get any offers at all, only that man came over.

Q. That is what I want to know about. You wouldn't take that offer, would you? A. For fifteen dollars?

Q. Yes. A. No, I wouldn't rent the rooms by themselves.

Q. You did not try then to rent it to anybody? A. We had it in the——

Q. Answer the question? A. We had a "To Let" out there all the time.

Q. You didn't try to rent it to anybody, did you? A. Nobody came along.

Q. Answer the question. A. I had a To Let out and nobody came there to rent it except this fellow here, that first witness.

BY THE COURT:

Q. What do you mean you had a To Let out? A. On the place.

Q. A sign? A. Big sign, "Stable to let."

BY MR. CARPENTER:

Q. When did you put that out? A. Put it out probably the 15th of August.

Q. Probably? Then do you know when you put it out? A. During the month of August, I don't know what date. I had it hung out.

Q. Did you put the property in the hands of any agents? A. Yes.

Q. Who? A. What is his name? I went up several times—Steljes & Steljes.

Q. Anybody else? A. No, that is the only one.

Q. When did you call up Steljes? A. Well, in August.

Q. If anybody had come there and offered you seventy-five dollars a month for the stable you would not let them have it, would you? A. Nobody offered me anything except that fellow came over.

Q. Answer the question. A. No, sir.

Q. You would not? A. I wouldn't rent it. I would rent it for anything I could get.

Q. You could get fifteen dollars a month and you wouldn't take it? A. I wouldn't take it for the upper floor.

Q. That is for a couple of rooms upstairs? A. It was five rooms.

THE COURT: That is what he says, Mr. Carpenter. It was not so much the quantity of rental offered for the particular apartments, but he says they would not rent the rooms singly out of the entire stable building, and would not rent, as I understand it, the apartments by themselves.

MR. CARPENTER: That is all.

BY MR. TIFFANY:

Q. These rooms are used by the one that occupies the stable? A. The party that occupies the stable wants the apartment.

DEFENDANT RESTS.

Motion to Direct a Verdict.

MR. CARPENTER: If your Honor Please, I ask for a direction of verdict in favor of the defendant on the grounds made yesterday in my motion for nonsuit, and on the further ground that the plaintiff has not proved a valid contract. In the first place, there is no mutuality in the contract—no consideration for the contract. The plaintiff has not proved that it had title, which I contend, as your Honor knows, is a necessary part of the plaintiff's case, and lacking in mutuality and lacking consideration, any pretended or alleged contract is null and void and cannot be recovered on in this court.

Second, I claim that it now appears both by the plaintiff's pleadings and by the overwhelming weight of the testimony, that the defendant quit the premises that it had been occupying under lease, on the 31st of July, 1914, therefore there was no holding over, no recognition of the plaintiff as a landlord, no relation of landlord and tenant between these parties after the 31st of July, 1914.

Furthermore, I say that this alleged verbal contract entered into as contended in June, 1914, was a contract not to be performed with-

in one year, and hence void under the statute of frauds.

(Discussion).

THE COURT: I will decline to direct a verdict and give you an exception.

Court's Charge to Jury.

Gentlemen of the Jury:

This is an action brought by the Levenson Wrecking Company, a corporation, against the Gatti-McQuade Company, a corporation. The paramount issue, or at least the one which must necessarily, it seems to me, first receive your attention and of necessity be first solved, is whether there was an agreement or undertaking actually entered into binding upon the defendant company for a leasing or a renting of the premises that have been spoken of, for the period of one year from August 1, 1914, to and including July 31, 1915, because if that has not been made out then the entire structure of plaintiff's case falls. That is what their suit is based upon, and it is for the rent reserved, as we say, that they are asking now for a recovery.

Now the situation seems to have been this, that these parties did enter into a lease in writing for the use and occupation of these premises for the period extending from August 1, 1912, I believe, to and including July 31, 1913. That paper is in evidence and is known as Exhibit P-1 in the case. Next, at or about the expiration of the term of that undertaking there was an agreement by parole or by word of mouth, as it is spoken of, by which the defendants arranged and agreed to have and take the occupancy of the same premises for a period of another year, namely from August

1, 1913, to July 31, 1914. As I remember the testimony, there is no contest over those two particular things; first, that there was the written agreement and the defendants held thereunder; secondly, that there was an oral, verbal, word of mouth agreement by which the defendants held as tenants of the plaintiff for the following year, namely from August 1, 1913, to July 31, 1914. When we get to that period or near to the expiration of that term, gentlemen, then the controversy about which this whole case revolves commences.

Plaintiff says that preceding that time, some time in the month of June of 1914, by and through Mrs. Levenson, who was the vice president of the plaintiff Company, and through Mr. Galloway, who was the secretary, I believe, or an officer and director of the defendant company, a new agreement, verbally, by word of mouth, was made, whereby the defendant company was to take the same premises under the same terms and conditions, so the plaintiff says, for an additional period of one year, commencing August 1, 1914, and ending July 31, 1915. The defendant says that is not so. Defendant says that we made no such agreement, and therefore, having made no agreement, we did not stay there, we vacated the premises on the 31st day of July, and therefore there was no obligation upon our part to pay anything to the plaintiff.

Now, as I have said, gentlemen, the paramount issue, the principal issue, the first issue that you must consider and try out from the facts and pass upon is the queston as to whether or not there was an agreement binding upon the defendant company by which it was to take over the premises in question for the year which I have last spoken of, namely from August 1, 1914, to July 31, 1915.

Court's Charge to Jury.

Now, at the outset, gentlemen, of your consideration of the matter, keep this in mind, that the burden is upon the plaintiff to satisfy you by a fair preponderance of the evidence, of all of the essential things necessary to make out this case. Speaking to the question of this agreement particularly now, the burden is upon the plaintiff to satisfy you by a fair preponderance of the evidence, that the alleged agreement binding upon the defendant company was actually entered into and made, because I think it needs no process of reasoning upon my part indicated to you, gentlemen, that if they have not made that out, and in that manner, then the whole case falls.

Now throughout the testimony of the plaintiff, or the plaintiff's witnesses, I was about to say there may be some contrariety, and yet probably that is not the exact and proper way of putting it before you. By what I have just said I mean this—and remember at all times, gentlemen, as I am referring to testimony, if I make reference to it and what I say does not match up with your recollection of what the testimony is or was as you heard it, then you will disregard what I say about it, because what I say does not make it evidence; the evidence is what you heard the witnesses say, so that if any statement I make does not match up with your recollection of the testimony of the several witnesses, then you disregard what I say and go back to your recollection. As I remember the evidence, Mrs. Levenson says that some time in June she answered a telephone message from Mr. Galloway in which he took up with her the question of the premises then being occupied by the defendant company, and that that conversation was something after this manner or was of this purport and import: "If we are to take the premises another year, or if you want us to

take the premises another year, then you shall have to make certain repairs or certain improvements, or both", and she says he in that message, or in that talk over the 'phone, detailed to her what was to be done. If that was all there was in it, gentlemen of the jury, if that is all or was all of the conversation there was upon the subject, then I will say to you it did not make for a contract such as the plaintiff contends for. She goes further, however, and says, I think the next day after the telephone message Mr. Galloway called at her office and at the office, if my recollection serves me correctly as to what the testimony was, another conversation was had very nearly in line with that which she testified to having the day before over the telephone, but it resulted, so she says, in Mr. Galloway and she going to the stable in question and having pointed out to her by Mr. Galloway the several particular items of repairs and improvements that were required. She says that that culminated in this, that after he had done so she said, speaking for the plaintiff company, that they would make the improvements, and he then said we will take the premises another year under the same conditions as heretofore.

If that is what took place, gentlemen of the jury, then, excepting for what I will say to you shortly, you may find that there was such a contract entered into as the plaintiffs have contended for in this action; but you will keep in mind that the defendant comes forward then and says by and through Mr. Galloway and such other witnesses as they have produced, first, that this conversation over the telephone referred to by Mrs. Levenson was not as she says it was at all, but in fact to the exact contrary of what she says. Mr. Galloway says further that he did not go to

the office of the plaintiff company the next morning, as Mrs. Levenson says, and that he did not go with her to the stables that day or any other day at that time, as she says, and he also denies having had any such conversation with her with regard to the rental or re-rental or continuance of the occupation of the stable in question, as she says he had with her on the morning after the telephone message and at the stable.

I am bringing these things to your attention, gentlemen, because it is a qeustion of fact as well as a question of contract which you are to pass upon, and therefore you are to take into consideration all of the facts in the case. And while I am at this point, and before I proceed further with what I have to say to you upon the other points in the case, let me say to you this. You must be, as I have said to you before, guided absolutely in your determination and finding by the evidence in the case and by what the law is or the rules of law are as the court may give them to you applied to those facts as you find them. You are not in any manner to be prejudiced or led by favor or sympathy, to either the one side or the other. What may have occurred during the trial is not to in any manner prejudice you. You are not to take into consideration any matters in the shape of offers of testimony or anything of that character where the court has not permitted them to be allowed in evidence, because when I have not allowed them in evidence as far as you are concerned they are not matters of fact with which you have a right to deal or work.

Now you are to determne from all of the evidence what are the facts; you are to determine what credibility is to be accorded to each and every witness; you are to determine what degree

of truth is to be stamped upon the testimony of each and every witness, and there are numerous ways in which you are to do that. For instance, you are, and have a right to consider and take into consideration the manner in which each witness gives his or her testimony, either the freedom with which it is given or the reluctance with which it is given. You are to also consider and may consider the opportunity which each witness had to know of the thing of which he or she speaks. You are to take all of these matters into consideration, gentlemen, in determining what degree of truth and probability and probity is to be accorded the testimony of each witness. And then what is a fair preponderance of the evidence? Where one side alleges a certain proposition as being a fact, and the other side denies it, for instance, as in this case, where the plaintiff asserts and alleges that a contract was made and the defendant denies it, you are to take all of the evidence that you find on each side of that proposition; you are to take the evidence which you find on the side in favor of the sustaining of the allegations, you are also to take the evidence which you find on the opposite side, going to be contrary. You are to weigh it up. There is a preponderance of evidence only in favor of the proposition if you find that evidence which stands in favor of its sustaining and being sustained outweighs that which appears against it. Just exactly, gentlemen, as if you had the two lots of evidence, if it were possible, in a scale, and then you would determine which weighed the heavier. If that in favor of the proposition did not outweigh that which is against it, then you would not have a preponderance in favor of the sustaining of the allegation. That is as nearly as I can indicate to you and explain to you what fair preponderance means.

Now, if you find that the evidence on the part of the plaintiff does make a fair preponderance of the evidence for the contract in question, then there still remains the question as to whether or not the defendant company was bound thereby. Of course the fact is that corporations can only act by and through agents. In this case the defendant seeks to show that there was no specific, direct authorization to Mr. Galloway to enter into any such agreement; secondly, that if he were without specific, direct authority, and did enter into such an agreement the defendant company did not ratify such action upon his part. I do not know, gentlemen, and I do not recall that there is any evidence which goes to controvert or deny those two assertions upon the part of the defendant. Of course if there is in evidence that which does, then you will, of course, consider it, but as I understand the plaintiff's contention, it is not relying upon either one of those situations in order to bind the defendant company if such a contract was entered into as between Mr. Galloway and the plaintiff company through Mrs. Levenson, but they evoke this rule; that if a corporation in the course of its business dealings has permitted one to act for it and he has in the business of the corporation in the past acted for it and as if he were acting upon its behalf and in its interests and the corporation has permitted him so to act and has recognized such acts done and taken by him, then the public or persons dealing with that corporation, knowing of that, have a right to assume and presume that he is acting by authority of the corporation.

Our courts have said that that principle applies ordinarily to corporations the same as it would apply to an individual. Where an individual per-

mits another to represent to the public that he is acting for the principal and the representative does, and from time to time does act, and the corporation recognizes those acts of such agent, then the principal would be bound by the acts that were afterwards followed by him and performed by him in that line so indicated, by either permitting him to so previously have acted. Such a principle also applies in ordinary circumstances to a corporation.

Now the plaintiff says that Mr. Galloway stood in that position, that he had upon previous occasions dealt with the plaintiff as the agent and the representative of the defendant company, that he had negotiated arrangements prior to the entering into of the first or original lease, or the lease in writing, that as to the renewal thereof he was the person claiming to represent the defendant company and who did negotiate for that continuance or that new term, and by the act of the defendant company his acts in so negotiating were recognized and throughout that period negotiations with respect to the leased premises were had as between the officer of the plaintiff company and Mr. Galloway. Their contention and the contention upon the part of the plaintiff being that the defendant company had recognized the acts and the doings and the arrangements made by Mr. Galloway for it in and about this particular piece of property, and that therefore the plaintiff was entitled to assume and presume that when he acted or when it acted in conjunction with Mr. Galloway in and about this alleged agreement about which the suit is, it had a right to do so because of the position that the defendant company had allowed Mr. Galloway to assume in relation to similar transactions between the two corporations.

If you find that has been substantiated and those other things which I have spoken to you about, going for and making the contract as alleged, then the plaintiff has made out that part of this case. If it has not and the burden as to all of it, as I have indicated, is to satisfy you thereof by a fair preponderance of the evidence, and that burden is upon the plaintiff—then the plaintiff is entitled to recover.

The evidence undisputedly is that no part of the rent reserved or the rent provided for has been paid. The plaintiff says that at no time during the term of the twelve months or the one year during which the alleged agreement ran, was the premises occupied or did the plaintiff take or re-take possession thereof or sent them, but they were during the entire period in question reserved and kept for the possession of the defendant company.

Under such circumstances, gentlemen—and I do not find as far as my recollection serves me, that there is any evidence in the case to the contrary—the plaintiff is entitled to recover; is entitled to recover the rent for the period of the twelve months, at one hundred dollars per month, or the sum of twelve hundred dollars.

MR. CARPENTER: They do not go that far. They say from the first of July, 1914, to the first of July, 1915, which would be eleven months.

THE COURT: I do not understand so.

MR. CARPENTER: They are complaining in their complaint that the first month of July was part of this new lease. That is what they say, as a matter of fact.

MR. TIFFANY: I called you attention to it.

THE COURT: Then, gentlemen, I am mistaken in some other of my statements to the jury. Then that contention is not that this new arrangement

ran from the first of July 1914, because then your contention is that the arrangements ran all through the new contract, from the first of July, 1914.

MR. TIFFANY: That has evidently been, as called to my attention, a typographical error, putting in the first of July instead of August, and evidently there has been a typographical error.

THE COURT: I think we have gone all through this case, this day and a half——

MR. TIFFANY: We are willing to stand on it. We are willing to stand as the complaint says.

THE COURT: Then you are only asking for eleven months?

MR. TIFFANY: Eleven months.

THE COURT: That seems to be the situation. If there is a verdict at all the verdict can only be for the period of eleven months at one hundred dollars per month, and the plaintiff says the interest—now when do you ask interest from?

MR. TIFFANY: I will not stand on the interest proposition.

THE COURT: All right. Gentlemen, with that you may take the case, with the exception of one request to charge. Of the requests to charge which I have been asked to charge I will charge this one; the balance I decline to charge. This one is: "The plaintiff has the burden of establishing by the fair preponderance of the evidence every element of its case that is necessary to support a verdict before you can find for plaintiff."

That request is in line with what I have already said to you upon two or three occasions, gentlemen.

(The jury retired).

Defendants' Exceptions.

MR. CARPENTER: First I ask an exception to the charge where the court said the question for the jury is was there a binding agreement to take the premises from August 1, 1914, to July 31, 1915. I claim as a matter of law that there was none.

THE COURT: You are not referring now to the fact that the declaration——

MR. CARPENTER: Oh, no.

THE COURT: —and complant in the case seem to have varied from what my thought and my knowledge was upon which the case has been tried and first came to my attention——

MR. CARPENTER: Also I except to the portion of the charge to the effect that there is no dispute that the rent reserved or provided for was paid.

THE COURT: Not paid?

MR. CARPENTER: Was not paid. I claim there was no rent either reserved or provided for.

Also to that portion of the charge to the effect that if there is a verdict at all for the plaintiff the plaintiff is entitled to eleven hundred dollars. I claim if there is a verdict at all it cannot be for more than six cents.

Defendants' Requests to Charge.

1. The plaintiff has the burden of establishing by the fair preponderance of the evidence every element of its case that is necessary to support a verdict before you can find for the plaintiff.

2. Plaintiff contends that prior to July 1st, 1914, plaintiff rented to defendant and defendant rented of plaintiff certain premises in Hoboken.

Before plaintiff could rent such premises to defendant, it must, of course, have either been the owners of such premises, or have had some right to rent to defendant. Plaintiff has given no evidence on this point whatever, and you must therefore find for defendant.

3. There is no presumption in this case that plaintiff owned the premises 1415-1417 Grand Street, Hoboken, nor has defendant admitted that fact.

4. Plaintiff is not entitled to more than six cents damages if entitled to anything.

Exhibit P-1.

THIS INDENTURE, made the first day of August, one thousand nine hundred and twelve, BETWEEN LEVENSON WRECKING COMPANY, a domestic corporation of the State of New Jersey, party of the first part, and GATTI-McQUADE COMPANY, a domestic corporation of the State of New York, party of the second part, WITNESSETH, That the said party of the first part has letten, and by these presents, do grant, demise, and to farm let, unto the said party of the second part, and the said party of the second part has taken and hired and by these presents do hire and take of and from the party of the first part the entire premises and improvements situated on Grand Street, Hoboken, N. J., being one hundred and twenty-five feet east of 15th Street, Hoboken, consisting of two buildings, one two stories high and one building one story high, both buildings containing 32 stalls; the premises leased under this agreement being fifty feet in width front and rear by one hundred feet in depth on both sides, with the appurtenances, for the term of one year from the

Exhibit P-1.

1st day of August, one thousand nine hundred and twelve, at the yearly rent or sum of Twelve Hundred ($1200.) Dollars, said rent to be paid in equal monthly payments of $100. in advance on the first day of each and every month, during the term aforesaid. Rent for the month of August, 1912, being acknowledged.

AND it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and the same to have again, repossess and enjoy, by legal proceedings or force without being liable to prosecution therefor. AND the said party of the second part does covenant to pay to the said party of the first part the said yearly rent as herein specified.

AND ALSO, to pay the regular annual rent or charge, which is or may be assessed or imposed according to law, upon the said premises, for the water, when due in each year, during the term, and if not so paid, the same shall be added to the month's rent then due. AND the said party of the second part further covenants that they will not assign, mortgage or pledge this Lease nor let or underlet the whole or any part of the said premises, nor make any alterations therein without the written consent of the said party of the first part, under the penalty of forfeiture and damages; and that it will not occupy or use the said premises, nor permit the same to be occupied or used for any business deemed extra hazardous on account of fire or otherwise, without the like consent under the like penalty. AND the said party of the second part, further covenants that it will permit the said party of the first part, or its agent, to show the premises to persons wishing to

Exhibit P-1.

hire or purchase, and on and after the first day of May next preceding the expiration of the term, will permit the usual notices "To Let" or "For Sale" to be placed upon the walls or doors of said premises, and remain thereon without hindrance or molestation.

AND IT IS FURTHER AGREED between the parties to these presents, that in case the building or buildings erected on these premises hereby leased shall be partially damaged by fire, the same shall be repaired as speedily as possible at the expense of the party of the first part; that in case the damages shall be so extensive as to render the building untenantable, the rent shall cease until such time as the building shall be put in complete repair, but in case of the total destruction of the premises by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth this lease shall cease and come to an end, provided, however, that such damage and destruction be not caused by the carelessness, negligence, or improper conduct of the party of the second part, its agents or servants.

AND the said party of the second part further covenants and agrees that it will comply with all the requirements of the Board of Health, Municipal Authorities and Police and Fire Departments of the City of Hoboken, so far as the use and occupation of said premises by it may be concerned, but not to the extent of making any structural changes, or additions in, to or about said premises; and that it will not create or permit any nuisance in the premises hereby rented to the annoyance to neighboring occupants.

AND the said party of the second part further covenants and agrees to use said rented premises only for stable and trucking purposes.

Exhibit P-1.

AND at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted with respect to the interior thereof only, it being the duty of the party of the first part to keep all the exterior portions of said premises in repair.

AND the said party of the first part do covenant that the said party of the second part, on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

IT IS FURTHER AGREED between the parties to these presents that this instrument shall not be a lien against said premises in respect to any mortgages that hereafter may be placed against said premises, and that the recording of such mortgage or mortgages shall have preference and precedence and be superior and prior in lien of this lease, irrespective of the date of recording, and the party of the second part agrees to execute any such instrument without cost, which may be deemed necessary or desirable to further effect the subordination of this lease to any such mortgage or mortgages, and a refusal to execute such instrument shall entitle the party of the first part, its assigns and legal representatives to the option of cancelling this lease without incurring any expense or damage, and the term hereby granted is expressly limited accordingly.

IT IS FURTHER AGREED between the parties to these presents that the party of the first part, or its assigns, shall not be liable for any accidents occurring to any one in and about said premises under the control and in the possession of the said

party of the second part, that may be due to any act or omission of the party of the second part, its servants, employees or agents.

IT IS FURTHER AGREED between the parties to these presents that the party of the second part will not cause or permit nor allow under tenants to do anything in said premises, or bring anything into said premises, or permit anything to be brought into said premises, or to be kept therein, which will in any way increase the rate of fire insurance on said demised premises, nor use the demised premises or any part thereof, nor suffer or permit their use for any business or purpose which would cause an increase in the rate of fire insurance on said building, and the party of the first part agrees to pay on demand any such increase.

IT IS FURTHER AGREED between the parties to these presents that it will not allow any portion of said premises to be used for immoral or bawdy purposes, and if the party of the first part, or his assigns, shall receive notice from the municipal authorities that said premises are so used for immoral or bawdy purposes, then party of the second part agrees upon receipt of notice of such use of said premises to immediately cause all persons using said premises for such immoral or bawdy purpose to be evicted and removed from said premises and every part thereof.

IT IS FURTHER AGREED between the parties to these presents that the party of the second part shall and will keep the interior of said premises in good order and repair during the term aforesaid, and upon failure so to do, the party of the first part, or its assigns, may do and perform all repairs which may be necessary in and about the interior of said demised premises and add the

Exhibit P-1.

amount of the cost of such repairs to the rent due hereunder on the first of the month following the date of repairs, and such costs of said repairs shall be and constitute such rent together with the rent above provided for. The party of the first part shall keep the exterior of said premises in repair during said term at its own cost and expense.

The party of the second part shall have the option of further period of three years at the termination of this contract at the same rental and subject to all conditions of this lease; but said option shall be exercised by registered mail to party of the first part on or before May 1, 1913.

The party of the first part shall have the right to enter said premises at a reasonable hour each month to ascertain if said premises are kept in proper repair and condition.

AND IT IS FURTHER UNDERSTOOD AND AGREED, that the covenants and agreements contained in the within Lease are binding on the parties hereto and their legal representatives.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in
the presence of
HELEN LEVENSON,
Commissioner of Deeds,
State of New Jersey.

LEVENSON WRECKING CO., INC.,
M. Levenson,
President.

GATTI-McQUADE CO.,
D. Galloway,
Secretary.

Exhibit P-1.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

BE IT REMEMBERED that on this
day of August, 1912, personally appeared
, who, being duly sworn, doth depose and make proof to my satisfaction, that he is the Secretary of, and well knows the corporate seal of the LEVENSON WRECKING COMPANY, the grantor named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said corporation, and that the same was so affixed thereto, and the said instrument signed and delivered by
, who was at the date and execution thereof, the President of said corporation, in the presence of said deponent as the voluntary act and deed of the said corporation; and that the said deponent thereupon signed the same as subscribing witness.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

BE IT REMEMBERED that on this
day of August, 1912, personally appeared DAVID GALLOWAY, who, being duly sworn, doth depose and make proof to my satisfaction, that he is the Secretary of, and well knows the corporate seal of the GATTI-MCQUADE COMPANY, the grantor named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said corporation, and that the same was so affixed thereto, and the said instrument signed and delivered by JOSEPH GATTI, who was at the date and execution thereof, President of said corporation, in the presence of said deponent, as the voluntary act and deed of the said corporation; and that the

said deponent thereupon signed the same as subscribing witness.

Exhibit P-2.

LETTERHEAD OF EM. BORNSTEIN & SON.

New York, July 1, 1914.

Levinson Wrecking Co., Inc.,
15th St. & Willow Avenue,
Hoboken, New Jersey.

Gentlemen:

We propose to install two (2) drains for you in your stables at Grand Street, between 14th and 15th Streets, Hoboken, New Jersey, complete in every way, as shown by your Mr. Levinson to our Mr. Wm. Bornstein, for the sum of Two Hundred Seventy-five Dollars ($275.00).

No other charges are to be made for this work.

Trusting that we will be favored by your valued order we remain,

Very truly yours,

EM. BORNSTEIN & SON,
Per Wm. Bornstein.

Exhibit P-3.

LETTERHEAD OF LEVENSON WRECKING CO., INC.

Hoboken, N. J., July 2, 1914.

Mess. Em. Bornstein & Son,
1422 Madison Ave.,
N. Y. City.

Gentlemen:

Your estimate to put in sewers to the two stables on Grand Street between 14th and 15th

Streets, Hoboken, N. J., is herewith accepted. It is hereby understood that you are to perform the entire work necessary for this contract in a thoroughly workmanlike and efficient manner and complete in every way for the sum of Two hundred and seventy-five dollars ($275.00).

Very truly yours,

LEVENSON WRECKING COMPANY, INC.,
M. Levenson, Pres.

10

Exhibit P-4.

LETTERHEAD OF GATTI-McQUADE CO.

Hoboken, N. J., July 7, 1914.

Levenson Wrecking Co.,
Hoboken, N. J.

Gentlemen:

20 This is to advise you that we have made other arrangements regarding a stable and that we will vacate your stable on July 31st—at which time our lease expires.

Yours very truly,

GATTI-McQUADE CO.,
D. Galloway.

Exhibit P-5.

30

LETTERHEAD OF WELLER & LICHTENSTEIN.

Hoboken, N. J., July 9, 1914.

Gatti-McQuade Co.,
15th & Garden Streets,
Hoboken, N. J.

Gentlemen:

Your letter of the 7th instant, addressed to the

40

Levenson Wrecking Company, wherein you state that you intend to vacate the stables now occupied by you, on July 31st, has been handed to us for reply.

We have been requested to inform you that in the event of your vacating the premises on the date mentioned that it is the intention of our client to hold you responsible until the expiration of the term of your lease, which we understand does not expire on July 31st, as you state.

Recently a representative of your company requested our client to go to considerable expense in fixing up the premises, which they are now doing for you.

Under the circumstances do you not think it advisable to reconsider your determination?

Very truly yours,

WELLER & LICHTENSTEIN.

JL/MG. G.

Dictated; not corrected.

Exhibit P-6.

July 10, 1914.

Weller & Lichtenstein, Esqs.,
Hudson Trust Building,
Hoboken, N. J.

Dear Sirs:

Your letter of July 9th inst. to Gatti-McQuade Company, 15th and Garden Sts., Hoboken, N. J., has been handed by them to us for reply.

We have carefully conferred with the officer of that Company, who alone has had any communication with your client, the Levenson Wrecking Company, concerning a possible renewal of the

Exhibit P-5.

lease existing between these parties and expiring by lapse of time the 31st inst., with the result that we are satisfied that no agreement has been made by the Gatti-McQuade Co. to renew the lease mentioned, and we have so advised them.

The Gatti-McQuade Co. will therefore vacate on or before July 31st inst., the premises leased to them by the lease mentioned, dated August 1, 1912, and this course of action they will legally defend so far as action on the part of your client may make that necessary.

Very truly yours,

SMITH & BOWMAN.

Judgment.

HUDSON COUNTY CIRCUIT COURT.

LEVENSON WRECKING COMPANY, a corporation,

Plaintiff,

v.

GATTI-McQUADE COMPANY, a corporation,

Defendant.

Judgment entered February 8, 1917.

Damages	$1100.00
Costs	58.91
Total	$1158.91

WELLER & LICHTENSTEIN,
Attorneys.

Judgment and verdict in the above entitled cause was entered in this Court on the 8th day of February, in the year of our Lord One Thousand Nine Hundred and Seventeen in favor of the plaintiff, Levenson Wrecking Company, a corporation, and against the defendant, Gatti-McQuade Company, a corporation, on a pleading of action at law, for the sum of Eleven hundred dollars and ..... cents damages and Fifty-eight dollars and ninety-one cents, costs of suit.

Judgment entered and signed this eighth day of February, 1917.

(Minutes 61, p. 518.)

New Jersey Court of Errors and Appeals

LEVENSON WRECKING COMPANY, Plaintiff-Appellee, vs. GATTI-MCQUADE COMPANY, Defendant-Appellant.	Action at Law. On appeal from the Hudson County Circuit Court.

BRIEF OF PLAINTIFF-APPELLEE.

Statement.

This was an action by the Levenson Wrecking Company, a corporation, against the Gatti-MacQuade Company, a body corporate, for rent.

The tenancy originated under a written lease for one year, to take effect on August 1st, 1912, and on that date defendant took possession of the premises. Thereafter defendant entered into an oral renewal of the lease with the plaintiffs for one year ending July 31st, 1913. It was during this period that plaintiff contends the oral letting sued upon was entered into to take the premises for another term of one year from the 1st day of August, 1914, that pursuant to this agreement the defendant remained in possession until the third

or fourth days of August, 1915, and then vacated the premises. Defendant denies entering into an agreement for the second renewal period. It was the issue of whether or not there was a second renewal which went to the jury and which the jury determined, as we claim rightfully, in favor of the plaintiff, and awarded a judgment for $1,100. A rule to show cause was taken and upon the hearing thereof the rule was dismissed.

Argument.

The plaintiff-appellee contends that the judgment should be affirmed,

First, for the reason that there was ample evidence to establish the making of the renewal lease;

Second, that the defendant is estopped to deny that plaintiff was not the owner of the leased premises;

Third, that the trial court did not err in refusing to permit the defendant to amend and plead that title was conveyed *prior* to the date of the renewal of the lease;

Fourth, that the court did not commit error in refusing to allow in evidence the deed showing change of title prior to the date of the renewal of the lease;

Fifth, that the case of Edge vs. Stafford, upon which the defendant asks that this judgment be reversed, was repudiated by Chief Justice Beasley and was never the law of New Jersey.

POINT 1.

There was ample evidence to prove the making of the lease.

"Where the existence, and not the validity of construction, of a contract, or the terms

thereof, is the point in issue, and the evidence is conflicting, it is for the jury to determine whether the contract did in fact exist."

13 C. J., 781.

The record shows (pages 12 and 164) a lease for one year, between Levenson Wrecking Co. and Gatti-McQuade Co., dated August 1, 1912, and under it Gatti-McQuade Co. took possession of the property and held possession for the term of the lease and for a year longer under an oral arrangement (page 15).

It was during the second year of this possession so held under the terms of the original lease that the renewal lease for a third year was made (page 19).

In June, 1914, an oral arrangement for a renewal was made (pages 19 and 20).

Under the oral contract repairs were to be made as requested by the defendant, which were fully done as agreed upon (pages 22, 23, 24 and 26).

Mrs. Levenson testified (page 29 lines 28 to 38):

"Q. Didn't he say he would not want to stay another year? A. No, sir; I am positive about that; he said he would stay another year if I would do all that work (repairing).

Q. Did he say anything about what he would do if you did not do that work? A. He said that if I would put a sewer in, he would stay for another year."

Her testimony that there was a letting from the expiration of the existing lease (August 1st, 1914) to August 1st, 1915, is full and complete, as appears from partial excerpts of her testimony in

appellant's brief. No point is made that we did not do all the repairing as agreed upon.

In the case of Knickerbocker Ice Co. vs. Anderson, 31 N. J. Law, 333, the Court held that in a conflict of testimony, when the facts found by the jury will sustain the verdict, the Court will not set it aside, although in their opinion the jury might, upon the evidence, have found otherwise.

To the same effect is the case of Scott vs. Blakely, 85 N. J. Law, 727, where the Court of Errors and Appeals said:

> "The only question in controversy was as to whether or not Mrs. Scott was married to a man named Goshen, who died seized of the lands described in the declaration. The error assigned and argued was that the jury disgarded what the plaintiff's counsel contends was the uncontradicted testimony as to the marriage. There was testimony tending to show a lawful marriage between the parties named, but there was also testimony to the effect that they never were married. The jury found for the defendant and, there being testimony to support that verdict, this court, under the well known rule, will not disturb it."

We respectfully submit that the evidence is ample and the verdict of the jury is conclusive upon this point.

POINT 2.

Defendant is estopped to deny that plaintiff was not the owner of the leased property.

It was early decided in England in the case of Cooke vs. Loxley, 5 Term Rep., 4, in an action for

rent against a tenant, that the tenant could not deny the landlord's title.

Chief Justice Cockburn said in Delaney vs. Fox, 28 L. J. C. P., 249, that the rule had its birth in the Feudal period and the principle had never been questioned, and the only exception he points out is where the landlord has parted with title *since* the making of the lease, a condition which does not arise here.

This principle was early adopted in New Jersey in Montgomery vs. Bruere, 4 N. J. L., 260 (1818), and is today one of the fundamental rules governing the relation of landlord and tenant. And as stated in Zabriskie vs. Sullivan, 80 N. J. L., 673, is applicable to every species of tenancy—to a tenant holding over, to a tenant by sufferance; and estops the tenant from showing that the lease was improperly executed.

In 16 Rul. Cas. Law, page 651 the editor says:

> "The doctrine extends to all classes of tenants; whether the person is in possession as a tenant at will or at sufferance the consequence is precisely the same; and is fully recognized in courts of equity as well as in courts of law. It applies where an agent executes a lease in his own name as lessor, and the lessee is estopped to deny the agent's title and where a tenant accepts a lease from one claiming to act as agent of the landlord the tenant is estopped to deny the authority of the agent for the same reason by which he is estopped to deny the title of the landlord."

And on page 659 it is stated:

> "The rule that one who goes into possession as a tenant of another is estopped to deny the title of the landlord applies equally to a case where the tenant was in possession at the time of the making of the lease as well as where he takes possession under and by virtue thereof."

Citing numerous cases.

So the plaintiff insists that the estoppel applies to the defendant, as he was at the time the renewal lease was agreed upon in possession of the property.

There was no necessity for the plaintiff to show that it was the owner of the leased property and the question asked (page 14) as to the ownership of plaintiff in the premises was immaterial and reversal cannot be based upon an interrogation of a wholly immaterial matter.

And it is to be noted that evidence in favor of the landlord's title is admissible; it is only evidence derogatory to the title that is shut out by the rule above cited.

The defendant's possession of the land was never disturbed, and as is stated in 16 Rul. Cas. Law, 673:

> "So long as the tenant is not disturbed in his occupation, he is bound by the contract to pay the rent, whether the landlord's title be defective or not."

Defendant cites several cases upon the point that rent is an incident to the reversion, and hence the plaintiff was not entitled to recover rent with-

out owning the reversion. We find no complaint with the cases cited. The first case cited by him (Condit vs. Neighbor, 13 N. J. Law, 831) was upon a lease made to a husband and wife and the wife survived; and it was held that the rents under the lease after the decease of the first husband, went to the wife. The second case cited is Abbott vs. Hanson, 24 N. J. Law, 493, which held that if a lessor *subsequent* to the making of the lease parts with title he cannot sue for rent thereafter due; the other case of Mills vs. Boylan, 22 N. J. L. J., 148, was where the plaintiff had acquired the title to the land *subsequent* to date of lease. The case of Messler vs. Fleming, 41 N. J. L., 111, was upon the question of the right of a landlord to recover rent where he had lost title by foreclosure proceedings *after* the date of the lease.

The first case cited has no relevancy to any of the questions involved in this case. The last three cases cited are upon the well-established exception to the rule that a tenant is not estopped to deny his landlord's title where *after* the making of the lease sued on he parts with title. But we are not concerned here with that exception. No claim is made that after the date of the renewal lease there was a change of title. We discuss this exception to the rule in the next point.

It is important to bear in mind that the defendant admits that it entered into a formal written lease with the plaintiff (page 88), and, under said lease, entered into possession of said premises that it verbally renewed this lease (page 88) and always paid the rent reserved and that at no time was it ever disturbed in or ousted from the quiet enjoyment and possession thereof.

POINT 3.

This rule of estoppel to deny title of landlord applies to an action for rent against the tenant, though the tenant vacated the premises before the rent sued for accrued.

Defendant insists that as it had removed from the premises after the 4th day of August, that it has the right therefore to question the plaintiff's title.

The defendant has confused the different situations where this rule of estoppel is invoked.

Actual possession of leased premises necessary to invoke the rule denying to the tenant the right to deny his landlord's title is never a prerequisite (in fact, it is immaterial) where there is a lease. It is the relation of landlord and tenant which works to close the tenant's mouth, and this relation, no doubt, is often determined by the actual occupancy of the land. But not so where there is a lease. As Chief Justice Beasley said in the Birckhead case (supra), when the relation is established liability attaches.

In Farmers D. Nat. Bank vs. W. Pa. F. Co., 215 Pa. St., 115, 64 At., 374, the Court said:

> "The plaintiffs in error are to be considered as occupying under the lease with Murphy's (the landlord's) agent, for if they did not remain in the actual possession of the premises, they might have done so. They were not evicted or disturbed in their possession by any title paramount to Murphy's, and if they turned themselves out, it was their own fault and no reason for refusing the stipulated rent.

> A tenant cannot be compelled to occupy the premises he leases. If he chooses that they shall stand vacant, his will is law to himself, but let him not imagine that his caprice, or change of interest, will excuse his payment of the rent."

In 16 Ruling Case Law, page 673, the editor says:

> "In an action by landlord to recover rent the tenant as a general rule is estopped to set up in defense the want of title on the part of the landlord, and this general rule is held to apply though the tenant vacated the premises before the rent sued for accrued."

POINT 4.

The Trial Court did not err in refusing to permit defendant to amend and plead that title was conveyed prior to the date of the renewal lease.

Defendant asked to amend his complaint to show that on May 4th, 1914, a date prior to the making of the last renewal lease, plaintiff had conveyed its entire title.

We have discussed in the last point the rule that a tenant is estopped to deny his landlord's title. We attempted to show there that a tenant cannot deny that his landlord had title at the time the renewal lease was made. Defendant urgently insists, however, that it can show that at a time *prior* to the new lease the landlord had parted with title. This cannot be done. The learned counsel for the defendant has sought to bring the defendant within

the exception to the rule, but his proffered testimony, as well as his proposed amendment, did not reach the exception.

A transfer of title *before* the renewal lease was made could not be shown, for it would permit a tenant to show that the landlord did not have title at the time the lease was made, which we fully explained, in the last point discussed, could not be done. Had the proffered deed been made at a time *after* the date of the lease, his contention would have merit.

16 Ruling Case Law, 665, clearly states the rule:

> "The estoppel of the tenant extends to a denial of the title which the landlord had at the time of the lease."

The defendant's proffered deed bears date May 4, 1914 (pages 147-148). The renewal lease sued on was made in June, 1914, a month later than the date of the deed.

This prior transfer cannot, we insist, be now urged as it is a clear denial of the landlord's title. Hence, the Court did not err in refusing the amendment to allow it to be pleaded as a defense.

POINT 5.

The Court did not commit error in refusing to allow in evidence the deed showing a change of title prior to the date of the renewal lease.

The defendant insists that the deed executed prior to the making of the lease was admissible on three grounds: first, for the purpose of showing that plaintiff was not the owner of the premises; second, for the purpose of testing the veracity of one

of the plaintiff's witnesses; and, third, for the purpose of corroborating one of defendant's witnesses.

Neither of these grounds is sound.

The rule that estops a tenant from denying his landlord's title is really not a rule of evidence, but it is a rule of substantive law. As Wigmore says in Section 1471, Vol 2:

> "The rule of substantive law, that a tenant may not dispute by plea or by claim the superior right of his landlord, has occasionally been erroneously applied in the domain of Evidence, and has been supposed to forbid, as a rule of evidence, the use of a tenant's declarations against his proprietary interest, so far as they tend to cut down the landlord's right. It is difficult to see how such an application can be invoked."

And this rule of estoppel is mutual. It bars the landlord from denying his own title to the same extent that it bars the tenant from denying the landlord's title.

The rule is stated in 16 R. C. L., page 653:

> "This estoppel to deny a landlord's title is as a usual rule mutual, and prevents the landord, or those claiming under him subject to the tenant's rights, to deny the landlord's title for the purpose of ejecting the tenant, and may be made available to enable a tenant to eject the landlord, who will not be permitted to deny that he had title and that consequently the tenant was without title."

For us to repeat the arguments advanced in the previous points as to the inadmissibility of evidence

affecting the landlord's title is not desirable. The rule clearly excludes this testimony on all the grounds suggested by defendant. To admit immaterial or inadmissible evidence for the purpose of testing a witness' veracity, or to corroborate a witness, or to contradict a witness upon an immaterial statement is clearly not permissible.

To seek in this indirect method to prove one's case when it could not be done in a direct way is not allowable.

In State vs. Hendrick, 70 N. J. L., 41, the court said (page 46) :

> "The rule is that the introduction of irrelevant or immaterial testimony by one party can never justify the introduction of illegal testimony by the other, *not even for the purpose of contradiction.*"

The testimony of Mrs. Levinson, that the landlord was the owner of the reversion, was immaterial, we think, under the rule that a landlord's title cannot be disputed, but, though admissible on the ground that it is not derogatory to the landlord's title, a deed showing that the landlord had transferred his title prior to the making of the lease is clearly illegal and hence is not admissible either for the purpose of contradiction of plaintiff's witness or for corroboration of defendant's witness.

In Morris vs. At. Ave. R. Co., 116 N. Y., 552, it was held that a witness could not be impeached on collateral or irrelevant testimony.

POINT 6.

The presumption is that the renewal was upon the same terms as the old lease.

The evidence is sufficiently convincing as to the meaning of the defendant that the old lease was to be adopted for another year.

In 13 Corp. Juris, 626, the editor says:

> "A renewal of a contract will be presumed to be in accordance with the terms of the original contract in the absence of evidence to the contrary (citing numerous decisions)."

In the case of Feigenspan vs. Popowska, 75 N. J. Eq., 342, Vice-Chancellor Stevenson held that an agreement to renew a lease implied a renewal for a like term on like conditions.

POINT 7.

Defendant must show its inability to get possession under the renewal lease before it can deny the landlord's title.

Defendant claims that it did not take possession under the renewal lease, and denied its existence, and that it is thereby free to deny the landlord's title. The evidence (page 16) shows defendant did take possession and remained for several days. The defendant, however, does not claim possession was refused; they simply did nothing toward getting the possession. They had occupied the premises for two years without dis-

turbance of any kind. We submit that they are estopped under the circumstances from denying plaintiff's title.

The case of Vernan vs. Smith, 15 N. Y., 327, was an action by a landlord against a tenant to recover a year's rent. Defendant pleaded as one of his defenses "That the plaintiff, at the time of the making of the lease, represented that he was the owner of the premises and entitled to make the lease, but that in fact he was not the owner of any estate or interest therein; but the premises were owned by other persons 'to whom the defendant was liable for the use and occupation thereof,' and that no estate or interest vested in the defendant, by means of the lease."

Chief Justice Denio says (page 330):

> "But the defendant's counsel argues that the present is not an action for use and occupation, but one founded upon the express contract of the defendant, *and if maintainable at all, it is upon facts irrespective of any occupation and enjoyment of the pemises; and if the complaint alone be examined, the position is correct.* No entry or occupation is alleged, but only a demise, and an agreement by the defendant to pay the rent, contained in a writing under seal. If the defendant in his answer had confined himself to a denial that the plaintiff, at the time of the demise, had any estate in the premises, the question would be presented whether the ancient rule of the common law, to which I have referred, prevails at this day. *There would not be much appearance of justice in holding that where one has taken a written lease of premises and agreed to pay the rent, but has not thought*

proper to avail himself of the right he had thus contracted for by going into possession, when he might have done so without hindrance from any one, he can defend against his engagement by showing that there was a defect in the lessor's title, and that he was not really seized of the land."

In the case of Dixon vs. Whedon, 1 Ed. Smith (N. Y.), 141, the plaintiff sued the defendant for rent, and it was held that the lessee was estopped to deny that the landlord was not the owner of the property and that the plaintiff need not show that the defendant actually occupied the premises.

In the case of Bigler vs. Furman, 58 Barb. (N. Y.), 545, the action was brought upon an indenture of lease whereby the plaintiff let certain premises to the defendant for the period of five years, at a rent agreed upon. The complaint simply alleged the making of the lease and the non-payment of the installments of rent for which the action was brought. The answer alleged that the defendant was led and induced to believe that the plaintiff was the owner of the premises in question and had full right to let and demise the same, but that he was not the owner of the premises at the time of the execution of the lease, or at any time since, but that the same belonged to the State of Virginia and to other persons. It was held that the tenant was estopped to show that he was never in possession unless he could prove fraud.

Professor Bigelow, in his standard treatise on the law of estoppel (page 548), in discussing the question of the estoppel of a tenant to deny his landlord's title, refers to an article in Vol. 6 of the American Law Review (pages 1 to 36) as having been written by one of the most learned

men on the law of estoppel. From that article (Vol. 6, American Law Review, pages 16 and 17) we quote:

> "But we conceive that the true doctrine at this day goes even farther than was admitted in Smith vs. Scott, and that even if there appears no entry or possession taken by the lessee, that he will still be estopped if he does not show that he could not get possession. If the tenant, having the power to enter, does not do so after receiving a demise, valid against the lessor, it cannot be said that he has received no quid pro quo because he has neglected to avail himself of his right. Estoppels are mutual and, as lessor, would be liable in ejectment if he did not give up possession to the tenant or enable the latter to take it (citing cases). The latter must be held to his side of the reciprocal obligation. Indeed, this may not unfairly be inferred from Chettle vs. Pound as there possession in the lessor so that he could transfer it to the tenant and not possession taken by the tenant, was held to be the requisite to sustain the bar of estopped."

Professor Bigelow, in his work on estoppel (pages 550-551), says:

> "It is suggested, and with much soundness apparently, that the estoppel will arise even if there appears no entry or possession by the tenant, if it does not show that he could not get possession."

The cases that seem to suggest that possession is an element essential before the doctrine that a

tenant is estopped would apply, were cases which did not discuss the necessity of possession; and, as we have before stated, possession may be the means of creating the relation of landlord and tenant, but we submit that there is no natural reason why possession should be a stronger reason for invoking the rule than that of a contract relation.

POINT 8.

The case of Edge vs. Stafford, 1 C. & J., 391, was repudiated by Chief Justice Beaseley fifty years ago.

Defendant bases its right to reversal finally upon the case of Edge vs. Stafford, 1 Crompton & Jervis, 391 (also reported in 148 Reprint, 1474). The discussion of the Edge case, and the question there involved—the relation between the second and fourth sections of the Statute of Frauds—would be tedious, but, happily, is no longer necessary. The Edge case, of interest two generations since, when textbook writers devoted whole sections in seeking to unravel its meaning, is no longer so. The courts have not agreed as to just what was decided by this case (see Brown on Statute of Frauds, Secs. 36 and 37, and cases cited, ante).

The Edge case was upon a contract to furnish lodgings. Its companion case (Inman vs. Stamp, 1 Stark M. P., 16) was decided by Lord Ellenborough, who held that the hiring of lodgings was a contract for an interest in land.

In the case of Berckheard vs. Cummings, 33 N. J. L., 44, the court discusses fully both the Edge case and the Inman case. At pages 53 and 54 the Chief Justice says:

"The two decisions rest upon precisely the same groundwork of facts and, consequently, reflect light upon each other. But it does not seem to me that they will, when carefully analyzed, be found to support the hypothesis which has been understood to be erected upon them. It has been said that they laid down the broad rule that a parol lease, of the description excepted by the statute, cannot be sued upon before an entry by the tenant. But, in my comprehension, neither case has so wide a scope."

After quoting at length from the Edge case, the learned Chief Justice continues (page 54):

"From this extract it is apparent that this decision is not authority for the principle that a parol lease is in no respect valid until the lessee has gone into possession, but, on the contrary, it distinctly admits that, as a lease, it is valid before such event. Unless, therefore, the reservation of rent can be said to be no part of the essence of a lease, the case is not an authority against a right of action to recover such rent before the tenant has entered. It would be singular, indeed, to hold, as the case of Edge vs. Stafford does, that on the execution of the parol lease, and before any entry under it, the tenant acquires an inter esse termini, but that, before he enters, his landlord cannot sue him for the rent reserved. If such were the law, the tenant, having the right to enter at any time during the term, could compel the lessor to keep the premises vacant for the same period and yet, by omitting to enter, he could preclude a suit against

himself for the rent. I think the cases of Inman vs. Stamp and Edge vs. Stafford decided nothing more than that a suit for damages cannot be brought on an agreement that the lessee will take actual possession of the premises. * * * The conclusion to which I have come on this branch of the case is that, by a just consideration of the statute of frauds, a parol lease, not exceeding three years from the making, and reserving rent from the proportion designated, is good from its inception, and will support an action for the rent in arrear without any entry having been made upon the premises by the lessee."

The Supreme Court of the State of Indiana discussed the Edge case in Hoffman vs. Starks, 31 Ind., 474, in connection with its companion case (Inman vs. Stamp), and refused to follow it, *and held that the parties to a parol lease of lands for one year could have such remedies for violation of the contract as would appertain to violations of other contracts.*

In the case of Young vs. Dake, 5 N. Y., 463, the doctrine of the Edge case was repudiated, and it was held that a present oral lease of land, not exceeding three years, to commence in the future, was not within the statute of frauds and was enforceable, and that such a lease passed a present interest in the term to the lessee.

In the case of Beacer vs. Flues, 64 N. Y., 518, Chief Justice Church held that a parol lease of premises for a year, to commence in the future, was not an executory contract prior to the time of taking possession, but that it vested a present interest in the term and could not be rescinded by either party alone, and that where the lessee refused

to perform the lessor was not required to lease to another if he had an opportunity and is not confined to his remedy for actual damages, and that he may refuse to accept rescission and hold the lessee liable for the rent. This case was cited with approval in the case of Whiting vs. Ohlerl, 52 Mich., 463, and in Gano vs. Chicago Rwy. Co., 60 Wisc., 12.

But aside from this there was evidence that defendant was in possession after August 1st, 1914, when the new lease commenced. Testimony of Mrs. Levenson, page 16.

We submit that the only question involved is: Was there a renewal of the lease? The jury said there was, and, on a rule to show cause, the verdict was approved. We think this determines the matter and hence we earnestly insist that the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

WELLER & LICHTENSTEIN,
Attorneys for Appellee.

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

New Jersey Court of Errors and Appeals

LEVENSON WRECKING COMPANY, *Plaintiff-Appellee,* vs. GATTI-McQUADE COMPANY, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Hudson County Circuit Court.*

BRIEF OF McDERMOTT & ENRIGHT, FOR APPELLANT

Defendant appeals from a judgment entered in the Hudson County Circuit Court in favor of the plaintiff for $1,158.91, inclusive of costs.

The complaint recites (1) that prior to July 1, 1914, plaintiff, a corporation, entered into an agreement with the defendant, a corporation, whereby plaintiff rented to the defendant two stable buildings, Nos. 1415 and 1417 Grand street, Hoboken, for the term of one year from July 1, 1914, at the yearly rent of $1,200, payable in monthly instalments of $100 the first day of each and every month in advance.

(2) That the defendant rented the premises and agreed to pay the rent aforesaid;

(3) That defendant continued in possession of the premises after the making of the lease and up to July 31, 1914;

(4) That the defendant, in pursuance of the terms of the lease and on or about July 1, 1914, paid plaintiff the sum of $100 for the first month's rent under said lease for the month beginning July 1 and ending July 31, 1914;

(5) That on said 31st day of July, 1914, defendant, without consent of plaintiff, vacated the premises and has since that time refused and neglected to pay rent. Plaintiff demands the rent for the year.

Defendant answering said that it admitted continuing in possession of the premises until July 31, 1914, but said that its possession was not under any such lease as was mentioned in the complaint, but that the defendant's possession was under a

lease made between the parties in writing dated August 1, 1912, which expired August 1, 1913, and which was verbally renewed for one year additional and expired August 1, 1914, and prior to which last-mentioned date defendant quit the premises. Defendant denied making any such lease as was alleged in the complaint; admitted that it paid the rent for the month of July, 1914, but averred that the payment was under the prior lease which terminated as above mentioned. At the conclusion of the trial plaintiff conceded that defendant was never in possession of the premises under the alleged lease that was sued upon.

On the trial defendant moved for permission to add an additional defense, namely, that plaintiff conveyed to the Levenson Lumber Company, a New Jersey corporation, by deed dated May 4, 1914, recorded May 5, 1914, in Liber 1183 of Deeds for Hudson County, page 133, the lands and premises on which the stables mentioned in plaintiff's complaint are located, and that plaintiff did not have title to these premises at the time the alleged lease was alleged to have been made and at the times mentioned in plaintiff's complaint (bottom p. 52, top p. 53). The Trial Court refused to permit this amendment for the reason that the facts sought to be pleaded in the answer as amended did not constitute in law a defense, on the theory that a tenant cannot raise the question of his landlord's title (pp. 55, 56). The Court expressly said that the motion was not denied on discretionary grounds, but solely on the question of law, and allowed an exception to the ruling.

The defendant on its case offered in evidence the record of the deed from the plaintiff corporation to the Levenson Lumber Company, a New Jersey corporation above mentioned, showing that prior to the time when the alleged negotiations between plaintiff and defendant for the making of a new lease for a year was alleged to have been entered into the plaintiff did not have title to the lands and premises, and the offer was overruled and an exception taken.

The witness relied upon by plaintiff to prove that a lease was made between the parties was Mrs. Helen Levenson, wife of Morris Levenson, one of the officers of the plaintiff corporation. Mrs. Levenson said that she held the office of vice-president and director of the plaintiff corporation; that she made a verbal agreement to lease the premises in question with Mr. Galloway, secretary of the defendant corporation. Mr. Galloway denied making any such agreement. There was no writing

between the parties wherein they agreed to lease, or leased the premises. In fact, on July 7, 1914, the defendant in writing notified the plaintiff that it had made other arrangements regarding a stable and would vacate plaintiff's stable on July 31 —"at which time our lease expires." Messrs. Weller & Lichtenstein, replying to this letter under date of July 9, acknowledged receipt of the letter and said: "We have been requested to inform you that in the event of your vacating the premises on the date mentioned that it is the intention of our client to hold you responsible until the expiration of the term of your lease, which we understand does not expire on July 31, as you state."

One would suppose that if a lease or an agreement to lease were made that Mrs. Levenson, who alleges that she made it for the plaintiff, would be able to express its terms with some degree of certainty. She told at least four different versions of the transaction. She said first, page 19, that during some time in June, 1914, over the telephone Mr. Galloway said:

> " 'Mrs. Levenson, if you care to have our people stay another year you better get busy on a sewer.' I said, 'All right.' And he said, 'There are several other repairs, but I would have to come over and show you what is to be done.' I said, 'All right, you could do that.' Then he came over the following day and he said to me, 'You come down to the stable with me and I will show you what is to be done,' and I did go down, and there was a leak in the roof, some glass was broken in the stalls, and some of the wainscoting was ripped, and he also wanted a sewer, and I said, 'All right, we will take care of it immediately,' and he said, 'All right, if you do that we are going to stay another year,' and I promised we would get busy at once, and we did. That was the last conversation I had with Mr. Galloway" (pp. 19-20).

She said, page 20, that this was the latter part of June, 1914.

On cross examination Mrs. Levenson testified that the repairs were finished around the 15th or 16th of July (page 27, lines 10 to 20). On page 29, line 30, Mrs. Levenson said that Mr. Galloway said he would stay another year "if I would do all that work," and I said I would do the work (page 29, line 39). She qualified this on page 30 by saying:

> "Q Is that all he said? A And all other little repairs that were to be done" (line 8).

On page 30, line 18, Mrs. Levenson said that when Mr. Galloway called her on the telephone he said:

> "'Now, Mrs. Levenson, if you want us to stay for another year you will have to do repairs, but I better come over and show you what is to be done.' I said, 'All right,' and he told me he was busy that day but he would come over the following day. He came over to our office to take me down to the stable to show me what was to be done with the stalls";

and page 31 she testified that she went with him. She could not say what day it was, what time of the day she went, and could not give any of the details (pp. 30-31). Page 33 Mrs. Levenson kept repeating that "if we would do the work he would stay another year" (p. 33, l. 8). She said that when Mr. Galloway called her on the telephone and said that he wanted repairs she agreed instantly to do what he asked, without regard to how extensive or expensive the job would be (p. 33). She testified, pages 44 and 45, that when she went to the stable Mr. Galloway showed her the condition of it and what should be done. He pointed out that the wainscoting needed repairs, the skylight, broken glass to be repaired, and page 35, line 9, she testified:

> "Well, he didn't mind the glass and all that so much as the sewer. He said if we put a sewer in and concreted the floor he would stay for another year, and I said, 'Yes, we would do it.'
>
> Q Did you know at that time what it would cost to do it? A I said before that I did not know what it would cost."

A long time before the trial of the action in the Circuit Court Mrs. Levenson testified in a suit on the same transaction in the Second District Court of Jersey City as follows (p. 36, l. 38): She said then that Mr. Galloway said to her over the telephone:

> "'Mrs. Levenson, if you want us to renew the lease for a whole year you had better hurry and fix the stable up for us.' I said, 'What do you want done'? He said, 'We want a sewer put in and also some of the stalls should be repaired,' and I said we would do it."

The Court, noticing the difference in Mrs. Levenson's testimony, examined her about what the conversation was—pages 44, 45 and 46—as follows:

> "Q You have told us that Mr. Galloway said this, or practically this, to you: 'If you want us to stay another year you will have to make these repairs, or some repairs.' Is that correct? Is that one of the things? Did he say that to you? A Did he say that to me? Yes, sir.

Q Now when did he say that to you? On more than one occasion? What occasion was it? A It was over the telephone.''

Again, at top of page 45, Mrs. Levenson said:

''A Well, when he came over the following day he said, 'We would stay another year if you would put the sewer in and do all these necessary repairs.' ''

Page 45, line 20, in reply to the Court's question, she said that Galloway told her:

'' 'If you want us to stay another year you will have to make repairs.' ''

Page 45, line 22, Mrs. Levenson testified that Mr. Galloway said: ''If we would do that he would stay another year.'' At the bottom of page 45 Mrs. Levenson testified that when Mr. Galloway came to her office he said:

'' 'You come down and I will show you what is to be done,' and he said, 'The stable is in bad condition on account of no sewer, and if you want us to renew the lease for another year put a sewer in'.''

On page 46 she testified that he said that down in the stable and he said it in the office. He said: ''If you want us to stay another year you better do that.''

Mr. Galloway, for the defendant, denied having any such conversations with Mrs. Levenson, and he denied, furthermore, that he ever was in the stables with Mrs. Levenson, and there was absolutely no corroboration for Mrs. Levenson's testimony to the effect that Galloway had any such conversation with her or that she was in the stable with him.

Mr. Bernstein, a great friend of the Levensons, testified (page 58) that Galloway came to the office one day and asked for Mrs. Levenson, and he asked her:

''How about the repairs, or the—rather, the sewer and the concrete floor of the stable which they wanted to have done, because the lease—because they wanted to stay there, and therefore wanted to have that done'' (p. 58, ll. 10 to 20).

On page 62 Mr. Bernstein testified that Galloway said when he came in:

'' 'He said that he came there to see her with reference to the stable and he wanted the sewer fixed, he wanted some stalls fixed, and he wanted some other things done there.' ''

He said, top page 64, that Mrs. Levenson said that she would have that attended to; that she would do it.

"Q Was that all that you heard said? A That is all" (p. 64, l. 4).

The same witness had testified before Judge Blair in the Second District Court that he was busy and he would not be sure as to what happened between these two people (p. 66, ll. 3 and 4).

The testimony of Mrs. Levenson indicates no more than complaints by a tenant to his landlord about the condition of the demised premises and asking that repairs be made. Certainly it does not constitute a lease, nor does it establish a contract to make a lease.

Plaintiff's Exhibit P. 2, admitted over objection, shows that on July 1, 1914, one Bernstein gave an estimate to Levenson Wrecking Company to install two drains, and that on July 2 the plaintiff accepted the estimate, but this work had not been done at the time the defendant notified the plaintiff in writing on July 7th that it would quit the premises at the end of the existing term, July 31, 1914. Certain repairs were made in the premises by the plaintiff, but we submit that that testimony is immaterial.

In defense Mr. Galloway denied that he went to the plaintiff's office, denied that he made any agreement to occupy the premises for another year, and proved conclusively that the premises were quit and everything of the defendant's was moved out by the 31st day of July, 1914. He said that before the letter of July 7th was written he had not told the Levenson Wrecking Company or anybody for them that the defendant would continue over for another year, or make a new lease (p. 90). He said that the condition of the stable at the time the letter of July 7th was written was very unsanitary; that there was no sewer; that the water came up and the horses were wet at night and that he acted on their veterinary's advice (p. 90, l. 20). Mr. Galloway said that a sewer was put in in July, 1914, but that it was not at his request (p. 90, l. 38). He said that on July 8th Mr. Levenson, after receipt of defendant's letter of July 7th, came to see Mr. Galloway and said that he was surprised to get the letter and wanted to know if the defendant would reconsider, and Mr. Galloway said, "No, that we had made other arrangements" (p. 91, l. 20). Mr. Levenson said then he would have to see his attorney (p. 91, l. 22). At that time Mr. Levenson said nothing about defendant having already made a new lease and he did not claim that the defendant was

tied up to a new lease for the year following (p. 91, l. 30). Mr. Galloway testified that their new lease for other stables had been drawn up in the offices of Smith & Bowman, 38 Park Row, New York, on July 5th, 1914 (p. 93, l. 10), but it was not signed until later. Mr. Galloway testified that he spoke to Mrs. Levenson on the telephone about the 15th of June, 1914 (p. 91, line 38), and on page 94 he said that the purpose of calling her up was to notify her that they did not want the stable for another year. He said that Mrs. Levenson asked him why he was going to give up the premises and "I told her that our veterinary had advised us not to re-rent the premises on account of the unsanitary condition" (p. 94, l. 36).

Mr. Farr, manager of defendant's Philadelphia office, was in the Hoboken office in the month of June, 1914, when Mr. Galloway was talking, and he remembered hearing Mr. Galloway say to somebody on the telephone "We will not renew the lease" (p. 118, l. 35). Mr. Galloway testified that that was the conversation over the telephone that he had with Mrs. Levenson (p. 117).

It was stated in the complaint that the defendant had quit the premises on July 31, 1914 (p. 2, par. 5), and although Mrs. Levenson attempted to show that some of defendant's material were left in the stable after that date, it was conclusively proved by the defendant's witnesses that all of the defendant's materials of every nature and description had been removed from the premises by July 31st, and at the close of the case plaintiff's counsel stated: "We are willing to stand as the complaint says." This concession leaves no controversy upon the fact that defendant was never in possession a day, even under the term for which rent is claimed.

Despite the fact that the complaint claimed one year's rent beginning July 1, 1914, alleging the term to have begun on that date, it was conceded on the trial that the rent for the month of July, which was paid, was the rent for the last month of the year due under the then existing lease. Consequently, the jury returned a verdict in favor of the plaintiff for eleven months' rent, or $1,100.

The Court allowed a rule to show cause, reserving the following exceptions as grounds of appeal:

GROUNDS OF APPEAL RELIED UPON

1. The refusal of the Court to direct a verdict in favor of the defendant.

2. Because the Court refused to permit an additional defense to be filed showing that the plaintiff before the term alleged had begun had conveyed the lands and premises to a third party and was not the owner of the lands and premises at the times mentioned in the plaintiff's complaint, the Court refusing to make the amendment solely because the tenant cannot raise the question of his landlord's title.

3. Because the Trial Court refused to allow in evidence a deed dated May 4, 1914, from the plaintiff conveying the lands and premises described in the complaint to the Levenson Lumber Company, a New Jersey corporation.

4. Because the Court refused to charge the jury as follows (second request to charge, p. 163):

> "Plaintiff contends that prior to July 1st, 1914, plaintiff rented to defendant and defendant rented of plaintiff certain premises in Hoboken. Before plaintiff could rent such premises to defendant, it must, of course, have either been the owners of such premises or have had some right to rent to defendant. Plaintiff has given no evidence on this point whatever, and you must therefore find for defendant."

5. Because the Court refused to charge defendant's third request, as follows (p. 164):

> "There is no presumption in this case that plaintiff owned the premises 1415-1417 Grand street, Hoboken, nor has defendant admitted that fact."

6. Because the Trial Court refused to charge defendant's fourth request to charge, as follows (p. 164):

> "Plaintiff is not entitled to more than six cents damages, if entitled to anything."

7. Because the Trial Court charged the jury:

> "If there is a verdict at all, the verdict can only be for the period of eleven months at $100 per month."

over the objection of the defendant.

8. Because the Circuit Court entered judgment in favor of the plaintiff and against the defendant for the sum of $1,100, whereas judgment should have been for the defendant.

The Court allowed an exception to his refusal to direct a verdict in favor of the defendant; the defendant properly objected to the portions of the charge above mentioned (p. 163) and to the refusal of the Court to charge the defendant's several requests to charge.

The Court in its rule to show cause (pp. 4-5) expressly reserved defendant's exceptions as above stated, stating in the rule "and they hereby are expressly reserved as reasons for appeal."

The conclusions of the Trial Court on the rule to show cause (pp. 5-6) show that none of the above grounds of appeal were argued or considered on the rule to show cause.

The motion for the direction of a verdict (p. 152) was made on the grounds: first, that the allegations in the complaint had not been proved; second, that there was no lease proved between the parties; third, plaintiff has not properly proved damages; has not proved that it was the owner of the premises the 1st of August, 1914, and continuously thereafter until the end of the year, which would be July 31st, 1915.

(This part of the motion was contained in the motion to nonsuit (p. 86), which was included in the motion for a direction.)

The further grounds were urged that there was no mutuality in the contract; no consideration for the contract alleged; that there was no holding over and no recognition of the plaintiff as landlord, and no relation of landlord and tenant between the parties after July 31, 1914, and, further, that the alleged verbal contract entered into, as contended in June, 1914, was a contract not to be performed within one year, and hence void under the statute of frauds.

All of the above grounds are relied upon for reversal of the judgment.

POINT I.

There was no lease proved for the term mentioned in the complaint.

The parties entered into a written lease dated August 1, 1912 (p. 164 to 169, inc.). This lease was for the term of one year to the first day of August, 1913. By consent of the parties the term which ended August 1, 1913, was extended for another year, and the term expired August 1, 1914. On July 7, 1914,

defendant wrote plaintiff a letter (p. 172, Exhibit P. 4) advising that defendant had made other arrangements regarding a stable and would vacate plaintiff's premises on July 31st, 1914, "at which time our lease expires."

The conversations testified to by Mrs. Levenson, a number of which are abstracted above, do not prove the allegations in paragraph 1 of the complaint; "that prior to July 1, 1914, plaintiff entered into an agreement with the defendant whereby the plaintiff rented to the defendant the stables 1415-1417 Grand street, Hoboken, for the term of one year from the first day of July, 1914, at the yearly rent of $1,200, payable in monthly payments of $100 each on the first day of each and every month, in advance."

Taking the most favorable construction of the conversations related by Mrs. Levenson, all that Mr. Galloway did was to agree that if plaintiff would make certain repairs, the defendant would enter into a lease for another year.

A promise to enter into a lease at a future date is certainly not a lease.

Goldberg v. *Wood,* 90 N. Y. S., 427.

Hill v. *Coal Valley Min. Co.*, 103 Ill., 41.

At best, a contract to enter into a lease is an executory contract. The letter from the defendant to plaintiff of July 7th, terminated any alleged agreement, even supposing there was an executory contract to enter into a lease.

If it be argued that the conversations related by Mrs. Levenson constitute a lease, the natural query is what were the terms thereof; when was the term to begin; when was it to end; what was the rent; how was it to be paid, &c.? There is nothing in Mrs. Levenson's testimony that can be construed into a renewal of the then existing lease, either for one year, two years or longer. Giving her testimony the most favorable construction for plaintiff, there was no lease assented to by the parties from July 1, 1914, to July 1, 1915, as pleaded.

> "There is no contract unless the parties thereto assent; and they must assent to the same thing in the same sense."
>
> *Parsons on Contracts,* Vol. 2, 6th Ed., Sect. 499, Chap. 2.
>
> It is elemental that plaintiff's proofs must support the case made out in the complaint. They must conform to the allegations in the complaint before the plaintiff can recover.
>
> 80 Atl., 623, 638; 67 Atl., 153; 78 Atl., 609.

Any damages that might be recoverable for the breach of an agreement to enter into a lease would be damages for breach of the agreement. Rent, as such, was not recoverable under any view of the testimony. The most damages that plaintiff might recover would be the money expended by plaintiff up to the date defendant's letter of July 7th was written, when the plaintiff was notified that defendant would vacate at the expiration of its then existing term.

The law does not even permit such damages to be recovered.

> *Edge* v. *Strafford,* 1 Crompton & Jervis, p. 391.
> *148 English Reprint,* p. 1474.

Rent could be recovered only on the theory that plaintiff was the landlord, and defendant was the tenant.

By no fair construction of any of the proofs can it be said that plaintiff was the landlord of this defendant after July 31, 1914, or that defendant was the tenant after that date.

On the contrary, the proofs and pleadings are convincing that on July 31st the defendant quit the premises and refused to recognize the plaintiff as its landlord, and contended at all times that all relations between plaintiff and defendant ceased July 31st, 1914, and yet it was on the theory that a new tenancy commencing July 1, 1914, was created, that the plaintiff recovered.

If the jury had found that a new term had been created from August 1, 1914, until August 1, 1915, the plaintiff would have been entitled, on the theory of the plaintiff's case, to $1,200, or the rent for one year.

Plaintiff's theory was that the new term began July 1, 1914, and ended July 1, 1915. But the rent for the month of July was due for the last month of the term ending July 31st, 1914. Therefore, we contend that the Jury did not find that a lease was entered into between the parties, as stated in the complaint.

The judgment therefore should be reversed.

POINT II.

Plaintiff did not prove that it owned the reversion and consequently did not make out one of the essential elements of its case.

Plaintiff pleaded a lease; defendant pleaded no lease. In this condition of the pleadings, it was incumbent on plaintiff to prove, as part of its case, a valid agreement capable of being enforced.

Ridgeway v. *Wharton,* 3 DeG. M. & G., 677.

The third question asked Mrs. Levenson on her direct examination was:

> "Q Did the Levenson Wrecking Company at that time own any property in Hoboken? A Yes.
>
> *Mr. Carpenter.* I object to that; that is a conclusion of law; I ask that the deeds be proved."
>
> (After argument) "*The Court.* I understand the formal proof is exacted, and I will not strike this out at present, but wait and see" (p. 14).

Plaintiff did not produce the formal proof of ownership of the property in question which was exacted and the answer of the witness that the plaintiff did own some land in Hoboken, is not proof that it owned the property in question at the time the alleged lease was entered into, and during the times mentioned in the complaint.

Under the pleadings in this case there can be no presumption as to ownership. That was an essential part of the plaintiff's case.

Since rent is an incident to the reversion (*Condit* v. *Neighbor,* 13 N. J. Law, 83; *Abbott* v. *Hanson,* 24 N. J. Law, 493; *Mills* v. *Boylan,* 22 N. J. L. J., 148) the plaintiff was not entitled to recover rent without owning the reversion. And since plaintiff did not prove ownership of the reversion, and since it was not admitted, what right did the plaintiff have to rent? If plaintiff did not have title to the reversion, how could the plaintiff be damaged by the defendant not performing the terms of the alleged lease or agreement to make a lease, which ever this was? The person who would be damaged by non-payment of rent would be the owner of the freehold, and not anyone who might sue for breach of an alleged contract to lease.

Thus it appears that an essential part of plaintiff's case was proof of ownership of the property in question.

> "The right to the rent passed to the grantee of the reversion under the deeds, with the title which he thereby acquired. If there was no title in the grantee there was no right to the rent, and it could not be held that he had any right to the rent until it was determined that the title was vested in him by the conveyance." Van Syckle, *J.*, in *Messler* v. *Fleming,* 51 N. J. Law, p. 111.

Because of failure of proof on this point, the Court should have directed a verdict for the defendant.

POINT III.

The Trial Court erred in refusing to permit defendant to amend its answer by pleading that plaintiff had conveyed away the lands and premises before the alleged agreement was made.

Counsel asked permission to add as an additional defense that the plaintiff had conveyed to the Levenson Lumber Company, by deed dated May 4, 1914, recorded in Liber 1183 of Deeds, p. 133, the lands and premises mentioned in plaintiff's complaint, and that the plaintiff did not have title to those lands and premises at the time the alleged lease was alleged to have been made and at the times mentioned in plaintiff's complaint (pp. 52 and 53).

The trial Court, after considerable argument, said:

> "The attack upon your landlord's title cannot be urged as a defense, and it is upon that ground that I deny the motion to amend, not upon the ground of discretion, because I fully agree with you, if I deny it upon that ground, it would not leave you in any position to have the correctness of that ruling tested. I deny the motion and the application to amend solely on the ground urged by Mr. Tiffany that the rule is against you and that you cannot raise the question of your landlord's title" (p. 56).

Exception was thereupon allowed.

Since the owner of the reversion is entitled to the rent (*Messler* v. *Fleming,* 41 N. J. Law, p. 111, *supra*), one of the most important defenses that the defendant could have interposed was that plaintiff did not own the reversion at any of the times complained of and was, therefore, not entitled to receive the rent. Had defendant admitted making a lease with the plaintiff, and had the plaintiff conveyed the premises to a third party after the making of such a lease, we urge that the

defendant still would have been entitled to plead that the plaintiff had conveyed the premises and was no longer the owner and no longer entitled to the rent, but that the owner of the reversion was entitled thereto.

This was not a case where the tenant was estopped from denying the landlord's title, but it was a direct denial of the plaintiff's right to receive any rent whatsoever, whether a lease was made, or not.

It was, therefore, error for the Court to refuse to permit the amendment and to allow the deed hereinafter mentioned to be offered in evidence.

POINT IV.

The Court erred in refusing to allow in evidence the deed from plaintiff conveying the premises to a third party.

Defendant offered in evidence (pp. 147, 148) the record of a deed from the Levenson Wrecking Co., plaintiff, to the Levenson Lumber Company, contained in Liber 1183 of Deeds, p. 133, whereby the plaintiff conveyed the premises alleged to have been demised on May 4, 1914. The deed conveyed all the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, etc. (p. 148).

It was conceded that this deed described the lands and premises mentioned in the complaint. (Mr. Tiffany, p. 148, lines 10, 11, 12, 13.)

This deed was admissible on several theories.

In the first place, Mrs. Levenson had testified, (p. 14) that the Levenson Wrecking Company owned property in Hoboken in 1914. This being an action for rent to which the owner of the reversion was entitled, and, on plaintiff's theory, it being presumed that the plaintiff without proof of title was entitled to rent, proof of a conveyance of the very lands and premises mentioned in the complaint, was proper as proving that, first, plaintiff was not the owner of the reversion and the rent, and, second, as bringing in issue the veracity of Mrs. Levenson's testimony on page 14 that the plaintiff company owned property in Hoboken.

The deed was admissible for a further reason: Mrs. Levinson had testified that she made an agreement to lease the lands and premises described in the complaint to the defendant company in the month of June, 1914. Mr. Galloway, defendant's secretary, with whom she testified she had the conversations, denied having made the statements attributed to him, and having had the conversations related on the plaintiff's part. As corroboration of Mr. Galloway's testimony, the defendant was entitled to show not only a denial of the conversations, but, also, evidence that the plaintiff was not even the owner of the lands and premises, and hence had no right to lease them.

On either of these theories, the deed was admissible in evidence, and the Court erred in rejecting it.

POINT V.

Defendant denying that it made a lease, was not estopped to show plaintiff did not have title.

> "The foundation of the estoppel is the occupation of the premises by the permission of the landlord. The estoppel is *in pais* and does not depend upon the lease, but is founded upon the possession, and is as operative after the conclusion of the lease as before, and until that possession is ended. A lessee who never takes possession under the lease is not estopped to deny the landlord's title."
>
> "Before an estoppel will arise in favor of the landlord as against the tenant there must be a tenancy in fact, created by contract and not by operation of law." (24 *Cyc.*, p. 937.)

See also *18 Am. & Eng. Ency. of Law,* 2nd Ed., 414.

James v. *Hutchinson,* 73 W. Va., 488, 491.

Ireton v. *Ireton,* 59 Kansas, 95.

Nerbooth v. *Althouse,* 8 Watts. Pa., 427.

Claridge v. *Mackenzie,* 4 Manning & Granger, 143.

Since the defendant quit the premises July 31st, 1914, which admittedly was the last day of the term of the lease between the parties, which began August 1, 1913, and since the defendant at all times thereafter denied being plaintiff's tenant, the estoppel theory should not operate in favor of plaintiff, particularly where the defendant had pleaded that it had made no lease with the plaintiff for the term in question.

Andrews v. *Woodcock,* 14 Iowa, 397.

BALDWIN, *C. J.* We think that defendant, under his plea of failure of consideration, could show that the plaintiff was not in possession of the property leased, and therefore could not comply with his contract with defendant; and this he could do without placing himself in the position of a tenant disputing the title of his landlord'' (p. 398).

Wright v. *Graves,* 80 Ala., 416.

McDevitt v. *Sullivan,* 8 Cal., 592-596.

Fuller v. *Sweet,* 30 Mich., 237.

"Where a person in possession agrees by parol to pay money to a person out of possession, and who has no title, it is impossible to find any sensible ground for sustaining such a promise which would not sustain any other promise made without consideration. Where there is an indenture there is, at common law, a presumed consideration, which may render it also reasonable enough, under ordinary circumstances, to require a landlord to be put back in *statu quo.*

"But a person who never had or gave up possession to the tenant is left in *statu quo* by the tenant's remaining in possession, and in reason should have no further claim. If he has, it must be by some peculiar and anomolous rule, for which we have found no support. Such a relation, if valid at all, must rest on a valid contract, and the only consideration for the contract would be the proof of title, not covering merely the period of tenancy, but outlasting it. When that is proved a right to possession is proved with it, and a further holding by the tenant would be wrongful, and subject him to eviction. But whether it could be made the basis of an implied contract to pay rent any longer is a different question, which does not arise in this case, as there is no such proof.

''Accordingly it has been regarded as competent in all cases where the tenant has not received possession from a party who claims rent, to authorize the claimant's title to be investigated, unless there is some other ground of estoppel.''

Campbell, *J.,* in *Fuller* v. *Sweet,* 30 Mich., 237.

See also: *Clary* v. *O'Shea,* 72 Minn., 105 is to the same effect.

Fenner v. *Duplock,* 2 Bing., 10.

Tenant can show expiration of landlord's title.

Randolph v. *Carlton,* 8 Ala., 606.

Tenant can deny title when out of possession.

Zimmerman v. *Marckland,* 23 Iowa, 474.

In *Lane* v. *Young,* 66 Hun. (N. Y.) 563, an action before a justice of the peace, the complainant alleged that one John S. Lane in his lifetime rented the premises to the defendants at a stipulated monthly rent to commence on August 1, 1889; that on Nov. 3, 1889, the lessor died intestate, leaving the plaintiff his only heir-at-law; and that since the lessor's death, the defendants had paid the rent accruing to plaintiff except the balance due, for which this action was brought. Defendants gave notice that they disputed that John S. Lane was the owner of the premises at the time of his death, and thereupon moved that the complaint be dismissed on the ground that the title to real property in question was disputed by the defendants. The justice granted the motion and the complaint was dismissed. Thereupon plaintiff appealed to the County Court, which Court reversed the verdict of the justice. Thereupon defendants appealed to the Appellate Division of the Fifth Department.

In reversing the judgment of the County Court, the Appellate Division of the Fifth Department, per Dwight, *P. J.,* said:

> "Under the former of the two allegations, viz., that the plaintiff has succeeded to the title of her deceased son, it was necessary that it should appear, either by direct proof or by implication, that title was in the son at the time of his death; and this it was which the defendants proposed to dispute; and this they were entitled to dispute. *They admitted the title of their lessor, at the time, by entering into possession under a lease from him, and they are estopped to deny what they have thus admitted. But the estoppel goes no further.*"

In *Cohen* v. *Carpenter,* 128 A. D. 862, it was held that a subtenant sought to be dispossessed on summary proceedings might show that his lessor's lease had expired by a lawful re-entry of the owner of the premises.

There are numerous cases holding that a tenant, who has gone into possession, may not deny that his landlord had title at the time of the making of the lease, but in every such case there was an actual taking of possession by the tenant.

There are also numerous cases holding that a tenant can deny his landlord's title after he is out of possession. It is clear, therefore, from the authorities, that the estoppel of the tenant depends upon possession, and unless there is possession, there is no estoppel. For instance, a tenant who has been ousted by one having a paramount title may, in an action for rent by his lessor, prove such paramount title.

POINT VI.

On the authority of *Edge* v. *Strafford*, 1 Crompton & Jervis, p. 391, 148 English Reprint, p. 1474, the judgment should be reversed.

The above mentioned case is strikingly similar to the case at bar and holds that the landlord under the circumstances cannot recover either on the express agreement to become a tenant, where the tenant does not take possession, or upon assumpsit, nor on a count for use and occupation.

It is submitted that the judgment under review should be reversed.

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