INDEX

NOTICE OF APPEAL.

ATLANTIC CITY DISTRICT COURT.

FRANK J. WILKINSON, *Plaintiff*, v. LOUIS PLAKET, *Defendant*.	Action at Law. Notice of Appeal.

To Seymour Cantor, Esq., attorney for defendant:

Dear Sir:

Take notice that the plaintiff, Frank J. Wilkinson, hereby appeals to the New Jersey Supreme Court from the judgment of the Atlantic City District Court rendered in the above stated action on the ninth day of December, 1926.

BABCOCK & CHAMPION,
Attorneys for Plaintiff.

[ENDORSED]

Due and legal service of a copy of the within notice of appeal is hereby acknowledged this 22nd day of December, 1926.

Seymour Cantor.
Attorney for Defendant.

TRANSCRIPT OF JUDGMENT.

IN THE
DISTRICT COURT OF THE CITY OF ATLANTIC CITY.

FRANK J. WILKINSON, *Plaintiff,* v. LOUIS PLAKET, *Defendant.*	In an Action at Law. Demand $500.00. Real Debt, $244.80. Babcock & Champion, Att'y. of Pl'ff. Seymour Cantor, Att'y. of Df't.

A state of demand filed and a summons was issued in the above stated cause August 31, A. D. 1926, returnable September 8, A. D. 1926, at ten o'clock A. M., and was returned by the sergeant-at-arms as follows:

I served the within summons and complaint September 2, 1926, on the defendant by reading it to him and giving him a copy thereof.

Leroy J. Smith,
Sergeant-at-Arms.

Sept. 8, 1926, Adj. to Sept. 15, 1926.
Sept. 15, 1926, Adj. to Sept. 29, 1926.
Sept. 29, 1926, Adj. to Oct. 6, 1926.
Oct. 6, 1926, Adj. to Oct. 13, 1926.
Oct. 13, 1926, Adj. to Oct. 20, 1926.
Oct. 20, 1926, Adj. to Oct. 25, 1926.

October 25, 1926, the plaintiff appeared ready for

trial, defendant appearing and it further appearing by the return endorsed thereon that the summons was duly served, the Court proceeded to hear and determine the cause. Mae Pennypacker sworn and testified on the part of the plaintiff. Lease admitted in evidence, marked Exhibit P1. Ida Plaket & Jno. Degler sworn and testified on the part of the defendant. Anthony M. Ruffu, sworn and testified on the part of the plaintiff in rebuttal.

Decision reserved.

December 9, 1926. Decision rendered.

The evidence being closed and submitted to the Court, judgment was given by the Court in favor of the defendant and against the plaintiff for the sum of no dollars and no cents debt and no dollars and no cents cost of suit.

January 20, 1927. Notice of appeal filed.

STATE OF DEMAND.

ATLANTIC CITY DISTRICT COURT.

FRANK J. WILKINSON,
Plaintiff,

v.

LOUIS PLAKET,
Defendant.

Action at Law.
State of Demand.

The plaintiff, Frank J. Wilkinson, demands of the above named defendant, the sum of $500.00 and for cause of action avers:

1. That on the 12th day of October, 1923, one Wesley A. Smith, owner of a certain store and dwelling house, situated and known as 124 North Missouri Avenue, Atlantic City, New Jersey, and the defendant executed a lease under seal of the said above mentioned premises for the term of one year, from the 12th day of October, 1923, to the 12th day of October, 1924, for the sum of $480.00, payable in equal monthly payments of $40.00 on the 12th day of each and every month, in advance.

2. That after the expiration of said lease, defendant held over and continued in possession, and renewed the same for the term of one year, from October 12, 1924, to October 12, 1925, and that after

the expiration of said term, he held over and continued in possession, and renewed the same for the term of one year, from October 12, 1925, to October 12, 1926.

3. That on November 6, 1925, the plaintiff purchased the above mentioned property from the said Wesley A. Smith, at which time the said Wesley A. Smith sold, signed and assigned and transferred to the plaintiff, all his right, title and interest, to the said lease, notice of all which was duly given to the defendant.

4. Six months rent of $240.00 due the 12th day of November and December, 1925, January and February, March and April, 1926, is unpaid.

Plaintiff demands as damages the sum of $240.00 with interest from February 12, 1926, together with costs of suit.

BABCOCK & CHAMPION,
Attorneys for Plaintiff.

STIPULATION.

ATLANTIC CITY DISTRICT COURT.

FRANK J. WILKINSON,
Plaintiff,
v.
LOUIS PLAKET,
Defendant.

Action at Law.
Stipulation.

It is hereby stipulated and agreed between the parties hereto that the following facts shall be considered as facts admitted and proven in evidence upon the trial of the above stated cause.

1. That on the twelfth day of October, 1923, one Wesley A. Smith, owner of a certain store and dwelling house, situate at and known as 124 North Missouri Avenue, Atlantic City, New Jersey, and the defendant executed a lease under seal of the said above mentioned premises for the term of one year, from the twelfth day of October, 1923, to the twelfth day of October, 1924, for the sum of $480.00, payable in equal monthly payments of $40,00 on the 12th day of each and every month, in advance.

2. That after the expiration of said lease, defendant held over and continued in possession, and renewed the same for the term of one year, from October 12, 1924, to October 12, 1925, and that after the expiration of said term, he held over and renewed the same for the term of one year, from October 12, 1925, to October 12, 1926.

3. That on November 6, 1925, the plaintiff purchased the above mentioned property from the said Wesley A. Smith, at which time the said Wesley A. Smith, sold, signed and assigned and transferred to the plaintiff, all his right, title and interest, to the said lease, notice of all which was duly given to the defendant.

4. The defendant did not pay to the plaintiff any rent for the months of November and December, 1925, January, February, March and April of 1926.

5. The defendant was duly given notice of the sale of said property, required by said notice to vacate, surrender and deliver up possession of the said premises on or before December 12, 1925, a copy of which notice is hereto annexed and made a part hereof.

Dated September 21, 1926.

BABCOCK & CHAMPION,
Attorneys for Plaintiff.
SEYMOUR CANTOR,
Attorneys for Defendant.

To Louis Plaket:

You are hereby notified that I have this day sold premises #124 N. Missouri Avenue, Atlantic City, New Jersey, being a certain store and dwelling house now occupied by you under lease dated October 12,

1923, wherein I demised the same to you from October 12, 1923, to October 12, 1924, at the rent of Four Hundred Eighty Dollars, payable in monthly payments of Forty Dollars in advance, which lease was renewed for a further term of one year from October 12, 1924, to October 12, 1925, to Anthony M. Ruffu, Jr., his heirs and assigns, of which sale you are hereby notified pursuant to the terms of said lease.

Further take notice as provided in said lease in event of sale that you are required to vacate, surrender and deliver up possession of the said premises to me on or before the twelfth day of December, 1925, upon which date your right to possession of said premises under the said lease is hereby terminated, possession of which upon said date is hereby demanded.

Dated September 3, 1925.

Wesley A. Smith
By Babcock & Champion
Attorneys

EXHIBIT P1.

Robert L. Warke, Jr.
October 25, 1926.

THIS INDENTURE Made the Twelfth day of October A. D. Nineteen Hundred and twenty-three BETWEEN Wesley A. Smith, of the City of Atlantic City, County of Atlantic and State of New Jersey, party of the first part, and Louis Pleikel, of the same place, party of the second part.

WITNESSETH, That the said party of the first part hath let, and by these presents doth grant, demise and to farm let unto the party of the second part a certain store and dwelling house situate and known as Number 124 North Missouri Avenue, Atlantic City, New Jersey.

with the appurtenances from the Twelfth day of October 1923 to the Twelfth day of October 1924.

at the rent of sum of Four hundred and eighty dollars, to be paid as follows: In equal monthly payment of Forty dollars, each and every month in advance.

PROVIDED, That if any rent shall be due and unpaid, or if default be made in any of the covenant herein contained, then this lease shall immediately cease and become void, and it shall be lawful for the said party of the first part, without notice and without any demand for said rent, to re-enter the said premises and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof, or otherwise however.

AND, the said party of the second part doth hereby covenant and agree, to and with the said party of the first part, to pay said rent in the proportions and upon the conditions aforesaid; and not to assign this lease, and not to underlet said premises, or any part thereof, nor permit any person or persons to occupy the same, or any part thereof, nor use or permit any part thereof to be used for any other purpose than a store and dwelling, nor make or suffer to be made any alteration therein, without the written consent of the said party of the first part; and also at the expiration of said term, to yield up and surrender the possession thereof, with the appurtenances in as good state and condition as the same now are, or may be put into by the said party of the first part, reasonable wear and tear and accidents happening by fire or other casualties excepted.

It is further understood and agreed that the party

of the second part shall make all repairs at his own expense.

It is further agreed and understood that in case the said party of the first part shall sell the said premises then the said party of the second part will vacate the same within three months after having received notice in writing from the party of the first part requiring possession thereof.

And the said party of the first part doth covenant that the said party of the second part, on paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly, have, hold and enjoy the said demised premises for the term aforesaid.

IN WITNESS WHEREOF the said parties have interchangeably set their hands and seals hereto the day and year first written.

W. A. Smith,
Louis Plaket.

Signed, Sealed and
Delivered in the
presence of

L E A S E

Wesley A. Smith
TO
Louis Pleikel.

Expires October 12th 1924.
Nov. 6, 1925.

For value received I hereby assign, transfer and set over the within lease to Frank J. Wilkinson, his heirs and assigns, forever.

Witness: W. A. Smith, (Seal)
L. D. Champion.

CERTIFICATION OF DISTRICT COURT CLERK.

THE STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } *ss.*

I, W. L. RISLEY, Clerk of the District Court of the City of Atlantic City, in the County of Atlantic, do certify that the foregoing is a true copy of whole record in the cause wherein Frank J. Wilkinson is plaintiff and Louis Plaket is defendant; case No. 54129 as full, entire and complete as the same remains on file in said court in the case there stated.

In testimony whereof, I have hereunto set my hand affixed the seal of the said Court this twenty-second day of December in the year of our Lord, one thousand nine hundred and twenty-six.

WM. L. RISLEY,
Clerk.

AGREED STATE OF THE CASE.

ATLANTIC CITY DISTRICT COURT.

FRANK J. WILKINSON, *Plaintiff-Appellant,* v. LOUIS PLAKET, *Defendant-Appellee.*	On Appeal. Agreed State of the Case.

It is stipulated and agreed by and between the attorneys for the respective parties that the following constitutes all of the evidence produced by the respective parties upon the trial of the above stated cause and that this agreed stipulation of the testimony in the case as hereafter detailed, shall have the same effect as though the testimony had been stenographically taken and the following were a true transcript thereof, duly certified, etc., as required by law.

The following stipulation, although not containing all of the facts, was signed by respective counsel and filed in the cause and was read to the Court in the presence of respective parties:

ATLANTIC CITY DISTRICT COURT.

FRANK J. WILKINSON, *Plaintiff,* v. LOUIS PLAKET, *Defendant.*	Action at Law. Stipulation.

It is hereby stipulated and agreed between the parties hereto that the following facts shall be considered as facts admitted and proved in evidence upon the trial of the above stated cause.

1. That on the twelfth day of October, 1923, one Wesley A. Smith, owner of a certain store and dwelling house, situate at and known as 124 North Missouri Avenue, Atlantic City, New Jersey, and the defendant, executed a lease under seal of the said above mentioned premises for the term of one year, from the twelfth day of October, 1923, to the twelfth day of October, 1924, for the sum of $480.00, payable in equal monthly payments of $40.00 on the 12th day of each and every month in advance.

2. That after the expiration of said lease, defendant held over and continued in possession and renewed the same for the term of one year, from October 12, 1924, to October 12, 1925, and that after the expiration of said term, he held over and renewed the same for the term of one year, from October 12, 1925, to October 12, 1926.

3. That on November 6, 1925, the plaintiff purchased the above mentioned property from the said Wesley A. Smith, at which time the said Wesley A. Smith, sold, signed and assigned and transferred to the plaintiff, all his right, title and interest to the said lease, notice of all of which was duly given to the defendant.

4. The defendant did not pay to the plaintiff any rent for the months of November and December 1925, January, February, March and April of 1926.

5. The defendant was duly given notice of the sale of said property, required by said notice to vacate, surrender and deliver up possession of the said premises on or before December 12, 1925, a copy of which notice is hereto annexed and made a part hereof.

Dated September 21, 1926.

BABCOCK & CHAMPION,
Attorneys for Plaintiff.
SEYMOUR CANTOR,
Attorneys for Defendant.

Counsel for defendant gave the following situation as the defense to this action: That before the death of the owner of the premises, Wesley A. Smith, Louis Plaket, made a new agreement with the said Wesley A. Smith, which agreement completely abrogated the former written lease, to the effect that Louis Plaket was to continue in possession of the dwelling at the rent of $25.00 per month and surrender the store to Wesley A. Smith, so that Wesley A. Smith would be in a position to rent the store to John Degler at the rent of $15.00 per month. By this arrangement Louis Plaket was to have his rent reduced from $40.00 per month to $25.00 per month and Wesley A. Smith was to have a tenant for his store which was never used under the written lease by the said Louis Plaket. Subsequent to this new arrangement, the entire building was sold, and Louis Plaket was given notice to vacate on or before December 12, 1925, and he did so vacate, his rent having been paid until the time he moved, which removal was in pursuance to the written notice to vacate.

Counsel for the defendant requested the Court to find as a fact that there was nothing due the plaintiff in this cause.

Mae Pennypacker, a witness produced upon the part of the plaintiff, being duly sworn, testified that she was employed by Ruffu Corporation, agent for the plaintiff, for the collection of rents for premises No. 124 North Missouri Avenue, Atlantic City, New Jersey; that she was familiar with the said premises and payments of rent made by the defendant; and that after the vacation of the property by Mr. Plaket it was rented by Mr. Wilkinson on May 1, 1926.

The lease referred to in the stipulation and the assignment noted thereupon were offered and admitted in evidence without objection and marked Exhibit P1.

Plaintiff offered in evidence the files in the landlord and tenant suit brought in the Atlantic City District Court by Frank J. Wilkinson, plaintiff against the defendant, Louis Plaket, on April 23, 1926, which suit was returnable April 28, 1926, the affidavit in which alleged the rental by Wesley A. Smith to the defendant of said premises, 124 North Missouri Avenue, Atlantic City, New Jersey, by virtue of the lease offered in evidence in this cause and marked Exhibit P1 and alleging that there was due to plaintiff from said defendant the sum of two hundred forty ($240.00) dollars, rent under said agreement as follows: An installment of rent of $40.00 due respectively on the twelfth days of November and December, 1925, and January, February, March and April, 1926; that judgment by default was entered in said proceedings in favor of plaintiff and against the defendant for possession.

Plaintiff thereupon rested his case.

Ida Plaket, a witness produced upon the part of the defendant, being duly sworn testified that she was the wife of the defendant; that the defendant occupied the premises in question under said lease; that in May of the year 1925, Mr. Wesley A. Smith, then owner of the premises in question, made a new agreement, to the effect that the property, which consisted of a store and dwelling was thereafter to be rented as follows: The dwelling to defendant at the rent of twenty-five ($25.00) dollars per month, beginning May 12, 1925; that he, Wesley A. Smith, had rented the store to a John Degler; that she last paid rent October 12, 1925, to Mr. Smith; that the premises were vacated on November 12, 1925, upon receipt of notice to Mr. Plaket, annexed to the stipulation.

Counsel for the plaintiff objected to the testimony by Mrs. Plaket as to any new contract because such testimony contradicted the proof then before the Court, amounted to a conclusion of law, and it was an attempt to change or modify the written agreement of lease, P1, by parole testimony, was without consideration and was inadmissible.

The Court overruled counsel's objection and granted an exception thereto.

Upon cross-examination the witness admitted that she had last paid rent October 12, 1925, to Mr. Smith of $40.00; that Mr. Smith told her to collect the rent from Mr. Degler, as his agent, which she did each month, paying the money to Mr. Smith with her rent; that she received no commission or compensation for collecting said rent.

John Degler, a witness produced in behalf of the defendant, being duly sworn, testified that an agreement was made the last week in April of 1925, between Mr. Smith and him, for the rental of said store, the rent for which was to start May 12, 1925, and was to be fifteen ($15.00) dollars per month. Objection was made to this testimony by counsel for the plaintiff, that the witness was testifying as to a conclusion of law, and that the testimony contradicted the proof in the case and was an attempt to vary the terms of the written lease, P1, by oral testimony and motion was made to strike out the testimony. The Court overruled the objection, and refused to strike out the testimony to which refusal, objection is noted.

The defendant then rested his case.

Anthony M. Ruffu, Jr., a witness produced by the plaintiff in rebuttal, testified that the witness, Degler, admitted to him, that he had rented said store from the defendant, Plaket.

It was stipulated and agreed as a fact in the case, that the store was used by the City of Atlantic City, under a lease made between the said city and the defendant, Plaket, during the election of June and November, 1926, and that the check of Atlantic City, to the order of the defendant, Louis Plaket, was delivered to him in payment of such use, but said Plaket claims he did not receive the money, but merely turned the check over to Degler.

Both sides rested.

Counsel for plaintiff requested the Court to find a verdict in favor of the plaintiff and against the defendant for the amount of rent claimed to be due, namely two hundred forty ($240.00) dollars, with interest from February 12, 1926.

Counsel for defendant requested the Court to find

a verdict of no cause of action, there being nothing due the plaintiff in this cause.
Dated:

BABCOCK & CHAMPION,
Attorneys for Plaintiff-Appellant.
SEYMOUR CANTOR,
Attorney for Defendant-Appellee.
JOSEPH ALTMAN,
Of Counsel with Defendant-Appellee.

POINTS OF APPELLANT.

NEW JERSEY SUPREME COURT.

FRANK J. WILKINSON,
Plaintiff-Appellant,
v.
LOUIS PLAKET,
Defendant-Appellee.

On Appeal from Atlantic City District Court.

Points.

Comes now the plaintiff-appellant, by Babcock and Champion, his attorneys and assigns the following reasons why the judgment rendered by the Atlantic City District Court in the above stated cause, should be reversed and set aside:

1. There is no evidence to support the judgment.

2. Under the evidence submitted, judgment should have been rendered for the plaintiff for the amount claimed by him.

3. The Court admitted testimony by Ida Plaket concerning a new agreement of rental, made in May of 1925, by the lessor, Wesley A. Smith, with the defendant, which testimony the Court should have excluded, because it contradicted the proof then before the Court, was a conclusion of law, was an attempt to change or modify the written agreement of lease, P1 by parol testimony and was without consideration.

4. The Court permitted the witness, Degler, to testify concerning an agreement made by said Wesley A. Smith in April of 1925, concerning the premises in question, which testimony the Court should have excluded, because it amounted to a conclusion of law, contradicted the proof then before the Court and was an attempt to vary the terms of the written lease P1.

5. The Court refused to strike out the testimony of the witness, Degler, concerning said alleged agreement, for the reasons stated in the next preceding point.

6. There was no defense presented to the plaintiff's case under the facts before the Court and the judgment of the Court should have been for the plaintiff for the amount claimed to be due.

Yours respectfully,
BABCOCK & CHAMPION,
Attorneys for Appellant.

OPINION.

NEW JERSEY SUPREME COURT.
No. 416. MAY TERM, 1927.

(Filed Aug. 27, 1927)

FRANK J. WILKINSON,
Plaintiff-Appellant,
v.
LOUIS PLAKET,
Defendant-Appellee.

Opinion.

(Submitted May 13, 1927; decided August 26, 1927.)

(Appeal from Atlantic City District Court.)

Before JUSTICES PARKER, MINTURN and CAMPBELL.
For Appellant—BABCOCK AND CHAMPION.
For Appellee—No brief.

PER CURIAM.

This is an appeal from a judgment in favor of appellee, defendant below, in an action for rent.

The facts contended for by appellant are that on October 12, 1923, Wesley A. Smith, then owner of a building containing a store and an apartment leased the same to the appellee for one year from October 12, 1923, to October 12, 1924 for $480 per year, payable monthly, in advance, on the twelfth of each month. At the expiration of the term of the lease, appellee, the tenant, held over from October 12, 1924, to October 12, 1925, and upon the expiration of that term again held over to October 12, 1926. On November 6, 1925, appellant purchased the property and took an assignment of the lease, as is said. The lease contained a provision that in case of a sale of the premises, the tenant, upon written notice, would vacate and such notice was given by Smith on September 3, 1925, requiring him to vacate on or before December 12, 1925. The tenant, appellee, did vacate and remove from the premises November 12, 1925.

The contention of the tenant, appellee, is that in May, 1925, he and Smith, the then owner, entered into a new agreement by parol, that he would rent the dwelling or apartment only, at a rental of $25 per month from May 12, 1925, and that then Smith, the owner, would rent the store and did so rent it from May 12, 1925, to one Degler at $15 per month. That the last payment of rent made by appellee was October 12, 1925, and that he vacated the apartment on November 12, 1925, pursuant to the before mentioned notice from Smith so to do. That by agreement with the owner, appellee collected for him the rent of the store and paid over to him such rent so collected as well as the rent for his apartment. Degler, the occupant of the store, testified that in April, 1925, he entered into an agreement with Smith, the then owner, to rent the store at $15 per month commencing May 12, 1925.

In rebuttal of this testimony of Degler, evidence was produced of an alleged admission by Degler that he had rented the store from the appellee and not from Smith. It was also stipulated that the store

was used for election purposes by Atlantic City in June and November and the check from the city for such use was to the order of appellee who contends that he turned it over to Degler.

Files of a proceeding in the Atlantic City District Court, being the same Court in which the present proceeding was brought and heard, between the same parties, were offered and admitted, showing that such action was for rent due as claimed herein and that judgment for possession was entered against appellee by default. Such action was in April, 1926. The present action was commenced August 31, 1926.

The first contention of appellant is that the evidence as to the new letting by parol was improper as it varied the terms of a written lease and such agreement was without consideration.

These contentions are without legal merit.

Contracts of this character not being required to be in writing the parties may by parol cancel them, or alter or supplement them or make a new contract. *Headley v. Cavileer*, 82 N. J. L. 635. On a finding of fact favorable to defendant the case would show substantially a surrender of the former lease by operation of law and a reletting of part of the original premises on different terms, by parol.

The remaining grounds appear to be that there was no evidence to support the judgment and that upon the evidence submitted the judgment should have been for appellant.

While there was a conflict of evidence there was proof supporting the finding of the trial Judge and it was for him to pass upon the truth thereof and the weight of the evidence.

Such being the situation his finding will not be disturbed by this Court.

The judgment below is affirmed, with costs.

RULE ON AFFIRMANCE.
NEW JERSEY SUPREME COURT.

FRANK J. WILKINSON,
Plaintiff-Appellant,
v.
LOUIS PLAKET,
Defendant-Appellee.

On Appeal.
Rule on Affirmance.

This cause having been duly argued at the May Term, 1927, of this Court, by Babcock and Champion, of counsel for the appellant, no brief having been filed for the appellee and the Court having inspected the record and proceedings in the Court below and having considered the causes assigned as grounds for setting aside the said judgment and being of the opinion that the said judgment should be affirmed with costs:

It is thereupon on motion of Joseph Altman, of counsel for the appellee, ORDERED, that the judgment had before the Atlantic City District Court, be in all things affirmed and that the said appellee do recover his costs in the Supreme Court, to be taxed and that the record and proceedings be remitted to the Atlantic City District Court, to be proceeded with in accordance with this order and the practice of the said Court.

Entered Sept. 23rd, 1927, on motion of

SEYMOUR CANTOR,
Attorney for Appellee.
JOSEPH ALTMAN,
Of Counsel with Appellee.

A true copy.

EDWARD J. KELLEHER,
Clerk.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

FRANK J. WILKINSON,
Plaintiff-Appellant,
v.
LOUIS PLAKET,
Defendant-Appellee.

On Appeal.
Notice of Appeal.

To Seymour Cantor, Esq., and Joseph Altman, Esq., Attorney and of Counsel for Appellee:

Take notice that the appellant (plaintiff) hereby appeals to the New Jersey Court of Errors and Appeals from the judgment entered in this cause upon the following grounds:

1. There was no evidence before the Supreme Court to support the judgment.

2. Under the evidence submitted to the Court below, and upon review before the Supreme Court, judgment should have been entered for the plaintiff below for the amount claimed by him.

3. The trial Court admitted testimony by Ida Plaket concerning a new agreement or rental made in May of 1925 by the lessor, Wesley A. Smith, with the defendant below, which testimony the Court should have excluded because it contradicted the

proof then before the Court, was a conclusion of law, was an attempt to change or modify the written agreement of lease, P1, by parol testimony and was without consideration and the Supreme Court should have so held.

4. The Court below permitted the witness, Degler, to testify concerning said new agreement of rental, which testimony the trial Court should have excluded for the same reasons as set forth in point three and the Supreme Court should have so held.

5. The trial Court refused to strike out the testimony of the witness, Degler, concerning said alleged agreement, which refusal the Supreme Court should have held was reversible error.

Yours respectfully,
BABCOCK & CHAMPION,
Attorneys for Appellant.

[ENDORSED.]

Due and legal service of a copy of the within notice of appeal is hereby acknowledged this 22nd day of September, 1927.

Seymour Cantor,
Joseph Altman,
Attorneys for and of Counsel with Appellee.

New Jersey Court of Errors and Appeals

FRANK J. WILKINSON,
Plaintiff-Appellant
vs.
LOUIS PLAKET,
Defendant-Appellee.
} ON APPEAL

BRIEF FOR APPELLANT

This is an appeal from a judgment of the Atlantic City District Court, in favor of the defendant for no cause for action. Suit was brought by the plaintiff below, to recover rent due by the defendant for the months of November, December, 1925 and January, February, March and April of 1926, at the rate of $40.00 per month, making plaintiff's claim $240.00, with interest from February 12, 1926. The lease upon which the suit was based, found at page 8, was between Wesley A. Smith, then owner of the property and the defendant and was made October 12, 1923 for one year. Prior to the trial, which took place October 25, 1926, the said Wesley A. Smith, being then deceased, the plaintiff and defendant in the Court below, entered into a written stipulation for the purposes of the trial, which stipulation is found at page 13. The issue was presented to the Supreme Court and is before this Court, upon an agreed state of the case (p. 12). The Supreme Court affirmed the judgment below, the opinion being found at page 20. The reasons assigned for reversal are found at page 24.

ARGUMENT.

Reasons 1, 2, 3 and 4 will be discussed together. They are:

1. There was no evidence before the Supreme Court to support the judgment.

2. Under the evidence submitted to the court below and upon review before the Supreme Court, judgment should have been entered for the plaintiff below for the amount claimed by him.

3. The trial Court admitted testimony by Ida Plaket concerning a new agreement of rental, made in May of 1925, by the lessor, Wesley A. Smith, with the defendant below, which testimony the Court should have excluded, because it contradicted the proof then before the Court, was a conclusion of law, was an attempt to change or modify the written agreement of lease, P-1 by parol testimony and was without consideration, and the Supreme Court should have so held.

4. The Court below permitted the witness, Degler, to testify concerning said new agreement of rental, which testimony the trial Court should have excluded, for the same reasons as set forth in point three and the Supreme Court should have so held.

The stipulation used at the trial, recites:

"It is hereby stipulated and agreed between the parties hereto, that the following facts shall be considered as facts admitted and proved in evidence upon the trial of the above stated cause."

It then stipulates the making of the lease, Exhibit P-1, which was made for the term of one year, from October 12, 1923 to October 12, 1924, for the sum of $480.00, payable $40.00 on the 12th day of each month, in advance; that after the expiration of said lease, it was renewed for a further term of one year from

October 12, 1924 to October 12, 1925 and further renewed for a further term of one year from October 12, 1925 to October 12, 1926.

On November 6, 1925, the plaintiff purchased the premises in question from said Wesley A. Smith, who, at the settlement, assigned to plaintiff the lease, notice of which was given to the defendant. The assignment appears at page 10. It was then stipulated that the defendant did not pay plaintiff any rent for the months of November and December of 1925, January, February, March and April of 1926. Said stipulation was made prior to the trial, filed in the cause and read to the Court at the time of the trial, (p. 12). Plaintiff relied upon said facts so stipulated as facts actually proven and established in the case. Upon the case as made out by the stipulation, the only defense as we conceive it, open to the defendant, was that of surrender and acceptance. There was no proof of surrender and acceptance as a defense to the suit under the case made by the stipulation therefor and under the facts presented by way of defense, the Court should have found a verdict for plaintiff for the amount claimed.

While it is true that Smith gave notice to the defendant that the property had been sold and required him to deliver possession on or before December 12, 1925, he did not so deliver possession. The notice was directed to the entire property and not a part thereof. The witness, Ida Plaket (p. 16) testifies that she vacated the dwelling part of the premises on November 12, 1925, but her testimony is clearly in error because it appears as a stipulated fact (p. 17, line 21) that the store was leased by the defendant to the City of Atlantic City, during the elections of June and November, 1926 and that the check of Atlantic City was made payable and handed to the defendant in payment of the use thereof, so that the defendant exercised

possession over said premises as late as June and November of 1926. Moreover, the notice served by Smith, which notice was under a clause in the lease (p. 10, line 3) that in event of sale, the lease might be terminated, in fact terminated the lease December 12, 1925, which termination was binding upon plaintiff and defendant alike and upon the defendant's testimony, the judgment of the Court below is erroneous for the reason that assuming, for the sake of argument, that defendant did vacate the premises November 12, 1925, the lease was not terminated until December 12, 1925, in which posture there would at least be due one month's rent from November 12th, to December 12th, or $40.00. Furthermore, suit was brought in the Atlantic City District Court on April 23, 1926, which suit was returnable April 28, 1926 (p.15), by the plaintiff, against the defendant, for possession of the said premises, he claiming in the proceedings in said cause, which were summary proceedings for dispossession or the rent, that there was due the sum of $240.00, for rent for the same months claimed in the suit at issue, which landlord and tenant suit resulted in judgment by default, being entered in favor of the plaintiff and against the defendant for possession.

The trial court, notwithstanding the facts stipulated, permitted the witness, Ida Plaket, to testify to a new agreement of rental, made in May of 1925 (p. 16, line 7) five months prior to the commencement of the last renewal, to the effect that the property, which consisted of a store and dwelling was thereafter to be rented, the dwelling to the defendant at the rate of $25.00 per month and the store to one John Degler. This testimony was objected to by Counsel for the plaintiff below, because it contradicted the proof then before the Court as a fact, which was not permissible, that it amounted to a conclusion of law, was an attempt to change the agreement of lease by parol testimony

and was without consideration. The Court overruled the objection of Counsel and noted an exception, (p. 16). The Court also, over the objection of Counsel for defendant, upon the same grounds, permitted the witness Degler to testify concerning an agreement made with him, which objection the Court over-ruled and noted the objection, (p.17).

The fact at the time of the offering of said testimony was established by the stipulation that there was a valid lease subsisting between Smith and the defendant for the year October 12, 1924, to October 12, 1925, which was afterwards renewed from October 12, 1925, to October 12, 1926, which lease had been in existence since October of 1923. That fact so established could not be changed by testimony. The stipulation was not challenged in any way and was binding on both plaintiff and defendant and the trial court.

Our contention in this respect seems to have been ignored by the learned Justices of the Supreme Court in their opinion below.

The agreement alleged by defendant, was not however carried out by the parties, for the reason that the original lease was renewed from October, 1925 to October, 1926 and a portion of the premises was leased by the defendant to Atlantic City for election purposes in June and November, 1926.

All of the facts in the case tend to show that the defendant had possession of the property for the months sued for and should pay rent therefor. Mrs. Plaket admitted (p. 16) that she last paid rent October 12, 1925, to Mr. Smith in the sum of $40.00, which was the payment due under the lease.

The evidence in the case, the making of the lease, the renewal thereof, including the renewal from the year 1925 to 1926, the assignment of the lease November 6,

1925, by Smith to the plaintiff below, the payment of rent by the defendant to Smith in October of 1925, the letting of the store by the defendant to Atlantic City and the default judgment in the landlord and tenant suit, all negative the fact that any new contract was made and it is submitted that the proof thereof, especially in view of the stipulated renewal, should not have been received by the trial Court.

The remaining reasons will not be discussed, except as they have been hereinbefore referred to.

It is respectfully submitted that the judgment of the Supreme Court affirming the judgment of the District Court of Atlantic City was erroneous, and should be reversed and judgment should be entered for the plaintiff below for the sum of $240.00, with interest from February 12, 1926, with costs.

BABCOCK & CHAMPION,
Attorneys for Appellant.