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The controversy arises as a result of the following facts: John O'Leary, deceased, in his life time had a lease on the farm owned by defendant, Harris, and known as the "Cooper Farm". This lease was dated December 17, 1913, for a period of five years from March 25, 1914, to March 25, 1919, (S. C. p. 72.) John O'Leary was accidentally shot on November 4, 1914, and Emma O'Leary, his wife, was appointed ad-

ministratrix of his estate (S. C. p. 7.) John O'Leary did not live upon the Cooper Farm himself, but farmed it in connection with another farm of which he was the owner.

After the death of John O'Leary, his widow found it impossible to run both farms, so negotiations were entered into between Mrs. O'Leary, through her attorney, and the defendant, Harris, for the purpose of relieving Mrs. O'Leary from the obligations of the lease
10 for the balance of its term. These negotiations resulted in the signing, on January 11, 1915, of the agreement on the back of the lease (S. C. p. 74.) The rent at that time was in arrears, and was paid up in full to March 25, 1915.

In the fall of 1914, John O'Leary sowed some grain on the Cooper Farm, which, of course, could not be harvested until the Summer of 1915. Before the harvest time had arrived, John O'Leary died and his widow, Emma O'Leary, had been made administratrix. Also
20 prior to the harvest time of 1915, Mrs. O'Leary had a public sale of property owned by her husband that was situated on the Cooper Farm, and at that sale she sold part of the grain to Walter Cliver. When the harvest time came in July, 1915, both Mrs. O'Leary and Cliver went to the Cooper Farm for the purpose of harvesting their respective amounts of grain, but neither was permitted to do so, and the defendant, Harris, himself subsequently appropriated the grain.

Suit was brought for the conversion of this grain
30 and to recover its value. Two suits were brought, which were tried together, as the same issue was involved in both.

The issue involved and upon which the trial court directed the verdict is raised by the fourth paragraph of the answer (S. C. p. 10.) and depends upon the construc-

tion of the agreement under which the lease was surrendered.

This agreement was entered into for the purpose of relieving Mrs. O'Leary and the estate of John O'Leary, deceased, from further obligation to pay the rent for the Cooper Farm, which had been reserved under the lease. The agreement specifically reserved any other questions in dispute between the parties. The only matter that was settled at that time was the payment of the rent due and the surrender of the balance of the term of the lease. It is admitted that if the lease had continued for another year or through the harvest season of 1915 Mrs. O'Leary would have been entitled to the grain in question. Also had the lease gone its full term, any grain planted by the tenant in the last year of his term would have belonged to the tenant and he would have had the right to go back on the premises and harvest the grain after the expiration of his term. 10

It is contended on behalf of the defendant that the surrender of the lease operated to vest in the landlord the title to the growing grain. On the other hand, plaintiff contends that the proper construction of the agreement of surrender plainly shows that the title to the growing crops was not included. 20

There were several controversies then existing between the parties. One involved the amount of the rent due, whether O'Leary had a proper offset against the rent, the question of title to the grain, and other matters. It was imperative that the question of continuance of the lease should be speedily determined so that Mrs. O'Leary should know whether she had to operate the farm for another year, and for the defendant to secure another tenant. The parties were unable to agree upon anything except the amount of rent that was due. Consequently, a settlement was made upon that basis, and 30

in order to show that all other matters were left open, it was specifically provided that any claims that Mrs. O'Leary had against the defendant, Harris, were not included in the settlement.

The Court in reaching its conclusion upon which it based its direction of verdict relied upon two cases. The first was *Debow v. Colfax*, 10 N. J. L. 128, on page 151 in the reprint of New Jersey cases. The other case was that of *Howell v. Schenck*, 24 N. J. L. 89.

10 In the case of *Debow v. Colfax*, one Mr. Field was the minister of the Dutch Church at Pompton Plains, which church was the owner of a tract of land called the parsonage land, of which the title was in the trustees, and which land was designed for the use of the minister of the church, and was occupied by the incumbent as part of the parsonage ground. In the year 1815, Mr. Field was the minister, and in the Fall of that year he sowed part of the land with rye. Early in the Spring of 1816, he sold the rye to one Romer, who afterwards
20 sold it to the plaintiff, *Debow*. Before the first of May, 1816, but after the sale of the rye, Mr. Field by his own act and voluntarily, withdrew from the ministerial service and ceased to be minister of that church, left the parsonage land and removed to another congregation and place of residence. The person who purchased from Mr. Field brought suit for trover and a non-suit was ordered at the trial, which was reviewed by the Supreme Court and sustained.

30 In the discussion of the *Debow* case the Supreme Court said, "He who has an estate or interest in lands the duration of which is uncertain in point of time, and he who has such an estate as may perhaps continue until the grain be ripe, shall, if he sows the land, be permitted, or his executors or administrators in case of his decease, to enter upon it at harvest and reap the crop, although in

the meantime his estate may have ended either by the act of God or by the law. But if the estate is between seed time and harvest determined by the *act of the tenant*, the growing crop passes with the land to him who thereupon becomes the immediate owner of the latter."

It will be seen that the law as laid down in the Debow case depends upon the determination of the estate by the act of the tenant alone. That is, there must be an abandonment of the premises by the tenant. The tenant must by his own act, and not in conjunction with the act of others, or as the result of any agreement with his landlord, abandon the premises. If he does that by his own act, then whatever interest he may have in any growing crops passes to the landlord. That is all that is determined in the Debow case. 10

It is respectfully submitted that in the cases now before the Court, that the surrender of the premises was not an act of the tenant alone as used in the determination of the law in the Debow case. It was a mutual agreement between the landlord and tenant, which agreement was, by reason of the peculiar circumstances, advantageous to both the landlord and the tenant. And the agreement went further, in that it provided that no disputes existing between the two should be considered as being determined by the payment of the rent and the surrender of the balance of the term. 20

If there had been no agreement, and Mrs. O'Leary had abandoned the premises, certainly she could have had no claim to the growing grain. But just the opposite of that situation is, in fact, what occurred. She did not abandon the premises, but entered into an agreement for the surrender of the same, paid her rent for that year and specifically reserved any rights that she might have against the defendant, Harris. 30

The case of *Howell v. Schenck* has no application

to the present case, because the only thing there involved was the rights under a lease made by a mortgagor subsequent to the making of the mortgage. It was true that the Debow case is adverted to in the opinion for authority as to the law of emblements, but the specific question of the right of a tenant to away-going crops was not in that case for determination.

10 The agreement for the surrender of the lease made between the parties hereto was such an agreement as precluded the Court from determining the matter adversely to the plaintiffs. It was an agreement, the meaning of which was perfectly plain and the interpretation of which should have been in favor of the plaintiffs and not against them.

And even if it may be assumed that the agreement was not such an agreement as should have been determined in favor of the plaintiffs by the Court, then it surely was such an agreement as should have been passed upon by the jury.

20 It is therefore respectfully submitted that the Court erred in directing a verdict for the defendant in these two cases.

Another reason urged for reversal of this verdict is that the Court admitted in evidence a paper writing purporting to be a lease made on day of January, 1909, between Alexander Harris and John O'Leary for the Cooper Farm for a period of five years from March 25, 1909, which lease had expired before the lease made between the same parties which was offered by the plaintiff, and which was involved in this suit (S. C. p. 33.)
30 This lease was made in 1909 and had expired prior to the lease offered by the plaintiffs, and under which John O'Leary was in possession of the premises at the time of his death and under which his widow was in possession of the premises at the time of the agreement for the

surrender of the lease. This lease made in 1909 had expired, it had no relevancy in any way, shape or form to the issue being tried. Its terms were different from those of the lease in controversy and had no relation whatever to them, except the mere fact that one lease succeeded the other. The purpose of the offer was not disclosed by counsel and its relation to the case was not disclosed. What purpose it might have had does not appear in any way in the case. It surely should not have been offered for any purpose whatsoever. 10

Another reason urged is that the Court permitted the defendant, Harris, to answer the following question: "Q. During the year that you farmed the farm, did you sow any fall grain?" (S. C. p. 33.) This question referred to a time antecedent even to 1909, which was the date of the first lease. Surely anything transpiring between John O'Leary and the defendant, Harris, prior to the first lease on the farm could not possibly have had any relevancy to the issue then being tried.

The examination of Mr. Harris then continued and 20 the following question was asked him, which the Court admitted over objection: "Q. Now, Mr. O'Leary continued in possession for five years under this lease, did he not?" (S. C. p. 34.) This question was objectionable because it called for a transaction with the decedent which was certainly in violation of Section 4 of the Evidence Act (Comp. Stat. 2219.) It called for a statement of a transaction with the decedent, and which transaction antedated even the date of the first lease. It was objectionable upon two grounds: First, that it was in viola- 30 tion of the evidence act; and, second, because of its irrelevancy to the issue then being tried.

The witness, Harris, was then permitted to answer the following question: "Q. The question is, Mr. O'Leary stayed there during the five years of this lease?"

(S. C. p. 36.) This was objected to and the Court admitted it. It was a transaction with the decedent and related to the occupancy of the premises by the decedent during the period of the first lease from 1909 to 1914. The conditions under that first lease had no relevancy whatever to the controversy and the question was therefore inadmissible.

The defendant, Harris, was then permitted to answer the following question: "Q. At the time that Mr.
10 O'Leary went into possession of these premises in 1909, was there any agreement between you and him with respect to the grain that was then on the place?" (S. C. p. 36.) Now, we have the situation of the Court having admitted a lease beginning in 1909. It permits the witness, Harris, to testify as to transactions and agreements between John O'Leary, in his life time, and the defendant, which varied the terms of the first lease. The lease itself had no relevancy whatever, but the witness was permitted to go on beyond that point and testify to
20 an agreement that did not appear as part of the lease and which was antecedent thereto in the making, as appears by the subsequent testimony. How this could possibly be admissible is beyond question. It was not an attempt to explain an ambiguous term of the lease but was a clear and unequivocal attempt to write into the lease an agreement which did not appear upon its face and the making of which was antecedent to the signing of the lease. It was objected to, but the Court overruled the objection. The Court's reason for over-
30 ruling the objection, as stated by it (S. C. p. 36.), was that the testimony could not be regarded by the jury in the case in which Mrs. O'Leary, as administratrix, was plaintiff, but that it was admissible in the case in which Cliver was plaintiff. The Court attempted to divide the testimony offered for the same purpose in both

cases, and say that it applied to only one case and should be disregarded as to the other. The Court's theory being that there was a case pending in which a personal representative was not a party, and that therefore transactions with the decedent were admissible. This was not true for two reasons: First, because the interest that Cliver had in this grain was derived from the title of Mrs. O'Leary, who obtained her interest as administratrix of her deceased husband; Cliver had no interest in this matter whatsoever until after the death of John O'Leary; 10 and, second, that it was a clear violation of the evidence act, and further was an attempt to read into an agreement something which did not appear there, and which purported to be a conversation between the decedent and the defendant many years prior to the conversation in question.

The Court then permitted the defendant, Harris, to testify as to what this agreement was (S. C. p. 36.) These questions were objected to, and certainly should have been excluded. There were questions that certainly 20 affect the rights of the plaintiffs and were therefore inadmissible.

The Court then permitted the witness, William Parry, to answer questions with reference to conversations with the decedent, John O'Leary, in his lifetime (S. C. pp. 52 to 54.) The Court again attempted to differentiate between the two cases then being tried, by saying that the testimony was applicable only to the Cliver case, and that the jury should disregard it as to the O'Leary case. If these conversations were admis- 30 sable at all, they were equally applicable to both cases.

The Court directed a verdict for the sum of \$581.54 in favor of the defendant in the case of O'Leary v. Harris. This was done by reason of an offset filed in the case upon certain checks. There was very little tes-

timony opposed to this testimony, as to the checks, and the Court said that under the circumstances it was so plain that it should direct a verdict for the defendant.

It makes no difference as to this matter, because we contend that the Court erred in the direction of the verdict for the defendant and not in the amount. The plaintiff in the O'Leary case should have been permitted to go to the jury upon the first branch of the case and it was then within the province of the jury to say whether
10 or not there was a proper offset against the plaintiff's claim.

It is, therefore, respectfully submitted that the Court erred in the direction of verdicts for the defendant in the cases and in the admission of testimony of defendant, Harris, and the witness, Parry, for which reasons the judgment should be set aside and a venire de novo awarded.

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NEW JERSEY
COURT OF ERRORS AND APPEALS.

EMMA O'LEARY, Adminis-
tratrix,

Plaintiff & Appellant,

VS.

ALEXANDER HARRIS,
Defendant & Respondent.

ON APPEAL.

WALTER CLIVER,

Plaintiff & Appellant,

VS.

ALEXANDER HARRIS,
Defendant & Respondent.

BRIEF OF DEFENDANT AND RESPONDENT.

In the present matter two cases were tried together, because they arose out of the same transaction and involved the same testimony and facts.

The facts were these:—Alexander Harris was the owner of a farm in Southampton Township, Burlington County, known as the "Cooper Farm." He leased this farm to John O'Leary, Jr., in January,

1909, for a term of five years and on the seventeenth day of December, 1913, he again leased the same farm to John O'Leary, Jr., for the term commencing March 25th, 1914, which was the expiration of the prior lease, for the term of three years thereafter. The first lease contained this clause, "and the party of the second part (John O'Leary, Jr.) hereby covenants that no cornstalks or wheat straw shall be sold or removed from the said premises during the term; that he will not sow more than twenty-five acres in grain in the fall of the year, and if he should sow more than twenty-five acres, all over the twenty-five acres shall be left on the said farm for the benefit of the said party of the first part at the expiration of the said term." The lease dated December 17th, 1913, contained the following clause, "And the said party of the second part hereby covenants that no cornstalks or wheat straw shall be sold or removed from said premises during said term; and that he will not sow over twenty acres in grain in the fall, and if he does sow over twenty acres, that all over twenty acres shall be left on said farm for the benefit of said party of the first part." It contained a further clause, "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 to remove all persons therefrom."

In November, 1914, and during the term of the second lease, John O'Leary, Jr., was accidentally killed, and Emma O'Leary, the plaintiff and appellant, qualified as administratrix of the estate of John O'Leary, Jr., her deceased husband.

On January 11, 1915, the administratrix surrendered the lease and the following was endorsed on the lease:—

“Mount Holly, N. J., Jan. 11, 1915.

“Received of Emma M. O’Leary, administratrix of John O’Leary, deceased, the sum of one thousand and sixty-eight dollars in full for rent due on within lease for the year ending March 25, 1915, and the within lease is hereby by consent of parties cancelled as to the balance of the term thereof. The within settlement being made without prejudice as to any claims of Emma M. O’Leary as administratrix against Alexander Harris.

Alexander Harris.”

At this time rent under the lease was overdue and had been due since March 25, 1914. In the fall of 1914, to wit, shortly before the death of John O’Leary, Jr., he sowed a little over twenty-nine acres of grain on said farm, although he had covenanted that he would not sow more than twenty acres of grain. In March, 1915, and some three months or more after the cancellation of the lease, a public sale was had on the premises and much of the personal property was sold, together with the growing grain then on the farm sowed by John O’Leary. At this sale, William Cliver, plaintiff in one of these cases, bought twenty acres of grain, leaving nine acres of grain unsold. At the harvest time, William Cliver attempted to cut and remove the twenty acres of grain, alleged to have been purchased by him from the administratrix of John O’Leary, Jr., and Emma O’Leary, administratrix, attempted to cut the remaining nine acres. Alexander Harris prevented the cutting of the grain by both of them and himself cut and harvested the grain and appropriated it to his own use.

Emma O’Leary, administratrix, brought suit

against Alexander Harris for the nine acres of grain, which she had not attempted to sell, and Alexander Harris counterclaimed against her for a certain protested check made by John O'Leary, Jr., in his lifetime, for five hundred dollars, together with protest fees. He also denied that Emma O'Leary had any property in the growing grain and also set up a custom in that community that when grain was found on the premises when a tenant takes possession, the same amount of grain is to be left on the premises at the expiration of the tenant's lease or when he quits the premises.

William Cliver brought suit against Alexander Harris claiming title to the twenty acres of grain which he attempted to buy at the sale of the administratrix aforesaid, and claimed damages by the conversion of Alexander Harris. The defendant in that case answered that by an agreement with John O'Leary, Jr., he agreed to leave upon the premises as much grain as he found growing at the time of taking possession and that all of the grain mentioned should have been left upon the premises, and further that the premises had been surrendered, and, therefore, no title in the grain remained in the administratrix at the time of the alleged sale.

Upon the proof of the cancellation of the lease on January 11th, 1915, and the surrender of the premises, which appeared to be between seed time and harvest, the Court held that the administratrix at the time of the alleged sale to William Cliver had no title to any part of the grain; that title having passed, together with the premises, to Alexander Harris and at the close of the whole case the Court directed a verdict against William Cliver for the reason that Emma O'Leary had no title, and, therefore, could convey nothing to William Cliver. The

Court also directed a verdict against Emma O'Leary, administratrix, for the reason that she had no title, by reason of having surrendered the premises and for the further reason the lease expressly covenanted that her decedent would not sow more than twenty acres of grain, and if he did sow more than twenty acres, it should be left on the farm for the benefit of the lessor, and directed a verdict for the defendant on his counterclaim against the plaintiff, Emma O'Leary, administratrix, for the amount of the protested check, protest fees and interest.

Complaint is made against the Court because of the direction of the verdict and also for the admission of evidence, which will be taken up in their order.

ARGUMENT.

The Direction of the Verdicts by the Court Was Proper.

1. At the end of the whole case, when all of the testimony was in, a motion was made that the Court direct a verdict against the plaintiff and in favor of the defendant in both cases. The testimony at the close of the cases revealed that the term which began on March 25th, 1914, and was to run for three years thereafter was terminated by the act of the plaintiff and the premises surrendered to the defendant, Alexander Harris, by Emma O'Leary, administratrix, on the eleventh day of January, namely, between seed time and harvest—after the grain had been sown and before it had been harvested. Blackstone, in Book 2, Chapter 8, Sec. 3, (page 123), lays down the law of England as follows:

"But if an estate for life be determined by the tenant's own act (as by forfeiture of waste committed, or if a tenant during widowhood thinks proper to marry) in these and similar cases, the tenants having thus determined the estate by their own acts, shall not be entitled to take the emblements," and cites Co. Litt. 55. The law is summed up by Prof. Tiedeman in his treatise on Real Property, Second Edition, Sec. 71, as follows: "But if the estate is terminated through the fault of the tenant, as when he abandons the premises, or voluntarily destroys his estate, by failure to perform a condition, or where the party is in wrongful possession without color of title, he is not entitled to emblements," and he cites a long line of cases among which is *DeBow vs. Colfax*, so that it seems beyond question that the common law is that where the estate is terminated by the act of the tenant as, by surrendering the estate he surrenders all rights growing out of his tenancy, and, therefore, the emblements go with the land to the landlord.

In *DeBow vs. Colfax*, 10 N. J. Law, 128, one Field was the minister of the Dutch Church at Pompton Plains. The church owned a tract of land called the parsonage land, designed for the support of the minister. In 1815, while Rev. Mr. Field was the minister and in the fall of that year he sowed part of the land in rye. Early in the spring of 1816, and before harvest time, he sold the grain in the ground to one Romer, who afterward sold it to DeBow. Before May 1st, 1816, and after the sale, Mr. Field voluntarily withdrew from the ministry of that church, left the parsonage land and removed to another congregation and place of residence. The rye was harvested by the defendants, who were the Trustees of the church. DeBow, the purchaser,

brought trover and the Chief Justice non-suited the plaintiff at the Circuit and the matter was taken to the Supreme Court to determine the propriety of the non-suit. The Court, in that case, by the opinion of Chief Justice Ewing, said: "He who has an estate or interest in lands, the duration of which is uncertain in point of time, and he who has such an estate, may, perhaps, continue until the grain be ripe, shall, if he sows the land, be permitted, or his executors or administrators, in case of his decease, to enter upon it at harvest and reap the crop, although in the meantime his estate may have ended either by an act of God or by the law. But, if the estate is between seed time and harvest determined by the act of the tenant, the growing crop passes with the land, to him who thereupon becomes the immediate owner of the latter." He cites Co. Litt. 55, Shep. Touch, 451, and the Court sustained the non-suit because the tenancy had been terminated by the act of the tenant.

The appellant in his brief argues that the termination must be by the act of the tenant alone; that if it is in conjunction with the act of the landlord, the rule does not apply. If this were law, the case at bar would fall squarely within the rule laid down by the appellant himself, because in the present case the appellant, O'Leary, by her own voluntary act surrendered the premises. The defendant may have acquiesced in her act, but there was nothing on his part that he did to determine the surrender. He merely acquiesced in the voluntary act of the appellant alone. But this is not the law; a voluntary termination can only be the termination of the tenant. If it be not the act of the tenant alone, it is not voluntary, nor can the tenant surrender or terminate the tenancy during the term, except by the

consent of the landlord so that counsel's argument that it has to be the act of the tenant alone is a mere shadowy argument without any substance, because the very nature of a voluntary termination requires that it be the act of the tenant alone. The acceptance of that surrender is the act of the landlord. The argument of counsel in this particular seems to us as a distinction without difference.

The appellant further argues that the question of way-going crops was not the question for the determination of the Court in *DeBow vs. Colfax*. A casual reading of the case will prove the contrary. The only question at issue was the way-going crops. It was an action for trover for these very crops and the question was, who was entitled to these crops—the vendee of the tenant or the landlord, exactly the same question as is presented in the case at bar and is duplicated in the case of *Cliver vs. Harris*.

In *Howell vs. Schenck*, 25 N. J. L. 89, the question was, "Who was entitled to the emblements?" It appears that Howell, the plaintiff, was the lessee of one Bogart from the first of April, 1850. Long prior to the making of the lease, the property had been mortgaged and the mortgage duly registered. In December, 1850, a decree of foreclosure was obtained in the Court of Chancery and the premises ordered sold. In March, 1851, oats were sown on the leased premises and on the first day of April, 1851, the plaintiff gave up the possession of the premises, pursuant to the lease, and on the eleventh day of April, 1851, the premises were sold by the sheriff and conveyed without any reservation of the growing crop to the defendant, who immediately took possession and at the proper season cut the oats and converted the grain and straw to his own use. The question is, who is entitled to the oats? The Court

held that the mortgagor holds the premises so long as the mortgagee chooses to leave him in possession as the owner without the implied consent to lease them. "It is well established that a person entering by title paramount, is entitled to the emblements and this doctrine applies to a case like the present, there being no allegation that the mortgagee or the purchaser in any way recognized the lease or assented to the sowing of the grain." The Court held: "By the common law, a tenant of lands for an uncertain term is entitled, by way of emblements to the annual products of his annual labor, although his estate may have been terminated by an act of God or by the law, before he shall have reaped the same, but if he determine his estate by his own act, or if he held for a certain term, which expires by its own limitation, he is not entitled to emblements," and cites Co. Litt. 55, Com. Dig. Biens, 2 Blackstone, 122, and *DeBow vs. Colfax*. The Court, in this case, held that as between the tenant whose estate was to that extent the estate of the mortgagor could not hold the emblements as against the mortgagee on the foreclosure.

Cyc. states the law to be "Where a tenant before the expiration of his term surrenders to the landlord, or by breach of condition forfeits his lease, and the landlord re-enters the latter is entitled to the growing crops upon the land, and, therefore, no right or title remains in the tenant." 24 Cyc. 1071. So that it seems perfectly clear that Emma O'Leary having surrendered the premises between said time and harvest, surrendered likewise her right to the way-going crops and she had no title therein, which she could sell to William Cliver, nor did any title remain in her giving her a right to re-enter and harvest the grain.

Again it abundantly appears from the testimony in this case and especially from the lease and the surrender thereon endorsed, that John O'Leary had not paid the rent which was due on the premises on the twenty-fifth of March, 1914, and by a covenant in the lease it is provided that "if any rent shall be due and unpaid or if default be made in any of the covenants herein contained, then it shall be lawful for the party of the first part to re-enter the said premises and to remove all persons therefrom."

In *Gregg vs. Boyd*, 23 N. Y. Supplement, 918, it was held where, on the tenant's failure to pay the rent the landlord under the terms of the lease re-enters and takes possession of the premises, the tenant's right to the growing crop is lost and the lessee cannot recover the property from the landlord. Again it is provided in the lease that "not more than twenty acres of grain shall be sown in the fall and if he does sow over twenty acres that all over twenty acres shall be left on the farm for the benefit of the said party of the first part." It is the testimony of the plaintiff that twenty-nine acres were sowed and constituted a breach in the covenant entitling the landlord to re-enter. In addition to this the administratrix professed to have sold twenty acres of grain and if so under any condition were she entitled thereto, she had parted title with all that she could hold, therefore, she had no right in the remaining nine acres of grain and a direction of the verdict against the administratrix was correct upon any theory of the case.

But to restate the contention of the defendant in these proceedings, it is claimed that on the showing made in the plaintiff's case, the estate was terminated by the voluntary act of the tenant between

seed time and harvest and that the crops, therefore, went to the landlord.

2. Plaintiffs Claim, However, That Reservation in the Cancellation Clause Endorsed on the Lease Reserved the Estate in the Grain to the Tenant.

This we deny. The interpretation of written instruments is for the Court. The testimony in the case clearly shows that at the time the cancellation clause was made, there was not in existence any dispute or controversy between the parties in this case with respect to the growing grain. The testimony shows and is undisputed (S. C. page 61 and following) that at the time the cancellation clause was signed, there was a suit pending between John O'Leary, Jr., and Charles Gilbert, bailiff, for distress of rent levied on John O'Leary's goods for non-payment of rent, and the reservation made in the cancellation clause was for the protection of Mrs. O'Leary's rights to proceed with the dispute in that suit. So that the cancellation clause had no relation at all according to the testimony to the growing grain, but referred entirely to an independent suit between the parties. The cancellation clause itself discloses that there was a complete surrender of the premises and title and possession of the grain growing on the premises were as effectively carried by the cancellation as was the real estate itself. There is no reservation that rights to the growing grain were not surrendered at the time of the cancellation, but is clear as words can make it that the entire estate in the premises of the administratrix was surrendered to Harris and vested in him and the reservation clause has no reference to any part

of the estate, but refers to any claims of O'Leary against Harris and certainly claims cannot by any stretch of imagination be held to mean the title to growing grain. Therefore, it seems clear in any question that the title of the growing grain passes to the landlord by the voluntary surrender of the premises on the part of the tenant.

3. The next matter that we are concerned with is the admission of certain evidence by the Court over objection of the plaintiff. The first objection is to the admission of evidence of the lease of January, 1909; that is, the lease immediately preceding the lease that was surrendered and now in question. The purpose of the offer of this lease was to show on what terms and conditions John O'Leary held the premises and to be followed by the introduction of testimony; that at the time John O'Leary first took possession of the farm there was growing grain on the premises, which he took under an agreement with Harris; that when the term should expire he should leave upon the premises the same amount of growing grain as he found upon them when he took them. A custom was averred to prevail in the community that when a tenant takes growing grain upon his entering upon the premises that the tenant shall leave the same amount of growing grain at the expiration of his tenancy and further to show that there was an agreement between O'Leary and Harris to the same effect. The Court in its discretion had a right to receive this testimony. If testimony was not subsequently offered to support the theory upon which the case was received, it was then the plaintiff's right to move to strike out the testimony. No such motion was made and he cannot, therefore, complain that the testimony was received so long as it was receivable upon some theory of the case.

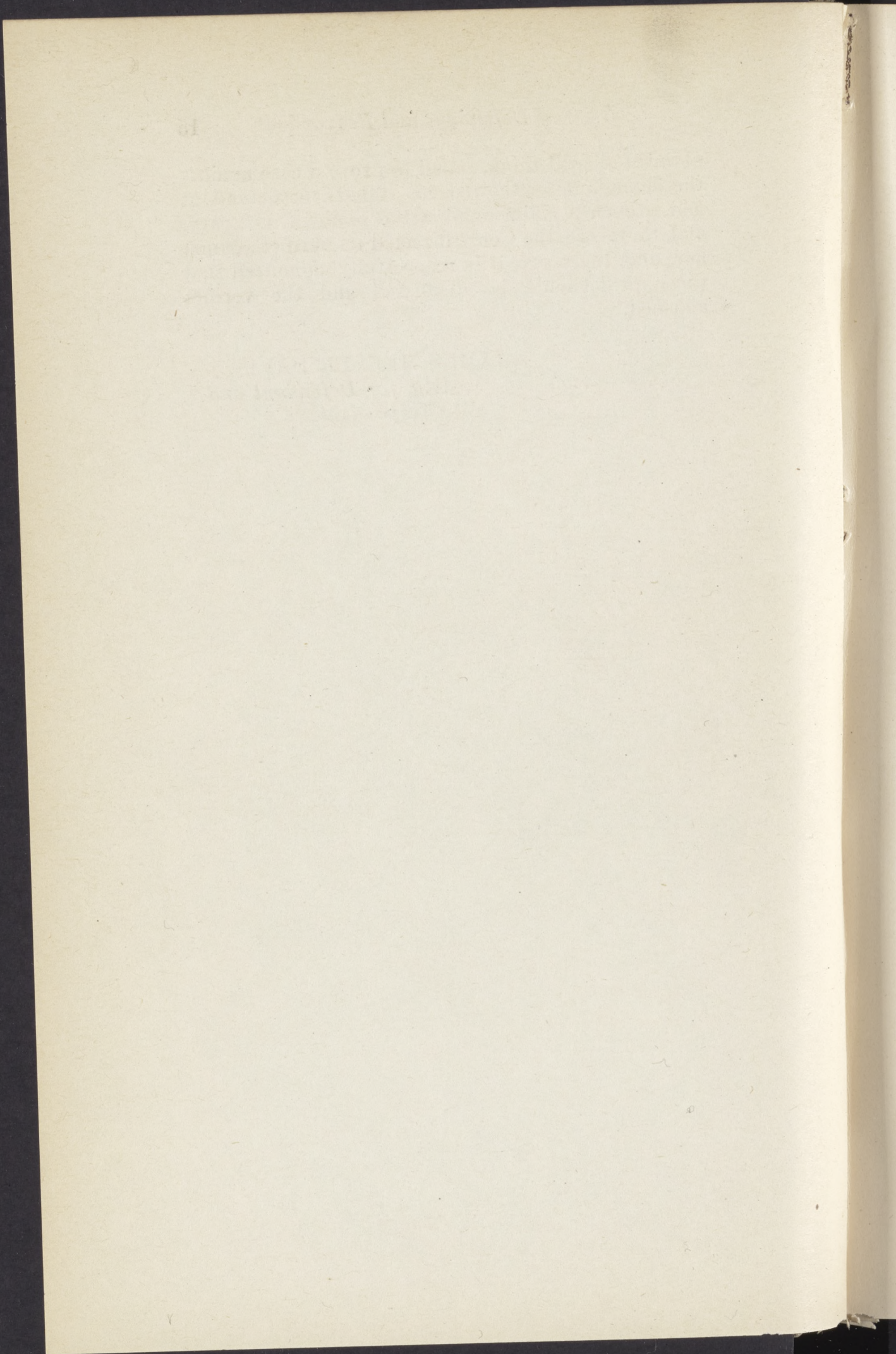
Objection is also made to the allowance of the following question: "During the year that you farmed the farm, did you sow any fall grain?" (S. C. 23.) This was asked on the theory that there was an agreement between O'Leary and Harris as to the away-going crops and also in support of the proof of the custom prevailing in the community and the question also asked: "Now, Mr. O'Leary continued in possession for five years under this lease, did he not?" and a number of questions of like import were asked by the defendant and affirmed by the Court, which the defendant claims were perfectly correct, but even if it were error in the Court, it was harmless error, because the Court did not take into consideration the defendant's side of the case when he directed a verdict, but merely the plaintiff's side of the case. Only one objection to testimony need be observed and that is that Alexander Harris was permitted to testify as to certain transactions with John O'Leary, Jr., the intestate of the plaintiff, Emma M. O'Leary. The testimony was offered and received merely as affecting the plaintiff, William Cliver. The Court distinctly received it upon that theory alone (S. C. 35, line 9, also page 36, line 22). It is perfectly clear that unless a party is either suing or being sued in a representative capacity, the law in this State permits a surviving party to a transaction to testify to the transaction of the deceased person, and that was exactly the situation with respect to Cliver. The testimony was receivable so far as he was concerned, but not admissible so far as Emma O'Leary was concerned and that was exactly what the Court stated. But how can any of these objections to the reception of the testimony affect the merits of this case? The direction of a verdict was based upon the plaintiff's

case alone, not upon the defendant's case, nor did the ruling of the Court in anywise depend upon any of the testimony to which objection was made, but depended entirely on the testimony produced on the part of the plaintiff.

It is, therefore, clear if any error was made on the part of the Court, which is here denied, it was harmless error and could not affect this case. No question for the jury remained at the close of the plaintiff's case with respect to the plaintiff's claim. The plaintiff proved himself out of court, likewise in the question remaining for the determination of the jury at the close of the defendant's case, because, with respect to the counterclaim, no question was raised by the plaintiff that left in substantial dispute the question whether or not the plaintiff, Emma O'Leary, owed the \$500.00 protested check. Under these conditions, it was perfectly proper for the Court to direct the verdicts that it did. The plaintiff, Emma O'Leary, does not raise any objection as to the claim of the defendant as against her on the protested check (see page 10 of Appellant's Brief), but claims that the question should have gone to the jury on the plaintiff's claim, and, therefore, that it would have been a jury question to determine in whose favor the balance was. That being the position of the appellants in this case, there seems no room for doubt that the ruling of the Court was correct. There was nothing left in dispute for the plaintiff's claim. The direction of a verdict or the granting of a non-suit with respect to plaintiffs was the only course left open to the Court. The Court chooses to hear all the testimony, before deciding that question for which the defendant cannot and does not complain, but at the close of the whole testimony the Court dealt with the case as it then stood. The

plaintiffs had, I think, failed to prove a case against the defendant for the reasons stated; the defendant had proven a claim against the plaintiff, O'Leary, and, therefore, the Court directed its verdict against her, and, therefore, it is respectfully submitted that the appeal should be dismissed and the verdict affirmed.

JAMES MERCER DAVIS,
*Atty. for Defendant and
Respondent.*



NOTICE OF APPEAL.

NOTICE OF APPEAL

FILED APRIL 12, 1916

10

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

EMMA O'LEARY, ADMINISTRA-
TRIX,

Plaintiff.

Vs.

ALEXANDER HARRIS,

Defendant.

ACTION AT LAW
NOTICE OF APPEAL

20

To DAVIS & DAVIS, ESQS., Attorneys for Defendant:

Take notice that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:— 30

I. Because the Court admitted in evidence a paper writing purporting to be a lease made on the

day of January, 1909, between Alexander Harris and John O'Leary for the "Cooper Farm" for a period of five years from March 25, 1909, which lease had expired before the lease made between the same parties, which was offered by the plaintiff, and which was involved in this suit.

2. Because the Court permitted the witness Alexander Harris, to answer the following questions:

10

Q. During the year that you farmed the farm did you sow any fall grain?

Q. Now Mr. O'Leary continued in possession for five years under this lease, did he not?

Q. The question is, Mr. O'Leary stayed there during the five years of this lease?

Q. At the time that Mr. O'Leary went into possession of these premises in 1909 was there any agreement between you and him with respect to the grain
20 that was then on the place?

Q. Now what was that agreement? What was the agreement Mr. Harris? A. Between Mr. O'Leary and I?

Q. Yes?

3. Because the Court permitted the witness, William Parry, to answer the following questions:

Q. And you got one-third of what?

Q. Did you have any conversation with John
30 O'Leary as to whether or not any wheat must be left on the place?

Q. What conversation did you have with him with respect to leaving any wheat or grain on the place?

4. Because the Court directed the jury to render a

verdict against the plaintiff and in favor of the defendant for five hundred and eighty-one dollars and fifty-four cents.

V. CLAUDE PALMER,
Attorney for Plaintiff.

Service of a copy of within notice of appeal is hereby acknowledged this 24th day of March, nineteen hundred and sixteen.

DAVIS & DAVIS,
Attorneys for Defendant.

NOTICE OF APPEAL

FILED APRIL 12, 1916.

10

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

	WALTER CLIVER,	Plaintiff.	}	ACTION AT LAW	
20	<i>Vs.</i>				
	ALEXANDER HARRIS,	Defendant.			NOTICE OF APPEAL

To DAVIS & DAVIS, ESQS., Attorneys for Defendant:

Take notice that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

- 30
1. Because the Court admitted in evidence a paper writing purporting to be a lease made on the day of January, 1909, between Alexander Harris and John O'Leary for the "Cooper Farm" for

a period of five years from March 25, 1909, which lease had expired before the lease made between the same parties, which was offered by the plaintiff, and which was involved in this suit.

2. Because the Court permitted the witness, Alexander Harris, to answer the following questions:

Q. During the year that you farmed the farm did you sow any fall grain? 10

Q. Now Mr. O'Leary continued in possession for five years under this lease, did he not?

Q. The question is, Mr. O'Leary stayed there during the five years of this lease?

Q. At the time that Mr. O'Leary went into possession of these premises in 1909 was there any agreement between you and him with respect to the grain that was then on the place?

Q. Now what was that agreement? What was the agreement Mr. Harris? A. Between Mr. O'Leary 20 and I?

Q. Yes?

3. Because the Court permitted the witness, William Parry, to answer the following questions:

Q. And you got one-third of what?

Q. Did you have any conversation with John O'Leary as to whether or not any wheat must be left on the place?

Q. What conversation did you have with him with respect to leaving any wheat or grain on the place? 30

4. Because the Court directed the jury to render a

verdict against the plaintiff and in favor of the defendant of no cause of action.

V. CLAUDE PALMER,
Attorney for Plaintiff.

Service of a copy of within notice of appeal is hereby
10 acknowledged this 24th day of March, nineteen hundred and sixteen.

DAVIS & DAVIS,
Attorneys for Defendant.

COMPLAINT

 NEW JERSEY SUPREME COURT
 BURLINGTON COUNTY

10

 EMMA O'LEARY, ADMINISTRA-
 TRIX,

Plaintiff.

Vs.

ALEXANDER HARRIS,

Defendant.

 ACTION AT LAW
 COMPLAINT

20

Plaintiff, who resides at Vincentown, in the County of Burlington and State of New Jersey, says:

1. That John O'Leary died on or about November 4, 1914, intestate, and letters of administration were thereupon issued by the Surrogate of the County of Burlington to plaintiff and were accepted by her.

30

2. That on the tenth day of July, 1915, she was lawfully possessed of certain goods and chattels, to wit, ten acres of growing wheat of the value of \$400.00.

3. And being so possessed of the said goods and

chattels, the plaintiff, afterwards, to wit, on July 10, 1915, casually lost the said goods and chattels out of her possession and the same came into the possession of the defendant on said July 10, 1915, by finding. And defendant knowing the said goods and chattels to be the property of the plaintiff and fraudulently intending to deceive and defraud the said plaintiff has not as yet delivered the said goods and chattels, or any of them, to the said plaintiff, though often requested so to do, and 10 has wholly refused so to do; and on the said July 10, 1915, the said defendant converted and disposed of the said goods and chattels to his own use.

4. Plaintiff demands \$400.00 damages.

V. CLAUDE PALMER,
Attorney for Plaintiff.

ANSWER

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

10

EMMA O'LEARY, ADMINISTRA-
trix,

Plaintiff.

Vs.

ALEXANDER HARRIS

Defendant.

ACTION AT LAW
ANSWER

20

Defendant, residing at Vincentown in the County of Burlington and State of New Jersey, says that:

1. He admits the facts set out in paragraph one of the Complaint.

2. He denies the truth of the matters contained in paragraphs two and three of said Complaint.

3. Plaintiff's decedent, John O'Leary, in his life 30
time leased certain premises of the defendant and by
said lease agree to leave as much growing grain thereon
as he, the said John O'Leary, found thereon upon his
going into possession of said premises and that the
goods and chattels mentioned in said complaint are a
part of the grain mentioned in said lease.

4. The premises on which said grain was growing were surrendered and turned over by the said John O'Leary or his representative to the plaintiff whereby said property or goods and chattels became the property of the defendant.

5. The general custom in the renting of farms is that the tenant shall leave as much growing grain upon the premises at the termination of his term as he found
10 at the beginning of his term and that the grain mentioned in said complaint was a part of the growing grain which the said John O'Leary was bound to leave upon said premises by virtue of the prevailing custom.

Defendant says, by way of counter-claim, that:

1. The said John O'Leary, in his life time was indebted to the defendant in the sum of Five Hundred Dollars for a certain protested check given by the said
20 John O'Leary to the defendant, dated April 14, 1913, together with protest fees and interest from April 14, 1913, to the date of Judgment herein; a copy of the check and protest is attached hereto.

2. The defendant still owes said check. The said check is still unpaid.

3. The defendant counter-claims \$501.54 damages with interest from April 14, 1913 to date of judgment.
30

DAVIS & DAVIS,
Attorneys of Defendant.

UNION NATIONAL BANK (55-290)

Mount Holly, N. J., April 14th, 1913. No.——
 Pay to the order of Alexander Harris——\$500.00
 Five HundredDollars.

John O'Leary, Jr.

UNITED STATES OF AMERICA }
 STATE OF NEW JERSEY } ss.

10

Be it known, That on the day of the date hereof,
 I, Samuel L. Tomlinson, Notary Public within the
 State of New Jersey, by lawful authority duly com-
 missioned and sworn, residing in the town of Mount
 Holly, in the State of New Jersey, at the request of the
 Union National Bank at Mount Holly, New Jersey,
 presented the original check hereunto annexed, unto the
 officer in attendance at the Union National Bank where 20
 the same is payable and demanded of him payment
 thereof, which he refused for want of funds of the
 maker.

Answer, "Not sufficient funds to his credit."

Whereupon I, the said Notary, at the request afore-
 said, did Protest and by these present do publicly and
 solemnly Protest, as well against the Drawer and En-
 dorsers of the said check as against all other whom it 30
 doth or may concern, for Exchange, Re-change, and all
 Costs, Charges, Damages and interests already incurred,
 and to be hereafter incurred for want of payment of the
 same.

Thus done and protested at Mount Holly, Afore-said, the 16th day of April, in the year of our Lord one thousand nine hundred and thirteen. In Testimony Whereof, I have hereunto set my hand and affixed my Notarial Seal, the day and year last above mentioned.

S. L. TOMLINSON, Notary Public.

COMPLAINT

 NEW JERSEY SUPREME COURT
 BURLINGTON COUNTY

10

WILLIAM CLIVER,

Plaintiff.

Vs.

ALEXANDER HARRIS,

Defendant.

ACTION AT LAW

COMPLAINT

 20

Plaintiff, who resides at Vincentown, in the County of Burlington and State of New Jersey, says:

1. That on July 10, 1915, he was lawfully possessed of certain goods and chattels, to wit, twenty acres of growing wheat of the value of \$800.00.

2. And being so possessed of the said goods and chattels, the Plaintiff, afterwards, to wit, on July 10, 1915, casually lost the said goods and chattels out of his possession and the same came into the possession of the defendant on said July 10, 1915, by finding. And defendant, knowing the said goods and chattels to be the property of plaintiff, and fraudulently intending to

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deceive and defraud the said plaintiff, has not, as yet, delivered the said goods and chattels, or any of them, to the said plaintiff, though often requested so to do, and has wholly refused so to do; and on the said July 10, 1915, the said defendant converted and disposed of the said goods and chattels to his own use.

3. Plaintiff demands \$800.00 damages.

ANSWER

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

10

WILLIAM CLIVER,	}	ACTION AT LAW.
Plaintiff.		
<i>Vs</i>	}	ANSWER
ALEXANDER HARRIS,		
Defendant.		

20

Defendant, residing at Vincentown in the County of Burlington and State of New Jersey, says that:

1. He denies the truth of the matters contained in the complaint hereof.

2. One John O'Leary leased from the defendant certain premises upon which the grain mentioned in said complaint was grown and that in and by said lease the said John O'Leary agreed to leave upon said premises as much growing grain at the expiration of his term as he, the said O'Leary, found thereon upon his going into possession thereof, and that the goods and chattels men-

30

tioned in said complaint are a part of the grain mentioned in said lease.

3. That the premises on which said grain was growing was surrendered and turned over by the said John O'Leary or his representative to the defendant whereby said goods and chattels became the property of said defendant.

10 4. The general custom in the renting of farms is that the tenant shall leave as much growing grain thereon at the termination of his term as he found at the beginning of his term and that the grain mentioned in said complaint was a part of the growing grain which the said tenant O'Leary was bound to leave upon said premises by virtue of the prevailing custom.

DAVIS & DAVIS,
Attorneys of Defendant.

TESTIMONY

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

10

WALTER CLIVER	}	ACTION AT LAW
Plaintiff,		
<i>Vs.</i>		
ALEXANDER HARRIS,		
Defendant.		

AND

EMMA O'LEARY, ADMX.,	}	ACTION AT LAW	20
Plaintiff.			
<i>Vs.</i>			
ALEXANDER HARRIS,			
Defendant.			

Mt. Holly, N. J., December 28, 1915.

30

(The two cases were tried together by consent of counsel.)

(After the openings by the respective counsel a recess was taken till 1.15 P. M.)

(Trial of the cause resumed at 1.15 P. M.)

Mr. Davis. I understood from Mr. Palmer that he admits the signature to the check and certificate of protest.

Mr. Palmer. Oh, yes, no question about the signature.

10

GEORGE W. ELBERT, sworn for plaintiff.

Direct examination by Mr. Palmer.

Q. Mr. Elbert, where do you live?

A. Vincenttown.

Q. What is your business?

A. Look after Mr. Budd's interest in cranberries.

20

Q. Do you know the Cooper farm?

A. Yes.

Q. Did you go there about a year ago for the purpose of measuring some wheat growing on the place?

A. About a year ago next March.

Q. Did you measure it?

A. Yes, sir.

Q. How much was there there?

A. A little over twenty-nine acres.

Q. Can you give us approximately? Was it nearer thirty than twenty-nine?

30

A. No, about twenty-nine and one-third. It was about two acres of it was eaten off by the chickens, and I suggested that we agree on twenty-seven, make it twenty-seven.

Q. Did you see that grain later in the season?

A. Yes, sir.

Q. Have you been a farmer?

A. No, sir. Well, I will say thirty-five years ago I worked on a farm.

Q. Have you any idea what that grain would produce to the acre?

A. No, sir

No cross-examination.

10

DANIEL HAINES, sworn for plaintiff.

Direct examination by Mr. Palmer.

Q. Mr. Haines, where do you live?

A. Vincenttown.

Q. And what is your business?

A. Farming.

Q. For whom do you work?

A. Mrs. O'Leary.

Q. Were you working for her during this last year?

A. Since June.

Q. Did you some time in July go to the Cooper farm at her instructions?

A. Yes, sir.

Q. For what purpose?

A. To cut the grain.

Q. Who went with you?

A. Joe Lemon and Shreve Nixon.

Q. Do you remember when it was, the date?

A. I don't exactly, no. It was sometime in July.

Q. The fore part of July?

20

30

A. I think so, yes.

Q. Who did you see at the Cooper farm?

A. Mr. Harris and John.

Q. John?

A. John Harris.

Q. His son?

A. Yes, sir.

Q. By Mr. Harris you mean Alexander Harris?

A. Yes.

10 D. Did you have any conversation with him?

A. None whatever, excepting he refused to let us cut the grain.

Q. What did you say to Mr. Harris when you went there?

Mr. Davis. There is no dispute that Mr. Harris refused to let you cut the grain.

A. We drove up in the yard and the gate was locked and I asked him if we could go in and cut the grain and he said no, and that was all that was passed.

20 Q. That was all that was said?

A. Yes.

Q. Then you went away?

A. Yes.

No Cross-Examination.

JOSEPH LEMON, sworn for plaintiff.

30

Direct examination by Mr. Palmer.

Q. Where do you live, Mr. Lemon?

A. Vincenttown, near Vincenttown.

Q. What is your business?

A. Farmer.

Q. For whom do you work?

A. Mrs. O'Leary.

Q. Did you work for John O'Leary in his lifetime?

A. Yes, worked for him off and on for five years.

Q. Did you go to the Cooper farm the fore part of July of this year?

A. Yes, sir.

Q. For what purpose?

10

A. To cut the grain.

Q. At Mrs. O'Leary's instructions?

A. Yes.

Q. Who did you see there?

A. Mr. Harris and his son.

Q. What did you say to them?

A. Well, I went to cut the grain and the gate was locked and he refused to let us cut it.

Q. What did you say to him?

A. Well, I didn't say nothing.

20

Q. Did you hear the conversation between Mr. Haines and Mr. Harris?

A. No, sir; I didn't hear no more than what he said.

Q. What he said?

A. What John just told you.

Q. What was that?

A. Well, he told you what Mr. Harris said.

Q. Refused to let you cut the grain?

(Objected to.)

Q. What did he say?

30

A. Well, he refused to let us cut it.

Q. Were you working for Mr. O'Leary when he first rented the Harris farm in 1909?

A. I was there the first spring. I was there until

about—I don't know—about the first of harvesting time I left.

Q. The first year that he had the farm?

A. Yes.

Q. Was there any grain growing on the farm when Mr. O'Leary took it?

A. I don't know about that. I was there the first spring, I know the grain was there.

Q. Was there the first spring?

10 A. Yes.

Q. How much was there there?

A. Well, that other field next to where his property—joined his property. I don't know how many acres was into it. I couldn't tell you nothing about that.

Q. Any other fields?

A. No, six; not as I remember.

Cross Examination

20 By Mr. Davis.

Q. Then you worked for John the first year that he had the Cooper farm; is that right?

A. Yes.

Q. What time of year did you go to work for him?

A. About the first of April.

Q. Now they harvest along in July, do they not?

A. Yes.

30 Q. When did you leave?

A. Well, I left about the first of July.

Q. Now in that year there was grain on the farm, was there not?

A. Yes.

Q. John cut that grain?

A. Why, sure.

Re-direct Examination.

By Mr. Palmer.

Q. Do you know where that grain was sown?

A. No.

By Mr. Davis.

10

Q. Was that fall grain or spring grain?

A. Well, I understood it was fall grain.

Q. Well, you knew that no grain was cut there in the spring that you worked there?

A. No.

Q. That was cut there, I mean, when you were there.

A. No. I told you the grain was cut after I went away.

20

Q. You went there in April, didn't you?

A. Yes.

Q. Now between April and the time that you left no grain was sowed by John that he cut that year, so far as you know, was there?

A. No, sir.

Q. The grain that he cut was grain that was on the place when he took possession of the premises; that is a fact, isn't it?

A. Well, I don't know about that. I never knowed nothing about the place until I went to work for him. 30

Q. You went the first of April?

A. Yes, sir.

Q. The grain was there then, wasn't it?

A. Yes.

Q. And he went there on the 25th of March, didn't he?

A. I don't know when he went there. I don't know when he took the place.

Q. That was his first year there?

A. Yes. No, sir; I don't know when he took the place.

10

JOSEPH O'LEARY, sworn for plaintiff.

Direct Examination by Mr. Palmer.

Q. Where do you live, Mr. O'Leary?

A. Vincentown.

Q. You are a brother of John O'Leary?

A. Yes, sir.

Q. In 1909 did you live near the Cooper farm?

20

A. Yes, sir.

Q. And did you live there for several years?

A. Yes, sir.

Q. You know when John first took the Cooper farm?

A. Yes.

Q. That was in 1909?

A. Yes, sir.

Q. Was there any grain growing on the farm at that time?

A. Yes, sir.

30

Q. Where?

A. Twenty-two acres right back next to where I live, adjoining the farm where I live.

Q. Do you know when that was planted?

A. Yes, sir.

Q. When?

A. Sowed in the fall of 1908.

Q. Do you know who sowed it?

A. I do, for my property joins. It was sown to rye. I went there and sowed it for him.

By the Court.

Q. Was it rye?

A. This was rye sowed there in that field, twenty- 10
two acres.

By Mr. Palmer.

Q. Was it sowed for Mr. Harris?

(Objected to as leading.)

Q. Was it sowed for John?

A. Yes, sir.

20

Mr. Davis. I object and ask to strike it out.

(Objection overruled. Objection noted for defendant as ground of appeal.)

The Court. He has already said it was.

Q. When was the rye put in?

A. Sowed in the fall, I think somewhere about 30
the middle of September.

Q. The fall before the March in which John took possession?

A. Yes, sir.

Q. Was there any other grain growing on the farm at that time?

A. No, sir.

Q. It was cut, I suppose, during the year of 1909?

(Objected to.)

By the Court.

10 Q. Was it or was it not cut during the year 1909?

A. It was cut during the year 1909, for I harvested it for him in that year.

Q. Mr. O'Leary, what was wheat worth in the fore part of July, 1915?

(Objected to.)

The Court. If he knows. Find out whether he knows.

20

Q. Do you know what wheat was selling for in July, 1915?

A. Not exactly.

Q. Did you buy or sell any at that time?

A. No, sir.

Q. Did you see any quotations of prices?

(Objected to as incompetent.)

30 Mr. Palmer. It is an article that is on the market all the time.

The Court. Well, he says he has no knowledge.

Cross Examination.

By Mr. Davis.

Q. What time did you sow this grain?

A. Sowed it about the middle of September, 1908.

Q. Who was tenant on the farm then?

A. A man by the name of Thompson lived on the farm. Mr. Harris had charge of it.

Q. Who had charge of it?

10

A. Mr. Harris.

Q. Thompson or Thomas?

A. Thompson.

Q. Who was farming it?

A. Mr. Harris had charge of it.

Q. And you sowed the grain up next to your farm?

A. Yes, sir.

Q. What other parts of the farm did you go on?

A. Well, I was over all parts of it. I was over 20 there the next spring and helped get the ground ready to plant.

Q. And this is the only wheat or rye that was on the place?

A. Yes, sir.

Q. Where was the wheat?

A. I didn't see any wheat there.

Q. What was it you sowed, wheat or rye?

A. Rye.

Q. And you sowed nothing but rye?

30

A. Rye.

Q. You don't know whether there was any wheat on the farm or not?

A. I didn't see any wheat there, and I was there

with teams and helped them get the ground ready the next spring.

A. Was there any wheat?

A. I didn't see any.

Q. Well, can you tell us whether there was any wheat there or not?

A. That I couldn't tell, for I didn't see any there.

10 By Mr. Palmer.

Q. Were you over the entire farm at any time in the spring of 1909?

A. Yes, sir.

Q. You saw no wheat growing anywhere?

A. No, sir.

20 JOHN GALE, sworn for plaintiff.

Direct Examination by Mr. Palmer.

Q. Where do you live, Mr. Gale?

A. I live at Hainesport.

Q. Where did you live in 1909?

A. I moved from John O'Leary's tenant house along the railroad in February, 1909, to the Cooper farm.

30 Q. You were working for John O'Leary at that time?

A. Yes, sir.

Q. In February, 1909, you moved on the Cooper farm?

A. Yes, sir.

Q. Any grain growing on the farm at that time?

A. Yes, sir.

Q. Where was it?

A. There was a twenty-two acre field in rye next to Joseph O'Leary's.

Q. Any other?

A. There was a field right this side of the house, I can't just say how big; I think it was called at that time twenty acres, that was in wheat.

Q. Next to the house?

A. Yes.

10

Q. Do you know who put that in?

A. I do not.

Q. Do you know who put in the rye?

A. Yes, sir.

Q. Who.

A. Joseph O'Leary drilled it.

Q. Did you help in that work?

A. I helped plow the ground and harrow it.

Q. Do you know when the wheat was planted?

A. It was planted, as near as I can tell—I don't 20 know exactly the date—around the middle of September.

Q. Of 1908?

A. Yes, sir.

Cross Examination.

By Mr. Davis.

Q. Now that wheat wasn't put in by you, was it, Mr. Gale?

A. The wheat wasn't sowed by me, no, sir.

30

Q. Nor by Joseph O'Leary?

A. No, sir; not to the best of my knowledge.

Q. The wheat was sowed there by the man who was then tenant of the farm, wasn't it, or by Mr. Harris?

A. I couldn't say.

(Objected to.)

Q. Did you work on the farm and live on the farm?

A. Not in that fall when this grain was sowed. That was sowed the fall before I went on the farm?

Q. Did you work for Mr. O'Leary in that fall, 10 1908?

A. Yes, sir.

Q. Did you have any knowledge of the sowing of this wheat?

A. No, sir.

Q. So far as you know he didn't sow the wheat?

A. I don't know whether he did or not.

Q. So far as you know you have no knowledge of him sowing it?

A. No.

20 Q. But you do know the rye was sowed by him?

A. I know the rye was sowed by him.

Q. And there were about twenty acres of wheat and then this other field of about twenty-two acres of rye which Joseph O'Leary sowed?

A. Yes, sir.

Q. And then you went to live on the Cooper farm, did you not, Mr. Gale?

A. Yes, sir.

Q. And lived there how long?

A. Five years.

30 Q. That was during the time that Mr. O'Leary had the first lease, was it not?

A. So I understood through Mr. O'Leary and Mr. Harris, that he had a five year lease there.

Q. Mr. O'Leary told you that he had a five year lease?

A. Yes, sir.

Q. And you stayed there until who went there?

A. I moved away and William Parry went there.

Q. Now in the harvest of 1909 John O'Leary cut this wheat, did he not?

A. No sir.

Q. This wheat that was sowed there?

A. No, sir.

10

Q. He didn't reap that wheat?

A. No, sir.

Q. Who did?

A. We plowed it under and put the field in potatoes the same spring I moved there.

Q. What I am trying to show is, no one else cut it?

A. No, sir.

Q. Were you there in 1914?

A. I think I was.

20

Q. You left in the spring of 1914 before Mr. Parry took possession, did you not?

A. Yes, sir.

Q. Did you ever hear Mr. O'Leary say anything with respect to leaving any wheat on the farm or growing grain on the farm?

Mr. Palmer. I object to that as not cross examination, and calling for a statement made by a decedent. This witness has testified to no transactions with the decedent. It is not cross examination.

30

A. No, sir.

WILLIAM CLIVER, sworn for plaintiff.

Direct Examination by Mr. Palmer.

Q. Where do you live, Mr. Cliver?

A. Southampton Township.

Q. You are a farmer?

A. Yes, sir.

Q. Did you attend the sale at the Cooper farm in
10 March of this year?

A. Yes.

Q. Did you buy some grain at that time?

A. Bought twenty acres.

Q. Did you go to harvest that later in the year?

A. I went there on Sunday, I don't remember the
date—

The Court. Was that twenty acres of wheat?

20 Mr. Palmer. No, rye.

A. I saw the tenant there and asked him if he had
any objection—

(Objected to.)

Q. Did you see Mr. Harris?

A. Not at that time.

Q. Did you go there later and see Mr. Harris?

A. No, sir; he came to my place.

30

Q. What did he tell you there?

A. Forbid me coming on there and cutting it.

Q. Now, Mr. Cliver, what was wheat worth in
July of this last year?

(Objected to.)

The Court. Have you shown that he knows?

Q. Do you know what wheat was selling for in July?

Mr. Davis. I think it is the particular time that this was taken, too.

10

Mr. Palmer. Yes, this was July.

Mr. Davis. You have got to get closer than that.

Mr. Palmer. The fore part of July.

A. Barclay Allen sold his for—

Mr. Davis. I move that be stricken out.

20

Mr. Palmer. His knowledge of sales comes from his knowing what it is selling for in the neighborhood; it doesn't necessarily have to be his own sale. It is not a subject that is subject to any peculiar value; it is a common commodity in the market, has a certain value at certain times. Anybody that has any reason to know anything about it knows what the selling price is. He doesn't have to qualify as an expert.

The Court. You may show how familiar he is with it. Of course it does not require expert knowledge. 30

Q. Do you know of any sales being made about that time?

A. Barclay Allen sold his for—

(Objected to.)

The Court. Sales in that locality, generally.

A. \$1.10

Mr. Davis. He has not shown any knowledge. I move that be stricken out. The question was whether he knew what it sold for generally, not what it did sell for.

10

By the Court.

Q. Have you raised grain and sold wheat in that vicinity?

A. Yes, sir.

Q. Are you a farmer?

A. Yes, sir.

Q. Have you been a farmer in that locality?

A. All my life time.

20 Q. Then do you know as a farmer, living in that locality and being familiar, having grown and sold wheat, what wheat was worth in the market early in July, 1915?

A. Well, Mr. Hopkins here at Moorestown paid \$1.10 to two different parties I knew, right from the machine, right out in the field.

Mr. Davis I move that be stricken out as not responsive.

30

By the Court.

Q. Just eliminating Mr. Hopkins, but speaking generally, do you know what wheat was worth in the market in the locality in Vincentown early in June of 1915.

Mr. Davis. He can answer yes or no.

Q. Now do you know? Say yes or no.

A. This man that sold this wheat got \$1.10.

By Mr. Palmer.

Q. Just say whether you know or not.

A. I don't know then.

10

By the Court.

Q. Don't you know what wheat was worth in that neighborhood?

By Mr. Palmer.

Q. Mr. Cliver, did you see this wheat on this Cooper farm?

A. I did.

20

The Court. Well, gentlemen, is there any question about what wheat was worth at that time?

Mr. Palmer. None at all as far as I know.

The Court. Do you make a point of that?

Mr. Davis. I don't know what it is worth and I do not believe Mr. Palmer knows unless he is dealing in it. I am not, that is very sure, and I don't know what it was worth. 30

The Court. Well, can't you gentlemen agree on a price so we can get along in this case?

Mr. Davis. My client tells me it was worth 90 cents, depending upon the quality.

Mr. Palmer. Certainly, no question about that.

The Court. Do counsel agree that it is worth between 90 cents and \$1.10, according to the quality?

Mr. Davis. I guess that is pretty near right, yes,
10 sir.

By Mr. Palmer.

Q. Did you see this wheat, Mr. Cliver?

A. I saw it passing the roadside. I wasn't over in the field.

Q. What, in your opinion, would that wheat produce per acre?

20 Mr. Davis. I object to that, a man just passing along the road and asked what a twenty-two acre field would produce.

By the Court. Well, do you know about it, Mr. Cliver, to tell the yield per acre?

A. Well, there is a difference in the yield of wheat crop in different fields. I should say anywheres from—

30 Mr. Davis. Wait a minute. Let us not guess at it. Answer his Honor's question.

A. Twenty or thirty bushels to the acre.

Mr. Davis. I move that be stricken out. That is not what his Honor is asking you.

The Court. What was the question?

Mr. Davis. Your Honor asked whether he knew and he said the yield of wheat varies.

By the Court.

Q. Are you familiar with the land upon which this wheat was growing?

A. Yes, sir.

10

Q. Did you see the wheat growing?

A. I did.

Q. Well, tell us—

Mr. Davis. Now if your Honor please, he has already said that he only saw it as he went along the road, and I submit that is not such a familiarity with it as would give him the information.

Q. Tell us as near as you can, if you can tell us at 20 all, what the yield per acre was.

A. Twenty-five bushels to the acre.

Cross Examination.

By Mr. Davis.

Q. Now Mr. Cliver, you were not in this wheat at all, were you?

A. No, sir.

Q. And all that you saw of it after it had reached a state of maturity was by riding along the road; that is a fact, isn't it?

30

A. Yes, sir.

Q. And by riding along the road you mean along the lane that leads into the farm, don't you?

A. Yes, sir.

Q. That is not a public road?

A. No, sir.

Q. You were up there how many times?

A. Oh, I didn't take count of the times.

Q. The times you went up there to see this wheat?

A. I was by there two or three times.

10 Q. I am talking about the time after it had reached maturity; you were there once on Sunday, weren't you?

A. Yes, I was there on Sunday and I went there after it was cut, what they had cut.

Q. After it had been cut?

A. Yes, sir.

Q. That is, through the lane?

A. Yes, sir.

Q. But never into the wheat at all?

A. No, sir.

20

By the Court.

Q. You are calling it wheat. Was it wheat or rye?

A. Wheat.

By Mr. Davis.

Q. Your estimate of twenty-five bushels per acre was just an estimate based upon looking at it as you went along the road?

A. It looked pretty good over the field.

30

Won't you answer the question? That is the case and that is the opportunity that you had to see it, wasn't it?

A. Certainly.

JOSEPH O'LEARY, recalled for plaintiff.

Direct examination by Mr. Palmer.

Q. Mr. O'Leary, you have been a farmer for a number of years?

A. Yes.

Q. Did you see this field of wheat on the Cooper farm in July of 1915?

A. Yes, sir.

10

Q. What, in your opinion, would be the yield per acre from that field of wheat?

A. Twenty-five bushels.

Q. Was it good wheat?

A. Yes, sir.

Cross Examination.

By Mr. Davis.

20

Q. When did you see it?

A. The fore part of July, before it was cut.

Q. Where were you?

A. Right over along the field.

Q. Which side.

A. Next to Mr. Powell.

Q. Then you mean the lane that leads into the farm?

A. No, sir.

Q. On the other side?

30

A. On the south side of it.

JOHN P. LIPPINCOTT, sworn for plaintiff.

Direct Examination by Mr. Palmer.

Q. Mr. Lippincott, where do you live?

A. I live in Mount Holly.

Q. You are a farmer, have been?

A. Well, I have some farms that I have run and I assist them. I have farmed all my life.

10 Q. For how many years?

A. I farmed for myself about forty-six, I think.

Q. Do you know the Cooper farm near Vincenttown?

A. Yes, sir.

Q. Were you present at the sale made in March, 1915?

A. Yes, sir.

Q. You were a clerk at the sale, were you not?

A. Yes, sir.

20 Q. Did you have any conversation with Mr. Harris at that time with reference to the sale of this grain?

A. Yes, somewhat.

Q. Will you tell us what that was?

A. Well, I ordered them to sell twenty acres of grain of Mr. Harris'. I told him I knowed all about it and he thought I didn't. He said he sowed the grain and I told him he didn't. But I told them to sell twenty acres of grain.

Q. What other conversation with Mr. Harris did you have?

30 A. Well, he told me when I first commenced to talk to him, it was in reference to the year that Butterworth left, and I knew that he had the grain that year, Butterworth had. The next year he undertook to run the farm himself and his man left during the season and

he told me, Harris did, Mr. Harris, that he sowed the grain that year. But I am not authority for it at all, because I didn't see it nor know anything more about it.

Q. That was a year?

A. That was the year before the sale.

By Mr. Davis.

Q. The year before the sale?

A. The sale, 1914, the fall of 1914.

10

By Mr. Palmer.

Q. Did he tell you how much he sowed?

A. No, he didn't tell me how much he sowed.

Q. Did he tell you he sowed it in that year?

A. He said he had his own teams and sowed it himself.

Q. And he said the grain that had been offered for sale was what he had sowed himself the year before?

20

A. That is what he told me.

Q. Did he say anything about having sowed grain on the farm before John O'Leary took it, the year before John took it?

A. Well, that was—yes, that was the time, in the first year that he took the farm.

Q. The first year after John took the farm?

A. Yes.

Q. Did he tell you where he had sowed it?

A. No, he didn't tell me where.

Q. Did he tell you what had become of it during the following year?

30

A. No.

Q. Mr. Lippincott, do you know the price of wheat in July of this year?

A. Oh, wheat was quoted from 15 to 20 in July.

Q. You mean \$1.15 to \$1.20 a bushel?

A. Yes. Millers gave \$1.10 for it.

Q. The miller was giving \$1.10?

A. That is what they gave for it, yes, sir, at that time.

Cross Examination.

10 By Mr. Davis.

Q. Mr. Lippincott, at this sale in March, 1915, there was some little argument between you and Mr. Harris with respect to the right to sell this wheat, wasn't there?

A. Why—

Q. Just answer yes or no.

A. I told him—

Q. No, I just want to know if there was such.

20 A. Oh, well, just a little talk, of course. Mr. Harris and I often had a talk.

Q. And he told you that the wheat belonged to him because the year that John took possession of the farm the first time, that he had sowed the wheat?

A. He told me that.

Q. That is what he told you, was it?

A. Yes.

Q. And he objected to the sale of this wheat?

A. Yes.

30 Q. Because of that reason?

A. Yes.

Re-direct Examination.

By Mr. Palmer.

Q. Now Mr. Lippincott, you are familiar with the custom existing among farmers as to their right to have the away-going crops?

A. Yes, sir.

Q. Now suppose, Mr. Lippincott, that there was some wheat sowed on the farm before John O'Leary took it and that his lease provided for his sowing not more than twenty-five acres of grain, and that if he did sow more than twenty-five acres the excess above twenty-five should be left on the farm for the benefit of the land- 10 lord at the expiration of his term, and that the wheat sowed by the landlord preceding the tenancy was plowed in by the tenant; would the landlord be entitled to have any grain remaining on the farm?

Mr. Davis. I object. That is the question of interpretation of a lease, if your Honor please, and is a question for the court.

Mr. Palmer. It is a question of custom.

20

The Court. The court must construe the contract.

Mr. Palmer. Very well, then; if my friend is relying entirely upon the contract I am perfectly willing that that situation should result. In our argument this morning he stated that he was relying not only upon the contract but the custom existing.

The Court. Well, the trouble is with me, I can't see that it would be admissible evidence. It may be at a later stage of the case. The defence is predicated upon the theory— 30

Mr. Palmer. I will withdraw the question for the time being.

Re-Cross Examination.

By Mr. Davis.

Q. Now Mr. Lippincott, the custom is in the neighborhood, is it not, that when a tenant goes on a
10 farm and takes at the time that he comes the away-going crops, that when he leaves he leaves the away-going crops; that is a fact, isn't it?

Mr. Palmer. I object. The question of custom has just been ruled out.

Mr. Davis. No, the question of custom has not been ruled out. The question as to interpretation of the law was ruled out. My objection was that it was a ques-
20 tion of his interpretation of the law, and I do not think Mr. Lippincott qualifies or attempts to qualify as a lawyer.

The Court. The difficulty about the question is that Mr. O'Leary and Mr. Harris—

Mr. Davis. I will withdraw my question.

The Court. —put their contract in writing. Un-
30 less there is something about the writing which calls for explanation the writing is the contract. All right. The question is withdrawn.

Mr. Palmer. Now if your Honor please, I desire

to offer the lease, dated September 17, 1913, made between Alexander Harris—

The Court. Did you put the first lease in?

Mr. Palmer. No. This is not the first lease, it is the second lease.

The Court. Are you going to offer that?

10

Mr. Palmer. No, I don't think that has any relevancy at all. That had terminated when this one was made. I offer the lease and rest.

Mr. Davis. Then I move to strike out all the testimony relating to the condition prior to the date of this lease.

The Court. The motion is denied for the time being.

20

Mr. Davis. He has offered a lot of testimony which long antedates this lease.

The Court. Well, it was simply anticipating your defence.

Mr. Davis. Well, I think it is incompetent, immaterial, irrelevant and inadmissible.

The Court. Well, you let it go in.

30

Mr. Davis. Well, I did it on the theory, of course, that he was going to offer the first lease.

The Court. It is in. I can't see how to rule it out.

(Objection noted for defendant as ground of appeal.)

Mr. Davis. I object to the offer of the lease because there is no proof of signatures.

10 Mr. Palmer. I thought you admitted the signatures.

Mr. Davis. My only reason for it was requiring formal proof of the lease but also its cancellation. If the cancellation is admitted without further proof I have no objection to the lease.

Mr. Palmer. Your client made that memorandum on the back. I am offering it all.

Mr. Davis. All right then.

20

The Court. Formal proof of the execution is waived then, as I understand it?

Mr. Davis. Both of the lease and its cancellation.

(Paper marked Exhibit P 1.)

PLAINTIFF RESTS

30

M. Davis. I move at this time for a nonsuit.

The Court. I am inclined to hold your motion until the conclusion of the whole case. I will pass upon it at the conclusion of the case.

DEFENDANT'S TESTIMONY

ALEXANDER HARRIS, sworn for defendant.

Direct Examination by Mr. Davis.

10

Q. Mr. Harris, you are the owner of the Cooper farm?

A. Yes, sir.

Q. You got possession of this farm when? When did you first buy it?

A. About nine years ago or ten; I couldn't say rightly.

Q. The first year that you owned the farm, who occupied it?

20

A. Mr. Butterworth.

A. That is Samuel Butterworth?

A. Yes,

Q. Was he there more than one year or two years?

A. He was there two years.

Q. At the expiration of his two years who farmed it?

A. I did.

Q. And how long did you farm it?

A. One year.

Q. You have a farm across the road and a little nearer Vincentown, have you not?

30

A. Yes.

Q. Farm the two farms in connection with each other?

A. Yes, sir.

Q. Now after you had farmed it for a year who became the tenant?

A. Mr. O'Leary.

Q. That is John O'Leary?

A. Yes, sir.

Q. And you gave him a lease, did you, or not?

A. I did, yes, sir; for five years.

Q. I show you a lease dated the day of Jan-
10 uary, 1909, between Alexander Harris and John O'Leary,
Jr., purporting to lease farm known as the Cooper farm
from the 25th day of March, 1909, for a period of five
years at the rental of \$1,000—

Mr. Palmer. I object to the reading of the contents
of this lease.

Mr. Davis. I am not through with my question.

20 The Court. Just let him finish.

Mr. Davis. And I ask you if that is the instrument
or lease by virtue of which Mr. O'Leary entered into pos-
session of the farm.

Mr. Palmer. That is objected to upon the ground
that the lease expired some years before the lease that
has been offered and has no connection or relation to it.

30 (Objection overruled. Objection noted for plaintiff
as ground of appeal.)

The Court. Do you waive the formality of proving
signatures?

Mr. Palmer. Yes, no question about the signatures.

(Paper offered in evidence and marked Exhibit D
I.)

Q. During the year that you farmed the farm did
you sow any fall grain?

Mr. Palmer. I object. If they stand upon the lease
then the situation is disclosed by the lease entirely; that is 10
all there can be to the situation. Anything that this man
may have done prior to the making of the lease, prior to
the tenancy of Mr. O'Leary, can have no relevancy what-
soever.

The Court. I am not so sure that that is right. The
objection is overruled.

(Objection noted for plaintiff as ground of appeal.)

(Question repeated.)

20

A. Yes, sir.

Q. What did you sow?

A. Wheat.

Q. Where?

A. Right in this same field, that is, within this last
year.

Q. Where is that field?

A. Right north of the house.

Q. How many acres did it contain?

30

A. About twenty-seven, but then John taken three
acres—

Mr. Palmer. I object to any transaction with the decedent.

Q. Was this grain on the farm on the 25th day of March, 1909?

A. Yes, sir.

Q. Did you take the grain off of the farm?

A. No, sir.

Q. That is, in the year 1909, the year after Mr. O'Leary had entered into possession?

A. No, sir; I did not.

Q. Now Mr. O'Leary continued in possession for five years under this lease, did he not?

Mr. Palmer. I object to that as calling for a transaction with the decedent.

Mr. Davis. Yes, but there are two plaintiffs and I have got a right to go as against the other.

20

The Court. Does that statute apply to this case?

Mr. Palmer. Certainly.

The Court. Is anybody sued in a representative capacity here?

Mr. Palmer. Mrs. O'Leary is bringing suit.

30

The Court. Is anybody being sued?

Mr. Palmer. It works both ways.

Mr. Davis. It might apply to Mrs. O'Leary but not to Cliver.

Mr. Palmer. Cliver's title is derived from the purchase from Mrs. O'Leary, so as to transactions previous to March of this year the statute must apply. Anything since Cliver purchased in March of this year is one thing; anything prior to that is another consideration.

(After further argument:)

The Court. So far as Mr. Cliver is concerned, Mr. O'Leary, the intestate, is neither suing nor being sued; 10 and any transaction with him in Mr. Cliver's case can be made evidence.

Mr. Palmer. Yes, but Mr. Cliver's interest did not arise until March of this year. This question relates to the situation preceding that.

The Court. I understand, but it may be connected, however.

Mr. Palmer. It cannot be, because it did not arise, 20 did not exist.

(Question repeated. Objected to. Objection overruled. Objection noted for plaintiff as ground of appeal.)

Mr. Palmer. How does that question relate to Cliver's interest or Cliver's case at all?

Mr. Davis. Tracing his title to this ground. 30

The Court. Well, it is a preliminary question. I understood from the opening of Mr. Davis that he was going to show that there was some contemporaneous

agreement between O'Leary, the tenant, and Harris to O'Leary, which was not inconsistent with the written lease, and which contemporaneous arrangement would destroy your claim for the emblements, the wheat.

Mr. Davis. That is right, sir.

Q. The question is, Mr. O'Leary stayed there during the five years of this lease?

10

(Objected to. Objection overruled. Objection noted for defendant as ground of appeal.)

A. Yes.

Q. At the time that Mr. O'Leary went into possession of these premises in 1909 was there any agreement between you and him with respect to the grain that was then on the place?

20

Mr. Palmer. I object. It is certainly calling for a conversation and transaction with the deceased.

The Court. The court has ruled that that testimony cannot be regarded by the jury, must be disregarded by the jury in the case which Mrs. O'Leary brings in a representative capacity by the defendant; but it is evidence, it is admissible evidence only in the Cliver case.

(Objection noted for plaintiff as ground of appeal.)

30

Q. Now what was that agreement? What was the agreement, Mr. Harris?

A. Between Mr. O'Leary and I?

Q. Yes.

(Objected to. Objection overruled. Objection noted for plaintiff as ground of appeal.)

A. The agreement was to leave as much grain on the place as he found when he taken the place for five years; and the same—

Mr. Palmer. Now I move that that be stricken out, as it is not within the lease, which covers all the arrangements between the parties. 10

The Court. Well, Mr. Davis, you ought to show if you can show the circumstances, how this matter came about and when this other arrangement was made if it was made at all.

Mr. Davis. I am going to get that.

Q. Now when was this agreement made, Mr. Harris? 20

(Objected to.)

A. Between Mr. O'Leary and I?

Q. Yes.

A. The same year that he taken the farm for five years.

Q. How near to the signing was the agreement with respect to the lease, the first lease?

A. I don't understand.

Q. Well, you said that you had an agreement with Mr. O'Leary with respect to the grain that he was to leave on the place and the grain that he found on the place. 30

A. Yes, between him and I.

Q. Now we want to know when was that made,

how near to the making of the lease of the farm?

A. About the same time.

Q. The same time?

A. Yes, sir.

By the Court.

Do you mean it was made before the signing?

A. No, sir; after we signed the lease, the lease
10 drawn.

Q. It was afterwards?

A. It was right at the time that he was to sign the
lease that him and I made the agreement.

Q. Before he had signed the lease?

A. Yes.

Q. Before he had signed the lease?

A. Yes, just about the time he was going to sign it
that day.

20 By Mr. Davis.

Q. And that agreement provided for what, Mr.
Harris?

Mr. Palmer. I object. The testimony discloses an
agreement made preceding the execution of the lease.
The lease assumes every agreement made as being in-
corporated there.

30 Mr. Davis. Oh, no. This lease is silent on that
question. That does not mean that when a man makes
a writing that everything that is said between the parties
is incorporated with the agreement. When the lease
speaks of it of course that is true; when the lease speaks
of the subject matter of course that is true; but the lease

does not speak of that subject matter and therefore there is no presumption that it is taken in the lease.

(Mr. Palmer reads from the lease.)

The Court. It is the law that where people enter into a contract in writing all that they have said and done with reference to the subject matter of the contract antecedent to the execution of the contract is supposed to be embodied in the contract and the only contract of the 10 parties.

(Objection noted for defendant as ground of appeal.)

Q. Now Mr. Harris, when you came up to the signing of this second lease where was it signed?

A. In our house.

Q. Who was present?

A. My daughter.

Q. Mary?

20

A. Yes, sir.

Q. Now what was said and done by you and Mr. O'Leary with respect to the crops that were growing, crops that were then on the farm?

A. Just the same as—

Mr. Palmer. I object. We have got the same situation again. First the objection is as to conversation and transactions with the decedent and conversation prior to the execution of the instrument which embodies what the terms were. 30

(Previous testimony repeated.)

The Court. You mean before the lease was signed?

Mr. Davis. The second lease, just to relieve your Honor of any prejudice in the matter because of anything they may have said before, the second lease contains a written memorandum to that effect.

The Court. To what effect?

10 Mr. Davis. The leaving of the grain on the farm.

The Court. Well, if it is in the lease it is not necessary—

Mr. Palmer. It is not in the lease, it is a memorandum on the back, not signed at all.

Mr. Davis. I think your Honor will find it is in the lease.

20

Q. Now, Mr. Harris, you got this lease how, the second lease?

A. How did I get it?

Q. Yes.

A. Got it drawn out and John came over to the house—

Q. No, I mean did you get it through the mail or delivered to you or how?

A. No, Mr. O'Leary fetched it over.

Q. The second lease?

30

A. The second lease.

Q. Over to your house for signing?

A. Yes.

Q. Now when he came to your house for signing what was said and done by you with respect to the grow-

ing grain that was then on the farm, if anything?

Mr. Palmer. I object to that for two reasons: first because it is a transaction with the decedent; and secondly because—

By the Court.

Q. Well, say what was said between you and John O'Leary before the second lease was signed. 10

A. Well, him and I talked over—

Mr. Palmer. That is what I object to. May I have an exception to this ruling?

The Court. I am trying to find out whether this was a matter which arose before or after the signing of the agreement.

Mr. Palmer. Well, you have asked him what was 20 said, not as to time. That is the point that I am objecting to, was to the conversation being given.

The Court. No, I want to know now whether or not you and John O'Leary did not talk all about your business with reference to the use of this farm and the grain before the last lease was signed.

A. We talked over just the same as we did before, before this second lease was drawn, and he got those two 30 leases drawn and fetched them over to the house.

Mr. Palmer. I object to what he said.

The Court. I don't want anything what he said.

Mr. Palmer. The witness was volunteering.

By Mr. Davis.

Q. Now when you came up to the signing what was done?

A. He signed it; I signed it first and then he signed it and then my daughter signed.

Q. What was done or said with respect to the 10 crops that were then on the farm?

Mr. Palmer. That is objected to for two reasons.

The Court. The objection is sustained to whatever happened between these parties.

Mr. Davis. But it is part of the lease, right here in the lease.

20 The Court. Well, then if it is in the lease he does not have to explain it.

Mr. Davis. Well, I think it is subject to explanation. I want to show why it is written on the back of the paper. Now what I am trying to get at is whether or not at this time this was considered a part of the lease, this arrangement that was written on there at that time.

30 The Court. Well, you will have to prove all the facts and the court will rule when the facts arise.

Q. I show you, Mr. Harris, what purports to be a lease dated December 17, 1913, and ask you in whose handwriting is the part in handwriting reading—
(Objected to.)

The Court. You need not read the contents. Let him look at the handwriting.

Q. Indicated here.

By the Court.

Q. Whose handwriting is that, Mr. Harris, if you know?

A. My daughter's.

10

By Mr. Davis.

Q. Mary?

A. Yes.

Q. And when was it written there?

A. At the time he fetched the lease over there, the two leases.

Q. At the time it was signed or not?

A. Yes, at the time it was signed.

20

Q. May I ask whether or not the matter which was therein incorporated—how it came to be incorporated there, how it came to be written there?

A. Well, because he said the two leases—

Mr. Palmer. I object, first, because it is calling for a statement of the decedent and secondly it is not incorporated within the lease. There appears to be some writing outside of the lease, on the back of the lease.

By the Court.

30

Q. When did your daughter write it?

A. At the time that we were signing the leases.

Q. Written before the lease was signed, was it?

A. Yes, sir.

The Court. What is your question?

Mr. Davis. I was asking him to tell how it came to be written there.

The Court. I cannot see, Mr. Davis, that that is important, because he says it was written on there by his
10 daughter before the lease was executed. It is evidently no part of the lease. It is something that occurred before that was not put in the lease, it was put on the outside of the lease. It does not appear to be signed by the parties. I do not see that it has any significance at all.

Mr. Davis. Well, that is just the point that I wanted to take the testimony on, to show your Honor that it was at that time considered by the parties as a part of the lease.

20

(Continues argument and cites authorities.)

The Court. Well, I will pass that for the time being. I will give you a chance to furnish me some law which sustains your position. I am not inclined to dispose of the case tonight anyhow. I will consider the legal aspects later.

Mr. Davis. Well, the proof that I have, if your
30 Honor please, is purely along that line, with reference to the defence in the Cliver case. Then I raise that law with respect to the defence both in the Cliver and the O'Leary case.

The Court. Is that all you have to offer?

Mr. Davis. That is all I have from this witness.

The Court. Well, I am disposed to exclude this proof that you desire to offer, reserving the right, however, to change my mind between now and Thursday morning.

(Objection noted for defendant as ground of appeal.)

10

Cross Examination.

By Mr. Palmer.

Q. Mr. Harris, the field that was in grain this present year, 1915, you cut that grain, didn't you?

A. This year?

Q. Yes.

A. No, sir; I didn't. My tenant done it, the man I rented the farm to got the grain, the same as to leave that 20 much on it.

Q. That grain this present year was wheat or rye?

A. It was wheat.

Q. And that was the same field you had planted in wheat in the year 1908?

A. Yes, the same field that I planted in wheat the year that I farmed the farm, yes.

Q. So that when John O'Leary took the farm in 1909 the field that you say then was planted in wheat, planted by you, was the same field in which wheat was 30 cut from during this present year, 1915?

A. Yes, sir.

Q. There was no other wheat planted by you anywhere else on the farm?

A. No, sir.

Q. That was the only field that had been planted by you?

A. Yes, sir.

Q. And that is the same one that had the wheat in about which we are in dispute here?

A. Yes, sir.

Q. I show you a check dated April 14, 1913, drawn to your order and purporting to be signed by John O'Leary, Jr., and ask you if that is your signature upon
10 the back of that check.

A. Yes, sir.

Q. When was that check given to you?

A. I couldn't right say the date.

Q. Somewhere around the date of the check?

A. Yes.

Q. What was it given to you for?

A. For money that I had loaned him.

Q. What?

A. Money I had loaned.

20 Q. When?

A. The check shows it there.

Q. When you had loaned it to him?

A. Yes, I loaned him \$600 and he gave me \$100 and gave me a check for \$500, and the check went to protest and he never attended to it until the poor boy got killed.

Q. When did you loan him the money?

A. Well, I couldn't say that. The check will tell you there.

30 Q. This check will show you?

A. No, the other blank check is there and the duplicate both.

Q. What date was it loaned to him?

A. I couldn't say right now what year, but there is the check shows it.

Q. How long had he had it when he paid you back or attempted to with this check?

A. Well, he had it a little over a year.

Q. And was he a tenant on your farm at that time?

A. He was, yes, sir.

Q. Paying you rent for the farm?

A. He was, yes, sir.

Q. How much?

A. \$1,000.

10

Q. \$1,000 a year?

A. Yes.

Q. This was in 1912 and 1913?

A. I think so, yes.

The Court. I did not get the significance of those checks in this case. What are they for?

Mr. Palmer. They file a counter-claim against Mrs. O'Leary on the protested check of \$500. That is the 20 counter-claim filed in this suit.

The Court. It was not for rent?

Mr. Palmer. Oh, no. That is what I asked him about. That is just what I interrogated him about. They filed the check without any statement as to what it was for at all. The pleadings do not show anything except the check. That is what I am trying to find out.

The Court. How many checks are there, two or 30 one?

Mr. Palmer. One.

The Court. For \$500?

Mr. Palmer. \$500.

The Court. Protested check?

Mr. Palmer. Protested check, and that is what I asked him about, and he said it was for money loaned at various times.

10

Q. I show you Exhibit P 1 and call your attention to the signature under the written part on the back of that and ask you if that is your signature.

Mr. Davis. We admit that is his signature.

A. Yes, it is my signature, yes.

Q. Do you remember where you signed it?

A. No, sir; I don't.

20

Q. Didn't you sign it in my office?

A. I couldn't say now. I know it is my signature.

Q. You know what the body of it says, don't you?

A. Yes.

Q. You know that at that time you received a check from me, did you not, at the time you signed this?

A. That is, received a check for the rent?

Q. Yes. I gave you a check at that time.

A. You did, yes, sir.

Q. Or for the \$1,068?

A. Yes, sir.

30

Q. And for rent for the year ending March, 1915?

A. I don't understand what you mean by that.

Q. The check was for rent for the farm for the year ending March, 1915, this present year?

A. Yes, sir.

Q. He paid you a year's rent up to that time?

A. Yes, sir.

Q. Now there were some deductions and settlements arranged at that time, were there not?

A. Yes, there was.

Q. The full amount of rent was \$1,200, wasn't it?

A. Yes, sir.

Q. And you received a little over \$1,000. Did you say anything to me at that time about John O'Leary owing you \$500 on a protested check?

10

Mr. Davis. I think that is incompetent, irrelevant and immaterial. This was not any settlement.

The Court. If these gentlemen had mutual dealings and they were there squaring their accounts—

Mr. Davis. But they were not squaring their accounts. They were purely satisfying this lease.

20

Mr. Palmer. That tells what it is for.

Q. Did you at that time say anything to me about John O'Leary owing you \$500?

A. I think I did, yes, Mr. Palmer.

Q. Do you mean to say that it was discussed at that time?

A. Yes, sir; right in your office.

Q. That protested check?

A. That protested check.

Q. At the time we made that settlement with you?

30

A. I think so, yes. I said it to you in your own office.

Q. That was at the time it was dated?

A. Whatever time it was dated, this time, I showed

you about it at the same time, yes, sir.

Q. You signed this upon the day that it bears date, did you not?

A. I did, yes.

Q. And you saw me write that memorandum on the back, didn't you?

A. I seen you write it, but I didn't look, I only put my name to it when you handed it to me.

Q. Didn't you read it over before you signed it?

10 A. I did, yes.

Q. And you saw me write it first?

A. I did.

Q. And you mean to say that at that time you told me that John O'Leary owed you \$500 on this protested check?

A. I think I did, yes, sure.

Q. You are sure?

A. I told you I hadn't the check with me but I would fetch them in the course of a day or two.

20 Q. Did you ever bring them in to me?

A. I gave them to Mr. Davis.

Re-direct Examination.

By Mr. Davis.

Q. Now Mr. Harris, as I understand it, this check for \$500 was not for rent?

A. No, sir.

30 Q. And was for money loaned?

A. Yes.

Q. Now I show you a check dated April 9, 1912 to the order of John O'Leary, for \$200, and ask you if that is one of the checks.

A. That is one of them, yes, sir.

Q. I show you a check dated June 10, 1912, to the order of John O'Leary, Jr., for \$200 and ask you if that is one of the checks.

A. Yes, sir.

Q. I show you a check dated June 17, 1912, to the order of John O'Leary, Jr., for \$200, and I ask you if that is one of the checks.

A. That is all them. He drew them up his own self and I put my name on them.

Q. Did those checks go through bank, paid in 10 bank?

A. Yes, they went through bank, sure.

Q. Now these three checks amount to \$600?

A. Yes, sir.

Q. How came this check to be \$500?

A. He gave me \$100 when he was giving me this check, in money.

Q. \$100 was paid on—

A. In money, on account of this, and then he gave me a check of \$500. That made the balance of \$600. 20

Q. This check went to protest?

A. Yes, sir.

The Court. What is the date of this check?

Mr. Davis. This check is dated April 14, 1913.

The Court. There is three years' interest on it?

Mr. Davis. Yes, sir.

30

Q. Have you ever been paid this check?

A. No, sir.

Mr. Davis. I understand Mr. Palmer admitted the

signature on the check, the genuineness of the certificate produced, and I offer it in evidence. I offer, may it please your Honor, a check under date of April 9, 1912, signed by Alexander Harris and made to the order of John O'Leary, for \$200.

I offer in evidence a check dated June 10, 1912, to the order of John O'Leary, Jr., and signed by Alexander Harris, for \$200.

I offer in evidence a check dated June 17, 1912, to
10 the order of John O'Leary, Jr., for \$200 and signed Alexander Harris.

I offer in evidence a check on the Union National Bank, of Mount Holly, New Jersey, dated April 14, 1913, to the order of Alexander Harris for the sum of \$500 and signed by John O'Leary, Jr., the signature being admitted.

I offer in evidence a certificate of protest to date of April 16, 1913, the certificate being executed by S. L. Tomlinson, Notary Public.

20 (Checks marked Exhibits D 2, D 3, D 4, D 5, and D 6.)

WILLIAM PARRY, sworn for defendant.

Direct Examination by Mr. Davis.

Q. Mr. Parry, you were employed by John
30 O'Leary?

A. Yes, I rented the place on thirds last year.

Q. Sublet it of him?

A. Yes, sir.

Q. And you got one-third of what?

Mr. Palmer. I object. This is conversation with the decedent, no relevancy to this issue at all. It is subletting.

Mr. Davis. An admission of the decedent as to the obligation to leave the grain.

Mr. Palmer. You cannot prove that by conversation with the decedent. He cannot prove that by relating the conversation with the decedent. That is just the 10 point of the ruling of the statute, permitting testimony to be given of conversations with somebody after the person is dead, who is not able to appear and answer or deny it. That is just the purpose of the statute, and that is what this is.

Mr. Davis. I am offering this in the Cliver case.

Mr. Palmer. It doesn't make any difference which case you offer it in.

20

The Court. Answer the question.

(Objection noted for plaintiff as ground of appeal.)

A. I got one-third the wheat that was on the place.

The Court. The testimony, gentlemen of the jury, is not to be regarded in the suit which Mrs. O'Leary brings as administratrix. It will be received in the Cliver 30 case.

(Objection noted for plaintiff as ground of appeal.)

Q. You got one-third of the wheat?

A. Yes.

Q. Did you have any conversation with John O'Leary as to whether or not any wheat must be left on the place?

Mr. Palmer. I object. It is clearly a conversation with the decedent and clearly within the limitations of the rule.

10 The Court. That is true so far as Mrs. O'Leary's case is concerned but it is not so in the Cliver case. The court has ruled.

(Objection noted for plaintiff as ground of appeal.)

(Question repeated.)

Q. Answer yes or no.

A. Yes.

20 Q. And about when was it?

A. About when he was talking about it?

Q. Yes, about what time?

A. About the 18th or 20th of February, when I rented the place from him, subletted it.

Q. What conversation did you have with him with respect to leaving any wheat or grain on the place?

(Objected to.)

30 The Court. Between him and the decedent?

Mr. Palmer. It is clearly within the rule.

The Court. I understand your objection. You have got it enough, I guess, to protect you, Mr. Palmer.

The court has ruled, so that there can be no misunderstanding about it, this jury cannot be misled. They have been instructed to disregard this evidence in the suit where Mrs. O'Leary is administratrix and consider it in the Cliver case.

(Objection noted for plaintiff as ground of appeal.)

By the Court.

10

Q. You had a conversation with John O'Leary?

A. Yes.

Q. In which he told you to leave what?

A. That I was to leave as much wheat on the place as I found there; that that was his contract to do when he left the place.

Q. That was the agreement between you and him?

A. Yes, sir.

By Mr. Davis.

20

Q. And that was the agreement that—

The Court. No.

Q. To do with whom, did he say?

A. With Mr. Harris.

Q. When you went on the place how much wheat did you find on the place?

A. I couldn't exactly tell you. The same field that was cut last year. 30

Q. The same field?

A. Yes, the same field. It wasn't measured when we put it in. When we sowed it it wasn't measured. We sowed it right back.

Cross Examination.

By Mr. Palmer.

Q. The same field?

A. The same field that was there when I—

Q. When did you take the place?

A. I took the place the 18th day of March.

Q. What year?

10 A. 1914.

Q. The same time that Mr. O'Leary renewed his lease, then?

A. Yes.

Q. How much grain did you get off that field?

A. He had the selling of it all and he squared up with me. I got \$35 for my share.

Q. You got \$35 for your share?

A. Yes.

Q. Do you know how many bushels there were?

20 A. No, sir; I don't. He had everything to do with it. I know what I got for my share, that was all.

Re-direct Examination.

By Mr. Davis.

Q. \$35 was what part?

A. It was the wheat part. You know there was wheat and—

30 Q. In this same field?

A. Yes.

Q. Was that your one-third?

A. Yes. Well, I didn't cut the same field it was in. There was two separate fields in when I went there.

Q. Was there as much as there was in this field

that you sowed the year you went there?

A. Well, I suppose about the same, yes, sir.

Q. That was met after the taking out of the labor or what?

A. That was after the seed wheat was saved out and all, I got that share.

Q. \$35 for your third?

A. Yes, sir.

DEFENDANT RESTS.

10

PLAINTIFF'S TESTIMONY IN REBUTTAL

JOSEPH O'LEARY, recalled for plaintiff.

Direct Examination by Mr. Palmer.

Q. Mr. O'Leary, in the fall of 1908, you sowed some rye for your brother on the Cooper farm?

A. Yes.

Q. And you sowed it in the same field in which the wheat was growing this year?

A. No, sir.

Q. Where was it?

A. Right over next to the line fence, right next to where I live.

Q. Do you know where the field was that the wheat was growing in this year?

A. Yes, sir.

Q. How close to the field that you sowed?

A. How close to that field?

Q. Yes.

20

30

A. One field in between.

Q. One field in between?

A. Yes, sir.

Q. Was there any wheat growing in the field, this last field, in the spring of 1909?

A. Which last one do you mean?

Mr. Davis. Their own witnesses have testified to that, that there was wheat growing there.

10

The Court. How is that material?

Mr. Palmer. Particularly Mr. Harris. Mr. Harris says that he sowed only in wheat and that was the same field—

The Court. Is it a matter of any consequence?

Mr. Palmer. Yes.

20

The Court. Proceed.

Mr. Davis. Their own witness testified that the wheat was growing in that field.

The Court. Let him answer the question.

(Question repeated.)

30

A. Not that I remember

Cross Examination.

By Mr. Davis.

Q. Now you are not certain about it?

A. Well, I was there.

Q. I understand you were there, but you are not certain that this other man is mistaken, are you, when he says that he plowed it up?

A. Well, I helped plow the field too.

Q. You helped plow the same field?

A. Yes.

Q. Now what do you say, that the other man is at fault?

10

A. Well, I couldn't see any grain.

Q. Then his testimony is not true, as far as you are concerned?

Mr. Palmer. I object. This witness is not in a position to pass on the veracity of any other witness.

The Court. That is for the jury.

Q. You were a brother of John O'Leary?

20

A. Yes, sir.

DANIEL HAINES, recalled for plaintiff.

Direct Examination by Mr. Palmer.

Q. Mr. Haines, did you do any work on the Cooper farm in the fall of 1908?

A. Yes, sir.

30

Q. What did you do?

A. I helped plow a field that was all growed up in weeds and sowed it in rye.

Q. Where was that field?

A. Right back by Joe O'Leary's.

Q. And is that the field upon which there is wheat this present year, 1915?

A. No, sir.

Q. Did Mr. Harris sow any grain or any wheat in any field on that farm in the fall of 1908?

A. Not to my knowledge.

Q. Were you around there?

A. Yes, sir.

10 Q. Did you see any grain there?

A. Well, I didn't exactly see the grain growing.

Q. Were you around there during 1909?

A. Yes, I was. I worked there a year.

Q. All the year 1909?

A. Yes, sir.

Q. Was there any grain except wheat that you sowed and the rye that had been sowed by Joe?

A. I think there was a field of wheat plowed under.

Q. How much was there in that field?

20 A. Well, it was the same field that was in this year.

V. CLAUDE PALMER, sworn for plaintiff.

The Witness. With reference to the payment to Mr. Harris of the \$1,000 rent, which was paid to him by me in my office, a memorandum on the back of the lease is in my handwriting signed by Mr. Harris then, and
30 nothing was said by Mr. Harris about having any protested check of John O'Leary's.

No Cross Examination.

PLAINTIFF RESTS

DEFENDANT'S TESTIMONY IN
SURREBUTTAL

JAMES M. DAVIS, sworn for defendant.

The Witness. I want to say, if your Honor please, that I was in Mr. Palmer's office at the time that the cancellation was recorded on this lease, a copy of which 10 Mr. Palmer had in his office. There were present Mr. Harris and myself. Several times before that Mr. Harris had been in Mr. Palmer's office with respect to this same matter and had refused to sign any release at that time as stated by Mr. Palmer to me, not only at the time that this agreement or release was signed but also at former occasions. At the time that this cancellation was signed Mr. Palmer recalled that there was a suit pending of John O'Leary Jr., against Charles Gilbert, bailiff, for distress of rent that had been levied on John O'Leary's 20 goods, because he had not paid his rent; and the reservation was made in the cancellation of Mrs. O'Leary's rights to proceed with the dispute in that suit. At that time in my presence mention was made of the fact that there was a protested check of John O'Leary Jr., and later proof—

Mr. Palmer. This is objected to as not being surrebuttal, from this point on as not being thorough rebuttal.

30

The Court. The court in its discretion will allow it.

The Witness. And at that time it was stated to Mr. Palmer that presentation of this note would be made in

accordance with the rules of the Orphan's Court and the law and an affidavit sworn to. Subsequently such a proof was made, but this suit was brought before that time, before it was presented, and as a matter of fact instead of presenting, if I remember correctly about that—I think it is true—instead of presenting the note, the suit having been brought, we pleaded it as an offset; and I offer in evidence the affidavit of Mr. Harris proving this claim prior to the filing of the reply in this suit.

10

Mr. Palmer. What is the date of that?

The Witness. It is dated the 15th of January, 1915.

Mr. Palmer. That was prior to this suit, wasn't it?

The Witness. Yes, but not presented.

Mr. Palmer. Didn't you send me that claim?

20

The Witness. I don't know whether I did or not. I have the original here.

Mr. Davis. I offer this in evidence as showing the date of the proof of the claim in this case, being dated January 15, 1915, three or four days after the date of the cancellation.

30

(Paper marked Exhibit P 2.)

The Court. The occasion that is being talked about here, when Harris was in Mr. Palmer's office, was that when the cancellation of the lease occurred?

Mr. Davis. Yes, sir.

The Court. Where is that cancellation? Is it that lease?

Mr. Davis. It is on the back of the lease.

The Court. Let me ask you this question, Mr. Davis: did Mr. Harris produce checks, cancelled checks, which he gave to Mr. O'Leary? How many checks did he produce?

Mr. Davis. Why, he produced three cancelled checks, aggregating \$600.

The Court. He said O'Leary paid \$100 of it?

Mr. Davis. \$100 of it at the time that he made this second check for \$500.

The Court. Well, Mr. Palmer, have you any doubt but what Mr. Harris loaned Mr. O'Leary that money? 20

Mr. Palmer. I know absolutely nothing about it. Our hands are absolutely tied and our lips closed.

The Court. But here are the checks.

Mr. Palmer. Well, we know nothing about the situation. It may have been for something else for all we know. We don't know a thing about the situation. John 30
O'Leary is dead, the only man who does know the transaction is dead, and what it was for we don't know and have no way of finding out, no possibility of our knowing.

Mr. Davis. I ought to by way of testimony say to your Honor that there was a considerable sum of rent due at the time of the date of the cancellation. John O'Leary claimed credit by reason of some repairs that had been made to the premises—

Mr. Palmer. That does not figure here. That is in that other suit. I object to any testimony showing the details of that settlement. It speaks for itself.

10

The Court. Oh, well, you both testified to your recollection of what occurred with reference to the \$500 transaction. It seems to be independent—

Mr. Davis. Not the \$500 transaction, we didn't testify to that. Mr. Harris testified as to that, Mr. Palmer and I said nothing about it. We are testifying to the cancellation.

20 The Court. You didn't testify that he did say something to Mr. Palmer?

Mr. Davis. Oh, yes, I testified that at that time he said that he had a \$500 protested check.

30 The Court. That is exactly what I have stated. I have said that you gentlemen, both counsel, have said that in Mr. Palmer's office there was talk upon the part of Mr. Harris—rather, you said that Mr. Harris told Mr. Palmer about the \$500 check, which Mr. Palmer denies. He said no such thing happened. Now I ask Mr. Palmer whether in the light of these cancelled checks whether they seriously dispute this claim of \$500.

Mr. Palmer. We certainly do. We have abso-

lutely no knowledge about it and I think the situation will be disclosed in the argument without any question.

Mr. Davis. Well, it requires some proof, as I understand, to dispute in a court of law.

Mr. Palmer. We won't get any argument beyond the testimony; rest assured at that.

The Court. What is your motion?

10

Mr. Davis. My motion is for the direction of a verdict.

The Court. What kind of a verdict?

Mr. Davis. As against Cliver, a verdict of no cause of action, by virtue of the law of the state in the two cases which I have cited, namely, that where there is a voluntary surrender of the term before the expiration of the lease, the away-going crops do not go with the tenant but belong to the landlord; that therefore Mrs. O'Leary, in surrendering the premises as the administratrix of John O'Leary, Jr., surrendered such right, title and interest of, in and to the away-going crops as determined all interest whatsoever which she as administratrix has in the away-going crops; that this being done on January 11, 1915, she could by no possibility have made any title to the wheat on the 25th day of March, 1915, which was some three months subsequent, nearly three months subsequent to the date of her surrender of her right in the premises.

20

30

The Court. I want to hear you on that.

(Mr. Palmer replies.)

The Court. Well, counsel agree that by the law of New Jersey when a lease is cancelled by the consent of the parties the lessee surrenders all crops and everything else, in the absence of an agreement to the contrary. The law of the state is well settled in 10 Vroom and 24 Vroom. First is an opinion by Chief Justice Ewing, in Debow vs. Colfax; and the next is an opinion by Justice Elmer in Howell vs. Schenck. If the estate is between seed time and harvest determined by the act of the tenant the growing crop passes with the land to him; he thereupon becomes the immediate owner. If there is a termination by a surrendering of the premises or by cancellation of the lease, which is the same, the land and all the crops go to the landlord; unless, as I said a moment ago, there is a very clear understanding between the parties that that shall not be so.

The question before the court now is whether by the language employed in the cancellation of this lease the parties agree that the rule of law which I have just read did not govern the situation and that the administratrix of Mr. O'Leary's estate should have the right to go back and gather the crops and harvest them.

Now the language which counsel for the plaintiff relies on to support his contention is against the rule of law which I have read, as follows: "The within settlement being made without prejudice as to any claims of Emma M. O'Leary as administratrix against Alexander Harris." That is the language. What does that mean? Can that be said to mean that after she had thus expressly cancelled the lease and surrendered the lease to the landlord that she reserved the right to go back and gather the crop? Is that what that means?

Mr. Palmer. It doesn't mean anything else. This surrender, if your Honor please—that is dated January

11th. The actual surrender did not take place until long after. There was no time for Mr. Harris' tenant to go there, because he had the sale on the place in March.

The Court. When was the place to go back to the landlord?

Mr. Palmer. The 25th of March, was the agreement.

The Court. According to this surrender?

10

Mr. Palmer. Yes.

Mr. Davis. No, sir.

The Court. Yes, it was. Yes, that is what it says. It is dated January 11th, "Received of Emma M. O'Leary, administratrix of John O'Leary, Jr., the sum of \$1,068 in full for rent due on within lease for the 20 year ending March 25, 1915; and the within lease is hereby, by consent of the parties, cancelled as to the balance of the term;" that is, the balance of the time after March 25th.

Mr. Davis. No, your Honor, that doesn't read that. It says for the year ending that time. It says "is hereby". That is the present tense, a termination. There is nothing in the lease to show that the cancellation takes effect on March 25th. It is "Received rent for the year ending 30 March 25, 1915." The cancellation takes place now for the balance of the term.

The Court. Well, what is the balance of the term?

Mr. Davis. The balance of the term is from then on for two years and more.

The Court. No, she had paid her rent up to the 25th of March. The balance of the term from the 25th of March on. That is what it is. What is your motion?

Mr. Davis. My motion is for a direction of a verdict as to Cliver, no cause of action; and for Mrs. 10 O'Leary I ask for the direction of a verdict for the amount of the cancelled check, to wit, the sum of \$500, with interest thereon from April 14, 1913, together with protest fees amounting to \$1.74.

The Court. I will hold this motion, gentlemen. I will consider this matter.

(Adjourned until January 3, 1915, at 9.45 A. M.)

20

TESTIMONY

Mount Holly, N. J., January 3, 1916.

(Trial of the cause resumed at 9.45 A. M.)

The Court. There is a juror absent. Is there any objection to concluding this matter with eleven jurors?

30

Mr. Davis. I have none.

The Court. I am required to deal with three motions. In the first motion I am asked to direct a verdict, or instruct the jury to return a verdict of no cause of

action for the plaintiffs. Then I am asked to direct a verdict for the defendant upon the count in his claim against the plaintiff, who sues as administratrix.

In December, 1913, the intestate John O'Leary and the defendant Alexander Harris entered into a lease under seal. The subject matter of the lease was the use and occupation of a farm known as the Cooper farm, in the locality of Vincentown, in this county. The lease was to run for three years, beginning March 25, 1914, with the privilege of two more years. The rent was to 10 be payable in advance. In the lease the tenant covenanted not to sow more than twenty acres of grain in the fall. In the fall of 1914, while O'Leary was in the enjoyment of the first year of his term under the lease, he was suddenly killed while gunning. In the month of January, 1915, his administratrix paid all the rent that was then due for the year between the 25th of March, 1914, and the 25th of March, 1915, and she voluntarily terminated the balance of the term called for by the lease. The estate of the tenant was therefore terminated between 20 seedtime and harvest by the act of the tenant and therefore the growing crop passed with the land to the landlord.

The reservation clause in the receipt which evidences the cancellation of the balance of the term of the lease has no application to the growing crop of grain, because the cancellation of the lease as to the balance of the term after March 25, 1915, was unconditional. The legal effect of the reservation clause was to keep open 30 for future settlement any claims growing out of transactions between the intestate and the defendant, or between administratrix and the defendant in respect to any other matters arising prior to the 25th of March, when the estate of tenant should seed. That being so the motion to direct a verdict against the plaintiffs will prevail.

And this motion will prevail against the administratrix upon two grounds: first, that the intestate covenanted not to sow more than twenty acres of grain in the fall in any year and, on the further ground, that when she terminated her interest in the estate the crop went to the landlord.

The motion will be directed against the other plaintiff, because the estate of the intestate was terminated between seedtime and harvest and the crops by operation
10 of law went to the landlord.

The next question the court has to deal with is a motion for a direction in behalf of the defendant, who sues for money loaned. Are the checks in evidence, do you say, Mr. Davis?

Mr. Davis. Yes, they are offered.

The Court. Have you figured up the interest?

20 Mr. Davis No, sir; I haven't done that yet.

The Court. Will you figure up the interest?

Mr. Davis. I will right now, sir. It is \$580 and a dollar and some cents for protest fees. \$1.54, that amounts to.

The Court. Then it is \$581.54?

30 Mr. Davis Yes, sir.

The Court. Now there being no facts in dispute on the defendant's counterclaim for money loaned to the intestate the situation of fact in respect to that claim is not such as would be likely to create any difference of opinion

among fair-minded men as to whether that claim is due or not. The only fact in the case open to criticism is that—as Mr. Palmer said—when the settlement was made Mr. Harris never said anything to him about that claim, but Harris says he did. The court, however, must assume that Harris did not say anything about it. But even so, would that omission in the face of positive proof now by Mr. Harris, which is corroborated to some extent by the canceled checks, warrant the submission of any question about that claim to the jury? Of course it 10 is the law that wherever there are disputed facts or wherever there may be a disagreement among fair-minded men as to the effect of undisputed facts, the case must go to the jury. But I see nothing in this case warranting the submission of any question to you. The mere fact that defendant said nothing when in Palmer's office would not warrant the court in submitting any question to you. It does not appear by the proof that the parties met together for any other purpose than to pay the back rent and cancel the lease, and there were 20 other matters, as evidenced by the receipt, which were left open between the parties. Therefore, gentlemen of the jury, I direct you to return a verdict of no cause of action in the suit wherein Emma O'Leary, Administratrix, sues Alexander Harris as defendant, and in that case you will bring in a verdict of no cause of action, in so far as Mrs. O'Leary as administratrix is concerned, but you will bring in a verdict against her for the defendant upon his counterclaim for \$581.54, for money which he loaned, and which the checks show he loaned, 30 to Mr. O'Leary in his life-time.

Now in the other suit in which Mr. Walter Cliver sues Mr. Harris you will return a verdict for no cause of action. These verdicts you are rendering in obedience to the direction of the court.

EXHIBIT "P 1."

THIS INDENTURE, made the seventeenth day of December, A. D., nineteen hundred and thirteen, between Alexander Harris, of the Township of Southampton, in the County of Burlington and State of New Jersey, of the first part, and John O'Leary, of the same place, of the second part:

- 10 WITNESSETH, that said party of the first part has hereby let and rented to said party of the second part, and said party of the second part has hereby hired and taken from said party of the first part, all that farm and plantation, situate on the public road leading from Vincen-
20 town to Pemberton, joining lands of Charles Lippincott Estate, I. Henry Butterworth, John P. Hutchinson and others, and known as the Cooper Farm, containing about one hundred and ninety-six acres of land, be the same more or less, with the appurtenances, for the term of three years, to commence on the twenty-fifth day of
March, A. D., nineteen hundred and fourteen, at the yearly rent of twelve hundred dollars, payable on the twenty-fifth day of March, A. D., nineteen hundred and fourteen in advance, each and every year during said term.

And it is agreed that the said party of the second part is to have the privilege of extending this lease for two more years, making in all five years, if such extension is so desired.

- 30 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 to remove all persons therefrom.

And the said party of the second part covenants to

pay to said party of the first part the said rent as herein specified, and that at the expiration of said term, or other determination of this lease, 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.

And the said party of the first part covenants 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 10 said demised premises for the term aforesaid.

And said party of the first part hereby agrees to furnish all grass seeds necessary to be sown upon said premises during said term.

And said party of the second part hereby covenants that no corn stalks or wheat straw shall be sold or removed from said premises during said term; and that he will not sow over twenty acres in grain in the fall, and if he does sow over twenty acres, that all over twenty acres shall be left on said farm for the benefit of said 20 party of the first part; that he will reset three hundred panels of rail fence during the term; that he will cart all materials for repairs to the buildings and fences that said party of the first part provides or wishes done; that he will clean out and keep open all ditches, trim all fences and meadows; that he will sow all grass seeds that are furnished by said party of the first part; that he will farm in a good husbandlike manner the said premises, and will till and cultivate only such fields during said term as come in in the regular rotation of farming dur- 30 ing the said term; that he will spread all manure made on said farm in the Spring on the fields that are to be farmed in potatoes and corn; that he will feed all cattle and stock kept upon the said premises during said term in the barnyard, pens and stalls during the winter months.

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

Signed, Sealed and
Delivered in the
presence of
B. H. WHITE, ATT.
ALEXANDER HARRIS

ALEXANDER HARRIS
(SEAL)

JOHN O'LEARY, JR.
(SEAL)

10

Mount Holly, N. J., Jan. 11, 1915.

Received of Emma M. O'Leary, administratrix of John O'Leary, deceased, the sum of one thousand and sixty-eight dollars in full for rent due on within lease for the year ending March 25, 1915, and the within lease is hereby by consent of parties cancelled as to the balance of the term thereof. The within settlement being made
20 without prejudice as to any claims of Emma M. O'Leary as administratrix against Alexander Harris.

ALEXANDER HARRIS.

EXHIBIT "D 1"

This INDENTURE, made the day of January, A. D., 1909, between Alexander Harris, of the Township of Southampton in the County of Burlington and State of New Jersey, of the first part, and John
30 O'Leary, Jr., of the same place, of the second part,

WITNESSETH, that the said party of the first part has hereby let and rented unto the said party of the

second part and the said party of the second part has hereby hired and taken from the said party of the first part, ALL THAT FARM AND PLANTATION situate and being on the public road leading from Vincentown to Pember-ton joining land of Charles Lippincott estate, I. Henry Butterworth, John P. Hutchinson and others, and known as the Cooper Farm, containing about One Hundred and Ninety-six acres of land, be the same more or less, with the appurtenances thereof for the term of Five Years from the Twenty-fifth day of March, A. D., 1909, at the 10 yearly rent of ONE THOUSAND DOLLARS (\$1000.) payable as follows: Five Hundred Dollars on the twenty-fifth day of September, A. D., 1909 and Five Hundred Dollars on the Twenty-fifth day of March, A. D., 1910, and Five Hundred Dollars on the twenty-fifth days of September and March in each and every year thereafter during the continuance of this lease.

And the said party of the first part covenants that the said party of the second part, on payment of the said yearly rent, as herein provided for, and performing the 20 covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid. And the said party of the first part hereby agrees to furnish all grass seeds necessary to be sown upon said premises during said term.

And said party of the second part hereby covenants that no corn stalks or wheat straw shall be sold or removed from the said premises during said term; that he will not sow more than twenty-five acres in grain in the Fall of the year, and if he should sow more than 30 twenty-five acres, all over the twenty-five acres shall be left on the said farm for the benefit of the said party of the first part at the expiration of the said term; that he will reset three hundred panels of rail fence each and every year during the term; that he will cart all ma-

materials for repairs for building and fences from a reasonable distance, that may be necessary; that he will clean out and keep open all ditches trim all fences and meadows; that he will sow all grass seed that may be furnished by the said party of the first part; that he will farm in a good and husband-like manner the said premises, and will till and cultivate only such fields as come in during said term in the regular rotation of farming; that he will spread all manure made on said farm in the
10 Spring of the year of each year and every year on the fields that are to be farmed in potatoes and corn; that he will feed all cattle and stock kept on said premises during said term in the barn yard, pens and stalls during the winter months.

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 reenter the said premises and to remove all persons therefrom and repossess the
20 same; at the option of the party of the first part.

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

Signed, Sealed and	}	ALEXANDER HARRIS,
Delivered in the		
presence:		JOHN O'LEARY, JR.
WILLIAM J. BAUMGARDT		

JUDGMENT RECORD.

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JUDGMENT

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

EMMA O'LEARY, ADMRX. OF
JOHN O'LEARY, DEC'D.
VS.
ALEXANDER HARRIS

} JUDGMENT RECORD

10

The Court directed the jury to render a verdict against the plaintiff and in favor of the defendant for the sum of five hundred and eighty-one dollars and fifty-four cents. (\$581.54).

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Wherefore it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff the sum of five hundred and eighty-one dollars and fifty-four cents and his costs which are taxed at the sum of thirty-nine dollars and ten cents making in the whole the sum of six hundred and twenty dollars and sixty-four cents. Judgment entered February 4, 1916.

WM. S. GUMMERE, C. J. 30

Damages	\$581.54
Costs	39.10
	\$620.64

JUDGMENT

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

10 WILLIAM CLIVER
vs.
ALEXANDER HARRIS

} JUDGMENT RECORD

The Court directed the jury to render a verdict in favor of the defendant and against the plaintiff.

20 Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff his costs which are taxed at thirty-nine dollars and ten cents. Judgment entered February 4, 1916.

WM. S. GUMMERE, C. J.

