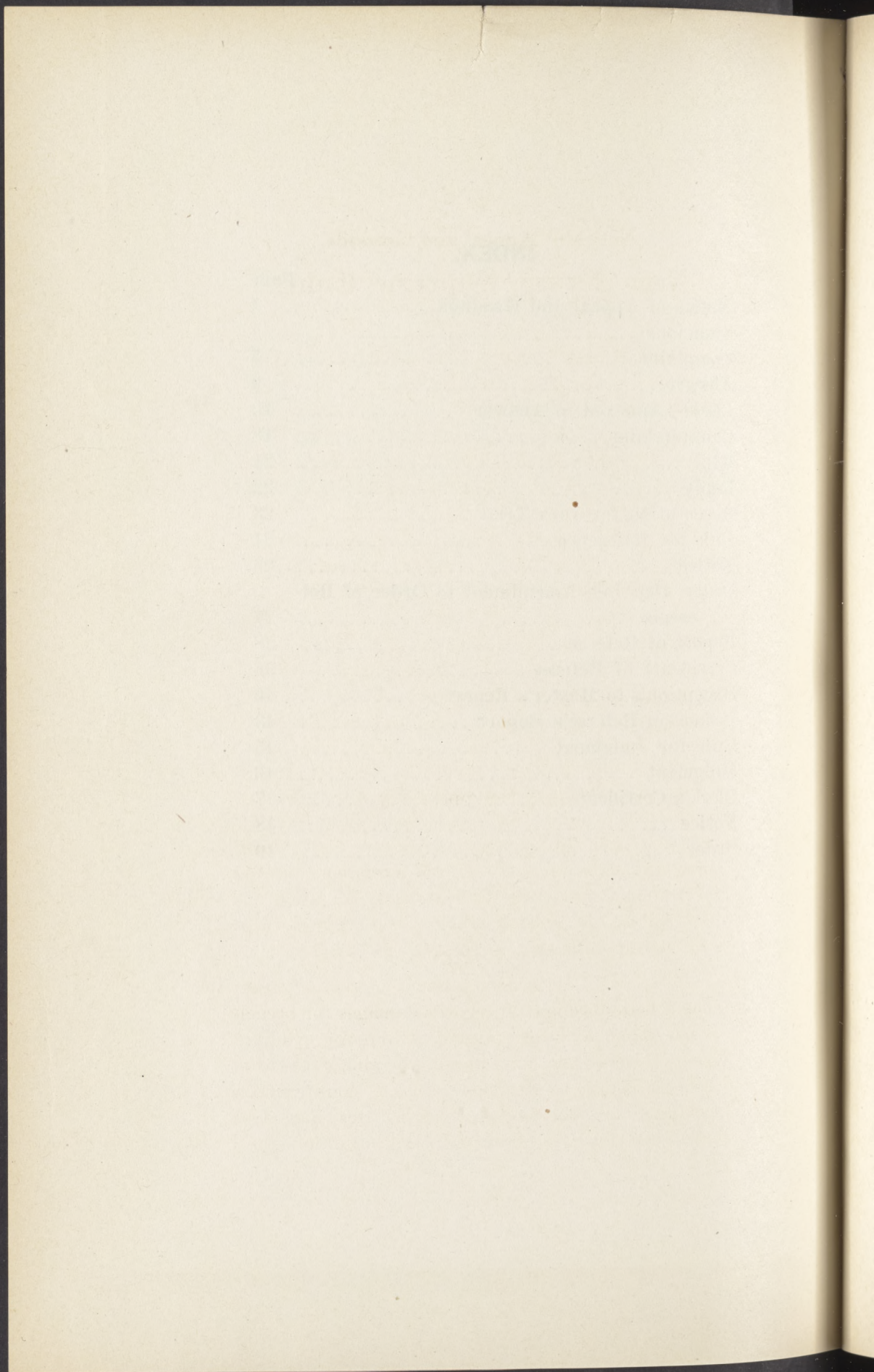


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Notice of Appeal and Grounds.
New Jersey Supreme Court.
 TO THE
 NEW JERSEY COURT OF ERRORS AND
 APPEALS.

10

GIUSEPPE BOCCHIERO,
 Plaintiff,

vs.

BENJAMIN CARRINO,
 Defendant.

Action at Law.

Notice of
 Appeal and
 Grounds.

20

To HERBERT A. KUVIN, ESQ.,
 Attorney for Defendant.

Take notice that the plaintiff appeals to the
 Court of Errors and Appeals from a certain rule
 made in the above entitled cause on October 31,
 1929 and from the report of the referee filed in said
 cause and from the whole of the judgment entered
 thereon in favor of the defendant and against the
 plaintiff in the sum of \$852.79 and \$290 costs of
 suit on the following grounds:

30

1. Because the action is not a subject of refer-
 ence it being brought to recover damages for breach
 of covenant for quiet enjoyment and for eviction.
 The defendant first filed an answer and afterwards
 through another attorney filed a counterclaim
 seeking to recover damages for injuries alleged to
 have been done by plaintiff to the building.

40

Notice of Appeal and Grounds.

2. Because on October 28, 1929 the cause was not listed on the call and the plaintiff did not appear in court. Afterwards the plaintiff was informed that the case had been called because it was listed in the Judge's book. The Court referred the cause to a referee. On November 21, of said year plaintiff made a motion before said court to strike out from the order his consent because erroneously incorporated therein. The motion was denied.

3. Because said order of reference was not filed with the clerk of the Circuit Court of Essex County as required by the statute.

4. Because on December 4, 1929 plaintiff filed with the clerks of the Supreme and Circuit Court reservations for a jury trial.

5. Because when the case was called for trial before the referee the plaintiff objected to the referee trying the case on the ground that no matters of account were in controversy. The referee overruled the objection and granted an exception.

6. Because the referee against plaintiff's objections admitted illegal evidence and decided questions involving unliquidated damages and held that the plaintiff should pay to the defendant \$998.29 for repairs made by the defendant to the building.

7. Because said report is in other respect illegal, erroneous and contrary to law.

8. Because the Circuit Court ratified and confirmed said report without seeing or considering the testimony or evidence submitted to the referee.

Notice of Appeal and Grounds.

9. Because the evidence submitted to the referee required a finding for the plaintiff and against the defendant, notwithstanding which the court did ratify and confirm the report of the referee to the contrary and enter judgment thereon in favor of the defendant and against the plaintiff.

10. Because said report was erroneously ratified and confirmed on May 15, 1930 and postea signed on the following day upon three days notice to plaintiff by reason whereof plaintiff prevented from objecting to its confirmation and filing exception thereto as provided by section 155 comp. stat. page 4101. 10

11. Because said order and rule erroneously dismiss and strike out from the record the demand made by the plaintiff for a trial by jury of the issues joined in said cause. 20

12. Because the Court in making said order and entering said judgment has deprived the plaintiff of his right to a trial of the issue joined in said cause by jury, as secured to him by the Constitution of the United States, the Constitution of the State of New Jersey and the Statutes of said state.

13. Because said order and judgment deprive the plaintiff of his property without due process of law as secured to him by the Fourteenth Amendment and the Constitution of the United States. 30

G. M. BELFATTO,
Attorney of Plaintiff-Appellant.

Service of a copy of the within notice is hereby acknowledged this 25th day of July 1930 as of time.

HERBERT A. KUVIN, 40
Defts. Attorney.

Summons.

Filed June 20, 1928.

The State of New Jersey, to BENIAMINO (known
also as BENJAMIN CARRINO.

You are summoned to answer
(L.S.) the annexed complaint of Giuseppe

Bocchiero, in an action at law in
10 the Supreme Court of New Jersey. And take notice that unless you file your answer to said complaint with the clerk of the said Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice
of the Supreme Court at Trenton this 18th day of
20 June, 1928.

FRED L. BLOODGOOD,
Clerk.

G. M. BELFATTO,
Attorney.

30

40

Complaint.

Filed June 20, 1928.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

GIUSEPPE BOCCHIERO,
Plaintiff,

vs.

BENIAMINO, (known also as Ben-
jamin) CARRINO,
Defendant.

Action at Law.

Complaint.

10

The plaintiff residing at #44 Summit Place, in
the City of Newark, County of Essex and State of
New Jersey, says that:

20

FIRST COUNT.

1. On August 22nd, 1924, defendant by lease
under seal, let to plaintiff a building known as
#178 Warren St., in said city, consisting of a
store, two apartments, and a small building in the
rear called "chicken market" for the yearly rent
of \$1380, payable in monthly instalments of \$115.
The store to be used for the sale of fish, fruit, and
vegetable; the chicken market for the care and sale
of chickens, and the apartments for dwelling pur-
pose. The defendant also covenanted that the
plaintiff should quietly enjoy the possession of the
said premises for said term.

30

2. On September 1st, 1924, the plaintiff under
and by virtue of said lease entered in possession
of said premises, and continued in the peaceful and

40

Complaint.

quiet possession thereof until June 10th, 1928 on which day the defendant wrongfully and maliciously entered upon said premises, and by his direction and under his authority divers persons tore down the east wall of said building, causing a large quantity of debris to fall in the alley ap-
 10 pertaining to said building, which is the only way to enter the chicken market and the yard of said premises from said street. By reason thereof, the regular operation and conduct of plaintiff's business was obstructed and impeded, and the plaintiff and his tenants disturbed in the peaceful possession of said premises.

3. Prior to June 10th, 1928, the plaintiff realized from the chicken business daily a net profit
 20 of \$20, and from the fish, fruit, and vegetable business \$15, and had the apartments occupied by two tenants paying \$23 and \$25 per month rent respectively. That by reason of said defendant's wrongful acts, the plaintiff has lost and until September 1st 1929, will lose said profits, and the rents of said apartments.

SECOND COUNT.

30 1. Paragraphs 1 and 2 of the first count are hereby repeated and made a part of this count.

2. In the year 1925, the plaintiff confiding in said covenant of quiet enjoyment, expended the following sums of money for fixtures required in said store and chicken market, all of which the defendant well knew. That by reason of the said defendant's wrongful acts, said fixtures became of no value to plaintiff, viz:

Complaint.

For labor and material in constructing a fish stand	\$275.00	
For labor and material in constructing four aquariums	125.00	
For plumbing work in the store and chicken market	175.00	
For a wire cage for chickens in said market	200.00	10
For labor and material in cementing floor in the market	150.00	
Total	\$925.00	

THIRD COUNT.

1. Paragraphs 1 and 2 of the first count are hereby repeated and made a part of this count.

2. At the time of the execution of said lease, the plaintiff deposited with the defendant the sum of \$345, to be applied to the payment of the last three months of said term. That by reason of said wrongful acts by the defendant, the plaintiff is entitled to demand and receive from the defendant the said sum of \$345. 20

Plaintiff demands as damages on the first count \$1000.00.

Plaintiff demands as damages on the second count \$925.00. 30

Plaintiff demands as damages on the third count \$345.00.

G. M. BELFATTO,
Attorney for Plaintiff.

Complaint.

ENDORSEMENTS.

I hereby appoint and depute Albert H. Freeman, to serve the within writ.

Witness my hand and seal this 19th day of June, 1928.

10

CONRAD DEUCHLER,

Sheriff.

By: ALFRED C. WALKER,

Under Sheriff.

Sheriff's Fees \$4.00

6/18/28 (SEAL)

20

Served the within summons and complaint upon Beniamino (or Benjamin) Carrino within named defendant by leaving a true copy thereof with a member of his household over the age of fourteen years at his usual place of abode 221 Prospect St., East Orange, N. J. June 19, 1928.

CONRAD DEUCHLER,

Sheriff.

By: ALBERT H. FREEMAN,

Sp. Deputy.

30

40

Answer.

Filed July 6, 1928.

NEW JERSEY SUPREME COURT,**ESSEX COUNTY.**

GIUSEPPE BOCCHIERO,
Plaintiff,

vs.

BENIAMINO, (known also as Ben-
jamin) CARRINO,
Defendant.

10

Action at Law.

Answer.

The defendant, Benjamin Carrino, residing at 221 Prospect Street, in the City of East Orange, County of Essex and State of New Jersey, answering the Bill of Complaint of the plaintiff, says: 20

ANSWER TO FIRST COUNT.

1. Defendant admits that on or about the 22nd day of August, 1924, he executed and delivered to the plaintiff a lease in writing of premises in the City of Newark, County of Essex and State of New Jersey, known as #178 Warren Street, consisting of a two-family house and store and a chicken market in the rear, for the term of five years from the 1st day of September, 1924, upon the terms and conditions, and for the purposes stated in said lease in writing, a true copy of which is annexed hereto, and made a part of the defendant's answer. 30

2. Defendant admits that on or about the 1st 40

Answer.

day of September, 1924, the plaintiff entered into possession of said premises under said lease and continued in peaceful and quiet possession thereof, but denies that defendant interrupted such peaceful and quiet possession on or about the 10th day of June 1928, or at any other time, and denies all other statements contained in paragraph 2.

10

3. This defendant has no personal knowledge of the allegations in paragraph 3 as to plaintiff's net profits and moneys received by way of rent from the tenants, but denies any wrongful acts done by this defendant to cause plaintiff any loss whatever in either profits or rent.

ANSWER TO SECOND COUNT.

20

1. This defendant repeats his answers to paragraphs 1 and 2, as in the first count.

2. This defendant denies the allegations in paragraph 2 of the second count.

ANSWER TO THIRD COUNT.

1. This defendant repeats his answer to paragraphs 1 and 2 of the first count.

30

2. This defendant admits that the plaintiff paid to this defendant the sum of \$345.00, as guarantee for the faithful performance of all the terms and conditions and obligations of said lease, as set out therein, to which reference is hereby made for a complete statement of the terms and conditions upon which said advance payment of \$345.00 was made.

40

3. This defendant denies any wrongful acts of the defendant as alleged in said paragraph and denies that the plaintiff is entitled to the return of

Answer.

said money, as alleged in said paragraph.

FIRST AFFIRMATIVE DEFENSE.

This defendant reserves his right to move before trial to strike out paragraph 2 of the third count of plaintiff's complaint as being not a pleading of fact, but a conclusion of law.

10

SECOND AFFIRMATIVE DEFENSE.

This defendant admits that in or about the month of June, 1928, this defendant did enter upon said premises and make certain repairs to said building, which were necessary for its proper preservation, but that said repairs were all made in good and workmanlike manner and in as short a time as was reasonable to perform the work necessary to be done and without any disturbance of the quiet possession or interference whatever with the business of the plaintiff and that all of said work was done at the express request of the plaintiff, and by virtue of the right reserved to this defendant under said lease, to permit him, his heirs, assigns, agents or attorneys to enter in and upon said premises at reasonable hours in the daytime, to examine the same and to make such repairs or alterations therein as shall be necessary for the preservation thereof; that said repairs were made by the defendant strictly in accordance with the terms of said lease and without any wrongful acts whatever toward the plaintiff of his possession, or any interference with his business, the terms of which fully appear in said lease and to which reference is hereby made.

20

30

ALGERNON T. SWEENEY,
Attorney of Defendant. 40

Lease—Annexed to Answer.

LEASE.

This Indenture made the day of September,
 One thousand nine hundred and twenty-four, be-
 tween, Benjamin Carrino, of the City of Newark,
 County of Essex and State of New Jersey, party
 of the first part, Witnesseth, that the said party
 10 of the first part has let and by these presents does
 grant, demise, and to farm let, unto the said par-
 ty of the second part, Giuseppe Bocchiero, of the
 City of Newark, County of Essex and State of New
 Jersey, premises known as No. 178 Warren Street,
 Newark, consisting of a two-family house and store,
 and a chicken market in the rear, with the appur-
 tenances for the term of five years from the
 day of September, one thousand nine hundred and
 20 twenty-four, at the yearly rent or sum of One
 Thousand three hundred and eighty dollars per
 annum, to be paid in equal monthly payments of
 One hundred fifteen dollars on the first successive
 business day of each month, in advance.

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 said premises, and to remove all persons
 30 therefrom.

And the said party of the second part does cov-
 enant to pay to the said party of the first part the
 said yearly rent as herein specified, to wit, \$1380.-
 00 in monthly instalments of \$115.00 on the first
 business day of each month successively.

And it is hereby agreed between the parties here-
 to that as guarantee for the faithful performance
 of all the terms, conditions and obligations of this
 40 lease, and the payment of said rent in successive

Lease—Annexed to Answer.

monthly payments of \$115.00 each, that the party of the second part shall deposit with the party of the first part \$345.00, which shall be applied to the payment of the last three months of this lease, if the party of the second part observes all of the terms, conditions and obligations of this lease; but in the event of his failure so to do, and failing to pay any month's rent, the party of the first part, may at his election, apply part of this deposit toward the payment of any month's rent, and his failure to apply any or all of such money toward the payment of any month's rent due and unpaid shall not operate to prevent his exercising such privilege in the event of any other or later default in the payment of rent. 10

And it is further agreed that in the event of the default of the party of the second part in the payment of a month's rent and the application of a part of said deposit toward the payment of such rent in default, that nevertheless, such default on the part of the party of the second part shall be considered as a breach of this lease, and the party of the first part shall have the option of declaring this lease abrogated and cancelled, and the party of the second part agrees in that event to quit and surrender up said premises. 20 30

And that at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition, as reasonable use and wear thereof will permit, damages by the elements excepted.

And the said party of the first part does covenant that the said party of the second part on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and 40

Lease—Annexed to Answer.

quietly have, hold and enjoy the said demised premises for the term aforesaid.

10 The party of the first part further agrees to permit the party of the second part to conduct a chicken market on said premises in the building established for that purpose, under a license issued to the party of the first part, #403, so long as the party of the second part, in good faith observes all the laws, municipal ordinances, rules and regulations relating to and governing the conduct of a chicken market, but is further agreed that if the party of the second part fails or neglects or refuses to obey such state laws, municipal ordinances, rules or regulations of the Department of Health of the City of Newark, in relation to the conducting of a chicken market on the said premises, and
20 any action at law or in equity is brought against the party of the first part to enforce a penalty or any other purpose whatever, which action shall be caused by the failure of the party of the second part to obey said laws, ordinances, rules or regulations as aforesaid, that this may, at the option of the party of the second part, be cancelled forthwith, and that upon the party of the first part serving a written notice upon the party of the second
30 part that he elects to cancel and abrogate this lease by virtue of this provision, that in that event the party of the second part, for his heirs, executors, administrators and assigns agrees to forthwith deliver up and surrender to the party of the first part his heirs, executors, administrators or assigns, possession of said premises without further notice or proceedings.

40 And it is further agreed that the party of the second part, in that event, shall forfeit to the par-

Lease—Annexed to Answer.

ty of the first part, his heirs, executors, administrators or assigns, the deposit of \$345.00 deposited by the party of the second part as surety for the faithful performance of all his agreements hereunder.

And the party of the first part further agrees that in consideration of the party of the second part, his heirs, executors, administrators or assigns fully performing their part under said agreement, and faithfully observing the laws, municipal ordinances, rules and regulations of the Department of Health of the City of Newark, in relation to the conducting of a chicken market in the place built for such purpose on said premises, that the party of the first part, will, at the proper time and place, annually apply for a renewal of said license to him, and upon its being granted to him will permit the party of the second part to operate said market according to his said license during the life of this lease, so long as the party of the second part observes the laws, ordinances, rules and regulations relating to the same, as aforesaid.

The party of the second part further agrees to pay all expenses for necessary repairs on, in or about the chicken market, to keep the same in good repair, sanitary and in proper condition for the conducting of a chicken market.

And the party of the second part does hereby promise and agree that he will not re-let or underlet the whole or any part of said premises nor assign this lease, nor use or permit any part thereof to be used for any other purpose than without the written consent of the party of the first part, his heirs, assigns, agent or attorneys, under the penalty of forfeiture and damages; that the said party of the first part, his heirs, assigns,

Lease—Annexed to Answer.

agents or attorneys may enter and into upon said premises at reasonable hours in the daytime to examine the same, or to make such repairs or alterations therein as shall be necessary for the preservation thereof; and to exhibit them at any time during the last three months of the said term from
 10 ten o'clock in the morning to five o'clock in the afternoon (Sundays excepted) to any person or persons; and put up notices "To let" or "For Sale" on the outside wall thereof. If the said premises shall become vacant or be deserted during said term, the said party of the second part, does hereby authorize the said party of the first part, his heirs, assigns, agents or attorneys, to re-enter the same at their option, and relet them and receive
 20 and apply the rent so received to the payment of the rent due by these presents.

And the said party of the second part does further agree to keep the premises in as good repair as the same shall be at the commencement of said term (wear and tear arising from a reasonable use of the same and damages by the elements excepted); and at the expiration of said term to yield up the peaceable possession thereof to the said party of the first part, his heirs, assigns,
 30 agents or attorneys.

And the said party of the second part does further agree to pay the water tax assessed upon said property, additional to the rent aforesaid.

In witness whereof, the said parties have here-

Lease—Annexed to Answer.

unto in duplicate set their hands and seals the day
and year first above mentioned.

(Signed) BENIAMINO CARRINO (L.S.)

(Signed) GIUSEPPE BOCCHIERO (L.S.)

Sealed and delivered in

the presence of

A. M. Ungaro.

10

State of New Jersey, {
County of Essex, } ss.:

Be It Remembered that on this 22nd day of August, in the year of our Lord one thousand nine hundred and twenty-four, personally appeared Benjamin Carrino and Giuseppe Bocchiero, who, I am satisfied are the lessor and lessee respectively, in the within Indenture of lease named, and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

20

(Signed) ARNOLD MANCUSI-UNGARO,

An Attorney at Law of New Jersey.

30

40

Counterclaim.

Filed Oct. 9, 1929.

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

10	GIUSEPPE BOCCHIERO, Plaintiff,	}	
	vs.		Action at Law.
	BANIAMINO (known also as Ben- jamin) CARRINO, Defendant.		Counterclaim.

20 Defendant, by way of counter-claim against plaintiff, says that:

FIRST COUNT.

1. On or about August 22nd, 1924, defendant and plaintiff entered into a lease, a true copy of which lease is annexed to and made a part of the answer filed herein.

30 2. On or about July 15th, 1928, the plaintiff moved from said premises and failed and neglected to pay the rent for said month of July 1928, and continued to fail to pay the rent to the end of the balance of the term of said lease.

3. There is due to this defendant from the said plaintiff the rent for the month of July, 1928 and the balance of the term of the lease, from said date.

40 4. Defendant was obliged to pay water rents, which the plaintiff, by the terms of the aforesaid

Counterclaim.

lease, had obligated himself to pay, for which defendant demands special damages.

Defendant demands as damages from the plaintiff, on the first count of this counter-claim the sum of One Thousand Dollars (\$1000.00).

SECOND COUNT.

10

1. Paragraph 1 of the first count of this counter-claim is repeated.

2. By the terms of said lease the plaintiff covenanted with defendant that the said plaintiff will quit and surrender the premises thereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

20

3. The plaintiff has breached the term of this covenant in that he left the premises in such dilapidated, worn, defective and destroyed and neglected condition, so that defendant was obligated to pay a large sum of money to repair the said premises and to place same in as good state and condition as the same were at the time of the demise aforesaid.

Defendant demands as damages of the plaintiff on the second count of this counter-claim the sum of Five Thousand Dollars (\$5000.00).

30

THIRD COUNT.

1. Paragraph 1 of the first count of this counter-claim is hereby repeated.

2. The plaintiff covenanted with defendant by the terms of said lease that the said plaintiff agreed

40

Counterclaim.

to pay all expenses for necessary repairs on, in, or about the chicken market, to keep the same in good repair, sanitary and in proper condition for the conducting of a chicken market.

3. Plaintiff has breached this term and condition of the contract aforesaid, and defendant has
 10 been compelled to expend a large sum of money for the maintenance, repair and alterations *alterations* in order to replace the premises in as good condition as they were prior to and at the time of the demise by the aforesaid lease, which repairs were occasioned by the neglect of the said plaintiff and failure by him to make the necessary repairs as aforesaid.

20 Defendant demands as damages of the plaintiff on the third count of this counter-claim the sum of Five Thousand Dollars (\$5000.00).

HERBERT A. KUVIN,
 Attorney for Defendant.

30

40

Reply.**NEW JERSEY SUPREME COURT,****ESSEX COUNTY.**

GIUSEPPE BOCCHIERO, Plaintiff, vs. BENIAMINO, (known also as Benjamin) CARRINO, Defendant.	}	Action at Law. Reply.	10
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The plaintiff answering the defendant's counter-claim, says that: 20

Paragraph 1, of the first count is admitted.

Paragraphs 2, 3, and 4 of the said count are denied.

Paragraph 1, of the second count is admitted.

Paragraphs 2, and 3 of said count are denied.

Paragraphs 2, 2 and 3 of the third count are denied.

DEFENSE.

On the 19th day of July 1928, the defendant instituted legal proceedings in the First District Court of the City of Newark, to dispossess the plaintiff from said premises and on the 23rd day of said month, the defendant took possession of said premises, since which time the said defendant has received the rents and profits thereof. 30

G. M. BELFATTO,
 Attorney of Plaintiff.

40

Reply.

Filed July 25, 1928.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

GIUSEPPE BOCCHIERO,
Plaintiff,

vs.

BENIAMINO, (known also as Ben-
jamin) CARRINO,
Defendant.

Action at Law.

Reply.

20

The plaintiff denies every allegation in the
answer.

G. M. BELFATTO,
Attorney for Plaintiff.

30

40

Reservation for Jury Trial.

Filed Dec. 4, 1929.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

GIUSEPPE BOCCHIERO, Plaintiffs,	} Action at Law.	10
vs.		
BENIAMINO, (known also as Benjamin) CARRINO, Defendant.	} Reservation for jury trial.	20

The plaintiff does hereby reserve his right to a trial by jury.

G. M. BELFATTO,
Attorney for Plaintiff.

30

40

Rule for Reference.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10	GIUSEPPE BOCCHIERO, Plaintiff,	}	Action at Law.
	vs.		
	BENIAMINO, (known also as Ben- jamin) CARRINO, Defendant.		Rule for Reference.

20 The above entitled cause coming on before the Hon. Wm. A. Smith, Circuit Court Judge to whom the same was referred for trial and on Monday, October 28th, 1929, in the regular daily call, and the same was marked "Ready", but it appearing that Gaetano Belfatto, attorney for the plaintiff was not prepared to proceed with the matter, and Herbert A. Kuvin, attorney for the defendant was ready to proceed, and it appearing further to the Court that there are involved in the said cause

30 matters of account between the parties, and it further appearing to the Court that the attorneys for the plaintiff and the defendant respectively have consented that the said matters be referred to some competent person to ascertain, determine, and report upon the matters of controversy between the parties,

40 It is on this 31 day of October, 1929 ORDERED that the same be referred to Charles H. Stewart, Esq., as referee, to ascertain and determine the con-

Rule for Reference.

troversies for the parties, and to report the same to the court within 30 days.

Entered November 7, 1929.

WM. A. SMITH,
Essex County Circuit Court Judge,
Supreme Court Commissioner. 10

On motion of

HERBERT A. KUVIN,
Attorney for Defendant.

Clerk's Certificate.

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing are true copies of the Summons and Complaint with Service Annexed, Answer and Affirmative defenses, Counter-claim, Reply, Reservation for Jury trial and Rule for Reference, in the above stated cause as the same remain on file in my office. 20

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twelfth day of July A. D. nineteen hundred and thirty. 30
(L.S.)
FRED L. BLOODGOOD,
Clerk.

Notice.

NEW JERSEY SUPREME COURT,

GIUSEPPE BOCCHIERO,
Plaintiff,

vs.

BENIAMINO, (known also as Ben-
jamin) CARRINO,
Defendant.

Action at Law.
Notice.

To HERBERT A. KUVIN, ESQ.
Attorney of Defendant.

Take Notice that on Thursday, November 21, in-
stant at the hour of 10 o'clock in the forenoon or
as soon thereafter as counsel can be heard, I shall
apply to the Honorable William A. Smith, Judge
of the Essex County Circuit Court for an order
amending the order of reference made in the above
stated cause on October 31, 1929.

Dated November 19, 1929.

Respectfully,

G. M. BELFATTO,
Atty. of Plaintiff.

30

40

**Order Denying Amendment to Order of
Reference.**

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

GIUSEPPE BOCCHIERO, Plaintiff, vs. BENIAMINO, (known also as Ben- jamin) CARRINO, Defendant,	}	Action at Law. 10 Order Denying Amendment to Order of Reference.
---	---	--

This matter being opened to the court by G. M. Belfatto, Attorney for Plaintiff and in the presence of Herbert A. Kuvin, Attorney for defendant, and it appearing that notice of an application to amend the order of reference heretofore made on the 31st day of October, 1929, to strike out the word "consent from said order of reference has been duly served upon the said Attorney for defendant, and it appearing that good cause being shown to the contrary.

It is on this ~~21 day of November 1929~~ *21 day of August 1930*, ORDERED, that the said application be and the same is hereby denied, *and order entered nunc pro tunc as of Nov 21, 1929* WM. A. SMITH, 30
Essex County Circuit Court Judge,
Supreme Court Commissioner.

Consent to the making and entry of the above order is hereby given.

HERBERT A. KUVIN,
Defendant's Attorney.

Report of Referee.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10	GIUSEPPE BOCCHIERO, Plaintiff,	}	Action at Law.
	vs.		
	BENIAMINO, (known also as Ben- jamin) CARRINO, Defendant.		Report of Referee.

20 This cause coming on for trial in the Essex Circuit, and having been referred to me, Charles H. Stewart, as Referee, and I having been first duly sworn that I would faithfully and fairly hear and examine said cause in question, and make a just and true report according to the best of my skill and understanding; and the said parties, by their respective attorneys, having appeared before me, and witnesses produced having been duly sworn and examined, and proofs of the respective parties offered and submitted in evidence, and the matter

30 in issue debated by counsel, and I having considered the same, do respectfully report as follows:

That I find for the defendant and against the plaintiff on the First, Second and Third Counts of the complaint, for the reasons hereinafter set forth; and that I find for the defendant and against the plaintiff on the Counterclaim, as hereinafter set forth.

40 This is an action brought by the plaintiff Giuseppe Bocchiero against the defendant Benjamin

Report of Referee.

Carrino, for damages alleged to have resulted from the defendant wrongfully and maliciously entering upon the premises known as No. 178 Warren Street, Newark, and tearing down, or causing to be torn down, the east wall of the front building on the demised premises, and obstructing the alley way running from the street to a chicken market on the demised premises, in the rear yard thereof, which obstruction of the alley way the plaintiff claims obstructed and impeded the regular operation and conduct of plaintiff's business and disturbed the plaintiff and his tenants in the peaceable possession of the premises; this summarizes the wrongful acts complained of in the First Count. 10

The Second Count of the complaint alleges that the plaintiff, relying on the covenant of quiet enjoyment expended \$925. for store fixtures in the store and chicken market, and that, by reason of the defendant's alleged wrongful acts, the fixtures became of no value. 20

The Third Count demands the return of \$345. deposited with the defendant as security for the payment of the rent for the last three months of the term.

The lease under which the plaintiff was in possession at the time of the alleged wrongful acts is dated the day of September, 1924 and runs to September 1, 1929. The alleged wrongful acts are alleged to have occurred on the 10th day of June, 1928, or within the period of the term. 30

The evidence shows that the east wall of the store building on the front of the premises, which was brick up to the top of the first story and stucco from there up to the roof, had become in ill repair, so that the stucco was loose and threaten- 40

Report of Referee.

ing to fall. The defendant, in the lease, reserved the right to enter into and upon the premises, at reasonable hours in the daytime, to make repairs or alterations therein as might be necessary for the preservation thereof.

10 I find, from the evidence, that the entry of the defendant upon the premises, for the purpose of removing the stucco and replacing the same with boards, was necessary for the preservation of the building.

20 The question, therefore, is: Did the defendant, in the performance of this repair, obstruct, more than was necessary to accomplish that purpose, the alley way over which the tenants of the plaintiff, his patrons and the plaintiff himself had to go in order to reach the chicken market and yard in the rear?

The evidence is quite convincing that the obstruction of the alley way by the erection of a scaffolding therein and the depositing of the stucco removed from the wall, did not unnecessarily impede the tenants and plaintiff in the use of the alley way.

I, therefore, find on the First Count for the defendant.

30 On the Second Count: The plaintiff's evidence showed that he built three fish troughs and a fish stand in the store, at a cost of \$450., about 1924, and that, in so doing, it was necessary to cut the floors and put concrete in between the beams and some reinforcing iron; that the troughs were made fast to the floors in between the beams with iron and concrete, making one monolithic whole. These troughs were, one 30 inches wide, 30 inches deep, and 8 feet long, two others 2 feet long, 1 foot wide
40 and 30 inches deep; and a hollow tile and cement

Report of Referee.

stand on which fish were placed. The troughs were made out of six inch concrete.

Plaintiff, also, under this Count, sought to recover for the value of the plumbing work done by him in the store and chicken market, and for wire cages for chickens, placed by him in the chicken market.

10

I find no evidence to support the claim that plaintiff did the plumbing work in the chicken market or placed wire cages for chickens, or other fixtures, therein.

The evidence does show that he built the fish troughs and fish stand in the store, with defendant's consent, and at a cost of about \$450.; but I find, as a fact, that the tearing down of the outside wall in nowise diminished access to the store, and, therefore, in nowise rendered the fish stand, aquariums and other work done in the store of less value or usefulness.

20

Assuming that the allegations contained in the Second Count form a basis upon which, if the evidence supported it, might be predicated a verdict for loss of rents from the apartments in the building rented, I conclude that the evidence does not support any such finding. The plaintiff did not pay his rent for the month of July, 1928. Dispossess proceedings were started in the First District Court of the City of Newark by the defendant, and before the Constable could serve the warrant of dispossession the plaintiff had removed from the premises.

30

The evidence further convinces me that the tenants had removed at some time prior to the commencement of the work of tearing down the wall on the east side of the building.

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Report of Referee.

I, therefore, find that the plaintiff is not entitled to recover anything on the Second Count.

10 Evidence was offered by the plaintiff to show that the defendant painted the front portion of the store on the demised premises, and that the paint dropped upon fruit and fish placed in front of the store and that the fumes of the paint spoiled the fish.

20 The evidence convinces me that the only portion of the front of the store that was painted was the fire escape and that there was an awning which projected over the stands in front of the store and that, at most, the painting occupied less than two whole days, and that the fumes of the paint had no effect on the fruit or fish, and that the plaintiff, by reasonable care, could have removed the fish and fruit to a place of safety while the painting was going on. There is nothing in the pleadings which would sustain a finding or damages for this loss.

30 On the Third Count: The lease provided that the plaintiff should deposit with the defendant \$345., which should be applied to the payment of the last three months of the lease "if the party of the second part observes all the terms, conditions and obligations of this lease; but in the event of his failure so to do, and failing to pay any month's rent," the defendant, at his election, might apply part of this deposit toward the payment of any month's rent.

40 The evidence further shows that on the first of July, 1928, Bocchiero failed to pay his rent for the month of July and that defendant dispossessed him under the proceedings, a copy of the docket of which is marked Exhibit P-3; and that Bocchiero moved out on the 15th of July.

Report of Referee.

In my opinion, the defendant had the right to deduct, from the \$345. that was deposited with him as security for the rent, the rent for the month of July, amounting to \$115.

The evidence shows that, while he was served with a notice to deliver up the premises on the 8th day of July and was subsequently, on the 9th day of July, served with a summons in dispossession, and that a judgment of possession was taken on the 16th of July, the plaintiff had voluntarily removed from the premises on the 15th of July. 10

The plaintiff could have contested the proceedings in the District Court, and whether the proceedings were brought for non-payment of rent or for some other breach of the covenants of the lease, the right of the defendant in this suit to the premises is *res adjudicata*; but, although the plaintiff voluntarily removed and, under the terms of the lease, the defendant herein, upon the premises becoming vacant or deserted during the term, was authorized by the lease to re-enter the same and re-let them and receive and apply the rents so received to the payment of the rent due on the premises, the defendant, by taking a judgment of possession, deprived himself of this right and made it impossible for the tenant to pay up arrears of rent and repossess himself of the premises, and, therefore, he had only the right to apply \$115. of the \$345. to the payment of rent. So that, the plaintiff would be entitled to a judgment against the defendant, on the Third Count, for \$230., if the pleadings were properly framed. The right to a judgment on the Third Count was based on the alleged wrongful acts of the defendant in the alleged constructive ejectment of the plaintiff by 20 30 40

Report of Referee.

the tearing down of the wall. The ejectment did not, in my opinion, occur.

10 The defendant filed a Counterclaim against the plaintiff, alleging that the plaintiff, on or about July 15, removed from the premises and failed to pay the rent for the month of July, and thereafter failed to pay any rent to the end of the term, and also claims for water rents which the defendant paid and which, under the terms of the lease, the plaintiff was to pay.

20 The evidence shows that the defendant paid water bills, one from December, 1927 to June, 1928, amounting to \$6., and the other for July, August and September, 1928, amounting to \$1.50. As the plaintiff moved out in July, 1928, and there is no evidence as to when this water was consumed, and as the evidence shows the premises were vacant for some time after the plaintiff moved out, it is a fair assumption that the \$1.50 was for water consumed while the plaintiff was in possession.

On the First Count of the Counterclaim the defendant is entitled to a judgment against the plaintiff in the sum of \$122.50.

30 Since the defendant in this suit saw fit, in the dispossess proceedings which he instituted in the First District Court of the City of Newark after the plaintiff herein had deserted the premises, to proceed with the tenancy suit to a judgment for possession and the issuance of a writ of possession, I find that the defendant, on his Counterclaim, is not entitled to recover any loss of rent after the month of July, 1928.

40 The Second Count of the Counterclaim is for repairs made necessary by the plaintiff removing from the premises and leaving them in a dilapidated condition. By the lease, the plaintiff agrees to

Report of Referee.

pay all expenses for necessary repairs in or about the chicken market and to keep the same in good repair, sanitary and proper condition, for the conduct of a chicken market, and further agrees to keep the demised premises in as good repair as the same should be at the commencement of the term, wear and tear arising from the reasonable use of the same and damages by the elements excepted. 10

The evidence very clearly shows that these covenants on the part of the plaintiff were not performed and that, at the expiration of the term, by reason of the plaintiff not paying the July rent and being dispossessed of the premises, the premises were in a most deplorable condition and the defendant had to expend, to put them in at least as good condition as they were at the commencement of the term, the following sums for the following items: 20

Newark Roofing Company, for new roof		
and skylights on the chicken market,	\$129.00	
Academy Metal Ceiling Company, for		
metal ceiling, in chicken market,	125.00	
Jacob Silverman, for plumbing work in		
chicken market,	35.00	
Canofrio Concellosi, for carpentry work		
in the chicken market,	6.00	30
Canofrio Concellosi, for carpentry work		
in the store,	18.00	
Cook & Genung Company, for material		
used in the chicken market,	219.60	
Cook & Genung Company, for material		
used in store,	23.20	
Tony Passariello, for mason work in		
chicken market,	93.50	
		40

Report of Referee.

	Tony Passariello, for mason work in store,	72.00
	Eagle Paint Stores, for painting material,	21.15
	Alex Brathwaite, for electrical work in chicken market,	25.00
	James Parisi, painter, for work in chicken market,	35.00
10	William Jones, for material used in floor of store,	18.33
	Alonzo Cuff, mason's helper on chicken market,	27.50
	Manfred Mancusi-Ungaro, for plans and supervising repairs in store,	150.00
	Total,	\$998.28

20 The defendant, on the Second Count of the Counterclaim, is entitled to a judgment for \$998.28, with interest from September 1, 1928, amounting to the further sum of \$99.01, or a total of \$1097.29.

As the covenant to keep the chicken market in proper repair is included in the larger covenant to quit and surrender the premises in as good a state of repair, (reasonable wear and tear and damages by the elements excepted), as they were at the
 30 commencement of the term, there will be no judgment entered on the Third Count.

Against this amount should be credited the balance of the \$345. after deducting the rent for July, 1928, and the water rents, amounting to \$122.50, as the said sum of \$345. was posted not only as security for the rent, but also as surety for the faithful performance of all the covenants under the lease. The application of this balance of \$222.50
 40 will reduce the amount to which the defendant is

Report of Referee.

entitled, under the Second Count, to \$874.79, subject to accumulations of interest as hereinafter set forth.

And I do state the account between the said parties:

1. The defendant is, therefore, debitted with the following items, to wit: 10

The balance of the deposit of \$345, made by the plaintiff with the defendant, as security for rent and for the performance of the covenants of the lease, after deducting the sum of \$115., rent for the month of July, 1928, and \$7.50 water rents for the months of December, 1927 to and including September, 1928, amounting in all to the sum of \$122.50, balance \$222.50 20

Interest on \$222.50 from Sept. 1, 1928 to the date of this report, 22.00

Total \$244.50

2. The defendant is credited with the items hereinabove set forth, amounting to \$998.28

Interest on the sum of \$998.28 at the rate of 6% per annum from September 1, 1928 to date of this report 99.01 30

Total \$1097.29

Balance due from plaintiff to defendant \$852.79

I do, therefore, find and report that the defendant hath sustained damages by reason of the non-performance of the covenants and agreements in the lease between the parties for the premises 178 40

Report of Referee.

Warren Street, Newark, New Jersey, upon which lease both the action of the plaintiff and the counterclaim of the defendant were predicated, to the amount of \$852.79.

10 All of which is respectfully submitted this twenty-fifth day of April, A. D. Nineteen hundred and thirty.

CHARLES H. STEWART,
Referee.

Certificate of Referee.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

20

GIUSEPPE BOCCHIERO,
Plaintiff,

vs.

BENIAMINO, (known also as Benjamin) CARRINO,
30 Defendant.

Action at Law.

On Report
of Referee.
Certificate.

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40 It having been represented to me by G. M. Belfatto, the attorney of the plaintiff, that, at the time that the parties appeared before me for the purpose of taking testimony, he raised an objection to my right to take the testimony and that no memorandum or statement of this objection is made or referred to in my report, I, therefore, at his re-

Certificate of Referee.

quest, certify that the testimony shows the following:

“Mr. Belfatto: Mr. Referee, if you will permit me, I want to have some record made of my objection to the order of reference on the ground that the subject matter involved in this case is not of reference, for it does not involve matters of account, as provided by the statute. 10

“The Referee: I suppose this argument was made before Judge Smith on the reference. Judge Smith having heard the argument on this point, and passed upon it, I decline to further pass upon it.”

CHARLES H. STEWART,
Referee. 20

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Exceptions to Master's Report.

Filed May 27, 1930.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10	GIUSEPPE BOCCHIERO, Plaintiff,	}	Action at Law.
	vs.		Exceptions to Master's Report.
	BENJAMIN CARRINO, Defendant.		

20 The said plaintiff Giuseppe Bocchiero by G. M. Belfatto his attorney except to the report to Charles H. Stewart, Esq. to whom the above stated cause, was referred, to take and state the account between the plaintiff and the defendant, and to report the same to the said court for the following reasons:

30 1. The court erroneously referred said case; it being brought to recover damages for breach of covenant for quiet enjoyment and for eviction. The defendant filed a counter-claim seeking to recover damages for the bad condition in which the plaintiff left the building on July 15, 1928.

2. The plaintiff filed reservations for a jury trial.

40 3. When the cause came up for hearing before the referee the plaintiff objected to his taking testimony on the ground that the case was not subject to reference. The referee overruled the objection and granted plaintiff an exception.

Exceptions to Master's Report.

4. Plaintiff testified that he was the lessee and in possession of a two story frame building No. 178 Warren St., Newark, N. J. owned by the defendant. That the lease would expire September 1, 1929. That in the rear of said building plaintiff carried on a chicken market. That the customers could only get there by means of an alleyway about 3½ feet wide situated alongside the east wall of the building. That on June 10, 1928 the defendant without notice to him built a scaffold on said alleyway and tore the plaster from said east wall and for ten days after said alleyway was so obstructed as to prevent the plaintiff's customers from going to said chicken market. That on June 20, of said year the defendant started to paint the front of said building and continued to do said work for one week. That the vegetables fruits and fishes which plaintiff had exposed for sale in front of the store of said building were spoiled. By reason whereof plaintiff lost a profit of \$35 per day and also \$40 per month rent for the two tenants that occupied the second floor of said premises; moved away. The referee therefore erroneously held that the acts and doings of the defendant did not amount to a breach of covenant for quiet enjoyment and to eviction.

5. Plaintiff testified that with the defendants consent he spent \$274 for a fish stand; \$125 for 4 fish troughs; \$175 for plumbing work; \$200 for a wire cage in the chicken market and \$150 for cement floors in said market. This testimony was uncontradicted yet the referee held that no such money was spent by plaintiff.

6. Plaintiff testified that he deposited with the defendant \$345 as security for his faithful per-

Exceptions to Master's Report.

formance of the agreements and for the payment of the last three months rent under the lease. This testimony was corroborated by the lease itself which was offered in evidence; yet the referee held that said deposit was not made for that purpose.

10 7. From the record of the Second District Court of the City of Newark, N. J. offered in evidence it appears that on July 1, 1928 the defendant instituted dispossession proceedings against the plaintiff and on July 12, of said year obtained an order for possession. The plaintiff vacated said premises on July 15, of said year yet the referee held that the defendant was entitled to the rent for the month of July of said year.

20 8. The referee against the plaintiff objection allowed testimony tending to show that the defendant had spent \$998.29 for repairs to the building because of the dilapidated condition in which plaintiff had left it. The referee erroneously allowed the defendant said sum of money.

30 9. Said report was erroneously filed and confirmed on May 15, 1930 and the postea signed by the court on the following day; all of which was done on three days notice served upon plaintiff on July 12, 1930.

10. Said report is in other respect contrary to law and the weight of evidence.

11. The plaintiff demands a trial by jury according to the form of the statute in such case made and provided.

Dated May 27, 1930.

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G. M. BELFATTO,
Atty. of Plaintiff.

Postea on Referee's Report.

Filed May 29, 1930.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

GIUSEPPE BOCCHIERO, Plaintiff,	} Action at Law. 10
vs.	
BENIAMINO, (known also as Benjamin) CARRINO, Defendant.	} Postea on Referee's Report.

The issues in this case coming on for trial at the Essex County Circuit Court on Monday, October 28th, 1929, before the Honorable William A. Smith, Essex County Circuit Court Judge, to whom same was referred for trial, and both plaintiff and defendant, by consent of their attorneys in open Court on said date, agreed that the aforesaid case be referred to some competent person to ascertain determine and report upon the matters of controversy between the parties, and on the 31st day of October, 1929, the said Honorable William A. Smith, Essex County Circuit Court Judge entered a Rule of Reference in accordance with the consent of the parties hereto, referring the said matters of controversy between the parties to Charles H. Stewart, Esq., as Referee, to ascertain and determine the issues between the parties and to report the same to the Court.

The report was made on April 25th, 1930 by the said referee, allowing the defendant Benjamin Car-

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Postea on Referee's Report.

rino, a balance of \$852.79 due from the said plaintiff Giuseppe Bocchiero.

The said Referee's Report was filed on May 15th, 1930.

10 On May 12th, 1930, a Notice was served upon the attorney for the plaintiff, said service being duly acknowledged upon said Notice, stating that application would be made to the said Honorable William A. Smith, for an Order Confirming the Report made by the said Referee and for a Postea in the said cause.

20 On May 15th, 1930, application having been made to the said Honorable William A. Smith, for a Postea in the above cause on the said Referee's Report, the said Honorable William A. Smith ORDERED that the said Referee Charles H. Stewart, Esq., be allowed the sum of \$235.00 as and for his fee as said Referee, and the said sum to be included in the costs to be taxed in the above suit.

Dated: May 16th, 1930.

WM. A. SMITH,
Essex County Circuit Court Judge.

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Rule for Judgment.

NEW JERSEY SUPREME COURT,

BENIAMINO, (known also as Benjamin) CARRINO,
Defendant.

ads.

GIUSEPPE BOCCHIERO,
Plaintiff,

Action at Law. 10
On Postea.

\$852.79

290.00

\$1142.79

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It is ordered that judgment be and hereby is entered in favor of defendant and against the plaintiff for the sum of eight hundred fifty-two dollars and seventy-nine cents besides costs to be taxed nisi.

Entered May 29, 1930,

On motion of
HERBERT A. KUVIN, Atty. 30

Judgment.

NEW JERSEY SUPREME COURT,

10	GIUSEPPE BOCCHIERO, Plaintiff,	}	Action at Law. On Postea.
	vs.		
	BENIAMINO, (known also as Ben- jamin) CARRINO, Defendant.	}	

\$852.79
290.00

20 \$1142.79

HERBERT A. KUVIN, Attorney.

Judgment entered this twenty-ninth day of May A. D. nineteen hundred and thirty in favor of defendant and against the Plaintiff for the sum of eight hundred fifty-two dollars and seventy-nine cents damages and two hundred and ninety dollars costs.

30

WILLIAM S. GUMMERE,
C. J.

Clerk's Certificate.

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true copy of Exceptions, Postea, Rule for Judgment and Judgment Final in the above stated cause as the same remain on file in my office.

In testimony whereof I have set my
 hand and the seal of said Court at
 (L.S.) Trenton, this eighteenth day of 10
 July, A. D. nineteen hundred and
 thirty.

FRED L. BLOODGOOD,
 Clerk.

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Notice.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

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GIUSEPPE BOCCHIERO,
Plaintiff,

vs.

BENJAMIN CARRINO,
Defendant.

Action at Law.

Notice.

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To HERBERT A. KUVIN, ESQ.,

Attorney of Defendant.

Sir:

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Take notice that on Saturday May 31 instant at the hour of 10 o'clock in the forenoon or as soon thereafter as counsel can be heard I shall apply to the Honorable WILLIAM S. GUMMERE, Chief Justice of the Supreme Court of New Jersey at the Hall of Records in the City of Newark for an order setting aside the report of the referee and granting a jury trial of the above stated cause on the grounds set forth in the hereto annexed exceptions to said report.

Dated May 27, 1930.

Respectfully,

G. M. BELFATTO,
Attorney of Plaintiff.

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Order.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

 GIUSEPPE BOCCHIERO,
 Plaintiff,

vs.

 BENJAMIN CARRINO,
 Defendant.

 } Action at Law. 10
 } Order.

This matter being opened to the court on appli-
 cation of G. M. Belfatto, attorney for plaintiff and
 in the presence of Herbert A. Kuvin, attorney for
 defendant on application for an order setting aside 20
 the report of the referee and granting a jury trial
 in the above stated cause on the ground of certain
 reasons and exceptions to the said referee's report,
 and it appearing to the court that the matter in
 controversy in said cause were by order, consent-
 ed to by both parties in open court at the Circuit
 when the said cause was reached for trial referred
 to a competent person for hearing and that the
 said order did not state what effect of the said 30
 referee's report should have.

It is on this 31st day of May, 1930 ORDERED
 That the said application be and the same is here-
 by dismissed and the costs of said application be
 taxed in favor of the defendant, Benjamin Car-
 rino and against the plaintiff, Giuseppe Bocciero.

Let this rule be entered on the minutes of this
 court.

WILLIAM S. GUMMERE, 40
 Chief Justice.

New Jersey Court of Errors and Appeals

GIUSEPPE BOCCHIERO,
Plaintiff-Appellant,

vs.

BENIAMINO CARRINO,
Defendant-Appellee.

Action at Law.

On Appeal
from Master's
Report, &c.

BRIEF OF PLAINTIFF-APPELLANT.

This is an appeal from the order of reference made in the above entitled cause by the Essex County Circuit Court on October 31, 1929 and from the report of the referee filed therein and from the judgment entered thereon in favor of the appellee and against the appellant in the sum of \$852.79 and \$290.00 costs of suit.

Facts.

In September 1924 the appellee by a written lease let and rented to the appellant the two story frame building and a small brick building in the rear known as 178 Warren Street, Newark, N. J. for the period of five years for the yearly rent of \$1380.00 payable in monthly installments of \$115 each (State of Case, p. 12).

The appellant conducted in the store of said building fruits, vegetables and fish business and in the rear building a chicken market. Two apartments were rented out (page 5, lines 20-40).

The appellant deposited with the appellee \$345

as security for the payment of the last three months rent under the lease and for the faithful performance of all covenants and conditions under said lease on his part (p. 15, ll. 1-10; p. 29, ll. 20-30; p. 32, ll. 20-40).

After the execution of the lease the appellant spent \$925.00 for fixtures and other work in the store and chicken market (p. 29, ll. 20-30; p. 30, ll. 30-40; p. 31, ll. 10-20).

From September 1924 until June 10, 1928 the appellant realized from the chicken market a daily profit of \$20. and \$15.00 from the business in the store. He received as rent for the apartments \$48.00 per month (p. 6, ll. 10-20).

On June 10, 1928 the appellee without notice to appellant entered said premises and began to tear down the east wall of said building, and continued to do so for ten days thereafter, and from June 20, until June 27 the appellee painted the front of said building (p. 32, ll. 1-20) by reason whereof the appellant could not do business in said store and chicken market (p. 6, ll. 1-10; p. 11, ll. 10-20; p. 29, ll. 30-40).

On July 9, 1928 the appellee instituted dispossession proceedings against the appellant and on the 16th of said month obtained an order for possession. Plaintiff moved from said premises a day before July 15, (p. 33, ll. 10-20; p. 32, ll. 30-40).

On June 20, 1928 the appellant brought a suit against the appellee to recover the \$345 deposited as aforesaid, \$925.00 spent for fixtures; the loss of profits in said business and the rents of the apartments (p. 5-6).

On October 9, 1928 the appellee counterclaimed \$1000. as rents under the lease, \$5,000. as damages for the bad condition in which the building was left by the appellant and \$5,000 for repairs made to the chicken market (p. 1, ll. 19, 20).

On October 31, 1929 the case was not on the list for trial and the appellant was not in court. Shortly afterwards the appellant was informed that the case had been called because listed in the Judges' book, and that the court had referred it to a referee. The appellant objected to the reference on the ground that the case was not subject of reference but consented to the name of the referee. The order of reference was drawn by the attorney of appellee. The appellant upon discovering the reference contained his consent, on November 21, 1929 made a motion before said Court to strike out from the reference the word "consent". The motion was denied and exception taken (p. 27, ll. 10-40).

On December 4, 1929 the appellant filed a reservation for jury trial (p. 29).

When the matter came up for trial before the referee the appellant objected to his taking testimony on the ground that the case was not subject of reference. The referee overruled the objection and granted an exception (pp. 38-39).

On May 12, 1930 the appellee served a notice upon the appellant to the effect that on May 15, he would apply to the Court for an order confirming the report of the referee and for a postea in said cause (p. 44).

On May 15, said report without notice to appellant was filed in the Clerk's Office of Essex County (p. 44).

On May 16, an order was made by the Circuit Court without confirming said report and allowing the referee \$235.00 (pp. 43-44).

On May 27, the appellant filed exception to the report (p. 40).

On May 29, judgment on Postea and final judgment were entered (p. 45-46).

On May 31, the appellant made a motion before the Supreme Court at Newark demanding a trial by jury. The motion was denied (pp. 48-49).

LAW.

POINT 1.

The action is not subject of reference.

Section 155, p. 121, Sheen Pr. Act provides: All actions in which matters of accounts are in controversy may by rule be referred to some competent person or persons to state and report an account between the parties and the amount that may be due from either party to the other which report signed by the referee or a majority of the referees when confirmed by the Court shall be final and conclusive between the parties and judgment may be entered thereon and execution issued in the manner provided by law, but either party may at the time of ordering such reference:

(a) Enter in the minutes his reservation of a right to trial by jury.

(b) At the same term in which the report is filed may demand a trial by jury in which case the action shall be so tried.

(c) The costs of reference to abide the result.

(d) On such a trial the report of the referee or referees shall be prima facie evidence of all the facts therein found and reported.

(e) The party demanding a trial by jury shall file his exceptions to the report in 20 days after the filing of the report and no other exception shall be considered at the trial.

(f) If no such reservation has been entered or if the party fails so to demand a trial by jury or fails to file exceptions, the report may be confirmed on motion of either party on ten days notice.

In the case of *American Saw Co. vs. Trenton National Bank*, 58 L. 438, it was held: "An account is a statement of debits and credits between parties having reciprocal dealings."

In the case of *Tunison vs. Snover*, 56 L. 44, it was held: Numerous items of damages does not constitute an account.

POINT 2.

Order of Reference should have been amended.

The Court should have amended the order of reference when a motion to that effect was made, because the consent of the appellant to the reference was the result of a mistake and also because the denial of the motion to amend deprived the appellant of a constitutional right to have the case tried by the jury.

In the case of *Union Sugar Refinery vs. Mattheson*, 3 Cliff (U.S.) 146 the court said: "Three times this court itself has corrected a decree or order because it was ambiguous and even after the filing of the master's report."

POINT 3.

Reservation for jury trial properly filed.

Section 155, p. 121, Pr. Act provides that:

Either party may at the time of ordering such reference enter in the minutes a reservation of a right to trial by jury and at the same term in which the report is filed may demand such a trial.

Supreme Court Rule 103.

Harrington Co. vs. U. S. Express Co., 87
L. 154.

POINT 4.

Objection was made to the referee taking testimony.

That the case is not subject of reference may be objected to at the time of ordering the reference or before proceeding before the referee.

New York Metal Ceiling vs. Kierman, 73
L. 763.

Taylor vs. Thornton, 81 L. 7.

Adams vs. Board of Education, 83 L. 489.

POINT 5.

The referee contravened rules of law.

The referee erroneously found:

(a) That he had the right to decide unliquidated damages.

(b) That the entering of the premises by the appellee without any notice to the appellant and tearing down of the East Wall of the building and the painting of the front was not an eviction.

(Page 29, ll. 10-20; p. 32, ll. 10-20).

(c) That the building of the scaffold and the accumulation of the debris did not obstruct the alleyway.

(Page 30, ll. 10-30).

(d) That the appellant had to pay rent for the month of July, 1929, to be deducted from the deposit of \$345.00

(Page 31, ll. 20-40).

(e) That the deposit was not to be considered as liquidated damages according to the covenant in the lease.

(Page 32, ll. 10-30).

(f) That the repairs made by the appellee were necessary for the preservation of the property, and should be paid by the appellant.

In *Fitch vs. Archibald*, 29 L. 160, it was held: "If the referee contravenes rule of law in reaching his conclusions or his finding is not supported by the evidence the report will be set aside."

Where no duty to repair is imposed upon the landlord either by statute or by the provision of the lease he has no right to enter upon the premises to make repairs against the objection of the tenant though the repairs are necessary for the preservation of the property.

Am. & Eng. Ency of Law, Vol. 18, p. 425.

In the case at bar it was constructive eviction.

In *Hecklow vs. House*, 71 L. 478, which seems to be analogous to the one under consideration, it was held: "Where a deposit is made by the lessee in consideration of the making of the lease to indentify the lessor against a failure to perform the covenants of the lease and in case such failure does not occur to pay the last three months rent reserved under the lease at the expiration thereof, if during the running of the lease and before the last three months of its term default be made in the payment of the rent reserved for any month and the lessee is dispossessed by the lessor the lessee may recover from the lessor the amount of the deposit in excess or the rent in default and the water taxes then due by the lease no other default under the lease being alleged or shown.

In the case of *Monmouth Park Ass. vs. Wallis Iron Works*, 55 L. 132 it was held: "When damages may be sustained by the breach of a single stipulation and they are uncertain in amount and not readily susceptible of proof under the rule of evidence then if the parties have agreed upon a sum of money as the measure of compensation for such breach and that sum is not disproportionate to the presumable loss it may be recovered as liquidated damages."

In the case of *Chaddick vs. March*, 21 L. 463 it was held: "When a party to an agreement con-

tracts upon a given event to forfeit and pay a certain sum of money it will be construed as stipulated damages and not as a penalty unless a contrary intention is to be inferred from the other parts of the agreement.

In *Reed vs. Snovhill*, 51 L. 162 the lease was ended by agreement and the lessor took possession of the premises. The court held that: "The covenant to deliver up possession of the expiration of the lease in good repairs not having matured and because actionable during the continuance of the term is cut off by the surrender. Cited in *Fox vs. Lynch*, 71 E. 537.

In the case of *Meeker vs. Spalding*, 66 L. 60 the Court held: "Where a lease of building and appurtenances reserved to the landlord permission to make such repairs or alterations in the demised premises as should be necessary for the preservation thereof. If during the term demised the tenant abandoned the premises and subsequently the landlord enters and remodels the building making extensive alterations beyond any necessity for preservation such acts constituted a surrender by operation of law.

POINT 6.

The referee's finding was not supported by the evidence.

There is no evidence in the case as appears from the report that the appellant vacated the premises and left them in a dilapidated condition.

By taking possession of the premises before the end of the term the appellee lost all rights under the covenants in the lease.

In the following cases it was held that: "The report should be set aside if unsupported by the evidence or if the referee committed legal errors.

Children Assn. vs. Hall, 47 L. 152.

Doler vs. Harkens, 49 L. 577, 82 L. 113.

POINT 7.

Exceptions to report.

Deposition and evidence taken before referee form no part of the record upon which error can be assigned. D. L. & W. vs. Eng., 82 L. 113. But if exceptions are taken to the report it is part of the record, L. W. vs. Board of Education, 83 L. 489. Report is only evidence and it may be objected to, Pr. Act. Sec. 156, p. 126.

POINT 8.

Report should not be confirmed

(a) If exception or reservations were filed. Ernstice Bros. vs. Pittman, 95 L. 291.

(b) If no notice of motion to confirm the report was given. Pr. Act Sec. 373, p. 247.

(c) If application was made to set aside the report and for a jury trial. Adams vs. Board of Education, 83 L. 489.

POINT 9.

The report was not filed as required by statute.

The report was filed in the Essex County Clerk's Office without notice to appellant.

Supreme Court Rule 101 requires the report to be filed with the clerk of the Court out of which the order of reference was issued upon ten days notice to the other party.

Harrington Co. vs. U. S. Express Co., 87
L. 154.

Pr. Act Sec. 374, p. 247.

POINT 10.

Report was erroneously confirmed upon three days notice.

In the case in hand, no notice of filing the report was served and it was confirmed and judgment entered thereon upon three days notice.

Sec. 155, p. 121 (Sheen Pr. Act) requires the filing of the report upon 10 days notice and gives to the party demanding a jury trial 20 days from the day of filing it to file exception thereto.

Sec. 373, p. 247 (Sheen Pr. Act) provides: In all cases in which matters of account shall be referred by the Court or Justice to a referee the party moving for a confirmation of the report shall give notice in writing of the filing thereof and the opposite party shall have the time limited by the statute for filing exceptions thereto after the receipt of such notice.

POINT 11.

The reservation for jury trial was erroneously struck out.

Said Sec. 155 provides, that either party may at the time of ordering such reference enter in the

minutes such reservation of a right to trial by jury and at the same term in which the report is filed may demand a trial by jury.

In the case of Paulison vs. Hulsey, 38 L. 488 at bottom page 491, the court held: "Close upon the heels of the allegation of their consent, formally stated in writing upon the minutes a dissent not only in pursuance of their common law rights but also under their express reservation in the instrument reciting their consent."

Such dissent at once revoked the submission and left the parties at liberty to proceed by suit.

In this case a jury trial was had.

POINT 12.

Appellant was deprived of a constitutional right.

In making said order and entering judgment the Court deprived the appellant of his right to a trial of the issue joined in said cause by jury, as secured to him by the Constitution of the United States; the constitution of the State of New Jersey and the Statutes of said State and also of his property without due process of law.

The report of the referee should be set aside and the judgment entered thereon reversed and a new trial granted.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

GIUSEPPE BOCCHIERO, <i>Plaintiff-Appellant,</i> <i>vs.</i> BENIAMINO CARRINO, <i>Defendant-Appellee.</i>	}	<i>Action at Law. On Appeal from New Jersey Supreme Court.</i>
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BRIEF OF DEFENDANT-APPELLEE.

FACTS.

On June 20, 1928, plaintiff filed a complaint in the above cause in the New Jersey Supreme Court against the defendant charging defendant in the first count with causing plaintiff damages resulting from loss of rents and profits by reason of defendant's breach of quiet enjoyment; in the second count with damages resulting from loss of fixtures in premises leased to plaintiff by defendant by reason of said breach of said covenant of quiet enjoyment; and in the third count with loss of deposit of security deposited with plaintiff by defendant (S. C., p. 5).

On July 6, 1928, defendant filed an answer in said cause materially denying the plaintiff's allegations and by way of affirmative defenses that defendant did enter upon said leased premises but did so by reason of the terms of said lease between the parties and annexed a copy of said lease to his answer and made the same a part of his said answer (S. C., p. 9).

On October 9, 1929, defendant, after having retained other counsel to represent him in the cause, filed a counter-claim against the plaintiff, assigning therein in the First Count breach by

plaintiff of lease covenant to pay rent and water rents; in the Second Count thereof, breach of covenant to surrender demised premises in as good state and condition as reasonable use and wear thereof will permit; and in the Third Count thereof breach of the lease covenant whereby tenant (plaintiff) was to pay all expenses for necessary repairs on, in or about chicken market, to keep same in good repair, sanitary and in proper condition for the conducting of a chicken market (S. C., p. 18).

To this counter-claim plaintiff filed an answer denying the breaches assigned against him setting up a special defense that defendant dispossessed him (S. C., p. 21).

On October 28, 1929, the case (having been at issue and noticed for trial in the Essex County Circuit of the New Jersey Supreme Court, and Supreme Court cases in and for Essex County Circuit having been referred to Essex County Circuit Court Judge, William A. Smith) was in the daily call and was marked "Ready," but plaintiff's attorney was not prepared to proceed with the trial and defendant's attorney was prepared to proceed with the same; the plaintiff's attorney and defendant's attorney consented that the said matters be referred to some competent person to ascertain, determine and report upon the matters between the parties (S. C., p. 24, ll. 30-35).

On October 31, 1929, the said trial judge entered an order on said consent referring the same to a referee,

"to ascertain and determine the controversies for the parties, and to report the same to the court within 30 days" (S. C., p. 24, l. 40; p. 25, l. 5).

On November 19, 1929, plaintiff served a notice of application to have the aforesaid order of reference amended (S. C., p. 26).

On November 21, 1929, the application was argued before the trial judge, who made the order of reference, to strike from said order of reference the word "consent," and the said application was denied to the end that, on August 11, 1930, the said Judge entered an order denying the said application *nunc pro tunc* as of November 21, 1929 (S. C., p. 27).

Such proceedings were had in the cause that on April 25, 1930, the referee by his report found in favor of the defendant on his counter-claim against the plaintiff and assessed the damages against the said plaintiff in the sum of Eight Hundred Fifty-two Dollars and Seventy-nine Cents (\$852.79) (S. C., p. 28; p. 38, l. 10).

On December 4, 1929, plaintiff filed in the Supreme Court Clerk's office a reservation of his right to a jury trial (S. C., p. 23).

On May 27, 1930, plaintiff filed in said Clerk's Office exceptions to Master's report (S. C., p. 40; p. 42, l. 40).

On May 29, 1930, defendant filed a Postea on referee's report which Postea was signed by the trial judge on May 16, 1930 (S. C., pp. 43-44) and on the same date judgment was entered in said cause on said Postea in the sum of Eleven Hundred Forty-two Dollars and Seventy-nine Cents (\$1142.79) in favor of the defendant and against the plaintiff being the amount of damages and costs of suit taxed (S. C., p. 46).

On May 27, 1930, plaintiff served upon defendant a notice of application for an order setting aside the report of the referee and granting a jury

trial on the exceptions filed on said date (S. C. p. 48).

On May 31, 1930, argument was heard by the Chief Justice of the said Supreme Court on said application and an order was entered on that date dismissing said application (S. C. p. 49).

PRELIMINARY STATEMENT.

Defendant-appellee will first argue his own points of law to sustain the action of the Supreme Court and the trial judge and will then answer the appellant's points of law.

POINT 1.

The reference having been consented to, the subject matter of the action is immaterial as to the validity of said reference.

By the recitals in the Order of Reference (S. C., p. 24, ll. 30-35), in the Order Denying Amendment to Order Of Reference (S. C. p. 27) in the Postea on Referee's Report (S. C. p. 43, ll. 23-30) and in the Order Denying Dismissal of Referee's Report (S. C. p. 49, ll. 25-30) it conclusively appears that the parties had consented "that the matters in controversy in said cause be referred to some competent person to ascertain, determine and report upon the matters."

This court in the case of *The Childrens' Home Association v. Hall*, 47 N. J. L. 142, on the bottom of page 152, stated: "But references by consent are not regulated by statute."

The statutes of our State, sections 155 and 156, 3 *Comp. Statutes* pp. 4101-4102, and Supreme Court Rules 100 and 101 (of the October Term, 1929) apply it is true to cases involving only

matters of account and do not pertain to matters or cases referred by the express consent of the parties as was done in this case.

POINT 2.

The reference being by consent, the Referee's Report has the same effect as a Jury Verdict, unless the Order of Reference expressly provides to the contrary.

Supreme Court Rule 99 (October Term, 1929), provides as follows:

"All rules of reference entered by consent of parties in this court, or in the circuit, may state whether the award of the referee is to have the effect of a finding of arbitrators, or merely the force of a verdict, and in the absence of such statement the award shall be treated as a verdict."

This court in the case of *Children's Home Association v. Hall*, *supra*, speaking of consent references on p. 153, states:

"They were formerly regarded as voluntary submissions to a tribunal selected by the parties, and the referee's report was held to be as conclusive as the award of arbitrators.

"In later years the practice was adopted in our courts of treating the report of a referee, appointed by consent, as the verdict of a jury. This practice was sanctioned in *Fitch v. Archibald*, 5 Dutcher 160 (29 N. J. L. 160), and in the subsequent case of *Excelsior Carpet Lining Co. ads Potts*, 7 Vroom 301 (36 N. J. L. 301).

"At the same term in which the latter case was decided, rule 109 of the Supreme Court was adopted. Under this rule, all references entered by consent of parties shall state whether the award of the referee is to have the effect of the finding of arbitrators, or merely the force of a verdict, and, in the

absence of such statement, the award shall be treated as a verdict.'''

The referee's report in the case at bar therefore has the force and effect of a jury verdict rendered at the trial. The order of reference expressly recites that the same is entered by consent of the parties. The application to amend the said order of reference by striking out the word "consent" was denied by the trial judge who made said order of reference (S. C. p. 27). And the order of refusal to set aside said referee's report recites that the said order of reference was consented to and that the same was silent what the effect of the referee's report should be (S. C. p. 49, ll. 25-30).

POINT 3.

Practice under consent rule of reference, silent as to effect of referee's report is application to trial court to set aside referee's report and grant new trial.

Since the effect of the referee's report is that of a jury verdict, the plaintiff-appellant must make his application to the trial court to set aside the said report of the referee and to ask for a new trial. This the trial court will do only on the same grounds and for the same reasons that it will set aside a jury verdict and grant a new trial as that the same was contrary to the weight of the evidence, that the referee was corrupt, or had proceeded on principles contrary to natural justice, or had founded his report on a mere mistake. *Runyon v. Hodges*, 46 N. J. L. 359, cited with approval by this court in *Children Homes Association v. Hall*, 47 N. J. L. 153.

POINT 4.

There is no appeal from the trial court's refusal to set aside consent referee's report and finding.

This court in the same case of *Children Homes Association v. Hall*, *supra*, on p. 153, states:

"Under the settled rule of practice, therefore, the plaintiff in error, on the refusal of the court below to set aside the report of the referee, was in the precise position he would have occupied if the verdict of a jury had been rendered against him and the court had refused to grant a new trial."

There is no appeal from the trial court's refusal to grant a new trial on a jury verdict unless there has been a gross abuse of its discretion. *Hickman v. Powell*, 99 N. J. L. 274; *Gaffney v. Illingsworth*, 90 N. J. L. 490; and other cases too numerous to cite.

Surely in the State of Case filed in this cause there isn't the slightest evidence of a charge of abuse of discretion on the part of the Circuit Court Judge or the Chief Justice of the Supreme Court who signed the order denying the new trial and the setting aside of the referee's report.

POINT 5.

The referee's report having the effect of a jury verdict, a postea signed by the Circuit Judge on said report was properly entered and no notice of the entry of said postea was necessary to plaintiff.

Supreme Court Rule 116 (October Term, 1929), which is the rule pertaining to the filing of a postea states as follows:

"In actions in the Supreme Court, the postea may be filed immediately after relicta

given or verdict obtained and judgment shall be entered forthwith."

Since the referee's report has the effect of a verdict it was proper to cause the postea in the case at bar to be signed and filed and judgment entered immediately thereafter.

The attorney for the successful party draws the postea, causes the same to be signed by the trial judge and files the same. *Weinberger v. Erie R. Co.*, 86 N. J. L. 259.

POINT 6.

Plaintiff-appellant's appeal should be dismissed with costs of appeal and affirmance of the Supreme Court granted in favor of defendant-appellee.

From all of the above and especially the case of *Children Homes Association v. Hall*, *supra*, the plaintiff-appellant's appeal should be dismissed and defendant-appellant allowed his costs of appeal and a counsel fee.

ANSWERING POINTS.

POINT 7.

Reservation for jury trial was not properly filed even under the Practice Act.

Supreme Court Rule 103 and Section 155 of the Practice Act require that the reservation for trial by jury in reference matters, where the matters are matters of account, must be made at the time of the entry of said order of reference or immediately thereafter.

The plaintiff-appellant failed to do this. The rule for reference was made on October 31, 1929, and entered in the minutes of the Supreme Court

on November 7, 1929 (S. C. pp. 24-25); and the reservation for a jury trial was filed December 4, 1299, more than one month after the making of the rule for reference, and the filing of same.

In the case of *Consolidated v. Lux*, 94 N. J. L. page 1, Chief Justice Gummere, speaking for the Supreme Court, stated, on page 3, as follows:

"It is manifest from the statutory provision that a party who desires to place himself in a position where the report of the referee shall not be final and conclusive as to him, upon being confirmed by the court, can only do so by entering in the minutes **at the time of ordering the reference** his reservation of a right to trial by jury, and that if he fails to do this a demand made by him after the report is filed for such a trial will be bootless, notwithstanding that he shall have made it at the same term in which the report is filed. The language of the statute is perfectly plain, and does not call for judicial construction. The dissent to have vitality must be entered in the minutes at the time when the rule of reference is made, and not a week, or month, or any longer time thereafter.

"It may be said, in addition, that under the ninety-ninth standing rule of this court all rules of reference entered by consent of parties may state whether the award of the referee is to have the effect of a finding of arbitrators, or merely the force of a verdict; and that in the absence of such statement the award shall be treated as a verdict. The rule of reference in the present case was consented to by both parties; it contained no statement with relation to the effect which the award of the referee should have. The Circuit Court, therefore, was entirely justified in dealing with the exceptions to the referee's report as being, in legal effect, an attempt made to set aside a verdict."

POINT 8.

Objections to the referee's taking testimony was vitiated by the plaintiff submitting the testimony and proofs under his claim and cross examining defendant's witnesses on the defendant's counter-claim and defense and submitting his defense to the defendant's counter-claim.

Where a person takes part in the trial of a cause to the extent of cross examining witnesses and submitting the case on the merits of the same, so long as the tribunal had jurisdiction of the cause generally, that person has submitted himself to the jurisdiction of that tribunal, and therefore can not rely upon his objection to the tribunal's jurisdiction of him and the subject matter, *Fraley v. Feather*, 46 N. J. L. 429; *Funck v. Smith*, 46 N. J. L. 484; *Edwards v. Currie*, 78 N. J. L. 566; and in *Venghis v. Commonwealth Casualty Co.*, 101 N. J. L. 151, this Court, on page 153, stated:

"* * * this case is governing on the question of jurisdiction by the principal, that when the attorney for the defendant takes part in the trial of the case to the extent of cross examining the witnesses as to the merits of the litigation, it is equivalent to a general appearance. As was said by this Court, a defendant, who in one breath challenges the jurisdiction of the Court in a pending suit, and in the next asks relief against the plaintiff on the merits in the same litigation, submits himself to the jurisdiction of the Court."

POINT 9.

Objections to referee's findings and improper actions on part of referee in this case, are not subject of appeal to this Court.

Since the referee's report by the authorities above cited and the effect of the submission of

both parties to the litigation, is that of a submission of the case to a certain tribunal, and the said report has the effect of a jury verdict, the action or decision on the part of the referee is not subject to appeal in this court, since the action of a jury in deciding issues upon the evidence and proofs adduced before it are subject to the control of the trial court only on applications for rules to set aside the verdict, *Children's Homes Assoc. v. Hall, supra*.

Since the testimony taken before the referee is not made a part of the record and the objections and exceptions, if any, taken before such referee, are not set forth in the State of Case and made part of the same for the purpose of this appeal, this court has upon innumerable occasions ruled that such objections and exceptions will not be considered on appeal, since there is nothing before the Court to show whether or not the referee committed error, *Sweeney v. Grissler*, 7 N. J. Misc. R. page 505 (146 Atl. 63).

POINT 10.

Appellant was not deprived of a constitutional right but waived the same by entering his consent to the reference and submitting to the jurisdiction of the said referee as the tribunal to try the cause.

Under Amendment 7 of the United States Constitution, which amendment provides that the right of trial by jury shall be preserved, our United States Supreme Court held that parties have a right to enter into a stipulation waiving a jury and submit the case to the Court, even without any legislative provision for waiver. *Henderson's Distilled Spirits*, 14 Wall. 53; *Rogers v. United States*, 141 U. S. 554; *Campbel*

v. Boyreau, 21 How. 223; and this amendment has no application to cases tried in the State courts, *Pearson v. Yewall*, 95 U. S. 294; *St. Louis, etc. v. Kansas City*, 241 U. S. 419; *Brown v. New Jersey*, 175 U. S. 174.

Article 1, Section 7 of the New Jersey Constitution (as amended), 1 Comp. Stat. IV, which provides that the trial by jury shall remain inviolate, has not been violated by the procedure in this case, since the plaintiff-appellant, by his stipulation and submission to the referee as the tribunal to try his cause as aforesaid, waived his right to a jury trial, and such waiver has been held effective in the cases of *Hinchly v. Machine*, 15 N. J. L. 476; *Raphael v. Lane*, 56 N. J. L. 108; *Ten Eyck v. Farlee*, 16 N. J. L. 348; *Humphrey v. Eakley*, 72 N. J. L. 424; *Kohn v. Lehlback*, 160 U. S. 293; 40 L. Ed. 432.

CONCLUSION.

From all of the above, since the parties had by stipulation agreed and submitted, and finally litigated upon its merits, the matters in controversy before the referee, as a proper and competent tribunal; and since the legal effect of said tribunal's decision was the same as that of a jury verdict, the plaintiff-appellant's appeal should herewith be dismissed and defendant-appellee allowed his costs of appeal and a reasonable counsel fee.

Respectfully submitted,

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