INDEX

PAGE

Notice of Appeal and Grounds 1

Summons 2

Complaint 3

Notice of Application to Amend 5

Answer 7

Answer to Second Count 8

Reply 10

Postea 11

Order to Amend 7

PLAINTIFF'S TESTIMONY:

Leslie W. Orr—Direct 13
Cross 20
Recalled—Direct 85
Recalled—Cross 87

M. Leroy Cobbin—Direct 26
Cross 36

Ingram Cobbin—Direct 42
Cross 48

Charles P. Orr—Direct 51
Cross 57
Re-direct 63
Recalled—Direct 88
Recalled—Cross 90

New Jersey State Library

PAGE

Motion for Non-suit 65

DEFENDANT'S TESTIMONY:

Charles S. Rudolph—Direct 67
Cross 72
Re-direct 77
Recalled—Cross 85

Samuel Rudolph—Direct 79
Cross 82

Tillie Rudolph—Direct 83
Cross 84

Decision of the Court 90

Exhibit P1, Agreement 93

Exhibit P3, Letters 97

NOTICE OF APPEAL AND GROUNDS.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

CHARLES P. ORR, *Plaintiff*, v. SAMUEL RUDOLPH and ROSE RUDOLPH, *Defendants.*	Action at Law. Notice of Appeal and Grounds.

10

To Louis B. LeDuc, Attorney for Plaintiff:

Sir:

20

Please take notice that the defendant in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause on the following grounds, to wit:

Because the Supreme Court erred in giving judgment to the plaintiff instead of the defendant in that:

(a) The verdict was against the greater weight of the evidence.

30

(b) Because the Court refused to grant a non-suit in favor of the defendant.

(c) Because the Court refused to direct verdict for defendant as requested.

(d) Because the verdict included interest on the damages awarded.

Respectfully yours,

PATRICK H. HARDING,
Attorney of Defendants.

10

SUMMONS.

THE STATE OF NEW JERSEY TO SAMUEL RUDOLPH AND ROSE RUDOLPH:

(Seal) You are summoned to answer the annexed complaint of Charles P. Orr, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with

20 the clerk of the 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 4th day of June, A. D. nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

LOUIS B. LEDUC,
30 *Attorney.*

COMPLAINT.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

10

CHARLES P. ORR, *Plaintiff,* v. SAMUEL RUDOLPH and ROSE RUDOLPH, *Defendants.*	Action at Law. Complaint.

Plaintiff residing in the Borough of Haddonfield, County of Camden and State of New Jersey, says 20 that:

1. On or about October 14, 1925, defendants entered into a written agreement with plaintiff wherein and whereby defendants agreed to sell and convey to plaintiff premises located on the White Horse Pike in the Borough of Magnolia, County of Camden and State of New Jersey, more particularly described in said agreement, for the purchase price of $6600. There was paid to defendants by plaintiff 30 at the time of the execution of said written agreement, the sum of $600.00 on account of the said purchase price.

2. Defendants and each of them refused and neglected to carry out the aforesaid agreement of

sale and have at all times refused and neglected and still refuse and neglect to carry out the aforesaid agreement and convey the said premises to plaintiff, in accordance with the terms and conditions set forth in their aforesaid agreement of sale.

3. Plaintiff, relying upon the performance of said agreement by defendants, incurred obligations and expended moneys, particularly in the ordering of
10 title insurance, the employment of counsel to represent him at settlement and in conveyancing charges and otherwise in connection with the purchase of said premises; and as a result of the aforesaid refusal and failure of defendants to perform their said agreement and their failure and refusal to repay to plaintiff the said deposit money of $600.00, plaintiff has been damaged and has lost the aforesaid deposit money of $600.00, together with moneys expended and obligations incurred by him as afore-
20 said.

Plaintiff demands as damages the sum of $1,000.

Louis B. LeDuc,
Attorney of Plaintiff.

[Endorsed]

30 I hereby depute and appoint Harry Gleason to execute the within writ. Witness my hand and seal this 9 day of June, A. D. 1927.

Walter T. Gross, (Seal)
Sheriff Camden Co.
By J. M. Ackley,
Under Sheriff.

NOTICE OF APPLICATION TO AMEND.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

CHARLES P. ORR, *Plaintiff,* v. SAMUEL RUDOLPH and ROSE RUDOLPH, *Defendants.*	Action at Law. Notice of Application to Amend.

10

Please take notice that on Friday, January 13, 1928, at the hour of ten o'clock in the forenoon thereof or as soon thereafter as counsel can be heard, I shall apply to Honorable Ralph W. E. Donges, Circuit Judge, at his chambers in the court house, in the City of Camden, New Jersey, for a rule amending the complaint in the above-entitled cause by designating the first three paragraphs thereof as "First Count" and by adding thereto the following: 20

SECOND COUNT.

30

1. Paragraph 1 of the first count is repeated.

2. Defendants and each of them, being in possession of the premises above referred to, subsequent to the making of the aforesaid agreement of purchase and sale and prior to the time fixed for

settlement thereunder, permitted the water supply system in the dwelling house and store erected on the said property to freeze and as a result of such freezing to break and disintegrate, thereby causing damage to the water pipes throughout the said building, to the hot water heating system and the pipes, radiators and other fixtures connected therewith in said building, and to the walls, floors, ceilings and divers other parts of the building itself, whereby the
10 said building was rendered uninhabitable and of materially less value than at the time of the making of said agreement of purchase and sale.

3. Plaintiff requested defendants and each of them to repair the damage done as aforesaid or to permit him to make the necessary repairs and charge the defendants therewith; defendants and each of them refused both of plaintiff's said requests and have ever since refused.
20

4. Plaintiff has at all times been ready and willing to perform his obligations under the said agreement of purchase and sale.

5. Plaintiff, relying upon the performance of said agreement by defendants, incurred obligations, expended moneys, particularly in the ordering of title insurance, the employment of counsel to represent him at settlement, and in conveyancing charges, and
30 otherwise in connection with the purchase of said premises. As a result of the aforesaid refusal and failure of defendants to perform their said agreement, and of their acts and neglects hereinabove set forth, and their refusal to repay to plaintiff the said deposit money of $600.00, plaintiff has been damaged and has lost the aforesaid deposit money,

together with moneys expended and obligations incurred by him as aforesaid.

Plaintiff demands as damages the sum of one thousand dollars.

LOUIS B. LEDUC,
Attorney of Plaintiff.

To Patrick H. Harding, Esquire,
Attorney of Defendants.

10

ANSWER.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

20

CHARLES P. ORR, *Plaintiff,* v. SAMUEL RUDOLPH and ROSE RUDOLPH, *Defendants.*	Action at Law. Answer.

Defendants, Samuel Rudolph and Rose Rudolph, of Berlin, County of Camden and State of New Jersey, in answer to plaintiff's complaint, say that:

30

1. They admit the allegations contained in paragraph one of the plaintiff's complaint.

2. They deny the allegations contained in paragraph two of the plaintiff's complaint.

The foregoing application to amend was allowed by order of the trial Judge and said order should have been made part of this record.

3. They neither admit nor deny the allegations contained in paragraph three and leave plaintiff to his proof.

DEFENSE.

The defendants and each of them, have always been willing and able to carry out the agreement of 10 sale and have at all times been ready and have offered to do so in accordanec with the terms and conditions set forth in said agreement of sale.

PATRICK H. HARDING,
Attorney for Defendants.

ANSWER TO SECOND COUNT.

20 NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

CHARLES P. ORR, *Plaintiff,* v. SAMUEL RUDOLPH and ROSE RUDOLPH, *Defendants.*	Action at Law. Answer to Second Count.

30

Defendants by way of answer to the second count of the plaintiff's complaint, say that:

1. They admit the allegations contained in paragraph one of the second count.

2. They deny the allegations contained in paragraph two of the second count.

3. They deny the allegations contained in paragraph three of the second count.

4. They deny the allegations contained in paragraph four of the second count.

5. They deny the allegations contained in paragraph five of the second count. 10

6. They neither admit nor deny the allegations contained in paragraph six of the second count, but leave the plaintiff to his proof.

DEFENSE.

The defendants and each of them have always been willing and able to carry out the agreement of sale and have fulfilled all the duties they owe to plaintiff under said agreement and have at all times been ready and willing and have offered to carry out the terms of the agreement in accordance with the terms and conditions set forth in said agreement of sale. 20

PATRICK H. HARDING,
Attorney for Defendant.

30

REPLY.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

10

CHARLES P. ORR, *Plaintiff*, v. SAMUEL RUDOLPH and ROSE RUDOLPH, *Defendants*.	Action at Law. Reply.

20

Plaintiff denies all the affirmative allegations of defendants' answer.

LOUIS B. LEDUC,
Attorney of Plaintiff.

30

POSTEA.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

10

CHARLES P. ORR,
Plaintiff,
v.
SAMUEL RUDOLPH and ROSE RUDOLPH,
Defendants.

Action at Law.
Postea.

20

This case was tried before Honorable Ralph W. E. Donges, without a jury, at the Camden County Circuit, on June 22, 1928.

A verdict was rendered against the defendants and in favor of the plaintiff for $636.00, six hundred thirty-six dollars.

RALPH W. E. DONGES,
Judge.

30

TESTIMONY.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

CHARLES P. ORR,
Plaintiff,
v.
SAMUEL RUDOLPH, *et al.*,
Defendant.

Action at Law.

June 22nd, 1928.

DONGES, J., without a jury.

APPEARANCES:

LOUIS B. LEDUC, ESQUIRE, for the plaintiff.
PATRICK H. HARDING, ESQUIRE, for the defendant.

(Mr. LeDuc opened the case for the plaintiff to the Court.)

Mr. Harding: I renew the motion which I made when the case was originally up for trial before

your Honor, to the effect that we ask for judgment of a non-suit on the opening, by reason of the fact that the plaintiff has not stated the cause of action. I assume that these things have happened, but even if they have happened, he has put us on no responsibility so far as these happenings are concerned, because in his opening he has not indicated, nor has he asserted, that we had anything to do with what happened to this property, if these things which are alleged to have occurred, did actually occur. 10

The Court: I will reserve decision on that motion.

THE CASE FOR THE PLAINTIFF.

Leslie W. Orr, sworn.

20

By Mr. LeDuc:

Q. Where do you live?
A. 112 Avondale Avenue, Haddonfield.
Q. What business are you in?
A. General real estate.
Q. What relation are you to the plaintiff, Charles Orr, in this case?
A. Brother.
Q. Do you know the defendants, Samuel Rudolph and Rose Rudolph, his wife? 30
A. Yes.
Q. When did you first meet them?
A. On the evening of October 14th, at the time the agreement of sale was drawn.
Q. Did you go there with your brother?

A. Yes.

Q. For what purpose?

A. For the purpose of negotiating for the purchase of the property.

Q. I am showing you an agreement of purchase and sale, and ask you if you can identify that?

A. Yes, sir.

Q. What is that?

A. That is an agreement of sale that I drew between Samuel and Rose Rudolph and my brother, for the purchase of the property in question.

Q. In whose handwriting are the blanks filled in?

A. My handwriting.

Mr. LeDuc: I am offering this in evidence.

Q. Let me ask, also, was this agreement signed in your presence?

A. Yes, sir.

Q. Is the Charles P. Orr, which appears there, the signature of your brother?

A. Yes.

Q. And Samuel Rudolph and Rose Rudolph the signatures of the defendants?

A. Yes. I took the affidavit.

Mr. LeDuc: It is offered in evidence, without objection, I understand.

(Received and marked.)

Q. What, if anything, was said by either you or your brother, or Mr. and Mrs. Rudolph, in regard to the water that was in the house?

A. When I filled in the period of possession, when possession was to be given, I asked whether Mr. and

Mrs. Rudolph cared to turn the water off, in view of the winter season coming on, or whether they would care to have me do it, but they said they would be glad to do it, and would turn the key over to me on a later day.

Q. Who was present at this conference?

A. Mr. and Mrs. Rudolph, Mr. Rudolph's son, and the son's wife, and my brother and myself.

Q. Did you ever receive the keys to the house from the Rudolphs? 10

A. No, sir.

Q. From anybody?

A. No, sir.

Q. Was there more than one copy of the agreement made?

A. Yes, sir.

Q. How many?

A. Two.

Q. What became of the other copy, other than P1?

A. I gave one copy to my brother and the other to Mr. Rudolph. 20

Q. Did you have anything to do with the settlement on this contract?

A. Yes, sir.

Q. Where was settlement held?

A. At my office in Collingswood.

Q. At your real estate office there?

A. Yes.

Q. Were you present?

A. Yes, sir. 30

Q. Will you state just what occurred at the settlement, Mr. Orr —— I just wanted to ask, did you convey one of the Rudolphs to the settlement?

A. Yes, I called for the son.

Q. Where?

A. At his home.

Q. Then brought him in to the settlement?
A. Yes.
Q. Just tell me who was present at the settlement?
A. Mr. Rudolph, senior, and Mr. Rudolph, junior.

The Court: Senior is Samuel Rudolph?

Witness: Yes.

10 Q. Who else?
A. Mr. Cobbin, of Mr. Bennett's office.
Q. Mr. Leroy Cobbin?
A. Yes, sir.
Q. Yes?
A. My brother and myself.
Q. What happened at the settlement? What was said by the parties present in the course of your attempting to make settlement?

A. We discussed the balance of the money to be 20 paid over the mortgages, and Mr. Cobbin drew up a settlement sheet. Then I raised the question about the water, about the pipes having been burst, and asked for an allowance.

Q. What do you know about the pipes being burst?
A. It is our usual practice ——

The Court: What do you know about it?

Q. Did you know anything about it?
30 A. Yes. I had examined the property, and found they had been broken.

Q. Let me go back of that. Let me know when you examined them?
A. The day before settlement.
Q. How did you come to make an examination of them?

A. Several days before that, my associate had been down to look the property over, it being our usual practice, and he advised me ——

Mr. Harding: Objected to.

Q. As a result, you went down and looked at it yourself the day before settlement?

A. Yes.

Q. What did you find? 10

A. I found that the pipes had been burst.

Q. Let us be specific. What pipes do you mean?

A. The hot water heating pipes, the radiators had been burst at the ends and there was considerable water in the cellar, and ice as well.

Q. Did you go down the cellar?

A. Yes, sir.

Q. How much ice was there?

A. It was sufficient ice to bear my weight. I could not get all the way into the cellar. There is an outside entrance, and I went down several steps of the outside entrance to the cellar and that was as far as I could go. 20

Q. Why?

A. On account of the amount of water and ice in the cellar.

Q. Were you able to stand on the ice?

A. Just where the ice was around the steps.

Q. How much water was there under the ice? Do you know how high it was? 30

A. About two feet.

Q. How did you get into the cellar?

A. Through the outside cellar entrance.

Q. How did you get into the door?

A. The back shed door was open.

Q. Did you go anywhere else in the house?

A. Yes, I went through the house.

Q. Did you go on the second floor?

A. Yes, sir.

Q. Did you find any damage to the radiators, or the hot water pipes leading to the radiators on the second floor?

A. Yes, sir.

Q. What was it?

A. The ends of several of the radiators had been
10 burst, and one elbow in the front room had been burst.

Q. Was that on the second floor you are talking about?

A. Yes.

Q. What damage was there on the first floor you noticed?

A. In the front room, which was the [illegible] part of the property, the end of one radiator had been burst out, and also an elbow up against the wall had
20 been broken.

Q. You say it had been broken. How did you know it had been broken?

A. There was a piece out of it. The piece laid on the floor.

Q. How about the radiators with the broken sides? Did you see the sides that were broken?

A. Yes, sir.

Q. Where were they?

A. They were lying on the floor beside the radi-
30 ator.

Q. Did you notice whether the toilet was in good condition, or not, or did you look?

A. No, sir.

Q. This was what you referred to when you said you brought out at the settlement the matter of the pipes being burst?

A. Yes.

Q. What did you say in regard to it, and what, if anything, did the defendants say and the defendants' son?

A. I asked for an allowance of two hundred dollars to be made, to assure us that the heating plant would be put in proper shape again, and I agreed if there was anything left over the actual amount of the bill for the work to be done, that I would return it to Mr. Rudolph. Mr. Rudolph said he had had a plumber there and that fifty dollars was ample to cover any necessary repairs to the heating system. We could not agree on it. We said if Mr. Rudolph, I said if Mr. Rudolph would have the work done, I would have our plumber examine it afterwards, and if it was acceptable we would go ahead and make settlement.

Q. Was the matter left, or was anything else said?

The Court: What did he say to that?

Witness: He said he would have the work done.

Q. Anything else said at the settlement, or was that the winding up?

A. That was the wind-up.

Q. Did you go out after that and look at the property, or not?

A. I don't understand.

Q. Did you go and look at the property after this attempted settlement, or not?

A. No, sir.

Q. Had the Rudolphs told you anything about this condition of the pipes and heating system before settlement?

A. No, sir.

Q. Did they say anything about it at the settlement, until you brought it up?

A. No, sir.

Q. When was it you brought it up, after the settlement statement had been drawn up?

A. While it was being drawn up.

Q. Had Mr. Rudolph, junior, said anything to you about it coming in, in the car, from West Berlin?

10 A. No, sir.

Q. When, as nearly as you can recall, when was the day of settlement, Mr. Orr, in relation to the date fixed in the agreement, Exhibit P1, which was March 14th, 1926, can you say whether on that day, or before that day, or after that day?

A. It was after that day.

Q. Do you remember how long afterwards?

A. No, sir.

Q. Was it a week, or two weeks, or two days, or 20 what?

A. A very short space afterwards. I don't remember the exact day.

Q. Within a few days?

A. I would say within a few days.

Cross-examination.

By Mr. Harding:

30 Q. How long have you been in the real estate business?

A. Four and a half years.

Q. When did you first inspect this property?

A. Just prior to the settlement.

Q. You made your agreement to purchase it on October 14th, 1925?

A. Yes.

Q. You did not inspect the property until how long before the settlement, the day before?

A. Yes, sir.

Q. You had never been in there before that?

A. No, sir.

Q. At the time that you met Mr. Rudolph to negotiate for the purchase of the property, did he suggest to you that you ought to go look at it?

A. No, sir. 10

Q. Did he say anything to you at all about looking at it?

A. No, sir.

Q. Did you tell him, in answer to a question of his, that you looked at the property, that you didn't want to see it, you saw it from the outside, and you were in the market to speculate?

A. No, sir.

Q. You did not say that?

A. No, sir. 20

Q. At the time that you made the agreement, the agreement was made at his house, wasn't it?

A. Yes.

Q. Who was present, who were present at the time the agreement was made?

A. Mr. and Mrs. Rudolph, senior; that is, Mr. and Mrs. Samuel Rudolph, and Mr. and Mrs. Rudolph, junior, Mr. Rudolph's son, Mr. Orr, my brother, and myself.

Q. At that time you made some remark to one of the Rudolphs about water, is that right? 30

A. Yes, sir.

Q. Why did you make that remark? What caused you to think about water?

A. In view of the length of time before settlement was to take place, I felt it advisable to ask

them whether they were going to take care of the water, to shut it off, or whether they would have me do it.

Q. You wanted to be sure the water would not freeze up over the winter period?

A. Yes.

Q. At that time were the keys of this property turned over to you?

A. No, sir.

10 Q. Will you say they weren't?

A. Yes, sir.

Q. Was your brother there with you?

A. Yes, sir.

Q. Are you sure this young man here (indicating) did not give you the keys of the property at the time you drew up that agreement?

A. Yes, sir.

Q. When did you get the keys of the property?

A. I never received them.

20 Q. How did you get into the property?

A. The back shed door was open.

Q. And you got into the property two or three days before settlement?

A. The day before settlement.

Q. The day before?

A. Yes.

Q. What caused you to go to the back shed to get in?

A. Mr. Knight had been down before.

30 Q. How did Mr. Knight get in?

A. He went in through the back shed door, which was unlocked.

Q. Do you know how Mr. Knight knew that the back shed door was open?

A. He went down there with the intention of trying to get in.

Q. Mr. Rudolph lived not far from this property, didn't he?

A. A considerable distance.

Q. How far away?

A. In West Berlin, and the property was in Magnolia.

Q. He lived nearer the property that you did, is that right?

A. Yes, sir.

Q. You lived at Haddonfield? 10

A. Yes.

Q. When you sent Mr. Knight down to inspect this property, did you tell him to go to Mr. Rudolph and get the keys?

A. Mr. Knight went on his own volition. I didn't send him.

Q. You mean to say you didn't tell Mr. Knight to go down and look at the property?

A. No, sir.

Q. Mr. Knight was not present at the time the agreement was made, was he? 20

A. No.

Q. He knew nothing about this matter except what you told him?

A. Mr. Knight handles all the settlements in my office for me.

Q. It was not necessary for him to examine the property to make arrangements for settlement, was it?

A. Yes, sir. 30

Q. Why was it?

A. That was his duty.

Q. In other words, was it his duty to always go and inspect property before settlement was made?

A. Yes.

Q. You always pursue that course in your office?

A. Yes.

Q. Why did he delay inspection until the day before the date for final settlement?

A. In order to be absolutely sure that everything was in the condition that it was when we bought it, before settlement was made.

Q. It was your idea, if the property was not in the condition it was when you made your agreement therefor, you would not be obligated to make your
10 settlement. Is that what was in your head?

A. No, sir.

Q. Why did you send Mr. Knight there to inspect the property?

A. I didn't send him.

Q. If he went of his own volition, you say that was the custom of your office?

A. Yes.

Q. Why did Mr. Knight, of his own volition, as your employe, go down and look at this property?

20 A. In order to properly represent our client.

Q. For what purpose?

A. To see that the property was in the condition it was at the time we bought it.

Q. Your client was your brother?

A. Yes.

Q. He is a member of the Les-Orr Corporation?

A. No, sir.

Q. How long since?

A. He never has been.

30 Q. You don't know why Mr. Knight didn't go down and see Mr. Rudolph and get the key to this property, do you?

A. No, sir.

Q. You are not sure that Mr. Knight didn't have the key from your office?

A. Yes, sir.

The Court: What do you mean by that? Repeat the question.

(Question repeated.)

Q. When you went down, Mr. Orr, why didn't you go down and see Mr. Rudolph and get the key to the property?

A. Because Mr. Knight told me the property was already open. 10

Q. But Mr. Knight had been down there two or three days before you went down?

A. Yes.

Q. How long before you went down had he been there?

A. About three days before.

Q. You presumed that if the property was open when Mr. Knight went there, it would also be open when you went there?

A. Yes, sir. 20

Q. Is that the reason you give for not going to see Mr. Rudolph about the key?

A. Yes, sir.

Q. The front of the property was not open, was it?

A. No, sir.

Q. You say the back door was open?

A. Yes, sir.

Q. Did you think, when you went there, you would find the back door open? 30

A. Yes.

Q. Why?

A. Because it was open three days before.

Q. Mr. Knight told you?

A. Mr. Knight told me, three days before, it was open.

Q. That is the reason why you expected, when you went down there, the door would be open?

A. Yes, sir.

Q. Did you see anybody there when you went to the property?

A. No, sir.

Mr. Harding: That is all.

10

M. Leroy Cobbin, sworn.

By Mr. LeDuc:

Q. You are a member of the Bar of New Jersey?

A. That is right.

Q. Did you represent Mr. Charles Orr in his claim against the vendors of this property, the defendants

20 in this case?

A. He was represented by Harold W. Bennett and I was representing Harold W. Bennett at the settlement.

Q. You were connected with Mr. Bennett's office at the time?

A. Yes, and still am.

Q. Did you have entire charge of Mr. Orr's connection with this case?

A. I did.

30 Q. Were you present at the attempted settlement of this sale?

A. I was.

Q. I don't suppose you have a memorandum of the exact date, have you?

A. No, I do not.

Q. In the contract it was fixed as March 14th,

1926. Can you say whether it was on that day, or how close to it?

A. It was right around that time because it was just prior to Easter.

Q. Will you just tell us what happened at the settlement, as you recall it?

A. Mr. Orr, as I recall it, Mr. Knight and Mr. Rudolph and myself, having called previously for Mr. Rudolph, went to Mr. Orr's office to make settlement, and it occurs to me that Mr. and Mrs. Rudolph were present, although I am not absolutely sure Mrs. Rudolph was there. And after I drew up the figures for settlement, everything was arrived at in a proper way, the matter was brought up as to the damage to the property. 10

Q. Who brought that up?

A. It occurs to me that Mr. Orr brought that matter up.

Q. Which one?

A. Mr. Leslie Orr, because Mr. Charles Orr was not present. I didn't know anything about the condition of the property, so he would be the one to bring it up, and, as I recall it, Mr. Rudolph, senior, wanted to allow us fifty dollars, wanted to allow fifty dollars for the damages that had been done; and I told him he should allow whatever damage had been actually done in the premises. If fifty dollars, if a hundred dollars' damage was done, we should be allowed that amount, so he said positively he would not do it, had no intention to do it, and would not settle, but he would take care of the matter later. At the time, as I recall, I informed him that if he didn't make good, he would only have a suit on his hands, a suit for damage to refund the money, or damage for whatever we would lose if we secured a purchaser in the meantime and could not 20 30

settle with him. That is all I recall at the time. The settlement was not made and Mr. Rudolph refused to make it.

Q. Was anything said by either of the Rudolphs as to their undertaking to put the premises back in condition?

A. I don't recall Mr. Rudolph saying anything about putting the premises back in condition at the settlement, but it does occur to me that he said it
10 could be done for fifty dollars, but it was not at the settlement, I don't believe.

Q. Was anything said by either the Orrs or by yourself as to letting him try to put it in condition for fifty dollars?

A. I have a recollection of saying to Mr. Rudolph if he could put it in condition for fifty dollars and deliver it in as good condition as it was when the agreement was signed, we would be perfectly satisfied. That is what we wanted.

20 Q. Did you see the property yourself after settlement?

A. I did, positively, subsequent to the settlement.

Q. How long after the settlement was it?

A. I can't tell you just how many weeks or days, but it was still in the cold weather. I recall it because we crawled around on the ice on our hands and knees; that was the only way we could get in there.

Q. Who is "we," in the first place?

30 A. Mr. Orr consulted me about getting a plumber, and my father, being a plumber, I suggested him, which was rather logical, and it was agreed to, and it occurs to me Charles Orr took my father and I down there. I went down because I expected that it may be involved in some litigation, and I wanted to have first-hand information. I went down, and we went in the back door.

Q. You could get in the back door?

A. The back door was standing open. We went through the house and saw these various broken radiators and pipes, and, after we finished that, we went down the cellar. The rear cellar door, as I recall it, was open, and water was up to about within the second, or first or second step. It occurs to me it was the second step of this outside cellar door, and we descended as far as we could go, and then one of them went first—it was not me—to see 10 if the ice was strong enough to hold us. It was, and we crawled along the ice on our hands and knees. We could just about clear the cellar joists by crawling on the ice. We went over to see if we could tell anything, whether the top of the heater was broken, because it was very logical something was broken. While we were there we did gather up bits of radiators and fittings which we found lying around the floor.

Q. I am showing you a piece of pipe, or a joint 20 of pipe, probably you would call it an elbow, with a red label, figure one on. Can you tell me what that is?

A. That is an elbow that was procured in the Rudolph property, the property involved in this litigation, and when this elbow was found—it occurs to me it was found on the first floor on one of the risers which goes up to the second floor. When we found it, half of the elbow was lying on the floor, and the other half was still attached to one of the 30 pieces of pipe, and we removed the piece that was still on the pipe merely by picking it off with the hand, and put it together and brought it along.

Q. There are two halves to this piece I am showing you, tied together with string. Do you mean that one of these halves was on the floor?

A. Yes.

Q. The other half was still hanging to one of the pipes?

A. On one of the pipes, yes.

Q. I show you two small pieces of pipe, and ask you if you can state what they are. Each of them has a red label with the figure two on them?

A. I know what they are. They are the backs, the heel of another elbow of smaller size than this one which you have here. This is an inch and three-quarters.

Q. Of pipe?

A. An elbow is a piece of pipe connecting two pipes at right angles.

Q. What was carried in these pipes?

A. They are either risers or returns for the hot water heating system.

Q. I don't know whether I asked you the same question with regard to those marked number one here?

A. That was, likewise, either a riser or return, I don't recall which it was, for the hot water heating system.

Q. Where did you find these marked number two?

A. I made a record at the time, but I can't recall exactly where it was. It occurs to me that was on the first floor.

Q. I am showing you a memorandum?

A. That is a memorandum I made.

Q. Can you refresh your memory by looking at that?

A. Yes, they were found on the first floor, in two different rooms, as my statement would show. They are the backs, the heels, as I stated before, of the elbows of small size; and we also noted in there that —I made the statement at the time—they were the

back of these elbows, they were close to the wall. There is only one way for them to become detached from the rest of the elbow and that was by some inside force. They could not have been struck with a hammer, or anything like that. There would have to be some inside force, because it was close to the wall.

Q. No room for the play of a hammer?

A. No room for anything.

Q. I show you another piece of metal with the figure three on the red label attached to it, and ask you what that is? 10

A. That is the top and section of a hot water radiator, with the air valve screwed in this particular piece.

Q. Where did you find that?

A. That was found lying at the base of the end section of the radiator in question. It occurs to me this radiator was found in the front room, first floor, and a small piece was found in the front room on the second floor. 20

Q. The front room of the second floor?

A. It was lying on the floor, right at the base of the section out of which it came. I picked it up and fitted it in the place it had been expelled from, and it fitted perfectly. These notes say there was a bulge there, which would be ——

Q. A bulge where?

A. At the top of the radiator, where this would fit in. 30

Q. I am showing you a piece of metal with the figure four on the red label attached to it, and ask you what that is?

A. This is also the end section of another radiator. I believe this piece was found opposite. This is the other end of the radiator. The space of the

air valve has not been damaged. This was likewise found at the base of that section of radiator, and I also fitted that piece in to see if it would fit, and it was a perfect fit. The damage had been caused by some inside force.

Q. Did you notice any other broken pipes or radiators other than those you have described, and the exhibits before you?

A. There were several other fittings that were broken here and there about the house. I can't exactly recall where they were.

Q. What do you mean by fittings?

A. These elbows are fittings. There might be a coupling, or a T or some other fitting, to change the course of a piece of pipe, or couple the pipe, or join two lengths of pipe going in the same direction. They are usually cast iron, and break rather readily.

Q. I show you three fragments of metal, which are not marked in any way, and ask you if you are able to say what they are, if you recall?

A. I know what all three pieces are. I know where they came from. I gathered them at the same time, I recall exactly where. It occurs to me this fitting ——

Q. The large one?

A. This came out of the room on the north side of the front. I was unable to find the rest of this fitting.

Q. The first floor?

A. The first floor. I could see from the doorway going 'round the front where this came from. I looked around the room, but could not find the rest of it.

Q. That goes in there?

A. No, there is another piece of elbow. I can

tell by the union on the back of it that this is also a piece of elbow, but I cannot tell, I don't recall where it came from.

Q. And this?

A. This is what I would call the heel of an elbow of larger size than Exhibit marked No. 2. It also came from the Rudolph house. I got it at the same time I got the rest of them, but I forget exactly what room they came from, or what they were off of.

Q. You have described the broken radiators. Can you state how many radiators in the house were broken? 10

A. I am under the impression there was one more with cracked sections, but I could not tell, and you cannot tell absolutely how many were broken until you fill them with water. They may be broken in the back, towards the wall, where you could not possibly see them.

Mr. LeDuc: I offer these fragments of metal with the red labels, marked 1, 2, 3 and 4, respectively, and the three unmarked fragments. 20

Mr. Harding: I object to the offer of these fragments, because, first, Mr. Cobbin did not go in there until after the time for the performance of this agreement had expired, so what the status of the purchase was at that time may be more or less problematical. We would have to assume that after March 14th, when there was a refusal to fulfil, a refusal to carry through the —— 30

The Court: The testimony is that about March 14th an extension was apparently agreed to in order that the vendor might correct this condition.

Mr. Harding: There was no such testimony.

The Court: Mr. Orr said it was agreed that the vendor, Rudolph, should have an opportunity to put the property in condition.

Mr. Harding: My understanding of what he said happened was that Mr. Orr wanted two hundred dollars and that Mr. Rudolph said he would not give it, and he went away.

10 The Court: That is not my recollection of Mr. Orr's testimony. My recollection is that he said that Rudolph said it could be done for fifty dollars. Orr said that there should be an offset of two hundred dollars to cover whatever might be the reasonable cost; and that Rudolph disagreed with that, and said, "Well, I will have it fixed," and in that posture the meeting broke up.

(Testimony in question referred to and read by
20 the stenographer.)

The Court: I somehow got the impression that at some time in the testimony is that Mr. Rudolph said that was agreed to, and that the vendors left with the understanding that he would have the property put in condition. These will be admitted.

(Received and marked.)

30 (Exception noted for defendants.)

Mr. LeDuc: Mr. Harding, I ask you to kindly produce the letters called for in my letter to you to produce. I want first the letter of March ——

Mr. Harding: I have a number of letters here.

The letters will speak for themselves. I have produced all the letters, all the correspondence I have had with Mr. Cobbin.

Mr. LeDuc: I want to offer the entire correspondence file in question. First: letter of March 23, 1926, addressed to Mr. Samuel Rudolph and signed Harold W. Bennett. Second: letter addressed to Patrick H. Harding, Esquire, under the same date, signed Harold W. Bennett. Third: the letter of 10 March 29th to Mr. Bennett by Mr. Harding. Fourth: the letter of April 7th by Mr. Harding to Mr. Bennett. Fifth: the letter of April 8th by Mr. Bennett to Mr. Harding. Sixth: the letter of April 13th by Mr. Bennett to Mr. Harding. Seventh: the letter of June 9th by Mr. Bennett to Mr. Harding. Eighth: the letter of June 17th by Mr. Harding to Mr. Bennett. Ninth: the letter of July 2nd by Mr. Bennett to Mr. Harding. Tenth: the letter of July 8th by Mr. Bennett to Mr. Harding. Eleventh: the letter 20 of July 14th by Mr. Bennett to Mr. Harding. Twelfth: the letter of July 14th from Mr. Harding to Mr. Bennett. Thirteenth: the letter from Mr. Bennett to Mr. Harding, under date of July 16th.

(Received and marked.)

Q. Did you have occasion, at another time, to inspect these premises, or not?

A. I don't recall having gone down there a second 30 time to inspect the premises.

Q. Did you, at any subsequent time, have an inspection made of the premises by your father?

A. I did.

Q. Can you state when that was, and what was the occasion for it?

A. That was some time in the summer. I am not prepared to say whether it was in the middle or latter part of the summer; but it was after I had been informed by someone, as I recall it, from Mr. Harding's office, that everything was okay to go ahead and make settlement. I gathered the impression in some way, from Mr. Harding's office, that the premises were ready and to go ahead and make settlement. My reply was that I will have an in-
10 spection made and if everything is okay, we will settle.

Cross-examination.

By Mr. Harding:

Q. You and I had some correspondence in this matter?

A. Yes.

20 Q. Referring particularly to the letters that were offered in evidence, I wrote you a letter under date of July 14th, 1926, addressed to "Harold W. Bennett, Rudolph vs. Orr: In the above matter, Mr. Rudolph called and told me that he had an estimate of a heating man that would replace this heater for $195. He is willing to have this done, providing the contract is gone through or he is willing to let your client have the benefit of the $195.00 so that he can do the work. This, of course, is submitted
30 without prejudice." You wrote me, on July 16th, this letter: "Your favor of the 14th inst. at hand, and I note that you say Mr. Rudolph has had an estimate of a heating man to replace this heater. If he puts the place in proper order, my client is satisfied to go through with the contract. If there is other work to be done, we shall expect to have

that done also." What did you mean by that letter?

A. I meant to say that if there was anything wrong with the plumbing, the water system, all the plumbing would have to be put in good condition. When we were down there, the toilet was filled up with water and filled with ice, and the expansion tank was; the expansion tank to the heating system was frozen solid; it had not thawed yet; and the radiators were all broken; that is, a number of the radiators were broken, and, in some that were not 10 broken, the pipes were cracked.

Q. In other words, this letter indicates that if there was still other work to be done you expected us to do it?

A. That is right.

Q. And didn't set out what it was?

A. We had set out so many times that the entire heating system was practically wrong; and then, later, I had an estimate from my father, Mr. Cobbin, a plumber, that it would cost approximately 20 eight hundred dollars, because the entire system was shot, and we felt it right that if there was other work to be done, it would have to be taken care of.

Q. What do you mean by this paragraph in the same letter: "I wish you would have your client proceed to take care of this matter, and advise me when the same is complete. However, if your client is satisfied to allow all expenses in this matter, my client is satisfied to employ his own heating man, and have the place put in order." What did you 30 mean by that?

A. No more than if he was satisfied to go ahead and put the place in order, we are ready to settle. Or, if that was not satisfactory, we would put the place in order and deduct from the settlement.

Q. You didn't specifically set out in this letter what work you wanted him to do?

A. No, because it was said so many times before that the entire heating system had to be put in condition.

Q. About when did you go to this property?

A. It was a very short time after the settlement was scheduled to be made. I can't recall the exact number of days.

Q. You got in by way of the back door?

A. Yes, sir.

10 Q. Did you call on Mr. Rudolph and ask for any keys?

A. No.

Q. Who was with you when you went there?

A. It occurs to me Mr. Charles Orr was with me, and my father.

Q. And your father?

A. Yes.

Q. Did Mr. Orr tell you where the keys were to the property?

20 A. No, I don't recall any discussion about keys at all.

Q. Did you assume that the property was open, also, when you went there?

A. I didn't assume anything. The only thing I assumed, if anything, was to take him down there and get him in. I was not interested in the keys.

Q. Did he say anything to you about going to Mr. Rudolph and getting the keys?

A. I don't recall that he did.

30 Q. Did you ask him about where the key to the property was?

A. I was not interested. I didn't ——

Q. You knew you were going to look at the property?

A. Yes.

Q. Didn't it occur to you to ask where the key could be obtained to get into the property?

A. No, it did not.

Q. I replied to that letter of yours I just read, didn't I?

A. I don't recall the correspondence. It has been going through the office so long I don't recall anything about it.

Q. I will read you copy of my letter of July 19th. "Dear Mr. Bennett: I cannot understand your recent letter in the matter of Rudolph vs. Orr. I have endeavored to adjust this matter amicably 10 for your client and to that end induced my client to agree to the installation of the new heater or the allowance to you of the cost therefor. Your recent letter indicates that your client desires some other alterations or repairs. If your client does not with to go through with this contract that of course is up to him, but I do not believe that Mr. Rudolph will agree to any further expenditures, so if the matter is to be closed I think we should arrange for an early settlement." Did you make any 20 reply to that letter?

A. I don't recall. What was the date of it? What year?

Q. July, 1926.

A. I don't recall if I did. It has been so long ago that I don't remember very much. I turned all my correspondence over to Mr. LeDuc, I believe.

Q. Every attempt we made, through you, to reach an amicable adjustment on this, to the end that this contract be performed was met with some counter proposition of some kind. Is not that true? 30

A. From what I gathered, every attempt was more or less evasive of the real issue. Mr. Rudolph knew what the situation was, he knew the entire heating system would not work, and there was never any attempt made to install a new heating system or properly repair the heating system.

Q. Acting on behalf of Mr. Orr, did you ever, in any letter you sent to me, set out specifically what you wanted done, in order that this contract be performed?

A. I don't recall the exact correspondence.

Q. As a matter of fact you did not, you did not set out, in any letter to me, specifically what you wanted done?

A. I do not recall.

10 Q. You never set out specifically to me what you wanted done in order to make the settlement?

A. I do not recall.

Q. Every time I made some proposition towards settlement of this matter I was met with some counter proposition?

A. Every proposition we got was a compromise offer, and my people were not satisfied with a compromise.

20 By Mr. LeDuc:

Q. Referring to the letter to Mr. Bennett by Mr. Harding, dated July 14th, which Mr. Harding read to you, and in which it was stated, "In the above matter, Mr. Rudolph called and told me that he had an estimate of a heating man that would replace this heater for $195.00," and in connection with your prior testimony, that you sent your father to inspect the premises some time in the middle or latter part

30 of the summer, can you state whether or not you sent your father for this inspection after or before receipt of the letter of July 14th?

A. I can't recall the exact date he was sent. It was some time the middle or latter part of the summer, to see if any improvements had been made, any repairs made to the premises.

Q. Was it on receipt of some information that you had from Mr. Harding that you sent him?

A. As I testified before, I was led to believe, in some way, that the repairs had been made, but I don't recall just where I got my impression.

By Mr. Harding:

Q. There is no doubt but what you went into this property after March 14th?

A. That is the date set for settlement? 10

Q. Yes.

A. There is no doubt about that.

Q. Could you tell us about how long after that date it was that you went in the property?

A. I can't tell you about how long, but it was not very long after, because we anticipated trouble due to Mr. Rudolph's absolutely arbitrary attitude at the settlement. He would not do anything. He just simply left us flat, and we anticipated having difficulty and went down there to look it over so that 20 we would have first-hand information.

Q. Which of the Orr boys was with you at the time in question?

A. It occurs to me that Charles Orr took me down.

Q. When you took these fittings away from the property, did you still feel that the agreement was in existence?

A. I felt that there had been more or less of a breach of the agreement at that time. 30

Q. You felt that there had been a breach of the agreement at that time and you took those fittings from the property feeling that there had been a breach of the agreement. Is that correct?

A. Yes.

INGRAM COBBIN, sworn.

By Mr. LeDuc:

Q. Where do you live?
A. 25 Ninth Avenue, Haddon Heights, New Jersey.
Q. You are the father of Mr. Leroy Cobbin, who
10 was just on the stand?
A. Yes, sir.
Q. What is your business or profession?
A. Plumbing and heating.
Q. How long have you been engaged in that business?
A. About forty years.
Q. I imagine that was all your life?
A. Pretty near it.
Q. Have you been engaged in all the branches
20 of the plumbing business?
A. All the branches of plumbing and heating and ice machines.
Q. Do you know anything about heating systems?
A. Yes, a little.
Q. Did you at the request of your son go to look at this property at Magnolia of the defendants in this case?
A. I did.
Q. Can you state when you went?
30 A. I can't state the date, no. I didn't pay no attention to the date. I just went down and looked it over.
Q. What season of the year was it?
A. It was in the winter-time. The ice was in the cellar.
Q. Who did you go with?

A. Mr. Charles Orr and my son.

Q. How did you get in the premises?

A. Went in the back way.

Q. Referring to the exhibit of these various fragments, will you take these up and state what they are?

A. That is an elbow from a riser on the right in front of the store. One-half lay on the floor, and the other half was clinging to the pipe. I reached up and picked it off. 10

Q. And these little fragments?

A. They are heels of three-quarter-inch elbows. These came from the heel of the elbow, the back part, this part here, and this was against the wall.

Q. Referring to No. 1 as against the wall?

A. Yes.

Q. Where did you find fragment No. 2?

A. No. 2, I think they were found in the back room.

Q. First floor or second floor? 20

A. First floor.

Q. Number 3 and 4 are pieces of radiator?

A. I think No. 3 came from the first floor, the return section of a hot water radiator. I think this came from the second floor. That is flowing into the radiator. That is the return and that is the flow.

Q. Where did you find No. 3?

A. Found them lying on the floor in front of the radiator.

Q. What is this? 30

A. That is the heel of an elbow.

Q. The small one?

A. Yes.

Q. The large one?

A. That is the side of a one-inch elbow and this is a three-quarter elbow.

Q. Were they found on this same property?
A. Yes.
Q. Did you go down the cellar?
A. Yes.
Q. What did you find?
A. I found the cellar full of water. I went across the ice as far as the boiler.
Q. Ice was on the water?
A. Yes.
10 Q. You crawled on the ice?
A. Yes.
Q. How much water and ice was in the cellar?
A. At that time probably about maybe eighteen inches. I won't say positively, but it was pretty well in the boiler. I thought the boiler was done when I saw the ice there.
Q. Why do you say that?
A. Because a cast-iron boiler will never stand ice.
Q. From your observation of the heater fittings,
20 the system in the house at that time, could you state how much would have been the probable reasonable cost of repairing the system?
A. At the time when I looked at it, when I went in the house and saw the condition of the plumbing work, filled with water, I suppose I would not touch it under eight hundred dollars to put the whole thing in shape, figuring on a whole new heating system and repairing everything.
Q. That is your judgment?
30 A. That was my judgment. You can't tell these things until you test them out.
Q. How do you test them?
A. Fill them with water and pressure.
Q. You could not send the water where the ice was?
A. No.

Q. Did you look at the bathroom fixtures?

A. I did.

Q. How did you find them?

A. I found them full of ice. That was as far as you could go.

Q. How about the toilet bowl?

A. The toilet bowl was full of ice.

Q. Any damage to the toilet?

A. I could not tell until I tested it. It was full of ice. 10

Q. Do you recall how many radiators in the house were broken?

A. I only found two pieces out of the radiators, but, of course, you can't tell anything about the radiators. Sometimes they will crack in the back, and places you can't see. You can't tell anything until you fill the system with water.

Q. How about the other fittings and pipes connected with the hot water system?

A. You could not go over them. You could not 20 blow the radiators. These pipes were all open.

Q. My question is, how many could you say of your own knowledge were broken?

A. Three fittings and risers.

Q. Were there some of these on the second floor as well as the first?

A. Yes, but you could not get water to the second floor.

Q. In your judgment, as a practical plumber and from the appearance of the fragments before you, 30 and the other effects you saw in the house at this time, what would you say had caused the damage done?

A. Internal expansion.

Q. What does that mean? What was the force that caused the internal expansion?

A. Freezing.

Q. Could it have been anything else than freezing?

A. Not that I know of.

Q. That means the freezing of water?

A. The freezing of water.

Q. Did you have occasion to make another visit to this same place later?

A. I did.

10 Q. Can you state when that was?

A. No, I could not, but it was in the summer weather.

Q. Summer-time?

A. Summer-time.

Q. The same year?

A. Same year.

Q. How did you come to go down?

A. My son called me up on the telephone and asked me to go down there and look the plant over.

20 Q. Did he say why you were to look it over?

A. No. He just told me to go down and look it over. No purpose was given.

Q. You went?

A. I went down.

Q. What did you find?

A. I went down there. The house was occupied at the time. I asked the girl if I could go down the cellar and look over the heating system, and she said, "Yes," very timidly, and so the first thing I
30 went down and turned the water. I turned the water in the boiler, and when it got up to the second section the water started to come out of the boiler.

Q. Where did it come out of the boiler?

A. Out of the section.

Q. I haven't a very clear idea of that myself.

A. A boiler is composed of sections, one on top of the other. I think this one had three sections.

Q. Which section was the water coming from?

A. It appears to me it was the section under the dome section.

Q. Was that section entirely exposed to the outer air?

A. It was supposed not to be. The jacket was off. The cast-iron smoke jacket was gone. That was off there.

Q. Could you see any break or crack in the section? 10

A. No.

Q. Why?

A. Simply because it was inside the boiler. You could not see very well between the sections.

Q. How old was this heating system from your observation?

A. I judge that heating system would be about, according to these radiators, I judge that heating system would be about ten years old.

Q. How old? 20

A. Eight to ten years old.

Q. In that time, under ordinary conditions, would the boiler have worn out and broken down?

A. No.

Q. Were you able in any way to test the rest of the system, the radiators, in other places?

A. No, I could not test them.

Q. Why?

A. Because the water ran out of the boiler.

Q. You could not get the water on the upper floors? 30

A. No.

Q. Did you notice the condition of the radiators and other fittings?

A. No, I did not go through the house on account of the fact that the girl was there alone. I was not taking any chances.

Q. Would it have been possible to have repaired this section of the boiler from which the water escaped?

A. It would have been possible by taking the boiler apart, dissecting it and put in another section there.

Q. Suppose it was a repair job, and you took the section out and replaced it with another section, what would the probable cost have been, if you can
10 say?

A. I would not do it under fifty dollars.

Q. Suppose you had to have a new boiler?

A. I would not put a new boiler in less than two hundred dollars.

Q. Are you able to say whether or not it would have been necessary to put a new boiler in?

A. From my past experience I have tried to repair boilers before, when there had been ice, and they had to put in a new one. You can't tell any-
20 thing about them until we take them apart.

Cross-examination.

By Mr. Harding:

Q. You got in by the back way, too?

A. Yes, sir.

Q. Was there any key used at all?

A. The first time I got in the back way.

30 Q. How did you get in that time?

A. Walked down through the cellar and through the back door.

Q. Who was with you that time?

A. My son and Mr. Orr.

Q. The second time you went down there you went by yourself?

A. Yes.

Q. How did you get in that time?

A. I went in the store and asked the young girl to let me go through the place. The place was occupied.

Q. The place was occupied?

A. Yes.

Q. About what time of the year was it?

A. It was hot, rather. I think it was some time, maybe in July. 10

Q. When you went there the first time, ice was in the cellar?

A. Yes, sir.

Q. Do you know what the ice was due to?

A. Freezing. Beg pardon, the ice was due to a broken system, broken pipe, broken water system, broken heating system let all the water back into the cellar.

Q. You found the radiators all broken?

A. Not all. 20

Q. How many?

A. Two.

Q. Two out of how many?

A. I don't know how many radiators there was in the house. I didn't pay no attention to that.

Q. Only two broken as far as you observed?

A. Yes.

Q. You found one section of the boiler cracked?

A. I suppose one section. I didn't have the boiler full. 30

Q. What does a radiator cost?

A. A radiator?

Q. Yes?

A. At that time that radiator would cost at wholesale price about 38¢ to 40¢ a foot. I don't know whether that was a fifty-foot radiator or not.

Q. If that was a fifty-foot radiator that would cost about twenty dollars?

A. About that.

Q. The section you say would have cost about fifty dollars?

A. The boiler?

Q. Yes?

A. I judge that, installed.

Q. If you tore out the whole heating system and
10 the boiler, and put in a new boiler and all radiators and all piping, and had to re-install a new system, that would cost, in your judgment, about eight hundred dollars?

A. Plumbing and all, yes.

Q. That is plumbing and all?

A. Yes.

Q. You made a pretty thorough examination of the heating system?

A. No, you could not do it.

20 Q. How much of an examination did you make?

A. All you could examine was what you saw, as there was no water that you could test anything.

Q. You could tell by looking at the heating system about how long it had been installed?

A. No. I looked at these radiators. These are made by the American Radiator Company, which I recall handling radiators like these about ten years ago ——

30 Mr. LeDuc: Referring to fragments No. 4:

—— I remember the radiators distinctly. I remember using these radiators. They change the radiators from time to time.

Q. According to your best judgment they were in use about ten years ago?

A. About.
Q. It might have been over?
A. I could not tell you that.

By Mr. LeDuc:

Q. I didn't ask you what it would have cost in your judgment to have replaced, or repaired if it could be done, the broken pipes and fittings you found throughout the house? 10
A. I could not give you anything on that. You can't give anything on repairs. You can't tell anything about them. I have tried to do it, and lost money on it.
Q. You can't tell until you can test the whole system, is that it?
A. No, you can't do it.

20
Charles P. Orr, sworn.

By Mr. LeDuc:

Q. You are the plaintiff in this case?
A. Yes.
Q. What is your business?
A. Oil business, oil distributor.
Q. Have you ever been in the real estate business?
A. No, sir. 30
Q. When did you first make the acquaintance of the defendant, Rudolph, in this case?
A. When I went down with my brother on October 14th to purchase the property, arrange for the purchase of the property.
Q. That was when Mr. and Mrs. Rudolph, senior,

and Mr. and Mrs. Rudolph, junior, were present, at their home and you and your brother, Leslie?

A. Yes.

Q. On that occasion you signed Exhibit P-1?

A. Yes, sir.

Q. Was anything said by anybody present in regard to the water in the house?

A. Yes, sir. In arranging for the deposit, my brother raised the question of public utilities, particularly the water, and the Rudolphs stated that they would have the water turned off, and my brother particularly asked them to have the system drained. He thought they ought to do it inasmuch as possession was not to be taken until the date of settlement, and they retained the keys for the purpose of having the water shut off, and agreed to send them in to my brother.

Q. Can you recall who it was that spoke for the Rudolphs? You said the Rudolphs? I would like to make it more definite?

A. It was Mr. Rudolph's son, who was doing most of the talking, I think. I could not say definitely whether the father entered into it, or not.

Q. Were the keys produced at this meeting?

A. No, sir.

Q. Did you see them?

A. No.

Q. Did you ever get them?

A. No, sir.

Q. Have you ever seen them?

A. No, sir.

Q. When did you first see the premises involved in this case?

A. I went down just after we had signed the agreement to purchase the property, one Sunday morning with my brother-in-law, and looked all

around the place. The doors all seemed to be locked. I do not say whether I remembered them or not, but everything seemed to be all right. I looked in the left front store window.

Q. You mean they were closed?

A. Yes.

Q. You weren't able to get in?

A. I don't recall whether we tried to get in or not. Everything seemed perfectly all right, and they were not open. 10

Q. Did you look in the front shop windows?

A. I did.

Q. Did you notice anything that struck your attention?

A. No, sir.

Q. Just an empty room?

A. Just an empty room.

Q. Did you notice the radiator in that room?

A. Yes, sir.

Q. Did you notice whether any fragments or parts of it were lying on the floor alongside? 20

A. I didn't see anything, no, sir.

Q. Do you think you would have seen it if there had been such a fragment as is marked No. 3 exhibit in this case?

A. Yes, sir. The floor was entirely bare.

Q. Did you see any loose pieces of pipe or pipe elbow lying on the floor in the shop?

A. No, sir.

Q. Such, for instance, as is marked No. 1 in the exhibit in this case? 30

A. No, sir, and the pipe was right next to the window.

Q. Did you look into any other room in the house?

A. No, I could not see into any of the other rooms.

Q. Did you see the premises again prior to the

attempted settlement which has been described by the witnesses here today?

A. No, sir.

Q. You were present at the settlement?

A. Yes, sir.

Q. Did you go with your brother to get the younger Mr. Rudolph to take him to that settlement?

A. Yes, sir.

10 Q. Where did you go to get him?

A. We went to his home at West Berlin.

Q. Did you have any conversation with him there?

A. No, Mr. Roudolph was very agreeable. He offered us cigars and Easter eggs. It was around Easter time, and he told us to fill our pockets. In general, everything seemed to be very nice.

Q. He didn't say anything to you about any damage to the property because of water and freezing?

A. No, sir, nothing was said regarding it.

20 Q. You went to the settlement, and found there who?

A. I found my brother, and Mr. Knight and Mr. Cobbin representing Mr. Bennett's office, and the older Mr. Rudolph came to the office.

Q. Was Mrs. Rudolph, the elder Mrs. Rudolph, present?

A. I don't believe so, no, sir.

Q. What happened at the settlement?

A. Mr. Cobbin drew up the settlement, and we
30 came to the point of adjustment when my brother raised the question of the water system and the damage; and the older Mr. Rudolph seemed to go into a lot of talk, and seemed very much put out by the fact that we knew that that condition existed, and I said that an amount of money should be set aside which would defray the expenses, and he disagreed with us on that.

Q. The expense of what?

A. The expense of repairing any damage that had occurred due to their neglecting to turn the water off and draining the system which they agreed to do.

Q. What did Mr. Rudolph say to that?

A. He said two hundred dollars was ridiculous and would not consider it, and he said that they had investigated and fifty dollars would cover the damage. I was kind of sore myself, because they had not said anything about this condition existing, and we would have settled and everything would have been all right. Mr. Rudolph further suggested that we sell the property in the condition it was to somebody else. I told him I didn't do business that way.

Q. Was anything said about Mr. Rudolph putting the premises back in the condition in which they were when you bought?

A. Yes, we told them if they could repair it for fifty dollars to go ahead and do whatever was right. We just wanted them to do the right thing, and we left them in that way, that they would go ahead and do it for fifty dollars, or whatever amount it would be.

Q. Before that, you had brought Mr. Cobbin, of Mr. Bennett's office, into the case, to represent you at the settlement?

A. Yes.

Q. Did you have occasion to call on Mr. Cobbin for legal services after that?

A. After he had been brought in?

Q. After the settlement?

A. Yes. My brother represented me, and he instructed Mr. Bennett's office ——

Mr. Harding: Objected to.

Q. Did you instruct your brother? You directed contact with Mr. Bennett's office?

A. I was not present at the talk with Mr. Cobbin and my brother.

Q. In the letter addressed to Mr. Samuel Rudolph under date of March 23rd, as per Exhibit P-3, in which he states: "I have been retained by Charles P. Orr," was that letter written in accordance with your instructions or not?

10 A. Yes, I went in to talk with Mr. Bennett regarding this.

Q. I forgot to ask you whether when you came to the settlement you were prepared to go through with the settlement and pay the amount of cash the agreement called for?

A. I was, sir.

Q. How were you going to pay the twenty-two hundred cash which the agreement provided for?

A. By check, at the time of settlement.

20 Q. Did you have the money in the bank?

A. Yes, sir.

Q. Were you prepared after that to go through with the settlement and fulfill your part of the agreement?

A. I was, if they did the right thing. I was advised by Mr. Bennett's office that the Rudolphs had put the system in order, along—I won't say exactly when, but my recollection is it was the latter part of July—and accordingly Mr. Cobbin was sent

30 down to inspect the property to see if it was all right for use. I believe there was a date, a definite date arranged for a second settlement, and just before that date Mr. Cobbin went down and found that the system was not all right. The settlement was not made then, but I was prepared to make the settlement at that time, and I had the money in the bank to do it.

Q. Have you ever gotten the deposit you paid, back?

A. No, sir, I have not.

Q. Did you see the premises immediately before this attempted settlement in March?

A. No, sir.

Q. Did you see them afterwards?

A. Yes, sir.

Q. How soon afterwards?

A. I can't say whether within a week, within a week or ten days, I think it was. The ice was still there. 10

Q. You were down there with Mr. Cobbin?

A. Yes.

Q. You went over the premises with Mr. Cobbin?

A. Yes.

Q. You have heard them testify as to the condition?

A. Yes.

Q. Were the conditions as they described them? 20

A. Yes.

Cross-examination.

By Mr. Harding:

Q. You are in the oil business?

A. Yes.

Q. You were in the oil business in October, 1925?

A. Yes, sir. 30

Q. You had not been buying and selling real estate?

A. At what time?

Q. In October, 1925?

A. I bought some real estate, yes, sir.

Q. A great deal?

A. No, sir.
Q. Were you buying it for yourself?
A. Yes, sir.
Q. The real estate boom was on about that time?
A. Yes.
Q. Did you buy this property to re-sell it?

Mr. LeDuc: I object to that as immaterial and irrelevant.

10

The Court: Let him answer it.

A. I bought it as an investment.
Q. Did you buy it to re-sell it?
A. I would have re-sold it.
Q. Between the time you bought it, and the time fixed for settlement, the real estate boom had collapsed, had it not?
A. No, sir, it had not.

20 Q. Do you know when it did collapse?
A. No.
Q. Before you bought the property, Mr. Orr, you didn't look at it, did you?
A. No, other than the location and the general appearance of it seemed all right.
Q. At the time you bought it, did you know which side of the White Horse Pike it was on?
A. Yes.
Q. Which side was it?

30 A. The right-hand side going towards Atlantic City.
Q. When did you first see it?
A. I saw it a short time before we went down to West Berlin to arrange for the purchase of it.
Q. That was how many days before?
A. Possibly within the month of October.

Q. When you went there to arrange for the purchase of it, did you ask Mr. Rudolph if you could go through it and look at it?

A. No, sir.

Q. Why not?

A. I was not particularly interested in it.

Q. Why not?

A. I presumed everything was just as represented.

Q. Who represented the property to you? 10

A. I did, myself, as much as anybody.

Q. You represented the property to yourself?

A. Yes.

Q. Did you know what was in the property?

A. I knew that it had three rooms downstairs, and three rooms upstairs, and a kitchen and bath, and a store front, and side, and so forth, a side porch.

Q. What else did you know about it?

A. I didn't know that anything else was particularly necessary to be known about it. 20

Q. Did you ask Mr. Rudolph anything about the house?

A. No, sir.

Q. Did you ask him about the plumbing or heating, or anything else?

A. No, only the question of water in regard to plumbing.

Q. It was not material to you to know what was inside of the house. Nothing more than you wanted to know whether the water was turned on and off? 30

A. Yes, and that everything else was all right and in good condition.

Q. You didn't know what was in the property, did you?

A. I presumed everything was all right. That is the way I generally do business.

Q. Didn't you just tell me you didn't care what was in the property?

A. I don't believe I said anything of the kind. I knew there was a store front, and a side porch and so forth.

Q. You didn't go inside the property?

A. No, sir.

Q. You had not asked any questions as to what was inside the property?

10 A. No, sir.

Q. Therefore, you don't know what was inside it?

A. No, sir, I didn't know what was inside, other than I knew it had a hot water system.

Q. How did you find that out?

A. I found it out from the Rudolphs.

Q. When did they tell you about it?

A. At the time we arranged to buy the property.

Q. I asked you a few minutes ago what kind of a heating system it had; you said you didn't know.

20 Why didn't you tell me that?

A. I didn't think of it at the time.

Q. You have seen the materiality of it since?

A. No, sir.

Q. With whom did you have a talk about this property before you purchased it?

A. I had a talk with—I recall I had some ice cream or something down there on the White Horse Pike, and a friend of the Rudolphs told me that the property was for sale.

30 Q. And then did you go and see Mr. Rudolph?

A. I went to see Mr. Rudolph with my brother.

Q. Which of the Rudolphs are you speaking about?

A. Both of them.

Q. Was your brother with you when you bought the ice cream?

A. No.

Q. You didn't go at the time you bought the ice cream?

A. No, I could not get in touch with my brother. He went down a little later.

Q. You had seen the property before that?

A. Yes, sir.

Q. You had just seen the front of it?

A. Yes.

Q. You made inquiry about the property? 10

A. No, I didn't.

Q. How did you find out who the owner of the property happened to be?

A. From this man who was a friend of the Rudolphs. He ased me if —— I made inquiry regarding the property from this man that spoke of it.

(Recess declared to 1:30.)

20

Q. Then you sought out Mr. Rudolph, did you, to buy the property?

A. Yes, sir. Both of them represented the property as being all right.

Q. I wish you would not volunteer, Mr. Orr. I don't know whether that has been suggested to you or not. Kindly answer the questions. Don't volunteer a matter I don't ask about. After you made this agreement, did you have the agreement recorded? 30

A. Yes, sir.

Q. When?

A. Immediately.

Q. Did you order searches on the property?

A. Yes.

Q. When?

A. Immediately.

Q. Have you the search certificate here?

A. I don't know.

Mr. Harding: Have you the search certificate, Mr. LeDuc?

Mr. LeDuc: I am pretty certain I have.

10 Q. Whose duty was that to order that, yours, or your brother's?

A. My brother's.

Q. You don't know whether he ordered it or not?

A. Only what he told me, that he had gone through with the thing in the legitimate way.

Q. Was Mr. Rudolph ever seen in connection with the title certificate?

A. My brother would know more about that than I would.

20 Q. You don't know anything about it?

A. My brother represented me in it.

Q. You know nothing about the title certificate?

A. I know that I received a bill for the title from Mr. Bennett's office.

Q. From Mr. Bennett's office?

A. Yes, sir.

Q. Did you or your brother authorize Mr. Cobbin to negotiate a settlement of this matter after the contract had expired?

30 A. Yes, sir.

Q. Did you or your brother?

A. My brother. I authorized my brother to arrange for the property to be delivered as I was satisfied it was at the time I purchased it.

Q. What were your instructions to your brother to convey to Mr. Cobbin so far as settling this proposition was concerned?

A. My instructions to him were that all I wanted was the Rudolphs to do the right thing that they agreed to do at the time that I made the deposit.

Q. What do you mean by the right thing?

A. To defray any expenses for damage which had been caused by their neglecting to see that the water was turned off and the system drained.

Q. Did you fix any sum that your brother was to authorize Mr. Cobbin to take in settlement of that?

A. I was not interested in that. I didn't care regarding the expense. I just wanted it taken care of satisfactorily. 10

By Mr. LeDuc:

Q. When you first looked at the house, was there anybody in it?

A. I don't recall. It was either about to be vacated, or was vacant for a very short time before I arranged to buy it with my brother. 20

Q. You have referred to the settlement certificate. Did you pay anything to the title company for that settlement certificate?

A. I can't say definitely, but the title certificate was on the bill.

Q. On whose bill?

A. That bill to me from Mr. Bennett's office, and I imagine if that were on the bill it would have all been included in that bill.

Q. You had a bill from Mr. Bennett's office for services and disbursements? 30

A. Yes.

Q. Can you remember what the item for title insurance was for settlement certificate?

A. I think it was $45.00, and I was allowed a refund of $10.00.

Q. $35.00?

A. Yes.

Q. What did you pay Mr. Bennett, if you know, for Mr. Cobbin's services in attending the settlement and drawing the bond and mortgage which the settlement called for?

A. I think a settlement charge of something like $15.00 or $20.00, some amount lower than $25.00.

Q. Did that include the mortgage, do you know?

10 A. I think the mortgage was around $10.00 or $15.00.

Q. You are not very sure of that?

A. Not very sure, no.

Q. Did you pay Mr. Cobbin, the plumber, anything for his services in making the inspections he has testified to?

Mr. Harding: If the purpose of this testimony is to establish damages, I object to it, because the
20 parties, by their agreement, have fixed and ascertained a limit to the amount of their damages.

Mr. LeDuc: My purpose is to show damage. It seems to me we are entitled to go beyond the contract.

The Court: It doesn't seem to me that securing the services of a plumber to make an investigation would be—— I don't think it is competent.
30

(Exception noted for plaintiff.)

THE CASE FOR THE DEFENDANT.

Mr. Harding: I renew my motion for a non-suit taking advantage now, of course, of the testimony that has been offered by the plaintiff and his witnesses.

The Court: Let me see a copy of the contract. 10

Mr. Harding: If your Honor will refer to the contract, which was dated October 14th, 1925, between these parties, the contract calls for the seller to convey and the buyer to buy a certain tract of land and premises; and then refers to the size of the land, and the book and pages in which the deed for the land is recorded. It sets out also the consideration and terms on which the payment is to be made, and fixes the date for the settlement. When it comes 20 to the matter of encumbrances there is a notation, "No exceptions." It doesn't vary at all from the usual contract that is entered into in Camden County, and perhaps other parts of South Jersey. It is more or less the customary contract approved by the Real Estate Board, and in a measure by the attorneys who have been dealing in real estate. There is nothing in the contract at all that places any obligation on the part of the vendors to do other than convey the property in accordance with the 30 contract.

Mr. LeDuc replied.

(After further argument.)

The Court: It seems to me that this case is in

this posture—that the conclusion is inevitable from the plaintiff's testimony that the property, as far as the plumbing and heating were concerned, were in good condition, because the plaintiff testified that the defendants, or one of them, made that statement. This is supplemented by a cursory inspection of the property, when, as far as could be seen from the exterior, parts of the system, which thereafter were found to be defective and damaged, were to all out-
10 ward appearances in good condition. When the time of settlement arrived, it being brought to the attention of the vendors, they, apparently being ignorant of them theretofore from the statement of counsel for the defense, the defendants tendered what seemed to the plaintiff to be an inadequate allowance. I think it clear that thereafter the parties sought some means to compose their differences, but the offers made by the vendors were, in the opinion of the vendee, inadequate. That such allow-
20 ances were inadequate would seem to be sustained by the testimony of Ingram Cobbin as to the condition of the systems. It seems to me that in view of the attitude of the vendors in the premises that they must explain the situation created by the proof of the plaintiff, and I, therefore, deny the motion for a non-suit.

(Exception noted for defendants.)

30

CHARLES S. RUDOLPH, sworn.

By Mr. Harding:

Q. Where do you live?
A. West Berlin, at the time.
Q. The property in the controversy here is owned by your father, or was owned by your father at the time this agreement was made? 10
A. Yes, that is right.
Q. Did the plaintiff in this case approach you at that time with a view to buying the property?
A. Did he what?
Q. He approached you at that time?
A. Sure, but I never met him at the place.
Q. Where did you meet him?
A. That afternoon of the day the contract was signed. I imagine it must have been on a Wednesday. That is the only day I am out of the store, and 20 a man came, which later I found was Mr. Leslie Orr. He wanted to buy the property. It has been the custom between my dad and myself, it is very seldom we do anything without consulting each other, so my dad says: "I can't sell you the property unless my son will be here. I'll talk it over with my son," meaning me. He asked Mr. Orr to come back.

Mr. LeDuc: You are referring to a conversation 30 between your father and Mr. Orr?

Witness: I am referring to a conversation between him and Mr. Orr.

Mr. LeDuc: Were you present at the conversation?

Witness: No.

Mr. LeDuc: I object to anything further.

The Court: Yes.

Q. Tell me how ——

A. When I come home my dad told me I am to be home that night as there is someone coming with
10 regard to the purchase of the property. That evening Mr. Leslie Orr and Mr. Charles Orr comes up to see us pretty promptly. We were having dinner that evening, and as soon as we had the things cleared off the table, we sat down and got right down to business.

Q. Who was present at the time you started your talk about the sale of the property?

A. That evening?

Q. Yes.

20 A. Mr. Leslie Orr and Mr. Charles Orr, my dad, my wife, my mother and myself.

Q. Tell the Court just what was said by you, and what was said by Mr. Orr, regarding this purchase?

A. Right along I thought it was Leslie Orr after the property. Leslie did all the talking. Charles Orr just sat down and didn't say a word, and the price of the property was put at $6,500.00; and Mr. Orr wanted a longer time to settlement, and I says that will be quite an expensive item, seeing that the
30 property cost us $45.00 a month. It you want five months for settlement, it is a matter of a couple of hundred dollars. So then we compromised and split the difference and agreed on the price of $6,600.00 for that reason. He went and put on the paper we have agreed settlement was to be made in five months, and after that he writes out the name, he

writes out Charles P. Orr. I didn't like the idea of it, but I asked him what was it, and he said: "Well, I am doing this business for my brother. He has a few odd dollars around. I am going to see how he can make a few dollars on the transaction."

Mr. LeDuc: How are we interested in this?

The Court: What are you leading up to?

10

Mr. Harding: One of the material things in here is as to the controversy, what was said about the keys and turning off the water.

The Court: Go ahead.

A. (Continued): We went along, and the agreement was signed, and Mr. Orr, not Leslie, writes out a check for $600, and the deal was closed; and Mr. Orr gets up to walk out, and he says: "May we have the keys?" We says: "Yes, you may have the keys." 20

Q. Do you know who asked for the keys?
A. Mr. Leslie Orr.
Q. What happened? Did you give him the keys?
A. We gave him the keys.
Q. Who was there at the time?
A. Mr. Leslie Orr was ——
Q. Who was there when you gave the keys to Mr. Leslie Orr? 30
A. My dad, my mother, Mr. Charles P. Orr, Mr. Leslie Orr, my wife and myself.
Q. Was there anything said?
A. Mr. Charles Orr had nothing to do with it, as far as talking was concerned. Mr. Leslie Orr, he said, would I mind if I took care of the water.

Q. Yes?

A. And I says: "Yes, I will do that for you," and that I did, and I have a statement from them for it in writing.

Q. Did you get the water turned off?

A. I surely did.

Q. Where did you order the water turned off?

A. Laurel Springs Water Department at Laurel Springs.

10 Q. When did you go there?

A. I went there the following day, the next day.

Q. After that, did you attend what was supposed to be a settlement at Mr. Orr's office?

A. On the day or two before the settlement we got various calls from different people in Leslie Orr's office about the condition of the property, and we did say that we would allow the difference, over the 'phone we would allow $50.00 for it to go through with the settlement, for the reason that ——

20

Mr. LeDuc: I object to reasons.

Q. What was the first complaint made to you that there was anything wrong with the property?

A. The Friday before the settlement. The fourteenth happened to be a Wednesday, I believe.

Q. Who made that complaint?

A. Someone from Leslie Orr's office.

Q. Then when you reached the place of settle-
30 ment?

A. On the settlement day, Mr. Charles P. Orr calls me around ten o'clock, and settlement was to be made sometime in the afternoon. Mr. Charles P. Orr, he calls me, and he says, "Why, I want two hundred dollars for this," so I says to him, "According to your contract, you are not to get any-

thing, but I will let you have fifty dollars because I need the money badly for some things that is coming on in my place of business. I will allow you that," and I also arranged, a verbal arrangement, with him that they will come up and take my mother's settlement with a notary public at the store.

Q. Did they do that?

A. They did.

Q. What happened when you got to the settlement? 10

A. We went on with the settlement right along until we got down to that point. One said they wanted five hundred, and another said a thousand. One fellow said they would take the property away from us altogether. They were just trying to kid us along. They didn't mean business that day. They didn't mean to settle.

Q. Finally they didn't settle?

A. Finally we waited for about twenty minutes, 20 and then Dad came in to settle, and they started to do the same thing with him, kid him along. While they were doing it, Leslie Orr called up some one on the telephone. I don't know who it was, and he said that it would cost from $500 to $600 to put back, and my dad said that we would allow them fifty bucks.

Q. What happened?

A. They said they could not go through with the settlement. One man said we had better go through 30 with the settlement, or we will have a suit on our hands, and things like that. Dad asked for the paper my mother signed, and they said that upon receipt of $45.00 they would hand back the paper.

Q. You are sure about the day this water was turned off?

A. I am quite sure. I am positive.

Cross-examination.

By Mr. LeDuc:

Q. This $45.00 you mentioned, that was for the title?

A. I don't know what it was for.

Q. I think you said that at the time the property was owned by your father. Isn't it owned by him
10 now?

A. No.

Q. Has he sold it?

A. It has been sold during the time for a great deal less.

Q. He no longer owns it?

A. No.

Q. It has also been testified there was a tenant in the property the latter part of July, whatever it was Mr. Cobbin, the plumber, was there?

20 A. Sure, there was.

Q. When was that tenant put in?

A. I could not give you the exact dates, but he was put in there sometime during the summer months, because I recall he had a little soda water and ice cream store there, and his wife, they would have got along well, only his wife didn't like the idea of staying alone at night.

Q. What about the lease? Did you lease it?

A. Leased it monthly.

30 Q. Month to month?

A. Yes.

Q. You say you heard about the water being in the cellar and the system being broken down from people on the telephone shortly before the settlement. That is right, is it?

A. Yes.

Q. And on the Friday before the settlement, you think—the settlement was on a Monday, wasn't it?

A. I imagine it was on a Monday. I haven't looked up the days.

Q. When you heard about the condition this house was in, did you go to the telephone and call up Mr. Leslie Orr or Mr. Charles Orr and tell them about it?

A. No, I understood it was coming from their office. 10

Q. First you say people in the neighborhood called?

A. I didn't say people in the neighborhood.

Q. Who were the people who called you?

A. From the Les-Orr office.

Q. You didn't hear it from anyone else?

A. No, sir, no one else called up.

Q. How did you know it was from the Les-Orr office?

A. They stated so when they called up. 20

Q. Someone from the Les-Orr office told you, or some one from that office called up to tell you about the condition. Mr. Leslie Orr didn't call you to your knowledge, did he?

A. Yes.

Q. How many calls did you have?

A. Quite a number of calls the day before the settlement.

Q. All by the same person?

A. No, some from Mr. Bennett, some from Mr. 30 Charles P. Orr and some from Mr. Leslie Orr.

Q. You are sure Mr. Charles Orr called you up, and spoke to you?

A. Positively he called me up about three hours before we held the settlement.

Q. He went out in the car to bring you and others to the settlement, didn't he?

A. No, Mr. Leslie Orr was driving the car.

Q. Mr. Charles Orr was with him?

A. Yes.

Q. The two of them came to get you?

A. And Mr. Bennett.

Q. All of them came and took you to the place of settlement?

A. Yes.

Q. Just immediately before that, three hours you
10 said, Mr. Charles Orr called you on the phone?

A. Yes.

Q. Told you the premises were all shot by this freezing up?

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

Q. What did he tell you?

A. He said what was I going to do about it.

Q. Then you told him you would allow fifty dollars?

A. I would allow fifty dollars for one reason. I
20 needed the money badly. That was just what I told him.

Q. Never mind about the reason.

A. That is what I told him.

Q. You also told him at the settlement that you had some plumber look into it for you and you could get it done for fifty dollars?

A. Yes, I did, I have that in writing.

Q. You have that in writing?

A. From the plumber.

30 Q. You did say that before the settlement?

A. Yes.

Q. You were prepared to repair the damage done, and put the property in the same condition that it was?

A. No, I was not prepared to do that.

Q. Did the plumber say it would cost fifty dollars?

A. The plumber said he could do it for fifty dollars.

Q. You were prepared to pay whatever the plumber charged?

A. The plumber said he could do it for fifty dollars.

Q. At the time the property was sold on October 14th, 1925, there was nothing the matter with the heating system, was there?

A. I don't know. 10

Q. You never heard anything about it?

A. There could not be any complaint. The man sold it to me and moved out. I never heard him say whether the heater was in good condition, or not.

Q. When did your father buy the property?

A. I could not say definitely, but I don't think it was over fifty days before he sold it.

Q. You had been through the property and looked at it?

A. Yes. 20

Q. Everything appeared to be in good shape?

A. It appeared in good shape, but it didn't appear to be a property I would like to live in myself.

Q. There was no water in the cellar, was there?

A. At times there was in one corner, I was told.

Q. Never mind what you were told. Did you see any water in there yourself?

A. Very little in one of the corners.

Q. That was when you were going through the house? 30

A. Yes.

Q. See any broken radiators?

A. No.

Q. Any broken pipes or anything else?

A. No.

Q. Did you take up this matter for your father with Mr. Harding immediately after this settlement?

A. I did.

Q. It was you that acted for your father in going to Mr. Harding's office?

A. I did.

Q. Were you advised you had the right to keep the $600.00? You didn't have to make settlement,
10 you could keep the $600.00, and sell the property?

A. Yes, according to that I was.

Q. That is why you were reluctant to make these repairs and go through with the contract afterwards?

A. I didn't have to make any repairs. I rented it to these people as it was.

Q. You wanted to rent it, too, and keep the sum of money, and didn't want to go through with it and make this settlement?

20 A. Yes, I was glad to go through with it.

Q. The settlement with Charles Orr?

A. I was glad to go through with it.

Q. Why did you put a tenant in possession of the property if you expected to make it?

A. That was put in a long time after when I saw they didn't want to go through with it. The settlement was for March, and we didn't put a tenant in until June. It meant money for me every time the property was empty for a day.

30 Q. You didn't expect to make settlement with Mr. Orr after you put the tenant in, did you?

A. I put him in with that condition. I put him in with the condition that I should reach a settlement at any time.

Q. Did you have that condition in the lease to the tenant?

A. Yes, that was the way I had it.
Q. Are you sure of that, on your oath?
A. On my oath, I gave a monthly lease. I said

Q. Did you have it in or not?
A. I won't say that I did.
Q. What kind of keys were there to this property?
A. Two or three common keys.
Q. On a chain?
A. Mr. Orr had them on a little ticket of his. 10
Q. Large keys were they?
A. Ordinary common door keys. I could not say. They were not big keys.
Q. About how long, three or four inches?
A. About three inches or so.
Q. There were at least three of them?
A. I said two or three.
Q. Where did you get them?
A. We got them from the man we bought from.
Q. When Mr. Orr raised the question of keys, where did you get the keys to give him, as you say you gave them to him? 20
A. We had them right there.
Q. Where?
A. We had them in the cash register and we got them from the cash register.
Q. You are sure you handed them to Leslie Orr?
A. Positively, handed them to Leslie Orr. He was standing at the time.

30

By Mr. Harding:

Q. What company supplied the water to this property?
A. Laurel Springs Water Department.
Q. At the time you went there to have the water

turned off, did they give you a little slip, or statement?

A. At the time I went to get the water turned off, they didn't give me no statement at all, but when settlement was coming near and I was getting together all my notices and tax bill and ——

Q. Did this company give you a receipt for ——

A. I made up my mind to get a receipt.

Q. Is this the receipt?

10 A. Yes.

Q. Showing you paid one dollar?

A. Yes, I paid a dollar for turning it off.

Mr. Harding: I offer it.

Mr. LeDuc: I think it is purely hearsay. I suppose he can use it to refresh his memory. There is nothing on it to identify it, no reference to the property, nothing to make it evidence of the fact

20 that it was turned off at a certain day.

The Court: It seems to me that if it is to be offered as evidence of the fact that it was turned off ——

Mr. Harding: I can offer it to refresh his memory.

Q. Using that, will you look at it, and tell me how

30 it serves your memory as to the date that this water was turned off?

A. It serves me as to the date I have ordered it turned off, ten fifteen, and they have had a slip here, ten fourteen, we made the agreement, and ——

Mr. LeDuc: I object to it, and would like to have it marked for identification.

Q. Did you authorize anybody to do anything to this property to bring about the condition that we are complaining of here concerning the plumbing and heating?

A. I don't understand.

Q. Did you authorize anybody to do anything to the heating or plumbing system?

A. To bring it back into condition?

Q. No, to bring about the condition complained of here? 10

A. I certainly did not. What reason would I have to do that.

By Mr. LeDuc:

Q. You don't know of your own knowledge that the water was turned off. You just took it from the report given you by the water company?

A. I paid for it, and I should think I got what I paid for. 20

The Court: Did you go there and ascertain whether the water was turned off?

A. No, I didn't go there.

Samuel Rudolph, sworn.

By Mr. Harding: 30

Q. You are the father of the previous witness?

A. Yes, sir.

Q. You were the owner of this property on the 14th October, 1925?

A. Yes, sir.

Q. Were you present at your home when Mr. Leslie Orr and Mr. Charles Orr came there to see about purchasing this property?

A. Yes.

Q. Will you tell the Court just what conversation you had about the purchasing of the property?

A. Mr. Leslie Orr came about three o'clock with another party, a big man with him, he wanted to
10 buy the property. I said I wanted for the property $6,500.00, and he said, "I will not dispute with you. I will give you $6,500.00 for it, and you can give me a receipt for it." I said, "You have got to come back at six o'clock, when my son will be here." I could not read any agreement. I would have to get my son to read the agreement and he is working. If you will give me a half hour for that. All right, he said, and so they come back at seven o'clock, Mr. Leslie Orr, with Mr. Charles Orr, and they
20 started to talk about the property, and they had the agreement and everything set down, and we talked a short time, and he give me a check, Mr. Leslie Orr give me a check, his check Mr. Leslie Orr handed me the check, and that is all. When they talked it all over, I told them they could take the keys on account that they might have a customer to sell, and Mr. Leslie Orr said, "All right." I went to the register and took the keys out, and handed them to Mr. Leslie Orr. I can recall now there was a
30 white piece of string hanging to one of the keys.

Q. Who was there when you handed the keys to Mr. ——

A. My daughter-in-law, my wife, and my son, and myself and Mr. Leslie Orr and Mr. Charles Orr.

Q. He took the keys away with him?

A. Yes, he took the keys, and put them in his overcoat pocket.

Q. Was there anything said about his looking at the property?

A. Yes, I asked him if he was willing to go and look at the property, and he said, "I buy ground. I don't buy the property. I buy the outside."

Q. Do you remember the day of the settlement?

A. Yes.

Q. Were you at the settlement?

A. Yes.

Q. Who else was there besides you? 10

A. Me, when I came from town, my son come, too, and two men from Mr. Leslie Orr's office.

Q. You were at the settlement?

A. Yes.

Q. Tell us what happened at the settlement.

A. At the settlement when I come in my son walks up to me and says, "Pop, don't be hard with them. We want money. We need it." "All right" I said. They tried to make some kind of dummy out of me. Mr. Leslie Orr said he had called up about the pipes, 20 and he wants $800.00 to fix it. Mr. Bennett says, "It is all right, we will sue for ten thousand dollars." I was still sitting there ten or fifteen minutes. "Will you settle?" "No." "Will you leave $800 or $1,000 and we will settle up?" I say, "Nothing doing." I picked up the little paper there, and my keys, and they start to walk out. I asked them if they would give me the title paper, and they said if I would give them $45 they would.

Q. Did you get your keys? 30

A. Yes.

Q. Who gave you these keys?

A. Mr. Bennett was sitting right near the desk when the keys was there.

Q. Mr. Bennett or Mr. Cobbin?

A. Mr. Bennett.

Q. Did the keys have a ticket or anything of them?

A. A ticket.

Q. What did it have on it?

A. Three inch ticket, plain white.

Cross-examination.

By Mr. LeDuc:

10

Q. When Mr. Leslie Orr talked to some one at the settlement he talked to Mr. Cobbin at Haddon Heights. It was to Mr. Cobbin he was talkinng?

A. He said Haddonfield.

Q. Mr. Cobbin was it?

A. I don't know who he was talking to. He said he was talking to somebody. I don't know who.

Q. Was it not Mr. Cobbin?

A. I don't know. He said he was talking to

20 somebody.

Q. Did you ask for the keys at the settlement?

A. Yes.

Q. Where were they?

A. Right on the table with all the papers.

Q. When did you first hear about the property being damaged by the breakdown of the heating system?

A. The Friday before the settlement, Mr. Charles Orr called me up, in the morning before my son

30 came to the store.

Q. That is the plaintiff?

A. Yes.

Q. You mean Charles Orr?

A. He called me up and he told me who he was.

Q. Is that the first you heard of this breakdown?

A. The first I heard of it.

Q. You don't know of your own knowledge whether the water was turned off or not?

A. No, I would not swear to it. My son was to do it, that's all.

TILLIE RUDOLPH, sworn.

By Mr. Harding: 10

Q. You are the wife of young Mr. Rudolph?

A. Yes.

Q. You live at Berlin?

A. No, we live in Clementon.

Q. Do you recall the day that Mr. Orr and his brother called at your father-in-law's house about the purchase of this property in question?

A. Yes, I was there in the evening when they came to give the deposit. 20

Q. About what time would you say it was?

A. We were eating supper at the time.

Q. Was there anybody there besides Mr. Orr and his brother and you and your husband and father and mother-in-law?

A. Nobody else was there.

Q. Just you six?

A. Yes.

Q. Will you tell us as near as you can just what conversation took place there about the purchase of this property? 30

A. I really don't distinctly remember, because I had my two children with me. I was busy attending to them. I do remember certain points, but not all of it.

Q. Limiting yourself to the points in question

here about the keys, did you hear anything about the keys?

A. That I do remember. The two gentlemen had on their hats and coats ready to leave. He asked for the keys, he said in case somebody wanted to go and look at the house. He would like to have the keys so as to be able to show it.

Q. He took the keys away?

A. Yes, he did.

10 Q. Who gave the keys to him?

A. As far as I can remember, I think my father-in-law, Mr. Rudolph.

Q. Was there anything said there that you recall about water?

A. Yes, I remember him asking us to have the water turned off.

Q. What was said in answer to that?

A. And my father-in-law or my husband said: "Yes, they would surely attend to that."

20 Q. Were you at the settlement?

A. No, I was not.

Q. You didn't attend the settlement?

A. No, I didn't go.

Cross-examination.

By Mr. LeDuc:

Q. Was it your father-in-law that gave the keys
30 over to Mr. Orr?

A. I don't remember which one gave them to him.

Q. You think it was your father-in-law?

A. Yes, as far as I can remember.

Q. Your husband testified he gave them over?

A. I don't distinctly remember which one it was.

By Mr. Harding:

Q. Do you recall a question directed by Mr. Rudolph to Mr. Orr as to whether he wanted to look at the property or not?

A. Yes, that I do.

Q. What reply did he make?

A. He didn't care what the property was like. He was out just to make some money. 10

Charles S. Rudolph, recalled.

By Mr. LeDuc:

Q. How did you expect the Water Company to get into this property without the keys?

A. At the time I didn't think of it, but I thought they would turn the water off on the outside. That was all I had to attend to, the turning off of the water. 20

Leslie W. Orr, recalled.

By Mr. LeDuc:

Q. You have heard the testimony of the defendants' witnesses in regard to giving the keys to you. I want to ask you, after listening to their testimony very carefully, as I believe you have, whether you have any occasion for changing the testimony which you gave this morning in regard to receiving the keys? 30

A. No, sir.

Q. Are you just as certain you did not get these keys as you were on direct examination this morning?

A. Yes, sir.

Q. What is the practice of your office with regard to keys that come into the office from clients or tenants?

10 Mr. Harding: I object to that.

The Court: How is that material?

Mr. LeDuc: I would like to show that they had a regular established practice, and the customary thing would have been to receive the keys and put them in a certain place. If your Honor does not think it is material, I will not press it.

20 Q. I don't suppose you can say whether or not someone from your office called up Rudolph in regard to the condition in this house before the settlement. You don't know, do you?

A. No.

Q. I suppose it is possible someone could have done that, but they didn't do it under your instructions?

A. No, sir.

Q. You brought the matter up at the settlement, didn't you?

30 A. Yes, sir.

Q. Did you bring it up as something that was being brought up for the first time before Mr. Rudolph, or something that was brought up before and discussed with them?

A. Brought up for the first time.

Q. Did they express any surprise, or otherwise, when you announced that the property was damaged?

A. No, sir, they merely said they were willing to allow fifty dollars, which they had a written estimate of.

Q. Did you ever call up Mr. Charles Rudolph on the telephone at any time prior to the settlement?

A. No, sir.

10

By Mr. Harding:

Q. You were acting, as I understand, as agent for your brother for this property?

A. Yes, sir.

Q. You intended to re-sell it, if you could, didn't you?

A. Yes, sir.

Q. In view of that, will you tell us how it happened that you didn't ask for, or receive, the keys of that property? 20

A. I did ask for the keys.

Q. Why didn't you get them?

A. They retained them to have the water turned off, and agreed to send them on later.

Q. Even after the water was turned off, why didn't you get them?

A. We had no occasion to go down to the property before the settlement.

Q. Did you hear the young woman testify that you asked for the keys because you said you might have someone who would be interested in it? 30

A. Yes, sir.

Q. Did you say that in her presence?

A. Yes, sir.

Q. Why did you say that if you were not asking about the keys?

A. I was asking about the keys.

Q. Were you refused the keys?

A. Yes, sir.

Q. By whom?

A. By Mr. Rudolph.

Q. You heard Mr. Rudolph testify that in the presence of the son and daughter, and your brother, he got the keys from the cash register and turned them over to you, and that at the final settlement, or
10 what was supposed to be the final settlement, he again got the keys back from you. Do you still maintain you didn't get those keys?

A. That statement is not true.

Q. That is not true?

A. No.

Charles P. Orr, recalled.

20 By Mr. LeDuc:

Q. Did you ever telephone Mr. Rudolph before the settlement?

A. No, sir.

Q. Did you ever telephone to him at any time?

A. No.

Q. Ever talk to the father at any time on the telephone?

A. No, sir.

30 Q. You have heard the testimony of the defendants' witnesses. I want to ask you the same question I asked your brother, whether you have any occasion for changing the testimony you gave in regard to receipt of the keys by your brother, Leslie?

A. None whatever. I simply stated the facts.

Q. Are you just as sure you didn't receive the

keys from Mr. Charles Rudolph or either of the Rudolphs?

A. Positively.

Q. Were the keys produced at the settlement by anybody?

A. No, sir.

Q. Did you at my request go down to the Laurel Springs Water Supply Company to inquire whether they had any record of turning off the water in this particular house? 10

A. Yes, sir, I did.

Q. What did you find out?

A. I found down there that there was no record in their office of whether the water had been turned off from the time the deposit money was placed until a short time before the settlement. The question was raised with the Water Company, and I saw the date there, March 4th, 1926. I would not be surprised but what that were the date that this thing actually took place. They have to pay a dollar in 20 order to have it recorded there at the office in the regular way. The water was off at this time, March 4th, 1926, and that is just a few days before the settlement.

Q. Did you have any check made?

A. I asked this man, Mr. Nicholson, particularly if they had any request to turn the water off from ——

Mr. Harding: I object to that. 30

Q. Did you have any discussion with Mr. Charles Rudolph coming in to the settlement in your brother's car as to the damage done to the property?

A. No, we were smoking cigars and eating Easter eggs, and everything was lovely.

Cross-examination.

By Mr. Harding:

Q. You don't notice any difference in the typewriting in that lower statement there, do you?

A. I would not recall.

Q. Do you mean to infer from that that somebody
10 didn't go down to the office?

A. I am looking at the date. I just set my mind on the date.

Mr. LeDuc: Plaintiff rests.

Mr. Harding: So that we have the record straight, I take it that you are sitting both as Judge
20 and jury, and I am going to ask at this stage that the Court direct the jury to find a verdict on behalf of the defendants.

The Court: The motion is denied.

(Exception noted for defendants.)

Donges, J.:

30 It seems to me that probably I can dispose of this matter now, while the testimony and the argument of counsel upon the legal and factual aspects of the case are fresh.

As it appears to me, this case turns upon a point concerning which there is, so far as I can recall, no substantial dispute. I think, therefore, it is not necessary to review at any great length the testi-

mony, and try and reconcile the differences in the testimony. It seems to me, in view of the fact which is uncontradicted, that the vendors, the defendants, undertook by the undisputed testimony, the testimony of all the witnesses who were present when the agreement was entered into, and when the question of turning off the water was discussed, the defendants, as I say, undertook to perform that act. It seems to me the question turns upon whether or not that undertaking, which was assumed by the vendors, and which, perhaps, in the absence of any other agreement would have been the duty of the vendors in any event, had been performed within the spirit and intent and in accordance with the duty which devolved upon the vendors. There is no dispute upon that point, so that I am relieved of the necessity of determining which of the parties in that respect is telling the truth, because there is no dispute. The plaintiff says, and his brother testified, that the defendants agreed to do that. The defendants say they did agree to do it. The son of the defendants says that he took steps to have the water turned off. Whether it was actually accomplished; whether it was done in a manner that would result in the property not being subject to loss by freezing of water that may be in the pipes, does not appear. It seems to me that it is inevitable to conclude from all of the testimony that the damage here complained of, and complained of by the vendee at the time of settlement and thereafter, was occasioned by the freezing of water in the plumbing and heating systems; that the defendants had agreed at least to turn the water off; and I am inclined to go further, and believe that that duty involved likewise the removing of any water that may subject this system to damage. I think I am bound to conclude that that work was not done, either in accordance

with the express understanding and undertaking, and, as I have said, in my view, probably at the same time in consummation of a duty which was encumbent on the vendors without regard to any express agreement. It was not undertaken by the vendee, and there is no testimony that the vendee was ever in possession. I think it unnecessary to determine whether he had the keys for the purpose of admission to the property, because he was not charged
10 with the duty of protecting the systems, which were filled, or might be filled with water. It seems to me in that situation, the vendee was entitled to have either a diminution in the purchase price, equivalent to the damage done by the failure of the sellers; or to rescind, and it appears that although the time for settlement was delayed, apparent efforts on the part of the persons interested, and their counsel to accommodate the differences, that it was futile, and that the contract was rescinded in the situation
20 by right. As a result, there will be a verdict for the plaintiff. I think there is no adequate proof of any damage, and therefore, I will not allow anything except the return of the six hundred dollars deposit. That carries interest, I take it, from the time that this suit was brought, June 4th, 1927.

Mr. LeDuc: Does it not carry interest from the date of the contract?

30 The Court: No, I think not. I think from the date of the rescission. Under the testimony the date of rescission was when you brought suit. If you compute the interest, I will have that entered as the verdict of the jury.

Mr. LeDuc: The interest will be $36.00.

The Court: The verdict will be for $636.00.

EXHIBIT P1.
6/22/28.
A. W. D.

THIS AGREEMENT, Made the 14th day of October A. D. 1925,

BETWEEN Samuel Rudolph and Rose his wife, of West Berlin, N. J., of the first part, hereinafter called the "SELLER," and Charles P. Orr, of Haddonfield, N. J., of the second part, hereinafter called the "BUYER." 10

WITNESSETH, That the "SELLER" agrees to sell and convey and the "BUYER" agrees to buy all that certain lot, tract, or parcel of land and premises situate in the Borough of Magnolia, County of Camden, and State of New Jersey, more particularly described as follows:

Premises as described in deed from Wm. E. Taylor & wife to Frank D. Major, and Jennie A. Major his wife recorded in Register of deeds office at Camden on Book 529 Page 44 Lot 54′ x 145′ more or less having a frontage of 54′ on the White Horse Pike, for the price or sum of Sixty-Six Hundred and 00/100 Dollars, under and subject to the following terms and conditions: 20

Six

1. A first payment of Five Hundred and 00/100 Dollars, receipt of which is hereby acknowledged by the "SELLER." 30

2. The balance of the purchase price shall be paid in the following manner:

Purchase made subject to an existing first mortgage of $2300 payable from year to year and a second mortgage of $1500 payable within 3 years.

Balance of $2200 in cash at settlement, at the time of final settlement, which shall be made at the offices of the Les-Orr Corporation, 636½ Haddon Ave., Collingswood, N. J., on or before March 14th, 1926,
Six
or the deposit of Five Hundred Dollars made herewith, at the option of the "SELLER," may be applied on account of the purchase price or be forfeited as liquidated damages to the "SELLER," and not
10 as a penalty, provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay, not the fault of the "BUYER" in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained.

3. The title to the premises shall be free and clear of all incumbrances, including municipal liens and assessments, except municipal improvements in the
20 course of construction and not assessed, obvious easements, usual restrictions running with the land, ...no exceptions......and shall be a marketable title, and the "SELLER" shall tender a plain warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the "BUYER."

4. All adjustments shall be made as of date of settlement and possession shall be given the
30 "BUYER" on date of settlement

5. The "BUYER" shall pay for searches and all other expenses, excepting the preparation of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the "SELLER."

6. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

7. Time is the essence of this agreement.

8. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items:

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

Samuel Rudolph (L. S.)
Rosse Rudolph (L. S.) 10
Charles P. Orr (L. S.)

Signed, Sealed and Delivered
in the presence of
L. W. Orr.

Alteration of deposit from $500 to $600 made before execution.

L. W. Orr.

STATE OF NEW JERSEY, } *ss.* 20
CAMDEN COUNTY, }

BE IT REMEMBERED, That on this 14th day of October in the year of our Lord one thousand nine hundred and Twenty-Five before me, a Notary Public of New Jersey, personally appeared Samuel Rudolph and Rose, his wife, who I am satisfied are the grantors mentioned in the above deed or conveyance, and I having first made known to them the contents thereof they acknowledged that they signed, 30 sealed and delivered the same as their voluntary act and deed. All of which is hereby certified.

L. W. Orr.
(Notarial Seal).

My Commission Expires February 2, 1930.

(COVER OF EXHIBIT P1)

(In Blue Pencil)
60
———
2637

10

(In Lead Pencil)
March 14th, 1926

AGREEMENT
For Sale of Land
Samuel Rudolph
and
Rose Rudolph
to
Charles P. Orr.

Received at CAMDEN, N. J., Mar 16th 1926 at 3.30 P. M., and Recorded in Book No. 622 of Deeds, Page 193 &c., in the Office of the Register of Deeds, &c., of CAMDEN COUNTY.

20

Joshua C. Haines,
Register.

(In Lead Pencil)
H. W. Bennett
Paid
175
(Written in Ink)
Rec. 1/27/26
(In Lead Pencil)
Mar. 16-26 at 3.30 P. M.

30

EXHIBIT P3.
6/22/1928.
A. W. D.

Law Offices
HAROLD W. BENNETT
CAMDEN, N. J.
—
317 Market Street

10

March 23, 1926.

Mr. Samuel Rudolph,
West Berlin, N. J.

Dear Sir:

In re: Orr vs. Rudolph

I have been retained by Charles P. Orr who entered into an agreement to purchase certain property in the Borough of Magnolia from you, and which property you allowed to become in ill repair during the time between the signing of the agreement, and the date of settlement.

20

Mr. Orr desires to become the owner of this property, and go through with his part of the agreement, but insists that you must repair the heating system and plumbing which you allowed to freeze up and burst, or pay sufficient damages to him to allow him to do the same.

There has been a thorough investigation of this situation made, and I am entirely satisfied that you are in fault in this matter. If you wish to settle this matter without legal proceedings kindly let me hear from you without further delay, for if Mr. Orr has an opportunity to sell this property and must lose the sale due to his inability to obtain a clear

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title at this time, this is going to add to the damage which you will be obliged to pay.

I shall be glad to take this matter up with you at any time.

Very truly yours,
Harold W. Bennett.

C MH

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Law Offices
HAROLD W. BENNETT
CAMDEN, N. J.

317 Market Street

March 27, 1926.

Patrick H. Harding, Esq.,
517 Federal St.,
Camden, N. J.

20 Dear Sir:

In re: Orr vs. Rudolph

Mr. Charles P. Orr has placed in my hands the matter of a claim for damages against Samuel Rudolph, who I am informed is represented by you.

The claim is based on the negligence of Mr. Rudolph, who allowed his heating system and plumbing system to freeze and burst last winter causing practically a total loss to the heating and plumbing systems. The freezing took place subsequent to the 30 signing of the agreement, and prior to the day of settlement. It was arranged for at the time of settlement that Mr. Rudolph was to take precautions to prevent this happening.

Mr. Orr is ready and willing to go through with his agreement but does not wish to make settlement and incur the expense of repairing the old heating

system and likewise the plumbing system, or putting in a new one.

I shall be glad to hear from you in this matter, and will take the matter up further in detail with you if you so desire.

Very truly yours,
Harold W. Bennett.
C.

C MH

10

PATRICK H. HARDING
Counsellor at Law
517-519 Federal St.
CAMDEN, N. J.

March 29, 1926.

Harold Bennett, Esq.,
317 Market Street,
Camden, New Jersey. 20
Dear Mr. Bennett:

I have yours of the 27th instant, in the matter of Orr vs. Rudolph. I am writing to Mr. Rudolph to let me have a statement of his side of the controversy.

Just as soon as I hear from him, I will get in touch with you.

Respectfully yours,
Patrick H. Harding.

PHH/E. 30

PATRICK H. HARDING
Counsellor at Law
517-519 Federal St.
CAMDEN, N. J.

April 7, 1926.

Harold W. Bennett, Esq.,
317 Federal Street,
Camden, New Jersey.
10 Dear Mr. Bennett:

Orr vs. Rudolph.

I have had my client call at the office and have taken the matter up with him so that I fully understand it and can advise you of our position.

I am of the opinion that Mr. Rudolph has not violated any of the terms of the agreement between himself and Mr. Orr. Mr. Rudolph is ready and willing to go through with the agreement. He has had several estimates made on repairing the heat-
20 ing system, none of which amount to very much over $50.00. If Mr. Orr still desires the property he can have it; otherwise we disclaim all liability under the agreement and will put the property up for sale immediately.

I trust that we may be able to settle this matter amicably for it seems that the real cause of the difficulty in this matter is the fact that Mr. Orr is under the impression that he has entered into a bad bargain and is trying to get out of it.

30 Respectfully yours,
Patrick H. Harding.
M.

MM/E.

Law Offices
HAROLD W. BENNETT
CAMDEN, N. J.

—

317 Market Street

April 8, 1926.

Patrick H. Harding, Esq.,
517 Federal Street,
Camden, N. J.
Dear Mr. Harding: 10

In Re: Orr vs. Rudolph.

I have your letter in the above matter and I shall confer further with my client after which I shall again communicate with you.

Respectfully yours,
Harold W. Bennett.

HWB:NCH.

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Law Offices
HAROLD W. BENNETT
CAMDEN, N. J.

—

317 Market Street

April 13, 1926.

Patrick H. Harding, Esq.,
517 Federal Street,
Camden, N. J.
Dear Mr. Harding: 30

In Re: Orr vs. Rudolph.

I have your letter with reference to the above matter in which you say that you are willing to go ahead with the deal and make settlement on the basis of the original agreement and that you are willing to recommend to your people that they pay

$50.00 to repair the heating apparatus. I do not believe it is a question of our repairing the heating apparatus. Under the original arrangements, your people sold us the property with the heating apparatus in order and we expect to receive the same in perfect order at the present time. My people are willing to go ahead with the agreement and purchase the property and complete the settlement, if your clients will agree to put the heating apparatus
10 in perfect order.

As soon as your people have made the necessary repairs and given us notice to that effect, we shall arrange for settlement upon inspection of the plant to be assured that it is in perfect order.

I am sure that you agree with me that it is the duty of your clients to put this heating apparatus in perfect order themselves. I cannot see any obligation on the part of my people to do this and I feel that it is properly fair for your clients to repair it
20 at once and then notify us.

I will immediately go ahead with our settlement after we have inspected the same.

Kindly let me know if this meets with your approval.

Very truly yours,
Harold W. Bennett.

HWB:NCH.

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Law Offices
HAROLD W. BENNETT
CAMDEN, N. J.

—

317 Market Street

June 9, 1926.

Patrick H. Harding, Esq.,
517 Federal Street,
Camden, N. J. 10

Dear Mr. Harding:

In Re: Orr vs. Rudolph.

Please let me have further information with reference to the above. My client is anxious to have settlement made if your client has made the necessary repairs.

Please let me hear from you.

Very truly yours,
Harold W. Bennett.

HWB:NCH. 20

(In Lead Pencil at Bottom of Letter)
P. H. H. You are handling this.
???

PATRICK H. HARDING
Counsellor at Law
517-519 Federal St.
CAMDEN, N. J. 30

June 17, 1926.

Harold W. Bennett, Esq.,
317 Market Street,
Camden, New Jersey.

Dear Mr. Bennett:

Orr vs. Rudolph

In regard to the above entitled matter, my client

has advised me that he is ready to make settlement and already has tenant living in the property for several months.

Respectfully yours,
Patrick H. Harding.

PHH/E.

10

Law Offices
HAROLD W. BENNETT
CAMDEN, N. J.

—

317 Market Street

July 2, 1926.

Patrick H. Harding, Esq.,
517 Federal St.,
Camden, N. J.

Dear Sir:

20 In re: Rudolph to Orr.

Upon receiving information from your office that the Rudolph property in Magnolia, New Jersey, was now in condition for settlement, I had a plumber inspect the property to see if everything was O. K. He reported to me that he went to the property, and started to fill the heating system with water. When the boiler was about one-half full of water, the water began to run out in a quite a stream, proving that the boiler which froze up last winter had not been 30 repaired.

He further informed me that the hot water pipes were not connected, and that the entire house was without a hot water supply, which would indicate more than likely that some part of the system which furnished the hot water for domestic use is also out of repair.

Of course, he was unable to test the pipe lines to the radiators belonging to the heating system for he could not get the water that far.

I wish you would kindly have your client take care of this matter in a satisfactory manner immediately.

Very truly yours,
Harold W. Bennett,
By M. LeRoy Cobbin.

C:MH

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Law Offices
HAROLD W. BENNETT
CAMDEN, N. J.

317 Market Street

July 8, 1926.

Patrick H. Harding, Esq.,
517 Federal Street,
Camden, N. J.

20

Dear Sir:

In Re: Rudolph to Orr.

My client informs me that the work was not done satisfactorily on the property on White Horse Pike. I would like to know when I can see you personally about this matter and go over the same with you.

Awaiting your reply, I am

Respectfully yours,

30

Harold W. Bennett.

HWB:NCH.

Law Offices
HAROLD W. BENNETT
CAMDEN, N. J.

—

317 Market Street

July 14, 1926.

Patrick H. Harding, Esq.,
517 Federal St.,
Camden, N. J.

10 Dear Sir:

In re: Rudolph to Orr.

I wish you would kindly advise me as to what your client wishes to do in the above matter, in the line of repairing the property, and making the settlement. My client insists that either the settlement be made within a reasonable time from date or suit be started for damages in this matter.

I would appreciate hearing from you.

Very truly yours,
20 Harold W. Bennett,
By M. LeRoy Cobbin.

C:MH

PATRICK H. HARDING
Counsellor at Law
517-519 Federal St.
CAMDEN, N. J.

July 14, 1926.

30 Harold W. Bennett, Esq.,
317 Market Street,
Camden, New Jersey.

Dear Mr. Bennett:

Rudolph vs. Orr.

In the above matter, Mr. Rudolph called and told me that he had an estimate of a heating man that would replace this heater for $195.00. He is willing

to have this done, providing the contract is gone through or he is willing to let your client have the benefit of the $195.00 so that he can do the work. This of course is submitted without prejudice.

Respectfully yours,

Patrick H. Harding.

PHH/E.

Law Offices
HAROLD W. BENNETT
CAMDEN, N. J.

10

317 Market Street

July 16, 1926.

Patrick H. Harding, Esq.,
519 Federal St.,
Camden, N. J.

Dear Sir:

In re: Rudolph to Orr.

20

Your favor of the 14th inst. at hand, and I note that you say Mr. Rudolph has had an estimate of a heating man to replace this heater. If he puts the place in proper order, my client is satisfied to go through with the contract. If there is still other work to be done, we shall expect to have that done also.

I wish you would have your client proceed to take care of this matter, and advise me when the same is complete. However, if your client is satisfied to allow all expenses in this matter, my client is satisfied to employ his own heating man, and have the place put in order.

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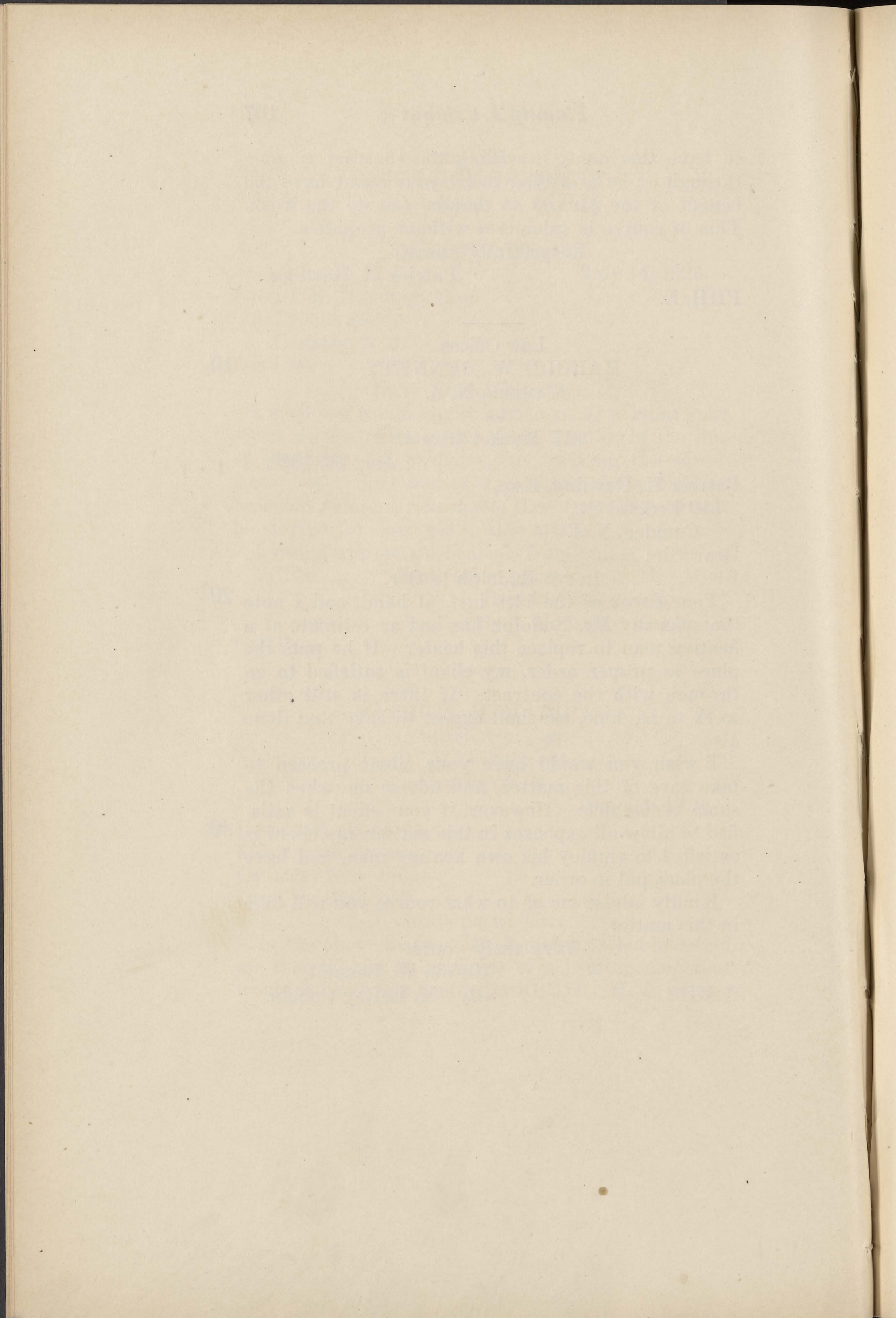
Kindly advise me as to what course you will take in this matter.

Very truly yours,

Harold W. Bennett,

C:MH By M. LeRoy Cobbin.



NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES P. ORR,
Plaintiff-Respondent,
v.
SAMUEL RUDOLPH and ROSE RUDOLPH,
Defendants-Appellants.

ACTION AT LAW.

BRIEF IN BEHALF OF SAMUEL RUDOLPH and ROSE RUDOLPH, (Defendants-Appellants).

STATEMENT OF FACT.

This is an action brought by Charles P. Orr against Samuel Rudolph and Rose Rudolph, his wife, in the New Jersey Supreme Court, for damages resulting from the breach of a contract for the sale of a parcel of land.

Plaintiff, Charles P. Orr, was the purchaser, while the defendants, Samuel Rudolph and Rose Rudolph, were the sellers. The premises in question is a store, in the Borough of Magnolia, Camden County, New Jersey.

The agreement is dated October 14, 1925, and the time for settlement fixed as on or before March 14, 1926.

The case was tried before Judge Ralph W. E. Donges, without a jury.

The real question in issue is the right of plaintiff to recover deposit money and rescind the contract because of the alleged failure of defendant to have water on premises turned off.

The first witness called by the plaintiff was Leslie W. Orr, brother of the plaintiff. The only testimony of importance that this witness gave is found in the printed State of the Case at the bottom of page 14, and the first five lines on page 15.

This testimony is important because it shows that this witness asked if the defendants cared to turn the water off, knowing that it was not their duty so to do.

The next witness called by plaintiff, was M. LeRoy Cobbin, a member of the bar of this State. This witness produced certain fragments of metal, supposedly to have been parts of the plumbing of the property in question. His testimony, as shown on page 41, of the State of the Case, states emphatically that he visited the property after the date set for settlement, and knew nothing of its condition prior to that time.

The next witness called by the plaintiff was Ingram Cobbin, father of M. LeRoy Cobbin, the previous witness.

This witness knew nothing of any previous arrangements but testified only to conditions as he found them at the time he visited the premises in question with his son after the time had expired for settlement.

The last witness called by the plaintiff was

Charles P. Orr, the plaintiff himself. This witness emphatically stated as will appear on page 58, of the State of the Case, line 13, etc., that he purchased this property as an investment during the real estate boom that was then at its height. He further stated as will appear in lines 22 to 25, that he never inspected the property when he purchased it, and that he was not interested in seeing the property as is stated in line 6, page 59, of the State of the Case.

From the testimony of this witness we can readily see that he purchased the property as a pure speculation, while the real estate boom was at its peak.

When time for settlement arrived some five months later and the property was not yet resold, plaintiff, looked about to see what excuses he could offer to regain the deposit money, and relieve himself of the obligations incurred under the terms of the agreement.

The first witness called by the defense was Charles S. Rudolph, son of the defendants, Samuel Rudolph and Rose Rudolph; by the testimony of this witness, as will appear in lines 2, 3, 4 and 5, of page 69, of the State of the Case, the plaintiff purchased the property as a mere speculation. This witness emphatically states that he had the water turned off the day after the agreement was entered into.

The next witness called by the defense is the defendant, Samuel Rudolph, who confirms the testimony of the plaintiff, Charles P. Orr, and the testimony of Charles S. Rudolph, as is shown in lines 4 and 5, on page 81, of the printed State of the Case, in that the plaintiff purchased this property for speculation.

The last witness called by the defense was Tillie Rudolph who confirmed the statements of both Charles S. Rudolph and Samuel Rudolph.

ARGUMENT.

The testimony of all of the witnesses, both plaintiffs and defendants, clearly established the fact, that this property was purchased as a speculation during the height of the real estate boom.

The plaintiff himself stated that he was not interested in the condition of the property when he purchased it and did not examine it to ascertain its condition.

It is important to note that the testimony does not disclose that any money or check was actually tendered at the time of settlement. The plaintiff never offered to carry out the terms of the contract and sue for any damages that he may have sustained. He was interested in relieving himself of the bargain and regaining the deposit money.

The law is well established, and without exception, as to the loss or deterioration of property, between the time the agreement for the sale is entered into and the time the deed and possession are delivered.

In th case of *Marion v. Wolcott*, 68 New Jersey Equity, 20, the Court said, "Under a contract for the sale of land, the equitable ownership passes to the vendee, and he is entitled to all subsequent improvements and increases in value and is subject to all losses and depreciations, not occasioned by the neglect or default of the vendor in carrying out the contract."

In the case of *Schmidt v. Opie*, 33 New Jersey Equity, 138, the Court laid down the law to be, "On an agreement for the sale of lands being made, the purchaser becomes in equity the owner of the land, and the vendor becomes the owner of the purchase money."

The rule is further stated in 27 Lawyer's Reports Annotated, 643 as follows: "Since equity regards that as done, which ought to be done, the rule is well established, that where a valid and therefore enforceable contract for the sale of land, has been made, the land becomes the property of the vendee from the execution of the contract. Consequently, as is stated in the above opinion, the great weight of authority supports the proposition that the destruction of the buildings upon the land, or any deterioration of the property, between the time of the execution of such contract, and the time fixed for completion thereof, must be the loss of the vendee, and not the vendor."

a. Defendants respectfully submit that the plaintiff failed to establish and prove that the defendants were in any way negligent or were the cause of the damage done to the property, if any there was.

It is therefore respectfully submitted that the verdict was against the law and a non-suit should have been granted.

c. It is further respectfully submitted that the trial Court erred in refusing to direct a verdict for the defendants as requested, because the proof submitted warranted such a direction.

d. The Court erred in awarding interest upon the damages, because the contract itself between the parties fixed and established the damages, and the award of the Court was contrary to the plain terms of the contract—R. C. L. Vol. 8, page 578, paragraph 127.

b. The plaintiff did not establish or prove that the defendants failed or neglected to fulfill their duties under the agreement, and assuming that defendants agreed to have the water turned off there was no consideration for such promise and it was made no part of the written agreement.

In addition to that it is urged that there is no proof to show that the damage caused was due to the failure to have the water turned off. Defendant, Rudolph, testified he had the water turned off the day after the agreement was made, October 15, 1925. From that time on the premises in equity belonged to plaintiff. It was his duty to protect the property against loss or damage. Defendant could be held only for active negligence or permissive negligence occasioned by his fault. It is suggested that if there were any freezing weather from the time defendant, Rudolph, testified he gave notice to the Water Company, to turn off the water (October 15, 1925), it does not appear anywhere in plaintiff's case.

LAW.

As hereinbefore referred to it has been repeatedly held that after a contract for the sale of improved real estate is entered into and destruction of the property takes place the loss must fall on the purchaser as he is regarded as the beneficial owner of the land and must fully protect himself from loss by insurance. This is also the view taken of the matter in England, and is commented on at some length in R. C. L. Volume 27, page 651, paragraph 412.

It will be noted in this case that the testimony is conflicting as to when the statement was made by the defendant, Rudolph, that he would have the water turned off. According to the testimony of Leslie W. Orr, page 14, line 35, he says:

> "A. When I filled in the period of possession, when possession was to be given, I asked whether Mr. and Mrs. Rudolph cared to turn the water off, in view of the winter season coming

> on, or whether they would care to have me do it, but they said they would be glad to do it, and would turn the key over to me on a later day."

The testimony of plaintiff, Charles P. Orr, on this matter given on page 69, line 34, is as follows:

> "A. Mr. Charles Orr had nothing to do with it, as far as talking was concerned. Mr. Leslie Orr, he said, would I mind if I took care of the water.
>
> Q. Yes.
>
> A. And I says: 'Yes, I will do that for you,' and that I did, and I have a statement from them for it in writing.
>
> Q. Did you get the water turned off?
>
> A. I surely did.
>
> Q. Where did you order the water turned off?
>
> A. Laurel Springs Water Department at Laurel Springs.
>
> Q. When did you go there?
>
> A. I went there the following day, the next day.

If the statement regarding the water was made by Rudolph as testified to by plaintiff, Orr, then it evidently cames with the ruling suggested in the case of *Rocca v. Calabrese*, decided by our Supreme Court, and reported in 130 Atlantic, 447.

The doctrine as laid down in that case and suggested by the Court is that matters relating to a contract of sale which may be construed as previous negotiations should be merged in the written contract or are not effective manifestly if Orr's statement is correct, the part of the negotiation relating to the purchase of this property concerning the turning off of the water was not made part of the written contract.

If Rudolph's testimony as to the time the statement was made, namely, that it was made after the contract itself was executed, then there evidently was no consideration for the promise and it was nothing more than a promise to do a courteous act because after the contract was signed the burden under the law hereinbefore referred to to protect the property fell on the purchaser.

The Court's attention might be here directed to the class of cases which held that a purchaser desirous of recovering his deposit money or rescinding the contract must put himself in positon to perform the terms of the contract in accordance with the contract. Orr made no tender at any time of the sum due under this contract. He took the stand that he was entitled to certain alterations to be made in the building to put it in the same shape he claimed it was at the time of the purchase, but he fixed no sum which could be construed as the amount of damage, if any, to the end that the sale be completed.

This is the law as announced in the case of *Mass v. Munzing,* 136 Atlantic, page 344, and *Gerba v. Miturske,* 84 New Jersey Equity, 141.

It is urged that the trial Judge committed error in not only awarding the deposit made by the purchaser to the purchaser, but adding interest thereto.

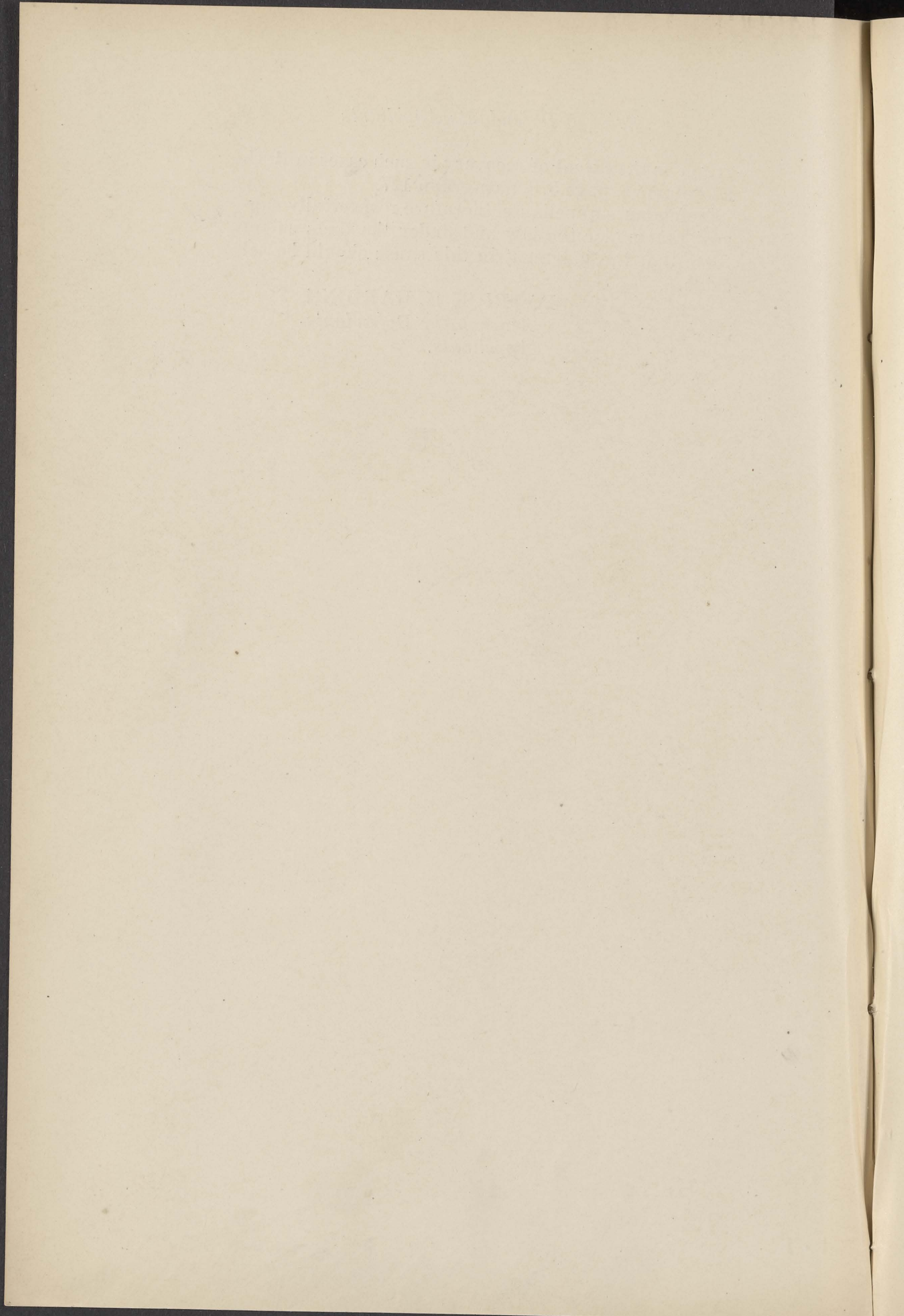
The contract itself fixed the damages and neither the Court nor jury could add thereto or detract therefrom unless the damages were so out of proportion to the deposit made that it would be inequitable to allow only the return of the deposit. That this was not so in this case is evidenced by the fact that the trial Judge acting as a jury considered the return of the deposit only as the element of damage, but added interest to it.

This question is adverted to at length in a para-

graph on the extent of recovery in such cases in R. C. L. Volume 8, page 578, paragraph 127.

Defendants-appellants, therefore respectfully suggest that under the law and under the facts as set forth that the judgment in this cause should be set aside.

PATRICK H. HARDING,
Atorney for Defendants-Appellants.



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New Jersey Court of Errors and Appeals

CHARLES P. ORR,
Plaintiff-Respondent,
v.
SAMUEL RUDOLPH and ROSE RUDOLPH,
Defendants-Appellants.

ACTION AT LAW.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT.

This appeal is prosecuted from a judgment in the amount of $636.00 in favor of the plaintiff, entered by the Supreme Court after a trial in the Camden County Circuit before Judge Donges, sitting by consent without a jury. *S. of C., p.* 11. The plaintiff's suit was to recover the amount of a deposit on the purchase of the defendants' property, together with other damages, the property having been damaged in the interval between sale and settlement by the freezing of water in the pipes.

THE FACTS.

Avoiding unnecessary detail, the facts may be stated in summary form as follows:

The written agreement of sale (*Exhibit P1, S. of C., p.* 97), prepared on a printed form, was executed by the parties on October 14, 1925, at the home of the defendants. The property sold consisted of a two-story dwelling house with store front, for which the plaintiff agreed to pay the sum of $6,600, conveyance to be made subject to certain existing mortgages. A deposit of $600, made at the time of signing the agreement, was acknowledged therein. *S. of C., p.* 93, *lines* 29-31. By the express terms of the agreement, the vendor retained possession of the premises until settlement. *Ibid. p.* 94, *lines* 29-31.

There were present at the signing of this agreement the two defendants and their son and his wife, as well as the plaintiff and his brother, Leslie Orr, a realtor, who had negotiated the sale. *S. of C., p.* 15. The latter raised the question of turning off the water on the premises in view of the fact that the winter season would intervene before settlement:

> "When I filled in the period of possession, when possession was to be given, I asked whether Mr. and Mrs. Rudolph cared to turn the water off, in view of the winter season coming on, or whether they would care to have me do it, but they said they would be glad to do it, and would turn the key over to me on a later day." *S. of C., pp.* 14-15; *see also p.* 52, *lines* 10 *to* 20.

This inquiry by Mr. Orr and the agreement by the Rudolphs to attend to the turning off of the

water is confirmed by the testimony of all of the defendants' witnesses. See, in addition to the above reference: Charles S. Rudolph, p. 69, lines 17-22, 32-36; p. 70, lines 1 to 4; Samuel Rudolph, p. 83, lines 1 to 5; Tillie Rudolph, p. 84, lines 10 to 20.

Mr. Leslie Orr further testified that the keys which the Rudolphs had retained for the purpose of turning off the water were never thereafter delivered to him. *S. of C., p.* 15, *lines* 8 *to* 15. Nor were they delivered to the plaintiff. *S. of C., p.* 52, *lines* 20 *to* 32. On this point there was a sharp conflict in the testimony, all of the defendants' witnesses insisting that the keys were delivered at the time the agreement was signed.

In dealing with this testimony of the Rudolph family it will be noted that it is not consistent with the admissions by these very witnesses that they had agreed to turn the water off, and Mr. Charles Rudolph was unable to explain how this could be done if they didn't retain the keys to gain admission to the house, except by saying—"I thought they would turn the water off on the outside." *S. of C., p.* 85, *line* 20. But what was far more important was that the water be turned off on the *inside*. It was the draining of the pipes in the house, and not merely turning off the water on the outside, that was essential to the protection of the property, and it was clearly this that Mr. Orr had in mind when he raised the point and what the Rudolphs meant when they agreed to attend to it.

That the keys were never delivered to the plaintiff or his brother, is further confirmed by the fact that when Mr. Leslie Orr sent his associate, Mr. Knight, to the property three days before settlement, he did not have the keys and the latter was forced to gain admittance through the back door (*S.*

of C., p. 22, *lines* 20-38); as was also Leslie Orr, LeRoy Cobbin and Ingram Cobbin, when they successively visited the property at different times thereafter. *S. of C., p.* 17, *lines* 30-35; *p.* 28, *line* 38; *p.* 29, *lines* 1 *to* 2; *p.* 43, *lines* 1 *to* 3; *p.* 48, *lines* 25 *to* 30. And we have the further fact that in June, 1925, while the plaintiff was still endeavoring to arrange a final settlement, the defendants installed a tenant, to whom it is reasonable to assume the keys in question were delivered. *S. of C., p.* 49, *lines* 1 *to* 10; *p.* 76, *lines* 10 *to* 35; *p.* 77, *lines* 1 *to* 5. Finally, in view of the fraud, hereinafter referred to, which the defendants attempted against the plaintiff, their credibility as witnesses is gravely impugned. *Falsus in uno, falsus in omnibus.*

The point is scarcely important in view of the uncontroverted testimony that the Rudolphs agreed to attend to turning off the water, but we submit that the weight of credibility is with the plaintiff and his witnesses in their sworn testimony that the keys were never in their possession.

In any event, the plaintiff and his brother, relying upon the defendants' promise to turn off the water, did nothing in this regard. About three days before settlement (which was to take place at Leslie Orr's office), the latter sent his associate, Mr. Knight, to look at the property. *S. of C., p.* 17, *lines* 1 *to* 10. As a result of what he reported, Mr. Orr, himself, went there the day before settlement and found the house in a seriously damaged condition. The hot-water heating pipes had burst, the radiators were broken out at their ends, and the cellar was several feet deep in ice and water. *S. of C., pp.* 17 *to* 18.

Settlement had been arranged for a day shortly subsequent to that originally agreed on—probably

within a few days thereafter. *S. of C., p.* 20, *lines* 15-25. LeRoy Cobbin, a member of the bar, represented the plaintiff and attended settlement in his behalf. There were also present the plaintiff and his brother and the defendant and his son, Charles. Mr. Cobbin had drawn up the settlement sheet and neither of the Rudolphs had said anything about the damage done to the property when Mr. Leslie Orr raised the point and pointed out that some adjustment would have to be made to enable the plaintiff to make the necessary repairs.

> "I asked for an allowance of two hundred dollars to be made, to assure us that the heating plant would be put in proper shape again, and I agreed if there was anything left over the actual amount of the bill for the work to be done, that I would return it to Mr. Rudolph. Mr. Rudolph said he had had a plumber there and that fifty dollars was ample to cover any necessary repairs to the heating system. We could not agree on it. We said if Mr. Rudolph, I said if Mr. Rudolph would have the work done, I would have our plumber examine it afterwards, and if it was acceptable we would go ahead and make settlement.
>
> Q. Was the matter left, or was anything else said?
>
> The Court: What did he say to that?
>
> Witness: He said he would have the work done.
>
> Q. Anything else said at the settlement, or was that the winding up?
>
> A. That was the windup." *S. of C., p.* 19, *lines* 4 *to* 27.

See, also, in confirmation of the above, the testi-

mony of LeRoy Cobbin, *p.* 27, and of the plaintiff, *p.* 55, *lines* 18 *to* 23.

We note in passing, the contention advanced in the appellants' brief that plaintiff defaulted at the settlement by failing to make tender. It is perfectly obvious, in view of the fact that settlement was postponed in order to enable defendants to make the required repairs, that a tender would have been out of place. However, plaintiff did testify that he was ready and willing, both at this time and for several months thereafter, to make settlement as soon as the damage had been repaired and that he had the money in bank with which to pay the defendants. *S. of C., p.* 56, *lines* 12 *to* 35.

Immediately after the attempted settlement, Ingram Cobbin, an experienced plumber, was employed by the plaintiff to inspect the heating and plumbing in the premises. He went there accompanied by his son, LeRoy Cobbin, and the plaintiff. *S. of C., pp.* 42 *to* 43. Both of the Cobbins testified to finding ice in the cellar and the pipes and radiators generally broken throughout the house; and both identified various pieces of broken pipes, elbows and radiators, which were offered in evidence as Exhibit P2. *S. of C., pp.* 29-34, 43-45. The elder Mr. Cobbin gave his opinion that the bursting of the pipes could have been caused only by the freezing of water in the system. *S. of C., pp.* 45-6.

As the defendants at settlement had undertaken to make the necessary repairs (see *supra*), plaintiff did not move further in the matter except through his attorney to press the defendants' attorney for a prompt settlement. Counsel for the defendants, in their appeal brief, have sought to give the impression that the plaintiff "bought on speculation," and that when time for settlement came he

decided to withdraw from his bargain and sought legal excuses for doing so. Such contention is directly answered by the correspondence between counsel from March to July, 1925, which is set forth in the State of the Case as Exhibit P3, at pp. 97-107, and in which the plaintiff's desire to complete his purchase was emphasized again and again.

Finally, in July, 1926, LeRoy Cobbin was informed by counsel for defendants that the repairs had been made and that the defendants were ready for settlement. *S. of C., p.* 36, *lines* 1 *to* 10; *p.* 41, *lines* 1 *to* 5. It was then that the elder Cobbin was again dispatched to the premises for an inspection and check-up and discovered that while the broken pipes and radiators had, apparently, been mended or replaced, the broken boiler had not been touched. *S. of C., pp.* 46-48.

> "* * * the first thing I went down and turned the water. I turned the water in the boiler, and when it got up to the second section the water started to come out of the boiler." *S. of C., p.* 46, *lines* 30 *to* 33.

Inasmuch as the boiler was broken, it was, of course, impossible to get water to the upper floors and, therefore, the rest of the system could not even be tested. *S. of C., p.* 47, *lines* 25 *to* 30. Defendants had apparently hoped that by creating an external appearance of repair, the plaintiff might be induced to accept their assurances that the system was in order and not make a test which would instantly disclose the deceit which the defendants were practicing upon their purchaser. Thus, for the second time, the defendants attempted to pass off a damaged property on their buyer and again their fraud was detected and exposed. See particularly the letters

in Exhibit P3, printed on pages 104 to 107 in the State of the Case.

Finally, after two of the letters of plaintiff's counsel had gone unanswered, defendants' counsel wrote under date of July 14, 1926, offering to allow a credit of $195 for the heater. *S. of C., pp.* 106-7. As this offer did not include any assurance that the radiators and the rest of the system were, or would be, put in good condition, Mr. Cobbin replied inviting the defendants to take care of the repairs themselves or to allow the plaintiff to do so. *S. of C., p.* 107. This was the last that was heard from the defendants or their counsel, and in June of the following year, the plaintiff brought this suit, thereby exercising his right to rescind the contract, in the attempted performance of which he had met with nothing but continued trickery and evasion from the defendants.

At the trial below, the plaintiff proved the above facts and rested. A motion to non-suit was then made and disposed of by the trial Court, on grounds which were set forth on pages 65-66 of the record. We shall not add to the statement of the grounds of denial there made by the Court.

The defendants' witnesses brought out nothing new except their insistence that the keys had been delivered to the plaintiff. As we have seen, they all admitted that they had undertaken to take care of the water. The son, Charles Rudolph, attempted further to show that the water had been turned off. His testimony, however, amounted to nothing more than that he had told the water company to attend to it. He had not given them the keys with which to get into the house, nor had he ascertained whether they had carried out the instructions which he testified he gave them:

"Q. You don't know, of your own knowledge, that the water was turned off. You just took it from the report given you by the water company?

A. I paid for it, and I should think I got what I paid for.

The Court: Did you go there and ascertain whether the water was turned off?

A. No, I didn't go there." *S. of C., p.* 79, *lines* 15 *to* 25.

Similarly, Samuel Rudolph testified:

"Q. You don't know, of your own knowledge, whether the water was turned off or not?

A. No, I would not swear to it. My son was to do it, that's all." *S. of C., p.* 83, *lines* 1 *to* 5.

So that it is sufficiently obvious from the fact that the water was in the system at the time of the sale and that the system was damaged by the freezing of water some time during the winter months, that the water had not been drained off by the defendants.

The trial Judge held on this evidence that the defendants owed a duty to the plaintiff to turn off the water in the premises sold—"and I am inclined to go further, and believe that that duty involved likewise the removing of any water that may subject this system to damage"— and having failed to carry out this duty, plaintiff was entitled to have "a diminution of the purchase price, equivalent to the damage done," and upon defendants' refusal to allow such diminution, the right to rescind arose. *S. of C., pp.* 90-92. The Court, accordingly, allowed a verdict for the deposit money, but held that no other damages had been sufficiently proved.

THE LAW.

It is difficult to see how any question of law is brought up on this appeal, or how any question, whether of law or fact, is presented which a Court of Appeals can properly consider. There was positive testimony (*S. of C., p. 19, lines 4 to 27*), that at settlement the defendants had agreed to make the necessary repairs and there was further testimony, which was uncontradicted, that they failed and refused to do so. On such evidence alone the trial Court was justified in finding a verdict for the plaintiff irrespective of the underlying question of the defendants' duty in the first instance to drain the water before the winter set in. Nevertheless, in order that our brief may be complete, we shall briefly discuss this last proposition.

The Court, in its opinion at the close of the case, emphasized the fact that the defendants had *expressly* agreed to turn off the water, a duty, however, which, it said, was "probably * * * incumbent on the vendors without regard to any express agreement." *S. of C., p. 92, lines 4 to 6.*

That such duty was incumbent upon the vendors as a legal consequence of their contract of sale and that its violation by them without compensation to the buyer gave the latter a right to rescind, we hold to be settled propositions of law in themselves determinative of the questions raised on this appeal.

In our following discussion of the law, we shall, therefore, disregard *arguendo* the express assurances given by the defendants to the plaintiff with regard to turning off the water and demonstrate that, even without the uncontradicted proof of such assurances, the plaintiff would have been entitled to pre-

vail. In this view of the case, such assurances, as well as the recognition by defendants at settlement and afterwards of their liability to make the repairs or pay for them, were merely the explicit recognition of an obligation imposed by law upon the defendants and which they could not have avoided except by express agreement to the contrary or by actually yielding possession and control of the property to the buyer. This, we understand, was the view entertained by the learned trial Judge, and is, indeed, clearly indicated in his opinion.

As the appellants correctly point out in their brief, the effect in law of a sale of real estate is to vest at once in the purchaser the equitable title to the property sold, the vendor retaining the legal title primarily in trust for the purchaser. From such relationship of trustee and beneficiary devolves the very duty which is the foundation of the plaintiff's right of action in this case. Because the vendor is a trustee, he is required to exert himself reasonably to protect the property sold from damage or depreciation. Where purchasers have been required to assume a loss occurring before consummation of a sale, it has been only where such loss was not in any way chargeable to the malfeasance or neglect of the vendor. The doctrine is clearly set forth by Chancellor Magie in *Marion v. Wolcott,* 68 N. J. Eq. 20, and, as his statement of the law is inaccurately quoted in the appellants' brief (p. 4), we set it forth in full here:

> "It is the settled doctrine of our Courts of Equity that under a contract for the sale of lands the purchaser becomes the equitable owner of the lands and the seller the equitable owner of the purchase-money. King v. Ruckman, 21 N. J. Eq. (6 C. E. Gr.) 599; Haughwout v. Mur-

> phy, 22 N. J. Eq. (7 C. E. Gr.) 531; Schmidt v. Opie, 33 N. J. Eq. (6 Stew.) 138.
>
> It is also declared to be the doctrine of equity that when under such a contract of sale the equitable beneficial interest passes to the buyer and he becomes in the contemplation of equity the real owner, he takes the benefit of all subsequent improvements and increase of value, but he will also be subject to all losses and depreciations *not occasioned by the neglect of default of the seller* in carrying out the contract. Pom. Spec. Perf. Sections 522; Fry Spec. Perf. Secs. 895-897; Pom. Eq. Jur. Secs. 368; 1406." (P. 22.) (Italics ours.)

The duty of protection rests in part upon a consideration of the vendor's obligation to deliver to the purchaser the property sold in as nearly as possible the same condition as it was when purchased.

Such obligation to maintain the property, growing out of the relations of the parties, has been repeatedly recognized in England and in this country, although it does not seem to have been expressly dealt with in any reported New Jersey case. The law is stated in the most recent text-book on the subject in England (Williams, Vendor and Purchaser, 3d Ed., 1922), as follows:

> "As the result of the purchaser's equitable ownership of the property sold and the vendor's consequent trusteeship for the purchaser, the vendor is bound while he remains in possession of the property sold to take reasonable care to preserve the property in the same condition in which it was at the date of the contract for sale. He must use the same care that a trustee ought to use with regard to the trust

property of which he is in possession; that is to say, he must take the same care as a prudent owner would take of his own property. Thus, he must cultivate the lands if in hand in a husbandlike manner, keep the property in a reasonable state of repair, eject disseisors and others wrongfully in possession of the property sold, or any part of it; and if he fails in any of these duties the purchaser shall be entitled to an allowance by way of compensation to be deducted from the purchase price, or in case of his completing the contract in ignorance of the vendor's breach of duty, he may sue the vendor for damages for the loss sustained thereby."

1 *Williams* 488.

We quote from another English authority, as follows:

"* * * the vendor from the date of the contract holds the estate in trust for the purchaser subject to payment of the purchase money with the right until the time fixed for completion to retain the interim profits; and his fiduciary possession demands that he shall, while in possession, take reasonable care to preserve the property in a reasonable state of preservation and so far as may be, as it was when the contract was made. If, therefore, by his wilfull acts or mere negligence he caused or permitted the property to deteriorate—as by allowing hedges and fences to get out of repair, or the land to remain uncultivated or any improper course of husbandry or by determining tenancies without the purchaser's consent, or acting so improvidently as to cause loss or permitting injuries by trespassers to the land, or by improperly

neglecting to relet—the purchaser is entitled to an allowance; and, of course, deterioration may be of such a nature or to such an extent as to release him from the contract; and the vendor must answer for deteriorations occasioned by the conduct of his tenants, even though the lease has expired."

Dart on Vendor & Purchaser (7th Ed., 1905), 672-3.

The English decisions supporting the texts just quoted are voluminous and go to considerable extremes in protecting the right of the buyer to have the property delivered in the same state as when he bought it. A few citations will illustrate the scope of the law.

In *Royal Bristol Society v. Bomask* (Ch. 1885), 35 Ch. D. 390, abatement was enforced for damages to a building resulting from the lawful removal of fixtures by a tenant. The Court said:

> "The vendor, having property under his control, in his possession, which he has contracted to sell, is bound to sell it in a reasonable state of repair *so that a purchaser may take the thing which he has contracted to buy* * * * they ought to have taken that reasonable care of the property which would have prevented it being damaged by Fleming in the exercise of his legal rights to remove fixtures * * *" (p. 398).
>
> (Italics ours.)

Clark v. Remuz (1891), L. R. 2 Q. B. 456, was an action for damages by the vendee for the removal of soil by a trespasser, the loss not being discovered until after conveyance of the property. Recovery was allowed.

Other cases are:

Philip v. Silvester, L. R. 8 Ch. 173 (1872—buildings allowed to go to ruin).

Lysaght v. Edwards (1876), 2 Ch. D. 499, 507 (in which the Court said of the vendor: "He is not entitled to treat the estate as his own. If he wilfully damages or injuries it, he is liable to the purchaser, and more than that, he is liable if he does not take reasonable care of it.").

Egmont v. Smith, L. R. 6 Ch. D. 469 (1877—loss of tenant).

Engel v. Fitch, L. R. 4 G. B. 659 (ejection of trespassers).

Binks v. Rokeby (Ch. 1918), 2 Swanst 222, 226 (deterioration).

Golden Bread Co. v. Hemmings (1922), 1 Ch. 162, 172.

The same principle is recognized in our American text-books and decisions. Pomeroy adopts the statement of Lord Coleridge in *Clark v. Remuz, supra,* as follows:

> "During the interval prior to completion the vendor in possession is a trustee for the purchaser, and as such has duties to perform towards him, not exactly the same as in the case of other trustees, but certain duties, one of which is to use reasonable care to preserve the property in a reasonable state of preservation and so far as may be as it was when the contract was made."
>
> *Pomeroy Eq. Rem.,* 4th Ed., Sec. 858.

The rule is also stated in Cyc. as follows:

> "A purchaser may be entitled to an abatement for damages which occur to the premises between the time of making the contract and the

time for conveyance; as if damages had been through the negligence or misconduct of the vendor while in possession."

39 *Cyc.* 1578, and see cases there cited.

Thus, we see that the Rudolphs, not only because they expressly agreed to protect the property, pending settlement, from damage through freezing of water in pipes and boiler, but because so long as the vendee was out of possession, the law imposed this very duty upon them, were obligated to restore the property damaged through their neglect or suffer the consequences of a breach of contract. Their duty was not only to deliver title but to deliver the property which they had contracted to sell without impairment of value through any act or negligence of theirs. And upon such failure to deliver, can it be doubted that the purchaser had available to him all the remedies provided in the case of a vendor's breach of contract, including that of rescission and recovery back of purchase money paid?

The buyer's right to rescind where the seller refuses to restore the property to the condition in which it was at the time of the sale, or to allow an abatement sufficient to enable the buyer so to restore it, is directly analogous to the buyer's right of rescission where the seller is unable or unwilling to remove an encumbrance on title and refuses to permit an abatement of the purchase price therefor. In such case it is familiar law that the buyer has the alternative right of enforcing specific performance with abatement or rescinding the contract and recovering the purchase money paid. 39 *Cyc.* 1998.

Cases involving deterioration of physical property are rarer and in most of the reported cases thereon the buyer has sought specific performance

with abatement. In no case that we have read, however, has the alternative right of rescission been denied. The following cases are particularly in point:

In *Riverside R. E. S. Co. v. Huhsted* (S. C. of Ap. Va., 1909), 64 S. E. 958, the higher Court affirmed a judgment for the return of instalments of purchase money on the sale of certain building lots. Before completion of the monthly payments stipulated, the plaintiff brought his suit, claiming that the defendant, without the knowledge of the plaintiff, had "permitted a race-track corporation to enter upon and remove the soil from the greater part of the lots, the excavation varying in depth from a few inches to six feet." The Court said of the evidence:

> "There was no controversy as to the fact that there had been an excavation and removal of the surface of the lots and that their physical condition had been materially changed."

No affirmative misconduct or neglect was imputed to the seller. It was held:

> "Where, as in this case, no possession was ever delivered and the vendor has placed himself in a position or has permitted himself to be placed in a position where he cannot deliver the land sold in substantially the condition it was when the contract of purchase was entered into, he is really in no better condition than if the title to the property sold was bad and it would seem to be clear that the vendee who has paid a part or the whole of the purchase price may elect to disaffirm the contract and sue at law and recover the purchase money paid by him."

In an early Kentucky case, *Dourett v. Simpson*,

3 T. B. Mon. 517, suit was brought to rescind a contract of purchase and recover back the purchase money paid. The physical damage complained of was not charged to any conscious neglect of the vendor, but to the excesses of his tenant. Nevertheless, recovery of the purchase money was allowed. We quote from the Court's opinion as follows:

> "It may be assumed that the purchaser meant to run the risk of deterioration by ordinary and proper use of the estate (consisting of a hotel and grounds). But it is against the intention of the parties and the spirit of the contract to suppose that the vendee was to bear every injury which might be inflicted on the estate until the possession was delivered.
>
> It is clearly shown that Patterson, the tenant of Simpson (the vendor) frequently gave up the use of a room or rooms for mountebanks and exhibitors of shows and spectacles for gain who drove spikes into the floors or walls or inserted screws into them to suspend their scenery and apparatus which injured the floors and in many places the plastering on the walls, which were made of brick. But what is still more the tenant or some of his subtenants suffered the garret to be very improperly appropriated by reason of which the plastering was much stained and loosened in the lower apartments of the house, so that the costs of repairing it were considerable (they were shown to be from $500.00 to $700.00) * * *. We will not for the present inquire whether this alone would be good grounds for rescinding the contract. *As no such compensation was offered or tendered to Dourett on the day that his possession was to commence, he might be well war-*

> *ranted in refusing either the possession or conveyance.*
>
> Every reason must prove that Simpson and not Dourett was to run the risk of this injury. The estate was leased for Simpson's benefit and to him alone were his tenants responsible.'' (Italics ours.) pp. 520-1.

In *Borough of Erie v. Vincent,* 8 Watt (Pa. S. C.) 510, the buyers purchased a certain riparian lot in the town of Erie by reference to a plan, for a consideration of $4600. A 10% deposit was made at time of sale. After the sale the vendor altered the plan locating the buyers' lot at a point less accessible to the pier shown on the original plan. The buyers sought to rescind and, upon suit brought by the vendor, counter-claimed for their deposit money. The Court held:

> ''We consider it a plain principle of law and justice, that *if one person contracts to convey real estate to another,* at a future time, for a certain price to be paid for it, *and afterwards, and before the time of the conveyance, alters the state of the property, so as materially to lessen its value, the other party may rescind the contract* and refuse to accept the deed and to pay the purchase money, or, if he has paid a part, *may recover back the money thus paid.* The maxim, that no one can take advantage of his own act, directly applies. I do not speak of the case where the property turns out differently from what it appeared to be at the time of the contract, without the subsequent act or default of either party; there justice may, in some instances, be done by a deduction from the purchase money for the failure of consid-

eration. But that is very different from the case where the party contracting to convey property, himself voluntarily diminishes its value in a material degree. *He has then no equity to compel the other party to proceed with the bargain, and accept a thing different from that which he contracted for.* It is of no importance in what the alteration consists provided it is attended with serious and permanent loss to the party, whether it is a conveyance of a portion of the land, or a grant of an easement or servitude out of it, or a dimunition of certain benefits which it at first possessed. It is sufficient that a material loss is to be incurred in consequence of the voluntary act of the vendor." (Italics ours.)

The brief submitted by the appellants does not even pretend to discuss the question of the authorities bearing on the defendants' liability to repay the deposit money, and it is fair to assume therefrom that there are no precedents against the plaintiff's right of rescission under the particular circumstances of this case.

APPELLANTS' POINTS.

Referring now specifically to such points as are raised in the brief of the appellants, we find the contention made on pages 7 to 8 that the obligation to turn off the water, not being incorporated in the terms of the written agreement of purchase and sale, could not be relied on by the plaintiff. Such contention, of course, overlooks the fact that the undertaking of the defendants was a mere recogni-

tion of an obligation already imposed upon them by law and arising out of their contract of sale to the plaintiff. The assertion that the undertaking was a prior oral agreement is also untenable by the appellants in view of their own testimony at the trial below that the undertaking was made after "the deal was closed." *S. of C., p.* 69, *lines* 17 *to* 22.

In this connection, the appellants purport to set forth, on page 7 of their brief, an excerpt from the testimony of the plaintiff which, however, will be found, on inspection of the page referred to, to be the testimony of Charles Rudolph and not the plaintiff.

Appellants also make the point that the Court erred in allowing interest on the deposit from the date that the suit was brought—this being on the theory that the right of rescission was exercised at that time. Appellants say that the liquidated damage clause in the contract prevented an allowance greater than the amount there specified; but as the amount stipulated was liquidated damages to the vendor, it obviously has no relation to a claim for damages by the vendee. The two cases cited on page 8 of the appellants' brief are not in point. If any error was made by the Court in this regard, we feel that it was in not allowing interest from the day on which the deposit money was paid, as was done in the case of *Force v. Dutcher,* 18 N. J. Eq. 401.

Except for the objection as to allowance of interest, the assigned grounds of appeal are merely the conventional grounds that the verdict was against the weight of evidence and that the Court erred in denying a non-suit and in refusing to "direct a verdict." The answer to each of these grounds of

appeal is contained in the argument which we have addressed to the Court in this brief.

We respectfully submit that there is no merit in the appeal, and that the same should be dismissed.

LOUIS B. LeDUC,
Of Counsel for Plaintiff-Respondent.