

The defendant does not in his pleadings allege that the plaintiff in fact abandoned his interest in the premises, or that any release was obtained from him of his rights as lessee.

I am unable upon the evidence to find whether or not the plaintiff left Ottawa with intent to relinquish his rights under his agreement with the defendant. There are several circumstances which rather indicate that he did. But, if his evidence and that of his daughter be true, before he left Ottawa the defendant had taken the position that he would not recognise any right in the plaintiff under the agreement, and would not give him possession of the premises. I incline to believe this evidence. The defendant was, I am satisfied, desirous of being rid of the plaintiff as a tenant before the latter left Ottawa.

The burden is upon the defendant to establish satisfactorily a relinquishment by the plaintiff of his rights under the agreement. He has failed to do so. He certainly did not make any reasonable effort to ascertain the plaintiff's whereabouts, or to communicate with him to know whether or not he intended to carry out the agreement. He probably could have found the plaintiff had he wished to do so. Without communication with the plaintiff he leased the premises to Daniels and Chambers at a largely increased rental. I am satisfied, however, that when the leases to Daniels and Chambers were made, the defendant actually believed that the plaintiff did not intend to resume business in Ottawa or to carry out the agreement for lease. Moreover, although the plaintiff was definitely and finally refused possession early in the month of April, 1907, this action was not begun until the 2nd December following.

Having regard to all the circumstances, to the uncertainty created by the plaintiff's own conduct in absenting himself from Ottawa for two months without communication with the defendant, to the belief of the defendant that the plaintiff had relinquished his claim as lessee, and to the plaintiff's delay in commencing this action, the discretionary remedy of specific performance should not, I think, be given. But, upon the authorities, the plaintiff is, in my opinion, entitled to damages for breach by the defendant of his agreement for lease: *Ford v. Tiley*, 6 B. & C. 325.

It remains to determine what should be the measure and quantum of such damages. Counsel for the plaintiff