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COMPLAINT.

NEW JERSEY SUPREME COURT.

McCRORY STORES CORPORATION, a corporation of the State of Delaware, and M. E. BLATT Co., a corporation of the State of New Jersey,	} Plaintiffs,	Judgment Record. Action at Law. On Postea.	10
v.			
S. M. BRAUNSTEIN, INC., a corporation of the State of Delaware,	} Defendant.	BOURGEOIS & COULOMB, <i>Attorneys.</i>	20

S. M. Braunstein, Inc., a corporation of the State of Delaware, the defendant in this cause, was summoned to answer unto McCrory Stores Corporation, a corporation of the State of Delaware, and M. E. Blatt Co., a corporation of the State of New Jersey, the plaintiffs therein, in an action at law upon the following complaint:

(Summons issued June 24, 1924.) 30

The plaintiffs, McCrory Stores Corporation, a corporation of the State of Delaware, doing business in the City of Atlantic City, N. J., and elsewhere, and M. E. Blatt Co., a corporation of the State of New Jersey, doing business in the City of Atlantic City, N. J., says:

1. That on the 1st day of November, A. D. 1915, Samuel M. Braunstein, by a lease bearing that date, granted, demised and let unto Braunstein-Blatt Company, a corporation of the State of New Jersey, doing business in Atlantic City, N. J., all that certain premises situate in the City of Atlantic City, County of Atlantic and State of New Jersey, beginning in the Southerly line of Atlantic Avenue, one hundred and seventy-five feet East of the East-
10 erly line of New York Avenue; thence (1) Southwardly, at right angles with Atlantic Avenue, one hundred and fifty feet to a twenty-foot wide alley; (2) East along the Northerly side of said twenty-foot wide alley fifty feet; (3) Northerly one hundred and fifty feet to the Southerly line of Atlantic Avenue; (4) Westwardly, in and along the South-
erly line of Atlantic Avenue, fifty feet to the place
20 of beginning; with the buildings and appurtenances, including the roofs and walls thereof, and including the engine, boiler, pumping apparatus and all other
appliance attached to and forming a part of said building, for a period of twenty years, beginning the 28th day of October, 1915, and ending the 27th day
of October, 1935, at the annual rental of \$15,000 per year, to be paid \$1,250 per month in advance, on the 28th day of each and every month, during
the operation of said lease; a copy of said lease is
30 hereunto attached, made a part hereof, and marked "Schedule A," and to which for greater certainty the plaintiffs beg leave to refer.

2. That in and by the third paragraph, it was provided as follows:

"And the said party of the second part does hereby covenant and agree that it will pay all excess water rents that may be assessed against said premises, and also all the increase in

taxes on and after October 27th, 1920, which said excess water bills and said increase in taxes shall be considered as so much rent due and payable within thirty days after the same become due and payable to the City of Atlantic City, and the said party of the first part does hereby covenant and agree that he will pay all the taxes, sewer charges and minimum water charges as the same are rendered. (The sewer charges now being \$42.30 per annum, and the minimum water charges now being \$35 per annum.)”

3. That after the execution of said lease, the said Braunstein-Blatt Co. went into possession of said building, and continued to occupy the same until on or about the 1st day of February, A. D. 1921.

4. That after the execution of said lease, Samuel M. Braunstein, the lessor, granted and conveyed the above described premises, subject, however, to said lease, to S. M. Braunstein, Inc., a corporation of the State of Delaware, and the defendant herein, by deed dated the day of March, 1918, which deed was duly recorded in the Clerk's Office of Atlantic County, at Mays Landing, N. J.

5. That on February 19th, A. D. 1921, the Braunstein-Blatt Co. assigned said lease to McCrory Stores Corporation, and on that date McCrory Stores Corporation entered into possession of said property.

6. That after the assignment of said lease and before the bringing of this suit, the Braunstein-Blatt Co., by appropriate proceedings, according to the statutes of the State of New Jersey, changed

its corporate name to "M. E. Blatt Co.," by which name said corporation is now known and does business.

7. That subsequent to the assignment of said lease and on the 7th day of April, 1921, S. M. Braunstein, Inc., entered an action at law against Braunstein-Blatt Co. and McCrory Stores Corporation, the two plaintiffs in this suit, in the Atlantic County Circuit Court, to recover the above described premises, upon the ground that the rent due on the 29th day of March, 1921, had not been paid by the Braunstein-Blatt Co.; that in answer thereto the said McCrory Stores Corporation and the said Braunstein-Blatt Co. answered that the rent had been tendered, in accordance with the terms of the lease, by the McCrory Stores Corporation, the legal assignee thereof. That said proceedings were had in, said cause; that on the 7th day of January, 1922, the Atlantic County Circuit Court entered a judgment final in favor of the defendant, and against the plaintiff.

8. That after the determination of the said suit, the said McCrory Stores Corporation paid to the said S. M. Braunstein, Inc., all the installments of rent due up to and including the rent due on the 28th day of April, A. D. 1922, which said installments of rent were duly accepted by the said S. M. Braunstein, Inc.

9. That on or about the 1st day of April, 1922, S. M. Braunstein, Inc., rendered to M. E. Blatt Co. and the McCrory Stores Corporation, a demand for the increased taxes which it alleged to be due under

and by virtue of the third paragraph of the lease, above referred to, which claim was as follows:

Taxes for 1921.....	\$5293.90
Taxes for 1919.....	2189.60

Increase due	\$3104.30
8% Int. on one-half to December 1st.....	62.09
8% Int. on full amount from December 1st to April 20th, 1922.....	96.59

10

Amount due	\$3262.98
------------------	-----------

10. That said S. M. Braunstein, Inc., demanded of the McCrory Stores Corporation and of M. E. Blatt Co. that they or either of them pay said sum of \$3262.98 as and for the increase in taxes which it alleged to be due under the terms of said lease, or that in the event of their refusal to pay the sum it would take such action under said lease as it might be advised to be necessary.

20

11. That on April 25th, 1922, the said McCrory Stores Corporation and M. E. Blatt Co. paid to the said S. M. Braunstein, Inc., said sum of \$3262.98, as above set forth, protesting at the same time that said sum was not due and owing, but on the contrary, the amount due and owing by M. E. Blatt Co. and the McCrory Stores Corporation for and on account of the increase in taxes should be based, not upon the taxes for the year 1919, as demanded by S. M. Braunstein, Inc., but, in accordance with the terms of said lease, be based upon the taxes for the year 1920, and, furthermore, protesting that the said S. M. Braunstein, Inc., was not entitled to have 8% interest on one-half of said sum from June 1st to December 1st, and 8% interest on the full amount from December 1st, 1921, to April 20th, 1922, but, on

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the contrary, was not entitled to have any interest at all on said sum by reason of the fact that it had not paid said taxes for the year 1921, amounting to \$5293.90.

12. That under and by virtue of paragraph three of said lease, hereinabove set forth, the basic year for estimating the increase in taxes due thereunder was the year 1920; that in the year 1920 the taxes assessed against said premises by the City of Atlantic City amounted to \$3387.90—with the taxes for the year 1921, assessed by the City of Atlantic City against said premises, amounted to the sum of \$5293.90, making an increase in taxes of 1921, over 1920, to wit: the increase in taxes accruing on and after October 27, 1921, amounted to the sum of \$1906.00, which said sum was the true amount for the increase in taxes due and owing by M. E. Blatt Co. and the McCrory Stores Corporation to the said S. M. Braunstein, Inc.

13. That notwithstanding that the amount due for increase of taxes, in accordance with the terms of said lease from the said M. E. Blatt Co. and McCrory Stores Corporation to S. M. Braunstein, Inc., was the sum of \$1906.00, the said McCrory Stores corporation and M. E. Blatt Co. were obliged to pay under protest to the said S. M. Braunstein, Inc., the sum of \$3262.98, as hereinabove mentioned, that by reason thereof the said McCrory Stores Corporation and M. E. Blatt Co. overpaid to the said S. M. Braunstein, Inc., the sum of \$1356.98.

14. That on or about the 12th day of May, 1922, said McCrory Stores Corporation and M. E. Blatt Co. instituted suit in the New Jersey Supreme Court to recover said sum of \$1356.98, from the said S.

M. Braunstein, Inc., and such proceedings were had thereon that the same came on for hearing before said Circuit Court and the jury on the 12th day of January, 1923, and the Honorable Ralph E. Donges, Judge of said Circuit Court, directed a verdict in said cause in favor of the defendant, upon which verdict judgment was entered on the 20th day of January, 1923.

15. That an appeal from said judgment was taken 10
to the New Jersey Court of Errors and Appeals,
and the said judgment there affirmed, copy of the
opinion of said Court being hereunto annexed, made
a part hereof, and marked "Schedule B."

16. That said New Jersey Court of Errors and
Appeals did not determine, in and by its opinion,
whether or not the basic year for determining the
taxes should be the year 1919, as contended for by
S. M. Braunstein, Inc., or a year 1920, as contended 20
for by the plaintiffs, but decided said cause upon the
theory that said payment was a voluntary payment.

17. That it is impossible for the plaintiffs to have
it finally determined whether or not the basic year
for the computing of the taxes is the year 1919 or
the year 1920, excepting by refusing to pay the
amount demanded by the defendant, based upon the
taxes as assessed for the year 1919, and thereby
jeopardizing its rights under its lease, and sub- 30
jecting itself to a judgment of ouster from said
premises, in the event that it should be finally de-
termined that the year 1919 is the basic year for
determining said taxes under a proper interpreta-
tion of the lease mentioned and set forth in para-
graph 1.

18. That the plaintiffs, McCrory Stores Corporation, and M. E. Blatt Co., aver that under and by virtue of a true and proper interpretation and construction of said lease, the increased taxes to be paid thereunder should be the excess over the year 1920.

10 19. That the amount due to the City of Atlantic City for taxes assessed for the year 1924 is the sum of \$6,262.50; that the taxes due to the City of Atlantic City for the year 1920 is the sum of \$3,387.90; that the difference between the taxes assessed for the year 1920 and the taxes assessed for the year 1924 is the sum of \$2,874.60. That on the 23rd day of June, A. D. 1924, McCrory Stores Corporation tendered to S. M. Braunstein, Inc., the difference between the taxes assessed for the year 1924 and the taxes assessed for the year 1920, amounting to the sum of \$2,874.60. That notwithstanding that
20 said sum was the correct amount due for the taxes under a proper interpretation and construction of said lease, said S. M. Braunstein, Inc., refused to accept said sum so tendered, but demanded a larger sum, to wit: the sum of \$4,072.90, being the difference between the amount assessed for taxes in the year 1919 and the amount assessed for taxes in the year 1924, and threatened that unless said sum was paid, they would institute a suit for ejectment in
30 the courts of this State.

20. Plaintiffs further aver that if said suit for ejectment is instituted by said S. M. Braunstein, Inc., by reason of the failure of the plaintiffs to pay the amount demanded by the said S. M. Braunstein, Inc., to wit: the sum of \$4,072.90, being the difference between the amount of taxes assessed for the year 1924, and the amount assessed for the year

1919, and in said ejectment suit the Court should determine that under and by virtue of a true and proper interpretation and construction of said lease the amount due by the said plaintiffs, McCrory Stores Corporation or M. E. Blatt Company, to the defendant, S. M. Braunstein, Inc., was the difference between the tax due for the year 1919 and the tax due for the year 1924, then a judgment of eviction might be entered against said plaintiffs, and they might be evicted from the land and premises described in said lease, and deprived of their valuable rights under said lease. 10

21. The plaintiffs and each of them therefore pray that under and by virtue of an Act of the Legislature of the State of New Jersey, entitled: "An Act concerning Declaratory Judgments and Decrees," approved March 11th, 1924, that this Court construe the third paragraph of said lease, dated the 1st day of November, 1915, made by and between Samuel M. Braunstein, party of the first part, and Braunstein-Blatt Co., party of the second part, and referred to in paragraph 1 of this complaint, and that by its judgment it determine and declare that the basic year for determining the excess in taxes is the year 1920, and that the increased taxes to be paid under and by virtue of said lease, is the excess of taxes over and above the taxes assessed for the year 1920, to wit: the sum of \$2,874.60. 20

BOURGEOIS & COULOMB. 30
Attorneys of Plaintiffs.

SCHEDULE A.

LEASE—SAMUEL M. BRAUNSTEIN TO
BRAUNSTEIN BLATT CO.

THIS INDENTURE made the first day of November 1915, between Samuel M. Braunstein, of the City of Atlantic City, County of Atlantic and State of New Jersey, party of the first part, and
10 Braunstein-Blatt Co., a corporation of the State of New Jersey, doing business in the City of Atlantic City, County of Atlantic and State of New Jersey, party of the second part:

WITNESSETH, That party of the first part has let and by these presents does grant, demise and to farm let unto the party of the second part, all those certain premises situate on the Southerly side of Atlantic Avenue, in the City of Atlantic City, County of Atlantic and State of New Jersey, and
20 more particularly described as follows:

Beginning in the Southerly line of Atlantic Avenue, one hundred and seventy-five feet East of the Easterly line of New York Avenue; thence
(1) Southwardly, at right angles with Atlantic Avenue, one hundred and fifty feet to a twenty foot wide alley; (2) East along the Northerly side of said twenty foot wide alley fifty feet; (3) Northerly one hundred and fifty feet to the Southerly line of Atlantic Avenue; (4) West-
30 wardly, in and along the Southerly line of Atlantic Avenue, fifty feet to the place of beginning; with the buildings and appurtenances, including the roofs and walls thereof, and including the engine, boiler, pumping apparatus and all other appliances attached to and forming a part of the said building,
for a period of twenty years, beginning the twenty-

eighth day of October, 1915, and ending the twenty-seventh day of October, 1935, at the rental of Fifteen Thousand Dollars per year, to be paid Twelve Hundred and Fifty Dollars monthly in advance on the twenty-eighth day of each and every month during the operation of this lease.

1. And it is hereby agreed that if any rent shall be due and unpaid or if default shall be made in any of the covenants herein contained, then this lease shall immediately become void and it shall be lawful for the said party of the first part, without demand for said rent, to reenter said premises and remove all persons therefrom or proceed by action for the recovery of the possession thereof, or otherwise however. 10

2. And at the expiration of the said term or the termination of this lease, said party of the second part will quit and surrender the premises herein demised in as good state and condition as reasonable wear and use thereof will permit, damages by the elements, etc. 20

3. And the said party of the second part does hereby covenant and agree that it will pay all the excess water rents that may be assessed against said premises, and also all the increase in taxes on and after October twenty-seventh, 1920, which said excess water bills and said increase in taxes shall be considered as so much rent due and payable within thirty days after the same become due and payable to the City of Atlantic City; and the said party of the first part does hereby covenant and agree that he will pay all the taxes, sewer charges and minimum water charges as the same are rendered. (The sewer charges now being \$42.30 per annum, and the minimum water charges now being \$35. per annum.) 30

4. And it is further covenanted and agreed that in the event of the above demised premises being partially destroyed by fire, wind, water, lightning, earthquake or other cause, the party of the first part shall repair the same within thirty days thereafter, or, in default thereof, the rent reserved hereunder shall cease until such time as the same shall be put in complete repair.

10 5. And it is further covenanted and agreed by and between the parties hereto that in the event of destruction of the premises herein demised, whether by fire, wind, water, lightning, earthquake, or other cause, that the same shall not work a termination of this lease, but that the party of the first part will rebuild the said premises within a reasonable time after said destruction, that is to say, as soon as it is practicable to rebuild the premises so demised; but that the rent shall cease from the period of destruction of the said buliding until
20 the premises are rebuilt and put in condition for occupation by the said party of the second part.

6. And it is further agreed that party of the second part will not permit anything on said premises which shall constitute a nuisance, and that the premises shall at all times be kept neat and clean, and that no inflammable material shall be permitted to accumulate upon the demised premises or in the rear thereof, or to suffer or permit anything to be done in and about the premises which will contra-
30 vene the policy or policies of insurance against loss by fire now or hereafter existing upon said demised premises.

7. And the party of the second part covenants and agrees to make all the inside and outside repairs, including all repairs to the plumbing and heating appliances, at its own proper cost and expense; and the party of the first part hereby ex-

pressly agrees that the said party of the second part may make all such alterations or improvements as it may find necessary and beneficial to it in the operation of its said business conducted in the said premises; Provided, however, that if any of the appurtenances hereby demised be removed, they shall be replaced at the expiration of this lease.

8. It is also understood and agreed by and between the parties hereto that all improvements, of any kind and character, which the party of the second part shall place upon the demised premises and all those fixtures known as fixtures as between landlord and tenant, such as boilers, engines, etc., placed in renewal of those found in said demised premises at the time of the signing of this lease shall, immediately upon being placed therein, become the property of the party of the first part and shall not be removed at the expiration of this lease. 10

9. And the party of the first part covenants that the said party of the second part, on paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said premises for the term aforesaid. 20

10. It is agreed between the parties hereto that this agreement of lease shall bind and apply to the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by its President, its corporate seal to be hereto affixed, and duly attested by its secretary, the day and year first above written. 30

SAMUEL M. BRAUNSTEIN, (Seal)

BRAUNSTEIN-BLATT CO.,

By MAX E. BLATT, President.

(Corporate Seal)

Attest: LOUIS E. STERN,
Secretary.

Signed and sealed in the
presence of: Harry R. Coulomb.

STATE OF NEW JERSEY, } SS:
COUNTY OF ATLANTIC, }

BE IT REMEMBERED, That on this first day of
November, A. D., Nineteen Hundred and Fifteen,
10 before me, a Master in Chancery of N. J., personally
appeared Samuel M. Braunstein, who, I am satis-
fied is the person who executed the foregoing Inden-
ture of Lease, and I having first made known to him
the contents thereof, he acknowledged that he signed,
sealed and delivered the same as his voluntary act
and deed. All of which is hereby certified.

HARRY R. COULOMB,

Master in Chancery of N. J.

Received and recorded November 3d, 1915 at 9
20 A. M.

EDWIN A. PARKER, Clerk.

SCHEDULE B.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

No. 69, June Term, 1923.

30 McCrory Stores Corpora-
tion, et al.,
Plaintiffs-Appellants,

v.

S. M. Braunstein, Inc.,
Defendant-Respondent.

Argued June 26, 1923; Decided November 19, 1923.

1. A tenant, confronted with a demand for rent

claimed by it to be in excess of that provided in the lease, and being threatened with legal proceedings to enforce such demand, paid the amount demanded and later brought suit to recover back the alleged excess. Held, that the payment was voluntary and that a verdict for defendant was rightly directed.

2. The direction of a verdict will not be reversed on appeal even if rested on an untenable ground by the trial court, but will be affirmed, if it was proper for any legal reason that should have operated on the mind of the trial court. The question to be determined on review is the propriety of the judicial action, not the soundness of the reason that prompted it. 10

Plaintiff's appeal from Supreme Court.

For the appellants, Harry R. Coulomb.

For the respondent, Clarence L. Cole.

The opinion of the Court was delivered by
PARKER, J.:

The suit is to recover back an alleged overpayment of rent. The trial court directed a verdict for defendant, and plaintiffs appeal. 20

The rent was payable under a written lease made between other parties, but appellants have succeeded to the rights thereunder of the original tenant, and respondent to those of the original landlord, so that the case may be considered as though the parties before us were the original parties.

The claim of overpayment arose out of a disagreement as to the meaning of a part of the covenant to pay rent, which reads, so far as material to the present controversy, as follows: 30

"And the said party of the second part does hereby covenant and agree that it will pay all excess water rents that may be assessed against said premises, and also all the increase in taxes on and after October 27th, 1920, which said excess water bills

and said increase in taxes shall be considered as so much rent due and payable within thirty days after the same become due and payable to the City of Atlantic City."

10 The particular clause in dispute is that which reads "and also all the increase in taxes on and after October 27th, 1920." The landlord claimed that this meant the increase in taxes for 1921 over those for 1919, which increase amounted to \$3,104.30; the tenant claimed that it meant the increase over taxes for 1920, or \$1,906, and offered that amount. The landlord demanded the \$3,104.30 with interest, and gave notice that unless it was paid, the landlord "would take such action under said lease as it might be advised to be necessary." The leasehold was evidently a valuable one and the term was not to expire by limitation until October 27, 1935, so the tenant, evidently fearing a possible adverse result in a landlord and tenant proceeding, paid the amount
20 demanded under protest, and afterwards brought this suit to recover back the difference between the amount paid and the amount conceded to be due.

The trial court, as has been said, directed a verdict for defendant, basing the direction on a construction of the clause adverse to plaintiff's claim. The motion for a direction was rested also on other grounds, particularly that the payment was voluntary and therefore could not be recovered back.

30 We are of the opinion that the verdict for defendant was rightly directed, but find it unnecessary to examine into the question of the meaning of the covenant, because we are clear that the payment was a voluntary one. The appellant was confronted with the alternative of paying, or standing a suit for dispossession. To avoid that suit and its possible result, appellant exercised the option of paying. Such a case we think indistinguishable in

principle from *Sooy vs State*, 38 N. J. L. 324, in which Sooy voluntarily gave a bond as a state official, which the court held not required by law; *Camden v. Green*, 54 N. J. L. 591, where a license fee in excess of the legal fee was paid "without mistake of fact, fraud, duress, or coercion;" *Turner v. Barber*, 66 Id. 496, where plaintiff paid illegal wharfage to release his vessel from a libel in admiralty; *Koewing v. West Orange*, 89 N. J. L. 539, where plaintiff paid excessive taxes under threat of a tax sale claimed to be illegal; or *Byron v. Byron, Heffernan & Co.*, 119 A. 12, N. J. L., where a receivership was threatened. 10

In the case at bar, the landlord's claim was either legal or illegal. If legal, plaintiffs were, of course, bound to pay it. If illegal, they were entitled to resist it in a judicial proceeding. The nub of the case from a practical standpoint probably was that plaintiff feared the result of an adverse decision in a tenancy proceeding where the right of review is so restricted as it is under our statute; and so it is argued here that plaintiff could not have gone into the Court of Chancery for an interpretation of the contract under P. L. 1915, p. 184, Sec. 7. This is a mere argument *ab inconvenienti* and is equally applicable in any case where a party pays to avoid the embarrassment of a judgment or attachment. 20

It may not be out of place to add that the legislature has not left the tenant of a great store, factory, hotel, etc., wholly to the mercy of a small cause court; for by statute the tenant may at any time between issue and return of the summons in tenancy apply to a Justice of the Supreme Court, who, if he deem the case of sufficient importance, may order a removal into the circuit court, where it shall be tried, and it is further provided that the said circuit court shall have the same control over the ver- 30

dict and judgment as in other cases, and writ of error lies therefrom to the Supreme Court, C. S. 3074, pl. 24-a-24d inclusive.

It cannot be doubted that in a case of such importance as that before us, involving a troublesome question of construction and interpretation, there would have been a removal on proper application, and proper consideration by a superior court, subject to review, of the substantial question involved.

10 The trial judge did not put his direction on the ground of voluntary payment, but that does not debar an affirmance on that ground. The question to be determined on review is the propriety of the judicial action, not the soundness of the reason that prompted it.

Pierson v. N. Y. S. & W. R. R. Co., 83 N. J. L. 661.

McAndrews & Forbes Co. v. Camden, 78 N. J. Eq. 244.

20 Sadler v. Young, 78 N. J. L. 594.

Gillespie v. John W. Ferguson Co., Id. 470.

The judgment will be affirmed.

ENDORSED:

“Filed Nov. 19, 1923.

Thomas F. Martin,
Clerk.”

ANSWER.

(Filed June 28, 1924.)

S. M. Braunstein, Inc., a corporation of the State of Delaware, answering the complaint, says:

1. It admits paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

2. It admits so much of paragraph 11 as is not denied. It denies it was not entitled to the amount which it claimed.

3. It admits so much of paragraph 12 as is not denied. It denies that the year 1920 is the basic year for estimating the increase in taxes, and further denies that the amount which the plaintiffs say 20 is due is the true amount.

4. It admits so much of paragraph 13 as is not denied. It denies the alleged overpayment.

5. It admits paragraph 14.

6. It admits paragraph 15.

7. It admits paragraph 16.

30

8. It denies paragraph 17.

9. It denies paragraph 18.

10. It admits so much of paragraph 19 as is not denied. It denies the tender and also that the

amount tendered was the correct amount under the proper interpretation and construction of said lease.

11. It admits paragraph 20.

DEFENSES.

FIRST DEFENSE:

10

Defendant says that before the assignment by M. E. Blatt Co., one of the plaintiffs, to the McCrory Stores Corporation, the other plaintiff, of the lease referred to in the complaint, said Blatt Company and this defendant conferred upon the question of the true meaning and interpretation of the clause in said lease concerning the payment of excess taxes, and agreed that the year 1919 was the basic year for the determination of such excess, and after 20 such determination said Blatt Company paid the excess taxes to this defendant based upon the year 1919 as the basic year for increase. Plaintiff, McCrory Stores Corporation, had notice of such interpretation agreement and settlement when it accepted an assignment of said lease.

SECOND DEFENSE:

30

Before the assignment of the lease to plaintiff, McCrory Stores Corporation, plaintiff, M. E. Blatt Company paid to defendant the increased taxes as provided in said lease and used the year 1919 as the basic year for determining said increase.

THIRD DEFENSE:

This court is without jurisdiction to hear and determine the matter set up in the complaint and give relief to the plaintiffs for the following reasons:

(a) The Act of the Legislature of the State of New Jersey concerning declaratory judgments and decrees is unconstitutional, in that there is no power resident in the Legislature to authorize a court of law to settle and determine in advance of affirmative litigation, the rights of parties under a contract. 10

(b) The act properly interpreted does not permit a court of law to adjudicate as prayed by plaintiffs.

COUNTER-CLAIM.

Defendant, S. M. Braunstein, Inc., a corporation of the State of Delaware, demands of McCrory Stores Corporation, the possession of all that certain premises situate in the City of Atlantic City, County of Atlantic and State of New Jersey, beginning in the southerly line of Atlantic Avenue, one hundred and seventy-five feet east of the easterly line of New York Avenue; thence (1) Southwardly, at right angles with Atlantic Avenue, one hundred and fifty feet to a twenty foot wide alley; (2) east along the northerly side of said twenty foot wide alley fifty feet; (3) Northerly one hundred and fifty feet to the southerly line of Atlantic Avenue; (4) Westwardly, in and along the southerly line of Atlantic Avenue, fifty feet to the place of beginning; with the buildings and appurtenances, including the roofs and walls thereof, and including the engine, boiler, pumping apparatus and all 20 30

other appliances attached to and forming a part of said building, and also the sum of Ten Thousand Dollars for mesne profits and damages. And the plaintiff says that its right to the possession of same accrued on the first day of January, nineteen hundred and twenty-two, and that the defendant wrongfully deprives it of the possession thereof, to its damage, ten thousand dollars.

10

NOTICE.

To the Within Named Plaintiffs:

Notice that on the hearing of this cause we shall move to dismiss the complaint on the ground that it states no cause of action, and does not show a case within the jurisdiction of the Supreme Court.

COLE & COLE,

Attorneys for Defendant.

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REPLICATION.

(Filed July 3, 1924.)

1. The plaintiffs join issue on so much of the answer as denies the allegations in the complaint.

REPLY.

(Filed July 9, 1924.)

ANSWER TO FIRST DEFENSE:

1. Plaintiffs deny the matters and things set forth in the first defense. 10

2. Further answering said first defense, the plaintiffs say that it is without substance in point of law, and the plaintiffs pray to have the same benefit of this defense as though they had moved to strike out the same.

ANSWER TO SECOND DEFENSE:

20

1. Plaintiffs deny the matters and things set forth in the second defense.

2. Further answering said second defense, the plaintiffs say that it is without substance in point of law, and the plaintiffs pray to have the same benefit of this defense as though they had moved to strike out the same.

30

ANSWER TO THIRD DEFENSE:

1. The plaintiffs join issue on the third defense.

ANSWER TO COUNTER-CLAIM:

1. Plaintiffs deny the matters and things set forth in the counter-claim.

2. Plaintiffs say that they are in possession of said premises by virtue of the lease, referred to in the complaint in this cause.

10

3. Plaintiffs say that they have done and performed all the covenants contained in said lease, which under the terms thereof, they, the said plaintiffs, were obliged to perform.

4. Plaintiffs say that they have not defaulted in any of the terms, covenants and conditions of said lease.

20

5. Plaintiffs deny that the defendant has any right to the possession of said premises.

6. Plaintiffs deny that plaintiffs' right to said premises accrued on the first day of January, 1922.

7. Plaintiffs deny that they wrongfully deprive the defendant of possession of said premises.

30

FIRST DEFENSE TO COUNTER-CLAIM:

1. Plaintiffs say that the defendant's right to possession of said premises cannot be litigated in a proceeding under a declaratory judgment act, referred to in the complaint, and pray to have the same benefit of this defense as though they had moved to strike out the same.

SECOND DEFENSE TO COUNTER-CLAIM:

1. Plaintiffs say that they offered and tendered to pay to the said S. M. Braunstein, Inc., all of the moneys due by them to the defendant, under and by virtue of the terms of said lease, which said sum was refused.

THIRD DEFENSE TO COUNTER-CLAIM: 10

1. Plaintiffs say that under and by virtue of said lease, the sum of \$2,874.60 was due for excess taxes for the year 1924; that said sum was tendered and offered to the said S. M. Braunstein, Inc., and acceptance thereof was refused.

BOURGEOIS & COULOMB,
Attorneys for Plaintiffs.

Defendant joins issue on the plaintiffs' answer to counter-claim. 20

ANSWERS TO DEFENSES TO COUNTER-CLAIM.

(Filed July 14, 1924.)

FIRST DEFENSE:

Defendant denies the averments in the first defense. 30

SECOND DEFENSE:

Defendant denies the averments in the second defense.

THIRD DEFENSE:

Defendant denies the averments in the third defense.

COLE & COLE,
Attorneys of Defendant.

10

STIPULATION.

For the purpose of the decision of this cause it is stipulated that Braunstein-Blatt Company, lessee, had submitted to it by Braunstein, lessor, a bill for excess taxes for the year 1920 in which the year 1919 was used as the basic year for calculating the increase and that payment of said bill was made by Braunstein-Blatt Company without objection.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

COLE & COLE,
Attorneys for Defendant.

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FINDINGS OF THE CIRCUIT COURT JUDGE.

(Filed July 24, 1925.)

NEW JERSEY SUPREME COURT

ATLANTIC CITY.

10

McCRORY STORES CORPORATION, *et al.*,
Plaintiffs,
v.
S. M. BRAUNSTEIN, INC.,
Defendant.

Action at Law.
Findings by the
Court.

20

This case was submitted for trial, without a jury, upon the pleadings, and a brief stipulation, as follows:

“For the purpose of the decision of this cause, it is stipulated that Braunstein-Blatt Company, lessee, had submitted to it by Braunstein, lessor, a bill for excess taxes for the year 1920 in which the year 1919 was used as the basic year for calculating the increase, and that payment of said bill was made by Braunstein-Blatt Company without objection, the amount of such excess being \$206.64.”

The action is brought under and by virtue of an act entitled, “An Act concerning declaratory judgments and decrees” (Chapter 140 of the Laws of 1924).

The paper to be construed, and its meaning declared, is a lease entered into originally by Samuel M. Braunstein, lessor, and Braunstein-Blatt Company, lessees. Samuel M. Braunstein conveyed his interest in the property leased to S. M. Braunstein, Inc. Braunstein-Blatt Company assigned their interest in the lease to McCrory Stores Corporation, and, subsequently, the name of Braunstein-Blatt Company was changed to M. E. Blatt Company.

10 The provision of the lease, which is the subject of dispute between the parties to this action, is found in paragraph three (3), and so far as it is pertinent to the issue, is as follows:

20 “And the said party of the second part does hereby covenant and agree that it will pay all the excess water rents that may be assessed against said premises, and also all the increase in taxes on and after October 27th, 1920, which said excess water bills, and said increase in taxes, shall be considered as so much rent due and payable within thirty (30) days after the same become due and payable to the City of Atlantic City.”

30 The clause is susceptible of a simple and practical construction. The intent of the parties was that, whatever the amount of taxes payable after October 27, 1920, might be increased over the amount of taxes payable before October 27, 1920, the amount of increase should be paid by the tenant.

The language,

“shall be considered as so much rent due and payable within thirty days after the same become due and payable to the City of Atlantic City,”

indicates that whatever increase in amount became due and payable to Atlantic City was to be paid by the tenant.

By Chapter 236 of the Laws of 1918, and at page 872, it is provided (Section 602):

“Taxes shall be payable, one-half of the amount thereof on the first day of April, which, if not paid on or before the first day of June, will become delinquent on that day, etc. * * * the remaining half of said taxes shall be paid on or before the first of December, after which date, if unpaid, they shall become delinquent, etc.” 10

I think it makes no difference when and how taxes are assessed against this property. It is the amount payable to the City of Atlantic City after October 27, 1920, and the increase in that amount over the amount payable before October 27, 1920, which governs the construction of the agreement made between these parties. 20

The whole intent of the parties was that the amount payable after that date, with relation to the amount of the increase, should be paid by the tenant.

I so construe the lease, and a postea may be prepared, declaring the rights of the parties under the lease, in accordance with the above determination.

The basic figure is the tax payable to the City of Atlantic City on the first day of April, 1920, and from that basis the increase in taxes payable after October 27, 1920, should be calculated. 30

Having reference to the Tax Act of 1918, it is plain that the amount due and payable to the City of Atlantic City on April 1, 1920, represents the increase, therefore, which the lease requires the tenant amount of taxes assessed as of October 1, 1919. The

ant to pay, is the increase over the amount due and payable to the City of Atlantic City on April 1, 1920.

With respect to the plaintiffs' requests for findings, I find:

1. There is no evidence to show that the persons who gave the check in payment of the pro-rated difference of tax, from the period of October 27th, 1920, to January 1, 1921, over and above the tax for the year 1919, had any authority to make such payment or bind the corporation thereby.

2. That the payment was not, in fact, a practical interpretation or construction of the contract.

3. There is no evidence to show that the McCrory Stores Corporation had any knowledge of such payment.

20 4. The McCrory Stores Corporation had the right to rely upon the terms of the lease.

5. The construction of the lease is found at the beginning of these findings and memorandum.

6. The Declaratory Judgment Act is not unconstitutional.

30 7. I find the defendant's counter-claim must be dismissed, not for the reason expressed in the request for findings, but, for the reason that there is no proof before me to support the counter-claim.

8. The defendant is not entitled to a judgment in ejectment, under his counter-claim.

With respect to the defendant's requests for findings, I find:

1. The Court has jurisdiction to hear and determine the plaintiffs' claim, and therefore, the motion to non-suit is denied.

(a) The act invoked in aid of jurisdiction does vest it in a court of law.

(b) The act is not unconstitutional.

2. I find, to the contrary, that the parties to this action have not construed the lease by a practical construction. 10

3. The motion that a verdict be directed in favor of defendant is denied.

4. The motion to direct a verdict in favor of defendant, upon defendant's counter-claim, is denied, for the reason that there is no proof before me to support the counter-claim. 20

THEO. W. SCHIMPF,
Circuit Court Judge.

EXCEPTIONS.

(Filed Dec. 4, 1925.)

10 NEW JERSEY SUPREME COURT.

McCRORY STORES CORPORA-
TION,

Plaintiff,

v.

S. M. BRAUNSTEIN, INC.,

Defendant.

Exceptions.

20

Upon the opening of this case for hearing before me, without a jury, counsel for defendant moved to dismiss the complaint for the reasons stated in the notice and the answer, which motion was denied and an exception allowed.

Exception was taken to the Court's refusing to direct a verdict in favor of the defendant, and it is allowed.

30 Exception was taken to the Court's finding that the Declaratory Judgment Act is constitutional, and it is allowed.

Exception was taken to the Court's dismissing defendant's counter-claim, and it is allowed.

Exception was taken to the Court's finding a judgment in favor of plaintiff and against the defendant, and it is allowed.

Exception was taken to the Court's finding that McCrory Stores Corporation had a right to rely upon the terms of the lease, and it is allowed.

Exception was taken to the Court's finding that the payment by Braunstein-Blatt Co. referred to in the stipulation was not a practical interpretation of the contract, and it is allowed.

Exception was taken to the Court's finding that the person who signed the check in payment of taxes and referred to in the stipulation was without authority to bind plaintiffs, and it is allowed. 10

Exception was taken to the Court's finding that the basic year for the payment of increased taxes was 1919, and it is allowed.

THEO. W. SCHIMPF,
C. C. J.

POSTEA.

This case was tried before Hon. Theodore W. Schimpf, Circuit Court Judge, without a jury, in the Atlantic County Circuit Court, on the 23rd day of December, A. D. 1924, under and by virtue of an Act entitled "An Act concerning declaratory judgments and decrees" (Chapter 140 of the Laws of 1924), to determine the true intent and meaning of a certain lease entered into originally by Samuel M. Braunstein, lessor, and Braunstein-Blatt Co., lessees. Subsequently, Samuel M. Braunstein conveyed his interest in the property leased to S. M. Braunstein, Inc., and Braunstein-Blatt Co., assigned their interest in the lease to the McCrory Stores Corporation. Thereafter the name of Braunstein-Blatt Co. was changed to M. E. Blatt Co. The defendant, having filed a counter-claim in ejectment 30

against the said McCrory Stores Corporation, to which the plaintiff filed appropriate answer and denial, the Court also heard and adjudged the issue thereby joined.

JUDGMENT.

10 The Court finds as follows:

1. There is no evidence to show that the persons who gave the check in payment of the pro-rated difference of tax, from the period of October 27, 1920, to January 1, 1921, over and above the tax for the year 1919, had any authority to make such payment or bind the corporation thereby.

20 2. That the payment was not, in fact, a practical interpretation or construction of the contract.

3. There is no evidence to show that the McCrory Stores Corporation had any knowledge of such payment.

4. The McCrory Stores Corporation had the right to rely upon the terms of the lease.

5. The Court finds and declares the true construction and meaning of the provision of the lease, to wit:

30 "And the said party of the second part does hereby covenant and agree that it will pay all the excess water rents that may be assessed against said premises, and also all the increase in taxes on and after October 27, 1920, which said excess water bills and said increase in taxes shall be considered as so much rent due

and payable within thirty (30) days after the same becomes due and payable to the City of Atlantic City.”

is, that the increase in taxes which the said lease obligates the plaintiff, the McCrory Stores Corporation, its successors or assigns, to pay to the defendant, S. M. Braunstein, Inc., its successors or assigns, is the increase in taxes over the amount due and payable for taxes to the City of Atlantic City on April 1, 1920, the said taxes so due the City of Atlantic City on April 1, 1920, being the sum of \$3,387.90, and that the amount of increase in taxes which the plaintiff, the said McCrory Stores Corporation, its successors or assigns, is obligated to pay to the defendant, S. M. Braunstein, Inc., its successors or assigns, hereafter annually during the demised term of said lease, to wit: twenty years from October 28, 1915, ending October 27, 1935, under the terms of said lease, is the difference between the amount of taxes due for any current year over and above said sum of \$3,387.90, which said sum of \$3,387.90 was the amount due for taxes to the City of Atlantic City on April 1, 1920.

6. The Declaratory Judgment Act is not unconstitutional.

7. I find the defendant's counter-claim must be dismissed, not for the reason expressed in the request for findings, but for the reason that there is no proof before me to support the counter-claim.

8. The defendant is not entitled to a judgment in ejectment, under his counter-claim.

I further find that the plaintiff is entitled to have a judgment entered in its favor in accordance with

the above findings, together with the costs of this suit.

Whereupon, pursuant to an Act entitled "An Act concerning declaratory judgments and decrees" (Chap. 140 of the Laws of 1924), it is adjudged, found and declared that the true construction and meaning of the provision of the said lease, to wit:

10 "And the said party of the second part does hereby covenant and agree that it will pay all the excess water rents that may be assessed against said premises, and also all the increase in taxes on and after October 27, 1920, which said excess water bills and said increase in taxes shall be considered as so much rent due and payable within thirty (30) days after the same becomes due and payable to the City of Atlantic City."

20 is, that the increase in taxes which the said lease obligates the plaintiff, the McCrory Stores Corporation, its successors or assigns, to pay to the defendant, S. M. Braunstein, Inc., its successors or assigns, is the increase in taxes over the amount due and payable for taxes to the City of Atlantic City on April 1, 1920, the said taxes so due the City of Atlantic City on April 1, 1920, being the sum of \$3,387.90, and that the amount of increase in taxes which the plaintiff, the said McCrory Stores Corporation, its successors or assigns, is obligated to pay to the defendant, S. M. Braunstein, Inc., its successors or assigns, hereafter annually during the demised term of said lease, to wit: twenty years from October 28, 1915, ending October 27, 1935, under the terms of said lease, is the difference between the amount of taxes due for any current year over and above said sum of \$3,387.90, which said sum of \$3,387.90, was the amount due for taxes to the City of Atlantic City on April 1, 1920.

Whereupon, it is further adjudged that the counter-claim of the defendant be dismissed, together with costs, in favor of the plaintiffs, McCrory Stores Corporation, a corporation of the State of Delaware, and M. E. Blatt Co., a corporation of the State of New Jersey, and against the defendant, S. M. Braunstein, Inc., a corporation of the State of Delaware, which costs have been 10
 taxed at the sum of

Costs \$

Judgment entered September 26, 1925.

WM. S. GUMMERE,
C. J.

I, EDWARD J. KELLEHER, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal, 20
 and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

In testimony whereof, I have set my hand and the seal of said court at Trenton, this fifth day of October, A. D. nineteen hundred and twenty-five.

(Seal)

EDWARD J. KELLEHER,
Clerk.

NOTICE AND GROUNDS OF APPEAL.

(Filed Oct. 1, 1925.)

NEW JERSEY SUPREME COURT.

10	McCRORY STORES CORPORA- TION, <i>et al.</i> , <i>Plaintiffs-Respondents,</i>	}	Notice of Appeal.
	v.		
	S. M. BRAUNSTEIN, INC., a Corp., &c., <i>Defendant-Appellant.</i>		

20 *To the Within Named Plaintiffs:*

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

- 30
1. The Court erroneously found that the person who gave the check in payment of taxes for the period of October 27, 1920, to January 1, 1925, was without authority to bind plaintiffs.
 2. The Court erroneously found that said payment was not a practical interpretation of the contract.
 3. The Court erroneously found that McCrory Stores Corporation had a right to rely upon the terms of the lease.

4. The Court erroneously found that the clause in the lease touching the payment of taxes should be interpreted to mean that the basis year for the increase was 1920 instead of 1919, and that the amount which plaintiffs are obligated to pay to the defendant hereafter annually during the demised term of said lease, to wit: twenty years from October 28, 1915, ending October 27th, 1935, under the terms of said lease, is the difference between the amount of taxes due for any current year over and above said sum of \$3,387.90, which said sum of \$3,387.90 was the amount due for taxes to the City of Atlantic City on April 1, 1920. 10

5. The Court erroneously found that the Declaratory Judgment Act is not unconstitutional.

6. The Court erroneously dismissed defendant's counter-claim.

7. The Court erroneously held that the defendant was not entitled to a judgment in ejectment. 20

8. The Court erroneously found that there should be a judgment in favor of the plaintiffs and against the defendant, together with costs.

COLE & COLE,
Attorneys of Appellant.

Notes and Citations of Cases

1. The Court erroneously found that the clause in the lease requiring the payment of taxes should be interpreted to mean that the lease rent for the first year was the amount of 1833 and that the amount which should be charged to pay for the taxes for the first year was the amount of 1833 and that the amount of 1833 was the amount of the difference between the amount of the lease rent for the first year and above said sum of \$2,310 which was the amount due for taxes in the City of Atlanta on April 1, 1833.

2. The Court erroneously found that the lease rent judgment is not unconstitutional.

3. The Court erroneously dismissed the bill of complaint.

4. The Court erroneously held that the defendant was not entitled to a judgment in ejectment.

5. The Court erroneously found that there should be a judgment in favor of the plaintiff and against the defendant together with costs.

Corn & Co.

6. The Court erroneously found that the defendant was not entitled to a judgment in ejectment.

7. The Court erroneously found that there should be a judgment in favor of the plaintiff and against the defendant together with costs.

41

New Jersey Court of Errors and Appeals

McCRORY STORES CORPORATION,
Plaintiff-Respondent,

v.

S. M. BRAUNSTEIN, INC.,
Defendant-Appellant.

ON APPEAL FROM SUPREME COURT.

BRIEF FOR APPELLANT.

STATEMENT.

This cause was instituted in the Supreme Court and sent to the Atlantic Circuit for trial. It was tried before his Honor Judge Schimpf, without a jury, on the pleadings and stipulation. His findings were all favorable to the respondent and from the judgment thereon the appeal was taken. The complaint is grounded upon an act entitled "An Act concerning Declaratory Judgments and Decrees," approved March 11, 1924. From the standpoint of the respondent the question involved concerns the correct interpretation of a clause in a lease made by Samuel M. Braunstein to Braunstein-Blatt Com-

pany (the interest of the respective parties having finally become vested in the parties to this suit). The clause in question reads:

“And the said party of the second part does hereby covenant and agree that it will pay all excess water rents that may be assessed against said premises, and also all the increase in taxes on and after October 27, 1920, which said excess water bills and said increase in taxes shall be considered as so much rent due and payable within thirty days after the same become due and payable to the City of Atlantic City, and the said party of the first part does hereby covenant and agree that he will pay all the taxes, sewer charges and minimum water charges as the same are rendered; the sewer charges now being \$42.30 per annum, and the minimum water charges now being \$35 per annum.”

Respondent did not tender the amount in payment of increase in taxes as claimed by the appellant and before action brought by the appellant, this suit was brought. Appellant answered with some admissions, some denials, certain defenses, a counter-claim in ejectment for breach of covenant to pay increased taxes, and with a notice to dismiss on the ground that the Court was without jurisdiction. Formal replies were made and the case submitted as stated. The meritorious question is, what year was intended by the parties to the lease to be the basic year for calculating the increase in taxes. Other questions of a collateral character arose, were argued, and were considered and decided by the trial Court, formal exceptions were taken and signed and filed.

ARGUMENT.

I.

JUDGE SCHIMPF WAS WITHOUT JURISDICTION TO HEAR AND DETERMINE THE CAUSE.

Assume for the moment that the declaratory judgment act is constitutional. The first section reads:

“Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed,” &c.

It will be noticed that the action was instituted in the Supreme Court and not in the Atlantic Circuit. The proceeding is not according to the common law. It is purely statutory. There is nothing in the act to indicate a right to have a suit begun in the Supreme Court referred to another court for its consideration and judgment. What the appellant received was not the judgment of the Supreme Court, but the judgment of a Circuit Court Judge. If there was justification for referring the case to the Circuit, then Judge Schimpf by virtue of his power as Circuit Court Judge might have referred it to the Court of Common Pleas, and we would have had the judgment of the Judge of that court rather than the judgment of the Supreme Court. This is an error apparent upon the record.

II.

THE DECLARATORY JUDGMENT ACT IS UNCONSTITUTIONAL.

The trial Judge declared the act to be constitutional. The question is one of first impression in this court. The English courts have, we think, uniformly decided that such an act is valid. There are decisions both ways in this country with a majority in favor of constitutionality. In Vol. 12 A. L. R. page 1, and Vol. 19 A. L. R. page 1101, and 1124 will be found a careful consideration of the subject in the English House of Lords and the English Court of Appeal. Annotations refer to cases in this country. The English cases seem to turn upon the question of the power of the Court to make certain orders, and of course no constitutional question was involved. Cases in this country raise directly the question of constitutionality. The case upon which we rely is *Anway v. Grand Rapids, &c.*, 179 N. W. 350, and at page 26—12 A. L. R. The syllabus reads:

“A statute authorizing courts to make binding declarations of rights when no judicial controversy is involved, confers upon the courts powers not judicial and requires the performance of acts non-judicial in character and is in conflict with the constitutional provision vesting judicial power in the courts.”

The opinion of the Court is exhaustive of the subject and we think its logic unanswerable. To us the opinion seems to be directly in point, concerns a statute substantially like the one in question, and concludes that the Court is required by the act to

perform a non-judicial act. We feel it would be presumptuous upon our part to attempt to amplify what is said in the cited case. It treats the subject from every possible angle. Some of our own cases which concern suits in equity to decide rights are considered and analyzed. We willingly concede that the cases which uphold the constitutionality of such an act are not without force and are highly persuasive. The simple question seems to be, which path will this Court tread. We feel that nothing can be accomplished by attempting to challenge, criticize or analyze the opinions which hold contrary to the views expressed in the Michigan case, and we therefore say that we are content to rest upon the reasoning of that case and the numerous cases cited and discussed in support thereof.

We have the same constitutional provision as quoted in the Michigan case. In *Flanigan v. Smelting Co.*, 63 Law 647, this Court held that the Legislature of New Jersey cannot impair the jurisdiction of a constitutional court. While that act attempted to take from the Supreme Court its exclusive right to determine questions of fact, the reasoning deals with the question of legislative power over the judiciary. In *Story v. The Jersey City, &c.*, 16 Eq. page 13, the second syllabi reads:

“The proper office of courts of justice is to adjudicate upon and to protect and enforce the legal and equitable rights of parties litigant as they are established by existing laws. It is no part of their appropriate function to determine in advance whether a proposed law may or may not be enacted consistently with the rights of parties or interfere directly or indirectly with the course of legislation.”

In *Traphagen v. Township*, 39 Law at page 235, it is said:

“By force of Section 1 of Article VI of the new constitution, the nature of the Supreme Court can be altered only by a modification of the constitution itself. Under this constitutional guarantee, the powers which inhered in the Court at the formation of the constitution must be unassailable by legislation.”

It is true that these cases seem to deal with legislation which attempts to pare the jurisdiction of the Supreme Court while the act under consideration in the instant case seems to enlarge the powers of the Court.

As stated, no proceeding was pending to enforce the payment of the increased taxes when the suit was instituted. There is an averment of a threat to sue in ejectment. We shall not quote any section of the act. It will be interesting, however, to note what it requires Courts of record to do. Among other things the Court is obliged to construe a contract before breach and necessarily before action contemplated. It makes of every court of record a debating society. It permits parties to instruments who may have no thought of ever resorting to the Courts to have their legal rights determined, use the Courts merely to provoke an opinion as to what a written instrument may mean. It permits of relief in either affirmative or negative form. As shown in the above quotation it requires the Courts to *declare rights, status and other legal relations whether or not further relief is or could be claimed.*

Section 11 provides:

“In any proceeding which involves the validity of a municipal ordinance or franchise such

municipality shall be made a party and shall be entitled to be heard," &c.

This provision runs counter to and destroys the effect of numerous decisions in the Supreme Court, and this Court, to the effect that the Court will not except in specific instances and under peculiar circumstances adjudicate in advance as to the validity of a municipal ordinance or franchise. If determined to be constitutional it will create a clearing house of the Supreme Court to declare judgments in the most trifling cases and where without the act parties would not think of litigating through the ordinary judicial channel. It is fraught with grave possibilities. And it can be seen without too much conjuring of the imagination that many judgments might be declared without process of enforcement. Giving to the act the liberal interpretation which it in effect says should be given to it, the language of Section 1 would require the Supreme Court to pass upon the title to public office or a public franchise where nothing more than an advisory opinion was asked for and without any thought or suggestion of a real contest touching the office or franchise.

III.

THE ACT VIOLATES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION.

We appeal to the case of *Anway v. Grand Rapids, &c., supra*, to support this contention.

IV.

THE ORIGINAL PARTIES TO THE LEASE INTERPRETED THE CLAUSE IN QUESTION AND THAT INTERPRETATION IS BINDING UPON THE RESPONDENT.

The stipulation is:

“For the purpose of the decision of this cause, it is stipulated that Braunstein-Blatt, lessee, had submitted to it by Braunstein, lessor, a bill for excess taxes for the year 1920 to which the year 1919 was used as the basic year for calculating the increase and that payment of said bill was made by Braunstein-Blatt without objection, the amount of such excess being \$206.64.”

It will be noted that in the face of the stipulation that the payment was made by Braunstein-Blatt Co., the trial Court found:

“There is no evidence to show that the persons who gave the check in payment of the pro rata difference of tax for the period of October 27, 1920, to January 1, 1921, over and above the tax for the year 1919 had any authority to make such payment or bind the corporation thereby.”

This finding is contrary to the plain language of the stipulation and is without any evidence to support it.

Our contention is that the original lessor interpreted the lease to mean that the basic year for calculating the excess tax was the year 1919 and that the lessee assented to this interpretation by

paying upon that basis. The parties thereby interpreted the clause. See Williston on Contracts, Section 623; *Van Dyke v. Anderson*, 83 Eq. 568.

V.

PROPERLY CONSTRUED THE YEAR 1919 IS THE BASIC YEAR FOR CALCULATING THE INCREASE.

This question was before Judge Donges in a previous action and he decided that 1919 was the basic year. The case was appealed to this Court where the meritorious question was passed and the judgment affirmed upon another point made by the respondent at the trial. We are of the opinion that Judge Donges was correct and that his reasoning is better and more convincing than that of Judge Schimpf. We are content to rely upon what he said, which is as follows:

“I think that a determination of the third point, namely, the interpretation of the contract, is all that is necessary. In my opinion, it turns upon that question. The contract to be construed is a lease made on the first day of November, 1915, between Samuel M. Braunstein, individually, and Braunstein-Blatt Company, a corporation. Subsequently, the defendant corporation succeeded to the rights of Braunstein as the lessor, and by assignment, the plaintiff, McCrory Company, became the lessee, the assignee of the Braunstein-Blatt Company, and the substituted lessee. The lease demises the premises for a term of twenty years, beginning the twenty-eighth day of Oc-

tober, 1915, and ending the twenty-seventh day of October, 1935; so that the term year runs substantially from the twenty-seventh day of October of each year, and the rental payable monthly in advance is due on the twenty-eighth day of each month during the operation of the lease. So that the parties agreed that the termination of each monthly period was on the twenty-seventh day of the month. I mention that because in my conclusion as to what the lease means, that is a fact which I am bound to consider. The particular clause in the lease we have to deal with is that in addition to certain payments to be made, it is provided that the lessee shall also pay all the increase in taxes on and after October twenty-seventh, 1920. It seems to me that a fair and reasonable interpretation of that contract, in view of the fact that the twenty-seventh day of each month marks a rental period, is that all sums of money which the lessor has been obliged to pay for taxes for a period subsequent to October twenty-seventh, 1920, is to be added to the rental otherwise due, and that in substance means that it is my opinion that the lease provides for proportionate payments for a year. Otherwise, if the plaintiff's theory were adopted, there would be added to the rental no sum for taxes paid until after the first day of May, 1920, and it follows from the same argument, it seems to me, that the rental for taxes would begin May first or April when it became payable, and not for the calendar year 1921. If I make it clear, the plaintiff says that until after the lien attached for taxes due after October twenty-seventh, 1920, the lessee is

liable to pay, so that would mean, as I take the argument of the plaintiff, that April first, if that is the period when the lien would attach and the taxes become payable for the year subsequent to October twenty-seventh, 1920, would mark the time when the first payment would come due. That, of course, would involve the payment for a proportionate part of the year 1921 and not for the whole calendar year. It seems to me that inasmuch as the parties have fixed the twenty-seventh day of October as the beginning of each year, the twenty-seventh day of each month as the time when the rent is payable, that it involves a payment of whatever proportionate part of taxes or water rents or sewer rents, or whatever may be due after the twenty-seventh day of the month as being the reasonable interpretation of the contract, and that is the conclusion that I have reached after some reflection upon this case."

VI.

THERE SHOULD HAVE BEEN A DIRECTION FOR THE APPELLANT ON THE PLAINTIFF'S CLAIM AND ALSO A DIRECTION IN ITS FAVOR ON ITS COUNTER-CLAIM.

The foregoing is made upon the hypothesis that the Court will sustain the constitutionality of the act. We suppose that if it is declared and we think it should be, that the act is unconstitutional, then both the Supreme Court and Circuit Court were without jurisdiction to hear the main case and as a necessary consequence, without jurisdiction to con-

sider and decide the counter-claim. If, however, the act is declared constitutional and the meritorious question decided in favor of appellant, then there was a default in not tendering the amount due which entitled appellant to maintain ejectment.

All the questions here discussed were raised, decided, exceptions taken, and are set forth in the notice of appeal.

It is respectfully submitted that the act should be declared unconstitutional, the judgment reversed and all proceedings set aside or in the event that the act is declared constitutional, then that the judgment be reversed and with directions to enter a judgment in favor of the appellant on its counter-claim in ejectment.

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Of Counsel.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

McCRORY STORES CORPORATION,
Plaintiff-Respondent,

v.

S. M. BRAUNSTEIN, INC.,
Defendant-Appellant.

ON APPEAL.

BRIEF OF RESPONDENT.

STATEMENT.

The complaint in this case was filed under Chapter 140 of the Laws of 1924 (Pl. L. 1924, p. 312), commonly known as The Declaratory Judgment Act. The rights to be declared thereunder had to do with the interpretation and construction of a lease made between M. E. Blatt Co. and S. M. Braunstein, dated November 1st, 1915, and particularly as to whether under the terms of said lease, the basic year for computing the increase in taxes was the year 1919 or the year 1920.

An answer was filed, and likewise a counter-claim, seeking to eject the McCrory Stores Corporation for non-payment of taxes under the terms of the lease.

The matter came on for trial before Judge Schimpf, at the Atlantic County Circuit. The facts were either admitted in the pleadings or else stipulated. Upon the facts so admitted and stipulated, the Court decided that a proper interpretation of the lease was that the basic year for computing the taxes was the year 1920. He dismissed the counterclaim, and from his judgment this appeal is taken by S. M. Braunstein, Inc.

POINTS INVOLVED.

There are only two questions involved in the consideration of this appeal:

1. Is the Declaratory Judgment Act constitutional?
2. Was the trial Court right in determining that the basic year for the computation of the taxes was the year 1920?

I.

THE DECLARATORY JUDGMENT ACT IS
CONSTITUTIONAL.

The basic idea underlying the Declaratory Judgment Act is that there are times when it is necessary, expedient and just that some tribunal should determine the rights of parties under agreements, &c., before those rights become actually involved in litigation. The necessity of the protection which

the Act thus affords to parties standing in contractual relationship becomes manifest when one of those parties must either accept the interpretation placed upon the contract by the other party, or subject himself to a loss, if, rejecting that interpretation, he is involved in a litigation in which the Court finally decides that the interpretation of his adversary was the true one.

Its importance in the case at hand will be more fully discussed under Point II of this brief. Suffice it to say here, that the question is whether or not McCrory Stores Corporation should pay to Braunstein the excess of taxes based on the year 1919 or such excess based on the year 1920.

The contention of Braunstein is that 1919 is the basic year. If McCrory Stores Corporation pays upon this basis, it cannot afterwards recover the amount paid. *McCrory v. Braunstein* (99 N. J. L. 166), even though the year 1919 was not the basic year.

If, on the other hand, the McCrory Stores Corporation would refuse to pay the excess of taxes based upon the year 1919, it would subject itself to an ejectment suit, instituted by Braunstein, and if in such ejectment suit the Court would determine that Braunstein's contention was correct, it could only result in a verdict in favor of the Braunstein Co., and the McCrory Stores Corporation might, and very likely would forfeit a valuable leasehold right in the premises in question.

The Declaratory Judgment Act is not new in English jurisprudence. The present New Jersey Act is the uniform Act recommended by the National Conference of Commissioners on Uniform State Laws, at its session in August, 1920, but similar legislation was in vogue as early as 1852 in England, first in the Chancery Act, and later, in 1873

in Rule 5 of Order 25, adopted under provisions of the Judicature Act of 1873, the relief was applied generally in the following language:

“No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.”

Later on, another rule was added, which provided that:

“In any division of the high court, any person claiming to be interested under a deed, will or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and have a declaration on the rights of the persons interested.”

In America, the power of the Court to declare rights appears first in the California Act of 1850, and then in succession the Rhode Island Act of 1876, the New Jersey Act of 1915 (Sec. 7 Pl. L. 1915, p. 185), then in Connecticut in 1915, and latterly Michigan, Wisconsin, Florida, New York, Kansas and Pennsylvania, and, perhaps, other states have adopted and enforced the provisions of the Declaratory Judgment Act.

The uniform Declaratory Judgment Act as it appears in our statute is in sixteen sections.

The first section provides that courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations, whether or not other relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judg-

ment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

The second section provides that any person interested under a deed, will, written contract or other writing constituting a contract, or whose right, status or other legal relations are affected by statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise, and obtain a declaration of rights, status or other legal relations thereunder.

The third section provides that a contract may be construed either before or after breach.

The sixth section provides that the Court may refuse to enter a declaratory judgment or decree, where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

The seventh section provides for a review, as in other cases.

The ninth section provides for a determination of an issue in fact where that is necessary.

The eleventh section provides for making all parties to the controversy interested.

The twelfth section declares:

“This Act is declared to be remedial. Its purpose is to state and afford relief from uncertainty and insecurity of the rights, status and other legal relations, and is to be liberally construed and administered.”

The fourteenth section declares that the several sections and provisions of the Act, excepting one and two, are independent and severable, and the

validity, if any, of any part or feature thereof shall have effect ~~to~~^{not} render the remainder of the Act invalid.

The germinal idea which underlies the purpose of the Act is in reality not new or modern. It is said to have existed in Rome, and has certainly existed in our own State with respect to the interpretation of wills, instructions to executors and trustees, the quieting of title to lands, and under the Chancery Act of 1915, above referred to, to any agreement where equitable questions were involved.

The question is: Is its extension to the Law Courts unconstitutional?

The Constitution of the State of New Jersey provides in Article VI, Sec. 1, paragraph 1:

“The judicial power shall be vested in a Court of Errors and Appeals, the last resort in all causes, as heretofore; a Court for the trial of impeachments, a Chancery Court, a Prerogative Court, a Supreme Court, Circuit Court, and such inferior courts as now exist, and as may be hereafter ordained and established by law, which inferior courts the Legislature may alter or abolish, as the public good shall require.”

In the case of *Traphagen v. West Hoboken Twp.* (39 N. J. L. 232), it was held that:

“Under this constitutional guarantee, the power which inhered in the Supreme Court at the formation of the Constitution must be unassailable by legislation.”

There have been very many cases decided in which it was held that the endeavor of the Legislature to invade the rights inherent in the Supreme Court at the formation of the Constitution were invalid, but

the writer has been unable to find any cases touching or concerning the increase in the power of the Supreme Court. It is to be conceded that if the Legislature should attempt to increase the power of the Supreme Court, and such an increase invaded the power and jurisdiction of other constitutional courts, that such legislation would be invalid. It is submitted, however, that in the present situation, the Declaratory Judgment Act, by its express terms, limits its application to those cases arising within the respective jurisdictions of the several courts of record.

Having regard to this particular provision of the Act, Vice-Chancellor Backes, speaking for the Court of Chancery, in *Paterson v. Currier* (129 Atl. 711), not yet officially reported, said:

“This Act confers jurisdiction on the Law and Equity Courts to declare rights of parties in such matters only as the courts respectively would otherwise have jurisdiction over, if the rights were right for relief.”

It is quite plain from an examination of the present case that it is purely legal in all its aspects. It could not possibly come within any equitable head. The question concerns the legal rights of the parties under a contract of lease, and its proper construction. There is no fraud, surprise or mistake alleged. Therefore, so far as the jurisdiction of the Court is concerned, if any Court has jurisdiction, it is a Law Court, and not a Court of Equity.

The subject-matter is one over which this Court would have complete and ample jurisdiction, had the question arisen, as it might have arisen, upon an ejectment suit, in which the question for determination was whether the year 1919 or the year 1920 was the basic year for the computation of the ex-

cess taxes. The trial Court would have either determined the question as a matter of law, or, if there were any question of fact present, would have submitted it to a jury for its determination. Furthermore, there is in the present suit an actual controversy between the parties as to the correct interpretation of the contract. In 1921, a similar controversy arose between the parties. At that time, there was no Declaratory Judgment Act. Thereupon, the McCrory Stores Corporation paid under protest the excess taxes due for the year 1921, based upon the year 1919, and this Court, in its opinion above referred to, held that the payment was a voluntary one, and could not be recovered. These facts are alleged in the complaint in this cause. (See paragraphs 10, 11, 12, 13, 14, 15 and 16—pp. 5, 6 and 7.)

In paragraph 19 of the complaint (p. 8), it is averred as follows:

“That on the 23rd day of June, A. D. 1924, McCrory Stores Corporation tendered to S. M. Braunstein, Inc., the difference between the taxes assessed for the year 1924 and the taxes assessed for the year 1920, amounting to the sum of \$2,874.60. That notwithstanding that said sum was the correct amount due for the taxes under a proper interpretation and construction of said lease, said S. M. Braunstein, Inc., refused to accept said sum so tendered, but demanded a larger sum, to wit: the sum of \$4,072.90, being the difference between the amount assessed for taxes in the year 1919 and the amount assessed for taxes in the year 1924, and threatened that unless said sum was paid, they would institute a suit for ejectment in the courts of this State.”

In paragraph 20 of the complaint (p. 8), it is averred:

“Plaintiffs further aver that if said suit for ejectment is instituted by said S. M. Braunstein, Inc., by reason of the failure of the plaintiffs to pay the amount demanded by the said S. M. Braunstein, Inc., to wit: the sum of \$4,072.90, being the difference between the amount of taxes assessed for the year 1924, and the amount assessed for the year 1919, and in said ejectment suit the Court should determine that under and by virtue of a true and proper interpretation and construction of said lease the amount due by the said plaintiffs, McCrory Stores Corporation or M. E. Blatt Company, to the defendant, S. M. Braunstein, Inc., was the difference between the tax due for the year 1919 and the tax due for the year 1924, then a judgment of eviction might be entered against said plaintiffs, and they might be evicted from the land and premises described in said lease, and deprived of their valuable rights under said lease.”

The answer admits the threat and denies that the tender was the correct amount. The answer further admits paragraph 20.

It is plain from these statements in the pleadings that there is an actual controversy between the parties as to the correct interpretation of the lease, which might result in great detriment and damage to the McCrory Stores Corporation.

We, therefore, have the following elements present:

1. An actual existing controversy between the parties, concerning the construction of the lease.

2. The controversy presents a legal question.
3. The controversy, if it were ripe for litigation in the ordinary course, would be cognizant in this court.

There is a great deal of literature upon the question of the Declaratory Judgment Act. The Harvard Law Review, in its edition of May, 1921, Vol. 34, No. 7, p. 697, contains a historic and legal review of the entire question. An article from the Michigan Law Review, printed in Vol. 42, p. 102, of the New Jersey Law Journal, likewise contains a thorough review of the entire subject. Also, 28 Yale Law Journal, 1,105, November and December, 1918.

In the case of *Russian Bank v. British Bank*, reported in 19 A. L. R. p. 1101, it was held that:

“A mortgagor may apply to the King’s bench division of the high court, under Order 25, Rule 5, of the Rules of the Supreme Court, for a declaration as to the amount due in respect of the mortgage, and that he is entitled to the mortgaged property upon payment of that amount, without making any offer to redeem.”

In the case of *State of Kansas v. Charles E. Grove* (19 A. L. R. 1116), it was held that:

“A statute authorizing the rendition of merely declaratory judgments is not unconstitutional on the ground of attempting to confer non-judicial power upon Courts. Such judgments may be judicial acts, although rendered in actions admittedly brought before a right has been invaded, and although no consequential relief is given or sought.”

There is quite an extended note to this case, supplementing a note in 12 A. L. R., p. 57, from which we will not attempt to quote in full.

In the Kansas case, the suit was brought to determine the legal capacity of Charles E. Grove, the defendant, to hold the office of member of the Board of Commissioners of Wichita, to which he had been declared elected on the canvass of the returns. The case was submitted on the pleadings, the facts not being in dispute. It appeared that the defendant was in the employ of the Missouri Pacific Railroad Company, and the claim of disqualification was based upon the statute which forbids an employe of a railway company operating under any franchise granted by the city to hold any city office, and imposing a penalty of both fine and imprisonment for doing so. The defendant had not attempted to exercise any of the duties of his office, and the proceeding against him was brought under the provisions of the Declaratory Judgment Act. The Court said:

“A statute authorizing declaratory judgments has recently been held unconstitutional. *Anway v. Grand Rapids R. Co.*, 211 Mich. 592, 12 A. L. R. 26, 179 N. W. 350. The proceedings in which the decision was rendered was not based upon an actual controversy. The members of the court appear to have agreed that for this reason it could not be maintained. A majority of the Justices, however (two out of eight dissenting, and another limiting his concurrence to the result reached), treated the proceeding as one of the kind the legislature intended to authorize, but held the statute invalid because the power to make a declaration of rights where no consequential relief can be had is not judicial, and cannot be conferred upon Courts.”

The Court then said (p. 1119):

“It is often said that a cause of action arises only upon the breach of a duty—the invasion of a right. This, however, is merely the announcement of a general rule of practice subject to possible exceptions and to legislative change. Actions to quiet title and to construe wills are recognized methods of invoking judicial action which do not originate in the actual commission of a wrong or terminate in a judgment inflicting a penalty, granting compensation, or injunction, or otherwise giving ‘consequential relief;’ the declaration of rights being all that is necessary to fit the requirements of the case. The decree in an action to quiet title is sometimes so drawn as to order the setting aside or cancellation of a deed. A declaration that the instrument is void and without effect amounts to the same thing. The judgment does not change the condition of the title, but simply declares where it is vested. It gives the only relief that is necessary to settle the controversy—the determination of the ownership of the property. Why the legislature cannot authorize similar procedure in like situations to meet like needs is not apparent. It is hardly conceivable that any fundamental principle of our government, beyond legislative control, prevents two disputants, each of whom sincerely believes in the rightfulness of his own claim, but each of whom wishes to abide by the law, whatever it may be determined to be, from obtaining an adjudication of their controversy in the courts without one or the other first doing something that is illegal (in the case of the present defendant, criminal) if he is mistaken in his view of the law.

The mere judicial determination that one party to litigation is right in his contentions and his opponent wrong, accomplishes, in some instances, all that he seeks, and in others at least a considerable part of it; it conclusively and finally settles the question of liability between the parties. This is recognized in various expressions of the Courts and text writers, of which the following are illustrative:

‘But in general the office of a judgment is fully performed when it declares and adjudicates the existence or non-existence of the liability sought to be established; it is not concerned with the means of enforcing the liability declared.’ 23 Cyc. 669.

‘The first and most obvious consequence of a judgment is that it establishes an indisputable obligation, and confers upon the successful party the right to issue execution or other process of the Court for its enforcement. But this, it must be repeated, is not an integral part of the judgment. The judgment is merely the affirmation of a liability. The right to use the process of the court for its enforcement is a consequence which the law attaches to it * * * The judgment, after performing its office of declaring the existence of a certain liability, leaves the party to pursue the remedies which the law provides.’ 1 Black, Judgm. §4.

Where the plaintiff asks the recovery of money, and his claim is held to be unfounded, the defendant needs no injunction against its further prosecution. He is fully protected by a judgment explicitly or impliedly declaring it to be invalid. The maker of a note may sue, before its maturity, to have it cancelled for fraud; a judgment declaring that it was fraud-

ulently procured might answer the same purpose. In such an action the rendition of a judgment for the holder declaring the note valid would be an unquestioned exercise of judicial power. It would seem that, if the holder, learning of a claim on the part of the maker that his signature was procured by fraud, should bring an action authorized by statute to have that matter determined, a decree in his favor declaring the note valid ought not to be a nullity on the ground of being non-judicial."

In the case of *Anway v. Grand Rapids Railroad Co.* (12 A. L. R., p. 26), which was referred to in the case of *Kansas v. Grove*, the Declaratory Judgment Act was declared unconstitutional. We submit, however, that that case is not in point, for the reason that in that case there was no actual controversy, the question for determination arising as follows:

Anway was employed by the Grand Rapids Railroad Co., he desired to work more than six (6) days in consecutive seven (7) days. He did not claim to have any such contract with the defendant, nor did he claim any breach of any contract, nor did he claim that the defendant had committed or threatened to commit any wrong upon him, nor that he had any claim, present or prospective, of any damages from the defendant. What he sought was to have the Court advise him whether the defendant would be violating the provisions of an Act of the Legislature of Michigan, if it should in the future permit him to work more than six (6) days in consecutive seven (7) days. There was no controversy between the parties of any character presented by this request—it was purely an advisory opinion.

While under Section 2 of the Uniform Declaratory Judgment Act, "any person * * * whose right, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise, and obtain a declaration of right, status or other legal relations thereunder." And Section 6 permits a Court to refuse to render or enter a declaratory judgment, if such judgment would not terminate the uncertainty or controversy giving rise to the proceeding. In other words, the entire language of our Act indicates that there must be some controversy of some sort or description. Such a controversy is presented in the present case, and, therefore, we contend it is not within either the ruling or reasoning of the *Anway* case.

The Court, in the *Anway* case, placed its decision upon the theory that the power granted by the Declaratory Judgment Act was non-judicial in its nature. Judge Sharp, who wrote a dissenting opinion in the *Anway* case, quotes, at p. 46, a number of definitions of judicial power, and the limitations and province of the judicial department. His extract from Cooley's *Constitutional Law*, 7th Ed., p. 132, is typical, and we will here repeat it:

"To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department."

A careful examination of the opinion in the *Anway* case will clearly disclose that it was based entirely upon the proposition that the result of the Court's action under the Declaratory Judgment Act would be to render an advisory opinion upon a moot

question. Practically all of the cases discussed in the Court's opinion in the Anway case refer to purely abstract questions, such language as:

"It is not the office of Courts to give opinions on abstract propositions of law." *Hamer v. Com.* (137 Va. 636).

"We are to decide questions arising out and undetermined in a case pending, and we may not tender advice on matters not in litigation." *Shell v. Welch* (28 Montana, 462).

"It is universally understood by the bench and bar, on the contrary, that a moot case is one in which one seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered for any reason, cannot have any practical legal effect." *Ex parte. Steel* (162 Fed. 694).

All of the cases which are cited by the learned opinion writer have a very decided bearing upon the matter in controversy then before the Court, which was unquestionably a mere moot question, and not one in which an actual controversy was involved.

We respectfully suggest, further, that the Anway case proceeded upon the theory that the power conferred by the Declaratory Judgment Act was not judicial in its nature. The entire plan of the Act is to provide for a judicial determination of a question actually in controversy between parties interested therein.

The final effect of the judgment in the present case, for instance, is to declare what the Court would be called upon to declare if Braunstein insti-

tuted an ejection suit against McCrory Stores Corporation, for the non-payment of the taxes.

It is a judicial act, because it calls upon the Court, under appropriate pleadings, to define the rights of parties, properly before it, under a contract, the meaning of which is in dispute.

In the *Anway* case, the Court suggests that there can be no judicial process to enforce the judgment, and, therefore, infers that because there can be no such judicial process, there can be no judgment or no judicial judgment.

We submit that the opinion of the learned Judge in the *Kansas v. Grove* case, above referred to, is much more convincing upon this point. As he suggests, a judgment for the defendant in a damage suit needs no execution to make it effective as a bar. Money judgment for the plaintiff needs no execution to make it binding upon the lands of a defendant, unless other lienors intervene, and that by reason of the Execution Act, and not because of any lack of force in the judgment, itself.

A judgment upon a writ of certiorari defines the rights of the parties involved in the controversy without any further execution or process issued thereon.

We take the liberty of quoting definitions of Judicial Power and Judicial Proceedings contained in 34 C. J., p. 1183, and maintain that the powers conferred by the Declaratory Judgment Act are fairly and squarely within the scope of the definitions:

Judicial Power.

“The phrase ‘judicial power’ is not capable of a precise definition which would be applicable to all cases. The term has been variously defined as the authority to determine the rights of persons or property by arbitrating between adversaries in specific controversies at the in-

stance of a party thereto; the authority exercised by that department of government which is charged with the declaration of what the law is and its construction so far as it is written law; the authority or power vested in the Judges or in the courts; the authority vested in some court, officer, or person to hear and determine when the rights of persons or property or the propriety of doing an act is the subject matter of adjudication; the power belonging to or emanating from a Judge as such; the power conferred upon a public officer, involving the exercise of judgment and discretion in the determination of questions of right in specific cases affecting the interest of persons or property, as distinguished from ministerial power or authority to carry out the mandates of judicial power or of the law; the power exercised by Courts in hearing and determining cases before them, or some matter incidental thereto, and of which they have jurisdiction; the power of a Court to decide and pronounce a judgment; the power to interpret the constitution and the laws, and make decrees determining controversies; the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws. 'Judicial Power' implies the construction of laws and the adjudication of legal rights. It includes the power to hear and determine, but not every one who may hear and determine has judicial power. The term 'Judicial Power' does not necessarily include the power to hear and determine a matter that is not in the nature of a suit or action between parties.'

Judicial Proceedings.

“Any proceeding for the purpose of obtaining such remedy as the law allows; a proceeding in a legally constituted court; any proceeding which is held in or under the authority of any court of justice; proceedings before a competent court or magistrate in the due course of law or administration of justice, which are to result in any determination of the action by such court or magistrate; proceedings in a court of justice established by law, wherein the rights of parties recognized and protected by law are involved and may be determined; proceedings which take place in or under the authority of a court of justice, or which relate in some way to the administration of justice, or which legally ascertain any right or liability.”

In the case, *in re: Ungaro*, 88 N. J. Eq. page 25-28, Chancellor Walker, referring to Section 7 of the Chancery Act of 1915, P. L. 1915, p. 185, said:

“At first blush it might seem that the words ‘cognizable in a court of equity,’ were intended to limit the Court to construction of an instrument in the class of cases in which the jurisdiction of the Court was then asserted, which, in the case of a will, would only be to construe it incidentally to affording some relief between the parties. If this be the meaning of the act, it would be merely a declaratory statute. But there was no reason for passing a declaratory act on the subject, there being no doubt about the jurisdiction or its limitations.

“In 1 Bl. Com. 86, it is laid down: ‘Statutes also are either declaratory of the common law, or remedial of some defects therein. Declara-

tory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, in *perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been.'

"Instead of being declaratory I think the statute in question was meant to be remedial—that is, to extend the remedy of construction to cases where there exists no present right to relief resulting from construction. The fact that so many cases have been brought for construction where no relief was available and the suitors were turned away, seems to indicate a situation where construction without relief was a right much desired and one which might be extended with propriety. And the legislature seems to have taken this view. Moreover, that statute provides in its first section that the act shall be liberally construed, which, of course, means to advance the remedies given in and by it.

"What the legislature meant by 'a right cognizable in a court of equity' was, in my judgment, a right over which, in and of itself, this Court has jurisdiction, and it was intended that the jurisdiction should be exercisable where the right was present, although an accompanying circumstance, the presence of which theretofore alone permitted the right to be declared, was absent. In other words, I think the act was passed to enable this Court to do the very thing which the petitioner is seeking to do, but cannot do in this proceeding, as above pointed out."

In the case of *Renwick v. Hay*, 90 N. J. Eq., 148, the Court of Chancery had before it the question of

determining the rights of the parties in certain private ways or roads. Vice-Chancellor Lane, after referring to Section 7 of the Chancery Act of 1915, said (p. 156):

“This section of the statute was considered by the Chancellor in *Re Ungaro*, 88 N. J. Eq. 25. The Chancellor drew attention to the fact that the statute provides that it should be liberally considered, and that what the legislature meant by a ‘right cognizable in a court of equity,’ in his judgment, was a right over which, in and of itself, the court had jurisdiction and that it was intended that the jurisdiction should be exercisable where the right was present, although an accompanying circumstance, the presence of which theretofore alone permitted the right to be declared, was absent. The section was also considered by Vice-Chancellor Backes in *Trenton Trust and Safe Deposit Co. v. Cook*, 88 N. J. Eq. 516. The right asserted by complainant is, I think, one cognizable in equity within the meaning of the statute. Equity has jurisdiction to settle conflicting rights in common easements.”

In the case of *Bayonne v. East Jersey Water Company*, 108 Atl. p. 121 (not officially reported), former Vice-Chancellor Lane, sitting as advisory Master, said (p. 127):

“It was suggested by counsel of defendant in the original brief that the question was to whether Bayonne, as assignee of the Water Company, might exercise the right of renewal, so far as customers outside of Bayonne are concerned, was not in this suit. But the bill prays for a determination of the rights of the parties with respect to the entire subject matter. No-

tice of the exercise of the option had been given at the time of the filing of the bill. Defendant, by its answer unites with complainant in submitting to the Court its rights and obligations and those of complainant, to the end that the same may be adjudged and determined. The rights arise under written instruments; they are cognizable in a court of equity. The subject matter of the supply of water is of such a nature as that the aid of this court may properly be invoked to obtain the remedy either of specific performance or injunction. Section 7 of the Chancery Act of 1915 (P. L. 1915, p. 184) is relied upon by both sides. I have considered that Statute in *Renwick v. Hay*, 106 Atl. 547, 551, and reiterate what I there said.

* * * I will advise a decree settling the rights of the parties as indicated by this opinion."

It would seem manifest that the power extended to the Court of Chancery to declare rights in the absence of any further relief, as provided in the Act of 1915, is quite the same power as that extended to both courts of equity and courts of law, under the Declaratory Judgment Act of 1924. The Chancery Act of 1915 was carefully prepared and the section referred to has been before the courts a number of times. It apparently never occurred to the learned Chancellor and Vice-Chancellors who have written opinions involving the 7th section, that the power thus bestowed was non-judicial in its character. Certain it is that if the Uniform Declaratory Judgment Act of 1924 is unconstitutional because it bestows non-judicial powers upon a court of law, then the Chancery Act of 1915 must likewise be unconstitutional for the same reason. It is, of course, fundamental that an Act will not be declared unconstitu-

tional unless it is clearly so, and we submit that an Act of such a high remedial nature as the Declaratory Judgment Act should not be declared unconstitutional unless it is plainly and patently manifest that the powers granted are so clearly unconstitutional as to shock the mind and conscience of the Court. The legislature has solemnly declared it to be a law; the courts of other cities have declared similar Acts constitutional.

In California the Declaratory Judgment Act was held constitutional in the following cases:

Robinson v. Kerrigan, 151 Cal. 40;

Peo. v. Linda Vista, Irr. Dist. 128 Cal. 477.

The Tennessee Act was declared constitutional in the case of *Miller v. Miller*, 261 S. W. 965.

In the State of Kansas their Declaratory Judgment Act was tested in the case of

State v. Grove, 109 Kans. 619,

and was held to be constitutional.

The Nebraska Act was substantially copied from California Statute, which is exemplified in the case of

Alfalpa Irr. Dist. v. Collins, 46 Neb. 411.

Colorado Statute is in all substantial particulars the same as the California Act, being modelled after the said Act, which is illustrated in

Anderson v. Grand Valley Irr. Dist., 35 Colo. 525.

The State of Idaho Declaratory Judgment Act is modelled after the California Statute, and is explained in

Nampa, etc. Irr. Dist. v. Brose, 11 Ida. 474.

That the Act will be of great aid in the administration of justice, and in the settlement of disputes

between litigants is manifest. As was said in a pamphlet issued by the National Conference of Commissioners of Uniform State Laws:

“The Declaratory Judgment is a big, forward step in administrative justice. Its benefits will not be confined to any class or portion of society. Every citizen of the State will enjoy and profit by its good offices. Accordingly, the effort to enact it as a part of the jurisprudence of a state can involve no conflict of political parties, no division of industrial interest, and no clash of social forces.

“The present system of court procedure has in certain respects, become antiquated. It holds its place in the administration of justice largely on account of a tradition that those things which are ancient must be good. As a matter of fact, the practice of cases in court has stood still for many years while business and social affairs have been progressing. The result has been that a gulf exists between the judicial process and the community interest that it is supposed to serve; and into this gulf have been dropped a great many possibilities. For any one to think that the administration of the law prevailing centuries ago is adequate for the needs of the present, is quite as absurd as to indulge the idea that the clothes of the boy can be worn in comfort by the grown man.

“Today our courts are operated largely on the fundamental idea of giving to an injured party reparation and redress. Certainly it is still a primary rule of jurisdiction that until a party has been hurt, and has suffered loss, he has no standing in court.

“This ancient rule of jurisdiction has long been found too narrow to meet the requirements

of modern social, industrial and economic conditions. Men ought not be forced to the necessity of encountering damage or assuming ruinous responsibilities before they are permitted to seek and secure a court decision as to their rights and duties. Such a scheme puts a premium upon the delinquency and penalties altogether out of harmony with a proper conception of law, order and justice. It should be the primary purpose of the State to save its citizens from injury, debt, damage and penalties; and to this end the highest function of the court ought to be to decide, when possible, the controversies of parties before any loss has been suffered or any offense committed."

We respectfully submit that it would be a disastrous and backward step if this court should declare the Declaratory Judgment Act unconstitutional.

II.

THE TRIAL COURT PROPERLY CONSTRUED
THE LEASE AS MEANING THAT THE
BASIC YEAR FOR THE COMPUTATION
OF THE EXCESS TAXES WAS THE YEAR
1920.

The Court was asked to declare by its judgment that the basic year for determining the excess taxes under the terms of the lease was the year 1920. The question, therefore, to be determined by this Court is whether or not the Court below, in deciding that the basic year for the computation of the excess taxes was the year 1920, was correct.

FACTS.

The facts are practically undisputed, and indeed there was very little testimony taken with respect to them. Practically all of the allegations of the complaint were admitted by the defendant's answer.

The salient facts are these:

On October 27th, 1915, S. M. Braunstein leased a store building to Braunstein-Blatt Company, situate and known as No. 1415, &c., Atlantic Avenue, Atlantic City, N. J.

On February 19th, 1921, Braunstein-Blatt Company assigned said lease to the McCrory Stores Corporation. Admitted by defendant's answer.

That subsequently the Braunstein-Blatt Company changed its name to M. E. Blatt Co. Admitted.

After the execution of the lease, S. M. Braunstein, the lessor, granted and conveyed the premises, subject to the lease, to S. M. Braunstein, Inc., a corporation of the State of Delaware, and the defendant in this suit. Admitted.

Paragraph 3 of said lease contains the following provision:

“And the said party of the second part does hereby covenant and agree that it will pay all the excess water rents that may be assessed against said premises, and also all the increase in taxes, on and after October twenty-seventh, 1920, which said excess water bills and said increase in taxes shall be considered as so much rent due and payable within thirty days after the same become due and payable to the City of Atlantic City; and the said party of the first part does hereby covenant and agree that he will pay all the taxes, sewer charges and mini-

imum water charges as the same are rendered (the sewer charges now being \$32.30 per annum, and the minimum water charges now being \$35 per annum).''

The lease contained a provision of forfeiture in the event of the failure to pay the rent or to perform any of the terms, covenants and conditions of the lease. The lease is admitted (p. 10).

ARGUMENT.

Accepting as a canon of construction, the proposition that the contract must be taken most strongly as against the grantor, then in this case the contract must be taken most strongly as against Braunstein, Inc., the defendant, which succeeded to the rights of Mr. S. M. Braunstein, the lessor.

Increase in taxes may arise in two ways:

1. By an increase in the amount of assessment.
2. By an increase in the rate.

Sec. 202 of the Tax Act of 1918 (P. L., p. 848) provides that all property shall be assessed to the owners thereof with reference to the amount owned on the first day of October in each year.

Sec. 501 of the Tax Act of 1918 (P. L., p. 862), provides that the assessor shall begin his work on the first day of October in each year and shall complete the same by the tenth day of January, following, on which date he shall attend before the County Board of Taxation and file with said board his complete assessment list, and a true copy thereof, to be called the assessor's duplicate.

These two provisions cover the amount of the assessment. The question of the rate depends, of course, on the amount that is to be raised for said municipal and county purposes. The provisions of the Tax Act with respect to these are as follows:

Sec. 503 of the Tax Act of 1918 (p. 863) provides that the State Comptroller shall, on or before the first day of February in each year, transmit to the State Board of Education and to the County Collector of each county, a statement of the amount of tax appropriated by the State for that year and to be raised by taxation for the public schools, and shall also, on or before the first day of February, annually, transmit to each County Collector a statement of the amount, if any, necessary to be raised by general taxation for state purposes.

It is the duty of the County Collector to lay these statements before the County Board of Taxation of his county on or before the tenth day of February in each year, and said board shall apportion the amount required among the taxing districts.

Sec. 504 of the Tax Act of 1918 (p. 864) provides that the County Collector of each county shall, on or before the first day of March in each year, transmit to the County Board of Taxation a statement of the total amount appropriated by the Board of Chosen Freeholders to be raised for current expenses, debt and interest, public works and for all other county purposes, and all amounts otherwise required by law to be raised by taxation in that year for county purposes. The County Board of Taxation shall apportion the tax among the taxing districts.

Sec. 505 of the Tax Act of 1918 (p. 865) requires the municipal clerk or other proper officer of each taxing district, on or before the first day of March in each year, to transmit to the County Board of

Taxation a copy of the annual taxing ordinance or resolution, or other evidence showing the amount to be raised by taxation for the purpose of the taxing district.

Sec. 506 of the Tax Act of 1918 (p. 865) directs that the clerk of the school district shall, on or before the first day of March in each year, transmit to the County Board of Taxation a certified statement of the amount of moneys appropriated for school purposes, to be raised by taxation in said school district.

Sec. 508 of the Tax Act of 1918 (p. 867) provides that the County Board of Taxation shall, on or before the tenth day of March, tabulate the duplicates and tax estimates submitted, as hereinabove set forth, which tabulation is printed, and a copy forwarded to the State Comptroller, the State Board of Taxes and the clerk in such county.

This section also provides, among other things, for the determination of:

“The tax rate per one hundred dollars of valuation in each taxing district.”

Section 509 of the Tax Act (p. 868) provides that the County Board shall, on or before the first day of April in each year, submit the corrected, revised and completed duplicates, to be delivered to the respective collectors of the various taxing district.

The paragraph of the lease in question provides for the payment of:

“All the increase in taxes on or after October 27th, 1920.”

“Increase,” according to Webster, is “Addition or enlargement in size, extent, quantity, number, intensity, value, substance, etc.” It is, therefore, a relative quantity, and has relation to some other amount or figure.

The only increase in taxes which can occur after October 27th, 1920, is the increase which takes place in 1921.

This increase, as above pointed out, by reference to the statute, is made by the assessment of the first day of October, 1920, and by the tax rates made on March 10th, 1921, which rate, as fixed by the Board of Taxation on March 10th, 1921, becomes the taxes due for the year 1921, and are commonly called "1921 Taxes." In other words, there is no increase in taxes after October 27th, 1920, until the County Board of Taxation fixes the tax rate on the 10th day of March, 1921.

That this is the increase which the parties had in mind is evident from the provision of the paragraph in question, which says:

"Said increase in taxes shall be considered as so much rent due and payable within thirty days after the same became due and payable to the City of Atlantic City."

Now, the first increase in taxes after October 27th, 1920, did not become due and payable until the 1st day of May, 1921, and the taxes due the 1st day of May, 1921, were the taxes for which the assessment was made in October, 1920, and for which the rate was fixed on March 10th, 1921.

It was suggested that because the taxes were payable as rent, they were payable monthly. We submit that this proposition is without force. The tax year is an entirety, and whereas the taxes are payable in May of each year, they are paid for the entire year beginning January 1st and ending January 1st, the rate being made up, as we have pointed out, on or before March 10th of each year, and, furthermore, Section 3 of the lease, while providing that the taxes shall "be considered as so much rent" (p.

11, l. 28), the same section provides that the taxes are to be paid "within thirty days after the same became due and payable to the City of Atlantic City" (p. 11, l. 30).

We submit, therefore, that the taxes cannot be considered as accruing monthly, because the date for their payment is absolutely fixed by the terms of the lease.

No increase in taxes took place after October 27th, 1920, until the amount of the tax was determined by the Board of Taxation between the 1st and 10th day of March, 1921. If, therefore, the Court had determined that 1919 was the basic year, it would have been obliged to take the taxes for the year 1920 as determining the amount of increase for the first year. Now, any increase of the tax in 1920 over 1919 took place prior to October 27th, 1920—in fact, it took place by the act of the County Board of Taxation between March 1st, 1920, and March 10th, 1920. It is the tax fixed by the Tax Board between March 1st and March 10th, 1920, that would determine the increase, if the year 1919 is to be considered as the basic year, whereas, the lease provides that the increase is to be the increase on and after October 27th, 1920. Furthermore, a determination that the year 1919 was the basic year would require the McCrory Stores Corporation to pay an increase in taxes determined by an act of the County Board of Taxation which took place prior to October 27th, 1920, namely, between March 1st and March 10th, 1920, in violation of the provisions of the lease requiring the McCrory Stores Corporation to pay the tax increase which took place after October 27th, 1920.

The trial Court said, in this regard (p. 29, l. 14):

"I think it makes no difference when and how taxes are assessed against this property. It is the amount payable to the City of Atlantic City

after October 27th, 1920, and the increase in that amount over the amount payable before October 27th, 1920, which governs the construction of the agreement made between these parties.

The whole intent of the parties was that the amount payable after that date, with relation to the amount of the increase, should be paid by the tenant."

At p. 29, l. 33:

"Having reference to the Tax Act of 1918, it is plain that the amount due and payable to the City of Atlantic City on April 1, 1920, represents the increase, therefore, which the lease requires the tenant to pay, is the increase over the amount due and payable to the City of Atlantic City on April 1st, 1920."

There can be no doubt as to the meaning of the Court in the above-quoted phrases. It was necessary that a basic year be fixed, and the increase after October 27th, 1920, cannot be determined without determining what the basic amount is, and it seems clear that the basic amount must certainly be the amount fixed by the County Board of Taxation at the tax period prior to October 27th, 1920, and that was the amount of tax fixed by the County Board of Taxation between March 1st and March 10th, 1920, and which became due on April 1st, 1920.

B.

THERE WAS PRIVACY OF CONTRACT
BETWEEN THE PARTIES.

The defendant's contention in this regard is set at rest by the case of *S. M. Braunstein, Inc., v. McCrory Stores* (116 Atl. 707). In this case, the very lease involved in the present case was before this

Court, and it was held that the assignment was valid, and that the provisions of the lease applied to the assignee.

In addition to the above case, S. M. Braunstein, Inc., also brought a suit for ejectment against McCrory Stores Corporation on the ground that the rent had not been tendered by M. E. Blatt Company. It was shown that the rent was tendered by the McCrory Stores Corporation, and refused. The Circuit Court gave judgment for the defendant. On the appeal of Braunstein, Inc., this Court held that the lease was assignable, and that all the terms, covenants and conditions of the lease were assignable.

C.

THERE WAS NO PRACTICAL INTERPRETATION OF THE LEASE.

It is contended by counsel for the defendant that there was a practical interpretation of the contract, whereby 1919 was considered the basic year. The only proof upon this point is the stipulation (p. 26), which reads as follows:

“For the purpose of the decision of this cause it is stipulated that Braunstein-Blatt Company, lessee, had submitted to it by Braunstein, lessor, a bill for excess taxes for the year 1920 in which the year 1919 was used as the basic year for calculating the increase and that payment of said bill was made by Braunstein-Blatt Company without objection.”

Considering this contention, the trial Court said (p. 30, l. 8):

“There is no evidence to show that the per-

sons who gave the check in payment of the prorated difference of tax, from the period of October 27th, 1920, to January 1, 1921, over and above the tax for the year 1919, had any authority to make such payment or bind the corporation thereby."

We further submit that the contract was not so ambiguous as to permit the acts or declarations of the parties to be used in interpreting it.

In the case of *Stewart v. Lehigh Valley R. Co.* (37 N. J. L. 53), it was held that where terms used in a written contract are of themselves susceptible of a definite legal construction, the fact that the parties have adopted and acted on an erroneous construction of the contract will not preclude them, as to transactions not clear, from insisting on the proper and true legal construction.

If the meaning of the contract is plain, the acts of the parties cannot prove a construction contrary to the plain meaning. (*Williston on Contracts*, Vol. 2, Sec. 623, p. 1207, and cases cited.)

In the case of *Reed v. Trenton* (80 N. J. Eq. 503), Mr. Justice Voorhees, speaking for the Court of Errors & Appeals, said (p. 508):

"It has not been shown that the fixing of fare between Trenton and Yardley, by the joint action of the three corporations, was by reason of the language of the contract, and because that agreement was binding upon all the companies. Hence, the effect of this joint action would not amount to a practical construction of the ordinance.

A practical construction of a contract becomes evidential only when the writing is ambiguous, and where it appears that the acts done under it were those of the very parties

thereto, and were done in pursuance and by reason of it. *Rogers v. Colt* (21 N. J. L. 1 Zab. 704); *Stewart ads. Lehigh Valley Railroad Co.* (37 N. J. L. 8 Vr. 53); *United Boxboard and Paper Co. v. McEwan Brothers Co.* (76 Atl. Rep. 550); *McMillin v. Titus* (222 Pa. 500); *Sternbergh v. Brock* (225 Pa. 279)."

3.

THE COURT DID NOT ERR IN DISMISSING
DEFENDANT'S COUNTER-CLAIM.

Defendant, relying upon the proposition that the excess taxes had not been paid based upon the year 1919 as the basic year, filed a counter-claim in ejectment. This counter-claim was dismissed by the trial Court, and judgment entered in favor of the plaintiff thereon.

We submit that the trial Court could not have done otherwise, having declared that the year 1920 was the basic year, and it having been admitted by the pleadings that the excess taxes based upon that year had been tendered and refused, there was no breach of the covenant contained in the lease.

Furthermore, we submit that a counter-claim is not a proper pleading in an action under the Declaratory Judgment Act. The very purpose of the Act is to have the rights declared in order to avoid loss or forfeiture, and the remedial scope and plan of the Act would be violated if, having declared the right of the respective parties under a disputed contract, the Court should award a money judgment or a judgment of eviction based upon such interpretation of the contract.

The idea of the Act is to have the rights declared in order that the parties interested in the contract or lease would have the opportunity of performing it in accordance with its true interpretation, and thus avoid either loss or forfeiture.

In conclusion, we respectfully submit:

1. That the Declaratory Judgment Act is constitutional.
2. That the Court's interpretation of the agreement was correct.
3. That the counter-claim was properly dismissed.

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Attorneys for Respondent.



