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Notice of Appeal and Grounds.

Filed May 8, 1931.

Hassair County Circuit Court.

JACOB KATZ,
Plaintiff,

vs.

MORTIMER INGLIS,
Defendant.

Action at Law.

Notice and
Grounds
of Appeal.

10

20

To: ABRAM I. BLUESTEIN, Attorney for the Plaintiff, Jacob Katz:

Please Take Notice, that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in the above stated cause on the following grounds:

(1) The Circuit Court erred in striking out defendant's answer to the Third Count of plaintiff's Complaint. 30

(2) The Circuit Court erred in making the Order dated April 28th, 1931.

(3) The Circuit Court erred in its ruling that a tenant at will under a Lease void under section 1 of the Statute of Frauds, must give six months' notice to the landlord of his intentions to vacate the premises.

40

Notice of Appeal and Grounds.

(4) The Circuit Court erred in its ruling that a tenant at will under a Lease void under Section 1 of the Statute of Frauds must give a notice to quit on a recurring period measured by the terms of the void Lease.

10 (5) The Circuit Court erred in entering a judgment in favor of the plaintiff and against the defendant.

Dated: May 8th, 1931.

PETER COHN.
Attorney for Defendant.

Service of a copy of the within Notice of Appeal and Grounds is hereby acknowledged this 8th day of May, 1931.

20 ABRAM I. BLUESTEIN,
Attorney for Plaintiff.

30

40

Amended Complaint.

Filed Feb. 7, 1931.

PASSAIC COUNTY CIRCUIT COURT.

JACOB KATZ,

Plaintiff,

vs.

MORTIMER INGLIS,

Defendant.

10

Action at Law.

Amended
Complaint.

Plaintiff, residing in the City of Paterson, in the County of Passaic and State of New Jersey, says that: 20

FIRST COUNT.

1. On the fourteenth day of June, 1924, plaintiff and defendant executed a lease under seal covering the premises known as 132 Market Street, and the space to the rear of store at 134 Market Street, occupied by Dodd & Dodd, Inc., a copy of which lease is in the possession of the plaintiff and will be produced at the trial. 30

2. Said lease was executed by its duly authorized agent, James Inglis, said authorization to said agent, being executed in writing by the said defendant.

3. Said premises were rented to the defendant herein under said lease at a yearly rental of \$9,000.00, payable in equal monthly payments of \$750.00 in advance on the first day of each and every month. 40

Amended Complaint.

4. One month's rent in the sum of \$750.00 became due and payable on January 2nd, 1931, January 1st, being a legal holiday, and is unpaid.

Plaintiff demands of the defendant, the sum of \$750.00 and interest from January 2nd, 1931.

10

SECOND COUNT.

1. On the fourteenth day of June, 1924, plaintiff and defendant, by his agent, executed a lease under seal covering the premises known as 132 Market Street and the space to the rear of store at 134 Market Street, occupied by Dodd & Dodd, Inc., a copy of which lease is in the possession of the plaintiff and will be produced at the trial.

20

2. The defendant, Mortimer Inglis, went into possession under said lease, and with full knowledge of same, and occupied said premises for a period commencing July 1, 1924, and until January 1, 1931, and that the execution of said lease was ratified by defendant by his entering into possession of said premises and continuing in possession thereof, and by allowing the plaintiff herein to comply with the terms and conditions of the original lease in that the plaintiff repaired and altered the premises in conformity with said lease, and which alterations and additions were done with the consent and knowledge of the defendant, Mortimer Inglis and that same were done in accordance with the provisions of said lease.

30

3. Said premises were rented to the defendant herein under said lease at a yearly rental of \$9,000.00, payable in equal monthly payments of \$750.00 in advance on the first day of each and every month.

40

Amended Complaint.

4. One month's rent in the sum of \$750.00 became due and payable on January 2nd, 1931, January 1st, being a legal holiday, and is unpaid.

Plaintiff demands of the defendant the sum of \$750.00 and interest from January 2, 1931.

THIRD COUNT.

10

1. On the first day of July, 1924, the defendant entered into possession of the premises known as 132 Market Street, and the space to the rear of store 134 Market Street, occupied by Dodd & Dodd, Inc. Said entry was under a void lease, in that the lease was signed by an agent, who the defendant claims had no authority in writing to do so.

2. That by reason of the defendant entering into possession of the premises under said void lease as aforementioned, he became and is a yearly tenant.

20

3. That no legal notice of the termination of the yearly tenancy was given by the defendant to the plaintiff.

4. That said defendant has vacated said premises on the first day of January, 1931, and thereupon rent for the month of January, became due and owing in the sum of \$750.00.

30

5. The defendant did not pay rent for the month of January, 1931.

Plaintiff demands of the defendant, the sum of \$750.00 and interest thereon.

ABRAM L. BLUESTEIN,
Attorney of Plaintiff.

40

Answer.

Filed Feb. 18, 1931.

PASSAIC COUNTY CIRCUIT COURT.

10	JACOB KATZ, Plaintiff,	}	Action at Law. Answer.
	vs.		
	MORTIMER INGLIS, Defendant.		

20 Defendant Mortimer Inglis, residing in the City of Paterson, County of Passaic and State of New Jersey, through his Attorney Peter Cohn, says that:

First Count: Defendant denies each and every allegation of the first count.

30 First Separate Defense: Defendant says that he gave no authorization either parol or written, to any person to execute the Lease referred to in paragraph 1 of the first count.

Second Separate Defense: That under and by virtue of the Statute in such cases made and provided, the authorization to an agent to execute a Lease of the character as described in the first count, must be in writing, and no such authorization in writing was ever executed by this defendant to the said James Inglis or to any other person.

40 Third Separate Defense: Defendant hereby reserves the right to move at or before the trial of

Answer.

this cause, to strike out the first count of the complaint on the grounds that the matters contained therein are untrue, sham and false in fact.

Second Count: Defendant denies each and every allegation of the second count.

First Separate Defense: Defendant hereby reserves the right to move at or before the trial of this cause, to strike out the second count on the grounds that the same fails to disclose a cause of action in that, the ratification referred to in paragraph 2 thereof was not in writing. 10

Third Count: Defendant denies each and every allegation of the third count.

First Separate Defense: Defendant's tenancy was a tenancy at will. 20

Second Separate Defense: Defendant duly served upon plaintiff a three months' notice in writing as required by law, under date of October 1st, 1930, of his intentions to vacate and deliver up the possession of the described premises to plaintiff, on January 1st, 1931, and defendant duly vacated the said premises and delivered the possession thereof to plaintiff on or before the 1st day of January, 1931, and duly paid or caused to be paid all rents accruing prior thereto. 30

Third Separate Defense: Defendant hereby reserves the right to move at or before the trial of this cause, to strike out the third count on the grounds that the same does not disclose a cause of action in that, it does not specify the nature and character of notice required by law from defendant.

PETER COHN, 40
Attorney for Defendant.

Notice.

(Not filed).

PASSAIC COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">JACOB KATZ, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">MORTIMER INGLIS, Defendant.</p>	}	<p>Action at Law. Notice.</p>
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To PETER COHN, Attorney for the defendant herein:

20 Take Notice, that on Friday, the twenty-seventh day of February, 1931, at two o'clock in the afternoon, or as soon thereafter as counsel can be heard, at the Circuit Court, Court House, in the City of Paterson, before Judge William B. Mackay, or whomever may be appointed in his place and stead, to hear this motion, I shall move to strike out the answer to the third count, First Separate Defense to the Third Count, Second Separate Defense to the Third Count, and Third Separate Defense to the Third Count, filed in the above entitled cause, for the following reasons:

- 30
1. That the same are filed for the purpose of delay.
 2. That the same is sham.
 3. That the same is frivolous.
 4. That the same is frivolous and sham.
 5. That the same does not set forth any legal defense.

40 ABRAM I. BLUESTEIN,
Attorney of Plaintiff.

Affidavit of Jacob Katz.

(Not filed).

PASSAIC COUNTY CIRCUIT COURT.

JACOB KATZ,
Plaintiff,

vs.

MORTIMER INGLIS,
Defendant.

10

Action at Law.

Affidavit.

State of New Jersey, }
County of Passaic, } ss.:

20

Jacob Katz, being duly sworn according to law on his oath deposes and says:

I am the plaintiff in the above entitled cause. On the 1st day of July, 1924, the defendant entered into possession of the premises mentioned in the complaint and remained there until the 1st day of January, 1931. The entry on the 1st day of July, 1924, was made as the result of a lease executed to the plaintiff by the defendant, but alleged by the defendant to be void by reason of the fact that it was executed by one James Inglis, who had no authorization from the defendant to execute the same. No other lease or agreement of any kind was made or executed between the parties between the said 1st day of July, 1924, and the 1st day of January, 1931; no other notice was ever served upon the plaintiff that the defendant intended to vacate said premises, other than the notice alleged in his answer, which was served on the

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Notice.

1st day of October, 1930 that the premises would be vacated on the 1st day of January, 1931.

JACOB KATZ.

Sworn and subscribed to before me
this 7th day of March, 1931.

10

Margaret H. Tietsell,
Notary Public
of New Jersey.

Notice.

(Not filed).

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PASSAIC COUNTY CIRCUIT COURT.

JACOB KATZ,
Plaintiff,

vs.

MORTIMER INGLIS,
Defendant.

30

Action at Law.
Notice.

To MORTIMER INGLIS, Defendant, or PETER COHN,
Attorney for Defendant.

Please Take Notice, that on Friday, the seven-
teenth day of April, 1931, at the Court House, in
the City of Paterson, at two o'clock in the after-
noon, or as soon thereafter as counsel can be heard,
40 I will make application before Honorable William

Order.

B. Mackay, Judge of the Circuit Court, to discontinue the first and second counts of the plaintiff's complaint, and to strike out the defendant's answer to the third count of the plaintiff's complaint, and enter summary judgment thereon, pursuant to the opinion of the Court.

ABRAM I. BLUESTEIN, 10
Attorney of Plaintiff.

20

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Opinion.

Filed April 14, 1931.

April 13, 1931.

Re: Jacob Katz, Plaintiff, vs. Mortimer Inglis,
Defendant.

In the case of Katz vs. Inglis, I have considered
the briefs and studied the various cases. 10

Briefly, the facts as I find them are: on July
1st, 1924, defendant entered into possession of
plaintiff's premises under a void lease. He re-
mained there until January 1st, 1931. As I un-
derstand it the lease was in writing for more than
three years and signed by an agent who did not
possess the written authorization as required by
Section 1 of the Statute of Frauds.

On October 1st, 1930, defendant gave plaintiff
a three months' notice that he was going to quit 20
the premises on January 1st, 1931. Plaintiff con-
tends first, that the notice is insufficient in that
the tenant is required to give a six months' notice,
and second, that it should be for a recurring period.

"Half a year's notice to quit is necessary
in all cases of uncertain tenancy whether
under the name of tenancies from year to
year, or tenancies at will.

All general and undefined tenancies, 30
whether they originate simply by permission
of the owner, or where the tenant has enter-
ed under a void lease, or been let in, pend-
ing a treaty for a purchase, or wherever
there has been no express agreement between
the parties as to the terms of the occupan-
cy, provided the entry was a lawful one, or
with the privity and consent of the owner,
are now held to be tenancies at will. And
all tenancies at will, as well as such as are
created by grant, or contract, as those which 40

Opinion.

arise by implication, so far at least, as to entitle the tenant to half a year's notice to quit, are constructively held to be tenancies from year to year. * * *

10 These, and numerous other books and cases, show that the ancient rule of the common law, required that the notice, when necessary, and not otherwise limited by agreement of the parties, should be for half a year, or six calendar months, expiring at the end of the current year of the tenancy; and that a notice expiring at any other period, sooner or later, will not be sufficient."

Den vs. Drake, 14 N. J. L. 523-528.

20 This case disposes of both questions and it only remains to consider whether or not the Statute, Section 29 of the Landlord and Tenant Act, passed subsequent to the time of this decision, changed the ancient common law rule as to the notice to be given by the tenant.

After the passage of the Statute we find the case of *Zabriskie vs. Sullivan*, 80 N. J. Law 673, in which the court says:

30 "The common law rule undoubtedly was, as stated in that case, that in tenancies from year to year, landlords were obliged to give and might require six months' notice in order to end them.

40 The appellant indeed admits that, at common law a tenant was charged with the reciprocal duty of giving his landlord a six months' notice of his intentions to vacate if he had been permitted to hold over in order to rid himself of the obligations of a tenant, citing *Doe vs. Spence*, 6 East., page 120. The reciprocal nature of this duty has not been altered by Statute and still prevails in this State as at common law. It has been so de-

Opinion.

clared in *Hanks vs. Workmaster*, 46 Vroom, page 73; *Mitchell Fertilizer Co. vs. Armour*, 49 Id., page 118.

But the appellant contends that the common law doctrine has not been recognized in this State because the Statute, (Gen. Stat., page 1921, Sec. 29), reducing the notice from six to three months, applies only to the notice by the landlord, and is silent regarding that to be given by the tenant. 10

We fail to see the force of this reasoning. This, however, makes against the tenant in the present case, for, as has been pointed out, at common law, a six months' notice was required on the part of the tenant, and, if the statute has not shortened it, then it still remains six months."

Zabriskie vs. Sullivan, 80 N. J. Law 673, 77 Atl. Rep. 1075. 20

Counsel for defendant seemed to be of the opinion that because Section 29 of the Landlord and Tenant Act provided that a three months' notice should be given by the landlord to the tenant to vacate under a tenancy of this kind, that even though the statute was silent as to the notice to be given by the tenant, that the duty was of a reciprocal nature and that no greater burden could be placed upon the tenant than upon the landlord. 30
The fact remains that under the common law rule it has been held repeatedly that each party had to give a six months' notice and the only way the status of the parties could be changed would be by statute and if the Legislature had intended to relieve the tenant of the common law duty it would have so provided. This not having been done, it is my opinion that the statute simply changed the obligation on the part of the landlord. 40

Opinion.

and not of the tenant, and that the duty to give the six months' notice is still upon the tenant.

The plaintiff's motion to strike out the answer to the third count must prevail.

Very truly yours,

W. B. MACKAY,
C. C. J.

10

Summary Judgment.

Filed April 28, 1931.

PASSAIC COUNTY CIRCUIT COURT.

20

JACOB KATZ,
Plaintiff,

vs.

MORTIMER INGLIS,
Defendant.

Action at Law.
Summary
Judgment.

30

Upon this matter being opened to the Court by Abram I. Bluestein and Peter J. McGinnis, for the plaintiff, in the presence of Peter Cohn, for the defendant, on motion to strike out the answer to the third count in the above cause, and the Court having duly considered the application,

It is on this 28th day of April, 1931, ORDERED, that the plaintiff's motion prevail and that the

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Summary Judgment.

said answer, including the special defenses to the said third count, be stricken out and that judgment in favor of the plaintiff and against the defendant on the amount demanded in said third count, Seven Hundred and Sixty-four Dollars and Seventy-five Cents (\$764.75), be entered,

Whereupon, it is ADJUDGED, that the plaintiff Jacob Katz recover of the defendant Mortimer Inglis, the sum of Seven Hundred and Sixty-four Dollars and Seventy-five Cents (\$764.75). 10

WILLIAM B. MACKAY,
Judge.

Judgment entered and signed April 28th,
A. D., 1931, at 2:35 P. M.

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New Jersey Court of Errors and Appeals

JACOB KATZ,
Plaintiff-Appellee,

vs.

MORTIMER INGLIS,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT.

This is an appeal from an order made and entered in the Passaic County Circuit Court striking out defendant's answer, including the separate defenses, to the third count of the complaint, and entering a summary judgment thereon in favor of plaintiff and against the defendant, the first and second counts of the complaint having been previously discontinued by order of the Court.

POINT I.

The Court committed legal error in making the order striking out defendant's answer, and the separate defenses, to the third count of the complaint.

The answer denies all of the allegations of the third count and also sets up three separate defenses thereto, the second of which is that the defendant, on October 1, 1930, gave plaintiff written notice of

his intention to vacate the premises in question on January 1, 1931 (Case, p. 7, ll. 21 to 31). Neither the giving nor the receipt of this notice is denied by plaintiff. However, plaintiff contended, and the Court found and determined, that defendant was a tenant from year to year, and, therefore, was legally obligated to give plaintiff six months' notice of his intention to quit in order to terminate the tenancy, by reason of which the notice given was insufficient in law. In so deciding, the Court erred, because it first had to, and did, find, as a matter of law, that the tenancy under consideration was from year to year, which finding was wholly unsupported by and clearly contrary to the facts as pleaded in the third count and verified by the supporting affidavit.

The only facts, with reference to the character of the tenancy under consideration, disclosed by the third count of the complaint (Case, p. 5, ll. 10 to 40) and the supporting affidavit (Case, pp. 9-10) are that defendant, on July 1, 1924, entered into the possession of the premises in question under a void lease, and that he vacated said premises on January 1, 1931. These were the only facts before the Court below with reference to the nature of the tenancy, and it was from these that it found and concluded that the tenancy was one from year to year, notwithstanding the express provision of our Statute (Comp. St., Vol. 2, p. 2610, Sect. 1), which reads as follows:

"That all leases, estates, interests of freehold or term of years, or any uncertain interest of, in, to, or out of any messuages, lands, tenements, or hereditaments, made or created, or thereafter to be made or created, by livery or seizin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents

thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or in equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates notwithstanding."

Nor does the mere allegation in paragraph 2 of the third count (Case, p. 5, l. 22) that defendant was a yearly tenant make it such, since that allegation is not one of fact, but merely a conclusion of law, wholly unsupported by, and clearly contrary to, the very facts pleaded and upon which it is founded. Nor are we unaware of the expression of the Court in the case of *Pffeifer v. Peters*, 80 N. J. L. 661, that "it has now become settled that although the statute creates an estate at will only and that estate having come into existence, may and will be changed into a tenancy from year to year *by the payment of rent.*" The principle of law as there enunciated is wholly inapplicable to the case at bar, because, as is therein specifically stated, the change from one sort of tenancy to another is conditioned and dependent upon the payment of rent. *In the case at bar nothing appeared in the third count or the affidavit in support thereof, and, therefore, the Court could not legally find, nor did it find, that defendant ever paid any rent.*

As above indicated, our statute (Comp. St. Vol. 2, p. 2610, Sect. 1) clearly specifies what estates or tenancies shall be deemed and considered to be tenancies at will, yet it does not profess to indicate what the nature, incidents and characteristics of such tenancies are. Thus, to ascertain and determine these, recourse must be had to the common law.

Under the ancient common law a tenancy at will was one that was terminable *without notice.*

(35 Corpus Juris 1130, Sect. 362). Kent, in his commentaries (4 Kent's Com., 111, 112 1st ed.), defines a tenancy at will as being "an estate created by grant or contract whereby one man lets lands to another to hold, *at the will of the lessor.*" Apparently, realizing the harshness and injustice of this rule, which permitted the tenancy to be vacated *at the mere will or caprice of the landlord*, the Courts, in order to prevent the tenant from losing or being deprived of the crops which he had sown, by being turned out of possession without notice and before his crops had matured, from a very early date, by a well and long defined course of judicial decisions, have constructively held such tenancies, *for the purpose of entitling the tenant to notice to quit*, to be from year to year, and thus was evolved the principle requiring the landlord to give his tenant a six months' notice to quit, before being able to legally terminate said tenancy. *Den v. Drake*, 14 N. J. L. 523.

A careful examination of all the authorities in point discloses that while the Courts have specifically defined the character and length of notice which the landlord was compelled to give to his tenant in order to bring such a tenancy to an end, nevertheless a search of all the authorities, ancient as well as modern, fails to disclose a single case holding that the tenant is under a legal duty to give his landlord a six months' notice of his intention to quit in order to terminate a tenancy at will. Such was the rule of the common law, as was adopted by our State in *Den v. Drake*, 14 N. J. L. 523, decided in 1835, and continued to be such until the year 1840, when our Legislature enacted a statute, (P. L. 1840, p. 104) whereby it reduced the length of the notice which the landlord was required to give to his tenant from six months to

three months. This statute substantially now appears as Section 29 of our Landlord and Tenant Act (Comp. St., Vol. 3, p. 3077, Sect. 29). The Legislature did not then, nor at any other time, undertake to define the character or length of the notice which the tenant was required to give to the landlord.

All of the reported cases in this State, since the enactment of the Statute of 1840, *supra*, wherein the question as to the length of notice the tenant was required to give to his landlord in order to terminate a tenancy at will is involved, in the words of Mr. Justice Voorhees, in *Pfeifer v. Peters*, 80 N. J. L. 661, say that:

"The like obligation, however, rests upon the tenant to give notice to his landlord of his intention to quit as is borne by the landlord to notify his tenant to quit."

That obligation of the landlord, as fixed by the act of 1840, was to give a three months' notice, and, hence, the tenant being under a like obligation, is also obligated to give a three months' notice of his intention to quit.

That there is a duty resting upon the tenant, ever since the act of 1840, to give his landlord a three months' notice of his intention to quit in order to terminate his tenancy cannot be questioned or gainsaid. Our Courts have so stated in clear and unmistakable language. Mr. Justice Reed, in delivering the opinion of this Court in *Mitchell Fertilizer Co. v. Armour*, 78 N. J. L. 118, on page 119, *inter alia*, said:

"Nor is it denied that, if he was a tenant from year to year, his right to a continued possession of the premises, and the landlord's right to receive rent, would cease only upon a three months' notice to quit, or three

months' notice of intention to quit, or by an agreement to end their existing relations."

And again in the case of *Pffeifer v. Peters*, 80 N. J. L. 661, on page 662, Mr. Justice Voorhees, *inter alia*, said:

"The essential question now to be settled is what notice of intention on the part of the tenant to quit was necessary. In *Den ex dem. McEowen v. Drake*, 2 Gr. 523, it was held that tenancies at will, so far at least as to entitle the tenant to a half-year's notice to quit, are to be construed to be tenancies from year to year. . . *Three months' notice to the tenant now by statute is sufficient.*"

"*The like obligation*, however, rests upon the tenant to give notice to his landlord of his intention to quit as is borne by the landlord to notify his tenant to quit. *Hanks v. Workmaster*, 46 Vroom 73; *Mitchell Fertilizer Co. v. Armour*, 49 Id. 118; *Zabriskie v. Sullivan*, post p. 673."

This notice may be given at any time, to take effect upon the expiration of any rent period three months from the giving of said notice, since there can be, and is, *no such thing as a recurring period in a tenancy at will, the chief characteristic of such a tenancy being the uncertainty or indefiniteness of its term.* Stripped of its characteristic of uncertainty or indefiniteness of term, then there would be no such thing as tenancies at will in existence any longer, the existence of which, however, is expressly recognized by our statute (Comp. St., Vol. 2, p. 2610, Sect. 1) and the authorities hereinbefore referred to.

In view of the foregoing, we respectfully submit that three months' notice given by the defendant

to plaintiff in the case at bar was legally sufficient to terminate his tenancy at will and constituted a good and legal defense to plaintiff's action, and the Court committed legal error in striking same out.

POINT II.

The Court was without power or jurisdiction to strike out the answer.

Rule 80 of the Supreme Court, dealing with summary judgments provides as follows:

80. When an answer is filed in an action brought to recover a debt or liquidated demand arising—

- (a) Upon contract express or implied, sealed or not sealed; or,
- (b) Upon a judgment for a stated sum; or
- (c) Upon a statute;

the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend. (Rule 57, Pr. Act 1912).

Rule 81 of the Supreme Court which deals with the characteristics and prescribes the requirements of the affidavit, referred to in Rule 80, upon which an answer may be struck out and summary judgment entered, reads as follows:

81. The motion to strike out *shall be made upon affidavit* of the plaintiff or that of any other person cognizant of the facts,

verifying the cause of action, *and stating the amount claimed and his belief that there is no defense to the action.* (Rule 58, Pr. Act 1912).

The foregoing rules specifically provide that an answer may be struck out and judgment final may be entered upon a motion which "*shall be made upon affidavit*" which must (1) verify the cause of action, (2) *state the amount claimed* and (3) *set forth deponent's belief that there is no defense to the action.* The presentation and filing of an affidavit, containing these three facts and requirements, is absolutely mandatory, and dispensable in order to confer jurisdiction upon and empower the court to enter an order striking out an answer and entering summary judgment. Without such an affidavit, the Court is powerless and without jurisdiction to make or enter such an order, and its action in so doing is coram non iudice.

This Honorable Court, in the case of Danenhower v. Birch, 97 N. J. L. 193, 116 A. page 786, Mr. Justice Trenchard writing the opinion, inter alia, said:

"Now, in an action brought to recover a debt for liquidated damages for the character designated in Rule 80 of the Supreme Court (such as the present), a frivolous or sham defense may be struck out and judgment final entered, upon motion of the plaintiff, *supported by affidavit* of a person cognizant of the facts, *verifying the cause of action, and stating the amount claimed and his belief that there is no defense to the action*
* * * * * (Italics ours)

"In the present case the motions to strike out the answers and for judgment final were respectively supported by a proper affidavit *verifying the cause of action, stating the amount claimed, and that there was no defense.*"

Mr. Justice Bergen, in delivering the opinion of this Honorable Court, in the case of Eisele et al. v. Raphael, 90 N. J. L. 219, 101, A. page 200, *inter alia*, said:

“Rule 81 requires that the motion to strike out be made *upon affidavit* of “the plaintiff or that of any other persons cognizant of the facts verifying the cause of action and *stating the amount claimed, and his belief that there is no defense to the action*”. Reading the rules, to which the statute is subject, and the statute together, a plaintiff will be entitled to a summary judgment *upon presenting an affidavit complying with Rule 81 * **”

An examination of the affidavit presented in support of plaintiff's motion (Case, pp. 9 to 10) clearly and unquestionably shows that it is not in conformity with the requirements of Rule 81, as expounded by this Honorable Court in the case above cited, and is wanting in two respects, namely: (1) *It fails to state the amount claimed,* (2) *it fails to set forth the affiant's belief that there is no defense to the action.*

Such being the fact, no affidavit, complying with the requirements of Rule 81 and in conformity with the practice as defined by this Honorable Court in *Danenhower v. Birch* and *Eisele v. Raphael*, *supra* was presented by the plaintiff to the Court below in support of his motion. Hence, the Court below was unquestionably without power or jurisdiction to make the order striking out the answer and entering summary judgment, and in doing so committed reversible error.

POINT III.

The Court was without power or jurisdiction to order summary judgment to be entered in the sum of \$764.75.

By its order made and entered on April 28, 1931, the Court below ordered summary judgment to be entered in favor of the plaintiff and against the defendant in the sum of \$764.75 (Case, pp. 16-17). This it was clearly without power or authority to do. As already pointed out under Point II of our brief, the affidavit in support of plaintiff's motion failed to state the amount claimed, as well as affiant's belief that there was no defense to the action, by reason of which the Court below was without power to strike the answer or enter a summary judgment.

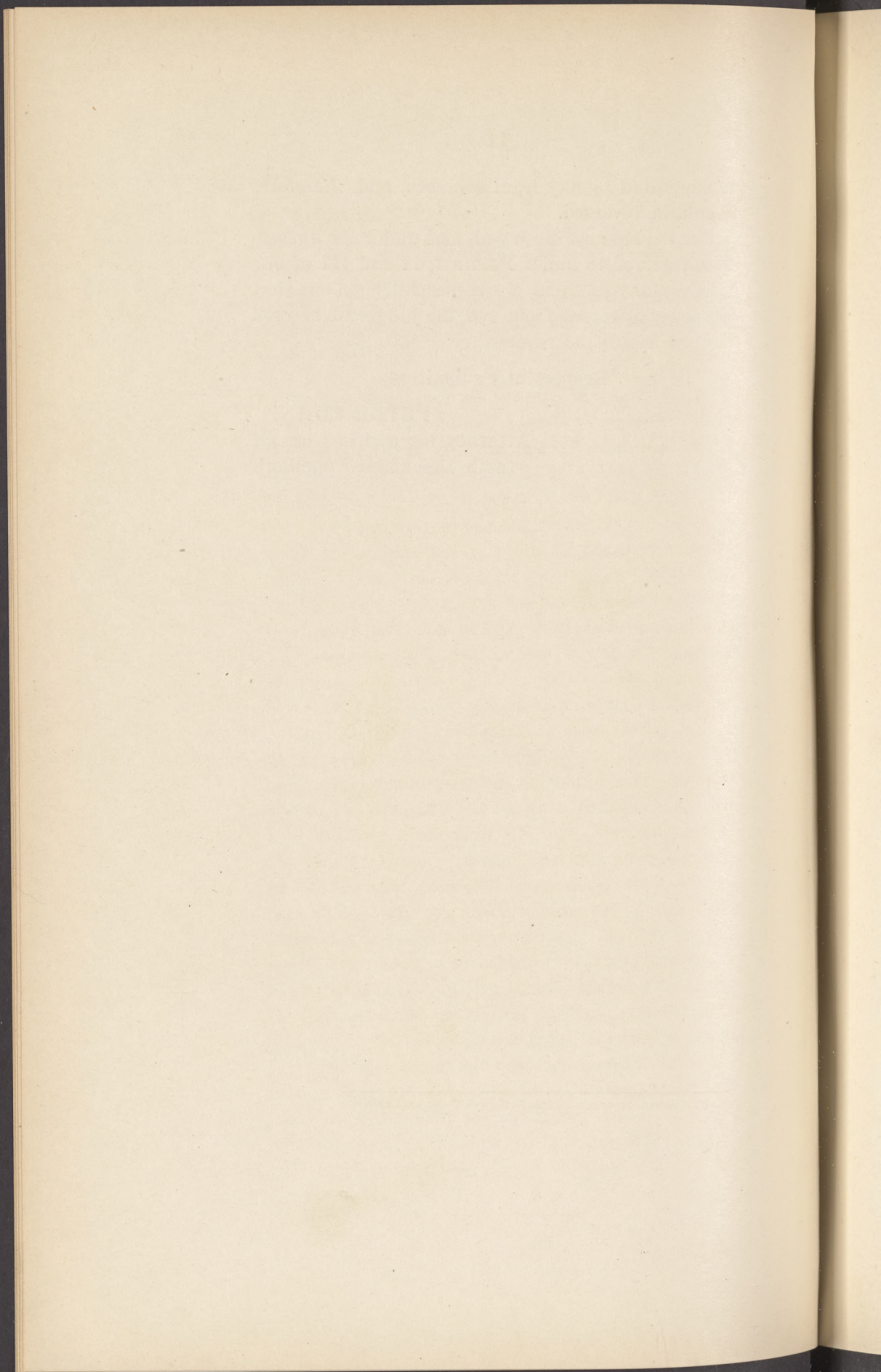
Assuming for the sake of argument, but not conceding, that notwithstanding the foregoing the Court below could legally enter a summary judgment, nevertheless it was without power to enter one in the sum of \$764.75, as it did, because there was absolutely no proof, not even a single scintilla of evidence, before it that the sum of \$764.75, or any other sum, was due from defendant to plaintiff. The affidavit, upon which the Court below entered the summary judgment, is devoid of a single statement or even inference that the sum of \$764.75, or any other sum, was claimed by or due to plaintiff from defendant. Under these circumstances, if the Court had a right to enter judgment for \$764.75, it can be said with equal force and reason that it could just as well have ordered judgment for \$75,000.00 or any other sum. The judgment of the Court below, in this respect, is clearly

unsupported by any legal evidence, and, therefore, should be reversed.

For the reasons discussed, and under the authorities referred to under Points I, II and III of our brief, or any of them, we respectfully submit that the order appealed from and the judgment entered thereon should be reversed.

Respectfully submitted,

PETER COHN,
Attorney for and of Counsel
with Defendant-Appellant.



New Jersey Court of Errors & Appeals

Jacob Katz,

Plaintiff-Appellee,

vs.

Mortimer Inglis,

Defendant-Appellant.

On Appeal from
Passaic Circuit

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE

By the appeal in this case the defendant seeks to reverse a judgment obtained by the plaintiff in the Passaic Circuit Court for the sum of \$764.-00 representing one month's rent and accrued interest for the month of January, 1931, for premises occupied by the defendant, being part of No. 132 and 134 Market Street, Paterson, New Jersey.

This judgment was entered as a result of an order of the Circuit Judge striking out the answer of defendant. There was no dispute as to the facts which in substance are as follows:

On July 1st, 1924, defendant entered into possession of the premises mentioned in the complaint and remained there until January 1st, 1931. Entry was made as the result of a lease executed to the plaintiff by the defendant, but elected by the defendant to be void by reason of the fact that it was executed by one James E. Inglis, a son of the defendant, who it was claimed had no authorization from defendant to execute the same.

No other lease or agreement was executed between the parties and the defendant paid from

the time of his entry the sum of \$750.00 each month as rent, up to and including the month of December, 1930. On October 1st, 1930, the defendant gave notice in writing to plaintiff of his intention to vacate and surrender the premises on the first day of January, 1931, and accordingly did vacate at that time.

The facts are not disputed. They appear in the third count of the pleadings and the answer thereto. In the answer the special defense was that notice had been given in writing on the first day of October, 1930, of the intention to quit and surrender the premises on January 1st, following. The facts further appear by the affidavit of Jacob Katz (Page 9 of State of Case).

AS TO POINT 1 OF APPELLANT'S BRIEF

Appellant contends that the defendant was under the circumstances related above, a tenant at will under a void lease and therefore a tenancy from year to year existed.

It would seem that the defendant in one part of his argument contends that there was no tenancy shown to be in existence, but he sets forth in his own special defense, that on October 1st, he gave a three months' notice in writing to quit. His exact language being:

“Defendant duly served upon plaintiff a three months' notice in writing as required by law, under date of October 1st, 1930, of his intentions to vacate and deliver up the possession of the described premises to plaintiff on January 1st, 1931, and defend-

ant duly vacated the said premises and delivered the possession thereof to plaintiff on or before the 1st day of January, 1931, and duly *paid or caused to be paid all rents accruing prior thereto.*" (P. 7, l. 20-30 of State of Case.)

Thus we have by defendant's own pleading an admission that there was the relation of landlord and tenant, and by it he paid rent, and that he was required to give, and plaintiff was entitled to receive three months' notice in writing of the termination of such tenancy.

Our proposition in substance is that an entry under a void *** lease creates a tenancy at will, by which the landlord was entitled to receive six months' notice of the intention to quit and plaintiff entitled to six months 'in turn of a demand for possession. This rule was laid down in the early case of *Den v. McGowan*, 14 N. J. Law, p. 523, and excepting as modified by Section 29 of the Landlord and Tenant Act which provides that the landlord could terminate the tenancy by a three months' notice, the rule enunciated in the *Den* case has ever since continued to be the law of this State.

The exact language stated in the case of *Den v. McGowan*, 14 N. J. Law, p. 523, is as follows:

"Half a year's notice to quit is necessary in all cases of uncertain tenancy whether under the name of tenancies from year to year, or tenancies at will.

All general and undefined tenancies, whether they originate simply by permis-

sion of the owner, or where the tenant has entered under a void lease, or been let in, pending a treaty for a purchase, or wherever there has been no express agreement between the parties as to the terms of the occupancy provided the entry was a lawful one, or with the privity and consent of the owner, are now held to be tenancies at will. And all tenancies at will, as well such as are created by grant or contract, as those which arise by implication, so far at least, as to entitle the tenant to half a year's notice to quit, are constructively held to be tenancies from year to year."

The Court speaking through Justice Hornblower, said that the old common rule had been that the tenant was entitled to reasonable notice, and having thus recognized the rule of reasonable notice, the Court then proceeded to pass upon what constituted reasonable notice in the following language:

"It is conceded, that in the case of tenancies from year to year, such a notice is indispensable; but it is insisted that the defendant was not a tenant for years; that at most he was a tenant at will, and that such a tenant was not entitled to a regular notice to quit."

(14 N. J. Law, P. 528 at bottom.)

Again:

"In order to answer this question, we are called upon to determine, not only what is

reasonable notice to quit, where such notice is required by the rules of law, but whether in a case like the one before us, a defendant is entitled to such notice.

The doctrine of notices to quit, has been recognized ever since the time of Henry VIII; and is to be found in the year books. 13 Hen. 8, 15b. See *Right v. Darby*, 1 T. R. 159; 2 Bl. Com. 147; *Doe v. Watts*, 7 T. R. 83; 85; *Doe v. Daggett*, 2 Bl. Rep. 1224; 4 Kent's Com. 1st ed. 110; *Ellis v. Paige*, 2 Pick. Rep. 71; Adams on Eject. ed. of 1821, 103; *Ibid.* 129, and Comyn on land. & ten. by Chilton, 2d ed. 303; *Brown v. Van Horne*, 1 Bin. Rep. 334, in note.

These, and numerous other books and cases, show that the ancient rule of the common law, required that the notice, when necessary, and not otherwise limited by agreement of the parties, should be for half a year, or six calendar months, *expiring at the end of the current year of the tenancy; and that a notice expiring at any other period, sooner or later, will not be sufficient.*"

14 N. J. Law, P. 528.

After discussing the character of the tenancy of the holding by the tenant under discussion, the Court proceeded to say:

"An estate at will, in the primary and technical sense of that expression, was created by grant or contract, whereby one man lets lands to another to hold, at the will of the lessor. Litt. Sec. 28; 4 Kent's

Com. 100, 1st ed.

Whether such a tenant at will was originally entitled to half a year's notice to quit, it is not now necessary to determine; since by a long course of judicial decisions, the old estates at will, for the purpose at least, of entitling the tenant to such a notice, have been constructively held to be tenancies from year to year. 4 Kent's Com. 111, 112. 1st Ed."

(14 N. J. Law, p. 529.)

The principle in *Den v. Drake*, was approved in *Zabriskie v. Sullivan*, 80 N. J. Law, 673.

The Court further dealt with the question as to whether the landlord was entitled to a three months' or a six months' notice and took the view very properly, that the Statutory modification as set forth in Section 29 of the Landlord and Tenant Act modified the common rule only to the extent of reducing the necessary notice from the landlord to the tenant to three months from the old common law rule of six months, and that this statutory enactment did not by implication carry with it a modification of the common law with respect to the notice the tenant was to give. Hence, we claimed that it was thoroughly well settled, and was so found by the Circuit Court Judge, viz., first, a notice to quit on one of the recurring periods of the entry which would be July 1st, 1931, and secondly, that such notice should be six months and not three months. So far as this demand is concerned, however, it is immaterial whether the demand should have been

three months or six months. Concededly the notice was to the landlord of a surrender of the premises on January 1st, 1931. The entry had been July 1st, 1924, hence the recurring period of July, 1924, should have been the time that defendant should have fixed as the time which he would quit and surrender up the premises in question.

POINT 2

DEFENDANT'S CONTENTION THAT THE COURT WAS WITHOUT POWER OR JUSTIFICATION TO STRIKE OUT ANSWER.

At the time of the argument on the motion to strike out no question was raised as to the ground of power and justification. In the grounds of appeal nothing was said as to the ground of justification. Of course if the Court had no justification, such justification could not be acquired by mere consent. An examination, however, of defendant's brief (Page 8) would indicate that the point of defendant's contention is not lack of justification but insufficiency of the affidavit.

An affidavit was filed. If it had been insufficient proper objection could have been made at the time of the argument, but no attempt was made to file any answering affidavit, nor was any criticism leveled against the affidavit filed, for the simple reason that the facts were agreed to by the parties. The answer of the defendant (Page 6 and 7) and the affidavit of plaintiff (P. 9) discloses a complete case. The plaintiff demanded \$750.00. No affidavit was filed by the defendant

that in anywise challenged the correctness of this demand. As we have stated at the outset of our brief that all the facts were conceded and the case turned on the second point as to whether or not notice should be given to quit on the recurring period of the entry, and whether the notice should be three months or six months. No other question was raised by the parties.

Counsel stresses his right for relief on the ground that the affidavit, as he contends, does not conform with the rule, and therefore the court was without jurisdiction. Aside from the question as to whether this is true or not, we would call the Court's attention to the fact that the Court had inherent power to strike out the answer, as either sham or frivolous. This rule is laid down in general terms in 49 C. J. 685, section 974 on the subject "Pleading," and again at p. 701, section 992. Notwithstanding a statute passed, giving the Court power in our own State, this rule has been recognized in the following:—

Anonymous, 7 N. J. L., p. 160, in a short opinion by Chief Justice Kirkpatrick.

In re: Beam, 93 N. J. Eq., p. 593, in an opinion by Chancellor Walker.

An instance of a statutory provision in practice, not overruling the common law jurisdiction of the Court, will be found in the case of *Flomerfelt vs. Zellers*, 7 N. J. L., p. 153.

Of course, therefore, the Court could not acquire jurisdiction merely because of the rule, nor

lose jurisdiction because of the non-compliance with it. The objects of rules of Court are set forth very fully in rule 218, as follows:—

“These rules shall be considered as general rules for the government of the court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice.” (Rule 5, Pr. Act. 1912.)

ABRAM I. BLUESTEIN,

Attorney and of Counsel
with plaintiff-appellee.

Abram I. Bluestein
Attorney and of Counsel
with plaintiff - appellee

