INDEX.

Notice of Appeal.

(Filed October 7, 1937.)

New Jersey Supreme Court

ESSEX COUNTY.

ESSEX TITLE GUARANTY & TRUST Co., a New Jersey Corporation, Plaintiff, *vs.* J. ROBERT WYLIE AND DOROTHY R. WYLIE, Defendants.	Action at Law. In Ejectment. Notice of Appeal.

To: Boyd and Dodd, Esqrs., Attorneys of Plaintiff, 483 Bloomfield Avenue, Montclair, N. J.

Gentlemen:

PLEASE TAKE NOTICE that the defendants in the above entitled matter do hereby appeal to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in favor of the plaintiff and against the defendants on the 6th day of October, 1937.

THOMAS BRUNETTO,
Attorney of Defendants.

I concede that there is good cause of appeal.

THOMAS BRUNETTO,
Of Counsel for Defendants.

Dated: October 6, 1937.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 7th day of October, 1937.

BOYD AND DODD,
Attorneys for Plaintiff.

Grounds of Appeal.

(Filed November 1, 1937.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

ESSEX TITLE GUARANTY & TRUST COMPANY, a New Jersey Corporation, Plaintiff, *vs.* J. ROBERT WYLIE AND DOROTHY R. WYLIE, his wife, Defendants.	Action at Law. Grounds of Appeal.

To: Boyd & Dodd, Esqrs., Attorneys of Plaintiff, 483 Bloomfield Avenue, Montclair, N. J.

The defendants state the following grounds of appeal for the reversal of the judgment of the New Jersey Supreme Court by the New Jersey Court of Errors and Appeals:

1. The Supreme Court erroneously struck out the answer of defendant-appellants.

Grounds of Appeal.

2. The Supreme Court erred in giving judgment in favor of the plaintiff and against the defendants.

3. The Supreme Court erred in entering judgment in favor of the plaintiff and against the defendants because it appeared by the affidavits read to the Supreme Court on behalf of the plaintiff and the defendants, that a disputed question of fact was involved that should have been determined by a jury.

4. The Supreme Court erred in entering judgment in favor of the plaintiff and against the defendants as said court deprived the defendants of the right of staying said suit upon the payment by the said defendants to the plaintiff, of the amount of rent claimed by the said plaintiff as provided by the provisions of Sections 7 and 9 of an act entitled

> "An Act Concerning Landlord and Tenants" C. S. 1709-1910, Volume 3, page 3068-3069.

5. The judgment of the Supreme Court is erroneous because the plaintiff at no time prior to the entering of said judgment submitted to said court any evidence that said plaintiff was entitled to a right of re-entry for nonpayment of rent by virtue of the agreement set forth in the affidavit of said plaintiff read to the court on the application for said judgment.

6. The judgment of the Supreme Court is erroneous as at no time prior to the entry of said judgment did the plaintiff submit to said court any evidence vesting jurisdiction in said court to

enter the judgment for the plaintiff and against the defendants.

THOMAS BRUNETTO,
Attorney of Defendants.

Dated: Newark, N. J.
October 27th, 1937.

Service of a copy of the within grounds of appeal is hereby acknowledged this 28th day of October, 1937.

BOYD AND DODD,
Attorneys for Plaintiff.

Judgment Record.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

ESSEX TITLE GUARANTY & TRUST COMPANY, a New Jersey Corporation, Plaintiff, *vs.* J. ROBERT WYLIE AND DOROTHY R. WYLIE, his wife, Defendants.	Judgment Record. Action at Law. Summary Judgment. Ejectment. Judgment for Possession.

BOYD & DODD, Attorneys.

J. Robert Wylie and Dorothy R. Wylie, his wife, the defendants in this cause were summoned to answer unto Essex Title Guaranty and Trust Company, a New Jersey Corporation the plaintiff therein in an action at law upon the following complaint:

(Summons issued: August 4, 1937.)

Complaint.

The plaintiff, Essex Title Guaranty and Trust Company, a New Jersey Corporation, demands of the defendants, J. Robert Wylie and Dorothy R. Wylie, his wife, the possession of certain premises with the appurtenances, known and designated as #32 St. Luke's Place, first floor apartment and one car garage, Montclair, in the County of Essex

and State of New Jersey, more particularly described as follows:

BEGINNING at a point on the westerly side of St. Luke's Place at the northeast corner of lands conveyed to Anna G. Bigelow by deed dated February 17, 1888 and recorded March 5, 1888 in Book Z-23, Page 183; thence (1) running along the westerly side of St. Luke's Place north 18 degrees 26 minutes east 58.70 feet to the southerly line of a driveway hereinafter more particularly referred to; thence (2) running along the said southerly side of said driveway on its various courses and distances as follows north 71 degrees 23 minutes west 25.75 feet to an angle in said line; thence (3) still further along said line north 77 degrees 23 minutes west 25 feet to an angle in said line; thence (4) still further along same north 79 degrees 47 minutes west 25 feet to an angle in said line; thence (5) still further along same north 82 degrees 45 minutes west 25.01 feet to an angle in said line; thence still further along said line south 88 degrees 43 minutes east 19.70 feet; thence (6) south 16 degrees 21 minutes west 42.44 feet to the northerly line of lands now or formerly of Bigelow; thence (7) running along said line of lands south 72 degrees 41 minutes east 116.07 feet to the westerly side of St. Luke's Place aforesaid and the point and place of BEGINNING.

This description being in accordance with a survey made by Frank W. Crane, Inc., Roy V. Sheldon, Municipal Engineer and Land Surveyor, dated May 14, 1928.

And the plaintiff says that its right to possession of the same accrued on the 1st day of Aug. 1937 and that the defendants wrongfully deprive it of the possession thereof to its damage.

BOYD & DODD,
Attorneys of Plaintiff.

Answer.

(Filed August 13, 1937.)

The defendants, residing in the Town of Montclair, County of Essex and State of New Jersey, answering the complaint of the plaintiff, says that:

1. They deny the truth of the matters contained in the complaint.

THOMAS BRUNETTO,
Attorney of Defendants.

Notice.

(Filed August 27, 1937.)

To the defendants, J. Robert Wylie and Dorothy R. Wylie, his wife, or Thomas Brunetto, Esq., their attorney:

TAKE NOTICE, that we shall apply to the New Jersey Supreme Court at the Court House in the City of Newark, Essex County, before such Judge as shall be sitting to hear motions in said Court, on Friday, September 24th, 1937 at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, for an order striking out the answer filed by you in the above entitled cause on

the ground that the same is sham and untrue in fact;

And take further notice that we shall use the accompanying affidavit of Clifford W. Buck at said time and place, in support of our said motion.

BOYD & DODD,
Attorneys for Plaintiff.

Order.

(Filed September 21, 1937.)

This matter coming on to be heard on Motion of Boyd and Dodd to strike out the answer filed herein by the above named defendants, J. Robert Wylie and Dorothy R. Wylie, his wife, and the Court having read and considered the affidavit of Clifford W. Buck and the affidavits submitted by the defendants;

And it further appearing from the affidavit of Clifford W. Buck that the allegations of the complaint have been substantiated and that the answer filed by the defendants herein is sham;

It is on this 4th day of October, 1937, ORDERED that the answer filed herein by J. Robert Wylie and Dorothy R. Wylie, his wife, be stricken out as sham and that the plaintiff may proceed to judgment as for want of an answer.

NEWTON H. PORTER,
Supreme Court Commissioner and
Circuit Court Judge.

Entered: October 6, 1937.

On motion of
BOYD & DODD,
Attorneys for Plaintiff.

Judgment Record.

Judgment.

Afterwards upon proceedings duly had according to the Statute and the Rules of Court, the Court ordered said answer stricken out as sham and the Court having further ordered that plaintiff proceed to judgment as for want of an answer.

Whereupon it is adjudged that the plaintiff Essex Title Guaranty and Trust Company, a New Jersey Corporation do recover of the said defendants J. Robert Wylie and Dorothy R. Wylie, his wife, the possession of the premises mentioned and described in the said complaint with the appurtenances together with its costs which have been taxed at the sum of Sixty-eight dollars and forty-two cents.

Costs $68.42

Judgment entered and signed October 6, 1937.

THOMAS J. BROGAN,
Chief Justice.

Clerk's Certificate.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-third day of December, A. D. nineteen hundred and thirty-seven.

(SEAL)

FRED L. BLOODGOOD,
Clerk.

Notice of Motion to Strike Answer.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

ESSEX TITLE GUARANTY & TRUST COMPANY, a New Jersey Corporation, Plaintiff, *vs.* J. ROBERT WYLIE AND DOROTHY R. WYLIE, his wife, Defendants.	Action at Law. Motion to Strike Answer.

To the defendants, J. Robert Wylie and Dorothy R. Wylie, his wife, or Thomas Brunetto, Esq., their attorney:

TAKE NOTICE, that we shall apply to the New Jersey Supreme Court at the Court House in the City of Newark, Essex County, before such Judge as shall be sitting to hear motions in said Court, on Friday, September 24th, 1937 at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, for an order striking out the answer filed by you in the above entitled cause on the ground that the same is sham and untrue in fact;

And take further notice that we shall use the accompanying affidavit of Clifford W. Buck at said time and place, in support of our said motion.

BOYD AND DODD,
Attorneys for Plaintiff.

Affidavit.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

ESSEX TITLE GUARANTY & TRUST COMPANY, a New Jersey Corporation, Plaintiff, *vs.* J. ROBERT WYLIE AND DOROTHY R. WYLIE, his wife, Defendants.	Action at Law. Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

CLIFFORD W. BUCK, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am the secretary of the Essex Title Guaranty and Trust Company, a New Jersey corporation, the plaintiff in the above entitled cause. I am fully familiar with the facts hereinafter set forth and am duly authorized by said corporation to make this affidavit.

2. Essex Title Guaranty and Trust Company is the agent for Montclair Trust Company, Trustee for bondholders in Series "B" under Trust Indenture made between Essex Title Guaranty and Trust Company and Montclair Trust Company, dated July 1st, 1912, as amended, the holder of a first mortgage on lands and premises in the Town of Montclair, Essex County, New Jersey,

which premises are known and designated as #32 St. Luke's Place, and are more particularly described in the complaint filed in this cause. Said premises are owned by Francis A. Finnerty and are occupied by a two-family house.

3. Said first mortgage was made by Francis A. Finnerty and wife to Essex Title Guaranty and Trust Company, a corporation, on May 31, 1928, and is recorded in the Essex County Register's Office in Book U-64 of Mortgages for said County on pages 217-219. Said mortgage was given to secure a certain bond of even date with said mortgage in the amount of $12,500.00.

4. The aforesaid mortgage has been in default since a time prior to the 30th day of January, 1934, both in respect to tax arrearages and in respect to the payment of interest.

5. By the terms of said mortgage, said mortgagee, its successors or assigns, is entitled to take possession of the mortgaged premises after default in the payments stipulated to be made in said bond and mortgage.

6. On or about January 30, 1934, the plaintiff entered into possession of said premises as mortgagee in possession and received from Francis A. Finnerty, the owner of said premises, a written assignment of rents dated that day, a copy of which assignment is hereto annexed, made part hereof and marked Schedule "A".

7. At the time of the execution of said assignment of rents and the entry by the plaintiff into possession of said premises the first floor apart-

ment of said premises was occupied by the defendants, J. Robert Wylie and Dorothy R. Wylie, his wife, under a rental agreement with said Francis A. Finnerty by the terms of which the said defendants paid a rental of Fifty ($50.00) Dollars per month.

8. By virtue of said assignment of rents, Essex Title Guaranty and Trust Company, as agent of Francis A. Finnerty, executed a lease with the defendants, J. Robert Wylie and Dorothy R. Wylie, his wife, dated October 19, 1934 for a period of one year from the first of October, 1934, for the yearly rental of Six Hundred ($600.00) Dollars.

9. At the expiration of said lease the defendants held over and continued in possession of said premises and continued to pay a rental of Fifty ($50.00) Dollars per month to the plaintiff as agent of Dr. Finnerty.

10. At the time of the institution of this suit the defendants were in default of two months' rent amounting to the sum of One Hundred ($100.00) Dollars. Said defendants have been in default of at least one month's rent at all times since March, 1935.

11. All of the payments made by or for the defendants on account of the rental of the premises occupied by them as aforesaid under the aforementioned lease and since the termination of said lease are listed on Schedule "B" which is hereby annexed and made part hereof.

Schedule "A."

12. Plaintiff has demanded that said defendants vacate said premises but defendants have refused so to do.

CLIFFORD W. BUCK.

Subscribed and sworn to before me this 18th day of September, 1937.

JOSEPH PAULISCO,
Notary Public of New Jersey.
(Seal)

Schedule "A."

WHEREAS, ESSEX TITLE GUARANTY AND TRUST COMPANY is the holder of the first mortgage upon lands and premises in the Town of Montclair, Essex County, N. J., which premises are known and designated as #32 St. Luke's Place; said premises being occupied by a two-family house, which premises are owned by Francis A. Finnerty;

WHEREAS, payment of taxes for the years 1932, 1933 and interest on the mortgage held by Essex Title Guaranty and Trust Company are now in arrears;

NOW THEREFORE, in consideration of the premises and of the forbearance of immediate foreclosure of said premises on account of said default in the payment of taxes and interest, KNOW ALL MEN BY THESE PRESENTS, that FRANCIS A. FINNERTY does hereby assign, set over and transfer unto Essex Title Guaranty and Trust Company all existing leases on said premises, together with all the rents, issues and profits now or hereafter

accruing from said premises; said assignment to be irrevocable as long as any taxes or interest payments are in default;

I further authorize the said Essex Title Guaranty and Trust Company to enter into possession of said premises as mortgagee and to collect all the rents as aforesaid, to enter into any new leases in my name or otherwise to sue for and collect any rent which may be in default at any time in my name or otherwise, and to bring any action in ejectment or dispossess proceedings which in their judgment they may deem wise, to make all necessary repairs and to apply the rents either to the payment of the interest or installments due under the mortgage or to repairs, or to other maintenance charges, to taxes or to insurance premiums, and in addition shall be permitted to pay an agent for the management and care of said property a sum not to exceed five percent annually of the gross annual rentals collected.

It is further expressly understood that the Essex Title Guaranty and Trust Company by reason of its entry into possession as mortgagee shall not waive any of its rights to foreclose its mortgage by reason of present or future default of payments therein specified.

In Witness Whereof, said Francis A. Finnerty has hereunto set his hand and seal this 30th day of January, 1934.

Francis A. Finnerty (L. S.)

Signed, sealed and delivered in the presence of:

C. W. Buck.

Schedule "B."

Rents re premises 32 St. Luke's Place, Montclair, New Jersey.

	Paid	*Amount*	*Due Date*
10	Mar. 5, 1934	$50.00	Mar. 1
	Apr. 10	50.00	Apr. 1
	May 15	50.00	May 1
	June 12	50.00	June 1
	July 14	50.00	July 1
	Aug. 14	50.00	Aug. 1
	Sept. 12	50.00	Sept. 1
	Oct. 19	50.00	Oct. 1
	Nov. 30	50.00	Nov. 1
	Jan. 15, 1935	50.00	Dec. 1
20	Feb. 26	50.00	Jan. 1
	Mar. 29	50.00	Feb. 1
	Apr. 24	50.00	Mar. 1
	May 16	50.00	Apr. 1
	June 20	50.00	May 1
	July 20	50.00	June 1
	Sept. 9	50.00	July 1
	Oct. 18	50.00	Aug. 1
	Nov. 7	50.00	Sept. 1
	Nov. 19	50.00	Oct. 1
30	Dec. 18	50.00	Nov. 1
	Jan. 28, 1936	50.00	Dec. 1
	Feb. 26	50.00	Jan. 1
	Mar. 17	50.00	Feb. 1
	May 1	50.00	Mar. 1
	June 1	50.00	Apr. 1
	June 15	50.00	May 1
	July 21	50.00	June 1
	Aug. 31	50.00	July 1
	Sept. 21	50.00	Aug. 1
40	Oct. 21	50.00	Sept. 1

Reply Affidavit on Motion to Strike Answer.

Paid	*Amount*	*Due Date*
Dec. 12	50.00	Oct. 1
Dec. 12	50.00	Nov. 1
Jan. 1937	50.00	Dec. 1
Feb.	50.00	Jan. 1
Mar.	50.00	Feb. 1
Apr.	50.00	Mar. 1
May	50.00	Apr. 1
June	50.00	May 1
July	50.00	June 1

Reply Affidavit on Motion to Strike Answer.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

ESSEX TITLE GUARANTY & TRUST Co., a New Jersey Corporation, Plaintiff, *vs.* J. ROBERT WYLIE AND DOROTHY R. WYLIE, his wife, Defendants.	Action at Law. Reply Affidavit On Motion to Strike Answer.

STATE OF NEW JERSEY, COUNTY OF ESSEX, } ss.:

J. ROBERT WYLIE being duly sworn according to law, upon his oath deposes and says:

1. That I am one of the defendants in the above entitled cause and the husband of Dorothy R. Wylie, the other defendant.

Reply Affidavit on Motion to Strike Answer.

2. That I have read the affidavit of Clifford W. Buck, sworn to on the 18th day of September, 1937, copy of which has been served upon Mr. Brunetto, my attorney on a motion to strike out the answer filed by me in the above entitled cause.

3. That the lease referred to in paragraph 8 of said affidavit is dated September, 1934 and not October 19, 1934.

4. That on August 4, 1934, I was not indebted to the defendant in the sum of $100.00 as stated by Mr. Buck in paragraph 10 of his affidavit. As a matter of fact, my rent has been paid in full up to and including the first day of August, 1937.

5. That at the time of the institution of said suit, I was indebted to said defendant for the August rent, 1937, and that prior to the institution of said suit, I offered said rent to the plaintiff and the same was refused by them. I was told by the said Clifford W. Buck at the time I offered said rent for the month of August, 1937, that what the plaintiff desired was possession of said premises pursuant to notice served upon me by the said plaintiff on or about the 27th day of July, 1937.

6. That since the filing of said suit and the service upon me of said complaint, I have delivered to the plaintiff my employer's check dated the 21st day of August, 1937, in the sum of $50.00 being rent for the said month of August, 1937.

7. That the said plaintiff has received said check and retained it to September 20th, 1937, at which time he returned it to my employer together

with another check of $50.00 dated September 14, 1937, which my employer had sent him as rent for the month of September, 1937.

8. That the rent for said apartment was not payable until the end of every month, in other words there was no agreement between myself and the said plaintiff that the said rent was to be paid in advance on the first of every month.

9. That in addition to the payments shown in Exhibit B attached to the Notice of Motion to Strike Out my Answer, I have also paid to the said plaintiff, on July 14, 1937, the sum of $50.00, being the check of my employer bearing date the 14th day of July, 1937, and being #988, which covered the July rent.

10. That at the time the suit was instituted by the plaintiff against me I was not indebted to the plaintiff for any rent whatsoever as the rent for the month of August was not due and owing until the 31st of August, 1937.

11. That the other defendant in the above entitled cause, Dorothy E. Wylie, never made any agreement with the plaintiff for the renting of the apartment occupied by myself and my wife, the said Dorothy E. Wylie.

J. Robert Wylie.

Subscribed and sworn to before me
this 24th day of September, 1937.

Louis C. Micone,
An Attorney at Law of New Jersey.

Opinion.

ESSEX CIRCUIT COURT,

NEWARK, NEW JERSEY.

Oct. 4, 1937.

In New Jersey Supreme Court, Essex County.

Essex Title Guaranty & Trust Co. *vs.* Wylie.

Messrs. Boyd & Dodd, 483 Bloomfield Ave., Montclair, N. J.

Thomas Brunetto, Esq., 9 Clinton Street, Newark, N. J.

Dear Sirs:

The motion in the above case, which was heard on September 24, is to strike the answer. At the conclusion of the hearing decision was reserved and briefs were called for. The same have been received and considered.

The question presented was whether or not the provisions of the landlord and tenants statute applied. The theory of the plaintiff is that there was no relationship of landlord and tenant existing at the institution of the suit for the reason that there was a default in the terms of the written contract between the parties and that, at the option of the plaintiff, the lease could be terminated, which option was exercised by it and then the suit. An examination of the papers before me leads me to the conclusion that the position taken by the plaintiff is sound. There was default by the defendant under the terms of the lease, whereupon the plaintiff had the right to possession. None of the decisions cited by the defendant, as I read them, decide to the contrary.

No proper defense being shown, the answer must be struck and the motion granted.

Yours truly,

NEWTON H. PORTER,
Judge.

NHP:RCS.

P. S. Lease and affidavit returned to Mr. Brunetto.

Lease.

Bring this Lease when you pay your rent

LEASE

From

ESSEX TITLE GUARANTY and TRUST Co.

To

J. ROBERT WYLIE.

From Oct. 1, 1934
To Sept. 30, 1935

THIS INDENTURE,

Made this day of September in the year One Thousand Nine Hundred Thirty-Four.

BETWEEN ESSEX TITLE GUARANTY and TRUST Co. agent of Montclair in the County of Essex and State of New Jersey of the First Part.

AND J. Robert Wylie of Montclair in the County of Essex and State of New Jersey of the Second Part,

Lease.

WITNESSETH, That the said Party of the First Part does hereby demise and Lease unto the said Party of the Second Part all that certain 1st floor apartment at 32 St. Lukes Pl., Montclair, N. J., with the appurtenances, and the sole and uninterrupted use and occupation thereof (except as hereinafter mentioned) for the term of one year from the 1st day of October for the yearly rental of six hundred dollars, payable monthly, in advance, on the first day of each month.

AND the said Party of the Second Part does hereby agree to pay to the said Party of the First Part, its heirs, assigns, agents or attorneys, the said yearly rental of six hundred dollars, at the time and in the manner aforesaid; and also will pay the water rent assessed on said property.

AND the said Party of the Second Part does further promise and agree that he will not Re-Let or Under-Let the whole or any part of said premises, nor assign this Lease, nor use or permit any part thereof to be used for any other purpose than a dwelling house, without the written consent of the said party of the First Part, its heirs, assigns, agents or attorney under penalty of forfeiture and damages; that the said Party of the First Part its heirs, assigns, agents or attorney, may enter into and upon said premises, at reasonable hours in the daytime, to examine the same or to make such repairs or alterations therein as shall be necessary for the preservation thereof; and to exhibit them at any time during the last three months of the said term, from Ten o'clock in the morning to Five o'clock in the afternoon (Sunday excepted) to any person or persons, and to put up notices "To Let" or "For Sale" on the outside wall thereof.

Lease.

And the said Party of the Second Part does further agree to keep the premises in as good repair as the same shall be at the commencement of said term (wear and tear arising from a reasonable use of the same, and damage by the elements occurring without any fault or neglect of the Party of the Second Part, his servants or agents excepted) and at the expiration of said term to yield up the peaceable possession thereof to the said Party of the First Part, its heirs, assigns, agents or attorney.

And also, that upon the default of the said Party of the Second Part, in the performance of the foregoing covenants and agreements, or any of them, the estate hereby created in and to the said premises shall, at the option of the Party of the First Part, immediately therefrom cease and determine. And also, that if the said premises, or any part thereof, shall become vacant during the said term, the Landlord or its representatives may re-enter the same, either by force or otherwise, without being liable to prosecution therefore: and Re-Let the said premises as the Agent of the said Tenant and receive the rent thereof, applying the same, first to the payment of such expenses as it may be put to in re-entering, and then to the payment of the rent due by these presents, the balance (if any) to be paid over to Tenant, who shall remain liable for any deficiency: and the said Tenant hereby expressly waives the service of any notice in writing or intention to re-enter,

Please Pay the First Month's Rent When You Sign the Lease

In Witness Whereof, the said parties have hereunto, in duplicate, set their hands and seals the day and year mentioned,

Signed, sealed and delivered in the presence of

Essex Title Guaranty and Trust Co.
Agent
K. R. S. Hand, President.
Lew Buck, Secretary.
(seal) J. Robert Wylie.

In consideration of the letting of the premises herein described and for the sum of one dollar, I do hereby become surety for the punctual payment of the rent, and performance of the covenants in the within written agreement, mentioned to be paid and performed by
and if any default shall be made therein, I do hereby promise and agree to pay unto
such sum of money as will be sufficient to make up such deficiency and fully satisfy the conditions of the said agreement without requiring any notice of non-payment, or proof of demand being made
Given under my hand and seal this day of
Witness:

New Jersey Court of Errors and Appeals

No. 21. February Term, 1938.

Essex Title Guaranty and Trust Co., a New Jersey Corporation, Plaintiff-Respondent, *vs.* J. Robert Wylie and Dorothy R. Wylie, his wife, Defendants-Appellants.	Action at Law. On Appeal from New Jersey Supreme Court.

BRIEF OF DEFENDANTS-APPELLANTS.

This is an appeal by the defendants-appellants from a judgment of the Supreme Court, adjudging that the plaintiff, Essex Title Guaranty and Trust Co., a New Jersey corporation, recover of the defendants-appellants, possession of premises mentioned and described in the complaint. See S. C., pages 8-9.

Facts.

Plaintiff on or about August 4, 1937, instituted an action of ejectment in the New Jersey Supreme Court, Essex County Circuit, for the recovery of the first floor apartment and one car garage located at 32 St. Luke's Place, Montclair, N. J. The complaint is set forth S. C., pages 5, 6, 7. In said complaint, the plaintiff alleges that its right of possession to said premises had accrued on the first day of August, 1937. The answer of the defendant denies that allegation. The Answer is set out, S. C., page 7. Upon the filing of the An-

swer, plaintiff gave notice of a motion to strike out the Answer upon the ground that the same was sham and untrue. Said notice is set out, S. C., pages 7-8, and repeated again in the S. C., on page 10. The affidavit attached to said notice was the affidavit of one Clifford W. Buck who was secretary of the plaintiff corporation. Said affidavit is printed on pages 11 to 14 of the S. C. Attached to said moving papers was also an agreement by the former owner of said property, Francis A. Finnerty, assigning the rents to said premises to the plaintiff. Said agreement is dated January 30, 1934 and printed S. C., pages 14-15. On pages 16-17, S. C., is Schedule B which was attached to said motion papers on behalf of the plaintiff. On pages 17-18, S. C., is printed the affidavit of J. Robert Wylie, one of the defendants, disputing the claim of plaintiff that it was entitled to the possession of said premises on August 1, 1937. Page 20, S. C., we have printed a letter from Judge Porter who heard said motion granting plaintiff's motion and striking the answer. On pages 21-22-23-24 is the lease for the premises executed by the defendant, J. Robert Wylie.

The defendants claim that the judgment of the Supreme Court awarding possession of said premises to the plaintiff is erroneous and assigns six grounds of error which are set out, S. C., pages 2-3-4.

ARGUMENT.

Point I.

Under this Point, grounds of appeal 1, 2, 3 and 5 are argued.

1. The Supreme Court erroneously struck out the answer of defendants-appellants.

2. The Supreme Court erred in giving judgment in favor of the plaintiff and against the defendants.

3. The Supreme Court erred in entering judgment in favor of the plaintiff and against the defendants because it appeared by the affidavits read to the Supreme Court on behalf of the plaintiff and the defendants, that a disputed question of fact was involved that should have been determined by a jury.

5. The judgment of the Supreme Court is erroneous because the plaintiff at no time prior to the entering of said judgment submitted to said court any evidence that said plaintiff was entitled to a right of re-entry for nonpayment of rent by virtue of the agreement set forth in the affidavit of said plaintiff read to the court on the application for said judgment.

It is contended on behalf of the defendants-appellants that on the argument of said motion, the court erred in striking out the answer of the defendants in that it appears by the affidavits filed by the parties to the above entitled suit, that a disputed question of fact was involved.

Plaintiff-appellee in support of its motion, read to the court the affidavit of Clifford W. Buck, S. C., pages 11, 12, 13, 14. The material allegations of said affidavit are as follows: By paragraph 6, S. C., page 12, l. 30, the affidavit states that on January 30th, 1934 the plaintiff entered

into possession of the premises in question as mortgagee, at the time receiving a written assignment of the rents for said premises from the then owner of the legal title. The defendants occupied the first floor of said premises under a rental agreement with the said owner at the rate of $50.00 per month.

By paragraph 8, same recites that by virtue of said assignment, the plaintiff as agent for said property owner, executed a lease with the defendants which lease is dated October 19, 1934 for a period of one year from the first of October, 1934 at the yearly rental of $600.00. There is no copy of said lease attached to said affidavit but however, the copy in possession of the defendants is a lease from the plaintiff to J. Robert Wylie, and the wife who is also made a party defendant in this suit is not a party to said lease.

By paragraph 9 of said affidavit, plaintiff states that the defendant continued in possession of said premises after the expiration of said lease and continued to pay a rental of $50.00 a month to the plaintiff as agent for Dr. Finnerty.

By paragraph 10, plaintiff states that at the time of the institution of said suit which was August 4, 1937, there was due and owing to it $100.00 and that the defendants had been in default at least one month's rent at all times since March, 1935.

By paragraph 11 of said affidavit, all the payments made by the defendants to said plaintiff under the aforementioned lease and since the termination of said lease, are shown on a schedule attached to said affidavit and which is made part thereof. By paragraph 12 of said affidavit, the plaintiff says that it has demanded possession of said premises and that defendants have refused to vacate the same.

The defendants, in opposing said motion, read to the court the affidavit of J. Robert Wylie, S. C., pages 17-18-19. By his affidavit, said defendant alleges that the original lease for said premises was made by himself and the plaintiff and his wife was not a party to it. He also states that on August 4, 1937, which is the time said suit was instituted, there was only due and owing to the plaintiff, one month's rent to wit: for the month of August and that prior to said date, he had offered said rent to the plaintiff and the plaintiff had refused to accept the same. See paragraph 5 of said affidavit, S. C., page 18, l. 20. Said affidavit of said defendant in opposition to said motion also shows, paragraph 6, S. C., page 18, l. 30, that the defendant delivered to the plaintiff, his employer's check on or about the 21st day of August, 1937 in the sum of $50.00, same being the rent for the month of August, 1937, and by paragraph 7, it is shown that said plaintiff retained said check together with one given to it on September 14 for the September rent until September 20, 1937, S. C., pages, 18-19. And by paragraph 10 of said affidavit, S. C., page 19, ll. 20-30, same alleges that at the time of the institution of said suit there was nothing due and owing from him to the said plaintiff. Therefore, it is contended on behalf of defendants-appellants that the court below erred in striking out said defendants' answer as said court in assuming to determine whether the affidavits of the plaintiff or that of the defendants were true, it determined a disputed question of fact which under the laws and the constitution of this state, should have been determined by a jury. See the following cases:

Jasion v. *Preferred Accident Ins. Co. of New York,* 113 N. J. L. 108, same case, 172 A. 367;

Louis Kamm, Inc. v. *Flink,* 113 N. J. L. 582, 99 A. L. R. 1, same case, 175 A. 62;
Eday Fabrics v. *Seymour Dress Co.,* 116 N. J. L. 251, same case, 183 A. 167;
Goldin v. *Universal Indemnity Ins. Co.,* 117 N. J. L. 192, same case, 187 A. 163;
Solomon v. *Salins,* 108 N. J. L. 214, same case, 157 A. 383;
Diamond T. Motor Car Co. v. *Eucker,* 10 N. J. Misc. 814, same case, 160 A. 41;
Jaeger v. *Naef,* 112 N. J. L. 417, same case, 171 A. 166;
Central Bank & Trust Co. v. *Forest Hill Foundry Co.,* 15 N. J. Misc. 39, same case, 188 A. 501;
Barnes v. *P. & D. Mfg. Co.,* 117 N. J. L. 156, same case, 187 A. 186.

The lease between the plaintiff-appellee and the defendant-appellant, J. Robert Wylie, contains no stipulation that upon default by the tenant in the payment of rent, the landlord was entitled to the possession of said premises. The undisputed fact is that at the time of the institution of said suit, the relationship between the plaintiff and the defendant was that of landlord and tenant. This is shown by the plaintiff's own affidavit on this motion to the effect that the defendant, J. Robert Wylie, although originally a tenant of J. Francis Finnerty in October, 1934, attorned to the plaintiff and was recognized by the plaintiff as his landlord and by the further fact of his execution of a lease for said premises for one year at an agreed rental of $50.00 per month and by continuing in possession from the time of the expiration of said lease and paying the same rental as provided in said lease thereafter, thereby renewing said lease by operation of law for another year. This is

borne out by paragraphs 7, 8 and 9 of Mr. Buck's affidavit, S. C., pages 12 and 13. Therefore, there is no dispute that on August 4, 1937, which is the date of the institution of the above suit, the relationship of landlord and tenant existed between the plaintiff and the defendant, and if the plaintiff was entitled to possession of said premises by reason of a breach of a covenant of said lease in that the defendant had failed to pay his rent, any proceedings brought by the plaintiff to recover possession of said premises by reason of said breach are governed by the provisions of an act entitled:

> "An Act Concerning Landlord and Tenants" C. S. 1910-3065, sections 7 to 9 of said act;

or under the provisions of the District Court act, sections 107-108, revision of 1898 and the amendments thereto and supplements thereof.

Having come to the conclusion that the relationship between the parties in the above entitled suit was that of landlord and tenant and not of mortgagee and tenant of the mortgagors in possession, and if the proceedings are to be governed under the provisions of an act entitled "An Act Concerning Landlord and Tenant" C. S. 1910-3065, under sections 7 and 9 of said act, the landlord is only entitled to recover possession of said premises for non-payment of rent. Section 7, C. S., page 3068 prescribes the remedy available to said landlord in case of default but however, under section 9, the tenant has the right at any time before trial, to tender to said landlord the amount claimed by him together with the costs to date; or to deposit said sum with the Clerk of the Court.

In the case at bar therefore, when the court summarily struck out the answer prior to said

case being reached for trial, it again committed legal error and when the lower court refused to allow the tenant to pay the money in court which was claimed by said plaintiff, it again committed legal error. It is further contended on behalf of the appellant that under his lease, the defendant is not entitled to the remedy to recover possession of the premises in question as nowhere in said lease the landlord is given a right of reentry upon default in the payment of rent and in the absence of any such provision in the lease, ejectment does not lie.

This court stated such to be the law in *Ocean Grove Association* vs. *Sanders*, 68 N. J. L. 631, where the opinion of this court was delivered by Justice Van Sickle. On page 635 of said opinion, the court said:

> At common law, upon a breach of the condition for the payment of rent, the estate was not determined until the lessor actually entered. The reason was that, when an estate commenced by livery of seizin, it could not be determined before entry. Dumpor's Case, 4 Coke 120;
>
> Mathews *v.* Smart, 12 East 444; Tayl. Land. & T., 295, and notes.
>
> The seventh section of our Landlord and Tenant act is copied from section 2 of the English statute (4 Geo. II., ch. 28), and its purpose was to make unnecessary the actual reentry required by the common law.
>
> *Where there is a mere right of re-entry for non-payment of rent the seventh section of the statute applies, and to sustain ejectment there must be proof by the landlord that no sufficient distress could be found upon the demised premises.*
>
> The seventh section has no application to the case under consideration.
>
> The plaintiff's right of action rests, not upon the statute, but upon the express provisions of the contract with the defendant.

The deed, hereinbefore recited, demises the locus in quo to the defendant for ninety-nine years, for a yearly rental not exceding $42, payable at such time as required by the lessor, with a provision "that if the lessee shall persistently neglect or refuse to pay, it shall be lawful for the lessor to enter and hold possession and this lease shall thereupon be wholly at an end and the estate hereby granted shall cease and determine."

In this state it is well settled that, upon breach of such a covenant, the lessor, and not the lessee, has the option to declare that the term is ended. Smith *v.* Miller, 20 Vroom 521; Creveling *v.* West End Iron Co., 22 Id. 34.

These parties, in express terms, agreed that, upon persistent failure to pay the rent as required by said deed, the term thereby granted should be at an end, and the defendant's estate should cease and determine.

The plaintiff cannot be deprived of the benefits of the contract, nor can a term be added to it, making it ineffective, unless he proves that there is no sufficient distress.

His action is based upon the deed independent of the statute.

It is familiar law that whenever a tenant unlawfully holds over after his term is ended ejectment will lie.

His term may end by mere lapse of the time stated in the lease, or it may, by express agreement, terminate sooner, upon failure to do or not to do certain acts.

In Jones *v.* Carter, 15 Mees. & W. 718, Baron Park said that where the lease contained a stipulation that for any breach of covenant it should "determine and be utterly void," it was perfectly well settled that it shall be void at the option of the lessor, and that the bringing of an action of ejectment was an election to end the term.

In Den *v.* McShane, 1 Gr. 35, which is an action of ejectment, the Supreme Court, in the opinion delivered by Chief Justice Ewing, held that where a party is in possession of premises, under an agreement which contains this clause, "in case a failure is made in any

of the payments, previous to the deed being executed, the said Bray shall be privileged to take possession of the premises," he is not entitled to notice to quit or demand of possession; the lessor of the plaintiff is authorized, by the letter of the agreement, to take possession, and, having the right of entry, can maintain an action of ejectment, and no notice to quit or demand of possession is necessary.

The failure of payment, like the efflux of the fixed time of a lease, is sufficient notice.

In Den *v.* Post, 1 Dutcher 285, Chief Justice Green stated the rule as follows:

> "But if the assignment be a violation of the covenant of the tenant, the mere breach can give the landlord no right of re-entry, unless there be a stipulation in the lease that such breach of covenant shall work a forfeiture or determination of the tenant's interest. No ejectment can be maintained by the landlord for a mere breach of covenant not coupled with a proviso for re-entry. His only remedy would be an action for breach of covenant. Neither the lease nor the assignment is avoided by reason of the breach of covenant."

In order to justify the judgment for possession by the court below, it was the duty of the plaintiff in the case at bar to offer the necessary proof as required under section 7 of the Landlord and Tenant act, volume 3, C. S., page 3068, which requires as follows:

> 7. Ejectment for Non-Payment of Rent: Service of Summons: Judgment and Execution as Bar: Costs: Rights of Mortgagee of Lease.—That in all cases between landlord and tenant as often as it shall happen that *one year's rent shall be in arrear,* and the landlord or lessor to whom the same is due has right to re-enter the demised premises for the non-payment thereof, such landlord or lessor may, without any formal demand or

re-entry, *serve a summons in ejectment for the recovery of the demised premises,*

* * * * * * *

In the case at bar, the plaintiff-appellee on its motion for judgment to strike out the answer, failed to produce any proof before the court below to the effect that the defendants-appellants were in arrear of one year's rent as required by said statute. Therefore, the court had no jurisdiction to strike out the answer of defendants-appellants and allow the plaintiff-appellee to enter judgment for possession. The lease in the case at bar, S. C., pages 22 to 24, does not contain a provision that upon non-performance of a covenant by the lessee to pay rent, the terms shall be at an end. Therefore, when the court struck out the answer of the defendant and allowed plaintiffs to enter judgment for possession, it committed legal error and the judgment of the court below should be reversed.

Point II.

Ground of appeal #4 is argued under this Point.

4. The Supreme Court erred in entering judgment in favor of the plaintiff and against the defendants as said court deprived the defendants of the right of staying said suit upon the payment by the said defendants to the plaintiff, of the amount of rent claimed by the said plaintiff as provided by the provisions of Sections 7 and 9 of an Act entitled

"An Act Concerning Landlord and Tenants"

C. S. 1709-1910, Volume 3, pages 3068-3069.

Defendants-appellants at the time of the making of the motion by the plaintiff to strike out its answer, offered to deposit in court the amount

which was claimed due to the plaintiff upon the basis of the affidavit of said plaintiff. The lower court denied defendant-appellants that right holding that as there was no relationship of landlord and tenant between the parties to this suit, consequently, Sections 7 and 9 of the landlord and tenant act, volume 3, C. S. 1709-1910, pages 3068-3069, did not apply. See court's opinion, pages 20-21 of the state of the case. However, this is contrary to the proof before the court at the time of said motion. The lease between the parties to this suit, printed S. C., pages 22 to 24, certainly created a relationship of landlord and tenant between the parties to this suit and if the tenants (defendants in this suit) continued in possession of said premises and paid the same rent as provided under said lease, this constituted a renewal of said lease between the parties by operation of law. Therefore, on August 1, 1937, the relationship between the parties to this suit was that of landlord and tenant and when the court in disposing of the motion of the plaintiff-appellee whereby it struck out the answer of the defendant, committed legal error.

The order entered on October 6, 1937, S. C., page 8, directing that the answer of the defendants be stricken out and giving the plaintiff the right to proceed to judgment for want of an answer and the judgment which was entered on said order, S. C., page 9, is erroneous and contrary to law as said order and judgment are predicated upon an affidavit of the plaintiff which did not contain sufficient proof to justify said order. Therefore, the order printed S. C., page 8, striking out the defendants' answer is erroneous and contrary to law and the judgment entered upon the authority of said order, printed S. C., page 9, is illegal and should be reversed.

Conclusion.

The judgment under review in the case at bar, being of a summary nature, the proof required to sustain said judgment must be definite and positive.

Defendants are deprived of the right to cross examine the makers of said affidavit.

Defendants are deprived of their constitutional right of a trial by jury.

The material facts as stated in the affidavit of the plainitff on one hand and in the affidavits of the defendant, are conflicting.

The record also discloses that at the time of the making of said motion, there existed the relationship of landlord and tenant between the parties to this suit.

The plaintiff-appellee at the time of the making of said motion to strike out defendants' answer, had failed to produce before the court any proof that the defendants were in arrear one year's rent.

The court below erred when it directed that the defendants' answer be stricken out and that plaintiff proceed to judgment as the defendants at the time were entitled to deposit the amount claimed by the plaintiffs in court until a jury determined the actual amount which was due between the parties to said suit.

It is respectfully submitted that the judgment of the Supreme Court is illegal, contrary to law and should be reversed, with costs to defendants-appellants.

THOMAS BRUNETTO,
Attorney and Counsel of
Defendants-Appellants.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.
(414)

NEW JERSEY COURT OF ERRORS AND APPEALS

ESSEX TITLE GUARANTY AND TRUST CO., a New Jersey corporation, *Plaintiff-Respondent* *vs.* J. ROBERT WYLIE and DOROTHY R. WYLIE, his wife, *Defendants-Apellants*	*On Appeal.*

BRIEF OF PLAINTIFF-RESPONDENT

FACTS

This is an ejectment suit. Plaintiff holds a first mortgage on the premises. In January, 1934, plaintiff procured from Francis A. Finnerty, the owner of the premises, an assignment of rents (S. C. 14-15), giving plaintiff the right to enter into leases in his name or otherwise (S. C. 15 line 10).

Plaintiff, as agent, executed a written lease with defendant, J. Robert Wylie, running from October 1, 1934, to September 30, 1935. At the end of that term, the defendant held over and became a year-to-year tenant. On August 4, 1937, plaintiff filed this suit to eject the defendant on two grounds; first, non-payment of rent resulting in the exercise of the option to terminate the tenancy in accordance

with the terms of the lease, and, second, defaults in the mortgage which was prior to the lease, entitling the mortgagee to take possession and eject the tenants of the mortgagor. Defendants filed a general denial which on motion of the plaintiff was struck and summary judgment was entered in favor of the plaintiff.

SUMMARY OF ARGUMENT

For convenience the respondent's argument will be divided into three parts. Point One will be devoted to a reply to the brief of the appellants, Subdivision A dealing with the appellants' assertion that a question of fact is presented and Subdivision B dealing with the applicability of the Landlord and Tenants Act to this proceeding. Point Two will be devoted to the right of the plaintiff below to judgment on the ground that the tenancy terminated upon non-payment of rent at the option of the landlord. Point Three will be devoted to the right of the plaintiff below to judgment on the ground that as mortgagee, it could bring ejectment against a tenant of the mortgagor at any time after default in the mortgage.

ARGUMENT

POINT ONE

A. It will be noted that appellants rest their argument that a question of fact is presented by the affidavits submitted to the lower Court, upon the assertions made in the affidavit of J. Robert Wylie as to the amount of rent owed on August 4, 1937, when this suit was instituted. Paragraph 8 of this affidavit shows that defendant was under the impression that his rent was not payable until the end of every month. Although the lease, a copy of which is printed in the State of Case on page 21 et seq. provides (S. C. 22 lines 12 & 13) that the

rental is "payable monthly, in advance, on the first day of each month," the defendant in his affidavit, paragraph 8 (S. C. p. 19 line 10) says "there was no agreement between myself and the said plaintiff that the said rent was to be paid in advance on the first of every month." Please note that defendant did not nor does he now deny the lease. It was admitted that defendant was in possession as a holdover year-to-year tenant and renewed thereby the terms of the lease copied into the State of Case (35 Corpus Juris 1104, Sec. 300). Therefore defendant's assertion in his affidavit as to the amount of rent owed must be colored by his paragraph 8. Let us see what these assertions are:

In paragraph 4 he says his rent was paid up to and including the first day of August, 1937; in paragraph 5 he says he owed August rent; in paragraph 6 he says he delivered a check to plaintiff for August rent on August 21, 1937, after suit was started; in paragraph 9 he says he paid July rent in July; in paragraph 10 he says he owed no rent because August rent was not due until August 31, 1937. In other words, defendant admitted owing August rent but asserted it was not due until the end of the month. The Court below, in view of the express provision in the lease that rent was payable on the first day of each month in advance, found that the rent was in default on August 4, 1937, at the time of the institution of the suit, and that as to this there was no question of fact. It is to be noted in this connection that the affidavit of Clifford W. Buck submitted by the plaintiff in support of its motion to strike answer, claims a default of two months' rent and sets out fully every payment made for a period of over three years prior to the institution of the suit and the month to which the payment was applied on Schedule "B" (S. C. 16-17). This Schedule shows that defendant had been in arrears for over two years prior to the suit. It would have been an easy matter for the defendant

to point out any errors in plaintiff's assertions in the face of this explicit information, if errors existed. Defendant, however, referred in his affidavit (Paragraph 9) to a July check which he said was in addition to the payments listed in Schedule "B." But a July check was listed in Schedule "B" which was applied to June rent. However, even if this July check were in addition to the ones listed, there still remained default of one month's rent at the institution of the suit. Defendant's affidavit is a frank admission of this fact, if it is conceded that rent was payable on the first day of each month, in advance. Therefore, having decided that on the uncontraverted facts (omitting the conclusion of law in paragraphs 8 and 10) the rent was payable on the first day of the month, there is no disputed question of fact as to the non-payment of the August rent and the Supreme Court so found.

B. Appellants contend that there was no stipulation in the lease that upon default by the tenant in the payment of rent, the landlord was entitled to the possession of said premises. May we respectfully call the attention of the Court to the following provisions in the lease (S. C. p. 22 line 14) :

> "And the said party of the second part does hereby agree to pay to the said party of the first part, its heirs, assigns, agents or attorneys, the said yearly rental of six hundred dollars, at the time and in the manner aforesaid . . . "

Then follow some further covenants and then this provision (S. C. p. 23 line 15) :

> "And also that upon the default of the said party of the second part in the performance of the foregoing covenants and agreements or any of them, the estate hereby created in and to the said premises shall at the option of the party of the first part immediately therefrom cease and determine."

There can be no mistake as to the meaning of this provision. The parties have contracted for the termination of the term at the option of the lessor upon default in the payment of rent. Therefore there existed no landlord and tenant relationship on August 4, 1937, when this suit was instituted. The defendant, J. Robert Wylie, and all persons holding under him, including the other defendant, Dorothy R. Wylie, his wife, held over without consent and could be ejected. As the Court will note from a reading of counsel's liberal quotation from Justice Van Sickle's opinion in the case of Ocean Grove Association v. Sanders, 68 N. J. L. 631:

> "The plaintiff's right of action rests not upon the statute but upon the express provisions of the contract with the defendant . . .
>
> "The plaintiff cannot be deprived of the benefits of the contract nor can a term be added to it, making it ineffective unless he proves that there is no sufficient distress . . .
>
> "It is familiar law that whenever a tenant unlawfully holds over after his term is ended, ejectment will lie. His term may end by mere lapse of the time stated in the lease, or it may, by express agreement, terminate sooner, upon failure to do or not to do certain acts."

We do not quote further from appellants' excerpts from this case for fear of being repetitious. Apparently from the paragraph underlined in appellants' brief, appellants are unfamiliar with the difference between the right of re-entry for a non-payment of rent and an agreement in the lease that upon default the term shall end and the estate demised shall cease and terminate. A study of the cases will reveal that the right of re-entry alone does not contemplate a termination of the relationship of landlord and tenant, but merely that the landlord may, in the absence of a sufficient distress,

"enter and hold 'til he is satisfied of the issues and profits." Farley v. Craig, 15 N. J. L. 191. The statute, then, gave the landlord the right where one year's rent was in arrears and the landlord had merely the right of re-entry to bring an ejectment suit without the common law requirement of actual re-entry and the statute further gives the defendant six months within which to redeem the premises by the payment of all rent arrears and costs. This right of re-entry is to be distinguished from the right of the landlord to terminate the lease.

This is the very reason why the provision which is contained in the lease in this case is now inserted in the usual form of lease. That the relationship of landlord and tenant ceases at the election of the landlord under such a provision is universally held. West Shore Railroad Company v. Wenner, 70 N. J. L. 233. Ocean Grove Association v. Sanders, supra. Uppercu Cadillac Corporation v. 536 Broad Street Corporation, 106 N. J. E. 529. Jonas Glass Company v. Ross, 69 N. J. L. 157.

The provisions for summary dispossession of tenants in the District Court Act, contained also in the Landlord and Tenant Act, may be employed by landlords to recover either their rent or possession of the premises. In the instant case the plaintiff-respondent is interested only in regaining possession of the premises, and in the instant case the landlord has elected to terminate the estate created by the lease as provided therein, thereby terminating the relationship of landlord and tenant.

We have, therefore, shown that the ejectment provisions contained in the Landlord and Tenant Act have no bearing upon the present issue and that the plaintiff-respondent is entitled to possession as against the defendants, J. Robert Wylie and Dorothy R. Wylie, his wife, who holds under him, on the ground that the estate of the defendant as tenant has terminated.

POINT TWO

Plaintiff was entitled to summary judgment below on the ground that there was no relationship of landlord and tenant existing at the institution of the suit for the reason that there was a default in the terms of the written contract between the parties and, at the option of the plaintiff, the lease could be terminated, which option was exercised. Without repeating the arguments heretofore made under the previous point, may we invite the Court's attention to the provisions of the lease quoted above, providing for a termination upon default at the landlord's option, and also may we invite the Court's inspection of the case of Ocean Grove Association v. Sanders, 68 N. J. L. 631, cited by appellants and quoted at length in appellants' brief.

POINT THREE

The plaintiff below had another ground upon which it relied to eject the defendants. Plaintiff is the mortgagee of the demised premises and as such after default is entitled to eject the owner and any persons in possession of the premises holding under him. Del-New Company v. James, 111 N. J. L. 157; Hinck v. Cohen, 86 Id. 617; Mershon v. Castree, 57 Id. 484; Shields v. Lozear, 34 Id. 496; Sanderson v. Price, 21 Id. 637; Bermes v. Kelly, 108 N. J. Equity 289; Stewart v. Fairchild-Baldwin Co., 91 Id. 86; Paramount Building and Loan Association v. Sachs, 107 Id. 328. The plaintiff states in the affidavit of its officer that the lease was entered into by it as agent of the owner by virtue of the assignment of rents, a copy of which was attached to the affidavit (S. C. 14-15), and this statement is uncontradicted. Taking an assignment of rents from an owner who has been unsuccessful in managing the property so as to procure sufficient rentals to pay taxes and interest is a familiar practice among mortgagees. The assignment permits the mortgagee to collect the rents, dis-

possess the tenants, enter into new leases with new tenants and generally manage the property as agent of the owner, without impeding the mortgagee from asserting any of its legal rights as mortgagee against the occupants or owner of the property. In many cases this management by the mortgagee as assignee and agent of the owner results in obviating the necessity of foreclosure and the restoration of the property to the owner after curing existing defaults.

It therefore appears that the plaintiff below was entitled to eject the defendants because of plaintiff's right as mortgagee after default in the terms of the mortgage.

SUMMARY

Respondent submits that the Court below was entirely justified in striking out appellants' answer and entering judgment for plaintiff.

The facts necessary to support both of the grounds for ejectment described above are contained in the affidavit of Clifford W. Buck (S. C. pages 11-17) and the Schedules thereto annexed. These facts, in so far as they entitled plaintiff to judgment, were not contradicted by defendants.

Respondent submits that the judgment of the Supreme Court should be affirmed with costs.

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Of Counsel.