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Notice of Appeal.
(Filed May 8, 1944)

No. 72092.

SECOND JUDICIAL DISTRICT COURT OF
ESSEX COUNTY.

HENRY FROST and NELLIE FROST,
his wife,

Plaintiffs,

vs.

MORRIS ALPER,

Defendant.

Action at Law.

10

To: HENRY FROST and NELLIE FROST, or
J. EDWARD BENNETT, Attorney for HENRY
FROST and NELLIE FROST, 17 Academy Street,
Newark, New Jersey.

20

SIRS:

TAKE NOTICE that the defendant, MORRIS ALPER,
hereby appeals to the New Jersey Supreme
Court from the determination of the Court in
the above stated action, whereby judgment was
rendered in favor of the plaintiffs and against
the defendant.

30

JEROME ALPER AND ALPER,
Attorneys for Defendant.

Dated: May 6th, 1944.

Served May 8th, 1944.

40

Specification of Determinations.

(Filed April 16th, 1945)

NEW JERSEY SUPREME COURT.

10 HENRY FROST and NELLIE FROST, his wife,	<i>Plaintiffs-Appellees,</i>	On Appeal from the Irvington District Court, Docket No. 72092.
	vs.	
	MORRIS ALPER, <i>Defendant-Appellant.</i>	

20 The determinations or directions of the Second
Judicial District Court of the County of Essex,
with respect to which appellant is dissatisfied in
point of law, are as follows:

30 1. The trial court lacked jurisdiction, as the
amount in dispute exceeded the sum of \$500.00,
exclusive of costs, as the State of Demand de-
manded \$500.00, together with attorney's fees
and costs, as allowed under the Federal Emer-
gency Price Control Act and to be fixed by the
Court.

2. The trial court erred in its refusal to grant
the defendant a Non-suit, and upon the failure of
the plaintiffs to comply with their Stipulation
dated January 14, 1944, for the reason that the
trial by jury reserved by the defendant was
waived, upon the condition that the plaintiffs
would testify. Plaintiffs did fail to testify in
accordance with the Stipulation, and, by doing

Specification of Determinations.

so, deprived the defendant of his constitutional right of trial by jury.

3. The trial court erred in denying the defendant's application that the plaintiffs' action be suppressed for their failure to answer the Interrogatories. 10

4. The trial court erred in denying the defendant's right to the answers to the Interrogatories theretofore served upon the plaintiffs, for the ground that the answers did not constitute a defense to plaintiffs' action.

5. The trial court erred in assuming jurisdiction to determine the maximum legal rental of the premises in question as of March 1, 1942, in violation of the provisions of the Federal Emergency Price Control Act. 20

6. The trial court erred in denying defendant's application to find a judgment for the defendant, by reason of Section 925 (e) of the Federal Emergency Price Control Act, which exonerates the defendant from liability under the Act.

7. The trial court erred in its determination, by fixing the maximum legal rental as of March 1, 1942, contrary to the provisions of the Federal Emergency Price Control Act. 30

8. The trial court erred in rendering a judgment to the plaintiffs instead of the defendant, upon the defenses shown; that the plaintiffs failed to make a demand for the return of the alleged overcharge; that they failed to call for a hearing 40

Specification of Determinations.

10 before the Office of Price Administration, to determine the maximum legal rental as of March 1, 1942; that they continued to pay, without protest, such alleged overcharge and failed to do any act to mitigate the damages prior to the commencement of their action; that they did entrap the defendant in paying the alleged overcharge without any protestation or notice to the defendant.

9. The trial court erred in denying the defendant's motion for a Non-suit, in that the plaintiffs failed to carry the burden of proof in their cause of action.

20 10. The trial court erred in entering judgment for the plaintiffs for \$500.00, besides costs, which judgment is contrary to the provisions of the Federal Emergency Price Control Act.

30 11. The trial court erred in its determination in entering judgment in favor of the plaintiffs and against the defendant for \$500.00, besides costs, as contrary to the provisions of the Federal Emergency Price Control Act (Section 205-e), in that if the plaintiffs are entitled to recovery, that the recovery cannot exceed three times the alleged overcharge of \$20.00 as shown in the State of Demand, or \$50.00, whichever sum is greater, together with reasonable attorney's fees and costs.

40 12. The trial court erred in its refusal to consider the motion for a new trial, on the grounds that such newly discovered evidence did not constitute a defense to the plaintiffs' action com-

Summons.

menced under the Federal Emergency Price Control Act.

JEROME ALPER & ALPER,
Attorneys for Defendant-Appellant.

10

Summons.

(Filed Sept. 28, 1943)

THE STATE OF NEW JERSEY
ESSEX COUNTY, ss.:

To any Constable of said County, or to the
Sergeant-at-Arms of the District Court of
the Second Judicial District of the County
of Essex. 20

SUMMON

MORRIS ALPER

to appear before the DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE COUNTY OF ESSEX to be held at 1068 Clinton Avenue, second floor, in the Town of Irvington, on Tuesday, Oct. 5, 1943, at TEN o'clock in the forenoon, to answer unto 30

HENRY FROST and NELLIE FROST, his wife,

in an action at law wherein the Plaintiff demands from the Defendant Five Hundred Dollars. Hereof fail not.

40

State of Demand.

WITNESS F. D. MASUCCI, Esq., Judge of said Court, at Irvington, as aforesaid, Sept. 28, 1943.

J. EDWARD DE LANCY, *Clerk.*

By M. C. WOLCOTT,

1st Asst. (*Acting*) *Clerk.*

10

(Seal)

State of Demand.

(Filed Sept. 28, 1943)

SECOND JUDICIAL DISTRICT COURT OF
ESSEX COUNTY.

20

HENRY FROST and NELLIE FROST,
his wife,

Plaintiffs,

vs.

MORRIS ALPER,

Defendant.

Action at Law.

30

Plaintiffs, of the City of Newark, County of Essex and State of New Jersey, say that:

1. During the year of 1942 and up to the present time and on various dates set forth in this state of demand, and on November 1st, 1942, the defendant herein was the owner and landlord of certain premises more particularly described as

40

State of Demand.

155-7 Peshine Avenue in the City of Newark,
New Jersey.

2. On the aforesaid date and subsequent there-
to, and up to the present time, the plaintiffs were
tenants in the said premises and as such occupied
an apartment known and designated as "Apart- 10
ment North on the third floor," the plaintiffs
having moved into said apartment on November
1st, 1942, after entering into a lease for said
apartment, which lease provided for rent to be
paid for said rooms in the sum of \$28.00 per
month and same has been paid and still is being
paid by the plaintiffs to the defendant and or its
agent or servant.

3. The 77th Congress of the United States of 20
America at its 2nd Session Enacted Public Law
No. 421 Chapter 26 which was approved on Jan-
uary 30th, 1942, and may be cited as the "Emer-
gency Price Control Act of 1942," which act pro-
vided among other things that the administrator
therein named may, from time to time, issue such
regulations and orders as he may deem necessary
or proper in order to carry out the purposes and
provisions of the Act, and more particularly may 30
by order or regulation establish maximum rents
for any defense area housing accommodations
within a particular defense rental area as in his
judgment will be generally fair and equitable
and will effectuate the purposes of the Act.

4. The said "Emergency Price Control Act of
1942" also contained the following provision:

State of Demand.

10 "If any person selling a commodity violates a regulation order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course or trade of business, may bring an action either for fifty (\$50.00) dollars or for treble the amount by which the consideration exceeded the applicable maximum price, which ever is the greater, plus reasonable attorney's fees and costs as determined by the Court. For the purpose of this Section, the payment or receipt of rent for defense area housing accommodations shall be deemed the buying or selling of a commodity as the case may be."

20

5. Under and by virtue of the power and authority given him under the "Emergency Price Control Act of 1942" the said Administrator did on the 28th day of April, 1942, establish the "Northeastern New Jersey Defense Rental Area," consisting of the County of Essex among others, and did on June 30th, 1942, issue "Maximum Rent Regulation No. 28 for Housing accommodations Other Than Hotels and Rooming Houses," for the said rental area which provided that maximum rents for housing accommodations rented on March 1, 1942, shall be the rent for such accommodations on that date.

30

6. The rent on March 1st, 1942, for the housing accommodations designated as "apartment north on the third floor" of premises known as No. 155-7 Peshine Ave., Newark, New Jersey, occupied by the plaintiffs as the tenants since No-

40

State of Demand.

vember 1st, 1942, was \$26.00 per month and specifically on November 1st, 1942, the defendant did demand and receive from the plaintiff the sum of \$28.00 per month as rent for said month of November, 1942, as provided for in the lease entered into between the parties. All of which was within the knowledge of the defendant and or his servants and agents. 10

7. The defendant by his agents or servants and or duly authorized representatives knew of the rent being charged for this same apartment on March 1st, 1942, and knew that same was the sum of \$26.00 per month but disregarded and violated the provisions of the aforesaid Act and the regulations thereunder by charging \$28.00 per month for the said month of November, 1942, for the premises in question which was paid by the plaintiffs. 20

Wherefore, judgment will be claimed by the Plaintiffs and against the defendant in the sum of fifty (\$50) Dollars, plus attorneys' fees and costs to be fixed on this Count.

SECOND COUNT.

1. The plaintiffs repeat the allegations set forth in paragraphs 1, 2, 3, 4 and 5 of the 1st Count and makes them a part hereof. 30

2. The rent on March 1st, 1942, for the housing accommodations referred to herein and occupied by the plaintiffs as the tenants since November 1st, 1942, was \$26.00 and specifically thereafter the defendant did demand from and receive from 40

State of Demand.

the plaintiffs the sum of \$28.00 as rent for the month of December, 1942, as provided for in the lease entered into between the parties, all of which was within the knowledge of the defendant and or his agents or servants.

10

3. The defendant by his agents or servants and or duly authorized representatives knew of the rent being charged for this same apartment on March 1st, 1942, and knew that same was \$26.00 per month but disregarded and violated the provisions of the aforesaid act and the regulations thereunder by charging \$28.00 per month for the said month of December for the premises referred to herein.

20

Wherefore judgment will be claimed by the plaintiffs and against the defendant in the sum of fifty (\$50) dollars, plus attorneys' fees and costs to be fixed on this Court.

THIRD COUNT.

30

1. The plaintiffs repeat the allegations set forth in paragraphs 1, 2, 3, 4 and 5 of the 1st Count and make them a part hereof.

40

2. The rent on March 1st, 1942, for the housing accommodations referred to herein and occupied by the plaintiffs as the tenants since November 1st, 1942, was \$26.00 and specifically thereafter the defendant did demand from the plaintiffs the sum of \$28.00 as rent for the month of January, 1943, as provided for in the lease entered into between the parties, all of which was within the knowledge of the defendant and or his agents or servants.

State of Demand.

3. The defendant by his agents or servants and or duly authorized representatives knew of the rent being charged for this same apartment on March 1st, 1942, and knew that same was \$26.00 per month but disregarded and violated the provision of the aforesaid act and the regulations thereunder by charging \$28.00 per month for the said month of January, 1943, for the premises referred to herein. 10

Wherefore judgment will be claimed by the plaintiffs and against the defendant in the sum of fifty (\$50) dollars, plus attorneys' fees and costs to be fixed, on this Count.

FOURTH COUNT.

20

1. The plaintiffs repeat the allegations set forth in paragraphs 1, 2, 3, 4 and 5 of the 1st Count and make them a part hereof.

2. The rent on March 1st, 1942, for the housing accommodations referred to herein and occupied by the plaintiffs as the tenants since November 1st, 1942, and \$26.00 and specifically thereafter the defendant did demand from and receive from the plaintiffs, the sum of \$28.00 as rent for the month of February, 1943, as provided for in the lease entered into between the parties all of which was within the knowledge of the said defendant and or his agents or servants. 30

3. The defendant by its agents or servants and or duly authorized representatives knew of the rent being charged for this same apartment on March 1, 1942, and knew that same was \$26.00 per month but disregarded and violated the pro- 40

State of Demand.

visions of the aforesaid act and regulations thereunder by charging \$28.00 per month for the said month of February, 1943, for the premises referred to herein.

- 10 Wherefore judgment will be claimed by the plaintiffs and against the defendant in the sum of fifty (\$50.00) dollars, plus attorneys' fees and costs to be fixed on this Count.

FIFTH COUNT.

1. The plaintiffs repeat the allegations set forth in paragraphs 1, 2, 3, 4 and 5 of the 1st Count and make them a part hereof.
- 20 2. The rent on March 1st, 1942, for the housing accommodations referred to herein and occupied by the plaintiffs as the tenants since November 1st, 1942, was \$26.00 and specifically thereafter the defendant did demand from and receive from the plaintiffs the sum of \$28.00 as rent for the month of March, 1943, as provided for in the lease entered into between the parties, all of which was within the knowledge of the defendant and or his agents or servants.
- 30 3. The defendant by his agents or servants and or duly authorized representatives knew of the rent being charged for this same apartment on March 1st, 1942, and knew that same was \$26.00 per month but disregarded and violated the provisions of the aforesaid act and the regulations thereunder by charging \$28.00 per month for the said month of March, 1943, for the premises referred to herein.
- 40

State of Demand.

Wherefore judgment will be claimed by the plaintiffs and against the defendant in the sum of fifty dollars (\$50), plus attorneys' fees and costs to be fixed on this Count.

SIXTH COUNT.

10

1. The plaintiffs repeat the allegations set forth in paragraphs 1, 2, 3, 4 and 5 of the 1st Count and make them a part hereof.

2. The rent on March 1st, 1942, for the housing accommodations referred to herein and occupied by the plaintiffs as the tenants since November 1, 1942, was \$26.00 and specifically thereafter the defendant did demand from and receive from the plaintiffs the sum of \$28.00 as rent for the month of April, 1943, as provided for in the lease entered into between the parties all of which was within the knowledge of the defendant and or his agents or servants.

20

3. The defendant by his agents or servants and or duly authorized representatives knew of the rent being charged for this same apartment on March 1st, 1942, and knew that same was \$26.00 per month but disregarded and violated the provisions of the aforesaid act and the regulations thereunder by charging \$28.00 per month for the said month of April, 1943, for the premises referred to herein.

30

Wherefore judgment will be claimed by the plaintiffs and against the defendant in the sum of fifty (\$50) Dollars plus attorneys' fees and costs to be fixed on this Count.

40

State of Demand.

SEVENTH COUNT.

1. The plaintiffs repeat the allegations set forth in paragraphs 1, 2, 3, 4 and 5 of the 1st Count and make them a part hereof.

10

2. The rent on March 1st, 1942, for the housing accommodations referred to herein and occupied by the plaintiffs as the tenants since November 1st, 1942, was \$26.00 and specifically thereafter the defendant did demand from and receive from the plaintiffs the sum of \$28.00 as rent for the month of May, 1943, as provided for in the lease entered into between the parties, all of which was within the knowledge of the defendant and or his agents or servants.

20

3. The defendant by his agents or servants and or duly authorized representatives knew of the rent being charged for this same apartment on March 1st, 1942, and knew that same was \$26.00 per month but disregarded and violated the provisions of the aforesaid act and the regulations thereunder by charging \$28.00 per month for the said month of May, 1943, for the apartment referred to herein.

30

Wherefore judgment will be claimed by the plaintiffs and against the defendant in the sum of fifty (\$50) dollars, plus attorneys' fees and costs to be fixed on this Count.

EIGHTH COUNT.

1. The plaintiffs repeat the allegations set forth in paragraphs 1, 2, 3, 4 and 5 of the 1st Count and make them a part hereof.

40

State of Demand.

2. The rent on March 1st, 1942, for the housing accommodations, referred to herein and occupied by the plaintiffs as the tenants since November 1, 1942, was \$26.00 and specifically thereafter the defendant did demand from and receive from the plaintiffs the sum of \$28.00 as rent for the month of June, 1943, as provided for in the lease entered into between the parties, all of which was within the knowledge of the defendant and or his agents or servants. 10

3. The defendant by his agents or servants and or duly authorized representatives knew of the rent being charged for this same apartment on March 1st, 1942, and knew that same was \$26.00 per month but disregarded and violated the provisions of the aforesaid act and the regulations thereunder by charging \$28.00 per month for the said month of June, 1943, for the apartment referred to herein. 20

Wherefore judgment will be claimed by the plaintiffs and against the defendant in the sum of fifty (\$50) dollars, plus attorneys' fees and costs to be fixed on this Count. 30

NINTH COUNT.

1. The plaintiffs repeat the allegations set forth in paragraphs 1, 2, 3, 4 and 5 of the 1st Count and make them a part hereof.

2. The rent on March 1st, 1942, for the housing accommodations referred to herein and occupied by the plaintiffs as the tenants since November 1st, 1942, was \$26.00 and specifically thereafter 40

State of Demand.

the defendant did demand from and receive from the plaintiffs the sum of \$28.00 as rent for the month of July, 1943, all of which was within the knowledge of the defendant and or his agents or servants.

10

3. The defendant by his agents or servants and or duly authorized representatives knew of the rent being charged for this same apartment on March 1st, 1942, and knew that same was \$26.00 per month but disregarded and violated the provisions of the aforesaid act and the regulations thereunder by charging \$28.00 per month for the said month of July, 1943, for the apartment referred to herein.

20

Wherefore judgment will be claimed by the plaintiffs and against the defendant in the sum of fifty (\$50) dollars, plus attorneys' fees and costs to be fixed on this Court.

TENTH COUNT.

30

1. The plaintiffs repeat the allegations set forth in paragraphs 1, 2, 3, 4 and 5 of the 1st Count and make them a part hereof.

40

2. The rent on March 1st, 1942, for the housing accommodations referred to herein and occupied by the plaintiffs as the tenants since November 1, 1942, was \$26.00 and specifically thereafter the defendant did demand from and receive from the plaintiffs the sum of \$28.00 as rent for the month of August, 1943, all of which was within the knowledge of the defendant and or his agents or servants.

State of Demand.

3. The defendant by his agents or servants and or duly authorized representatives knew of the rent being charged for this same apartment on March 1st, 1942, and knew that same was \$26.00 per month but disregarded and violated the provisions of the aforesaid act and the regulations thereunder by charging \$28.00 per month for the said month of August, 1943, for the apartment referred to herein. 10

Wherefore judgment will be claimed by the plaintiffs and against the defendant in the sum of fifty (\$50) dollars, plus attorneys' fees and costs to be fixed on this Count.

J. EDWARD BENNETT, 20
Attorney for Plaintiffs.

30

40

Demand for Trial by Jury.

(Filed Oct. 14, 1943)

No. 72092.

SECOND JUDICIAL DISTRICT COURT OF
ESSEX COUNTY.

10

HENRY FROST and NELLIE FROST,
his wife,

Plaintiffs,

VS.

MORRIS ALPER,

Defendant.

Action at Law.

20

To: J. EDWARD DE LANCEY, Esq., Clerk of the
Second Judicial District Court of Essex
County, 1068 Clinton Ave., Irvington, New
Jersey.

SIR:

30 PLEASE TAKE NOTICE that the defendant herein
hereby demands trial by jury, and herewith ten-
ders the sum of \$14.00 for jury fees.

JEROME ALPER AND ALPER,
Attorneys for Defendant.

Dated: October 13th, 1943.

40

Notice to Answer Interrogatories.

(Filed Nov. 24, 1943)

No. 72092.

SECOND JUDICIAL DISTRICT COURT OF
ESSEX COUNTY.

10

HENRY FROST and NELLIE FROST,
his wife,

Plaintiffs,

VS.

Action at Law.

MORRIS ALPER,

Defendant.

20

To: J. EDWARD BENNETT, Esq., Attorney for
Plaintiffs,
17 Academy St., Newark, New Jersey.

SIR:

TAKE NOTICE that the defendant demands of
the plaintiffs herein written answers, under oath,
to the attached interrogatories within ten days
of the service hereof; 30

AND FURTHER TAKE NOTICE that in the event the
said answers are not furnished within said time,
the defendant shall appear before the Honorable
F. D. MASUCCI, Judge of the above entitled Court,
located at 1068 Clinton Ave., Irvington, New
Jersey, on the 26th day of November, 1943, at
o'clock in the forenoon, Eastern War Time, or
as soon thereafter as the matter can be heard, 40

Demand for Interrogatories.

for an Order to suppress the plaintiffs' action,
or for such other orders that may be necessary
and proper, according to the statute in such case
made and provided.

10 JEROME ALPER AND ALPER,
Attorneys for Defendant.

Dated: November 12th, 1943.

Demand for Interrogatories.

No. 72092.

SECOND JUDICIAL DISTRICT COURT OF
ESSEX COUNTY.

20

HENRY FROST and NELLIE FROST,
his wife,

Plaintiffs,

vs.

MORRIS ALPER,

Defendant.

Action at Law.

30

To: HENRY FROST and NELLIE FROST, Plaintiffs,
and/or

J. EDWARD BENNETT, Attorney for Plaintiffs,
17 Academy St., Newark, New Jersey.

SIR AND MADAM:

40

TAKE NOTICE that the defendant demands of the

Demand for Interrogatories.

plaintiffs, within ten days, under oath, written answers to the following interrogatories:

1. Q. Did the plaintiffs make a demand for payment of the alleged claim, as stated in the State of Demand filed herein?

10

A.

2. Q. Who of the plaintiffs made such demand?

A.

3. Q. Where was such demand made? Give name of street, number, city, and state, and if in a building, in what part of such building.

20

A.

4. Q. Upon whom was such demand made?

A.

5. Q. On what date and time of the day was such demand made?

A.

30

6. Q. Was such demand made in writing? If so, attach a copy of the writing.

A.

7. Q. Was such demand made orally?

A.

40

Stipulation.

8. Q. If such demand was made orally, what words were used and said by such persons and to such persons heretofore stated, giving as full as possible all the words that were said, the amount asked, and anything else that was mentioned in said demand?

A.

JEROME ALPER AND ALPER,
Attorneys for Defendant.

Dated: November 12, 1943.

Stipulation.

(Submitted Jan. 14, 1944)

No. 72092.

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE COUNTY OF ESSEX.

30	HENRY FROST and NELLIE FROST, his wife,	<i>Plaintiffs,</i>	} Action at Law. On Contract.
	vs.		
	MORRIS ALPER, <i>Defendant.</i>		

40 IT IS STIPULATED, by and between the parties hereto, by their respective attorneys, as follows:

Stipulation.

1. The above case is to be tried without a jury.
2. This case is to be set down for trial peremptorily on January 21, 1944, at 10 A. M., to be tried before the Honorable Ferdinand D. Masucci.
3. In behalf of the plaintiffs' proof as to the ceiling rent of the premises in question as of March 1, 1942, the oral testimony of MARGARET BRADY will be offered, together with such receipts given by the landlord or his agent to MARGARET BRADY, and the records of the Office of Price Administration will be offered in behalf of the plaintiffs as part of the evidence seeking to establish the ceiling rent of the premises in question as of March 1, 1942, and the plaintiffs will also testify and produce their lease and receipts.
4. Plaintiffs will consent that the attached statement may be used by the defendant as being that which Harold Alper would testify to at the taking of the Depositions under the Commission heretofore entered, in New Haven, Connecticut, and may be entered on behalf of the defendant, in lieu of Harold Alper's appearance.
5. Plaintiffs will consent that the statement hereto attached of MORRIS ALPER would be his testimony, if it was taken on Depositions *de bene esse*, on behalf of the defendant.

J. EDWARD BENNETT,
Attorney for Plaintiffs.

JEROME ALPER AND ALPER,
Attorneys for Defendant.

Dated: January 14, 1944.

Deposition of Morris Alper.

MORRIS ALPER will testify as follows:

10 My name is MORRIS ALPER. I reside at 36 Van Ness Place, Newark, New Jersey. I am over 75 years of age; an invalid, and am presently confined to my home in a wheelchair and unable to leave my home to appear in court to testify.

I am the owner of the premises in question. Mr. and Mrs. Frost have a written lease, under which they pay \$28.00 per month. All rent is paid on the first of each and every month. I have not at any time received any notice from Mr. and Mrs. Frost, prior to the institution of this suit, for their alleged claim for which this suit was brought.

20 My daughter, Theresa, and my son, Harold, live with me. Harold is now in active military service and is presently located in New Haven, Connecticut. I live alone with my daughter since Harold has been called to active military service, in the month of April, 1943.

30 In September, 1940, MARGARET BRADY entered into an agreement with me for the rental of this flat, which is the subject of this suit. I told her the rent was \$28.00 per month. She stated that she was a widow, living with her daughter, then 10 years old, and her son, then 19 years old; that she couldn't pay so much because she was on relief. She offered to pay \$26.00 per month, and the difference of \$2.00 should be allowed for any services which she was able to render, or have her son or the gentleman who was with her do, in and about the property, such as small work as fixing electrical sockets, broken glass or such

Deposition of Morris Alper.

odd jobs which are necessary to be done in and about the house to which she was moving. I told her that since I was not able to get around, I would be willing to rent it to her under these arrangements. She agreed to this, and I rented the flat to her on a month to month basis, commencing October 1, 1940, and she was to do these jobs in and about the house when called upon, or by her son or the gentleman who was with her. 10

Mrs. Brady moved in about October 1, 1940, and moved out on June 1, 1942, at which time I learned that she had moved into one of the new housing projects in Newark, New Jersey. Mrs. Brady paid \$26.00 each and every month and also did whatever work was necessary, when called upon to do so, for which I did not pay her or her son, nor their mutual friend, who also agreed to do such work when her son, Gerald, was not available. This continued until sometime in May, 1942, when I was informed that their mutual friend was not able to do any work, because he did not come around to see the family and that her son was also working and she did not feel that he would have the time to do it. I then directed that on her receipt her rent would be \$28.00. On May 1, 1942, she paid \$28.00 and moved out at the end of the month. 20 30

With the present tenants I entered into a written lease. Harold Alper drew the lease and when they came to rent the place I told them that the former tenant had moved out about June 1, 1942. Since they moved out and up to October, 1942, the place was vacant and was in the process of painting and redecorating, which I had done. I told them that the rent would be the same as what Mrs. Brady was paying, and the lease pro- 40

Deposition of Harold Alper.

vided for the same rental. No services were required nor asked of the Frost family, nor did they perform any. At no time has Mr. Frost or his wife demanded of me, or asked for the payment of the alleged claim for which they
10 bring suit, nor did they ever complain that they were overcharged in the rental of the premises compared to what it was as of March 1, 1942.

Deposition of Harold Alper.

My name is HAROLD ALPER. I reside at 36 Van Ness Place, Newark, New Jersey, with my father, the defendant in this case. Presently I am in the
20 United States Armed Forces and stationed at New Haven, Connecticut.

In the month of September, 1940, MRS. BRADY came to 36 Van Ness Place, Newark, New Jersey, with a gentleman, and wanted to see the 6 room apartment which is the subject matter of this suit. My sister, THERESA ALPER, took them down to 155 Peshine Avenue, Newark, New Jersey, and she then returned with them, and they talked
30 with my father in my presence.

MRS. BRADY stated she liked the apartment and wanted to rent it. My father told them the rent was \$28.00 per month. MRS. BRADY stated she liked the place, and has been on relief and could not pay so much. She also stated she had a daughter who was then about 10 years old, and a son, GERARD HAWKINS, 19 years old; and that she was a widow, and the gentleman who was with her was an old friend of the family. She
40 further stated they would be willing to do every-

Deposition of Harold Alper.

thing they could in helping my father, in making small minor repairs that may be required in and about the premises, because my father was quite aged and could not get around to this house; and if he would consider this, there should be some concession in the amount to be paid.

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My father then stated that since he was quite advanced in years and could not get around to this house, he would rent the flat to her, if she would pay \$26.00 a month, and also render these small services when they are required during the month. MRS. BRADY said she was willing to have her son do that; and the gentleman who was with her and said he would also help MRS. BRADY, and if her son was not able to do such minor repairs, such as fixing washers on faucets, electrical sockets that would go bad, or other little jobbing work which is usually found necessary to be done around a 6 family house, fixing of window frames and so forth.

20

My father then stated he would rent the apartment to her under these arrangements, since she agreed to it, and that the rent would commence October 1st, 1940. MRS. BRADY moved in with her two children on October 1st, 1940, into this apartment, and stayed there until about June 1st, 1942.

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Whenever my father learned of any small repairs and minor work to be done, he would convey such instructions to MRS. BRADY, and the work was done by her son, or by this gentleman friend of hers. I occasionally called at the Peshine Avenue, Newark, New Jersey, house, and I noticed that such work when requested to be done, was performed by her son, GERARD, or this gentleman friend of hers, and was done well and with-

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Deposition of Harold Alper.

out any complaints. No moneys were ever paid to either one of them for such work.

10 Mrs. BRADY was always willing to help and do whatever was asked of her. She paid the sum of \$26.00 every month, on the first day of each and every month, until sometime in 1942, in addition to the above services that were rendered.

 Sometime later Mrs. BRADY told me that the gentleman was no longer able to do this work, and that her son, GERARD, had a job working at the WESTON ELECTRICAL INSTRUMENT CORP., and could not give any of his time to do these minor repairs, and that I should tell my father accordingly. I informed my father of this, and told him that he could not expect any more work to
20 be done by the BRADYS. This was sometime in the month of April, 1942.

 On May 1st, 1942, Mrs. BRADY paid the full rent of \$28.00 in cash for the premises, and no further services were required of her, nor did she render any services in making minor repairs, etc., as she had done in the past.

 I later learned that Mrs. BRADY moved to one of the Newark Housing Projects located on Hawkins Street, Newark, New Jersey, about June
30 1st, 1942.

 After I learned of the suit brought by HENRY FROST and his wife, I went to see Mrs. BRADY. This took place on Saturday, November 13th, 1943, when I was on a furlough. I spoke to Mrs. BRADY that evening. I asked her whether she knew anything of the suit brought by HENRY FROST and his wife, and she replied saying she did. She said to me that HENRY FROST saw her and had a long conversation with her, and took

Deposition of Harold Alper.

her rent receipts covering the premises, some for \$26.00, and one for \$28.00.

She also said the reason she paid \$28.00 was because my sister told her that since she could not do the odd jobs in and about the place, that her rent would be \$28.00 in cash, each and every month. 10

She also told me that she made application for new accommodations in the housing unit, where she is now living, under a lease signed by her son.

MRS. BRADY also said that she felt very sorry that a suit was brought against my father, as she liked him very much; and that she had taken a dislike against my sister, and for that reason she would want to do anything she could to harm her. She also said, if necessary, she would take sides with HENRY FROST, because if he was successful, she would get at least \$50.00 and possibly more. I told her that if she has to go to Court the only thing we would want her to do is to tell the truth, to which she replied we will see to that later. 20

MRS. BRADY said that her son is also in active military service, and is somewhere in Africa.

MRS. BRADY also told me that her son never got a cent either from my father or from my sister for any of the things he did around the place. There was one particular job he did in the cellar, when a trap was left open for the water, and it got clogged up. He cleaned it out and became so dirty in doing so, that she felt from that time on she would not let him do anything more. From that time on she paid \$28.00 a month. 30

The rent on March 1st, 1942, was \$28.00 a 40

Deposition of Harold Alper.

month, and MRS. BRADY paid \$26.00, in cash, and also rendered services which was valued at \$2.00 per month, which made up the difference. At the time when she moved out and when she did not perform any services, she paid \$28.00 per month, in cash.

I know HENRY FROST and his wife, who are the present tenants. I drew up the lease under which they are in possession. At no time did Mr. and Mrs. HENRY FROST ever complain or state to me that they have been overcharged, or were paying more than what the ceiling rent was for the same premises on March 1st, 1942. At the time the lease was prepared, HENRY FROST was told that MRS. BRADY's rent was \$28.00 a month, and since she moved out my father had renovated, painted and cleaned up the place, which was done before they moved in on November 1st, 1942; and that the rent, as set forth in the lease, was not more than MRS. BRADY, the former tenant, was paying.

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Judgment Record.

Case No. 72092.

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE COUNTY OF ESSEX.

HENRY FROST and NELLIE FROST,
his wife,

Plaintiff,

vs.

MORRIS ALPER,
36 Van Ness Pl., Nwk.,

Defendant.

10

Action at Law.

On Contract.

Plaintiff's Cost

Defendant's Cost

20

Summons 2.10

Mileage .24

Listing 1.50

Attorney's Fees 25.00

28.84

Order 1.00

Order 1.00

Venire 4.75

Order 1.00

Jury 1.75

Bond 1.00

Certified C. 4.00

30

J. EDWARD BENNETT, Plaintiff's Attorney.

JEROME ALPER & ALPER, Defendant's Attorney.

ML 40

Judgment Record.

Sept 28 1943 A summons was issued returnable:
Tuesday Oct 5 1943.

The demand was \$500.00.

10 The summons was returned as follows: The
said defendant . . . not being found I served
the within Summons Sept. 29, 1943 by leav-
ing a copy thereof at his dwelling house or
place of abode with a member of his family
above the age of fourteen years, informing
her of its contents.

FRED J. ANGSTMAN,
Sergeant-at-Arms.

Oct 4 1943 A State of Demand was filed.

20 Oct 5 1943 This matter came on to be heard and
was placed on the COMMERCIAL LIST of con-
tested cases.

Oct 14 1943 Affidavit of Max Singer M.D. was
filed.

Oct 14 1943 A demand for jury was filed by the
defts. mp

Oct 29 1943 An Order for Bill of Particulars
was filed.

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Oct 29 1943 A notice of motion was filed return-
able November 4-1943. mp

Nov 4 1943 Acknowledgment of service of Order
for Bill of Particulars was filed. mp.

Nov 4 1943 Both parties appeared on motion to
take depositions. Motion granted. Deposi-
tions to be taken and case placed on jury
list for trial Dec. 10, 1943.

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Judgment Record.

- Nov 12 1943 Order for appointment of Daniel Pouzzner as a Special Commissioner was filed. mp
- Nov 24 1943 A notice of motion was filed returnable Nov. 26-1943.
- Nov 24 1943 Demand for Interrogatories was filed. 10
- Nov 24 1943 A notice of motion was filed returnable Dec. 2-1943.
- Nov 26 1943 Notice returnable Nov. 26-1943 was adjourned to Dec. 2-43; Dec. 3, 1943;
- Dec 3 1943 Both parties appeared. After argument depositions to be taken. By consent of counsel the matter of interrogatories was argued. This application to answer interrogatories was denied. This case set down for trial Jan. 14, 1944, with jury. 20
- Dec 10 1943 This was adjourned to:—Jan. 14, 1944.
- Dec 16 1943 Commission was issued and sent to Jerome Alper & Alper, Esq.
- Dec 3 1943 Order for Commission was filed. mp 30
- Dec 28 1943 A notice of motion was filed returnable Dec. 30-1943. mp
- Dec 30 1943 The notice was adjourned to Jan. 6, 1944.
- Jan 6 1944 Defendant appeared; Plaintiff did not. The Motion was granted. Case returnable to the Jury List for trial Jan. 14, 1944.

Judgment Record.

Jan 5 1944 A *venire facias* was issued returnable January 14, 1944.

Jan 7 1944 Order for Bill of Particulars was filed. mp

Jan 10 1944 Bill of Particulars was filed.

10 Jan 13 1944 Both counsel appeared without notice and argument was heard in chambers. Demand for jury withdrawn. To be tried January 21, 1944. Stipulation to be lodged with plaintiff's attorney, if possible, by Saturday, January 15, 1944.

Jan 14 1944 This case adjourned to Jan. 21, 1944 for trial without jury.

20 Jan 14 1944 Whereupon the *venire* men were paid and excused.

Jan 21 1944 The case was listed and called. The plaintiff and the defendant appearing this cause was heard at this time.

The following witnesses were sworn on behalf of the plaintiff:

Margaret Brady May M. Lyons

30 Jan 21 1944 The following witnesses were sworn on behalf of the defendant:

Teresa Alper Elmer H. Wilson
Clara Graff

40 The Exhibits were:—P-1 Lease P-2 Receipt 3-1-42 P-3 Group of 11 receipts P-4 Notice of Increase P-5 Group of 13 Receipts P-6 Letter 1-5-42 P-7 Receipt for faucet P-8 Card for repairs P-9 O.P.A. Report D-1 Photo

Judgment Record.

- Jan 21 1944 Decision was reserved.
- May 4 1944 Decision was announced and judgment entered as follows:
- May 4 1944 Whereupon it is on this day by this Court considered and adjudged that Henry Frost and Nellie Frost, his wife the plaintiff . . . recover against Morris Alper . . . the defendant the sum of Five Hundred Dollars and no cents damages and costs of suit. mcw
- May 4 1944 The Court's Opinion was filed and copies sent by registered mail to the attorneys of record.
- May 6 1944 Attorneys for plaintiff and defendant having been notified, by registered mail, of the entry of judgment, proof of notification from the offices of J. Edward Bennett, Esq. and Jerome Alper & Alper, Esqs. was filed.
- May 8 1944 A notice of appeal was filed.
- May 8 1944 An affidavit of service was filed as to Notice of Appeal.
- May 11 1944 An appeal Bond was lodged at the Clerk's office on May 8, 1944 to be submitted to the Judge on the next Court day. The bond having been submitted to the Judge, the Clerk was directed to return the same to Counsel—not approved.
- J. EDWARD DE LANCY, *Clerk.*
By: V. L. K.
- May 12 1944 Appeal Bond was filed. mp

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Judgment Record.

May 15 1944 A certified copy of the docket page
was issued and sent to Jerome Alper & Alper.

Certificate dated 15th day of May, 1944.

J. EDWARD DE LANCY,
Clerk

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May 15 1944 Additional costs taxed since May
15th, 1944:

<i>Plaintiff's Cost</i>		<i>Defendant's Cost</i>
Order	:	1.00
Order	:	1.00
Order	:	1.00
Cont. of Certified Copy		1.00

20

May 26 1944 Order extending time for settling
State of Case filed.

June 1 1944 Rule to Show Cause for new trial
filed returnable June 15, 1944.

June 14 1944 An Affidavit of service was filed
as to Rule S/C. mp

Jun 15 1944 Both parties appeared; after argu-
ment the rule was denied on the ground of
lack of jurisdiction. MCW.

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Jun 15 1944 Affidavit of Ethel Steinberg filed.
MCW

Jun 23 1944 Order dismissing Rule To Show
Cause was filed. mp

Jul 6 1944 Order extending time for settling
case was filed.

Jul 21 1944 Order discharging Rule Show Cause
entered June 1—, 1944 etc. was filed. mp

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Judgment Record.

- Oct 14 1944 Certified copy of Order from N. J. Supreme Court was filed. mp
- Oct 14 1944 A notice was filed returnable Oct 19 1944 for a new trial, etc. mp
- Oct 19 1944 Proof of Service of notice filed. MCW 10
- Oct 19 1944 Both parties appeared on notice for a new trial. After argument, the motion was denied. MCW
- Oct 23 1944 Order dismissing application for new trial was filed. mp
- Oct 31 1944 Order extending time to Nov. 10-1944 to settle case filed. mp
- Nov 2 1944 A notice of motion was filed returnable Nov 2 1944. 20
- Nov 2 1944 Neither party appearing, the motion was not moved. MCW
- Nov 3 1944 It appearing that the notice of motion filed Nov. 2, 1944, was improvidently placed on the list on Nov. 2, 1944, by reason of a fault in the endorsement, the matter is re-listed on the Calendar to-day. 30
- Nov 3 1944 Defendant appeared on motion. Court will settle the State of the Case. MCW
- Jan 10 1945 Order extending time to January 17-1945 was filed. mp
- Jan 11 1945 Certified copy of the State of the Case settled by Court was filed. MCW
- Jan 12 1945 The certified transcript issued to 40

Order for Rule to Show Cause for New Trial.

Messrs. Alper and Alper on May 15 1944 was returned to this office; continued down to date and returned to Messrs. Alper and Alper.

Certificate dated 12th day of January, 1945.

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J. EDWARD DE LANCY,
Clerk.

Order for Rule to Show Cause for New Trial.
(Filed Oct. 14, 1944)

NEW JERSEY SUPREME COURT.

20

HENRY FROST and NELLIE FROST,
his wife,

Plaintiffs-Appellees,

vs.

MORRIS ALPER,
Defendant-Appellant.

On Rule to
Show Cause.

On Appeal
from District
Court.

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THIS RULE having come on to be heard at the October Term of this Court, and the Court having considered the same,

AND it being represented that since the filing of the appeal from the judgment entered below, the defendant has discovered evidence of such a character material to the issue, that it may change the results,

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Order for Rule to Show Cause for New Trial.

AND IT FURTHER APPEARING, that the District Court has lost jurisdiction to hear and consider such application for a new trial by reason of the filing of said appeal and the removal of said proceedings to this Court,

IT IS, THEREFORE, on this third day of October, 1944,

ORDERED AND ADJUDGED, that the defendant-appellant be, and he is hereby permitted to withdraw his appeal and that this action be remanded to the District Court of the Second Judicial District (Irvington) of the County of Essex, to the end that an application may be made to that Court for a new trial, and that the record and proceedings be remitted to the said District Court, to be therein proceeded on according to law and the practice of said Court, for such purpose;

AND IT IS FURTHER ORDERED, that all exceptions taken in the above entitled action and covered by the present grounds of appeal be preserved to the defendant-appellant, and that this rule shall not preclude the prosecution of an appeal by the said defendant-appellant, in case a new trial is denied, or from any judgment after such new trial.

LET the above rule be entered on the minutes.

Dated: October 3, 1944.

CHARLES W. PARKER,
Justice Supreme Court.
For the Court.

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Notice of Hearing on Rule for New Trial.

Entered Oct. 3, 1944.

On Motion of

JEROME ALPER,
Of Counsel of Defendant-Appellant.

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Notice for Hearing on Rule for New Trial.
 (Filed Oct. 14, 1944)

No. 72092

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
 OF THE COUNTY OF ESSEX.

20

HENRY FROST and NELLIE FROST,
 his wife,

Plaintiffs,

vs.

MORRIS ALPER,

Defendant.

Action at Law.
 On Contract.

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To: J. EDWARD BENNETT, Esquire, Attorney for
 for Plaintiffs, 17 Academy Street, Newark,
 New Jersey.

SIR:

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PLEASE TAKE NOTICE, that the defendant will, on
 the 19th day of October, 1944, at 10 o'clock in
 the forenoon, or as soon thereafter as the matter
 can be heard, before this Court, located at 1068

Affidavit of Theresa Alper.

Clinton Avenue, Irvington, New Jersey, move his application for a new trial to be granted to the defendant, or a judgment rendered in favor of the defendant instead of the plaintiffs; and

FURTHER TAKE NOTICE, that the defendant will use the affidavit of Theresa Alper and Ethel Steinberg, heretofore filed in this Court; and

FURTHER TAKE NOTICE, that the said application is made pursuant to the Order of October 3, 1944, issued out of the New Jersey Supreme Court, on appeal from this Court to the New Jersey Supreme Court entitled above, which Order is served simultaneously upon you and filed in these proceedings.

JEROME ALPER & ALPER,
Attorneys for Defendant.

Dated: October 14, 1944.

Affidavit of Theresa Alper.

(Filed June 1st, 1944)

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

THERESA ALPER, being duly sworn according to law, upon her oath deposes and says:

1. She is authorized to make this affidavit for and on behalf of the defendant, who is the petitioner named herein, and as such is well and

Affidavit of Theresa Alper.

truly familiar with the matters and things set forth in the foregoing petition.

10 2. Judgment was entered on May 6, 1944, against the defendant for the sum of \$500.00, besides costs of suit, for which Notice of Appeal was filed on May 8, 1944, and an Appeal Bond was filed on May 12, 1944.

3. Deponent further states that during the trial of said action, neither of the plaintiffs testified, and the defendant was unable to examine or cross examine the said plaintiffs.

20 4. Deponent further states that she has read the petition filed herein, and the matters and things contained therein are true to the best of my knowledge, information and belief.

30 5. Deponent further states that the petitioner has newly discovered evidence which has come to his knowledge and attention since the entry of judgment herein, and which was not available to the petitioner at the time of the trial, and deponent believes that such evidence will tend to defeat the plaintiffs' right to recover on the ten causes of action as stated in their State of Demand.

40 6. Deponent further states that Mrs. Frost, the said tenant, has asserted that since a verdict was entered in the plaintiffs' favor, they have or are about to institute a further action in the same District Court, seeking \$50.00 damages for each month for the payment of rent made from September, 1943, to June, 1944, and that this sum is

Affidavit of Ethel Steinberg.

to be in addition to the \$500.00 already recovered by them.

THERESA ALPER.

Subscribed and sworn to before
me this 27th day of June, 1944.

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A. KING BRAELOW,
Master of Chancery of N. J.

Affidavit of Ethel Steinberg.

(Filed June 15, 1944)

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

20

ETHEL STEINBERG, being duly sworn, according to law, upon her oath, deposes and says:

1. I live at 158 Peshine Ave., Newark, New Jersey, occupying the second floor, and have lived there for the past 4 years.

2. I have a son, Herbert, presently 14 years old, and a daughter, Myra, presently 18 years old. They both knew the Brady and Frost family and their children when they occupied 155 Peshine Ave., Newark, New Jersey.

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3. The Brady family moved to a housing project in the beginning of 1942. In the fall of 1942 the Frost family moved in. My children knew the Frost children, who formerly lived on Bergen St., and went to Bergen St. School. I often

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Affidavit of Ethel Steinberg.

heard them speak of the Brady family who lived there before, and they apparently knew each other because they went to the school together and also lived in the neighborhood. After the Frost family moved in, Mrs. Frost became friendly with me and the neighbors.

4. About a month after Mrs. Frost moved in, I was present and heard a conversation between Mrs. Frost and Julia Pascavage, which took place in front of the house at 155 Peshine Ave., Newark, New Jersey, about the rental that Mrs. Brady paid. I heard Mrs. Frost ask Julia Pascavage how much rent the Brady family paid for the flat she now rents, and Julia Pascavage told her the Brady family paid \$26.00 a month rent. Thereupon Mrs. Frost told Julia Pascavage she was paying \$28.00 a month for the same flat. Julia Pascavage told her maybe she is paying \$28.00 a month because the boy, Buddy, Mrs. Brady's son, was handy and did odd jobs around the house for Mr. Alper. Mrs. Frost then said she was going to find out if \$28.00 a month rent was right, and if the difference of \$2.00 was because Buddy, Mrs. Brady's boy was doing odd jobs around the house for Mr. Alper, and that was the reason why Mrs. Brady was paying \$26.00 a month.

5. I was also present at several conversations which took place in front of the house at the above address, and overheard Mrs. Frost on several occasions speak to the neighbors and myself and tell us that she was going to find out what the ceiling rent was from the Office of Price Administration for her flat and if she was not

Order Denying New Trial.

paying the right amount, she was going to make a lot of trouble for the landlord, sue him and stay in the premises until she gets what money she wants and then she would move.

ETHEL STEINBERG.

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Sworn and subscribed to before me this 13th day of June, 1944.

ESTELLE GREENBERG,
Notary Public of New Jersey.

Order Denying New Trial.

(Filed Oct. 19, 1944)

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No. 72,092

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE COUNTY OF ESSEX.

HENRY FROST and NELLIE FROST,
his wife,

Plaintiffs,

vs.

MORRIS ALPER,

Defendant.

Action at Law.

30

This matter coming on to be heard before me on this 19th day of October, Ninteen Hundred

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Order Denying New Trial.

and Forty-four, on an application for a new trial made by the defendant, and Jerome Alper, appearing for the said defendant, having presented his arguments therefore in the presence of J. Edward Bennett, who appeared for the plaintiff and the Court having considered the arguments of counsel, it is hereby

On this 20th day of October, 1944, ORDERED that the said application for a new trial is, and the same is hereby dismissed.

F. D. MASUCCI,
Judge.

Settled State of Case.

(Filed Jan. 11, 1945)

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE COUNTY OF ESSEX.

No. 72,092.

HENRY FROST and NELLIE FROST,
his wife,*Plaintiffs,*

vs.

MORRIS ALPER,

*Defendant.*Action at Law.
On Contract.

10

20

J. EDWARD BENNETT, *Attorney for Plaintiffs.*JEROME ALPER & ALPER, *Attorneys for Defendant;*
BENJAMIN M. WEINBERG, *of Counsel.*

The parties hereto, through their attorneys, having been unable to agree upon the State of the Case for Appeal, and having applied to me, Judge of the said Court, within the time limited by law, I do hereby settle the case, as follows:

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The action was brought by the plaintiffs against the defendant, and the cause of action is based upon the provisions of Section 205(e) of the Federal Emergency Price Control Act, of January 20, 1942; 50 U. S. C. App. Sec. 925(e).

Henry Frost and Nellie Frost, his wife are the plaintiffs and tenants of the defendant, Morris Alper, the owner of a six-family dwelling,

40

Settled State of Case.

10 under a written lease, dated October A.D. 1942, covering a six-room flat in premises at 155 Peshine Avenue, Newark, N. J., which lease was for two years, commencing November 1st, A.D. 1942 and ending November 1st, A.D. 1944, at the yearly rental of \$336.00, payable in equal monthly installments of \$28.00 on the first day of each and every month.

The plaintiffs entered into possession of said premises on November 1, A.D. 1942 and continued in possession thereof, and paid to the said defendant, and said defendant accepted the monthly rent of \$28.00 for each of the months for the period of November A.D. 1942 to and including the month of September A.D. 1943.

20 The plaintiffs claimed that the maximum rental for said months, under the provisions of the Federal Emergency Price Control Act, aforesaid, and regulations thereunder, was \$26.00 and that the defendant's agreement and acceptance of rent in excess thereof, for the months aforesaid, constituted a violation of said act and regulations which entitled plaintiffs to sue and receive the sum of \$50.00 for each of said violations.

30 Prior to the trial, the defendant served plaintiffs, without first obtaining leave of the Court, with written interrogatories. The same not having been answered, the defendant made application to suppress the plaintiffs' action. This application was denied and defendant prayed for and was granted an exception to said ruling.

The case was tried without a jury on January 21, A.D. 1944.

40 It was stipulated by the respective counsel that the lease between the plaintiffs and defendant for the premises in question be received in evidence

Settled State of Case.

and same was received and marked Exhibit "P-1," that the rent paid by the plaintiffs and received by the defendant for the months from November 1, A.D. 1942 to September 1, A.D. 1943, both inclusive, was \$28.00 for each month, evidenced by eleven receipts and received in evidence and marked, as one group, as Exhibits "P-3."

10

The evidence on behalf of the plaintiffs was as follows:

Mrs. Margaret Brady testified that she lived in the flat in question on March 1, A.D. 1942 and paid the agreed rent for said month to the defendant in the sum of \$26.00 and produced the receipt for said rent which was received in evidence and marked Exhibit "P-2." That the last month she lived in said flat was May, A.D. 1942, for which month she paid the increased rent of \$28.00. That when she first rented said flat, she saw the defendant, that the rent agreed upon was \$26.00 per month with the understanding that she was to keep the landing in front of the door to her flat and stairs to floor below clean. She denied that there was any agreement between the defendant and herself, that for a \$2.00 reduction in monthly rental, either she, her son or Mr. Wilson, a friend of hers, were to make minor repairs or work in the building; that her son did clean the sewer of said premises for which he received 35 cents; that her son and friend, Mr. Wilson, did install a light in the pantry for her own convenience, without the defendant's knowledge and that same was taken out by her when she moved from the flat, that a rent of \$28.00 per month was never suggested by the defendant

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Settled State of Case.

to her when she first rented the flat, that she was never to service any building, that she first knew plaintiffs in the latter part of August, A.D. 1943, when she told them her rent had been \$26.00 per month; that she may have said she disliked Miss Alper, but she was telling the truth; that she told Harold Alper that she could also make a claim for \$50 and that she was not shown any other apartment and did not know of rental of any other apartment. She then identified a receipt for rent paid by her for said flat for the month of April, A.D. 1942, with notation on the reverse side stating that "starting May 1, 1942, your rent will be increased two dollars to \$28.00 per month."

20 She further testified that in December or October, A.D. 1941, she returned a faucet to Miss Alper and got a receipt for same. The said faucet was never installed and son never had same in his hands. That on January 5, A.D. 1942, she asked the defendant for repair of kitchen stove and said repairs were made by some person employed by the defendant.

30 Miss Mary Lyons testified that she is a New Jersey attorney employed by the Office of Price Administration in its Regional Rent Office in Newark, N. J. Produced registration of said flat which was filed by the defendant on August 1, A.D. 1942, showing the then tenant, T. Armitage and the rent at \$28.00 per month.

40 Plaintiffs then rested and the defendant moved for a non-suit because no demand for return of excess rent paid by plaintiffs was made upon the landlord, to give the landlord an opportunity to pay back said excess and because there was a waiver of said claim because plaintiffs continued

Settled State of Case.

to pay rental of \$28.00 monthly after knowledge that the rental, on maximum rental date, was \$26.00. Motion denied and exception allowed.

On the part of the defendant, the evidence was as follows:

Statements of Harold Alper and Morris Alper were read to the Court and same were received in lieu of their testimony. Said statements form part of a stipulation on file with the papers in this case.

Miss Theresa Alper testified that she showed the apartment to Mrs. Brady and was present at rental agreement between Mrs. Brady and the defendant. That at said time Mrs. Brady said she was a widow, had a child, was on relief and had a son who would be handy doing odd jobs. That Mr. Wilson, a friend also agreed to make minor repairs and that the defendant agreed to reduce the rent from \$28.00 to \$26.00; that thereafter the defendant never paid any money for, nor requested to pay any money for any repairs; that for a long time she was friendly with Mrs. Brady, then a large family moved in the building and Mrs. Brady complained of their noise and filth and said family was evicted. Later Mrs. Brady took a family in to live with her and Miss Alper complained and Mrs. Brady got angry, said it was her house and she could do as she pleased. However, after a long time, the family finally moved out of Mrs. Brady's flat. On cross examination she testified that Buddy (Mrs. Brady's son) did all the work in repairing the sewer and he was not paid 35 cents; that man in Mrs. Brady's house fixed the windows; that a Mr. Shaefer fixed the stove, that the ten-

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Settled State of Case.

ants put nails in walls and shelves; that Mrs. Brady took the wiring out without objection on her part; that she used the wrong words in Exhibit "P-4," that certificate of registration talks of advance prices, that the rent in May, A.D. 10 1942, was increased because Buddy was working in a defense plant and Wilson didn't come around anymore and that she didn't remember who took over the work of making the minor repairs.

Mr. Elmer H. Wilson testified that he knew Mrs. Brady, the last time he was in her home was February, A.D. 1942, that he was present at showing of flat to Mrs. Brady, that she had asked him to take her there, that Mrs. Brady explained that the price of \$28.00 was steep, that 20 she was working on W.P.A. project, that she was shown that the stove had to be connected and Mrs. Brady suggested that her son would do some general work around the house and he offered to help and the defendant agreed on a reduction of the rent to \$26.00, that he hooked the stoves, put shelves in closet, did some work in cellar, fixed chains and latches and sash cords in windows and got no money from anyone.

On cross examination he testified that the boy 30 (Mrs. Brady's son) got a job November or December, A.D. 1940, with Western Electric and that he had a falling out with Mrs. Brady in February, A.D. 1942.

Mrs. Clara Graff testified that she lived at 159 Peshine Avenue, Newark, N. J., next door to plaintiffs' residence, that she knew Buddy Brady, that he repaired a water pipe which had burst in her apartment, that he worked off and on for two or three days and that it was the 40 only job she knew he had done and further stated

Settled State of Case.

that she saw a number of men doing work around her house.

On rebuttal, plaintiffs recalled Mrs. Brady who testified that Mr. Wilson at first used to call every evening and then her son started working a couple of months after she had moved into the flat and he worked steadily until he went into service; that he only did sewer job because defendant asked him to, saying that he couldn't get a plumber. 10

At the close of the case, the defendant renewed his motion for a nonsuit, upon the grounds previously urged. The motion was denied and exception allowed.

After reserving decision on May 6, A.D. 1944, judgment was entered in favor of the plaintiffs and against the defendant, in the sum of \$500.00. 20

On May 8, A.D. 1944, the defendant filed notice of appeal to our New Jersey Supreme Court and on May 11, A.D. 1944, filed the required appeal bond.

On October 3, A.D. 1944, the defendant obtained a rule of our said Supreme Court which, among other things, directed that said cause be remanded to this Court with leave to the defendant to make application for a new trial, reserving therein all exceptions taken and covered in defendant's ground of appeal. 30

The defendant made application to this Court and obtained a rule to show cause why a new trial should not be granted in the above cause which rule was duly heard and considered and dismissed.

Settled State of Case.

IN WITNESS WHEREOF, I have hereunto set my hand this 11th day of January, A.D. 1945.

F. D. MASUCCI,

*Judge of the District Court of
the Second Judicial District
of the County of Essex.*

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Opinion.

(Filed May 4, 1945)

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE COUNTY OF ESSEX.

No. 72,092

The issue of fact in the above cause is whether the maximum rent of the premises in question is \$26.00 per month as contended by the plaintiff or \$28.00 as insisted upon by the defendant.

10

Admittedly the cash rental paid was \$26.00 per month. The defendant, however, contends that there was a monthly allowance of \$2.00 for which the plaintiff, her son and a friend of the tenant were to make minor repairs for said building. The testimony on that phase might be said to be slightly in favor of the plaintiff, there being more probability to the plaintiff's version. However, assuming that the verbal testimony of the witness for each side, created a balance which did not weight in favor of either side, the plaintiff is additionally supported by the receipts and writings furnished by the defendant or the defendant's daughter. All of the original rental receipts to Mrs. Brady specify the rental as \$26.00. In none is there any statement that \$2.00 was being allowed for repairs to be made by the tenant, her son or friend. The receipt of April 1, A.D. 1942 is particularly significant. On the reverse side there is a statement that "Starting May 1, A.D. 1942 your rent will be increased two dollars to \$28 per month." Miss Alper appears to be an intelligent, educated and experienced young lady. If the claimed waiver of \$2.00 monthly was being stopped because the claimed service was not being rendered, some appropriate statement could easily have been incorporated in connection with

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Opinion.

said notation. Her simple statement that she used the wrong words does not sufficiently explain away the definite meaning of the words used.

10 Under the circumstances, I feel that the plaintiff has clearly sustained the burden of proof and although the result may be unduly harsh to the defendant, I have no alternative except to give judgment for the plaintiffs and against the defendant in the sum of \$500.00 (Five Hundred Dollars and no cents).

F. D. MASUCCI,
Judge.

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CLERK'S OFFICE
DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE COUNTY OF ESSEX.

1068 Clinton Avenue
Irvington, 11, N. J.

May 4, 1944.

30 Messrs. JEROME ALPER AND ALPER,
207 Market Street,
Newark 2, N. J.

In re: FROST vs. ALPER
Gentlemen: No. 72,092

Enclosed please find copy of the Judge's Opinion in the above entitled matter.

Very respectfully yours,

40 VLK J. EDWARD DELANCY, Clerk
By: Veronica L. Kendall

Schedule of Abstract of Exhibits.

Exhibit "P-1."

LEASE.

Lease, dated Oct. 27, 1942, made by Morris Alper, of 36 Van Ness Place, Newark, N. J., as landlord, and with Henry Frost and Nellie Frost, his wife, as tenants, for apartment north side of 3rd floor of 155-7 Peshine Ave., Newark, N. J., for two years, commencing Nov. 1, 1942, and ending October 31st, 1944, at yearly rental of \$336.00, payable in equal monthly payments of \$28.00 on the first of each month. 10

Exhibit "P-2."

20

Receipt.

March 1st, 1942.

Received of Mrs. Margaret Brady

Twenty-six Dollars for
Rent of 6 rooms at No. 155 Peshine Avenue for
one month ending March 31, 1942. 30

\$26.00

M. ALPER, T. A.

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Exhibit "P-3."**Group of 11 Receipts.**

10 This is a group of 11 receipts, each for \$28.00 given to Mr. Henry Frost and signed by M. Alper, the first is dated November 1st, 1942, and each month thereafter, and the last is dated September 1st, 1943, and on each is shown for rent for 6 rooms at 155 Peshine Ave., Newark, N. J.

Exhibit "P-4."**Receipt April 1st, 1942.**

20

April 1st, 1942.

Received of Mrs. Margaret Brady

Twenty-six Dollars for
Rent of 6 rooms at No. 155 Peshine Avenue for
one month ending April 30, 1942.

\$26.00 M. ALPER, T. A.

30

(See other side)

(Reverse side)

Starting May 1—1942, your rent will be in-
creased two dollars to \$28 per month.

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Exhibit "P-5."

This is a group of 13 receipts given by M. Alper to Mrs. Margaret Brady on same form as shown on Exhibit P-2. Each receipt is dated the 1st of January 1941, February, March, April, May, June, July, August, September, October, November, December, 1941, and February 1st, 1942, for \$26.00. Covers monthly rent of 6 rooms, 155 Peshine Avenue, Newark, N. J. 10

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Exhibit P-9.

10 This is a group of 13 receipts given by M. A. Brady to Mrs. Margaret Brady on same form as shown on Exhibit 1-2. Each receipt is dated the 1st of January 1941, February, March, April, May, June, July, August, September, October, November, December, 1941, and February 1942 for \$25.00. Covers monthly rent of 6 rooms, 137 Madison Avenue, New York, N.Y.

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Exhibit "P-9."

(Shown on page opposite)

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EXHIBIT "P 9"

GENERAL INSTRUCTIONS

The landlord is required to register separately each rental dwelling unit, whether occupied or vacant. A dwelling unit is a room or a group of rooms for which a single rent is paid. Complete this Registration Statement in triplicate, remove carbons, and mail or bring the three copies to the Area Rent Office. Use extra sheets, in triplicate, for sections "D" & "E" if necessary.

If the dwelling unit was not rented at any time during the period between January 1, 1942 and July 1, 1942, an application to establish the Maximum Legal Rent must be made on Form DD-112-2.

O. P. A. REGISTRATION
UNITED STATES OF AMERICA
OFFICE OF PRICE ADMINISTRATION
REGISTRATION OF RENTAL DWELLINGS
(TYPE OR PRINT PLAINLY - DO NOT FOLD)
(Do Not Use This Form for Hotels and Rooming Houses)

Form DD 2-D

LANDLORD'S
COPY

SECTION A. MAILING ADDRESS OF LANDLORD

1. Name of Landlord: MORRIS ALPER
2. Name of Agent: THORSA ALPER
3. Address Mail to: 36 VAN NESS PL.

Name: THORSA ALPER
Address: 36 VAN NESS PL.
City and State: NEWARK - NJ

IDENTIFICATION

1. 117-7 PEECHINE AVE Address of this rental dwelling unit
2. THIRD FLOOR NORTH Apartment number or location
3. Number of Rooms in this dwelling unit: 6
4. Total Number of dwelling units in this structure: 6

SECTION B. MAILING ADDRESS OF TENANT

Name of Tenant: M. T. ARMATAGE
Address: 117-7 PEECHINE AVE
City and State: NEWARK - NJ

SECTION C. MAXIMUM LEGAL RENT

Read carefully and fill in every item which applies to this dwelling unit.

1. Rent on March 1, 1942: \$ 28.00 per week () per month (X)
2. Not rented on March 1, 1942, but rented at any time between January 1, 1942 and February 28, 1942.
Date last rented during that two-month period: _____, 1942.
Rent on that date: \$ _____ per week () per month ()
3. Not rented at any time between January 1, 1942 and March 1, 1942, but rented before July 1, 1942.
Check one box:
() (a) Owner occupied or vacant between January 1, 1942 and March 1, 1942.
() (b) Newly constructed without priority rating.
() (c) Newly constructed with priority rating. (If checked, item 6 must also be filled in.)
Date first rented after March 1, 1942: _____, 1942
Rent on that date: \$ _____ per week () per month ()
4. Dwelling unit made available by a change which resulted in an increase or decrease in the number of dwelling units after March 1, 1942, but before July 1, 1942.
Date first rented after such change: _____, 1942
Rent on that date: \$ _____ per week () per month ()
5. Substantially changed after March 1, 1942, but before July 1, 1942. Check one box:
() (a) From unfurnished to fully furnished.
() (b) From fully furnished to unfurnished.
() (c) By a MAJOR CAPITAL IMPROVEMENT as distinguished from ordinary repair, replacement and maintenance.
Date first rented after such change: _____, 1942
Rent on that date: \$ _____ per week () per month ()
6. Dwelling unit newly constructed with a priority rating from the United States or any agency thereof.
Rent approved by agency granting priority: \$ _____ per week () per month ()
7. THE MAXIMUM LEGAL RENT FOR THIS DWELLING UNIT IS:
→ \$ 28.00 per week () per month (X)

Enter Maximum Legal Rent in accordance with the following instructions:

- (a) If only one of the above items applies to this dwelling unit the Maximum Legal Rent is the rent entered for that item.
(b) If more than one of the above items apply to this dwelling unit the Maximum Legal Rent is the rent reported for the most recent date, except in the case of item 6.
(c) If item 6 applies to this dwelling unit the Maximum Legal Rent is the lower of the two rents entered in item 3 and item 6.
*Note: If any one of the items 3(b), 4 or 5 applies to this dwelling unit you must also fill in the information required in Section "E".
The Administrator may at any time order a decrease in the Maximum Legal Rent determined under items 3(a), 3(b), 4, or 5, on the grounds that the rent is higher than the rent generally prevailing for comparable housing accommodations on March 1, 1942.

Section E - See Note Section C. 7 *

If item 3(b), 4 or 5 of Section C was filled in, set forth in specific detail the type and cost of:

- (a) New construction (c) A change from unfurnished to fully furnished
(b) A change in the number of dwelling units (d) A major capital improvement

This is a new tenancy commencing
Aug. 1-1942. Every Room newly
refurnished at advanced price
but the rent is as of March 1-42

SECTION D. EQUIPMENT AND SERVICES INCLUDED IN THE RENT ON MARCH 1, 1942

(If any one of the items 2 to 5 of Section C apply to this dwelling unit check Equipment and Services included in the rent on the most recent date you entered in Section C.)

1. EQUIPMENT	Yes	No
Furniture	()	(X)
Running Water	()	(X)
Hot Water	(X)	()
Flush Toilet	(X)	()
Bathroom	(X)	()
Central Heating	(X)	(X)
Heating Stove	(X)	(X)
Mech. Refrigerator	(X)	(X)
Electricity Installed	(X)	()
Cooking Stove	(X)	()
If any equipment is shared, explain below:		

2. SERVICES	Yes	No
Garage	()	(X)
Heat or Heating Fuel	()	(X)
Cooking Fuel	()	(X)
Cold Water	(X)	()
Hot Water	()	(X)
Light	()	(X)
Ice or Refrigeration	()	(X)
Janitor Service	()	(X)
Garbage Disposal	(X)	(X)
Painting & Decorating	(X)	(X)
Interior Repairs	(X)	(X)
Exterior Repairs	(X)	(X)
List any other services:		

ELECTRICITY
SUPPLIED IN
Are all equipment and services indicated above now included in the rent? Yes (X) No ()

WARNING

The rent for this dwelling unit on and after July 1, 1942 can be no more than the Maximum Legal Rent entered in Section C, Item 7.

A false statement on this form or an evasion or attempted evasion of the Maximum Rent Regulation may subject you to a \$5,000 fine or imprisonment for one year.

I HEREBY REPRESENT that all statements and entries given herein are true and correct.

Theresa Alper
(Signature of Landlord or his Agent)

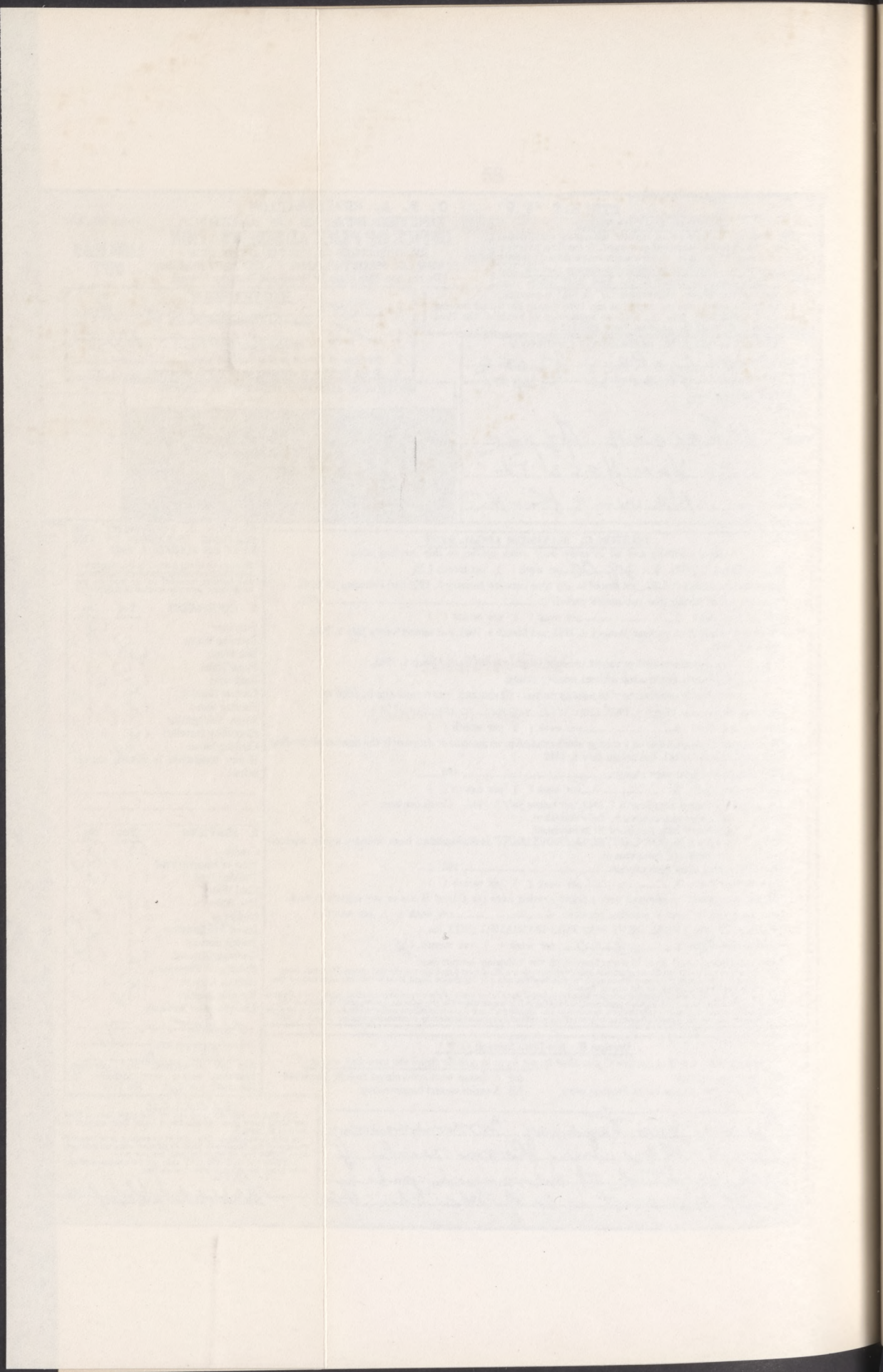


Exhibit P-9.

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EXHIBIT P-9.

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Exhibit P-9.

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EXHIBIT P-9.

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(Reverse Side)

(Shown on page opposite)

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Registration Received	
AUG 14 1942	
Date	_____
No.	159432

JAN 21 1944
 P-O-11
 Social Defense, Clerk
 72-082

INSTRUCTIONS TO THE LANDLORD

When the present tenant vacates this dwelling unit, and it is rented to a new tenant, you must:

- (a) Show this form to the new tenant and have him sign on the first blank line provided below; and
- (b) Fill out Form DD 125 (Report of Change in Tenancy) and send it to the Area Rent Office WITHIN FIVE DAYS after the change in tenancy.

INSTRUCTIONS TO THE NEW TENANTS

If the rental charged is more than the Maximum Legal Rent as stated in Section C, Item 7, or if you are not receiving all of the equipment and services reported as included in the rent in Section D, communicate with the local Area Rent Office.

STATEMENT BY NEW TENANTS

(Read The Reverse Side Carefully Before Signing.)

I, the tenant of this dwelling unit, hereby state that this Registration Statement has been exhibited to me, and that it is dated and numbered in the box in the upper left corner.

Tenant's Signature_____	Date_____	194_____
Tenant's Signature_____	Date_____	194_____
Tenant's Signature_____	Date_____	194_____
Tenant's Signature_____	Date_____	194_____
Tenant's Signature_____	Date_____	194_____

EXHIBIT P-9.

(Reverse Side)

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Notice of Appeal.

(Filed Oct. 22, 1945)

NEW JERSEY SUPREME COURT.

10	HENRY FROST and NELLIE FROST, his wife, <i>Plaintiffs-Appellees,</i> vs. MORRIS ALPER, <i>Defendant-Appellant.</i>	}	On Appeal from the Irvington District Court, Docket No. 72092, S. C. No. 413, May Term, 1945, No. 11590.
----	---	---	---

20 To: J. EDWARD BENNETT, Esquire, Attorney for
 Plaintiffs-Appellees,
 17 Academy St., Newark, N. J.

SIR:

30 TAKE NOTICE, that MORRIS ALPER, the defend-
 ant-appellant, appeals from the whole of the
 judgment entered in this cause in the New Jersey
 Supreme Court, affirming a judgment in the Dis-
 trict Court of the Second Judicial District of the
 County of Essex, to the New Jersey Court of
 Errors and Appeals.

JEROME ALPER & ALPER,
Attorneys for Morris Alper,
Defendant-Appellant.

Dated: September 27, 1945.

Grounds of Appeal.

(Filed Oct. 22, 1945)

NEW JERSEY COURT OF ERRORS AND
APPEALS.HENRY FROST and NELLIE FROST,
his wife,*Plaintiffs-Appellees,*

vs.

MORRIS ALPER,

*Defendant-Appellant.*On Appeal
from the New
Jersey
Supreme
Court.Sat Below:
Justices Case,
Bodine and
Perskie.

10

To: J. EDWARD BENNETT, Esquire, Attorney for
Plaintiffs-Appellees,
17 Academy St., Newark, N. J.

20

SIR:

The Defendant-Appellant, MORRIS ALPER, assigns the following as his Grounds of Appeal in the above entitled cause:

1. The Supreme Court erred in affirming the judgment of the Second Judicial District Court of the County of Essex, whereas the said Supreme Court should have reversed the said judgment.

30

JEROME ALPER & ALPER,
Attorneys for and of Counsel
with Morris Alper,
Defendant-Appellant.

Dated: October 22, 1945.

40

Opinion of Supreme Court.

NEW JERSEY SUPREME COURT.

No. 413—MAY TERM, 1945.

10	HENRY FROST and NELLIE FROST, his wife, <i>Plaintiffs-Respondents,</i> vs. MORRIS ALPER, <i>Defendant-Appellant.</i>	(Not for print in any report)
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20 Submitted May, 1945—Decided Sept. 6, 1945.
On Appeal.

For Appellant, JEROME ALPER & ALPER,
JEROME ALPER.

For Respondent, J. EDWARD BENNETT,
DAVID WEINICK.

Before Justices CASE, BODINE AND PERSKIE.

30 BODINE, J.: The amount recovered in this case in the District Court did not exceed its jurisdiction. There may be a recovery in that court of the sum of \$500 exclusive of costs. An attorney's fee may be taxed in the cause. R. S. 22:2-50.

The other questions argued have been determined adversely to the appellant in *Beasley v. Gottlieb*, 132 N. J. L. 603. See also *Carmelly*,

Opinion of Supreme Court.

Bowles, Intervenor v. Hanson, No. 403 May
Term, 1945.

The judgment below is affirmed with costs.

A True Copy,
JAMES J. GAVIN,
Clerk.

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New Jersey Court of Errors and Appeals

HENRY FROST and NELLIE FROST,
his wife,

Plaintiffs-Appellees,

vs.

MORRIS ALPER,

Defendant-Appellant.

On Appeal
from the
New Jersey
Supreme
Court.

Sat Below:
Justices CASE,
BODINE and
PERSKIE.

APPELLANT'S BRIEF.

Statement.

Defendant appeals from a judgment rendered against him by the District Court of the Second Judicial District of Essex County, for \$500.00, besides costs.

Facts.

The ceiling rent of the premises in question was \$28.00 a month (OPA Regulation, Exhibit P-9, S. C., pp. 58, 59).

On November 1st, 1942, the plaintiffs entered into possession under a 2-year written lease with the defendant, at a yearly rental of \$336.00, payable in monthly installments of \$28.00, in advance, on the first day of each month, for a 6-room flat owned by defendant at 155 Peshine Avenue, Newark, New Jersey. On November 1, 1942, and thereafter plaintiffs paid \$28.00 each month under the lease.

Plaintiffs instituted this suit on September 28, 1943 (S. C., p. 32), under the provisions of Section 205(e) of the Federal Emergency Price Control Act of January 30, 1942, alleging a \$2.00 overcharge for each of the ten months for which they paid for November, December, 1942, January, February, March, April, May, June, July, August, 1943, inclusive, and sought damages. They allege the ceiling rent was \$26.00 per month. The state of demand is framed in 10 causes of action, setting up 10 counts for each month of the alleged overpayment of \$2.00 for which they claimed judgment for "*Fifty (\$50.00) dollars, plus attorney's fees and costs to be fixed on this Count*" (S. C., p. 9).

Before the trial, the Court refused to compel plaintiffs to answer written interrogatories served by the defendant (S. C., p. 33, line 22).

Before the trial, the depositions of defendant, Morris Alper and Harold Alper, a witness, were used as evidence for the defendant. The defendant was an aged and infirm person, upwards of 75 years, an invalid and unable to appear in person. Harold Alper was a witness, in the United States Armed Forces.

Defendant demanded a jury trial (S. C., p. 32, line 25). Before trial, by written agreement of plaintiffs and defendant, the jury was withdrawn under the agreement that the plaintiffs will appear and testify (S. C., p. 23, lines 19, 20).

The case was tried on January 21st, 1944, without a jury (S. C., p. 34, lines 19, 20).

The plaintiffs offered the lease and it was marked into evidence (Exhibit P-1, S. C., p. 55).

The OPA registration for \$28.00 was offered and marked into evidence (Exhibit P-9, S. C., pp. 58, 59).

Payments by way of receipt of \$28.00 per month for the 10 months in question was offered and marked into evidence (Exhibit P-3, S. C., p. 56).

A motion for non-suit was denied (S. C., p. 50, line 38).

Over objection, plaintiffs offered the testimony of Margaret Brady, a previous tenant in their endeavor to prove the "Maximum legal rental of the flat as of March 1st, 1942, *and the Court proceeded to fix and determine what was the ceiling rent as of March 1st, 1942.* The plaintiffs contend the Court was without jurisdiction to fix the *ceiling rent as of March 1st, 1942.*

Over objection, the Court proceeded to try the case and assumed jurisdiction, where the amounts claimed in the state of demand in the 10 counts, exceeded the jurisdiction of the District Court.

The defendant raised the objection as the amount sued for exceeded the jurisdictional amount of the District Court to try the issues under R. S. 2:8-40, as the plaintiffs sought to recover an amount in excess of \$500.00, besides costs, taxed to a successful plaintiff under R. S. 22:2-44 and 50.

Plaintiffs failed to take the stand and testify as agreed under Stipulation with defendant to waive trial by jury (S. C., p. 34, lines 29, 30, 31).

At the close of the case, same objection and motion for non-suit were reviewed, which was denied with exceptions (S. C., p. 53, lines 15 to 18).

Decision was reserved.

On May 6, 1944, judgment was awarded to plaintiffs for \$500.00, together with costs.

From the judgment, the appeal is taken.

Questions Presented.

The appellant filed several reasons why there should be a reversal of the judgment of the District Court.

These reasons may be grouped under the following headings, to wit:

I. The trial court lacked jurisdiction under R. S. 2:8-40 to try the issues, as the amount in dispute exceeded the sum of \$500.00, exclusive of costs, to be ascertained and fixed by the trial court, as provided under Sec. 205(e) of the Federal Act.

II. The trial court erred in assuming jurisdiction to determine and fix a ceiling price of the premises in question as of March 1, 1942, and changed and modified such registration, which jurisdiction to do so was expressly given to the OFFICE OF PRICE ADMINISTRATOR, under the provisions of the Federal Emergency Price Control Act.

III. The trial court erred in denying the defendant's motion for a non-suit.

Assuming plaintiffs did prove their cause of action, which is denied, appellant grouped the several reasons for a reversal of the judgment, viz:

IV. The trial court erred (a) in rendering a judgment to the plaintiffs instead of the defendant, upon the defenses shown; (b) that the plaintiffs failed to make a demand for the return of the alleged overcharge; (c) that they failed to call for a hearing before

the Office of Price Administration, to determine the maximum legal rental as of March 1, 1942; (d) that they continued to pay, without protest, such alleged overcharge; (e) that they failed to do any act to mitigate the damages prior to the commencement of their action; (f) that they did entrap the defendant in paying the alleged overcharge without any protestation or notice to the defendant.

V. The trial court erred in its determination in entering judgment in favor of the plaintiffs and against the defendant for \$500.00, besides costs, as contrary to the provisions of the Federal Emergency Price Control Act (Section 205-e), in that, if the plaintiffs are entitled to recover, that the recovery cannot exceed three times the alleged overcharge of \$20.00 as shown in the State of Demand, or \$50.00, whichever sum is greater, together with reasonable attorney's fees and costs.

Statutes Involved.

Emergency Price Control Act of January 30, 1942, 50 U. S. C. A. App. No. 901, etc.

Section 205(d):

(d) No person shall be held liable for damages or penalties in any Federal, State or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement there-

under, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action.

Section 205(e):

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for *treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court.* For the purpose of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum

prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under the subsection, on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

Stabilization Extension Act of June 30, 1944,
50 U. S. C. A. Appx. 925, *et seq.*

Section 108(e):

Amendments to Section 205 of Emergency
Price Control Act of 1942:

Sec. 108. (a) The third sentence of subsection (c) of section 205 of the Emergency Price Control Act of 1942, as amended, is amended by striking out the period at the end thereof and inserting a colon and the following: "*Provided, however, That all suits under subsection (e) of this section shall be brought in the district or county in which the defendant resides or has a place of business, an office, or an agent.*"

(b) Subsection (e) of section 205 of the Emergency Price Control Act of 1942, as amended, is amended to read as follows:

"(e) If any person selling a commodity violates a regulation, order, or price schedule

prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. *In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty*

days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered."

Maximum Rent Regulation No. 28, 32 Federal Register Chapter XI, Part 1388.

Section 1388—1802:

SEC. 2. *Prohibition against higher than maximum rents*—(a) *General prohibition*. Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received.

Section 1388-1804

SEC. 4. *Maximum rents.* Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

(a) *Rental on maximum rent date.* For housing accommodations rented on the maximum rent date, the rent for such accommodations on that date.

(b) *Not rented on maximum rent date but rented during two months ending on that date.* For housing accommodations not rented on the maximum rent date, but rented at any time during the two months ending on that date, the last rent for such accommodations during the two-month period.

(c) *First rent after the maximum rent date but before effective date.* For housing accommodations not rented on the maximum rent date nor during the two months ending on that date, but rented prior to the effective date of regulation, the first rent for such accommodations after the maximum rent date. The Administrator may order a decrease in the maximum rent as provided in section 5(c).

Section 1388-1805:

SEC. 5. *Adjustments and other determinations.* In the circumstances enumerated in this section, the Administrator may issue an order changing the maximum rents otherwise allowable or the minimum services required

* * *

Continued next page (See Sec. 3 c)

Revised Statutes of New Jersey, R. S. 2:8-40,
District Court Jurisdiction:

“Every action of a civil nature at law, or to recover any penalty imposed or authorized by any law of this state, where the debt, balance, penalty, damage or other matter in dispute does not exceed, *exclusive of costs*, the sum or value of five hundred dollars, shall be cognizable in the district courts of this state.”

Revised Statutes of New Jersey:

R. S. 22:2-44. *Fees of clerk*. In all actions and proceedings in the district court, the following fees shall be paid to the clerk: (List of charges follow, as Summons, Listing Fee, Execution Fee, etc.

Revised Statutes of New Jersey, R. S. 22:2-50:

22:2-50. *Attorney's Fees*. There shall be taxed by the clerk in the costs against the judgment debtor, to be collected on execution or order in the nature of execution on any final judgment, a fee to the attorneys of the prevailing party, of five per cent of the judgment.

Section 3(c):

(c) *Grounds for decrease of maximum rent*. The Administrator at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

Section 7(d):

(d) *Orders where facts are in dispute, in doubt, or not known. If the rent on the date determining the maximum rent, or any other fact necessary to the determination of the maximum rent, is in dispute between the landlord and the tenant, or is in doubt, or is not known, the Administrator on petition of the landlord filed within 30 days after the effective date of regulation, or at any time on his own initiative, may enter an order fixing the maximum rent by determining such fact; or if the Administrator is unable to ascertain such fact he shall enter the order on the basis of the rent which he finds was generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date.*

POINT I.

The trial court lacked jurisdiction, as the amount in dispute exceeded the sum of \$500.00, exclusive of costs.

The jurisdictional amount of the District Court is limited under R. S. 2:8-40 (See p. 11 of Brief for the reading of the statute) to every action cognizable to be tried in the District Court where the damage or other matter in dispute does not exceed the sum of \$500.00, exclusive of costs.

The words "*exclusive of costs*" within the meaning of R. S. 2:8-40 are such costs which are cognizable in the District Courts of New Jersey. They are provided for by our statutes to a successful plaintiff and awarded against a judgment debtor, as for example, fees paid to the Clerk

of the Court, under R. S. 22:2-44 (page 11 of Brief); and those costs representing 5% of the amount recovered, being attorney's fees taxed to the costs, under R. S. 22:2-50. These items are the costs, which under our Statute (R. S. 22:2-44 and 50), "shall be *taxed* by the Clerk in the costs against a judgment-debtor."

The "taxed costs" are fixed by our statute, and by the positive command of the Legislature is a sum taxed and awarded against the judgment-debtor upon the amount recovered.

The plaintiffs' right to the action against appellant for civil damages, etc., stems from Section 205(e) of the Federal Act under which they "*bring action either for \$50.00 or for treble the amount, etc., plus reasonable attorney's fees and costs as determined by the Court.*"

Plaintiffs set out in their State of Demand, as the basis of their demand, the Federal Statute (S. C., p. 6), and at the end of each count they repeat the damnum clause as follows:

"Wherefore, judgment will be claimed by the plaintiffs and against the defendant in the sum of *Fifty (\$50.00) Dollars, plus attorney's fees and costs to be fixed on this count.*"

There are 10 such counts, making a total of damages sought for \$500.00, "plus reasonable attorney's fees and costs" the amount of which to be ascertained and fixed by the Court.

Under Section 205(e) of the Federal Emer-

gency Price Control Act, the plaintiffs have a cause of action in a proper case for:

- (a) Civil Damage for \$50.00;
- (b) Reasonable attorney's fees to be fixed by the trial court;
- (c) Costs to be fixed by the Court.

It would devolve upon the trial court to determine (a) damages, (b) attorney's fees, (c) costs, to a successful litigant. The measure of damages is named in the Federal Act, and the recovery for compensation for his civil injury (See *Beasley v. Gottlieb, infra*). The damages are mandatory and leaves no discretion as to the amount of the civil damage features of the Statute. It must be either three times the overcharge, or \$50.00, which sum is greater; however, the recovery of (b) attorney's fees, and (c) costs must be determined by the court, and such sum must be reasonable in amount. The attorney's fees must be commensurate with the amount of work and services necessary and the costs that are necessary in the prosecution of such action.

The Court determines what are reasonable attorney's fees and costs. Judge Welsh, of the United States District Court (Eastern District of Pennsylvania), referring to this subject matter, stated in *Herbert Everly vs. Edward G. Zepp, et al., infra*:

"The attorney's fees should not be in an amount tending to render such litigation profitable, and we think they should be the minimum commensurate with the necessity of the litigation to preserve the rights of the

client. Under the circumstances we do not think the fee should exceed the recovery."

The amount plaintiffs sued and sought recovery is in excess of \$500.00. Their recovery as sought would be \$500.00 legal damages, and assume the Court allows \$50.00 or \$75.00 for attorney's fees, and assume \$15.00 or \$20.00 for costs of attendance of witnesses, etc., and other evidence, necessary in the prosecution of such action, the amount of the verdict, if they establish a *prima facie* case, would be \$565.00 and upwards. To this sum, taxed costs would be added, such as District Court Clerk's charges for service, mileage and listing for \$3.84 (S. C., p. 31), (under R. S. 2:22-40), and 5% of the amount of the recovery for attorney's fees (R. S. 2:22-50); all of which would be taxed by the Clerk of the Court, as part of plaintiffs' taxed costs against the judgment-debtor.

These are the damages sought by the plaintiffs in this suit.

Appellees argued in the New Jersey Supreme Court that defendant misconstrues their demand for damages. They say their suit is divided into ten separate counts, and there is demanded \$50.00, *plus attorney's fees and costs* on each count; that the *costs* and *attorney's fees* in contemplation are those prescribed by the District Court Act, namely, the *costs* of suit, together with a 5% attorney's fee, citing R. S. 22:2-44, prescribing the costs that may be allowed; and R. S. 22:2-50, providing attorney's fees of 5% of the recovery; and these are the costs and fees demanded, and furthermore, there was no discretion given to the trial judge to fix any fees or costs other than those prescribed by the statutes.

Appellees very adroitly transposed the words "*attorney's fees*" and "*costs*" and thereby confused the issue.

The damnum clauses on each of their 10 counts of their State of Demand (S. C., p. 9, line 24) are clearly stated. They claim judgment for "\$50.00, *plus attorney's fees and costs to be fixed*" on each of the ten counts. The damnum clause follows the exact wording of the Federal Act under which they base their right of recovery, if any they are entitled to receive, and which they set out verbatim in Paragraph 4 of their State of Demand (S. C., p. 8, line 10):

"may bring an action either for \$50.00 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is greater, *plus reasonable attorney's fees and costs as determined by the Court.*"

If the plaintiffs only sought the \$50.00 penalty sum, as they argue, then the usual form adopted would be used as suggesting that "Judgment would be claimed for \$50.00, besides costs." These words were not used, so, it clearly indicates that they claimed the full Federal statutory measure of damages.

Appellant contends the New Jersey Supreme Court erred in its Opinion (S. C., p. 64, line 29), in affirming the judgment below.

The statute which determines the jurisdiction of the District Court to try the issue, expressly provides that the damage or matter "*in dispute,*" should not exceed the sum of \$500.00. This is determined by the State of Demand, and is the amount sued for.

It is not the amount of recovery that determines the jurisdiction of our District Courts; and appellant urges that the Supreme Court erred in its Opinion.

In this case on appeal, the damage and the matter in dispute as demanded in their State of Demand clearly exceeds the sum of \$500.00, *exclusive of costs*, and the amount *sued for*, and which is in controversy, is beyond the jurisdiction of the District Court under R. S. 2:8-40.

District Courts are creatures of the Legislature, and by statute created them and limits their jurisdiction as to territory and amount. See *MacPhail vs. Nassau*, 184 Atl. 633, 14 N. J. Misc. 292.

In *Besser vs. Krasny*, 114 N. J. L. 146, 176 Atl. 146 (E. & A., January, 1935), reversed 113 N. J. L. 81, 172 Atl. 533, the District Court lacked jurisdiction because the demand was for "\$500.00 and interest thereon."

It has been held in *Van Giesen vs. Van Houten*, 5 N. J. L. 822, and *Griffith vs. Clute*, 9 N. J. L. 264, and *Howell vs. Burnett*, 20 N. J. L. 266, that "interest" is part of the debt, and when added together it exceeds the jurisdiction of the Court. The attorney's fees and costs" to be fixed by the Court, under the Federal Statute is part of the debt and relate to the amount of the judgment to be determined by the Court and are added to the legal damages provided for under the Federal Act.

In the case here under consideration on this appeal, the State of Demand filed by the plaintiffs is in excess of \$500.00, besides costs.

It, therefore, follows plaintiffs' demand multiplied by 10 causes of action clearly shows that the amount sued for, and which is in controversy,

is beyond the jurisdiction of the District Court under R. S. 2:8-40.

Appellant urges the amount sued and in controversy, as provided for under Section 205(e), exceeds the jurisdictional amount of the District Court, and the trial court lacked jurisdiction to try the instant case.

POINT II.

The trial court erred in assuming jurisdiction to determine and fix the ceiling price as the maximum legal rental of the premises in question as of March 1, 1942, in violation of the provisions of the Federal Emergency Price Control Act.

Appellant submits in the case at bar, that the trial court erred when it usurped the powers, duties and the functions devolved and imposed upon the Administrator. Appellant urges that the trial court lacked jurisdiction in anywise to modify, change and determine the Maximum Legal Rent as of March 1, 1942, for the premises.

For plaintiffs to succeed, they had to prove they paid a sum in excess of the ceiling rental price. Hence we have the landlord's registration with the O. P. A. for \$28.00, Exh. P-9 (S. C., pp. 58-59), and was neither revoked, changed or modified by the Office of Price Administrator. It was properly filed under the form provided for, and Registration of the Maximum Legal Rental as of March 1st, 1942, Exh. P-9 (S. C., pp. 58-59) remains in the files of the Office of Price Administrator.

The evidence is clear and not denied that the plaintiffs paid \$28.00 each month on their yearly

lease, all of which show no excess payment for the ten months stated in their State of Demand.

Nor did the plaintiffs protest either to the appellant or to the Area Rent Director of the O. P. A. of any alleged overcharge.

The plaintiffs introduced the testimony of Margaret Brady challenging the correctness of the "ceiling rent," whereupon the trial court determined what was the ceiling rent on March 1st, 1942, in his ^{Opinion} ~~specified~~ ~~file~~ of May 4, 1945 (Opinion, S. C., p. 54-a).

The Price Administrator created under the Act, determines any facts necessary for determination, where the rent or any facts filed under the Maximum Rent Regulation No. 28, Maximum Rent Regulation No. 28 for Housing accommodations other than Hotels and Rooming Houses, *are in dispute, by the tenant or is in doubt, or is unknown.* He may bring the issue on for hearing, upon notice (Sec. 7), and enter a decree for any modification of the maximum rent allowable (Sec. 5-c).

Where defense rental areas have been defined by the Price Administrator, all housing accommodations within such area are subject to the Administrator's control for the purpose of establishing, fixing and determining rent ceilings. See *Adams, Rowe & Norman vs. Bowles*, 144 Fed. 2d 357 (U. S. E. C. A., July, 1944), and as pointed out in *Hillcrest Terrace Corp. vs. Brown*, 137 Fed. 2d 663 (U. S. E. C. A., 1943), the Court said that while Congress sanctioned the use by the Price Administrator of the maximum rent date, and method of establishing the maximum legal rent stabilization as a generally applicable formula for determining the maximum legal rent, it recognized that any adjustments and exceptions in formulating a workable maximum rent

regulation also rests with him. Section 901, *et seq.*, of this Act vests in the Administrator a broad discretion in determining what provision, if any, should be made for individual adjustments, although the exercise of the Administrator's discretion is subject to review in the Emergency Court of Appeals, to determine whether it was arbitrary or capricious.

Roth-Holt Co. vs. Bowles (Em. App. 1944),
144 Fed. 2d 877;

Equitable Trust Co. vs. Bowles (Em. App.,
1944), 143 Fed. 2d 735;

Gillespie-Rogers-Pratt Co. vs. Bowles (Em.
App., 1944), 144 Fed. 2d 361;

Wilson vs. Brown (Em. App., 1943), 137
Fed. 2d 348;

Rottenberg vs. United States (C. C. A.,
Mass., 1943), 137 Fed. 2d 850;

United States vs. Siegel Bros. (D. C.,
Wash., 1943), 52 Fed. Sup. 238.

The remedy of a tenant is under said sections, and not in the trial court, see *Bowles vs. Nu Way Laundry Co.* (C. C. A., Okla., 1944), 144 Fed. 2d. 741.

In *Everly vs. Zepp*, *infra*, the tenant followed the requirement of the Federal Act under which he sought judicial redress. He brought his suit after complaint was first registered with the Office of Price Administration Director and, upon a hearing had before the Rent Area Director, the rights of the landlord and tenant were then ascertained. This having first been done, the law court proceeded with the action.

The tenant followed the statutory requirements by bringing on a hearing before the Rent Area

Director, and after a complaint, and hearing, the Director determined the "maximum legal rental" as of March 1, 1942, and directed a finding of fact of the \$70.00 overcharge, which the landlord promptly returned.

In the case *sub judice*, all of this was lacking, and hence, appellant contends that the District Court was without jurisdiction to determine the "maximum legal rental" as of March 1, 1942, and was without jurisdiction to sit as a fact-finding body, to determine the reasonableness, or any facts necessary to fix the maximum legal rental of the fixed rental period.

In *Percy R. Jones, et al. vs. F. E. Shields, et al.*, Cal. Sup. Ct., Appel. Dept., Los Angeles Co., Cal.; reported No. 51878 O. P. A. Service, on March 2, 1944, held that the state court was without jurisdiction to review the action of the Administrator in applying the Rent Regulation to the facts of the particular case.

This question was decided by the United States Supreme Court, in the case of *Clem Lockerty vs. Phillips*, reported in 319 U. S. Reports 182 (1943), c. f. 146 A. L. R. 720, and 725, 150 A. L. R. 1470, and 151 A. L. R. 1469. This was an appeal taken to the United States Supreme Court from the dismissal of a bill of complaint brought by Clem Lockerty against the Director of the Office of Price Administration. Chief Justice Stone affirmed the dismissal of the complaint by the District Court and held Section 203 (a) sets up a procedure whereby any person subject to any provision of any regulation, order or price schedule promulgated under the Act may file a protest to the Director of the Office of Price Administration, specifically setting forth objections
* * * and the Administrator shall either grant

or deny such protest in whole or in part * * *. The United States Supreme Court further said that the plaintiffs did not protest to the Director of any price schedules which they now challenge; nor did they take any proceedings for a modification, reduction or for proper determination of such price schedules. Under this cited decision, the trial court lacked jurisdiction to alter, modify or nullify the rules, regulations and orders as filed. They did not protest the price regulation which they challenged, and took no proceedings for review by the Emergency Court of Appeals created under the Act. They sought the aid of the United States District to restrain the enforcement of an administrative order and price schedule without first pursuing the administrative remedy provided by the statute.

Appellant further relies upon Section 205(d) of the Emergency Price Control Act, for reversal of the judgment. This section relieves appellant from liability for damages in any Court on any grounds "in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act, or any regulation, price schedule, requirement or agreement thereunder, or under any price schedule of the Administrator— notwithstanding subsequently such provision, etc.—may be modified, rescinded or determined to be invalid."

There is nothing in the proof in this case appellant violated any order, regulation or rule or price schedule, and hence the defendant is not liable for any violation.

The evidence here is clear, corroborated and uncontradicted by the plaintiffs, that the landlord did all that was required of him. He filed his registration under Form DD 2-D, as provided for, and the Registration of the Maximum Legal

Rental as of March 1, 1942 ("Ex. P-9," S. C., pp. 58-59) remains in file in the Office of Price Administration, unchallenged, and neither revoked nor modified.

Appellant also urges as a ground for reversal of the judgment, that the provisions of Section 205(d) duly exonerated him from liability for damages, and further that the trial court was without jurisdiction to fix the ceiling price of the rental of the premises as of March 1st, 1942.

POINT III.

The trial court erred in denying the defendant's motion for a non-suit.

Appellant contends that the plaintiffs failed to carry their burden of proof.

Plaintiffs allege in their State of Demand (1) the defendant failed to comply with the provisions of the Federal Emergency Price Control Act, Section 205(e) and such rules, regulations and orders made by the Administrator therein named, and upon whom devolved the duty of regulating housing accommodations, and providing the maximum rents for such accommodations in the defense area established by the Administrator; and (2) the defendant accepted rent in excess of the maximum ceiling rental of the flat occupied by the plaintiffs for a period of 10 months; in an amount of \$2.00 per month or a total of \$20, hence a cause of action accrued to the plaintiffs for \$500, besides attorney's fees and costs.

Under Point II, of this brief, we have urged that the Court erred in fixing the maximum rent as of March 1, 1942. Assuming, but not conced-

ing, the trial court had power to determine this fact, appellant contends that from an examination of the testimony adduced in behalf of the plaintiffs, it indicates that the testimony of the witness, Margaret Brady, was such that not only was it uncorroborated in any way, but, in addition thereto, the testimony as given by her was highly impossible and biased (S. C., p. 50, lines 9, 10) and extremely self-serving (S. C., p. 50, lines 10-12), for it appears that she had a financial interest in the outcome of these proceedings, for she was to get at least \$50.00, if the plaintiffs were successful in any recovery (S. C., p. 51, line 10; S. C., p. 28, lines 31-40; S. C., p. 29, lines 1-27).

Here again, the plaintiffs had an opportunity to take the stand and testify. They failed to do so (S. C., p. 34, lines 22-40). Such failure, on the part of the plaintiffs to take the stand, should militate against Mrs. Brady's testimony, who clearly showed that she had an interest in the proceedings; reducing her testimony to its ordinary meaning, it is like this:

“You help us win this case, and you will be helping yourself, because, if we win this case, you will be paid.”

The testimony of the witness, Margaret Brady, carries no weight.

The plaintiffs failed to sustain the burden of proof, in that they failed to show any failure on the part of the defendant to comply with the Federal Act; and the record is barren of any proof of an overcharge, as alleged by the plaintiffs.

The plaintiffs paid \$28.00 per month.

The maximum legal rental for the premises as of March 1, 1942 (S. C., p. 50, Exhibit P-9), was \$28.00, and therefore there is no overcharge.

He who asserts an allegation must prove it, and their failure to carry the burden of proof must result in a non-suit. The burden of proof never shifts, and the plaintiffs are always charged with the duty of making out a *prima facie* case. The law is elementary on this proposition of law, and we do not deem it necessary to cite any authority in support thereof. This, the plaintiffs failed to do in the case at bar and the motion for non-suit should have been granted, and was improperly denied by the trial court.

Appellant preserved his constitutional right to trial by jury by the timely demand filed (S. C., p. 18), and the payment of the required jury fee to the Clerk, as required under R. S. 2:32-102.

During the course of the litigation, an order was granted for taking depositions of Harold Alper, one of the witnesses in behalf of the appellant, who at that time was in the United States Armed Services and residing in Connecticut. There was an application for the taking of the testimony of the defendant, who is an aged and infirm person, over the age of 75, and an invalid, residing in the City of Newark, but who was unable to appear in person at the time of the trial. These applications were timely made to the Court, and at that time, by mutual agreement, a stipulation was entered into, on January 14, 1944 (S. C., p. 23, lines 19, 20; S. C., p. 51, line 14), which stipulation provided that the defendant would waive his right to trial by jury, and, among other things, *provided, however, that the plaintiffs would personally appear and testify* (S. C., p. 23, lines 19, 20).

The defendant on his part carried out the terms of the stipulation, and the jury was withdrawn (S. C., p. 48, line 36), and the action proceeded to be tried by the Judge. The Court's attention was called to the plaintiffs' failure to testify, although they were present in Court. The stipulation was read into the record (S. C., pp. 22, 23).

A motion for non-suit was made by the defendant. It was denied.

A similar situation arose in *Elias Diem, et als. vs. New Jersey Landscape Co.*, reported in 8 N. J. Misc. Reports, 69 (Supreme Court, 1930). The Appellate Court *reversed* the judgment below, in such instance where the signed stipulation between the parties was not complied with, stating that the failure to do so invaded appellant's constitutional right to trial by jury.

Appellant submits that he has been deprived of his constitutional right to try the case before a jury. The rights of the defendant were prejudiced by the withdrawal of the jury and plaintiffs failed to carry out their part of the agreement to testify.

Appellants urge that the judgment in favor of the plaintiffs should be reversed.

POINT IV.

The trial court erred in (a) rendering a judgment to the plaintiffs instead of the defendant, upon the defenses shown; (b) that the plaintiffs failed to make a demand for the return of the alleged overcharge; (c) that they failed to call for a hearing before the Office of Price Administration, to determine the maximum legal rentals of March 1, 1942; (d) that they continued to pay without protest, such alleged overcharge; (e) that they failed to do any act to mitigate the damages prior to the commencement of their action; (f) that they did entrap the defendant in paying the alleged overcharge without any protestation or notice to the defendant.

Appellant contends the plaintiffs instituted these actions in bad faith and solely to enrich themselves through their own act.

In *Carmelly v. Hanson (infra)*, good faith upon the part of the landlord or the defendant under Section 205(e) has been held not to be a redeeming influence or a defense to an action against him under this section. The reasoning is sound for one who violates the law cannot plead good faith. How about good faith on the part of the purchaser who brings the suit?

Appellant urges the tenant did not bring the action in good faith, and such conduct on their part can be set up against their recovery.

There has always been a judicial aversion to aiding a malefactor in profiting from his own wrong. From this wellfounded principle has sprung the doctrine that one who is himself a

party to an illegal transaction may not obtain the aid of the courts. The ancient maxim that "no man shall take advantage of his own wrong" is still a living force. If wrong was done and was so conceived in the minds of the plaintiffs, they cannot now seek to take advantage of their own wrong by employing a statute enacted for their own benefit, as a protection against the wrong of others.

In an old English case—Baron Bramwell, in 1857, in *Hooper vs. Lane* (6 H. L. Cases 443-460) clearly enunciated the maxim with this distinction:

"It means that no one shall gain a right by his own wrong and not that if he has a right, he shall lose it, or the power of exercising it by a wrong done in connection with it."

Again—Bowen, L. J., in *In re London Celluloid Company* (36 Chan. D., 140, at p. 206) approved of the last quotation, and defined the maxim as follows:

"It means that a man cannot enforce against another a right arising from his own breach of contract or breach of duty."

Courts have been frequently called upon to apply the maxim. Perhaps the most striking illustration is to be found in the language of Mr. Justice Field:

"It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of the party whose life he had feloniously taken.

As well might he recover insurance money upon a building that he had wilfully fired.” *New York Mutual Life Ins. Co. vs. Armstrong*, 117 U. S. 591, at page 600; 68 S. Ct. 877-881; 29 L. E. 997.

Defendant did not in anywise conduct himself so as to permit the plaintiff to become entitled to any benefits under the Emergency Price Control Act.

Did the plaintiffs complain to the owner that they were overcharged, or to the Area Rent Director that they were overpaying, and that the maximum rental as of March 1, 1942, was in dispute, in doubt or unknown? Did they make a demand before the commencement of the suit, for the alleged overpayment? The evidence in this case is barren of such proof. The evidence, to the contrary, is clear and corroborative and undenied in that the Frosts did not make any complaint whatsoever.

Interrogatories were served seeking answers of the plaintiffs as whether they made any complaint, demand or effort before the commencement of the suit for the return of the alleged overcharge, upon whom, when, and where, if any such demand was made (S. C., pp. 20-22). Plaintiffs refused these answers and the Court sustained their refusal to answer, as such evidence would not be sufficient for a defense to the action.

The Court erred in dismissing the application for a new trial (S. C., p. 56, line 36). The affidavits of Theresa Alper (S. C., p. 41, line 30 to p. 43, line 10) and Ethel Steinberg (S. C., p. 43, line 20 to p. 45, line 10) were used and considered upon the application for a new trial.

No denial nor answering affidavits were made by the plaintiffs. These facts therein stand uncontradicted. The facts that the plaintiffs had knowledge of the rental arrangements as of March 1st, 1942 (S. C., p. 44, lines 11-40 and p. 45, lines 1-10), is undenied, nor did the plaintiffs deny that they waited for an accumulation of time before they would sue, and the plaintiffs intended to sue for a further period of time. The Court denied the application for a new trial for the reason that such evidence would not constitute a defense for the defendant.

Appellants urge that the trial court erred in this determination.

The Court also took judicial notice that the plaintiffs instituted two other suits in its court and against the appellant, under Dockets 73171 and 73172, for additional 10-month period, for a total of \$500.00, besides attorney's fees and costs under this section of the Federal Act. (For the Appellate Court's information, the trial court directed a verdict in favor of the plaintiffs and against the defendant, for the sum of \$450.00 besides costs.

Appeals were filed.

Appellant, during the appeal was served with a notice of motion to dismiss the appeals upon the grounds that the transcript of trial was not completed nor was it certified by the Trial Judge within 30 days after notice of appeal and within the time provided under R. S. 2:32-203. On the technical objection, the appeals were dismissed by the Supreme Court.

The opinion filed, sympathetic as it was, said the case is one of considerable hardship since the Court is confronted with a statute and not one of its rules which it may relax or modify, and

since it was urged, the appeal was dismissed without deciding on its merits.

The Court of Errors and Appeals affirmed the dismissal. The matter was argued in October Term, 1945.)

Justice Case, in the case of *Pilgrim Co. vs. Rosenblum, et als.*, reported in 130 N. J. L. 220; 32 Atl. 2d 453 (Sup. Ct., June 7, 1943), held that there was no increase of rent, where the amount plaintiff paid was not in excess of the registration sheet filed with the Office of the Price Administrator as of March 1, 1942. As Justice Case remarked:

“There is nothing suggestive of speculation, profiteering, manipulation or taking advantage of the house shortage or other emergency.”

We contend that the record in the present case at bar is barren of such improper conduct upon the part of landlord. There is nothing in the record to indicate that the defendant failed to comply with any of the provisions of the Act, or of any regulations, orders or price schedules prescribing a maximum price or prices promulgated by the Administrator under the Act.

The case of *Tropp v. Great A. & P. Tea Co.*, reported in 32 Atl. (2nd), 717; 21 N. J. Misc., 205, arose out of the Camden District Court, in which the plaintiffs (husband and wife) made a purchase of a bottle of Salad Dressing, on which was affixed a price tag calling the customer's attention that the ceiling price was 45c. She requested the Manager to correct the price to 41c, as being the ceiling price, which he did; but, through an error of the grocery clerk, 45c was charged for

the item. Upon arrival at her home, she discussed the day's happening with her husband, whereupon, on the following day, she returned, made another purchase, and her husband also followed her visit on the following day and continued to make further purchases, paying 45c for the same. Then two suits followed, one by the wife, alleging two violations, and a separate one by her husband, alleging one violation and seeking \$50.00 for each violation, together with reasonable attorneys' fees and costs under the federal statute. The Court entered a verdict for \$50.00 on the first purchase, alleging that with knowledge of the overcharge, the seller received the sum. However, the Court found no cause of action as to the remaining counts. The Court went on further to say:

*"This act was not created to make public informers of the general public. Viewed in a reasonable light it does not mean that every shopkeeper who makes an overcharge of even a few cents must forfeit \$50 to every customer who decides to sue. To permit this interpretation would result in the clogging of all court processes. * * **

*Persons should not be permitted to succeed under this act where their only motive is to enrich themselves at the expense of the man in business. To do so would violate one of the very purposes of the act which is stated in the preamble 'to prevent hardships to persons engaged in business.' * * **

The plaintiff, Nancy Ruth Tropp, upon her visit to defendant's store on March 9, 1943, I find, intended to make a *bona fide* purchase 'for use or consumption' and therefore

should be entitled to recover. A few decisions have been rendered in other jurisdictions as to whether or not the amount recoverable must be Fifty Dollars where treble the amount which the consideration exceeded the applicable maximum price is less than Fifty Dollars. *No effort is made by this Court to pass upon this point.*

"The verdict will therefore be a judgment of \$50 plus \$15 attorney's fees and costs of suit in behalf of Nancy Ruth Tropp on the first count of her complaint. Verdicts of no cause of action on all other counts of her complaint. A verdict of no cause of action on the complaint of the plaintiff, Walter W. Tropp."

The language of the *Tropp* case was cited with approval by the Federal District Court of the Eastern District of Pennsylvania in *Everly vs. Zepp* (Oct. 2, 1944), 57 F. Supp. 303 (Price Control Cases No. 52,001). That Court also used the following language supporting the view that the courts no less than the consumers or an administrator of the Act are charged with the responsibility for a reasonable administration of the provisions of the statute. The Court said:

"The Supreme Court has said that although the language of the act, Sec. 205(a) appears to be mandatory, some discretion must be allowed to the courts in construing it. They have been entrusted with a share of the responsibility in the war against inflation and their discretion in applying the remedies provided must be exercised in the light of the large objectives of the act. The

standards of public interest *and not the requirements of private litigation measure the propriety and need for the relief authorized.* The Court favored the interpretation which affords full opportunity for courts to treat the proceedings under the act in accordance with their traditional practices as conditioned by the necessities of the public interest. *Hecht Co. vs. Bowles*, 321 U. S. 321, 64 S. Ct. 587, 88 L. Ed. (1 Price Control Cases No. 51,073).''

In *Jacobson vs. Bowles* (1944), 53 F. Supp., 532 (1 Price Control Cases No. 65,148), it was held that "an entrapment does not become a defense unless it is more than the ordinary testing of the citizen." This seems to imply that in some cases entrapment may be a defense.

In a recent decision rendered on March 12, 1945, in the case of *Ray R. Dunakin vs. Southwestern Consumers, et als.* (Sup. Ct., New Mexico); reported (1 Price Control Cases No. 52,161), Judge Bickley refused recovery as plaintiff, at the time he purchased said can of tomato juice, knew that the said price of 57c was over and above the maximum price for said can allowed by the Office of Price Administration, and with such knowledge, purchased the can in bad faith, with the intent and for the purpose of laying a basis for this suit, in order to collect from the defendant the sum of \$50.00, together with costs and attorney fees, and for the purpose of inducing the defendant to violate the law and regulations of the Office of Price Administration, so that he might benefit by suing the defendant for the \$50.00 penalty provided by law.

The Court said:

“All the evidence and the circumstances introduced in this case do not convince the Court that it was purchased for that purpose, and the Court is in considerable doubt as to whether that was the purpose. The very prompt and aggressive way that the plaintiff made his purchase and checked on it, and went to the OPA office, and hired a lawyer, all within a couple of hours or so, throws a great deal of doubt upon the good faith of the plaintiff in this case, as to whether he bought it for the purpose of his own use and consumption, or whether he bought it for the purpose of bringing suit and collecting the penalty. The Court believes that the plaintiff in this case, at the time he bought this merchandise, knew it was not properly priced. It was not a case where there was a cent or two, or a small fraction off, but it was double its ordinary price. It is shown that this plaintiff had bought tomato juice many times before this, had bought it, when he stated the price was about half what was charged him at this time. He stated he thought it was a little out of line, but when he asked for the price and was told it was 57c he was satisfied that it was all right, but immediately it appears from the evidence, he went to a grocery store two blocks away, not for the purpose of buying, but for checking the price there, and then went to the OPA office, and got his lawyer. The Court will dismiss the action on the ground that the plaintiff hasn't proved the essentials to constitute a cause of action.”

The requirement that recovery sought in the con-

sumer's action, under 205(e), and much of the language of the Supreme Court of California in the *Miller* case tends to support it (see page 839 of the majority opinion) as follows:

"And the requirement that the recovery sought in the consumer action must be either \$50 or treble the amount of the overcharge, whichever is greater, also indicates that Congress intended the *minimum recovery* of \$50 to serve both as a deterrent to *initial violations* and as an inducement to the consumer to help enforce the act."

Judge Merrill E. Otis of the Federal District Court, Western District of Missouri, recently tried a case involving a similar sort of affairs. See *McCowen vs. Dumont* (1 Price Control Cases No. 51,946). The Court held that overcharge of rent amounting to a total of \$39.50 in excess of the ceiling over a period of more than six months, during which 24 rent payments were made, authorized merely a judgment for \$118.50 respectively for statutory damages and for attorney fees, as against the contention that judgment should be for \$1,200 respectively, for statutory damages and for attorney fees. Judge Otis' astonishment is thus expressed:

"The suit (the complaint is in twenty-four counts) is for a total of \$1,200 and an attorney's fee which the only testimony on the subject indicates also should be \$1,200. In other words, plaintiff would punish the widow, who is said to have overcharged plaintiff \$39.50, by a judgment against her in the amount of \$2,400. *Mirable dictu!*"

The evidence in the case at bar clearly shows by the proof that the plaintiffs sat back during the entire ten-month period, and voluntarily paid each month \$28.00 without any protest, which rental was not in excess of the amount registered as the Maximum Legal Rental. *Plaintiffs believed that by so sitting back they had created an action to their own advantage, whereby they could sue for \$50 for every \$2.00 they allege they overpaid, besides recovering attorney's fees and costs to be taxed by the Court and to be paid by the owner; that they failed to call a hearing before the Area Rent Director in the given area, to protest against any such payment which they allege to be an overpayment; that they failed to do anything to mitigate the damages, and failed to take the stand at the trial of this cause to testify or explain their passive conduct and actions; all of which appellant charges are acts indicative of a lack of good faith on their part and that plaintiffs' conduct in the institution of this suit is an abuse of process against the defendant, an innocent owner, who by the evidence clearly shows he has complied with all the rules, regulations and orders under the Federal Act and those promulgated thereunder.*

Appellant urges that the plaintiffs cannot recover under these facts and urges a reversal of the judgment, for the reason the plaintiffs cannot enrich themselves, through their own improper conduct.

POINT V.

The trial court erred in its determination in entering judgment in favor of the plaintiffs and against the defendant for \$500.00, besides costs, as contrary to the provisions of the Federal Emergency Price Control Act (Section 205-e), in that, if the plaintiffs are entitled to recovery, that the recovery cannot exceed three times the alleged overcharge of \$20.00 as shown in the State of Demand, or \$50.00, whichever sum is greater, together with reasonable attorney's fees and costs.

The Emergency Price Control Act authorized only the injured tenants to bring suit under Section 205(e).

We contend these plaintiffs are not the injured tenants; however, for the purpose of this argument but not admitting they have proved their right to judgment, we argue this point.

The right of action is thus limited to the party aggrieved. The action is remedial and not penal, and has been so held by our courts of New Jersey. *Beasley vs. Gottlieb* (Sup. Ct., 1943), 131 N. J. L. 117; 35 Atl. 2d 49; 1 *Corpus Juris Secundum* Actions No. 59 (p. 1180-Remedial and Penal).

Appellant insists, if plaintiffs can recover at all, that they are entitled to but one sum for the violation of each price schedule; thereby they can recover three times \$20.00, the total of overcharges, or \$60.00, since this sum is greater than \$50.00, plus a reasonable attorney's fee and costs.

The language used in the statute under consideration is very different in its practical application. Unlike the Fair Labor Standards Act often referred to in many of the decisions

throughout the country, this act in authorizing the filing of consumer action, merely formulates the manner in which a plaintiff may compute his claim, and the maximum for which he may sue. It stops short of saying that the defendant "shall be liable," for the amount claimed. Viewed in a reasonable light, we think it does not mean that every shopkeeper or landlord who makes an overcharge of even a few cents *must forfeit* \$50.00 to every customer who decides to sue. If that were so, a small shopkeeper could unwittingly put himself out of business in a few minutes by making a series of small overcharges, however innocent his intentions. Widespread bankruptcies might easily engulf unwary shopkeepers, large and small. If the contention is otherwise, it would mean that every overcharge means a violation, and that upon every bare showing of an overcharge, without more, a consumer becomes automatically entitled to the maximum.

We do not think Congress intended any such sweeping punitive measure, for it would actually serve to defeat one of the very purposes of the Act which is stated in the preamble, "to prevent hardships to persons engaged in business."

Plaintiffs' demand is for damages under Section 205(e), for an alleged overcharge of rent, claiming that they have been overcharged \$2.00 for 10 months from November, 1942 to September, 1943, for which they ask judgment for the sum of \$50.00 and attorney's fees for each month.

As we read the statute, and as we believe it should be interpreted, the thing prescribed by the law is the "selling" of a commodity above the maximum price set by regulations under the Act. Though the statute provides that "receipt of rent * * * shall be deemed the * * * selling

of a commodity * * *,” we believe that the determination of the question under consideration turns on what is the act of “selling.” Certainly it is not “receipt of rent.”

In the case at bar, the State of Demand shows defendant sold the plaintiffs “the right or the use and occupancy of an apartment for a period of two years, at the annual rental of \$336.00.” The agreement provides that the payment of this sum shall be made in monthly installments. This commodity, namely: “right to use and occupancy” of the apartment was sold at a stipulated price per year. It so happens that the plaintiffs used the flat thus sold for a period of two years. Up to the institution of the suit, plaintiffs had used it 10 months. Whether the defendant registered their apartment at a rental of so much per month or not, the rental was nevertheless fixed at the maximum being charged on the 1st day of March, 1942 (Exhibit P-9), (S. C., pp. 58, 59) at \$28.00 per month.

The plaintiffs did not pay anything in excess of these installment payments under the lease, they paid \$28.00 per month.

Assuming, but no conceding, that the maximum legal rental was less than \$28.00, what sums did they overpay under the lease? The Act provides that no person shall receive any rent higher than the maximum rate thus fixed. It so happens that the plaintiffs used 10 monthly installments, or rather portions of the two-year lease, of “the right to use and occupancy of the apartment.” There was thus but one “selling,” and not 10 sellings. This is the defendant’s interpretation, and his argument why the Court erred in entering the judgment as it did.

The judgment, if such was to be entered, should

be \$60, together with a reasonable attorney's fees and costs.

In a decision of the United States District Court, for the Eastern District of Missouri, in the case of *James V. Link, et al. vs. Sam Kallaos, et al.*, reported in Missouri (July 25, 1944), 56 Fed. 304, the Court had before it the same question raised as to the interpretation of the Act, and the proper application of the measure of damages. In his Opinion filed, he interpreted the statute in this manner:

"We think the term 'selling' as used in the statute, and the act, which give rise to the action is used in the accepted meaning, and is synonymous with the term sale. This term has a well recognized meaning. * * *

We can see no essential difference between the case of rental as thus presented, and the sale or 'selling' of a recognized commodity. To take a common illustration, meat. The price of meat is fixed at so much per pound, just as the price for the use and occupancy of the apartment in question was fixed at so much per year. There could be a sale or 'selling' to one customer (if he is fortunate enough to have the necessary stamps) of one pound or 12 pounds of meat, and if the sale was above ceiling price there would be but one offense, because there was but one sale or 'selling.' In the case of the sale or 'selling' of the use of the apartment to one person in violation of the rent regulation there is but one selling, one sale, one delivery, whether the person took one installment or portion, as the rent was fixed, or several installments or portions on the basis

of fixing of rent price. If there had been a rental of the apartment to 12 different persons during the 12-month period, there would have been 12 sales or 'sellings,' just as the sale of 12 pounds of meat to 12 different persons would have been 12 sales or 'sellings,' and if above ceiling price in either case, there would have been 12 separate offenses. Take the converse of the illustration used. If there was a sale made of one-half pound of meat above the ceiling price placed on meat at so much per pound, we do not think it would be urged that there was no offense, and likewise if the right to use and occupancy of the apartment had been sold for one-half month at a price in excess of the ceiling price set for the month, one could not claim there had been no offense committed. Can it be said the manner and time of rent payment determines the commission of the offense, and not the 'selling' of the premises? We do not think so. If this were true, two landlords doing exactly the same thing, and committing the same offense in charging in excess of ceiling price for rent, and one rented the premises by the week and collected rent by the week, and the other collected rent by the month, the former would have committed four offences and the latter only one; the former would be subject to punishment for four crimes and the latter only one.

We can see no reason for applying a different rule in the case of the 'selling' of right to use and occupy an apartment at a price fixed for the month and the 'selling' of a commodity on the basis of the price fixed.

We will not place such an interpretation on the statute especially in the absence of language in the statute indicating that it calls for such an interpretation, or that the Congress so intended.

That Congress never intended that the Emergency Price Control Act of 1942 should be given an interpretation placing the 'selling' of right to use and occupy housing accommodations on a different basis in determining liability for violation, than that provided for the 'selling' of an ordinary commodity is evidenced by the fact that in the amendment to the Price Control Act approved June 30, 1944, an effort has been made to improve the language of Sec. 108, sub-paragraph (e) so that under the law as amended it plainly appears that there can be no multiplying offences in the selling of the right to use and occupy housing accommodations at a price in excess of the maximum ceiling price, any more than there can be an accumulation of offences in the selling of commodities, where there is but one sale, 'selling' or transaction, regardless of when and how the rent is collected. See Public Law 783—78th Congress, Title I—Amendments to the Emergency Price Control Act of 1942; approved June 30, 1944."

We ask the Court to examine the decision in *McCowen vs. Dumont, et al.*, 54 F. Supp. 749, in which Judge Otis of the United States District Court for the Western District of Missouri held that every receipt of rent was not a separate selling, and confined judgment to three times the total overcharge, and a reasonable attorney's

fee. The Court will please observe that the reading of Section 205(e) uses the words "*Three times the overcharge, of \$50.00, or whichever sum is greater.*" It places a floor, rather than a ceiling upon the amount to be calculated. At page 751, Judge Otis says:

"The thing this statute makes punishable by triple damages is the 'selling' of a 'commodity' above the maximum price permissible. If we were dealing with some such commodity as, let us say, a refrigerator, the meeting of minds whereby a price was determined, delivery made, and title passed clearly would be the offense, the 'selling.' If the agreement was that the purchaser should pay in ten equal installments, there would not be ten sellings and ten offenses. There would only be one selling and one offense. When the 'commodity' is the right to occupy a given habitation, the 'selling' of the 'commodity' would seem to be the agreement whereby the right to occupancy is given. The fact that the consideration is to be paid in installments, or weekly, or monthly, logically would not transform one 'selling' into many sellings.

The statute must be read as a whole, 50 U. S. C. A. *appendix*, see 901, *et seq.* Another part of the statute makes a selling of a 'commodity' above the permissible price, if done 'wilfully' a criminal offense, Section 925(b) [205(b)]. Criminal statutes must be strictly construed. The criminal provision, and the provision we are here considering, have the same meaning as to what is the offense. One who holds with plaintiff, must

also be prepared to maintain that a landlord who wilfully overcharges in a six-month period, in a total amount of \$39.50, on a small apartment, if there were twenty-four rent payments, might be fined \$120,000 (\$5,000 for each payment) and sent to jail for twenty-four years (a year for each offense). Such an absurd interpretation should be avoided if that is possible."

The Act is a salutary war measure. Its purpose is obvious enough; to prevent avarice and cupidity on the part of sellers of commodities from getting out of hand, and thus prevent an increase of the consumers' hardships. The rising tide of prices had to be checked by legislative enactment. However, no intent can be read into that wise and prudent enactment to establish thereby a sort of gestapo, with each individual consumer an informer, leading to inordinate and unconscionable fines and penalties. Unless the section dealing with penalties commands in unequivocal language that each individual purchase shall carry a penalty of \$50.00, the conscience of the Court forbids that most harsh interpretation. Since Section 205(e) does not contain any such language, the construction irresistibly leads to the conclusion for one recovery.

In *Huntington vs. Attrill* (146 U. S. 657), 13 S. Ct. 224, 36 L. Ed. 1123, the words "remedial" and "penal" are often used interchangeably:

"The words 'penal' and 'penalty' have been used in various senses. Strictly and primarily they denote punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offence against

its laws. * * * But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer, in favor of the person wronged, not limited to the damages suffered. * * * The Act indeed does give a penalty, but it is to the party aggrieved. * * * The action is purely remedial and has none of the characteristics of a penal prosecution. All damages operate to a certain extent as punishment, and to deter others from offending in like manner."

It hardly matters, however, whether the statute in question be penal or remedial, for no words may be added or subtracted, and no fanciful meaning may be given to words of a statute. Any other reasoning would lead to cumulative penalties. The cases are legion to the effect that cumulative penalties are not sanctioned by the courts, unless constrained to do so by the plain and unambiguous language of the statute itself.

In *Sturgis vs. Spofford* (45 N. Y. 446), the Court of Appeals reduced a recovery of forty-six penalties of one hundred dollars each to but one penalty, because the statute "*does not say for each employment nor for each offence.*" The Court then stated that:

"Prosecutions for aggregated penalties should not be encouraged. * * * *If the prosecution is promptly instituted for a single offence, it operates as a salutary warning to discontinue the practice or acts complained of.*"

In *Milne vs. Wasserman*, reported 132 N. J. L. 285, 39 Atl. 2d 849 (Sup. Ct., November 30, 1944),

the Appellate Court remanded the case for trial because the trial court dismissed the action for want of jurisdiction of the trial court to hear same. No question was raised as to the construction to be given to Section 205(e) as to the amount of recovery, nor is the record clear, except that it was brought up because the trial judge was under the impression that the Court lacked jurisdiction to try the case because the action was for a penalty under the federal statute. The case was remanded to the District Court, *for trial and for such valid defenses as they may have.*

Appellant has read and examined many of the decisions that have appeared throughout the entire country. There has been a divergence of opinion on this particular question raised. As the statute was enacted strictly as a war measure, nevertheless we are mindful that the rights of the litigants are to be preserved, and that a clear and reasonable interpretation must be given as to the construction of the Act.

So far as we are aware, there is at present no decision of the United States Supreme Court that gives a specific answer to the question before us.

The general principle to be followed in the construction of Section 205(e) is succinctly expressed by the then Mr. Justice Stone in *Haggar Company vs. Helvering* (1940), 308 U. S. 389, 394, 84 L. Ed. 340, 344:

“All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.”

In *Bowles v. American Stores, Inc.* (1943), 139 F. 2d 377, the United States Court of Appeals, District of Columbia, in reviewing a judgment where the award was five dollars instead of the amount authorized by Section 205(e) (Section 925(e), took occasion to say this about the purpose of the legislation (p. 379):

“Congress foresaw that the task of enforcing the Act against retailers would be too vast for the Administrator to accomplish without the help of consumers. The plain purpose of the \$50 clause is to enlist the help of consumers in discouraging violations * * * The filing and prosecution of a small suit may or may not cost the plaintiff a substantial amount of money, but any suit takes time and effort. Most people have little time or taste for this sort of effort. Congress made \$50 a *floor* and *not a ceiling* in order to give overcharged consumers the necessary incentive to sue.”

To interpret the section as authorizing the recovery in one action of as many times fifty dollars as there are overcharges pleaded, would lead to results so absurd that the interpretation should be avoided unless required by the language of the section. This is not a fanciful speculation.

In the recent case of *Eula Peters vs. Margaret Felber, et als.*, reported in (Cal. Super. 1944), 152 Pac. 2nd 42, Judge Bishop modified the judgment below of a tenant who obtained a \$300 judgment for 60 monthly overpayments, and instead awarded a judgment of \$108, being three times the total overcharge, as it exceeded \$50. The Court said:

“The construction which we favor not only does no violence to the terms of the section, but, in the light of decision dealing with like statutes, is called for by the terms chosen for the section. This idea of inviting the aid of the public in the enforcement of a statute by the award of small sums in addition to compensable damages, is not new. A statute quite similar to that before us gave rise to the case of *Fisher v. N. Y. Central, etc., Ry. Co.* (1871), 46 N. Y. 644. The evil there sought to be discouraged was the making of a greater charge for railroad fare than that allowed by law—the statute provided that ‘any railroad company which shall ask and receive a greater rate of fare than that allowed by law, shall forfeit fifty dollars, which sum may be recovered, together with the excess so received, by the party paying the same.’ The plaintiff on 26 occasions was asked and paid a fare of 34c, which was more than the legal fare, and he obtained a judgment for \$1,376.48, made up mostly of \$50.00 for each of the 26 payments. After commenting upon the fact that the law prohibiting overcharges had, before the adoption of the law in question, been inadequately enforced, because the amounts involved were too small to justify the expense of private actions, the New York Court of Appeals stated (pp. 657, 658, 659): ‘To remedy this, the statute was passed giving the fifty dollars to the party paying the money, not as a satisfaction for the injury received, for that was otherwise compensated; but to enable him to prosecute in a court of record, when he could recover the

compensation of his attorney as costs, and to compensate for any further expense that might be incurred in the suit, and to compel the payment of such a sum by the defendant as would effectually stop the practice. To effectuate this intent, the language of the statute was chosen with care; which sum, etc., may be recovered, *omitting the words, 'for each and every offence,'* found in various penal statutes, showing clearly that the legislature did not intend to open a door to a *practice adopted in a case originating in another part of the State * * ** of opening a book account of penalties earned, and delaying suit for a year, when such penalties amounted to between \$20,000 and \$30,000. A construction permitting this would defeat the intention of the legislature, which was to suppress the extortion by prompt prosecutions, by enabling parties to forbear suing until the aggregate of penalties amounted to a large sum, and induce others to do as one of the plaintiffs in one of the cases now in judgment was honest enough to testify he did; that was to abandon other business and spend his time for a considerable period in riding back and forth from Tonawanda to Buffalo for the purpose of earning penalties * * *

My conclusion is, that but one penalty can be recovered upon the statute under consideration, for all acts committed prior to the commencement of the action. If, after this, it is again violated, another may be recovered in another action commenced thereafter, and so on, as long as violations continue. This will not only tend to put a stop at once to the extortion, when it is com-

mitted knowingly by the defendant, but where it is done under a mistake as to its rights, will give it notice that its rights to charge the amount claimed is challenged, and will induce a cautious examination of the question, and an abandonment of the claim before a ruinous amount of penalties have been incurred."

A like conclusion was reached in *Griffin v. Interurban St. Ry. Co.* (1904), 179 N. Y. 438, 72 N. E. 513, where this sanction had been provided to aid in the enforcement of a law which required the giving of a transfer upon request:

"For every refusal to comply with the requirements of this section the corporation so refusing shall forfeit fifty dollars to the aggrieved party."

Four times fifty dollars was sought because on four occasions a transfer had been refused when requested. These brief quotations from the decision suffice to reveal the Court's view (p. 449 of 179 N. Y.; p. 517 of 72 N. E.):

"Actions of this nature have become highly speculative and present a phase of litigation that ought *not* to be encouraged. The court is of opinion that if cumulative recoveries are to be permitted, the legislature should state its intention in so many words; that a more definite form of statement be substituted for the words hitherto deemed sufficient—we are dealing with a great abuse which demands immediate correction—*sound public policy requires that only one penalty should be recovered in a*

single action, and that the institution of an action for a penalty is to be regarded as a waiver of all previous penalties incurred. It follows that, in each of the actions before us, the judgment should be modified and reduced so as to permit a recovery for one penalty only, without costs to either party."

In the state of Tennessee a statute provides a penalty of \$100—for the failure of a railroad—to announce the length of each stop and the name of the stopping place. The plaintiff charged that the defendant had failed to comply with the statute when it made a stop at Paducah Junction, on two hundred and forty trips, and prayed for the wealth he saw coming to him from the defendant's repeated derelictions. The Tennessee Supreme Court disappointed him by declaring in *Parks v. Nashville, etc., Ry.* (1884), 13 Lea (Tenn.) 1, 6, 7, 8:

"* * * the statute does not say that there shall be a penalty for 'each and every offense.' In the absence of these words, it seems to be settled that only one recovery can be had for acts or omissions, in violation of the statute, prior to the commencement of the suit. The reason is, that it is the action which will bring the default to the attention of the corporation or party, and secure a compliance with the law. And it is the performance of the duties imposed which enures to the benefit of the passengers, on whose behalf the act was passed. A different construction would contravene the legislative intent, leave an opening for the perversion of the act, and make a statute punitive which was intended to be remedial. * * * *To allow*

a person to open a book account of penalties at an insignificant way station, and run up a charge of \$24,000 for the failure of the conductor, to announce the station, or the length of stay, of which no passenger has complained, would shock the conscience, pervert the intention of the Legislature, and turn a remedial into a highly punitive statute. If the Legislature had, in the act before us, in so many words authorized what the plaintiff had done, without any notice to the company, it would be difficult to sustain the constitutionality of the statute. For the effect would be the imposition of an excessive fine: Const., Art. 1, sec. 16. But the Legislature had no such intention, and we shall not press the language used so as to do indirectly what could not, perhaps, have been done directly. The statute, both upon reason and authority, admits of a different construction. We are of opinion, therefore, that only one penalty can be recovered up to the bringing of the suit."

The Court further commented:

"We have one appeal pending before us where a multiple of fifty dollar penalties is sought because of a succession of weekly rents which exceeded the ceiling price by twenty-five cents each. In another action now on appeal the plaintiff pleads twenty-two purchases in which he was overcharged a total of thirty-four cents, and prays for twenty-two fifty dollar penalties, a total of \$1,100. To interpret the section so as to hold out so great rewards for so minor over-

charges would serve to foster in buyers a desire to promote price violations rather than to put a stop to them, with the result that the section would operate to defeat rather than further its purpose. Such an interpretation, obviously, is not to be adopted if it may be avoided without doing violence to the provision of the section."

Only one recovery was allowed in the case of *Steve Caplinsky vs. Charles F. Lee, et al.*, reported in June, 1944, in O. P. A. Service No. 52003, and tried in the Municipal Court, Los Angeles, Cal. Here the Court held the action to be remedial, authorized one action, and but one minimum recovery, regardless of the number of prior overcharges, when the total amount of such overcharges trebled, is less than \$5,000.

The Court further remarked:

"Had he continued to pay the 25 cents weekly overcharge for the remainder of the year, he would then demand \$2,600 and attorneys' fees for an aggregate overcharge of \$13.

In either case the pay-off would be at a ratio of two hundred to one. Such odds are seldom seen at the race tracks.

Interesting results from the application of the fifty-dollar alternative to each of a series of related overpayments are not limited to rent cases. Take the case of the man who eats breakfast at the same restaurant each morning for a year and pays a daily overcharge of one cent. He would be entitled to recover \$18,250 as compensation for an overpayment of \$3.65—a ratio of five thousand to

one! Can one look his conscience in the eye, and say this is compensatory or remedial, and not penal?"

Similar decision as to the amount of recovery under the federal statute was reported on October 2, 1944, in the United States District Court, for the Eastern District of Pennsylvania, in the case of *Everly vs. Zepp*, reported in D. C. Penn., 57 Fed. Supp. 303. The facts in this case were that in August of 1942, Eismann filed the required rental registration, reporting the rental on March 1, 1942, the basic rental date, was \$33.00 per month. The landlord died and the executors continued to collect the monthly rent of \$33.00 from the plaintiff. In May, 1943, the *Rent Area Director* advised the defendants that a complaint had been made of the violation of the ceiling price regulations, whereupon defendants remitted \$70.00, representing *excessive rent received*, and advised that the rent would thereafter be *payable at the rate of \$26.00* per month. They also filed an amended registration with the rate. Plaintiff claims \$50.00 for each of the 10 months in which excessive rentals were paid, or \$500.00, plus reasonable attorney's fees and costs. The Court directed judgment for three times the overcharge, since it exceeded \$50.00, together with attorney's fees and costs; and also held that since the defendant refunded the \$70.00 overcharge, it was proper that credit was to be given therefor. The Court stated, in its opinion which bears good reasoning and logic in the proper interpretation of Section 205(e):

"Having determined the liability of the defendants, a question arises as to the amount of damage to be awarded to the plaintiff.

Does the act require the payment of \$50.00 for each of the ten successive overcharges or may we construe the repeated overcharge as arising out of a single transaction and make only a single assessment of the specified amount?

The circumstances of this case suggest certain possible inequities which might arise by a liberal enforcement of the act. If a consumer made a single purchase of 50 separate items of merchandise at prices slightly over the ceiling price, or if he had made many different purchases in the course of a continuing trade, would the seller be liable to pay \$50.00 for each of said violations? And, in the present case, is the Court compelled to award \$50.00 for each of the successive overcharges of the monthly rent? The language of the act is not entirely clear on this point. To award the maximum damages for each single successive payment may penalize an innocent or inadvertent violator and unconscionably enrich the consumer beyond the obvious intent of the legislators and the purposes of the act. *The plaintiff herein should not be privileged to enter into a lease with the landlord at a mutually satisfactory rental, sit back and do nothing for many months until the possible damages added up to a substantial figure, and then bring suit for the maximum damages, attorney's fees and costs.* * * *

It has been said that the purpose of Sec. 205(e) is to give overcharged consumers the incentive to sue, so as to elicit their cooperation in discouraging price violations, and that in fixing the damages, Congress in-

tended to eliminate judicial discretion in regard to the award of \$50.00 by giving the consumer the unqualified right to recover that amount upon establishing the overcharge. The granting of judgment on a lesser amount was error (*Bowles v. American Stores*, 139 F. 2d 377). *The provision was not, however, created to make public informers of the general public, nor was it intended to enrich any person at the expense of the business man. (Tropp v. Great A. & P. Tea Co., 32 Atl. 2d 717).* * * *

The Supreme Court has said that although the language of the act (Sec. 205-e) appears to be mandatory some discretion must be allowed to the courts in construing it. They have been entrusted with a share of the responsibility in the war against inflation and their discretion in applying the remedies provided must be exercised in the light of the large objectives of the act. The standards of public interest and not the requirements of private litigation measure the propriety and need for the relief authorized. The Court favored the interpretation which affords full opportunity for courts to treat the proceedings under the act in accordance with their traditional practices as conditioned by the necessities of the public interest (*Bowles v. Hecht*, 88 U. S. Law Ed. 465). * * *

"It has also been held that the section does not provide cumulative penalties so as to permit the plaintiff to recover \$50.00 for each of 31 successive violations by the landlord and recovery was limited to \$50.00 plus attorney's fees and costs. (Ward v. Bochino, infra.) We likewise hold that the tenants who have

paid rent in excess of the ceiling price are not entitled to recover \$50.00 for each of the successive months in which the overcharge was made. The rental contract is one continuous contract or transaction even though the rent be paid monthly, and the tenant may not multiply the remedy by the number of months involved in the violation. * * *

The attorney's fees should not be in an amount tending to render such litigation profitable, and we think they should be the minimum commensurate with the necessity of the litigation to preserve the rights of the client. Under the circumstances we do not think the fee should exceed the recovery."

Appellant argues that Congress could not have intended to penalize alike the inadvertent mistake of the landlord, who honestly and intelligently endeavors to comply with the law, and the contumacy of one who violates it. The aim of Section 205(e) is not to "penalize." That purpose is served by Section 205(b), which provides criminal penalties, and is limited to wilfull violations.

Appellees in their brief may cite the case of *Milne vs. Wasserman, supra*, and *Beasley vs. Gottlieb, supra*. To further indicate that these cases are not on point, we respectfully submit that the questions raised in those cases were upon the construction to be given whether the Act is "remedial" or "penal," and whether the trial court could within its jurisdiction and the limitations imposed upon it, try these actions.

There has been a divergence of opinion throughout the country upon the proper con-

struction to be given on the amount of recovery to be awarded to the tenant, under their action brought under Section 205(e).

The Courts are divided. One group following that the action is "penal," and the other, that the action is "remedial."

We have pointed out in our brief that there is at present no decision of the United States Supreme Court which gives specific answer to Section 205(e) as to the amount of recovery under the Act. There are reported cases that give \$50.00 for each monthly overcharge, and there are cases in which the aggregate amount of the overcharges has been calculated to the date of the suit, and the Court determines whether the recovery should be \$50.00 or three times the amount of the alleged overcharge.

There is no proof that there has been an overcharge in the present case on appeal; but assuming and not admitting such, for the purpose of argument, the application of the law as to the measure of damages should be given a reasonable interpretation.

Appellant does not believe we should choose between a rule of strict or liberal construction. We think the Act should be reasonably construed, and that its enforcement should proceed in a manner so as to accomplish the broad purposes of the Act.

New Jersey has interpreted that the tenants' action to be "an action of a civil nature" intended only to create a private suit for a private injury, and not to authorize recovery of a penalty. The tenant's suit to recover damages is a suit of a "*civil nature remedial of a private wrong and therefore not penal.*" See

Bendit vs. H. L. R. Holding Co., 32 Atl. (2) 53, 131 N. J. L. 91;
Wutkowski vs. Palutes (Sup. Ct., 1944), 37 Atl. (2d) 29, 131, L. 441;
Beasley vs. Gottlieb, *supra*.

Other Courts follow our decisions, holding the recovery was not cumulative. See

Griffin vs. Interurban St. R. Co., 180 N. Y. 538, 72 N. E. 1142;
Sturgis vs. Spofford, 45 N. Y. 446;
Jones vs. Rochester Gas & Electric Co., 168 N. Y. 65, 60 N. E. 1044;
Cox vs. Paul, 175 N. Y. 328, 67 N. E. 586.

And the Courts allow the landlord credit for the excess amount thus returned from the amount of the recovery. See

Gordon vs. Hochberg (June, 1944), 49 N. Y. S. (2) 957;
Everly vs. Zepp, *supra*.

Such recovery was not cumulative for the statute is not penal in nature.

In *Bowles vs. Berard* (1944 D. C.), 57 Fed. Sup. 94, a person was not excused from testifying in an action by the Administrator to recover damages under the statute, upon the grounds that to compel him to testify would violate his constitutional guaranty against being compelled to be a witness against himself, since such action was "*remedial and not penal*." Consumers' actions are remedial suits of a civil nature, which must be brought within one year, in contrast to the general statutory five-year period of limita-

tion, provided for penal statutes under 28 U. S. C. A. 791 (8 F. C. A. Title 28, Sec. 791).

The Courts which follow the "penal" feature are in the minority. They take the position that the suit is an "informer's action," in the nature of a "*qui tam* law," and designed not only to give the buyer a remedy for the overcharge, but also to enlist their assistance in enforcing the act by making such action worthwhile. In this view they claim it is the "sensible" construction to be given. They speak of the "offense" and use the "penalty" theory in awarding damages, holding that it was the manifest intention of Congress to give the state courts jurisdiction of such actions for "penalties and forfeitures," which had heretofore been reserved exclusively to the United States Courts under Jud. Code 256, 28 U. S. C. A., Sec. 371, and they hold this to be the broad view which the Court should take in actions to recover penal damages in such actions. The view was taken in *Lambur vs. Yates*, 148 Fed. (2) 173 (C. C. A., 8th Mo. Appel., 1945), cited by my opponent in his brief. The Court went on to say that the decisions of the District Courts and the State Courts are in conflict, and, although the statute has been amended, and no more cases will be filed under it, they expressed their views in regard to its construction, and they said there was no decision of any Federal Appellate Court construing the statute.

In New Jersey, *qui tam* actions are civil actions, and the character of the proceedings is for the recovery of a pecuniary penalty. See

N. J. Society vs. Russ, 83 Atl. 961, 962,
83 N. J. L. 450;

Brophy vs. Perth Amboy, 44 L., 217, 219.

and so termed from emphatic words of the clause in which the plaintiff was described in the old form:

Qui tam pro domino rege, etc. Quam pro seipso in hac parte sequitur;

(Who sues as well for the king, etc., as for himself, in this behalf);

Burril Law Dictionary.

Qui tam actions are defined by *Corpus Juris*, Vol. 1, Actions, Section 19, to be:

“*Qui tam* action is an action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act. It provides that the same shall be recoverable in a civil action, and part of the penalty shall go to any person who will bring such action, and the remainder to the state or some other institution so-called because the plaintiff states that he sues as well for the state as for himself. (See *State vs. Warner*, 197 Mo. 650, 663, 94 S. W. 962; *Grover vs. Morris*, 73 N. Y. 473, 478; *In re Barker*, 56 Vt. 14, 20).”

In New Jersey there are three *qui tam* statutes found in N. J. S. A. Index, page 663, and under R. S. 12:8-47 (Pilots); R. S. 12:4-22 (Navigation), and R. S. 12:3-21 (Riparian Land). Similarly, these actions permit any person to bring an action for a violation of the provisions of the Act, in which a definite sum is fixed as the amount of recovery “for each and every offense,” and that such recovery shall be made partly for themselves in bringing the suit, and partly for the state or governing body. These actions are

“penal” in nature, so expressed under the Act.

We have examined extensively the reported cases on the construction of the amount of recovery under this point, and we find the cases are numerous, and the Courts of various states seem to follow the “remedial theory” of the New Jersey Courts. See:

- McCowen vs. Dumont* (D. C., Mo.), 54 Fed. Sup. 749;
Link vs. Kallaos (D. C., Mo.), 56 Fed. 304;
Everly vs. Zepp (D. C., Pa.), 57 Fed. Sup. 303;
Peters vs. Felber (Cal. Sup.), 152 P. 2d 42;
Ward vs. Bochino, 181 Misc. 355, 46 N. Y. S. 2d 54;
Gordon vs. Hochberg, 49 N. Y. S. (2d) 957, 182 Misc. 117.

Appellant urges the Supreme Court in its opinion (S. C., p. 64) affirming the trial court erred in holding that this question had been determined in

Beasley v. Gottlieb, 122 N. J. L. 603.

See also

Carmelly, Bowles Intervenor v. Hanson,
 No. 403 May Term, 1945, 133 N. J. L. 180.

The controlling factor in *Carmelly vs. Hanson*, *supra*, was whether the overcharge, made in good

faith, is a redeeming influence to protect the owner from the specified recovery. Justice Case held it was not, as it existed under the statute enacted was at the time of the overcharge.

It was urged the Court to reverse their holding in *Beasley vs. Gottlieb*, *supra*, which held for jurisdiction of our state courts to try these cases under Sec. 205(e) of the Federal Act. The Court held in

Beasley v. Gottlieb (*supra*), 131 N. J. L. 117, 35 Atl. (2) 49,

the right of action under the Federal Act is thus limited to the party aggrieved, is an action "remedial" and "not penal" in its nature, giving jurisdiction to our state courts to try them. Citing cases in which the decision was followed in,

Bendet v. H. L. R. Holding Co., 131 N. J. L. 91;

Wutkowski v. Palutes, 131 N. J. L. 441;

Milne v. Wasserman, 132 N. J. L. 285,

By our lower courts in a number of instances

Schwartz v. Dell'Oso, 23 N. J. Misc. 151,

and in

Willentz v. Hendrickson, 135 N. J. E. 244, 255.

Justice Case refused to reverse the holding and said:

"Nevertheless, under the circumstances,

we are constrained to accept the decision as controlling precedent until the Court of Errors and Appeals shall indicate to the contrary."

Appellant has cited *Beasley v. Gottlieb, supra*, in the brief and we find no fault in the decision. We do agree that the action is "remedial," but we say that *Carmelly v. Hanson, supra*, is not dispositive of this question, as the construction of the Federal Act as to the amount of recovery.

Again we urge that Section 205(e) was never intended to be interpreted as a "penal" action upon the consumer's action, otherwise it would be expressed in terse language.

We also urge that Congress never intended that the interpretation and construction to be given to Section 205(e) to permit recovery of \$50.00 for each overpayment or the recovery of cumulative damages.

There are no decisions of the United States Supreme Court on this construction of this question nor are there any in our Court of Errors and Appeals.

It should be noted that the Stabilization Extension Act of 1944, 50 U. S. C. A. Appx., Sec. 925, which amended Section 205(e) of the Emergency Price Control Act and extended its operations on June 30, 1944, eliminates any doubt that has been raised as to this point, and eliminates the recovery of cumulative damages.

Conclusion.

It is respectfully submitted:

1. That the judgment of the trial court should be reversed, and
2. That the trial court should be directed to enter judgment of no cause of action in favor of the defendant.

Respectfully submitted,

JEROME ALPER & ALPER,
Attorneys for Defendant-Appellant.

JEROME ALPER,
of Counsel.

Dated: February, 1946, Term.

Serve 7 3 Copies of the within
Brief acknowledged this 7th day 7 Feb, 1946

FEB 7. 1946

Jerome Alfred Alper

New Jersey Court of Errors and Appeals

HENRY FROST and NELLIE FROST,
his wife,
Plaintiffs-Appellees,

vs.

MORRIS ALPER,
Defendant-Appellant.

On Appeal from
the New Jersey
Supreme Court.

Sat Below:
Justices Case,
Bodine and
Perskie.

APPELLEES' BRIEF.

Facts.

During the month of October, 1942, the plaintiffs entered into a written lease (S. C., "P-1," p. 55) with the defendant covering a six-room flat in a multiple dwelling house owned by the defendant at No. 155 Peshine Avenue, Newark, New Jersey, which lease was for two years commencing November 1st, 1942, and ending November 1st, 1944, at the yearly rental of \$336.00 payable in equal monthly installments of \$28.00 on the first of each month in advance. The plaintiffs entered into possession on November 1st, 1942, and paid to the defendant, at the defendant's request, the sum of \$28.00 for each of the months commencing November, 1942, and ending September, 1943 (S. C., p. 56). Plaintiffs learned from the tenant who occupied the flat in question as of March 1st, 1942, that the rent paid by such tenant was \$26.00 per month as of March 1st, 1942, and not \$28.00 per month, and upon obtaining such information instituted suit against the defendant under the provisions of the Federal Emergency Price Control Act alleging an overcharge for each of the ten months

in question and sought damages in the sum of \$500.00, or \$50.00 for each violation.

The case was tried before the Court on January 21st, 1944, without a jury. As part of the plaintiffs' case there was introduced in evidence the rent receipts given by the defendant to the former occupant, Mrs. Brady, who occupied the premises on March 1st, 1942, showing the rent for the apartment to be \$26.00 per month (S. C., "P-2," p. 55 and "P-5," p. 57). In none of said receipts was there anything mentioned about the rent being \$28.00 per month and a allowance of \$2.00 per month given to the tenant for alleged repairs and odd jobs the tenant was to perform. There was also introduced in evidence by the plaintiffs Exhibit "P-4" (S. C., p. 56) a rent receipt dated April 1st, 1942, on the reverse side of which appears the following: "*Starting May 1st, 1942, your rent will be increased \$2.00, to \$28.00 per month.*" There was also introduced in evidence the receipts given to the plaintiffs showing receipt of \$28.00 per month by the defendant (S. C., p. 56—Exhibit "P-3") and also the lease executed between the plaintiffs and the defendant (S. C., p. 55).

At the trial, it was stipulated by the respective counsel that the lease (S. C., p. 55) be received in evidence and that the rent paid by the plaintiffs to the defendant was \$28.00 for each month for the period in question (S. C., pp. 48-49). There was other testimony introduced (S. C., pp. 49-50).

The defense interposed by the defendant was that the Maximum Legal Rent as of March 1st, 1942, was \$28.00 and was rented at this figure to the previous tenant, Mrs. Brady; and that the defendant agreed to accept or reduce the rent from \$28.00 to \$26.00 in consideration of Mrs. Brady or her son doing odd jobs and repairs in and about

the premises. This assertion by the defendant was denied unequivocally by Mrs. Brady (S. C., p. 49).

The trial court had the opportunity to see the witnesses, heard the testimony and depositions, examine the exhibits, and rendered an opinion awarding judgment to the plaintiffs in the sum of \$500.00 against the defendant (S. C., pp. 54A-54B). The trial court regarded as of particular significance the receipt as of April 1st, 1942 (S. C., p. 56—Exhibit "P-4"), reading as follows: *"Starting May 1st, 1942, your rent will be increased \$2.00, to \$28.00 per month."*

The defendant then made several applications both in the New Jersey Supreme Court and Trial Court for a new trial, all of which were denied. In an appeal to the Supreme Court the judgment of the District Court was affirmed (S. C., pp. 64-65).

At no time in the proceedings in the District Court was the question raised by the defendant that the plaintiffs sought to recover an amount in excess of \$500.00. The State of Case fails to show that any such question was raised in the trial court and as a matter of fact no such question was raised.

POINT I.

The Trial Court did not lack jurisdiction as the amount in dispute did not exceed the sum of \$500.00, exclusive of costs.

The appellant did not raise any question of the jurisdictional action of the District Court and the Trial Court and cannot at this time raise this question in the Appellate Court. However, the appellant is in error in its claim, assuming it can raise the question at this time.

The appellant evidently misconstrues the plaintiffs demand for damages. The suit is divided into ten separate counts and there is demanded \$50.00 plus attorney's fees and costs on each count. The costs and attorney's fees demanded in the complaint are those prescribed by the District Court Act, namely, the costs of suit together with a 5% attorney's fee. That the District Court has jurisdiction up to \$500.00, exclusive of costs, cannot be disputed. Section 67 of the District Court Act.

Section 280 of the District Court Act (Revised Statutes 1937, 22:2-44) prescribed the costs that may be allowed and Section 282 of the District Court Act (Revised Statutes 1937, 22:2-50) provides for the allowance of attorney's fees of 5% to be taxed in the costs.

The costs and fees allowable under the above quoted Statutes were the only ones demanded in the complaint and the only ones in contemplation of the plaintiffs, despite what the appellant tries to read into the demand. No attorney's fees other than those allowed by the District Court Act were requested or expected. The trial judge was not asked to fix any fees nor was there any discretion given to him to fix any fees other than those prescribed by the statute.

It will be noticed that under Section 205 (e) of the Federal Emergency Price Control Act an action may be brought for \$50.00 or for treble the amount, and so forth, plus reasonable attorney's fees and costs as determined by the Court. This Section states that an action *may* be brought for the damages *plus reasonable attorney's fees and costs as determined by the court*. It will be noticed in the plaintiffs complaint they do not ask for reasonable attorney's fees so as to allow the

court any discretion in fixing the same. They ask for attorney's fees and costs as contemplated by the District Court Act. The appellant in his Brief, on page 13, misquotes plaintiffs demand so as to have it appear that plaintiffs requested reasonable attorney's fees other than those prescribed by the Statute.

It is therefore respectfully submitted that all that was requested was the sum of \$500.00, the statutory attorney's fees and costs, and that the jurisdiction of the District Court was not exceeded.

POINT II.

The Trial Court had the right to determine the maximum legal rental of the premises in question as of March 1st, 1942.

Under Section 4 of the Maximum Rent Regulation in accommodations which were rented on March 1st, 1942, the regulation provides that the Maximum Legal Rent shall be the rent charged or legally due or enforced on that date. The regulation also requires that a registration statement for each rented accommodation be filed by the landlord. The registration statement, however, *does not fix*, or in any way modify the Maximum Legal Rent. This *ceiling rent* is fixed *by operation of law* and the landlord's registration is merely his statement of conditions and facts out of or from which the Maximum Legal Rent is determined.

Such registration statement by the landlord may be true or it may be false; it may represent an innocent mistake or a fraudulent attempt to circumvent the regulation.

In any case, the Maximum Legal Rent must be determined without regard to the registration statement except if it may be used as evidence in that inquiry. That determination is for the Court.

One *may* appeal to the Area Rent Director for relief, but *this is not exclusive*. There is no prohibition in any of the regulations against the Court determining what the true facts are and determining what the Legal Maximum Rent is for any particular dwelling unit. Surely, the Court has the right to inquire into the facts and ascertain what rent was being paid as of March 1st, 1942, and whether more than the Maximum Legal Rent was being charged thereafter. Merely because the landlord files a false registration statement he cannot claim immunity from damages by hiding behind his own false statement.

The Maximum Legal Rent for this apartment, by operation of law, was \$26.00 per month. The registration shows it to be \$28.00 per month; but this is the *landlord's own self-serving statement* and the Court has the right to find out as a matter of fact whether such statement is true or false. The Court has, as a matter of fact, found it to be a false statement, and is fully within its rights as a judicial function in so finding.

Plaintiffs-appellees could have protested and complained to the Area Rent Director if they so desired, *but no obligation* rested on them to do so before instituting suit in the District Court.

Defendant seeks the benefit of the provisions of Section 205 (d) of the Emergency Price Control Act of 1942. The registration statement of the defendant was found to be false by the Court. One cannot claim good faith by alleging that he has complied with his own false statement when as a matter of fact he has violated the law by charging

more than the ceiling price fixed by law as of March 1st, 1942. The rent for the month of March 1st, 1942, was \$26.00 per month. This is shown by the Landlord's own receipt (Exhibit "P-2," S. C., p. 55). The rent as shown by the landlord in his registration statement as of March 1st, 1942, was \$28.00 per month (Exhibit "P-9," S. C., p. 58).

It is therefore respectfully submitted that the defendant-appellant has not urged any reversible ground on this point.

POINT III.

The Trial Court's action in denying defendant's motion for non-suit was proper.

The trial court had the witnesses, the Exhibits and evidence before it and resolved the questions in favor of the plaintiffs.

At the trial of this cause the Court had before it a stipulation admitting the lease, for the premises in question, in evidence, and the same was marked Exhibit "P-1," and also a stipulation that the rent paid by the plaintiffs for the premises in question was \$28.00 per month as evidenced by 11 receipts and marked as one group as Exhibit "P-3" (S. C., pp. 48-49). In addition thereto there was the evidence of Mrs. Brady, the tenant who occupied the premises as of March 1st, 1942, corroborating the fact of the rent being \$26.00 per month and not \$28.00 per month. The outline of Mrs. Brady's testimony appears on pages 49-50 in State of Case. Significant is Exhibit "P-4," (S. C., p. 56), part of which reads as follows: "*Starting May 1, 1942, your rent will be increased \$2.00 to \$28.00 per month.*" That the plaintiffs clearly sustained the burden of proof cannot seri-

ously be questioned and it was so found as a matter of fact by the District Court Judge in his opinion (S. C., p. 54-B).

Appellant further claims that he waived his right to trial by jury provided plaintiffs would appear and testify. The stipulation entered into between the parties regarding the trial by jury and the plaintiffs testimony speaks for itself (S. C., pp. 22-23). At the time of the trial plaintiffs were in Court and their testimony was stipulated by counsel (S. C., pp. 48-49). The appellant having stipulated plaintiffs' testimony it therefore did not become necessary that their testimony be taken from the witness stand. No objection was raised by the appellant in the trial court and he is in no position to raise such an objection in this Court. During the course of the trial in the District Court the plaintiffs at all times were present in court, but their testimony having been waived by the stipulation of counsel (S. C., pp. 48-49), the necessity of their testifying from the witness stand was waived. The plaintiffs having been available in court could have been called by the appellant to testify if the appellant really was desirous of having the plaintiffs testify. The appellant cannot at this time claim that he has been deprived of his constitutional right of trial by jury because the plaintiffs agreed to testify at the trial and subsequent thereto (S. C., pp. 48-49) the appellant stipulated plaintiffs testimony and waived the same.

POINT IV.

The Trial Court did not err in rendering a judgment for the plaintiffs.

It is not necessary for a plaintiff to make a complaint to the Area Rent Director before instituting suit for any alleged violation. Neither is it necessary to demand a refund of any over-payment prior to instituting suit. This has been decided in our Courts by *Beasley v. Gottlieb*, 122 N. J. L. 603, and *Carmelly, Bowles, Intervenor v. Hansen*, 133 N. J. L. 180. In *Beasley v. Gottlieb*, suit was started where it was alleged that over-payment of \$3.00 per month was paid for the premises in question. The overcharge was refunded to the tenant prior to the commencement of the suit. The District Court entered judgment of non-suit and the appeal was taken from that judgment. The Court stated:

“The question is whether the repayment by the landlord of the overpayments of rent is a defense to a subsequent action by the tenant to recover the sum of \$50.00 for each overpayment, together with reasonable attorney’s fees and costs.

There is no reported decision on this point in New Jersey but the decisions elsewhere have held that Congress made a distinction for good faith or mistake in criminal prosecutions but not in civil suit, that Congress intended to impose civil liability upon violations regardless of good faith or mistake, and that once the violation has taken place, the consumer-purchaser’s right of action for treble damages or for \$50.00, whichever is greater, accrues and no subsequent tender of the excess price affects the right to institute the action and to recover. *Zwang v. A. & P.*, 46 N. Y. Supp., 2nd Series, 747.

The Court is impressed with the logic and the reasoning of the cited opinion.

Judgment reversed and remanded to the court below to be dealt with in accordance herewith."

In *Carmelly, Bowles, Intervenor v. Hansen, Beasley v. Gottlieb* was affirmed and followed and the Court therein stated:

"The pertinent statutes will be found recited in our opinion in *Beasley v. Gottlieb*, 131 N. J. L. 117, 35 A. 2d 49. We are of the opinion that in a tenant's action, under sec. 205 (e) of the statute, as it was at the time of and respecting the period in question, the allowance of \$50 for each month of overcharge, where it applies, is mandatory. There was a rental overcharge, however, unintentional; and harsh as it seems in a case like the present, there is no discretion in the trial court to reduce the recovery below the amount sued for by the tenant in compliance with the statute and regulations. The controlling factor is the overcharge; good faith, we believe, is not, under the statute as it then was, a redeeming influence to protect the owner from the specified recovery."

It is therefore submitted that no demand for overpayment is necessary and consequently the interrogatories (S. C., pp. 20-22) were immaterial and need not be answered.

POINT V.

The Court was not in error in entering judgment in favor of the plaintiff and against the defendant in the sum of \$500.00.

That the plaintiffs were entitled to \$50.00 for each month's overcharge has been adjudicated in our State in the case of *Milne, et al, v. Wasserman*, 132 N. J. L. 285, and further in *Beasley v.*

Gottlieb and Carmelly v. Hansen, supra. The Court's attention is called to the fact that this action was instituted in September, 1943 (S. C., p. 6), and tried January, 1944, which was prior to the Stabilization Extension Act of June 30, 1944.

Also the case has been decided by the U. S. Circuit Court of Appeals in the matter of *Yates v. Lambur* in the New Jersey Law Journal under date of April 1st, 1945, page 7. The article in the Law Journal is set forth as follows:

"EACH RENT CHARGE OVER CEILING HELD
VIOLATION.

St. Louis (CCNS).—Every collection of rent by a landlord from a tenant which is in excess of Office of Price Administration ceilings is a separate violation, the Circuit Court of Appeals held, thereby reversing a decision by Federal Judge Hulen, which had attracted nationwide interest.

The jury awarded Jack Yates \$600 representing \$50 a month for a year, on the theory that each of the 12 months in which he was overcharged was a separate violation by defendants Charles and Pearl Lambur."

It is therefore respectfully submitted that the judgment below should be affirmed with costs.

Respectfully submitted,

J. EDWARD BENNETT,
Attorney for Plaintiffs-Appellees.

DAVID WEINICK,
Of Counsel.

To be argued orally by DAVID WEINICK.

Goffin and Corwelly v. Henson, supra. The Court's attention is called to the fact that this action was instituted in September, 1943 (S. C. 487) and tried January, 1944, which was prior to the Stabilization Extension Act of June 30, 1944.

Also the case has been decided by the U. S. Circuit Court of Appeals in the matter of *Y. S. v. Lumbur* in the New Jersey Law Journal under date of April 1st, 1945, page 7. The article in the law Journal is set forth as follows:

"After First Chance Over Carcase Here"

St. Louis (CNS).—Every collection of food by a landlord from a tenant which is in excess of three times the Administration ceiling is a separate violation, the Circuit Court of Appeals held today, reversing a decision by Federal Judge Hagan, which had attracted nationwide interest.

The jury awarded Jack Jones \$800 retroactive \$200 a month for a year, on the theory that each of the 12 months in which he was overcharged was a separate violation by defendant Charles and Pearl Lumbur.

It is therefore respectfully submitted that the judgment below should be affirmed with costs.

Respectfully submitted,

J. Howard Lumbur,
Attorney for Plaintiff-Appellees.

Davis Warner, of counsel to the case, is now in the case of *Y. S. v. Lumbur*, and is now in the case of *Y. S. v. Lumbur*.

To be argued orally by Davis Warner.