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Notice of Appeal.

New Jersey Supreme Court

UNION COUNTY.

10

MAX GREENWALD and PHILIP
KRINZMAN,

Plaintiffs,

vs.

MAX PERLMUTTER,

Defendant.

Action at Law.

Notice of
Appeal.

20

To: HONORABLE ABE J. DAVID,
Attorney of Defendant.

PLEASE TAKE NOTICE that the plaintiffs appeal to the New Jersey Court of Errors and Appeals from so much and such parts of the judgment entered in the above entitled cause in the New Jersey Supreme Court as determines and adjudges that the plaintiffs are not entitled to any recovery against the defendant for the damages sought under the First and Second Counts of the Complaint.

30

Dated: June 1st, 1931.

SAMUEL KOESTLER,
Attorney of Appellants.

40

Complaint.

writing, whereby the plaintiffs did let and rent to defendant and defendant did rent and hire from plaintiffs the westerly portion of store known as No. 1113 Elizabeth Avenue, Elizabeth, New Jersey; a copy of which lease and agreement is hereto annexed and made part hereof as "Exhibit A."

2. Said defendant agreed to pay the yearly rental of said premises in monthly installments in advance on the first day of each month as provided in said agreement "Exhibit A".

10

3. That in said demised premises there were butcher and other fixtures, the use of which was given to defendant by plaintiffs without requiring the payment of additional rental and upon the termination of the lease the defendant did agree to return the same to the landlord, plaintiffs herein, in as good condition as said butcher and other fixtures were at the time of the making of the agreement "Exhibit A".

20

4. That said lease and agreement "Exhibit A" was terminated by the breach of conditions and covenants of said lease by the defendant by virtue of an order made by the District Court of the City of Elizabeth on the fifth day of February, 1923, in a suit pending in said court, wherein these plaintiffs were the plaintiffs and said defendant was the defendant.

30

5. That on the tenth day of February, 1923, plaintiff received under said court order, last mentioned the possession of said demised premises and repossessed themselves of said demised premises and the said butcher and other fixtures aforesaid but said butcher and other fixtures were not in as good condition as the same were in at the time of

40

Complaint.

the making of said lease and agreement "Exhibit A."

6. That when plaintiff received the possession of said butcher and other fixtures as contained in paragraph 5 thereof, the same were not in good condition but were damaged, injured, ruined and almost entirely destroyed. That it will cost plaintiffs the sum of twenty-five hundred (\$2500.) dollars, to replace said butcher and other fixtures in as good condition as the same were at the time of the making said lease and agreement "Exhibit A."

7. To the damage of the plaintiff five thousand (\$5000.) dollars.

SECOND COUNT.

1. The plaintiff repeats the allegations of the first count.

2. That while said demised premises were in the possession of the defendant a fire occurred to said premises on the fifth day of December 1922, as the result of which the said butcher and other fixtures were scorched, burned, damaged, ruined, injured and almost totally destroyed.

3. That said defendant although said lease was not terminated until the tenth day of February 1923, did not repair the damage done to said butcher and other fixtures and did not replace the same in as good a condition as they were in at the time of the making of the agreement of said "Exhibit A" but has wholly neglected, failed and refused so to do notwithstanding the frequent requests thereof of these plaintiffs.

Complaint.

THIRD COUNT.

1. Plaintiff repeats the allegations in paragraphs 1 and 2 of the first count.
2. The defendant entered into possession of said premises by virtue of said lease and was in possession of said premises thereunder on December 1, 1922, and on said first day of December, 1922 there became due and owing to the plaintiff for the rental of December, 1922 one hundred (\$100.) Dollars. 10
3. On December 1, 1923, said defendant delivered to the plaintiffs as an evidence of payment of rent due on December 1, 1922 the following check:

Newark, N. J. Dec. 1st, 1923.

Pay to the order of	Greenwald and Krinzman	20
\$100.00	One Hundred 00/100 dollars	
	Max Perlmutter.	
4. The defendant did not honor said check when presented for payment and the same was protested for non-payment at a cost of two dollars and forty-two cents (\$2.42) on December 7th, 1922, which protest is in possession of plaintiffs.
5. Plaintiffs demand judgment on the Third Count for one hundred two dollars and forty-two cents (\$102.42) with interest from December 1, 1922. 30

FOURTH COUNT.

1. Plaintiffs repeat the allegations of paragraphs 1 and 2 of the first count.
2. Defendant entered into possession of said premises by virtue of said lease as tenant thereof. 40

Complaint.

3. That the defendant agreed with the plaintiffs that they need not change the electric meters entered in the name of the plaintiffs for electric current, power and services and that defendant would pay the bills on the same, as rendered by the Public Service Electric Company to plaintiffs.

10 4. That said defendant while in possession of said premises has used electric current of the Public Service Electric Company for lighting and power amounting to the sum of seventy nine dollars and forty-three cents (\$79.43) which is chargeable and payable against these plaintiffs and which is due and owing from defendants to these plaintiffs as per bill rendered by the Public Service Electric Company to plaintiffs.

20 Judgment will be claimed on the Fourth Count for seventy-nine dollars and forty-three cents (\$79.43) besides interest.

Judgment will claimed on the first and second counts for five thousand dollars, (\$5000.) on the third count for one hundred two dollars and forty-two cents (\$102.42) and on the fourth count for seventy nine dollars and forty-three cents (\$79.43).

30

SAMUEL KOESTLER,
Attorney of Plaintiffs.

“Exhibit A.”

THIS AGREEMENT made the eighth day of May in the year of our Lord, One thousand nine hundred and twenty-two, between Max Greenwald and Philip Krinzman of the Borough of Roosevelt, in the
40 County of Middlesex and State of New Jersey, par-

Exhibit A—Annexed to Complaint.

ty of the first part, (hereinafter called the Landlord) and Max Perlmutter of the City of Newark, in the County of Essex and State of New Jersey of the second part, (hereinafter called the Tenant).

WITNESSETH, that the said party of the first part, has hereby let, and rented to the said party of the second part, and the said party of the second part, has hereby hired and taken from the said party of the first part, all that certain portion of the store known as #1113 Elizabeth Avenue, Elizabeth, New Jersey, being the part near Jefferson Avenue and being Westerly of a line drawn from the most westerly line of the east window at right angles to the front of said store; for the term of three years, to commence on the Ninth day of May, 1922, at the yearly rental.....and to end on the ninth day of May, 1925, at twelve o'clock noon. The rental of said premises to be at the rate of \$100.00 per month payable in advance for the term expiring on January 1st, 1923 and from then to the end of the term granted hereunder at the rate of \$125.00 per month. The tenant is to pay on the signing of this lease \$73.27 as rental for the balance of the month of May, \$100.00 on the first day of June for the rental of the month of June and \$100.00 on the first day of each and every month of June and \$100.00 on the first day of each and every month thereafter in advance for the rental of said several months and on January 1, 1923, \$125.00 for the rental of the month of January, 1923 and at the rate thereafter, payable in advance on the first day of each and every month.

The tenant hereunder is to furnish his own light and is to also furnish light to the Royal Foods Store, the occupant of the east part of the store,

Exhibit A—Annexed to Complaint.

using the present lighting fixtures in said premises in the location where now placed.

The tenant hereunder is not obligated to furnish any additional lights to those now in the place.

10 The tenant hereunder shall not sell or offer for sale in said demised premises any groceries, canned goods, butter, cheese, eggs or lard. The breach of this covenant shall give the Landlord hereunder the right and option of terminating this lease and recovering possession of the demised premises and Summary Proceedings in the Elizabeth District Court.

20 The tenant hereunder shall have the right, without the payment of additional rental, to use the butcher and other fixtures in said premises and upon the termination, expiration or sooner termination of this lease shall return the same to the landlord hereunder in as good condition as the same now are.

The tenant shall not have the right to remove any of said fixtures from the present location or shall he have the right to make any alterations in the store or windows or any part of the demised premises without first obtaining the written consent of the landlord hereunder.

30 The tenant agrees it will comply with and carry out any and all the rules, regulations and requirements of the various departments of the City of Elizabeth and the requirements of the law of the State of New Jersey as the same may now be or may from time to time hereafter be enacted, altered or amended, and keep its part of the sidewalk free of snow and ice.

40 The tenant hereunder shall have the right to under-let the premises or assign this lease but any such action on the part of the tenant shall not re-

Exhibit A—Annexed to Complaint.

lieve him from the obligation to pay rental or to carry out the other conditions of this lease.

It is further agreed that if the tenant shall become bankrupt, either voluntarily or involuntarily or be placed in the hands of a permanent Receiver at any time during the term herein demised, then the landlord may at his option rescind this lease and thereupon the term of letting hereby granted shall be at an end and the landlord may re-enter said leased premises without being liable to prosecution therefor. In no event shall the landlord be obliged to return to anyone the security deposited with him for the performance by the tenant of the terms, conditions and covenants of this lease but shall retain said security until the expiration of the term mentioned in this indenture of lease at which time he shall return to the person entitled thereto, only so much of said security as shall remain after deducting all damage that the landlord has suffered during said term by reason of any act or default of the tenant. 10 20

This lease is subject to the existing tenancy of the Royal Food Stores, a corporation, for the portion of the store East of the line drawn from the Westerly line of the East window and also subject to the tenancy of the vegetable stand located north of the West window and south of the show case as located at this time. 30

The Landlord further agrees that the portion of the premises occupied by other tenants in said store shall not be used during the term of this lease for the sale of fresh or smoked meats.

The tenant has deposited with the landlord the sum of Three Hundred (\$300.00) dollars..... as security for the performance of all of the terms, conditions and covenants of this lease on the part 40

Exhibit A—Annexed to Complaint.

of the tenant to be performed, which security is to be returned to the tenant on the expiration of this lease upon his complying with all the conditions hereof.

10 This lease shall be binding upon the parties hereto to their respective heirs, executors, administrators and assigns.

In Witness Whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

MAX GREENWALD.
PHILIP KRINZMAN.
MAX PERLMUTTER.

Signed, Sealed and Delivered
in the presence of
20 Samuel Koestler.

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

30 Be it remembered, That on this Eighth day of May in the year of our Lord One Thousand Nine Hundred and Twenty-two before me a Master in Chancery of New Jersey, personally appeared Max Greenwald and Philip Krinzman who, I am satisfied are the parties of the first part named in the within Indenture of Lease named; and I having first made known to them the contents, thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

SAMUEL KOESTLER,
A Master in Chancery of New Jersey.

Answer.

Filed April 25, 1923.

The defendant residing in the City of Newark, New Jersey, answering the complaint, says:

ANSWER TO FIRST COUNT.

1. Paragraph one is admitted. 10
2. Paragraph two is admitted.
3. Paragraph three is admitted, except that the defendant alleges that as a matter of fact, the use of the butcher and other fixtures was considered in renting the portion of the store mentioned in the complaint, and in determining the amount of rental to be fixed and charged for the premises.
4. Defendant denies that the lease was terminated by breach of condition and covenants by the defendant, and alleges that the lease was terminated by the proceedings in the District Court referred to in said paragraph four. 20
5. Paragraph five is admitted, but defendant alleges that the butcher and other fixtures were not in a good condition because of a fire which happened in another portion of the plaintiff's premises and which damaged the said butcher and other fixtures without any fault whatsoever of this defendant. 30
6. Paragraph six is admitted, except defendant alleges that it will not require \$2500.00 to replace said butcher and other fixtures, but a much less sum, and defendant repeats the allegations contained in paragraph five of this answer.
7. Defendant denies plaintiff's damages in the sum of \$5000.00. 40

Answer.

ANSWER TO SECOND COUNT.

1. Defendant repeats the allegations of the answer to the first count.

10 2. Paragraph two is admitted, except the defendant denies that the first occurred in the demised premises, and alleges that the said fire occurred in the adjoining premises of the plaintiffs and without any fault whatsoever on the part of this defendant, and spread to the demised premises, thereby damaging the said butcher and other fixtures.

3. Paragraph three is admitted.

ANSWER TO THIRD COUNT.

20 1. Defendant repeats the allegations in the answers to paragraphs one and two of the first count.

2. Paragraph two is admitted.

3. Paragraph three is admitted.

4. Paragraph four is admitted.

30 5. Defendant alleges that on the fifth day of December, a fire occurred in the premises of the plaintiffs adjoining the demised premises, spread to the demised premises and damaged the same so as to render them wholly unfit for use by the defendant. Check of defendant's had not been cashed by the plaintiffs and defendant thereupon stopped payment thereof and tendered to the plaintiffs pro rata share of the rent for the month of December due at the time of the fire, namely, \$12.-88, and which tender the plaintiffs refused.

Answer.

ANSWER TO FOURTH COUNT.

1. Defendant repeats the allegations in the answers to paragraphs one and two of the first count.
2. Paragraph two is admitted.
3. Paragraph three is admitted.
4. Paragraph four is denied. 10

FIRST DEFENSE.

1. Defendant alleges that the plaintiffs were not the owners of the butcher and other fixtures mentioned in the complaint, but that they were merely in possession thereof prior to the making of the lease referred to in the complaint, as tenants of the premises. 20

SECOND DEFENSE.

2. Defendant alleges that the plaintiffs suffered no damage by reason of the matters complained of in the complaint.

THIRD DEFENSE.

3. Defendant alleges that the plaintiffs had the butcher and other fixtures insured. 30

FOURTH DEFENSE.

4. Defendant alleges that the owners of the premises in which the fire occurred, had the butcher fixtures insured and that there was no loss sustained by reason of the said fire.

FIFTH DEFENSE.

5. On the day of the fire, December 4th, 1922, plaintiffs locked the doors of the said store and 40

Answer.

kept defendant out of possession thereof forever after.

SIXTH DEFENSE.

6. Defendant reserves the question of law as to the right of the plaintiffs to recover under each and every count, and as to each and every paragraph
10 in all counts, for motion at or before the time of trial.

COUNTERCLAIM OF THE DEFENDANT
AGAINST THE PLAINTIFFS.

1. Defendant alleges that at the time of the making of the lease mentioned in the complaint, the defendant deposited with the plaintiffs, the sum of Three hundred dollars for performance of
20 the terms, conditions and covenants of the lease, and that at the termination of the lease by the plaintiffs, the defendant was and is entitled to the Three hundred dollars so deposited.

2. On or about December 5th, the premises were damaged by fire and rendered unfit for use by the defendant.

3. On or about the 26th day of January, 1923,
30 plaintiffs served notice on the defendant to deliver possession of the premises to the plaintiffs on January 30th.

4. On the fifth day of February, plaintiffs caused proceedings to be taken in the District Court of the City of Elizabeth, by virtue of which, judgment for possession of the premises was rendered to the plaintiffs against the defendant, and defendant removed by the plaintiffs from the premises, and the lease referred to in the complaint was then and
40 there terminated.

Reply.

5. Defendant has demanded return of the aforesaid Three hundred dollars from the plaintiffs, and payment has been refused.

Judgment for Three hundred dollars with interest and costs is demanded against the plaintiffs.

Attorney of Defendant.

10

Reply.

Filed April 30, 1923.

Plaintiffs in reply to defendant's answer say that they join issue on the answer to the First, Second, Third and Fourth Counts.

Plaintiffs allege that the matters set up as First, Second, Third, Fourth and Fifth defenses are not in fact defenses at all and do not set forth any facts which constitutes a defense to the said several actions set forth in the Fourth Count of plaintiffs complaint. 20

RESERVATION OF OBJECTIONS.

1. The plaintiffs reserve the right to move at or before the trial for the striking out of the First, Second, Third, Fourth and Fifth Defenses on the ground that no matters of fact are pleaded which constitutes a defense to the several actions of the plaintiffs as set forth in the Fourth Count of the complaint. 30

2. Plaintiffs reserve the right to move to strike out all of the Fifth Paragraph of the answer to the First Count, except so much thereof as admits paragraph 5 of the complaint, on the ground that 40

Reply.

the same does not constitute an answer or legal defense.

3. Plaintiffs reserve the right to move to strike out the Fifth Paragraph of the answer to the Third Count on the ground that the matters and facts therein set forth constitute no defense.

10

4. Plaintiffs in reply and by way of answer to defendant's counter-claim say:

1. They admit that pursuant to the termination of the lease the defendant deposited Three Hundred (\$300.00) Dollars as security for the performance of said lease but deny that the defendant is entitled to the return of any of said money because he breached said lease in the respects set forth in the complaint.

20

2. Plaintiffs admit that there was a fire in said demised premises on or about December 5, 1922 but that said premises were repaired and put in tenantable condition, that notice was served upon the defendant that said premises would be ready for occupancy by him as a tenant thereof on February 1, 1923 and defendant thereupon informed plaintiffs that he would not go into possession and therefor on January 26, 1923 plaintiffs caused a notice to be served upon the defendant that his tenancy would be terminated by reason of non-payment of rental which was due on December 1, 1922.

30

3. Plaintiffs admit the allegations of paragraphs 3 and 4 of the counterclaim.

4. Plaintiffs deny paragraph 5 of the counterclaim and allege that by reason of the breach of lease by said defendant said demised premises have

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Postea. Filed Nov. 5, 1930.

been vacant since February 1, 1923; that said defendant has not paid the rental as reserved under said lease and has not surrendered possession of the butcher and other fixtures in as good condition as the same were in at the time of the making of said lease.

5. That by reason of the actions of the said defendant and the several breaches of the covenants of said lease, defendant is not entitled to have said Three Hundred (\$300.00) Dollars or any part thereof returned to him. 10

SAMUEL KOESTLER,
Attorney of Plaintiffs.

Postea.

20

The above entitled cause came on for trial at the Union Circuit of the New Jersey Supreme Court before Honorable Peter F. Daly, then Circuit Judge, and a jury. Upon the evidence being offered and concluded, by consent of both parties the jury was withdrawn and the cause submitted for decision and determination on the questions of law and fact to said Circuit Judge, who has made and filed his findings of fact and conclusions of law in words following, that is to say: 30

I, Peter F. Daly, Circuit Judge, holding the Union Circuit of the New Jersey Supreme Court, do hereby certify the following to be my findings of facts and law in the above entitled cause.

1. Said cause came on for trial before me and a jury in the Union Circuit of the New Jersey Su- 40

Postea.

preme Court on October 9, 1923 and after the evidence had been produced by the parties interested, by consent of said parties and their respective attorneys, the jury was withdrawn and the cause submitted to the Judge without jury upon the pleadings and evidence produced.

10 2. The complaint in said cause consisted of Four Counts and the plaintiff withdrew any claim for damages under the Fourth Count.

Defense set up by answer and counter-claim, and under said counterclaim defendant endeavored to recover the sum of Three Hundred (\$300.00) Dollars deposited by him as security under the lease made by said plaintiffs with the defendant.

I find the following facts from the admissions in the pleadings and the testimony before me:

20 (a) That on May 8, 1922, the plaintiffs and defendant did enter into an agreement of lease as set forth in Exhibit "A" annexed to the complaint.

(b) That under said lease plaintiffs did rent to the defendant and the defendant did hire from the plaintiffs certain portion of the store known as #1113 Elizabeth Avenue, Elizabeth, New Jersey, for a term to commence on the ninth day of May, 30 1922 and end on the ninth day of May, 1925, at the rental of \$100.00 per month, payable in advance, and the rental was to be \$73.27 for the balance of the month of May, 1922, and \$100.00 on the first day of June for the rental of June and \$100.00 on the first day of each and every month thereafter in advance.

(c) That said lease in typewriting contained the following clause:

40 "The tenant hereunder shall have the right, without the payment of additional rental, to use the

Postea.

butcher and other fixtures in said premises and upon the termination, expiration or sooner termination of this lease shall return the same to the landlord hereunder in as good condition as the same now are”.

Said lease in printing contained the following clause:

10

“And at the expiration of the said term, or the termination of this lease, the said party of the second part will quit and surrender the premises hereby demised, in as good a state and condition as reasonable use and wear thereof will permit, damages by the elements excepted”.

Said lease in typewriting contained the following clause:

“The tenant has deposited with the landlord the sum of Three Hundred (\$300.00) Dollars as security for the performance of all the terms, conditions and covenants of this lease on the part of the tenant to be performed, which security is to be returned to the tenant on the expiration of this lease upon his complying with all the conditions hereof”.

20

(d) While said lease was in full force and effect and the defendant in possession of the demised premises, on December 5, 1922 a fire occurred in the store of which the demised premises forms a part; that said fire occurred without any fault of the defendant but that by reason of said fire there was the resulting damage to said butcher and other fixtures mentioned in the above quoted typewritten form of the lease; that the reasonable value of such damage is the sum of \$2060.00.

30

(e) Said demised premises were, in a reasonable time, placed in a proper condition of repair; that plaintiffs notified the defendant by letter

40

Postea.

dated January 16, 1923 that said demised premises would be ready for occupancy by the defendant on or before ~~January~~ ^{February} 1, 1923; that said demised premises were, in fact, ready for occupancy as mentioned in said letter but that the defendant neglected and refused to enter into the possession of said
10 premises and has not paid any rental therefor as reserved in the lease.

(f) That defendant never offered to, or in fact never did, repair the damage done to said butcher and other fixtures and did not in fact replace the same in as good condition as they were in at the time of the making of said lease, and that said fixtures, at the time of the termination of the lease by Court order as hereinafter stated, were damaged to the extent of \$2060.00 by the fire as aforesaid.

20 (g) That said lease was terminated by the Order of the Judge of the District Court of the City of Elizabeth, entered on the 5th day of February, 1923, and that pursuant to said Court Order the plaintiffs obtained possession of said demised premises and the butcher and other fixtures in damaged condition, on February 10, 1923.

(h) On December 1, 1922, the sum of \$100.00 rental became due and owing from the defendant
30 to plaintiffs and on December 1, 1922 defendant delivered to the plaintiffs his check in the sum of \$100.00 as and for payment of the rent of December, 1922, which said check was protested for non-payment at a cost of \$2.42 on December 7, 1922 and that defendant has not paid to plaintiffs the said check or any part thereof.

CONCLUSIONS OF LAW.

40 1. Defendant was not obligated to repair the

Postea.

fire damage to the said butcher and other fixtures and that therefore plaintiffs are not entitled to any recovery against defendant for said damages under the first and second count of the complaint.

2. Plaintiffs are entitled to recover from defendant the amount of said check on December 1, 1922, being \$100.00 besides \$2.42 protest fees and interest on \$102.42 from December 7, 1922 until the date of this conclusion, being the sum of \$146.90. 10

3. Plaintiffs are not entitled to recover from the defendant on the fourth count by reason of the fact that any claim for damages thereunder was withdrawn at the trial.

4. Plaintiffs and defendant were residents of different counties and as the amount of recovery is in excess of \$100.00, the plaintiffs are entitled to costs of suit. 20

5. Defendant, Perlmutter, is not entitled to recover against the plaintiffs, Greenwald and Krinzman, upon the counter-claim because of breach of contract committed by said defendant and the counterclaim is therefore dismissed.

6. Judgment will be entered in favor of the plaintiffs, Max Greenwald and Philip Krinzman, and against the defendant, Max Perlmutter, in the sum of \$146.90 besides costs of suit to be taxed. 30

PETER F. DALY,
Circuit Judge.

Amended Postea.

10 And it appearing that said findings of law and fact were filed, and the Postea signed by said Circuit Court Judge, but that by inadvertance it did not direct any judgment upon the first and second counts of the complaint, and that judgment has been entered upon the third count, which should be vacated, and that one complete judgment should be entered, and it appearing that the Honorable Peter F. Daly's term as Circuit Court Judge has since expired, and that he, as Supreme Court Justice has been assigned to a different Supreme Court Circuit, and application being now made for the signing of an amended Postea upon due notice thereof to the attorney of the defendant, and no cause appearing to the contrary, I do hereby determine and find that by said finding of law and fact certified to by the Honorable Peter F. Daly, as Circuit Court Judge, the said trial court did find the issues in favor of the defendant on the first and second counts of the complaint and against said plaintiffs, and did find the issues for the plaintiffs and against the defendant on the third count, and did thereupon assess the damages of said plaintiffs as against said defendant on the third count, as of March 5th, 1930, at the sum of One Hundred Forty-six dollars and ninety cents (\$146.90).

20

30

CLARENCE E. CASE,
Supreme Court Justice.

Judgment.

Whereupon it is adjudged that the first and second counts of the complaint of the plaintiffs be dismissed, and it is further adjudged that the plaintiffs Max Greenwald and Philip Krinzman do recover of the said defendant Max Perlmutter on the third count of the complaint the sum of One Hundred Fifty-five dollars and seventy-two cents damages, together with their costs which have been taxed at the sum of Fifty-eight dollars and sixty-six cents making in the whole the sum of Two hundred and fourteen dollars and thirty-eight cents.

Damages	\$155.72
Costs	58.68

	\$214.38

10

20

Judgment signed and entered March 10, 1931.

WM. S. GUMMERE,
C. J.

Clerk's Certificate.

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

30

(Seal) In testimony whereof I have set my hand and the seal of said Court at Trenton, this sixteenth day of September, A. D. nineteen hundred and thirty-one.

FRED L. BLOODGOOD,
Clerk.

40

Testimony.

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

October Term, 1923.

10 MAX GREENWALD and PHILIP
 KRINZMAN,
 Plaintiffs,

vs.

 MAX PERLMUTTER,
 Defendant.

20 Transcript of stenographer's notes of evidence in
the above-entitled cause, taken before HON. PETER
F. DALY, Circuit Court Judge, and a jury, in the
Union County Court House, in the City of Eliza-
beth, New Jersey, on the ninth day of October, A.
D. 1923, at 9:40 A. M.

APPEARANCES:

30 SAMUEL KOESTLER, ESQ.,
 Attorney for the plaintiffs.
 ABE J. DAVID, ESQ.,
 MARTIN P. O'CONNOR, ESQ.,
 Attorneys for the defendant.

(A jury being impaneled and found satisfactory,
they were sworn.)

(Mr. Koestler opens the case for the plaintiffs.)

(Mr. O'Connor opens the case for the defendant.)

40 Mr. Koestler: I desire to offer in evidence

Testimony.

lease made by Max Greenwald and Philip Krinzman to Max Perlmutter dated May 8, 1922, for all that certain portion of the store known as 1113 Elizabeth Avenue, Elizabeth, New Jersey, being the part nearer Jefferson Avenue, and being westerly of a line drawn from the most westerly line of the east window at right angles to the front of the store, for the term of three years to commence on the ninth day of May, 1922. 10

Mr. O'Connor: No objections.

The Court: It is admitted.

(Lease entered in evidence and marked "Exhibit P-1").

Mr. Koestler: I desire to read to the jury a clause in this lease which is the one upon which most of this action is based: 20

"The tenant hereunder shall have the right, without the payment of additional rental, to use the butcher and other fixtures in said premises, and upon the termination, expiration, or sooner termination of this lease, shall return the same to the landlord hereunder in as good condition as the same now are."

Mr. Koestler: I now desire to offer in evidence file and record of proceedings in the District Court of the City of Elizabeth, by Max Greenwald and Philip Krinzman, partners trading as Greenwald and Krinzman, against Max Perlmutter, showing the landlord's affidavit, with notice attached, summons to tenant, issued January 31, 1923, returnable February 5, 1923. The Court gave judgment for possession on the 30

40

Harry A. Morris—Direct.

return day, and with a warrant for removal issued on February 10, 1923.

10 HARRY A. MORRIS, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Koestler:

Q. Mr. Morris, where do you live? A. Trenton, New Jersey.

Q. What is your business? A. Refrigerator designer.

Q. By whom are you employed? A. C. V. Hill & Company, Incorporated.

20 Q. What is the business of C. V. Hill? A. Refrigerator and store fixtures manufacturers.

Q. Does that particularly relate to butcher fixtures? A. Yes, sir.

Q. How long have you been engaged in that line of business? A. Twelve to thirteen years.

Q. Just what are your duties? A. The designing and execution of plans and estimating of same.

30 Q. Does your estimate include making of new fixtures or repairing of old? A. Both.

Q. How long have you been engaged in estimating the cost of construction or repairing of fixtures? A. Four to five years.

Q. Do you know where the Kurtz building is at 1113 Elizabeth Avenue? A. Yes, sir.

Q. Are you familiar with the fixtures in there? A. Yes, sir.

Q. Did you examine them after they had been either destroyed or injured by fire? A. Yes, sir.

40 Q. Tell us just what effects you found and the

Harry A. Morris—Direct.

condition in which you found them. A. The face of the refrigerator was badly charred and it had to be removed. The meat rack was partly charred and partly damaged by smoke, and the meat hooks rusted by water and chemicals. The show cases were damaged by smoke and the varnish damaged by chemicals and all the glass broken or was damaged, impossible to use over again. The marble in several places was cracked. The office was damaged beyond repair. The window case was damaged in the glass and the finish. That is all the fixtures that I examined. One counter needed painting. 10

Q. Could those fixtures, in your opinion, be repaired? A. Yes, sir.

Q. What would it cost to repair them? A. \$2,060. 20

Q. How do you figure that amount? A. The meat rack for re-painting and replacing hooks and replacing part of the wood work that was charred was \$200. The main show case in the store, which had to have glass replaced and cleaned and varnished and several pieces of marble replaced, \$250. Show case in the window which had the glass broken and needed to be re-painted, \$100. An office similar to the size and type that was there that was entirely destroyed would have to be replaced with a new one \$250. Refinishing and repairing counter, \$60. Refrigerator, it was necessary to have an entire new face and owing to the condition of mouldings and things it was cheaper to replace with similar condition and design which we priced at \$1200. 30

Q. Makes a total of \$2,060? A. Yes, sir.

Q. In your opinion is that a reasonable charge 40

Harry A. Morris—Cross.

for replacing these goods? A. Yes, sir. Very reasonable.

Q. Would the Hill Company be willing to do it for that? A. Yes, sir.

Q. Would the Hill Company do it for less than that? A. No, sir.

10 Mr. Koestler: Cross-examine.

Cross-examination by Mr. O'Connor:

Q. Where is your business, Mr. Morris? A. Trenton, New Jersey.

Q. Does the cost of repairing these fixtures mean the cartage of these goods to Trenton and back again? A. No, sir.

20 Q. Where would you do it? A. In the store at Elizabeth.

Q. You say that one of the counters the marble was cracked? A. No, sir.

Q. Where was the marble cracked? A. In the show case.

Q. Do you know whether that had been cracked by the fire or not? A. I couldn't tell.

30 Q. Assuming that to have existed prior to the time of the fire, what would be the cost of repairing that? A. I couldn't very well tell you just now not knowing the exact size of the marble.

Q. When did you see these fixtures last? A. In January.

Q. What year? A. This year.

Q. Do you know how old these fixtures are? A. No, sir. The refrigerator I have no way of telling. The show case was comparatively new. The other fixtures I couldn't tell.

40 Q. You don't know what damage these fixtures had sustained prior to the time of the fire? A.

Harry A. Morris—Redirect.

The part that I figured on repairing was in good condition before.

Q. How do you know it was, if it is gone and don't exist? A. It exists to the extent that only the charred surface is there. The interior surely existed in good condition before the charring or it would not have stood the fire and water. 10

Q. You say you don't know how old these fixtures are? A. No, sir.

Q. You don't know what use they had been subjected to prior to the time of the fire? A. No, sir.

Q. Do your figures include putting them into absolutely perfect condition? A. Perfect working condition.

Q. Perfect working condition? A. Yes, sir.

Q. And not the condition they were in at the time of the fire? A. Well, it would be just as good. 20

Q. Better, won't they? A. Well, to a certain extent, yes.

Mr. O'Connor: Yes. That is all.

Redirect-examination by Mr. Koestler:

Q. To what extent would they be better than before the fire? A. To the adjustment of doors only in the show cases and refrigerator. 30

Q. Do you mean the doors would work easier? A. Absolutely.

Mr. Koestler: That is all.

Max Greenwald—Direct.

MAX GREENWALD, one of the plaintiffs, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Koestler:

Q. Mr. Greenwald, you are one of the plaintiffs in this case? A. Yes, sir.

10 Q. Your partner, Philip Krinzman, is the other plaintiff? A. Yes, sir.

Q. What is your business, Mr. Greenwald? A. Grocer.

Q. Prior to making this lease, Exhibit P-1, with Max Perlmutter, did you and Krinzman occupy any part of this property at 1113 Elizabeth Avenue? A. Yes, sir.

20 Q. During what period of time? A. November, December, January, February, March, April, around May I sublet this place.

Q. You occupied it until you sublet it to Perlmutter, is that it? A. Yes, sir.

Q. What sort of business did you conduct in the place you let to Perlmutter? A. Butcher and vegetables.

Q. At that time did you have this meat rack, show cases, these counters and refrigerator in there? A. Yes, sir.

30 Q. What was the condition of this refrigerator and other fixtures at the time you and Mr. Krinzman were conducting the business? A. In first class condition I had when—and in the first place I had it remodeled all the way through when I got into the place. I had it enameled fresh and I had the place altered to suit myself and I had it in good working condition all the way through.

40 Mr. Koestler: I have Mr. Morris here, he came from Trenton, and he has an engagement to go south. If counsel does not want

Max Greenwald—Direct.

him may I ask the Court to excuse him from further attendance?

The Court: Yes.

Q. How much did you pay for having those fixtures put into condition after you leased the property from Kurtz? A. Well, it cost me about \$400.

10

Q. And at the time you turned these fixtures and the lease of this part of the property over to Perlmutter what was the condition of those fixtures?

A. Very near the same. It has been just for six months which I have used.

Q. Well, what was the condition at the time you turned them over to Perlmutter? A. Well, it was in the same condition as I had it altered.

Q. How was the marble in the show case at the time you turned it over to Perlmutter? A. First class condition. Brand new.

20

Q. Was it cracked? A. No, sir.

Q. When did you first find out about the fire? A. About the next day when it was—after the fire was done.

Mr. Koestler: I suppose we can agree the fire was on December 5, wasn't it?

Mr. O'Connor: December 4.

Mr. Koestler: Either the fourth or fifth, 1922.

30

Q. You say you found it out about a day after it occurred? A. Yes, just right the following day in the morning.

Q. Did you come down to the place? A. Came down to the place; yes, sir.

Q. What did you see? A. I seen it in a wreck.

Q. What was the condition of the fixtures that

40

Max Greenwald—Direct.

you had rented to Perlmutter? A. All burned and broken up.

Q. Did you ever go to see Perlmutter about it?

A. Yes, sir.

Q. Did you ask him to repair them? A. Yes, sir.

10 Q. What did he say? A. Got nothing to do with it.

Q. Did you receive a check from Perlmutter for December rent, 1922? A. Yes, sir.

Q. I show you this check December 1, 1922, and ask you if that is the check you received? A. Yes, sir.

Q. Was it ever paid? A. No, sir. Stop payment.

Q. It was protested, wasn't it? A. Yes, sir.

20 Q. Is this the protest? A. Yes, sir.

Mr. Koestler: I offer the check and protest in evidence.

(Check and protest entered in evidence and marked "Exhibit P-2").

Q. Mr. Greenwald, after you got out of that place did Mr. Perlmutter continue to use the electric current and power in there? A. Yes, sir.

30 Q. Did you ever have any talk with him about that? A. No, sir.

Q. Were the bills rendered in your name or in his name? A. In his name. He was supposed to pay the bills, which he paid up until the fire.

Q. Are you sure he paid all the bills up to the fire? A. Well, pretty near. Probably a month behind. I don't know.

40 Q. Who was running the place in November, 1922? A. Perlmutter.

Max Greenwald—Direct.

Q. I show you three bills, and ask you if you have received them from the Public Service Electric Company? A. Yes, sir.

Q. Did you use any of that current? A. No, sir.

Q. Who did? A. Perlmutter.

Mr. Koestler: I have three bills here. Mr. O'Connor has slips which he says are payments of them. They do not show as payments on the face of the slips he has. I will offer these, and then if it shows they have in fact been paid, I am perfectly willing to strike them out. If you make the statement, Mr. O'Connor, they are paid, I will withdraw them. 10

Mr. O'Connor: I understand they are.

Mr. Koestler: All right. Strike them out. 20

Mr. Koestler: I ask for the production of letter January 16, 1923, written to Mr. Perlmutter.

Mr. Koestler: I offer in evidence the letter produced by the defense in response to my demand.

(Letter dated January 16, 1923, entered in evidence and marked "Exhibit P-3").

Q. Mr. Greenwald, you knew that I, as your attorney, wrote that letter to Mr. Perlmutter and his attorney? A. Yes, sir. 30

Q. Did we ever receive a written response to it? A. Did I receive any?

Q. Yes. A. I was down there at the time you wrote it.

Q. Did you ever receive a written response from Perlmutter? A. No, not at all.

Q. After that you took the proceedings which 40

Max Greenwald—Direct.

have been offered in evidence in this case? A. Yes.

Q. Now, as a matter of fact, the place was ready for a tenant on February 1?

Mr. O'Connor: I object. No use of leading the witness that way.

10 Q. Prior to writing the letter of January 16, 1923, to Mr. Perlmutter did you receive the information from the owners as stated in that letter? A. Yes, sir.

Q. Did you keep in touch with the place to find out when it was ready for a tenant? A. Yes, sir.

Q. When was it ready? A. Around February.

Q. What time in February? A. About the first.

20 Q. After we had the warrant entered for possession on February 10, 1923, did you endeavor to get a tenant for this portion of the premises? A. Yes, sir.

Q. Have you succeeded in doing so? A. No, sir.

Q. Who is your landlord? A. Mr. Kurtz.

Q. Have you paid the rent to Kurtz since February 1? A. Yes, sir.

30 Q. Have you gotten anything back out of the place?

Mr. O'Connor: Now, what is the object of that examination? Whether he has a tenant or has not a tenant is not involved in this suit. We are not suing for so-called breach of the lease to the extent they wish to recover the rental value from the time this defendant was out of the premises. All their claim is based upon, as I understand it, is for failure to return these goods and
40 chattels; secondly, for \$100 rent which we

Max Greenwald—Direct.

concede; and third, for the electric light bill which they concede is paid.

Mr. Koestler: You say it is paid and I take your statement.

Mr. O'Connor: I am making it in good faith, on what Mr. Perlmutter says, and the receipted bills are here. That brings the question down to one item only in dispute, namely, the failure of this defendant to return these goods and chattels in the condition they were in at the time he got them from the plaintiff. Now, whether Mr. Perlmutter did rent this place, or it is idle, we are not interested in that. 10

Mr. Koestler: They have a counter demand filed here in which they seek to recover this \$300, and as part of our direct case the lease shows we have this \$300, the lease which we have offered in evidence shows it, and therefore we are entitled, on our direct case, to show they have no claim for that \$300, because if they rested their case without offering any evidence, they might be entitled to a credit. That is the reason I am entitled to offer it on my direct case. 20

Mr. O'Connor: The answer to that counterclaim, as I understand it, sets up this fact, that we are not entitled to that \$300 back because of the allegations contained in the complaint. 30

The Court: And those allegations are to the effect that you have not lived up to the terms, provisions, and conditions of the lease.

Mr. O'Connor: In not returning these 40

Max Greenwald—Cross.

goods and chattels such as the lease calls for.

Mr. Koestler: I will call your Honor's attention to paragraph four of the first count.

The Court: I do not think it is set up sufficiently in the pleadings to justify this particular question.

10

Mr. Koestler: Cross-examine.

Cross-examination by Mr. O'Connor:

Q. You say this store was ready on or about February 1, 1923? A. About February 1.

Q. What do you mean by about? A. Well, just about the first it was ready.

Q. Well, was it ready on the first? A. On the first I have paid my rent.

20

Q. I am not asking you that.

Mr. O'Connor: I move to strike it out as not responsive to the question put.

The Court: It is stricken out.

Q. Was it ready for occupancy on February 1?

A. It was ready.

Q. Were the men working in the place repairing it on February 1? A. Not that I know of.

30

Q. Were you there on February 1? A. Yes, sir.

Q. Did you meet Mr. Perlmutter there on February 1? A. No, sir.

Q. Do you know that Mr. Perlmutter went there on February 1? A. I don't know.

Q. You don't know? A. No.

Q. And you don't know whether the men were working there repairing the place or not? A. They were working upstairs but not downstairs.

Q. Weren't they working in the store? A. Not
40 as I know of.

Max Greenwald—Cross.

Q. What time of day were you there? A. I was around there about between eleven and twelve o'clock.

Q. You don't know then that Mr. Perlmutter went down to that store on February 1? A. Yes, sir; I don't know.

Q. There was an understanding between you and Perlmutter that he was to get there on February 1, wasn't there? A. Not as I know of. I have not seen Perlmutter previous to that. 10

Q. You didn't see him there on February 1? A. No, sir.

Q. Was the store locked up on February 1? A. No, sir.

Q. What? A. It wasn't locked up.

Q. It wasn't locked up? A. No.

Q. Who had the key for it? A. The key was over in the lunch room right across the way. 20

Q. Who told Mr. Perlmutter the key was over in the lunch room? A. Well, I know I haven't locked it up.

Q. Well, you know it was locked, don't you? A. I know it was locked, and I received the key from the lunch room, that is where I received my key.

Q. Where is the key now? A. It is over in Stamler & Stamler's office. 30

Q. You say you conducted the butcher business in the place you leased to Mr. Perlmutter? A. Yes, sir.

Q. That was the westerly half of the store? A. Yes, sir.

Q. What was on the other side of the store? A. Grocery department.

Q. Had Mr. Perlmutter anything to do with that? A. No, sir.

Q. Who did you lease that to? A. I have leased 40

Charles Kurtz—Direct.

that to A. Friedman. That is, to the Royal Food Store.

Q. In other words, the Royal Food Store had the easterly half of the store? A. Yes, sir.

Q. And Mr. Perlmutter had the westerly half of the store? A. Yes, sir.

10 Q. On December 4, there was a fire in the Royal Food Store, wasn't there? A. Yes, sir.

Q. And it spread to the store of Mr. Perlmutter? A. Yes, sir.

Mr. O'Connor: That is all.

Mr. Koestler: That is all.

20 CHARLES KURTZ, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Koestler:

Q. Mr. Kurtz, where do you live? A. 710 Wyoming Avenue, Elizabeth.

Q. Where is your business? A. 4 Union Avenue, Cranford.

Q. What is your business? A. Butcher.

30 Q. How long have you been in the butcher business? A. Twenty-six years.

Q. Are you and your brothers the owners of the property 1113 Elizabeth Avenue? A. We are.

Q. You rented the property to Greenwald & Krinzman? A. I did.

Q. Also these fixtures that have been mentioned here? A. Fixtures, the entire store.

40 Q. The fixtures were in the store? A. All but the show case. Mr. Greenwald put that in himself, a new show case.

Charles Kurtz—Direct.

Q. At the time you leased this store and the fixtures to Greenwald, what was the condition of the fixtures? A. A number 1.

Q. How old were those fixtures? A. They were put in there 1908.

Q. Had they always been kept in condition? A. Excellent.

Q. Did a fire occur in that store? A. It did. 10

Q. When did you find out about the fire? A. The night the fire apparatus was going down there I was standing on Broad Street, and they said, "You had better come down there, your place is on fire."

Q. You knew it right away? A. I knew it, but it didn't bother me any.

Q. Did you go into the place after the fire was over? A. Yes, sir. 20

Q. What damage, if any, was done to the fixtures? A. Ruined.

Q. Did you, as owner of the place, afterwards put the store in condition for a tenant? A. I did.

Q. Did you put the fixtures in condition? A. I did not.

Q. Why not? A. It is up to Mr. Greenwald to put the fixtures in.

Q. Have you got a copy of your lease here? A. I have not. I believe you have one. You wrote the lease. 30

Q. When was the repair work in the store, other than the fixtures, completed by you? A. Completed for occupation on February 1.

Q. Are you sure of that date? A. Positive.

Q. Did Mr. Greenwald pay you his rent for the month of February? A. For the month of February; yes, sir.

Mr. Koestler: Cross-examine. 40

Charles Kurtz—Cross.

Cross-examination by Mr. O'Connor:

Q. Mr. Kurtz, you say the store was ready for occupancy on February 1? A. Yes, sir.

Q. What was the condition of the fixtures on that day? A. Well, the store was ready but I have nothing to do with the fixtures.

10 Q. I am asking you what the condition was. A. The same as they are today. Total wreck.

Q. This fire that injured the fixtures started where? A. The fire started in the store at 1113 Elizabeth Avenue.

Q. What part of the store, the Perlmutter store? A. No, Perlmutter's section, the fire didn't start in that section.

Q. It started over in the Royal Food department? A. It started behind the partition of the Royal Food Grocery.

Q. And spread over to the premises which were occupied by Mr. Perlmutter? A. Yes.

Q. What time of day did this fire start? A. At night around nine o'clock.

Q. Who was in the premises at the time? A. Nobody.

Q. What time did Mr. Perlmutter close his store that day, if you know? A. I don't know. I wasn't down there. Generally closes around six o'clock.

Q. Have you offered to take back the lease from Greenwald that you gave him?

Mr. Koestler: I object on the ground it is irrelevant to this issue.

40 Mr. O'Connor: He said a little while ago he was paying the rent and losing money, and I want to show now that that is not probably so.

Charles Kurtz—Cross.

The Court: Did he say that?

Mr. O'Connor: Why, he said he was paying the rent and the store was vacant and he wants to hold this \$300 we have up on deposit. I want to show there is no occasion to hold it because—I don't know this as a fact, but I want to inquire into as to whether or not he wasn't ready to take the lease back. 10

The Court: I will allow it.

Mr. Koestler: Prays exception.

Q. Did you make any proposition to Greenwald to take the lease back? A. I offered Mr. Greenwald a thousand dollars to leave the fixtures be there on account of the property is a detriment to Elizabeth Avenue and I am satisfied to lose that. 20

Q. When was that proposition made? A. The date I couldn't say.

Q. How long ago about? A. Right after the fire they were laying there.

Q. Did Greenwald refuse to accept your proposition? A. He didn't refuse. He didn't accept it. I don't know whether he refused it or not. He didn't accept it. 30

Mr. Koestler: I now move to strike out what the witness said after the question to which I took exception.

The Court: That is denied. You may take an exception.

Mr. Koestler: Prays exception. That is all, Mr. Kurtz.

I thought I had in my papers the original lease between Kurtz and Krinzman & Green- 40

Charles Kurtz—Cross.

10 wald but I find I only have a copy of it. I sent Mr. Krinzman to his place for the original lease, which he had at home, which he forgot to bring with him. I have a copy here which is a carbon copy, and I would like to have the right to offer this and supplant it with the original as soon as it arrives.

20 Mr. O'Connor: I object to it on the ground I fail to see the materiality of it. This is a lease made between someone else and not referred to in the pleadings, as I understand it, nor is it the original lease which they are suing. I do not see where this lease has any particular bearing on this case. The clauses may be entirely different from the clauses contained in the lease that exists between the parties to this suit. It is not referred to in the pleadings. I cannot see the particular features of offering this in evidence.

The Court: What is its purpose?

30 Mr. Koestler: It has a clause requiring us upon our part to return the goods, the same as the clause which is in the Perlmutter lease.

Mr. O'Connor: Then I object to it surely. Our obligation, our duty, if there is any duty at all here, is expressed in our lease, and surely this preceding lease—

Mr. Koestler: We are under the same duty to the landlord.

Mr. O'Connor: That may be.

40 The Court: There is a likelihood—and we always have to guard against that—of a prejudice that would interfere with the

Colloquy.

proper determination of the issue, unless certain facts, which ordinarily might be irrelevant, are not admitted. It is in evidence that these goods, according to the testimony, at the time of the fire, were the property of whom?

Mr. Koestler: They were in the possession of Greenwald & Krinzman under their right of possession. 10

The Court: Yes, but the ownership of whom?

Mr. Koestler: They were owned by Kurtz, he has testified to that. And he has also testified that it was up to Greenwald & Krinzman to make these repairs to them. Now, I want to show that by a written instrument between the parties. 20

The Court: I will not allow it, excepting I will allow proof to the extent as to the ownership of the property and the duty of the plaintiffs in this case to return that property.

Mr. Koestler: That is in the lease, there is an express clause in the lease.

The Court: Yes, but there may be so many other things in the lease. 30

Mr. Koestler: I only want it for that purpose.

The Court: Take out that part of it. If it is not agreed to—

Mr. Koestler: It refers to the fixtures and then it says, "The same, at the termination of the lease, are to be returned to the landlord in as good condition as reasonable use thereof, wear and tear will permit." 40

Colloquy.

Mr. O'Connor: That is not this clause we have. That is an entirely different proposition. Why should even the mere effect of that lease have upon that case between the parties here?

10 The Court: Because there may be a fear that the jury would believe that these plaintiffs might recover the value of the goods destroyed by fire, and yet they did not own them, and did not have to make good to somebody else. That is the only reason why I consider it at all. I am going to allow evidence to the effect as to the ownership, actual ownership of these goods and the duty to return these goods. Anything else I do not see is relevant at this time.

20 Mr. Koestler: That is the only clause I want. It is in the written instrument. I offer it for that purpose alone.

The Court: I do not want the whole of it in. Read that part in the record.

Mr. Koestler: It has already been read.

The Court: All right. That part is admitted.

Mr. Koestler: I rest.

30

MOTION FOR NON-SUIT.

Mr. O'Connor: I move for a non-suit. This lease has a clause in it to this effect: "And at the expiration of the said term, or the termination of this lease, the said party of the second part will quit and surrender the premises hereby demised in as good a state and condition as reasonable use

40

Motion for Non-Suit.

and wear thereof will permit, damages by the elements excepted."

That is a printed clause and is not inconsistent, I believe, with the clause on which the plaintiffs particularly rest their case. Then there is a type-written and specially inserted clause: "The tenant hereunder shall have the right, without the payment of additional rental, to use the butcher shop and other fixtures in said premises, and upon the termination, expiration, or sooner termination of this lease shall return the same to the landlord herein in as good condition as the same now are." 10

To hold the defendants responsible on that lease for these fixtures, puts the defendant in the position of an insurer, which I hold he is not, neither was it contemplated at the time that he should be, that is to say, at the time the lease was made. He is not an insurer, and as I said before, it was not his intention to be an insurer, neither was it the intention of any of the parties that he should be an insurer. I have gone into that question and your Honor has before you the case in New York of the Bayway Refining Company vs. Central Railroad, which I do not think has any application to this particular case, because of the phraseology used in that particular lease, which is distinguishable from the language used in this lease. That is an absolute condition to return. 20 30

The Court of Appeals in the State of New York had before it, in the case of *Young v. Ely*, (Argument by counsel).

(Mr. Koestler argued in reply to the motion.)

The Court: There does not seem to be much dispute about the facts in this case. I do not see why it is not entirely a question of law, outside of what the amount of damage done by this fire to these 40

Motion for Non-Suit.

10 fixtures was. There might be some question of fact as to the \$300 for which counterclaim has been made, but as to the main question in this case, it is exclusively a question of law, for which, remarkable as it may be, we have no New Jersey case specifically in point, with a similar state of facts. A tenant is given the right to use fixtures in the demised premises and has the obligation, of course, to return them in as good condition as he received them; and through no fault of his, and through no wilfulness of anyone else, those fixtures are destroyed by fire during the period of the lease. Is he responsible? The question is so interesting to me that I feel that it has sufficient importance to have it thoroughly briefed, if you could agree on the facts. The question of values only involves 20 the amount of the damage.

Mr. O'Connor: All the cases I can gather, I cannot find any in New Jersey.

The Court: There is a lot of reason might be worked out on this. For instance, in my mind there is this: Here is a lease that lets these premises. Certainly the tenant would not be responsible for the injury to the premises themselves by fire. All he was responsible for was to return the 30 premises in as good state as it was at the time that he received it, reasonable wear and tear alone excepted. What do these people lease? Did they lease the permanent structure alone, the store alone? It is a question whether they didn't also lease, as part of the original lease, the fixtures that were in the store, and it does, to a degree, disturb my mind as to how they could be held responsible for fire to the fixtures which were leased, when they are not held responsible in law for fire 40 to the structure itself. While there is, of course,

Motion for Non-Suit.

a resemblance between this case and the insurance case as cited, yet to my mind there is not a perfect analogy between those cases. I feel that the facts in this case ought to be agreed upon, and that you gentlemen, as well as myself, should give more time to the legal reasoning, because my mind is in a state of disturbance over it, and it is a very important question that if we can help to permanently settle it, I feel we have a duty to do it. Unless Mr. O'Connor is in position to prove that this young man from Trenton, who seemed to be a competent witness, that his testimony as to the damage done is not reliable, I do not see why we cannot agree, in case I hold this man is responsible for any injury done to these fixtures by the fire, why we cannot agree on that; or why we cannot agree on letting it go to the jury as to a question of damages, they to fix what the damages are, and the Court to determine what the verdict should be, as a matter of law.

Mr. O'Connor: There is not much difference, as you have well said, between the parties as to the facts. The proof I believe I could offer with regard to the damages to the fixtures would be about \$160 difference between their figures, approximately that, but the thing means a whole lot to this defendant, to hold him responsible, it seems to me, under this state of facts and under this lease. I think your Honor has put it well when you say that the whole thing was leased as one proposition, the store and fixtures just as it stood, the rent covered the whole thing. It was taken into consideration when the parties rented it. I cannot see, on the reasoning expressed on the cases that are in point in other states, which hold that the defendant is not responsible, and the only case

Motion for Non-Suit.

10 cited here is the New Jersey case by the plaintiff, which is not in point. And furthermore, we could take just a rather rough example, if I went out and hired a horse, and I said to the man, "I will return this to you at six o'clock tonight," and I went one hundred yards and the horse dropped dead, am I obliged to pay for that horse?

The Court: Oh, well, that does not apply.

Mr. O'Connor: That is the exact situation here. (Further argument by Mr. Koestler.)

20 Mr. Koestler: If Mr. O'Connor agrees to the damages as proven here, as he substantially does, if your Honor thinks you want time to determine this question of law, I do not want to force your Honor into an immediate decision. I am satisfied after your Honor considers that case, in view of the language in this contract and that contract, you will hold that they are almost identical.

The Court: You gentlemen can satisfy yourselves about it. Of course, I will rule, but I thought it was of enough importance to apply to it more extensive and deeper reasoning than I have the opportunity to do now.

30 Mr. Koestler: I say I do not want to force your Honor to decide it. If Mr. O'Connor will stipulate that the matter be submitted to you as a matter of law, I am agreeable, upon the evidence now before the Court. If he wants to put in other evidence, that is up to him. I do not think he ought to gamble on what the Court is going to decide and ask for leave to put in evidence. If he wants to put it in he ought to put it in now.

40 Mr. O'Connor: If you will let that question lay over for a little while and proceed with the facts relating to the counterclaim, that will give your

Max Perlmutter—Direct.

Honor an opportunity to look at these cases.

The Court: You may proceed. For the present the motion to non-suit is denied and it may be renewed hereafter.

DEFENDANT'S CASE.

MAX PERLMUTTER, the defendant, being
duly sworn according to law, on his oath, saith:

10

Direct-examination by Mr. O'Connor:

Q. Where do you live, Mr. Perlmutter? A. 679
South Twelfth Street, Newark.

Q. What is your business? A. Butcher.

Q. You are the tenant mentioned in the lease offered in evidence this morning? A. Yes.

Q. There was a fire in that store on December 4 or 5th, was there not? A. Yes, sir. 20

Q. Did you get word from anyone stating that the store was ready for use on or about February 1? A. Yes, sir.

Q. Did you go there on February 1? A. I came there February 1.

Q. Was it ready? A. The store was not ready for doing business.

Q. What was the reason? A. The fixtures were not fixed up. 30

Q. Was there anybody working in the store? A. Couple of carpenters working there.

Q. What were they doing there? A. Fixing around some. Cleaning up the place.

Q. Fixing up the place? A. Yes, sir.

Q. What time of day did you go there? A. Oh, about eleven o'clock in the morning.

Q. Who requested you to go there? A. I had a letter that the place was ready February 1. 40

Max Perlmutter—Direct.

Q. Did anybody accompany you to the store that day? A. Yes, sir.

Q. Who? A. Mr. Resser.

Q. Was Mr. Greenwald there? A. No, sir.

Q. Was the store locked up? A. Store was open.

10 Q. Was there anybody there that you knew? A. No, sir.

Q. Have you ever received word since that time that the store was ready for use? A. No, sir.

Q. Never have? A. Never.

Q. Were you there the night of the fire? A. Yes, sir.

Q. What time did you close your store that day? A. Six o'clock.

Q. Six o'clock? A. Yes, sir.

20 Q. What time did the fire take place, if you know? A. Around nine o'clock.

Q. Nine o'clock? A. Yes, sir.

Q. Do you know where the fire originated? A. Yes, sir. The grocery side.

Q. In the grocery store? A. Yes, sir.

Q. And spread over to your place? A. Spread over to my place.

30 Q. The fixtures were damaged, were they not? A. Yes, sir.

Mr. O'Connor: Take the witness.

Cross-examination by Mr. Koestler:

Q. You say you got there at eleven o'clock on February 1? A. Yes, sir; eleven o'clock.

Q. How long did you stay? A. Oh, about five minutes.

40 Q. What did you see the carpenter do? A. Cleaning up the place.

Max Perlmutter—Redirect.

Q. Cleaning up the place? A. Yes, sir.

Q. A carpenter was cleaning up the place? A. Yes, sir.

Q. Wasn't he making a counter on the other side for a vegetable man? A. I didn't see him make no counter. He was cleaning up the place.

Q. One carpenter there? A. Two.

Q. What were they doing? A. Cleaning up the place. Picking up the rubbish there and pieces of wood, threw down the cellar. 10

Q. That is all you saw them do? A. That is all I saw them do.

Q. The only thing that was not fixed were the fixtures which were destroyed by the fire? A. Yes, sir.

Redirect-examination by Mr. O'Connor: 20

Q. The place was not ready for use? A. Wasn't ready.

By the Court:

Q. Why wasn't it ready for use? A. It wasn't cleaned up the place properly yet. Fixtures was all around the store. Wasn't in proper place.

Q. Well, when did you go there after the first of February to find out if it was yet in condition? A. Never went there after. 30

Q. Why not? A. Didn't have no reason for that.

Q. Didn't you want the place? A. Yes, sir.

Q. Why didn't you go there? What was the matter of a day or two? A. They notify me February 1 ready the store. I went there and the store was not ready.

Q. How much of it was not ready? A. The fixtures wasn't in place at all. 40

Max Perlmutter—Recross.

Q. Nothing done? A. Nothing done at all.

Q. No new fixtures there? A. No, nothing at all.

Q. When was this fire, December 4? A. December 4. Notified police headquarters of the fire.

10 *Recross-examination by Mr. Koestler:*

Q. Did I understand you correctly that nothing was done in this place at all, it was just the same as it was the day after the fire? A. No, sir. The place was cleaned up inside.

Q. Wasn't it all painted and decorated? A. I don't know. The butcher fixtures wasn't.

Q. What you mean is that the butcher fixtures, about which we are having this dispute, were not repaired, isn't that what you mean? A. Yes, sir; I mean the butcher fixtures.

Q. But the rest of the place was all right, wasn't it? A. I don't know. It didn't concern me at all.

Q. Well, will you say it wasn't? A. The rest of the place they were cleaning up at the time.

Q. What did they have to do there, an hour's cleaning up, or two hours? A. I don't know how much time. Everything was—the place wasn't swept up.

30 Q. All they had to do was sweep up the floor?
A. Sweep up and clean up the place.

Q. Besides sweeping up the floor they had to re-build these fixtures, is that it? A. The place was not ready for business. You could not go in there.

Q. Answer the question.

(Question repeated by stenographic reporter).

A. Yes, sir.

Max Perlmutter—Recross.

Q. That is all that had to be done? A. To my estimation, yes.

Q. But the walls were painted? A. I don't know.

Q. Will you say they were not painted? A. I couldn't tell you. I don't know if they were or not.

10

Q. You didn't look very hard to find out, did you? A. I didn't look around at everything.

Q. As a matter of fact you lost money down there in the butcher business, didn't you? A. I did not.

Q. You didn't want to go back in the place? A. I didn't.

Q. Didn't I take the matter up with your counsel and with you several times to have you go back? A. The only notice I had. I got notice February 1 and I am ready to take over the place.

20

Q. Didn't you know, through your lawyer, we started proceedings to dispossess you, out of the District Court? A. I did not.

Q. You are sure of that? A. Sure of that.

Q. You didn't care, did you?

Mr. O'Connor: I object to an argument with the witness. Let us have the facts.

30

Q. You stopped payment on the check of December 1, didn't you? A. Yes, sir.

Q. Did you ever offer any money from that time to this time for rent of this place? A. I offered for the four days what I was in there. While I was in the store they locked the store on me. February 5 the store was locked.

Mr. Koestler: I move to strike it out on the ground it is not responsive.

40

Max Perlmutter—Recross.

Q. Did you offer any check or money after December 1? A. Yes, sir, I did.

Q. What? A. \$12 December 1 for four days rent what I been in there.

Q. Outside of the \$12 and some cents for four days rent you never came and offered any for rent of that place, did you? A. No, sir.

10 Q. You haven't offered any to this day? A. No, sir.

Q. Are you willing to make good your check of \$100 that was protested? A. If I have to I am willing to make good.

Q. You don't even want to do that if you don't have to?

20 Mr. O'Connor: He is here to try this case, and not for an argument. I have come into this case, trying it for somebody else, and I have advised him to pay it.

Q. When were you down to look at that place after February 1, 1923? A. I been there about a couple of months ago with a fixtures man.

Q. Couple of months ago? A. Yes, sir.

Q. Was it the same a couple of months ago as it was on the first of February? A. I didn't have no key. I didn't go in there.

30 Q. Could you look in? A. Yes, sir; I did look in.

Q. When you looked in did you see it was the same? A. I found the fixtures the same way they was before.

Q. How was the floor? A. All over the floor was papers.

Q. Was it just the same then? A. Was papers all over the floor.

40 Q. How long would it take to sweep out the

John I. Ressel—Direct.

papers that you saw on the floor a couple of months ago? A. I don't know. Probably fifteen or twenty minutes.

Mr. Koestler: That is all.

By Mr. O'Connor:

Q. The place was not ready for business, was it? 10
A. No, sir; it was not.

Mr. O'Connor: That is all.

JOHN I. RESSELL, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. O'Connor: 20

Q. Mr. Ressel, where do you live? A. 555
Springfield Avenue, Newark.

Q. What is your business? A. Grocer and
butcher.

Q. Did you ever go to Mr. Perlmutter's butcher
shop on Elizabeth Avenue? A. Yes, sir.

Q. When did you first go there? A. The sec-
ond day he took the lease over.

Q. Were you there shortly after the fire? A. 30
By the next morning.

Q. Next morning? A. Yes, sir.

Q. What occurred there? A. In which way do
you mean?

Q. That morning what happened? Did Mr.
Perlmutter go into the store? A. Yes.

Q. Who let him in? A. I believe the door was
open, broken open.

Q. When he left there who locked it up? A. 40
Mr. Kurtz.

John I. Ressel—Direct.

Q. How did he lock it up? A. Padlock.

Q. Padlock and chain? A. I couldn't exactly tell you if there was a chain or not. I know he put a padlock on.

Q. Who held the key? A. Mr. Kurtz.

Q. Locked it up when Mr. Perlmutter went out?

10 A. Yes, sir.

Q. That was the morning after the fire? A. Yes, sir.

Q. Did you go back there with him at any time?

A. Yes, sir.

Q. When? A. First of February.

Q. What was the condition of the place on the first day of February? A. In which respect?

Q. With respect to being in shape for occupancy. A. It wasn't in shape for occupancy.

20 Q. And what was the reason? A. Well, at the time I was there, there were people working in there.

Q. Do you recall what they were doing, Mr. Ressel? A. I do not.

Q. But they were working in there? A. Yes, sir.

30 Q. Were the fixtures changed, or anything done with them, or did they remain in the same condition as you saw them the day after the fire? A. They remained in the same condition I saw them the day after the fire.

Q. Do you recall whether the place was re-painted? A. It looked clean. I don't know whether it was re-painted or not.

Q. It looked cleaner? A. Yes, sir.

Q. Were the fixtures in place? A. No, sir.

Q. Was Mr. Greenwald there? A. No, sir.

40 Q. Do you know who had the key? A. No, sir.

John I. Ressel—Cross.

Q. These men were working there and you walked in? A. Yes, sir.

Mr. O'Connor: Take the witness.

Cross-examination by Mr. Koestler:

Q. Did Mr. Perlmutter tell you that Greenwald's lawyer was in Elizabeth? A. What is that? 10

Q. Did Perlmutter tell you that he knew where Greenwald's lawyer was? A. I don't see why he should tell me.

Q. Did he? A. Why?

Q. Did he tell you? A. Why, no.

Q. Now, when you say that on February 1 this place was not in shape, you mean that you could not use the fixtures, isn't that so? A. Positively, yes. 20

Q. And that is the reason it wasn't in shape? A. The store itself wasn't in shape.

Q. What was the matter with the store? A. Well, the fixtures wasn't set right. The place was, I should say—I don't know whether it was dirty or not, but I myself wouldn't take the store to go in business in there.

Q. Well, you mean it needed sweeping out, is that so? A. No, I don't. 30

Q. What else did it need? A. Well, I don't know. It needed straightening up there.

Q. Well, you mean the fixtures? A. Fixtures and every other thing, I believe.

Q. What are the other things? A. I couldn't tell you.

Q. Isn't it a fact that the entire inside of that place, outside of the fixtures, had been repainted? 40

John I. Ressel—Cross.

A. Well, it was clean. I should not say it was re-painted.

Q. Why won't you say it was re-painted? You went down there to see the condition of it, didn't you? A. No, I did not.

10 Q. Why did you go down there on the first of February? A. I went down there to take a ride.

Q. Didn't you know why Perlmutter was going down? A. No, I did not.

Q. Didn't he tell you? A. He said he was going to look at the store. For what purpose I don't know.

Q. In what part of the store were the people working that you saw there? A. They were in the center of the store.

20 Q. Weren't they building a shelf on the other side? A. No, sir.

Q. You don't know what they were doing? A. No, sir. I know one of them had a broom in his hand.

Q. Did you see him sweeping with it? A. No.

Q. How long did you stay there? A. Oh, I should judge about five or six minutes.

30 Q. The main objection you had to the place is that the fixtures were burned and not in their proper position, is that it? A. Why, they are not standing right.

Q. That is really your objection, the fixtures were not standing in their places, and they had not been repaired from the damage done to them by the fire? A. It wasn't fit for a man to go in there and do business.

40 Q. Of course, a man could not do a butcher business with burnt fixtures, could he? A. Or grocer either.

Motion for Direction of Verdict.

Mr. Koestler: That is all.

Mr. O'Connor: That is all.

Mr. O'Connor: There is one witness, he is not here, but I will rest. That is, subject to my motion.

10

MOTION FOR DIRECTION OF VERDICT.

Mr. Koestler: I move for a directed verdict in favor of the plaintiff in this case on the first and second counts for \$2,060, upon the ground that the lease expressly provides that the defendant herein, at the expiration, or sooner termination of the lease, shall return the same, meaning these fixtures, to the landlord hereunder in as good condition as the same now are.

20

The record before your Honor shows that this lease was terminated by reason of proceedings in the District Court, and notice having been served upon this defendant on January 26. That notice is that his tenancy would expire unless he, within three days, delivered the possession of the same. And proceedings were had in the District Court upon which a judgment for possession was entered on February 5, thus terminating the rights of Perlmutter under the lease, making the clause which I have just cited from the lease, applicable, and making the sooner termination of the lease, so that it became his obligation at that time to return those fixtures in as good condition as they were in at the time. The evidence here is, and they had to show that those goods were in substantially the same condition and that it would cost \$2,060 to put them in condition.

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Motion for Direction of Verdict.

I ask for a directed verdict on the third count for the amount of \$100, check of December 1, and protest fees \$2.42, and interest thereon from December 7, 1922, to date. That amounts to about five dollars. I ask on that count for a directed verdict of \$107.42. And on the first and second counts a directed verdict of \$2,060.

10 Mr. O'Connor: I do not understand my motion for a non-suit has been finally disposed of, but was held in abeyance pending the progress of the other branch of the case. But my answer to the motion for the direction of a verdict is the same argument I had on my motion for a non-suit, with this additional fact: that these fixtures were fixtures in this store; they are fixtures in the strict legal sense, that they are part of the realty, or trade fixtures, so contemplated by the parties and stood exactly in the same position as the building stood in at the time he took it. That that situation applies which I have already made known to your Honor. There is no need of going over it again. I feel that under the weight of authorities, from whatever source I can find them, that the tenant, under that language used in the lease, was not an insurer, and is not held to the return of those goods, where they perish without his fault, but we know that they were to be returned, pre-
20 sumes the continuance of the existence of the goods at the time they were to be returned, and if they are lost, through no negligence on his part, or through no fault of his, that he is not an insurer to the extent that he is duty bound to return those goods. The weight of authorities holds that to be the fact, under the law.

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40 The Court: What have you to say about my suggestion? There is certainly no question about

Motion for Direction of Verdict.

the extent of the damages, \$2,060. I am ready to decide this, but I think in all fairness we should, if we can, through more advanced reasoning on this, help to make the law on this point more certain, that we ought to do it. I want to admit that while I have my impression or opinion at the present time, yet I am not satisfied with it. If I should grant the motion for a directed verdict, certainly there is no question about the amount. If I should grant the motion for the non-suit, there would still be no question of the amount. That leaves, as to the first and second count, simply a legal question. I would like you good men to more thoroughly brief this in writing and I will look at it. 10

Mr. Koestler: I am willing to abide by any determination your Honor makes. 20

The Court: It is a pure legal question now, because there is no question for the jury to pass upon as to the amount, it is \$2,060, there is undisputed proof of the damage done. In case I find that the tenant is legally liable, then it will be agreed that there be a judgment for \$2,060 on that count. As to the rent there is no question about the \$100 and the protest fees. The plaintiffs are entitled to judgment for that. It leaves only the question to go before the jury as to whether or not this \$300, that was put up on deposit, should be returned, that amount, or any part of it. That is the only question of fact left for the jury to pass upon. 30

Mr. Koestler: That is even a question of law.

Mr. O'Connor: Certainly it is not.

Mr. Koestler: It is a question of whether it is a breach and whether you are entitled to a recovery. 40

Motion for Direction of Verdict.

ery upon breach is a question of law. There is no disputed fact in this whole case. Everything in it is a question of law.

The Court: He claims the premises were not ready for him.

10 Mr. Koestler: The judgment for possession in the District Court is *res adjudicata* against him. It is in evidence here.

The Court: What have you to say about that?

20 Mr. O'Connor: It is not *res adjudicata* at all. The facts in this case are that this man was notified that this store would be ready on February 1, and he went down there on February 1 and the store was not ready, and he is corroborated in that respect by this witness Ressel. The proceeding in the District Court was to dispossess him for the non-payment of rent.

The Court: Wasn't that such a breach as to make him forfeit his \$300?

Mr. O'Connor: No. I concede they are entitled to \$100, the rent then accrued. There is no dispute about that fact. But I claim we are entitled to our \$300 back, less the \$100.

30 Mr. Koestler: The further evidence in the case is that we have endeavored ever since the first of February to get a tenant for these same premises and have not been able to get one.

Mr. O'Connor: The further fact is that you were offered \$1,000 for the lease, which would have protected you, and you refused to sell it.

40 Mr. Koestler: That is absolutely inadmissible in this case, although it was admitted by the Court. We did not have to sell our lease. We have got what we consider a valuable lease to rent for a period of years, and have a right to hold it.

Motion for Direction of Verdict.

The Court: I am going to hold, as a matter of law, there was a sufficient breach of the terms of this lease, upon the part of the defendant, as forfeits his right to return of the \$300 or any part of the \$300. You may take an exception on that.

Of course, I will grant the motion for a directed verdict for the \$100, and the protest fees on the \$100 check. That leaves still the other question. If I decide it in favor of a directed verdict, there will be a judgment for \$2,060, and if I decide in the favor of the non-suit, there will not be any on the first and second count. You may take your exception as to the finding as to the \$300. 10

That leaves the big question a matter to be briefed and decided within a week or ten days.

Mr. Koestler: I am agreeable.

Mr. O'Connor: I am agreeable to that. 20

Mr. O'Connor: I would like to take an exception to the \$300 directed verdict.

Mr. Koestler: I think what we ought to do is to consent to the withdrawal of one juror and to submit the case to your Honor without a jury upon the evidence that is in the court.

The Court: Yes, I think so.

Mr. O'Connor: I am agreeable to that.

The Court: It is considered that one juror is withdrawn and the case is submitted to the court without a jury for his determination. 30

Exhibit P-1.

THIS AGREEMENT made the eighth day of May in the year of our Lord, One thousand nine hundred and twenty-two, between Max Greenwald and Philip Krinzman of the Borough of Roosevelt, in the County of Middlesex and State of New Jersey, party of the first part, (hereinafter called the Landlord) and Max Perlmutter of the City of Newark, in the County of Essex and State of New Jersey of the second part, (hereinafter called the Tenant).

10 WITNESSETH, that the said party of the first part, has hereby let, and rented to the said party of the second part, and the said party of the second part, has hereby hired and taken from the said party of the first part, all that certain portion of the store known as #1113 Elizabeth Avenue, Elizabeth, New Jersey, being the part nearer Jefferson Avenue and being Westerly of a line drawn from the most westerly line of the east window at right angles to the front of said store; for the term of three years, to commence on the Ninth day of May, 1922, at the yearly rent.....and to end on the ninth day of May, 1925, at twelve o'clock noon. The rental of said premises to be at the rate of \$100.00 per month payable in advance for the term expiring on January 1st, 1923 and from then to the end of the term granted hereunder at the rate of \$125.00 per month. The tenant is to pay on the signing of this lease \$73.27 as rental for the balance of the month of May, \$100.00 on the first day of June for the rental of the month of June and \$100.00 on the first day of each and every month of June and \$100.00 on the first day of each and every month thereafter in advance for the rental of said several months and on January 1, 1923, \$125.00 for the rental of the month of January, 1923 and at that rate there-

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Exhibit P-1.

after, payable in advance on the first day of each and every month.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom. 10

And the said party of the second part covenants to pay to the said party of the first part, the said rent as here specified, to wit:

The rental for said premises to be at the rate of \$100.00 per month, payable in advance for the term expiring on January 1st, 1923 and from then to the end of the term granted hereunder at the rate of \$125.00 per month. The tenant is to pay on the signing of this lease \$73.27 as rental for the balance of the month of May, \$100.00 on the first day of June for the rental of the month of June and \$100.00 on the first day of each and every month thereafter in advance for the rental of said several months and on January 1, 1923 \$125.00 for the rental of the month of January, 1923 and at that rate thereafter, payable in advance on the first day of each and every month. 20

And at the expiration of the said term, or the termination of this lease, the said party of the second part will quit and surrender the premises hereby demised, in as good a state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. 30

And the said party of the first part covenant, that the said party of the second part, on paying the said monthly rent, and performing the covenants aforesaid, shall and may peaceably and quiet- 40

Exhibit P-1.

ly have, hold and enjoy the said demised premises for the term aforesaid.

The tenant hereunder is to furnish his own light and is to also furnish light to the Royal Foods Store, the occupant of the east part of the store, using the present lighting fixtures in said premises in the location where now placed.

The tenant hereunder is not obligated to furnish any additional lights to those now in the place.

The tenant hereunder shall not sell or offer for sale in said demised premises any groceries, canned goods, butter, cheese, eggs or lard. The breach of this covenant shall give the Landlord hereunder the right and option of terminating this lease and recovering possession of the demised premises and Summary Proceedings in the Elizabeth District Court.

The tenant hereunder shall have the right, without the payment of additional rental, to use the butcher and other fixtures in said premises and upon the termination, expiration or sooner termination of this lease shall return the same to the landlord hereunder in as good condition as the same now are.

The tenant shall not have the right to remove any of said fixtures from the present location or shall he have the right to make any alterations in the store or windows or any part of the demised premises without first obtaining the written consent of the landlord hereunder.

The tenant agrees it will comply with and carry out any and all the rules, regulations and requirements of the various departments of the City of Elizabeth and the requirements of the law of the State of New Jersey as the same may now be or may from time to time hereafter be enacted, al-

Typewritten

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Exhibit P-1.

tered or amended, and keep its part of the sidewalk free of snow and ice.

The tenant hereunder shall have the right to under-let the premises or assign this lease but any such action on the part of the tenant shall not relieve him from the obligation to pay rental or to carry out the other conditions of this lease.

It is further agreed that if the tenant shall become bankrupt, either voluntarily or involuntarily or be placed in the hands of a permanent Receiver at any time during the term herein demised, then the landlord may at his option rescind this lease and thereupon the term of letting hereby granted shall be at an end and the landlord may re-enter said leased premises without being liable to prosecution therefor. In no event shall the landlord be obliged to return to anyone the security deposited with him for the performance by the tenant of the terms, conditions and covenants of this lease but shall retain said security until the expiration of the term mentioned in this indenture of lease at which time he shall return to the person entitled thereto, only so much of said security as shall remain after deducting all damage that the landlord has suffered during said term by reason of any act or default of the tenant.

This lease is subject to the existing tenancy of the Royal Food Stores, a corporation, for the portion of the store East of the line drawn from the Westerly line of the East window and also subject to the tenancy of the vegetable stand located north of the West window and south of the show case as located at this time.

The Landlord further agrees that the portion of the premises occupied by other tenants in said

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Revised

Exhibit P-1.

Max Perlmutter

store shall not be used during the term of this lease for the sale of fresh or smoked meats.

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The tenant has deposited with the landlord the sum of Three Hundred (\$300.00) dollars..... as security for the performance of all of the terms, conditions and covenants of this lease on the part of the tenant to be performed, which security is to be returned to the tenant on the expiration of this lease upon his complying with all the conditions hereof.

This lease shall be binding upon the parties hereto to their respective heirs, executors, administrators and assigns.

20

In Witness Whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

MAX GREENWALD.
PHILIP KRINZMAN.
MAX PERLMUTTER.

Signed, Sealed and Delivered
in the presence of
Samuel Koestler.

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Exhibit P-2.

Max Perlmutter No. 741
 Butcher
 1113 Elizabeth Ave., Elizabeth, N. J.
 Newark, N. J. Dec. 1st, 1922

Pay to the
 Order of Greenwald and Krinzman \$100.00
 Collectible at par through the Federal Reserve 10
 Bank of New York.

Pay \$100 and 00 Cts. Dollars
 Ironbound Trust Company
 Newark, N. J.
 55-17

Branch MAX PERLMUTTER.
 210 Ferry Street. Elizabeth Account.

Written in ink on side of Check: Rent \$100.00. 20
Stamped across face of check four times: Payment
stopped.

Endorsed on back: Greenwald & Krinzman.

United States of America }
 State of New Jersey } ss.:

On the 7th day of Dec. in the year our Lord, One 30
 Thousand Nine Hundred and 22 at the request of
 The Ironbound Trust Company of Newark,
 N. J.

I, Frank D. MacFadden, Notary Public in and for
 the State of New Jersey, duly appointed, commis-
 sioned and sworn, residing in the City of East Or-
 ange, in the State of New Jersey, did present the
 original Check made by Max Perlmutter at
 for \$100. dated Newark, N. J. Dec. 1st, 1922, and
 hereunto annexed, at the Ironbound Trust Co. 40

Exhibit P-2.

Branch, Newark, N. J. to the bookkeeper and of him demanded payment thereof, who then and there refused to pay the same, saying the maker was not present, and had not there left funds for that purpose.

10 Whereupon, I, the said Notary, at the request of the aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the maker and Indorsers of the said Check as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges, damages and interest already incurred and to be hereafter incurred for want of payment of said Check.

Protest No. 4776.

20 (Seal) Thus Done and Protested in the City of Newark and State aforesaid in the presence of John Doe and Richard Roe, witnesses.

In Testimonium Veritatis
FRANK D. MACFADDEN,
Notary Public.

Exhibit P-3.

Jan. 16, 1923.

30 Mr. Max Perlmutter,
679 South 12th St.,
Newark, N. J.

Dear Sir:

This is to advise you that Mr. Greenwald has just received notice from the owners of building at No. 1113 Elizabeth Avenue that the same will be ready for occupancy on or before February 1, 1923.

40 As you have recently made some statements about not going back into the place, I wish you

Exhibit P-3.

would advise me by return mail whether you intend to retake possession on February 1st and pay rental in advance according to your lease or whether you desire to abandon or surrender your lease.

I desire to know because if you are not going into possession I want Mr. Greenwald to look for a new tenant and lessen the damages you will be obliged to pay to him on breach of this lease.

10

I would thank you for a reply with your signature as in the event of your not replying to this letter I will consider your failure to reply as evidence of your intention to abandon the lease and not take possession on February 1st.

I am sending a copy of this letter to your attorney.

Yours truly,

20

SAMUEL KOESTLER.

Exhibit.

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

Max Greenwald being duly sworn, says that he is a member of the firm of Greenwald & Krinzman and is the agent of said firm for the purpose of renting premises and dispossessing tenants therefrom, and that Max Perlmutter is now in the occupancy and possession of a certain house and premises of Greenwald & Krinzman situate in the City of Elizabeth in said County and State, and known and designated as the Westerly portion of store known as #1113 Elizabeth Avenue in said City of Elizabeth, N. J. under an agreement made by and between Max Greenwald and Philip Krinzman, partners trading as Greenwald & Krinzman and the said Max Perlmutter on the Eighth day of May, A. D. 1922 whereby Max Greenwald and Phil-

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Exhibit.

ip Krinzman, partners trading as Greenwald & Krinzman let and rented said premises to said Max Perlmutter for the term of three years from the Ninth day of May, A. D. 1922 to the ninth day of May, 1925 at a rental of One Hundred (\$100.) Dollars, per month payable on the first day of each and every month from June 1, 1922 that the said

10 Max Perlmutter thereupon entered into the possession of said premises as tenant thereof, by virtue of the said agreement, and is now indebted to Max Greenwald & Philip Krinzman, partners trading as Greenwald & Krinzman in the sum of One Hundred (\$100.00) Dollars, for one months rent of the said premises, due on the First day of December, A. D. 1922; that on the First day of December, A. D. 1922 deponent demanded the said rent

20 from the said Max Perlmutter or possession of said premises and that on the 26th day of January, 1923 caused a three days written notice to be served on the said Max Perlmutter terminating his tenancy for reason of non-payment of rental.

And deponent further says, that the said Max Perlmutter has not paid the said rent, or delivered up the possession of the said premises; but that he has made default in the payment of the said rent, and holds over and continues in possession of the

30 said premises without the permission of Greenwald & Krinzman who prays that a summons may be issued against the said Max Perlmutter directing him to show cause why he does not quit or surrender said premises.

MAX GREENWALD.

Sworn and subscribed this 31st
day of January, A. D. 1923
before me, at Elizabeth, N. J.

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S K

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MAX GREENWALD and PHILIP
KRINZMAN,
Plaintiffs-Appellants,

vs.

MAX PERLMUTTER,
Defendant-Respondent.

On Appeal.

10

Grounds of Appeal.

The appellants hereby assign the following as grounds of appeal:

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(1) That upon the undisputed evidence in the cause the Court should as a matter of law have determined that the plaintiffs were entitled to recover from the defendant the reasonable value of the damage to the personal property and fixtures in said demised premises, to wit, the sum of Two Thousand Sixty Dollars (\$2060) and interest thereon.

30

(2) The Court should have determined as a matter of law from the undisputed evidence that it was the duty and obligation of the defendant to replace in good condition the butcher and other fixtures mentioned in the lease, and in default thereof to pay to plaintiffs the reasonable value of such replacement, to wit, the sum of Two Thousand Sixty Dollars (\$2060.00) and interest thereon.

40

(3) The learned trial judge concluded as a

Grounds of Appeal.

10 matter of law that the plaintiffs were not entitled to recover for damages under the first count of the complaint, whereas in fact such judge should have concluded that the plaintiffs were entitled to recover from the defendant the sum of Two Thousand Sixty Dollars (\$2060.00) and interest thereon.

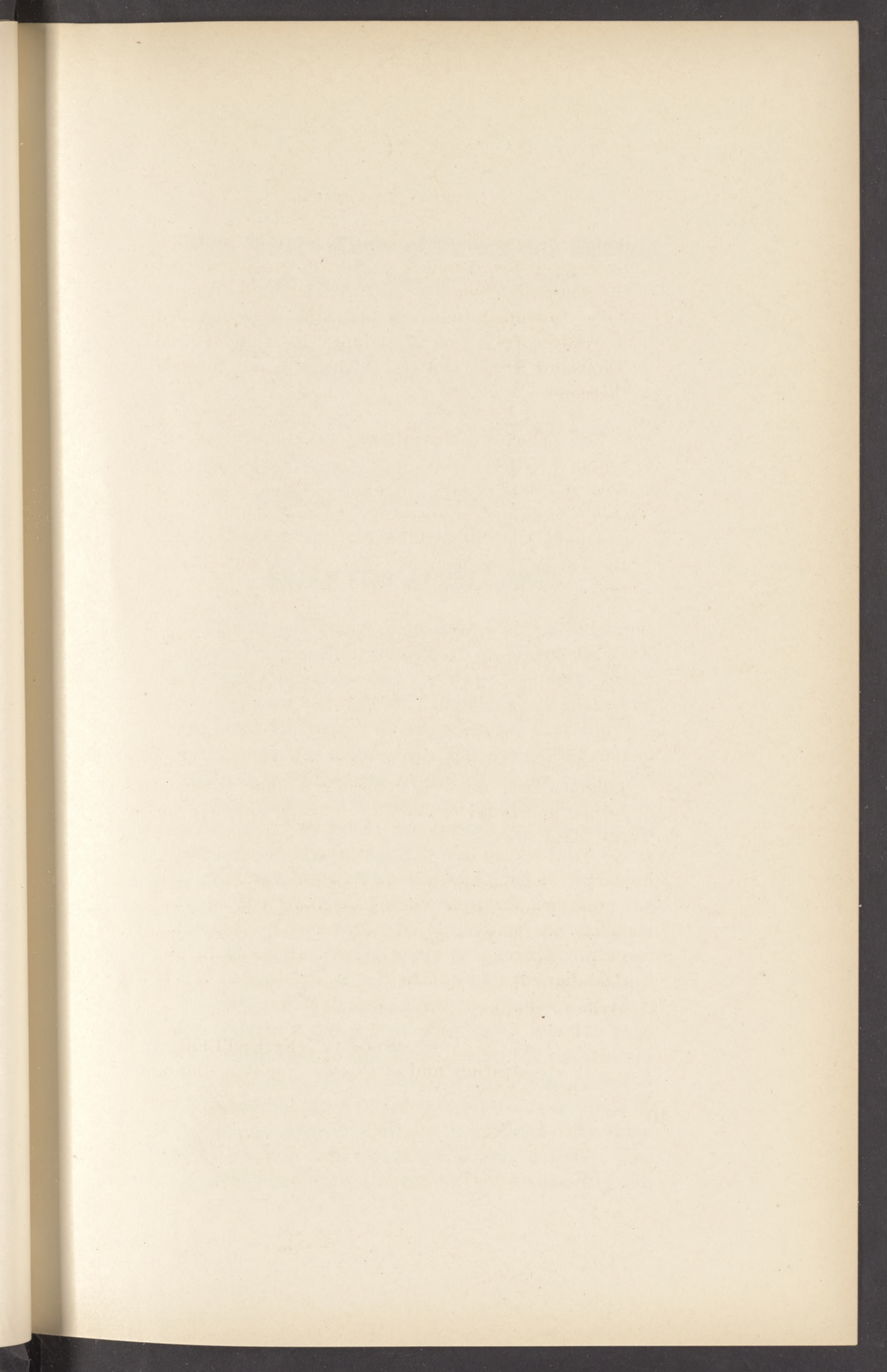
(4) The learned trial judge concluded as a matter of law that the plaintiffs were not entitled to recover for damages under the second count of the complaint, whereas such judge should have concluded that the plaintiffs were entitled to recover from the defendant the sum of Two Thousand Sixty Dollars (\$2060.00) and interest thereon.

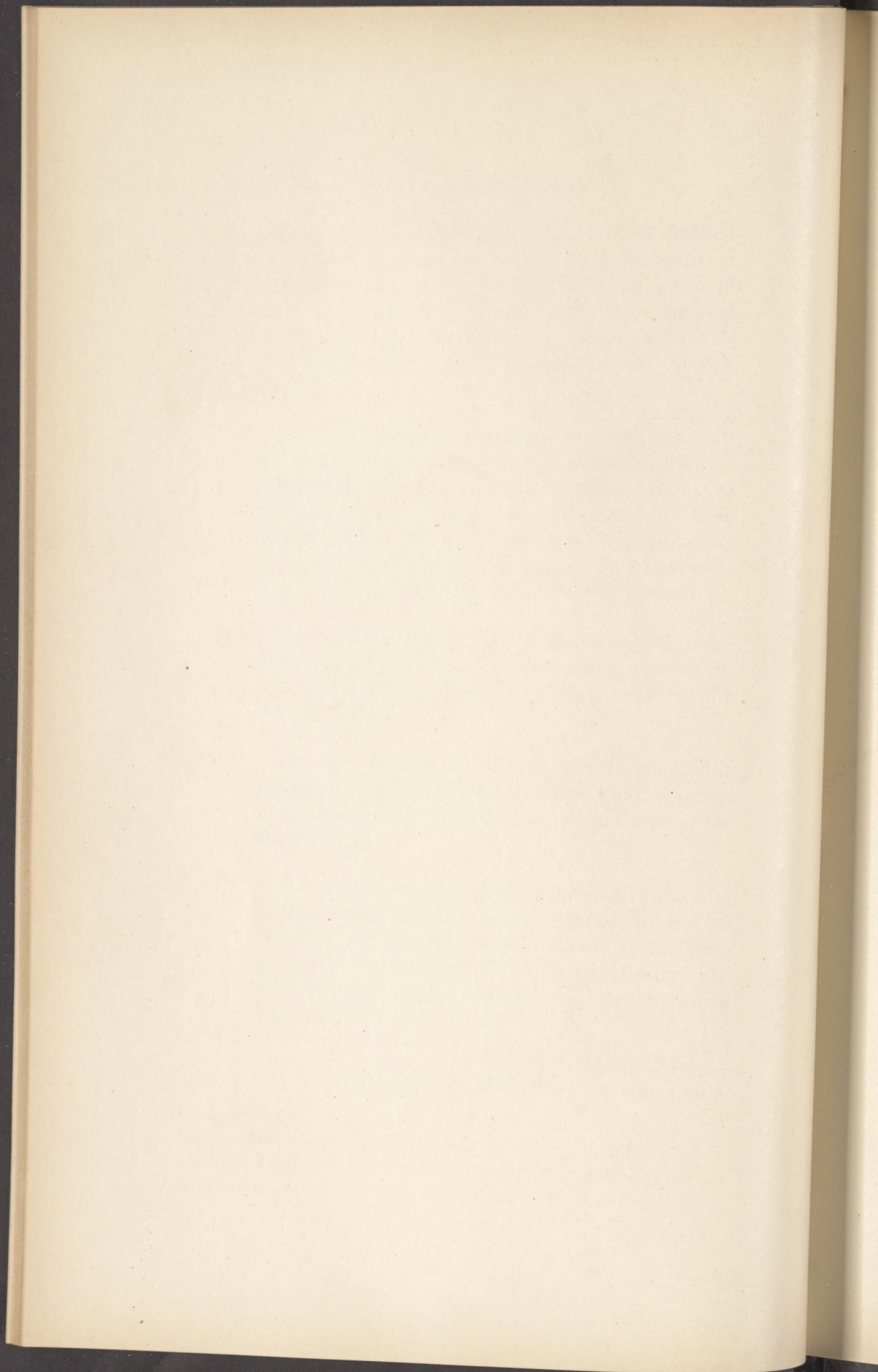
20 (5) On the First Count of the complaint judgment was rendered for the defendant, whereas in fact and in law it should have been rendered for the plaintiffs.

(6) On the Second Count of the complaint judgment was rendered for the defendant, whereas in fact and in law it should have been rendered for the plaintiffs.

30 (7) The motion for directed verdict in the sum of Two Thousand Sixty Dollars (\$2060.00) and interest on the first and second counts of the complaint, in favor of the plaintiffs and against the defendant should have been granted, and there was error in the denial of such motion.

SAMUEL KOESTLER,
Attorney and of Counsel for Appellants.





New Jersey Court of Errors and Appeals

CASE NO. 145, OCTOBER TERM, 1931.

 MAX GREENWALD, *et al.*,
 Plaintiffs-Appellants,
vs.
 MAX PERLMUTTER,
 Defendant-Respondent.

} On Appeal.

BRIEF FOR APPELLANTS.

This appeal brings before the Court a judgment entered in the Supreme Court on March 10, 1931, by which judgment was given for the plaintiffs on the third count for \$155.72 damages and costs, and the plaintiffs' cause of action on the first and second counts was dismissed. The appeal is from so much of the judgment as dismisses the plaintiffs' cause of action on the first and second counts. The defendant has taken no appeal or cross-appeal from the judgment against him on the third count of the Complaint. The case was tried at the Union Circuit of the New Jersey Supreme Court on the 9th day of October, 1923, and after the evidence was in, motions were made by plaintiffs' counsel for a direction of a verdict which raised certain questions of law, there being no question of fact. By consent a juror was withdrawn and the case was submitted to the Trial Judge for determination (Case, p. 63). The learned Judge, after a considerable lapse of time, reduced his findings of fact and conclusions of law to writing. The same were filed in this Court on March 5, 1930. The plaintiffs promptly thereafter took an appeal from

the judgment entered, and when ready to notice the case for argument were informed that no judgment had been entered of dismissal of the action on the first and second counts. Thereupon, it was necessary to vacate the judgment as entered on the third count only and to have an amended Postea signed, as appears on page 22 of the Case. Owing to the fact that Circuit Court Judge Daly was elevated to the Supreme Court and assigned to a different Circuit, he was unable to sign the amended Postea, and the same was signed by Justice Clarence E. Case.

All of this took considerable time and accounts in a measure for the delay in the entry of the final judgment, which, as I have above stated, was finally signed and entered under signature of the Chief Justice on March 10, 1931, and from that judgment the present appeal is taken, which seeks to have reversed the judgment of no cause of action or dismissal of the action on the first and second counts and to have judgment entered thereon in favor of the plaintiffs and against the defendant for \$2,060.00, besides the amount awarded on the third count.

Statement of Facts.

On May 8, 1922, a written agreement of lease was entered into by the parties plaintiffs and defendant, in and by which the plaintiffs rented to defendant, and defendant hired a certain store known as 1113 Elizabeth Avenue, Elizabeth, New Jersey, at a stipulated monthly rental for a term of three years. Defendant continued in possession of said store and the butcher and other fixtures therein until December 5th, when a fire occurred in the building, which damaged and injured the butcher and other fixtures to a considerable extent.

The owner of the building promptly commenced repairs to the building and the same was in condition for occupancy on February 1, 1923. By letter from plaintiffs' attorney to defendant, defendant was apprised of this fact and refused to enter into possession or to make any repairs to the fixtures, and stopped payment on a check which had previously been given for rental. Thereupon plaintiffs instituted suit for possession and termination of the lease, in the Elizabeth District Court, and judgment for possession was entered, terminating the lease.

The defendant has never returned the butcher and other fixtures in as good condition as they were in at the time the lease was made, as particularly provided for in the lease, nor has he repaired said fixtures or offered to pay the price necessary to repair the same, to wit, \$2,060.00. The lease between the parties is drafted on the regular printed form, which contains the usual covenants, as will be found by an examination of a copy of the same appearing on pages 64 and 65. The part of the lease appearing on page 66 is in the original instrument entirely in typewriting, and in this typewriting is a special clause which reads as follows:

“The tenant hereunder shall have the right, without the payment of additional rental, to use the butcher and other fixtures in said premises and upon the termination, expiration or sooner termination of this lease shall return the same to the landlord hereunder in as good condition as the same now are.”

Findings of Fact and Law.

Justice Daly's findings of fact and law are set forth in the printed Case on pages 17 to 21, inclusive. The evidence taken in the cause, or the

admissions of counsel in open court, fully sustain each and every finding of fact. The learned Trial Judge found that there was in existence a lease, that the clause particularly mentioned was in typewriting, while the lease in its printed clauses contained the usual agreement for surrender of the premises at the termination of the lease. It was also found that the premises were injured by fire occurring without the fault of the tenant, and that by reason of said fire the butcher and other fixtures mentioned in the typewritten portion of the lease were damaged to the extent of \$2,060.00 (Case, p. 19, l. 30); that the demised premises were put in condition of repair for re-occupancy, but that the defendant refused to enter the same or pay rent. The defendant never repaired the damage to the butcher and other fixtures and did not, in fact, replace the same in as good condition as they were in at the time of making the lease; that the damage to said fixtures was \$2,060.00 (Case, p. 20, l. 12, etc.). The learned Judge also found that the lease was terminated by judgment of the Elizabeth District Court in possession proceedings.

The Law.

There is in fact in this case only one question of law for decision. That is: Was there an agreement expressly made to absolutely return the butcher and other fixtures in good condition? The rule of law which governs this case is that which was laid down by this Court in the case of *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L. 240, in which the Middlesex Water Co. entered into a contract to furnish water to the owner of the factory with sufficient pressure for fire purposes. The factory was destroyed by fire by reason of the failure of the water company to

furnish water pressure sufficient for fighting the fire. It was held that the company was liable for damages sustained thereby, although the failure to supply the water was due to a break in its pipes without the company's fault. Mr. Justice Depue, in writing the opinion for the Court, says:

“The principle underlying all these cases is that where the contract is express, as it is in this case—to furnish water with a pressure sufficient for fire purposes—to do a thing not unlawful, the contractor must perform it, and if, by some unforeseen accident, the performance is prevented, he must pay damages for not doing it. No distinction is made between accidents that could be foreseen when the contract was entered into and those that could not have been foreseen. Where, from the result of such an accident, one of two innocent persons must sustain a loss, the law, as was said by Mr. Justice Whelpley, casts it upon him who has agreed to sustain it, or, rather, leaves it where the agreement of the parties has put it, and will not insert for the benefit of one of the parties, by construction, an exception which the parties have, either by design or neglect, omitted to insert in their agreement.

“To this general rule there are three exceptions. I know of no other. They are stated in the English notes (6 Eng. Rul. Cas. 611) as follows: ‘First, where the subsequent impossibility is imposed by law; secondly, where the continued existence of something essential to the performance is an implied condition of the contract; thirdly, in contracts for personal services, in which there is generally the implied condition that the person who is to render the service is alive and not incapacitated by illness.’”

So the real question is whether the instant case does or does not come within the second exception mentioned, to wit, where the continued exist-

ence of something essential to the performance is an implied condition of the contract. Mr. Justice Depue cited the case of *Taylor v. Caldwell*, 3 Best & S. 826; 6 Eng. Rul. Cas. 603, as the leading case, and after giving the facts of that case, said:

“In that case the agreement was wholly executory, and the result is placed by Mr. Justice Blackburn on the principle that ‘where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless, when the time for the fulfillment of the contract arrived, some particular, specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done.’”

“In *Taylor v. Caldwell* the music hall was destroyed by a cause *ab extra* before the time for the performance of the contract, and performance having become impossible, the contract was entirely put at an end as to both parties.”

The facts in *Taylor v. Caldwell* were as follows: Caldwell was the lessee of the Surrey Gardens and Music-Hall and agreed to let the same to the plaintiffs for four certain days for grand concerts, and was also to furnish certain kinds of specified entertainments and to advertise the performances, and for this he was to receive £100 from plaintiffs for each of those days. The first concert was to be held on June 17th and the others about monthly thereafter. On June 11th the music hall was destroyed by fire without either party being in fault, and it became impossible to give the concerts. The plaintiffs sued for damages and recovered a verdict. A rule was obtained, and in the opinion written by Judge Blackburn, after citing various cases and the civil law, he concluded that inasmuch as the music hall

ceased to exist both parties were excused from performance, and set aside the verdict.

In the case of *Central Railroad Co. v. Bayway Refining Co.*, 81 N. J. L. 456, this Court sustained a judgment for fire damages. In that case there was an express contract by which the defendant agreed to be liable for all loss or damage not caused by the negligence of the plaintiff. The cars in question were on a siding and without fault of either party were destroyed by fire. There ~~there~~ was a mutuality of contract and the cars were in fact not owned by the Central Railroad Company, but were cars which it had under contract of bailment from another railroad company. In the instant case the building was owned by Kurtz. The butcher and other fixtures were his and he had leased the same to the plaintiffs, who had in turn subleased the same to the defendant, and both leases had the clause in for the return of the property. Here the agreement of Perlmutter was for the use of these fixtures without payment of rental, for which he was to return the same in as good condition as the same now are. Thus, the contract contemplated that if in his use of them he break them, or they wore out or were destroyed or damaged by any other cause, he was to replace them so that they would be returned in as good condition.

The very language of the clause brings the case outside of exception 2 mentioned by Mr. Justice Depue, as aforestated, and brings the case clearly within the general rule that there was an express agreement to absolutely return, and this is clearly shown by the difference between the language in the typewritten clause and the language in the printed clause, which applies to the surrender of the freehold. The clause in relation to the freehold contains the usual exception. The type-

written clause in reference to the fixtures contains absolutely no exception.

The cases cited by my adversary will be

Gouled v. Holwitz, 95 N. J. L. 277;

Stewart v. Stone, 127 N. Y. 500;

Young v. Leary, 135 N. Y. 569;

Seevers v. Gabel, 62 N. W. 669.

In all of these cases something ceased to exist. The animal perished or the building or vessel was entirely destroyed. It no longer was here. The dead horse could not be brought to life and the destroyed building could not be repaired. In the instant case the fixtures were in existence and could be repaired.

The building or store for which Perlmutter agreed to pay rental was damaged by fire and was repaired and ready for occupancy, and was so found as a fact by the learned Trial Judge (Case, p. 20, l. 7), in which Justice Daly says:

“That said demised premises were, in fact, ready for occupancy as mentioned in said letter but that the defendant neglected and refused to enter into the possession of said premises and has not paid any rental therefor as reserved in the lease.”

The testimony of Mr. Morris was that these fixtures could be repaired at a cost of \$2,060.00. He says he figures the amount as follows:

“The meat rack for re-painting and replacing hooks and replacing part of the wood work that was charred was \$200. The main show case in the store, which had to have glass replaced and cleaned and varnished and several pieces of marble replaced, \$250.00. Show case in the window which had the glass broken and needed to be re-painted, \$100. An office similar to the size and type that was there that was entirely destroyed would have to be replaced with a new one \$250. Refinishing and repairing counter, \$60. Refrig-

erator, it was necessary to have an entire new face and owing to the condition of mouldings and things it was cheaper to replace with similar condition and design which we priced at \$1,200'' (Case, p. 27).

He says these figures would put everything back in working condition and it would be just as good as at the time of the fire (Case, p. 29).

Discussion of Law.

Referring to the case of *Taylor v. Caldwell, supra*, it will be noticed that Judge Blackburn cited the civil rule as used by Roman lawyers, which related more obviously to contracts dealing with living animals, whether man or brute, and the examples of these contracts were those respecting slaves. It must be apparent that in the intervening years this rule has been broadened to take in inanimate objects where the object was wholly destroyed or perished. For instance, in *Gouled v. Holwitz, supra*, the contract related to an animal, a horse, which died. The animal had perished; it was impossible to return the horse. In *Perlee v. Jeffcott*, 89 N. J. L. 34, in which the opinion was written by Justice Swayze, the principal subject matter of the contract was a building or barn which was wholly destroyed by fire. While it is true a new barn could have been built, a new barn was not the subject of the contract. An old barn was there and you could not in practice reduplicate the old barn. Therefore, the subject matter had perished; it ceased to exist, and such is the rule in all the cases which are cited by my adversary. Either the ship burned, the building burned, or the animal died, and, naturally, these cases came within the second exception to the general rule, as set forth by this Court in *Middlesex Water Co. v. Knappmann, supra*.

The instant case, however, is more nearly in line with the cases of

- Direct Nav. Co. v. Davidson*, 32 Tex. Civ. App. 492, 74 S. W. 790;
Pope v. Farmers' Union & Mill. Co., 130 Cal. 139, 53 L. R. A. 673, 80 Am. St. Rep. 87, 62 Pac. 384;
Grady v. Schweinler, 14 L. R. A., N. S., 1089 N. D. 113 N. W. 1031.

In the case of *Young v. Leary*, *supra*, the subject matter of the contract was a charter party for a vessel, which had provisions in for fire and marine insurance for one year. The letting was for one year. There was no provision made for renewal of the insurance. There was an implied extension of time for the return of the vessel, and within that extended time the vessel was destroyed by fire, without the fault of either party, and it was held that the liability of the charterer did not attach. The Court of Appeals of New York held that the language used in the contract created nothing more of an obligation than that which the law would raise without any such promise, and referred to the older New York cases, which merely created the usual obligation of a bailee for the return of a hired article. The Court then makes reference to lease of buildings and that the tenant would not be liable for return of the building destroyed by fire. The Judge writing the opinion says, however,

“It is otherwise if the lessee has covenanted to repair or rebuild. *McIntosh v. Lown*, 49 Barb. 550; *Phillips v. Stevens*, 16 Mass. 238.”

The basis of the decision was that if the contract contained the ordinary language providing for re-

delivery, an implication of continued existence of the thing to be returned is to be made.

In *Gouled v. Holwitz, supra*, the subject matter of the contract was a horse which died as the result of a horse disease diagnosed as spinal meningitis, the death resulting from the animal being shot by an agent of the Society for the Prevention of Cruelty to Animals.

The result of all the cases must necessarily be that where the animal perishes without the fault of either party, unless the contract expressly provides for that contingency, then the ordinary clause for a return of the property is subject to the condition of the continued existence of that property. The same applies to a boat or vessel destroyed by fire, or a building destroyed by fire, but in not one of the reported cases does it show that property which is *damaged* by fire or broken by user, and which is subject to a covenant to return, exempts the contracting party from his obligation to return. These cases must necessarily come within the general rule. An examination of what is said by Mr. Justice Blackburn in the opinion in *Taylor v. Caldwell*, 6 English Ruling Cases at page 607, shows that this rule gathered its force in the days of Roman slavery and has been in the ensuing years expanded by some of our courts. So that this second exception mentioned by Mr. Justice Depue in the *Middlesex Water Company* case has almost outgrown the general rule, and it is now time for the courts to put a limitation upon the exception. Here we have a lease of real estate, with the permission to use personal property without the payment of further or other rental. That lease contains the regular printed clause for the return of the demised premises, save for wear and tear and damage by the elements. The parties have incorporated in this agreement of lease a separate and

independent clause relating to the butcher and other fixtures and a positive agreement to return in good condition. There is no saving clause and no exception, and in view of the fact that the lease contains the two clauses it must have been the intention of the parties that the agreement to return the fixtures was absolute and at all events.

It is true that in *Central Railroad Co. v. Bayway Refining Co.*, *supra*, there was an express covenant that the one party should be liable for all loss and damage not caused by the negligence of the other party. Naturally, that included in the particular case a return of the two cars in question. The party was unable to return the cars because they were destroyed by fire. This Court, however, held that inasmuch as there was an express undertaking the defendant was liable. Likewise, in the instant case we have, in addition to the regular covenants for the return of the demised premises, an express covenant for the return of the goods, to wit, the butcher and other fixtures, "in as good condition as the same now are".

The facts in the case show that the plaintiffs received possession of the goods. These butcher and other fixtures were turned over and left in the demised premises, but not "in as good condition as the same now are" (then were). The agreement of the lessee, the defendant Perlmutter, was either to keep the goods in good condition, or if they got out of good condition to put them back in good condition, and the undisputed evidence is that it will cost \$2,060.00 to carry out that covenant. The distinguishing feature in this case from the other cases which are brought squarely within the exception 2 pointed out by Mr. Justice Depue, and as determined by the opinion of Chief Justice Gummere in the *Gouled* case, is that under the exception something perished,

ceased to exist, while here the butcher and other fixtures do exist; they have not been destroyed; they are merely damaged. Perlmutter could have exempted himself from that liability, but his obligation is complete—to return in good condition. Under the rule as laid down there is absolute liability, and inasmuch as the form of the agreement brings the case outside of exception 2, the plaintiffs were entitled to a verdict and judgment on the first and second causes of action, and this Court should now render the judgment which the Supreme Court should have rendered in favor of the plaintiffs and against the defendant for \$2,060.00, besides interest, on the first and second counts.

See cases:

Lehigh Valley R. R. Co v. McFarland, 44
N. J. L. 674;
Roth v. General Casualty Co., 106 N. J. L.
516.

Conclusion.

In conclusion, we reiterate that in the *Middlesex Water Co.* case there was an express covenant to supply sufficient pressure, and this must have been predicated upon the expectation that the pipes through which the water was to flow would continue to exist in a condition proper to produce the requisite pressure. The breaking of the pipe did away with that condition. Likewise, in the instant case, the fire damage to the fixtures rendered them unusable for a limited period of time, and was merely a temporary interference with the performance of the lease. The relief to Perlmutter was not to be absolved from his covenant for return, but merely to exempt him from payment of the reserved rental for the period, as

provided by Section 31 of the Landlord and Tenant Act. The instant case, by reason of the form of the covenants in the lease, is brought within the general rule and not within the second exception, as expounded in *Taylor v. Caldwell*, *supra*, or as mentioned in the *Middlesex Water Company* case.

The defendant, Perlmutter, has not brought any counter appeal either from the judgment against him on the third count or from the dismissal of his counterclaim, and therefore said matter is not arguable or reviewable in this Court. The only matter which is presented to this Court is that which is brought up by the direct appeal of the plaintiffs, and that is the erroneous judgment entered against plaintiffs on the first and second counts of the complaint. It being established that the case falls within the general rule of law that he who makes a contract expressly agreeing to perform some act which is not unlawful must either perform or pay damages for not doing it, therefore the judgment below is erroneous, should be reversed and judgment now entered in favor of the plaintiffs and against the defendant on the first and second counts of the complaint, for \$2,060.00 damages, besides interest from October 9, 1923, the day on which the case was submitted, to this date, in addition to the judgment heretofore entered on the third count.

Respectfully submitted,

SAMUEL KOESTLER,
Attorney for Plaintiffs-Appellants.

New Jersey Court of Errors and Appeals

MAX GREENWALD and PHILIP
KRINZMAN,
Plaintiffs-Appellants,
vs.
MAX PERLMUTTER,
Defendant-Respondent.

Action at Law.
On Appeal from
New Jersey
Supreme Court,
Union County.

BRIEF FOR DEFENDANT-RESPONDENT.

This appeal brings before the Court a judgment of the Supreme Court entered March 10, 1931, dismissing the first and second counts of plaintiffs' complaint and awarding to the plaintiffs the sum of One hundred fifty-five dollars and seventy-two (\$155.72) cents damages and costs on the plaintiffs' third count. The plaintiffs appeal from that part of the judgment dismissing the first and second counts of their complaint. The case was tried on October 9, 1923, before Supreme Court Justice Daly, then Circuit Court Judge presiding at the Union Circuit.

History of Case.

On May 28, 1922, the plaintiffs leased to the defendant the westerly portion of the store known as #1113 Elizabeth Avenue, Elizabeth, N. J. The lease is in writing and was offered in evidence (Case, pp. 6 to 10, Exhibit A). According to the pleadings and the proofs, the demised premises

contained certain butcher and other fixtures, the *use* of which was given to the defendant by the plaintiffs. Before the expiration of the lease and on December 5, 1922, a fire occurred in another portion of the building occupied as a grocery store (Case, p. 50, ll. 20 to 30) *without any fault or negligence* on the part of the defendant. This fact is not disputed. As a result of the fire, the butcher fixtures in question were damaged, ruined and destroyed. The second and third counts of the complaint were to recover the cost of replacing and repairing these fixtures because, the plaintiffs contended, it was the duty of the defendant to return the fixtures to the plaintiffs at the termination of the lease in as good a condition as they were at the time the lease was made. The plaintiffs fixed their damages at the sum of Two thousand sixty (\$2,060.00) dollars. The lease, amongst other things, contains the following clause upon which the plaintiffs rest their case:

“The tenant hereunder shall have the right without the payment of additional rent to *use* the *butcher and other fixtures* in said premises, and upon termination, expiration or sooner termination of this lease, shall return the same to the landlord hereunder in as good condition as the same now are” (Case, p. 8, ll. 16 to 22).

The plaintiffs now urge upon the Court to hold that by reason of this clause in the lease, the defendant is an insurer and that judgment should have been entered against him for the sum of Two thousand sixty (\$2,060.00) dollars because he did not “return the same (butcher and other fixtures destroyed by the fire) to the landlord”, which, of course, he could not do because of the fire. The defendant contends that he is not an insurer under the lease either by express language or by implication and that the lease does not mean

in the instant case that he is to return the goods or the value of the goods when they have been destroyed under the circumstances as shown by the proof in this case. A reference to the testimony discloses the condition of these fixtures after the fire. Harry A. Morris, a witness produced on behalf of the plaintiffs, employed by a refrigerator and fixture manufacturer, was called as a witness, and he testified (Case, p. 26, l. 40; p. 27, ll. 1 to 40) as follows:

“Q. Tell us just what effects you found and the condition in which you found them (referring to the fixtures in question)? A. The face of the refrigerator was badly charred and it had to be removed. The meat rack was partly charred and partly damaged by smoke and the meat hooks rusted by water and chemicals. The show cases were damaged by smoke and the varnish damaged by chemicals and all the glass broken or was damaged, impossible to use over again. The marble in several places was cracked. The office was damaged beyond repair. The window case was damaged and the glass. That is all the fixtures that I examined. One counter needed painting.

Q. Could those fixtures in your opinion be repaired? A. Yes, sir.

Q. What would it cost to repair them? A. \$2,060.00.

Q. How do you figure that amount? A. The meat rack for repainting and *replacing* hooks and *replacing* part of the woodwork that was charred was \$200. The main show case in the store which had to have *glass replaced*, cleaned and varnished, and *several pieces of marble replaced*, \$250. Show case in the window which had the glass broken and needed to be repainted, \$100. An office similar to the size and type that was there, that was *entirely destroyed*, would have to be *replaced* with a new one, \$250. Refinishing and repairing counter, \$60. Refrigerator was

necessary to have an entire new face, and, owing to the condition of mouldings and things, it was *cheaper* to *replace* with similar design which we priced at \$1,200.

Q. Makes a total of \$2,060.00? A. Yes, sir.

Q. In your opinion, is that a reasonable charge for *replacing* these goods? A. Yes, sir, very reasonable."

The plaintiff Greenwald, when his attention was called to these fixtures, testified (Case, p. 31, ll. 31 to 40; p. 32, ll. 1 and 2):

"Q. What did you see? A. I seen it in a *wreck*.

Q. What was the condition of the fixtures that you had rented to Perlmutter? A. *All burned and broken up*."

Charles Kurtz, a witness on behalf of the plaintiffs, testified concerning the fixtures (Case, p. 39, l. 4):

"Q. How old were those fixtures? A. They were put in there 1908 (l. 20).

Q. What damage, if any, was done to the fixtures? A. *Ruined*."

On cross-examination, the same witness was asked (Case, p. 40, l. 10):

"Q. I am asking you what the condition was (referring to the fixtures)? A. The same as they are today, total wreck."

It will be observed from the evidence not disputed that these fixtures were *ruined* and *destroyed* by fire originating in another part of the building and spreading to the defendant's store. The defendant was admittedly free from fault or negligence.

The question for determination is, was there any duty in the light of the facts on the part of the defendant to return these fixtures to the land-

lord in the condition they were at the time of the making of the lease.

The defendant contends that he was not an insurer under the lease either by express language or by implication, and that the lease does not mean that he is to return the goods or the value of the goods or replace them with new fixtures or repair them where the fixtures have been ruined or destroyed by fire and no longer exist as they were at the time prior to the fire. In other words, it was not an absolute and positive contract to redeliver without regard to what might happen to the fixtures.

“By a special contract, a bailee may assume the liability of an insurer. Agreement by the bailee that he will pay the value of the property if damaged or destroyed while in his possession; that he will assume responsibility for its loss from any cause, or that the property is to be at his risk against loss by fire or otherwise until return, are sufficient to make him liable as an insurer * * * but *by the weight of authority such an agreement does not make the bailee liable for injury to the property occurring without his fault.*” 6 *Corpus Juris*, 1101-1112.

“Unless a bailee has assumed the obligation of an insurer or as in a few special cases as had the same imposed upon him by operation of law, *in the interest of public policy* he may *relieve himself of responsibility* to redeliver by showing that the property bailed was lost through no fault of his or was stolen, *destroyed* or otherwise put beyond his power to return while he was in the exercise of the care required by law.” 3 *Ruling Case Law*, page 116, Sec. 38.

It is to be noticed that the case now before the Court is one which follows with the line of well-established cases dealing with the subject of intervening impossibility to perform as a release

from an obligation to perform a contract. *Stewart v. Stone*, 127 N. Y. 500. A principle recognized and settled in this State. I refer to the case of *Gouled v. Holowitz*, 113 Atl. Rep. 323, in which it appeared that the plaintiff and defendant entered into an agreement in writing by the terms of which a team of horses, a farm wagon and a double set of harness were rented. They were delivered to the defendant upon the following expressed understanding:

“To give board to said horses, free of charge for their care, and for reasonable work for a period of twelve weeks from above date and to return said horses and other property upon demand in ‘as good condition as they are at present’.”

The horses were taken sick and were afterwards killed. The plaintiff brought suit and recovered whereupon an appeal was taken, and Chief Justice Gummere, delivering the opinion for the Court, said:

“Where from the result of such an accident one of two innocent persons must sustain a loss, the law cast it upon him who has agreed to sustain it, or, rather, leaves it where the agreement of the parties has put it, and will not insert for the benefit of one of the parties by construction an exception which the parties have, either by design or neglect, omitted to insert in their agreement. *School Trustees v. Bennett*, 27 N. J. L. 513; *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. 240.”

“But as was stated in the case last cited, *this general rule is not universally applicable*, and one of the exceptions to it is, where the continued existence of something essential to the performance is an implied condition of the contract; and the question therefore before us is, whether the agreement to return the horse at the end of the term of bailment in as good condition as it was when the plain-

tiff received it, was absolute, and so within the general rule or whether its destruction without the fault of the defendant before the time of its return to the plaintiff had arrived, brought the case within the exception to the rule, and absolved the former from performance. Speaking of a similar contract, Peckham, J., in the case of *Young v. Leary*, 135 N. Y. 569-576, declared that where the contract relates to the hiring for use of the thing hired and the bailee expressly agrees to redeliver the article hired, upon the determination of the term of hiring, there is *implied a condition of the continued existence of the thing which is the subject of the contract, and if it perish without any fault of the hirer so that redelivery becomes impossible, the hirer is excused*. That for instance, if a horse be delivered to one under an expressed promise to redeliver when demanded and the horse died before the demand and without fault on the part of the bailee, he is excused. And he concludes with the following statement of the legal ruling: 'the authorities established the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, then in the absence of any express or implied warranty the thing shall exist, the contract is not to be construed as a *positive contract* but subject to an implied condition that the party shall be excused in case before breach the contract becomes impossible (of performance) from the perishing of the thing without the fault of the contractor.' "

And the Chief Justice, continuing, said:

"And Swayze, J., in the case of *Perlee v. Jeffcott*, 89 N. J. L. 34, says that the true

rule in cases of this kind is laid down by Mr. Justice Blackburn in *Taylor v. Caldwell*, 3 B. & S. 826, namely, that 'in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing (without the fault of the person against whom the contract is sought to be enforced) shall excuse the performance'."

In *Young v. Leary*, 136 N. Y. 569, decided by the Court of Appeals, it appeared that the Washburn Steamboat Co. let and hired to one McKay a steamboat for a period of twelve months. McKay agreed that *on the termination of the charter party* he would deliver the steamboat to the Washburn Steamboat Co. or their legal representatives in New York Harbor in the same condition as she is now in, ordinary wear and tear excepted. The vessel was burned at sea. The company duly demanded of the Company that he should cause the vessel to be delivered to it or to pay the value thereof, which defendant omitted to do. The company then assigned its claim to one Cornell, who commenced action to recover from the defendant the value of the vessel because of the failure to deliver it to the company on October 17, 1885, as he agreed to do. The question of waiver arose in this case, but has no bearing upon the point I wish to bring to the Court's attention. The Court said in this case:

"The case of *Harmony v. Bingham*, 12 N. Y., p. 99, is one of the leading cases of that kind which must have controlled the judgment of the Court below in the case at bar. It was reiterated as a principle well founded in the law of contracts, that inevitable accident or any unforeseen contingency not within the control of the party promising was no

defense to an action founded upon the express promise to do the thing and a failure of performance. An act of God, it was said, would excuse a party from performing a duty created by law, but not where such party had unconditionally engaged by express contract to perform. It is argued that here is an express promise to deliver this vessel in the harbor of New York, and as the promise was not fulfilled the promisor is liable and hence the liability of the defendant as his surety."

The Court, continuing, said:

"We do not think that the law applicable to the class of cases of which that of *Harmony v. Bingham* (*supra*) is a conspicuous example applies here. The contract in this case comes as it seems to us under *another class* which relates to the *hiring for use* of the thing hired, and where an express contract is made to *redeliver* the article hired upon the determination of the term of hiring, even in such cases of *express contract*, there is *implied a condition of the continued existence of the thing which is the subject of the contract, and if it perish without any fault of the hirer, so that redelivery becomes impossible, the hirer is excused*. If a horse be delivered to one under an express promise to redeliver when demanded, and the horse died before demand and without fault on the part of the bailee, he is excused (*William v. Lloyd W. Jones*, 179; *Sparrow v. Sowgate*, *Id.* 29). Mr. S. Martin Leake, in his Digest of the Law of Contracts, at page 706, says: 'The authorities establish the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, then in the absence of any

express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach the contract becomes impossible from the perishing of the thing without the fault of the contractor.' ”

The Court further says:

“Several cases are referred to in support of this proposition. Among them are those in the note to *Hall v. Wright*, 96 Eng. Com. L. R. 745, at bottom of page 795; S. C. (El.: Bl. S. El. 745); *Taylor v. Caldwell* (3 Best & Smith 826; S. C. 113 Eng. C. L. 826): Blackburn, J., says: ‘In the last case that the implication in an express contract of this nature that the thing itself shall be in existence when the person is called upon to fulfill his contract, tends to further the great object of making the legal construction such as to fulfill the intention of the parties to the contract, for in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition. (See also *Appleby v. Myers*, L. R. S. Com. Pl. 650, per Blackburn, J., 658). There is no question that a party can, if he so pleases, bind himself to deliver, notwithstanding the thing may perish which he contracts to deliver. *He does not thus bind himself by the use of the ordinary language as contained in this charter party. The above cases show this to be true.*’ ”

Continuing, the Court said:

“So it was held in the case of *Amex v. Balden*, 17 Barb. 513, where the defendant was sued for its value for not returning a steamboat according to the condition of the charter party, by which defendant agreed to return the same at the expiration of the term in as good condition as it then was, excepting ordinary use and wear. The Court said the

language must be held to have reference to the ordinary obligation of such a bailee to return the article hired, and defendant was exempt if before the time arrived the article had been destroyed without his fault. This is only another way of saying that an obligation expressed in such language carries with it an implied condition that the article to be returned shall be in existence at the time when the obligation to return arises, and if in the meantime it has been destroyed without the default of the promisor, he is not bound by his contract thus expressed. The case is thus entirely supported by the cases above cited."

To the same effect is the case of *Hyland v. Paul*, 33 Barb. 241.

"It seems to me as if authorities are not required upon the proposition that in a *contract containing the ordinary language providing for redelivery, an implication of continued existence of the thing to be returned is to be made, for, to again quote the language used by Mr. Justice Blackburn in Taylor v. Caldwell (supra): 'In the course of affairs men in making such contracts in general would, if it were brought to their minds, say, that should be the condition.'*"

Leary v. Young, supra, was cited with approval by Chief Justice Gummere in *Gouled v. Holowitz, supra*, as was *Caldwell v. Taylor*, 3 B. & S. 826. This latter case was also cited with approval in *Young v. Leary, supra*, and by Justice Swayze in *Perlee v. Jeffcott*, 89 N. J. L. 34, and all going to support the principle of law involved in the instant case, namely, an agreement for the use of goods to be returned at a certain period in the same condition as they were at the time the agreement was made, is not to be construed as a *positive contract*, but subject (to use the language of Chief Justice Gummere in *Gouled v. Holowitz*),

“to an implied condition that the party shall be excused in case before breach, the contract becomes impossible from the perishing of the thing without the fault of the contractor.” To the same effect is *Stewart v. Stone*, 127 N. Y. 500, also *Seevers v. Gabel*, 62 N. W. 669.

The case of *Middlesex Water Co. v. Knappmann, Whiting Co.*, 64 N. J. L. 240, and the case of *Central Railroad v. Bayway Refining Co.*, 81 N. J. L. 456, cited by the plaintiff in error, are not in point and have no application to the instant case which falls within the second exception as stated by Justice Depue in the former case, namely, that one of the exceptions to the general rule which relieves performance is the implied condition of the contract of the continued existence of something essential to a performance. And in the case of *Central Railroad v. Bayway Refining Co.*, *supra*, there the parties entered into a contract containing this clause: “The parties of the first part shall be liable for all loss or damage not caused by the negligence of the parties of the second part which may occur to any car or cars * * * and the parties of the second part shall be similarly liable for any cars * * *.”

In view of the proofs establishing the fact that these fixtures were ruined by fire without any fault of the defendant, they no longer existed to enable the defendant to return them in the condition they were in at the time of the hiring, and in some instances as the proof shows, the fixtures were completely destroyed. The facts bring the case within the rule which excuses the defendant from performance.

II.

There is still a further question as to defendant's liability. The defendant not only leased the building but the fixtures were undoubtedly intended to be a part of the premises leased. In other words, it seems clear on reading the lease that the premises leased consisted of the building and the fixtures therein just as the Trial Court said on motion to non-suit (Case, p. 46, ll. 30 to 40):

“Here is a lease that lets these premises. Certainly, the tenant would not be responsible for the injury to the premises themselves by fire. All he was responsible for was to return the premises in as good state as it was at the time that he received it, reasonable wear and tear alone excepted. What do these people lease? Did they lease the permanent store alone? It is a question where they didn't also lease as part of the original lease the fixtures that were in the store, and it does to a degree, disturb my mind as to how they could be held responsible for fire to the fixtures which were leased when they were not held responsible in law for fire to the structure itself.”

There was no duty on the part of the tenant to restore the building to its condition before the fire. The fixtures as between the parties was obviously a part of the premises leased. The duty of the defendant under the lease was to surrender the premises at the expiration of the term, damaged by the elements, usual wear and tear excepted. He owed no greater duty with respect to the fixtures, a part of the subject matter of the lease. If there had been no agreement to return the fixtures with the premises, the law necessarily by implication creates the duty and in such case

if the fixtures are destroyed by fire as they were in the particular circumstances, the duty of returning them in the condition they were before the fire would have been excused. The agreement in the lease to return is no broader or greater than the law in such cases raises without it. There is nothing in the language of the lease which makes the defendant an insurer. The law does not make him such when he has not consented to assume such a role.

It is respectfully submitted that the judgment of the Supreme Court dismissing the first and second counts of the plaintiff's complaint, should be affirmed.

ABE J. DAVID,
Attorney of and Counsel for Defendant-
Respondent.

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