

SUMMONS AND COMPLAINT

ISSUED November 24, 1930

SUMMONS

THE STATE OF NEW JERSEY, To:

LINCOLN HIGH-
WAY BUILDING &
LOAN ASSOCIA-
TION, a Corpora-
tion.

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You are summoned to
answer the annexed
complaint of HERMAN
Z. BAUM and FRED
BAUM, his wife, in an
action at law in the
Essex County Circuit
Court.

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AND TAKE NOTICE, that unless you file
your answer to said complaint with the clerk of
the Essex County Circuit Court, at Newark,
within twenty days after service upon you of
this writ and the annexed complaint, the plain-
tiffs may proceed in their suit and judgment may
be entered against you.

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Witness, NELSON Y. DUNGAN, Judge of
the Essex County Circuit Court, at Newark,
this 24th day of November, 1930.

JOHN H. SCOTT,
Clerk.

BENJAMIN M. WEINBERG,
Attorney.

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SUMMONS

Notice to the within named defendant:

10 TAKE NOTICE, that if the within
summons and complaint be served upon
you personally, and you intend to make
defense, then you must file an affidavit
of merits within ten days of such service,
and you must file an answer within twenty
days of such service; and that in default
thereof, judgment will be entered against
you. Lawful service upon a corporation
is deemed personal service.

20 BENJAMIN M. WEINBERG,
Attorney for Plaintiffs.

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COMPLAINT

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

FIRST COUNT

1. On September 3, 1927, plaintiffs entered 10
into an indenture of lease with the defendant
wherein they leased to the said defendant
premises known and designated as 507-509
Springfield Avenue, in the city of Newark, New
Jersey, for the term of eleven years commencing
on the 15th day of September, 1927, for the
yearly rental of \$1800 for the first three years
of said term, and for the yearly rental of \$2400
for the next ensuing two years of said term.
Said rental to be paid in equal monthly install- 20
ments of \$150 per month for the first three
years, and \$200 per month for the next ensuing
two years of said mentioned term.

2. Said lease above mentioned did further
provide that "should the lessee desire to vacate
and terminate this lease at any time during the
period hereof or its renewal, to pay the sum of
One Thousand Dollars (\$1000) to the Lessors 30
as liquidated damages and in consideration of
the privilege of so surrendering the lease herein,
and in addition thereto to notify the said Lessors
at least three months in advance of said intention
of said determination to surrender the lease
herein".

3. Pursuant to the privilege in said lease
hereinabove recited, the said defendant did on
August 12, 1930 send to the plaintiff a notice, a 40
true copy of which is as follows:

COMPLAINT

HERMAN Z. BAUM, and
FREDA BAUM,

834 South 13th St.,
Newark, N. J.

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TAKE NOTICE that the Lincoln Highway Building & Loan Association has elected to discontinue as tenants of the premises which it occupies at 507-9 Springfield Avenue, Newark, N. J., at the Junction of 18th Avenue, Newark, N. J., under a lease made with you on the third day of September, nineteen hundred and twenty-seven, said termination to take effect upon the 15th of November, 1930.

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HARRY T. DAVIMOS,
Attorney for Lincoln Highway
Building & Loan
Association.

Dated, August 12, 1930.

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4. On November 14, 1930 said defendant did, pursuant to the notice above stated, vacate said premises and is no longer a tenant therein.

5. Plaintiffs have demanded from the said defendant the payment to them of the said sum of \$1000 under and by virtue of the terms and conditions of said lease hereinabove mentioned, but the said defendant has failed and refused, and still does refuse, to pay to them the said sum of \$1000 mentioned.

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6. Plaintiffs tender themselves ready to pro-

COMPLAINT

duce the said lease hereinabove mentioned and to which reference has herein been made.

Plaintiffs demand as damages on the First Count herein, the sum of \$1,000.

BENJAMIN M. WEINBERG,
Attorney for Plaintiffs.

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ANSWER

Filed November 28, 1930

The defendant, Lincoln Highway Building & Loan Association, by way of answer to the complaint filed herein says: As to First Count:

- 10 1. It admits the contents of paragraph one.
2. It admits the contents of paragraph two.
3. It admits the contents of paragraph three.
4. It denies the contents of paragraph four
 excepting in so far that it sets forth it vacated
 said premises and gave said notice.
- 20 5. It admits the contents of paragraph five.
6. It has no knowledge of the contents of
 paragraph six, but denies plaintiffs are entitled
 to the sum claimed.

FIRST DEFENSE

- 30 This defendant, by way of defense to the First
 Count says that the plaintiff, Herman Z. Baum
 is a Director in the Association of the said de-
 fendant, and that at a regular meeting of the
 said Association held sometime during August
 or prior thereto, said plaintiff, on his behalf,
 and on behalf of his wife, joint owner, gave
 notice to said Building & Loan Association,
 publicly at the said meeting that the said Build-
 ing & Loan Association, could, at its option, sur-
 render said premises, and that the said defendant
40 in pursuance to said offer of said plaintiff, ac-
 cepted the same in form set forth, by giving

ANSWER

notice of such intention to quit said premises, thereby accepting the tender and offer made by the said plaintiffs, to release the said defendant under the terms of said lease. Pursuant to said offer on behalf of the said plaintiffs, the defendant did negotiate and obtain other quarters for itself, acting upon the said offer of plaintiffs. 10

SECOND DEFENSE

This defendant gave said notice as set forth in paragraph two of the First Count, pursuant to the tender of release by the plaintiffs to the defendant, at a regular duly constituted meeting of defendant, sometime in August or prior thereto. 20

That at the said meeting, the expenses of said Association, defendant herein, were discussed in the presence of the plaintiff, and it was set forth that the expenses incurred in refitting and fixing and repairing said premises were considerable, and that the defendant considered it too costly to continue in same, and thereby plaintiff, while attending the said meeting, made an offer to the defendant to permit and offered to the defendant to leave the said premises, and thereby in pursuance of said offer, and accepted by the defendant, the said notice was given to plaintiff, and said defendant thereupon leased other premises for the purposes of its business. 30

HARRY T. DAVIMOS,
Attorney for Defendant,
Lincoln Highway Building
& Loan Association. 40

NOTICE

To: LINCOLN HIGHWAY BUILDING & LOAN
ASSOCIATION, above named defendant; or
HARRY T. DAVIMOS, its attorney.

10 PLEASE TAKE NOTICE, that on Friday,
December 12, 1930, at 10 o'clock in the morning
thereof, or as soon thereafter as counsel may be
heard, I shall apply to such Judge as shall be
sitting for the purpose of hearing motions in the
above said court, at the Court House in the
City of Newark, N. J., to strike out the alleged
Affidavit of Merits filed on behalf of the de-
fendant herein, on the ground that same is de-
fective and not in compliance with the statute in
such case made and provided.

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I will also, at the same time and place, move
to strike out all of the defenses filed by the said
defendant, on the ground that the same are
sham and frivolous and do not constitute any
defense to plaintiffs' action, to wit:

1. Said defendant is estopped to set up the
matters and things set up under its "FIRST DE-
FENSE" by virtue of the statute concerning
30 "Frauds and Perjuries".

2. The matters and things set forth under
defendant's "SECOND DEFENSE" are
wholly irrelevant and wholly immaterial in view
of plaintiffs' objections to defendant's "FIRST
DEFENSE".

3. The matters and things set forth by said
40 defendant under its "DEFENSE TO THE

NOTICE

SECOND COUNT" are controlled by the terms of the lease referred to in plaintiffs' complaint and which clearly show that said defendant is obliged to pay the said sum of \$200 rent per month for the period mentioned. Said defense is therefore frivolous.

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If the motion of the said plaintiffs to strike out shall be granted, they will thereupon move for summary judgment against the said defendant for the amounts sued for under the various Counts of plaintiffs' complaint.

Upon the hearing of the within mentioned motion, the lease herein referred to, as well as the pleadings filed herein, will be read to the Court.

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BENJAMIN M. WEINBERG,
Attorney for Plaintiffs.

Service acknowledged December 4, 1930.
By HARRY T. DAVIMOS.

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JUDGE'S OPINION

January 9, 1931.

Re: Herman Z. Baum and Freda Baum
v. Lincoln Highway B. & L. Assn.

10 Harry T. Davimos, Esq.,
Benjamin M. Weinberg, Esq.

Gentlemen:

20 The above matter was submitted to me on a
motion to strike out the answer, and it was agreed
in open court that the defendant's amended
answer which was presented be allowed and
filed, and that the motion be addressed to the
answer as amended.

Both counsel, at the suggestion of the Court,
have also submitted affidavits, and these are con-
sidered on this motion.

30 My conclusion is that the answer to the First
Count should be stricken out as sham, the answer
to the Second Count stricken out as frivolous,
and the answer to the Third Count stricken out
as sham, as defendant in open court admitted
that there was no defense to the Third Count.

Yours very truly,

W. A. SMITH,
Judge.

AMENDED ANSWER

ESSEX COUNTY CIRCUIT COURT

HERMAN Z. BAUM, and FRED A. BAUM, his wife, <i>Plaintiffs,</i> <i>vs.</i>	}	<i>Action at Law Amended Answer</i>	10
LINCOLN HIGHWAY BUILDING & LOAN ASSOCIATION, a Corporation, <i>Defendants.</i>			

The defendants by way of amended answer
to the complaint filed herein say: 20

THIRD DEFENSE

That the said plaintiffs, by their agent, Herman Z. Baum, plaintiff herein agreed with the defendants to surrender said premises by reason of the fact that another tenant was available to the said plaintiffs, and because of the alterations and repairs of value made upon the premises of the plaintiffs by the defendants, which alterations and repairs would remain for the benefit of the plaintiffs. 30

That before the actual surrender of the premises by the said defendants, the said plaintiffs requested that the defendants advance their time of surrender so that the new tenant could take possession before the date set forth in the notice herein.

HARRY T. DAVIMOS, 40
Attorney for Defendant.

AFFIDAVIT OF HOWARD LIVERIGHT

State of New Jersey)
 County of Essex) ss.

10 Howard Liveright, being duly sworn on his
 oath, deposes and says that he is one of the Direc-
 tors and Vice-President of the Lincoln Highway
 Building & Loan Association defendant herein,
 and at a regular meeting sometime before Aug-
 ust, 1930, the defendant was in session discuss-
 ing inadvisability of continuing its location
 under lease from the plaintiffs. That the plain-
 tiff, Herman Z. Baum being a Director thereof,
 was present. That deponent herein proposed
 20 vacation of the premises at once to end the cost
 of expense incident to its continuance. That Mr.
 Baum, one of the plaintiffs herein, at that time,
 stated if the Building and Loan Association
 wanted to vacate, they could. That they did not
 have to stay there on his account, and plaintiff
 thereupon stated he had another tenant ready for
 the premises. The Building & Loan Associa-
 tion acting upon said representation of Mr.
 Baum, discussed it at several meetings and a
 30 committee was appointed to advise ways and
 means of solving the financial problem herein,
 and to report whether it should vacate premises
 leased from the plaintiffs. That acting upon
 the resolution adopted at said meeting, the Com-
 mittee was accordingly appointed to find and
 report the finding of another location, and did
 report the finding of another location to wit,
 27 Elizabeth Avenue, Newark, N. J., to which

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AFFIDAVIT OF HOWARD LIVERIGHT

to move its premises and accordingly notified the plaintiffs of its intention to vacate in reliance upon his statement to the Board of Directors at said meeting.

That the said defendant did thereupon enter 10
into a lease for occupying the new premises and accordingly vacated the premises owned by the plaintiffs.

General discussions were held at that meeting embracing the improvements, and the lease and of leaving same in the premises, to all of which plaintiffs participated or consented to, and approved of the resolution duly adopted for the appointment of the Committee to find another 20
location.

It was stated further by said plaintiffs that the Building & Loan Association would leave all its permanent improvements for the plaintiffs' benefit, in surrendering said premises, and in return for the consent of the said plaintiffs' permitting the said defendant to vacate. Acting upon this representation of the plaintiff to the defendant, said defendant moved out as aforesaid stated. 30

Sworn to and subscribed before
me this 5th day of January, 1931.

HOWARD LIVERIGHT.

HARRY T. DAVIMOS,
Master in Chancery of New Jersey.

AFFIDAVIT OF HERMAN Z. BAUM

State of New Jersey)
 County of Essex,) ss.

10 HERMAN Z. BAUM of full age being duly
 sworn according to law upon his oath deposes
 and says:

“I am one of the plaintiffs above named, and
 myself and wife own the premises formerly occu-
 pied by the defendant, against whom an action
 has been brought by us to recover certain moneys
 as stated in our complaint filed in this cause.

20 “I have had the Answer filed by the defen-
 dant, read to me, and I deny that I did or said
 anything set forth by the defendant in its defenses
 filed in this cause. I further say that the said
 defendants did not vacate the said premises by
 reason of any promise made by me but that they
 did leave said mentioned premises on the 14th
 day of November, 1930 in accordance with a
 notice given by the said defendant to us under
 date of August 12, 1930, a copy of which notice
 is as follows:

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“Herman Z. Baum, and Freda Baum,
 834 South 13th St., Newark, N. J.

TAKE NOTICE that the Lincoln
 Highway Building & Loan Association
 has elected to discontinue as tenants of
 the premises which it occupies at 507-9
 Springfield Avenue, Newark, N. J., at

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AFFIDAVIT OF HERMAN Z. BAUM

the junction of 18th Avenue, Newark, N. J., under a lease made with you on the third day of September, nineteen hundred and twenty-seven, said termination to take effect upon the 15th of November, 1930.

Dated August 12, 1930

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HARRY T. DAVIMOS,
Attorney for
Lincoln Highway Building
& Loan Association."

"Under the lease made between myself and my wife and the said defendant, it, the said defendant, was obligated to pay to us the sum of \$1,000 in consideration of the privilege of surrendering its lease, as will more fully appear by reference to the said lease. Said defendant has failed and refused to pay to us the said sum of \$1,000 or any part thereof, and there is now due and owing from the said defendant to us said sum of \$1,000 besides interest from the 15th day of November, 1930, amounting to \$5.67, making a total of \$1,005.67 due.

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"Said defendant by virtue of the lease aforesaid, owes to us the sum of \$400, being the amount of the rent as provided for in said lease mentioned, for the two months commencing September 15, 1930 and ending November 15, 1930 at the rate of \$200 per month. Said defendant has paid no part of said sum and is indebted to us in the amount of \$400, together with interest from November 15, 1930, amounting to \$2.26, making a total of \$402.26 due.

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AFFIDAVIT OF HERMAN Z. BAUM

10 "Under and by virtue of the terms of a written agreement set forth in the complaint filed in this cause, the said defendant became indebted to us in the sum of \$37.50 for two months' heating privileges, at the rate of \$18.75 per month, commencing September 15, 1930 and ending November 15, 1930, a copy of which written agreement is as follows:

LINCOLN HIGHWAY BUILDING & LOAN ASSOCIATION

Mr. Herman Z. Baum, Newark, N. J.
834 So. 13th St., November 15, 1929.
Newark, N. J.

20 Dear Mr. Baum:

The Board of Directors of the Lincoln Highway Building & Loan Association, by a resolution at its meeting on November 12, 1929, has agreed that your heating system be connected up with our radiators at once, and that heat shall be furnished by you for the sum of \$225.00 a year, to be paid in installments of \$18.75 monthly, in addition to the rent.

30 This heat is also to be furnished on our meeting nights, or whenever the Building & Loan offices shall be open and such heat shall be required.

Very truly yours,
BENJAMIN DUBOW,
Secretary."

BD:AG

40 Said defendant has paid no part of said sum and there is now due and owing from said defendant to us said sum of \$37.50 for heating as herein mentioned.

"It is my belief that said defendant has no defense to the action brought by us and that the Answer filed by it is sham and frivolous."

Sworn and subscribed to }
before me this 20th day } HERMAN Z. BAUM.
of December, 1930.

JACOB L. KAPLAN, 10
An Attorney-at-Law of New Jersey.

ORDER STRIKING OUT ANSWER

JUDGMENT ENTERED January 24, 1931.

Judgment or Order Striking Out Answer in 20
the above entitled action was rendered on the
Twenty-fourth day of January A. D. Nineteen
hundred and thirty-one in favor of the plaintiffs
Herman Z. Baum, Freda Baum and against the
defendant Lincoln Highway Building & Loan
Association, a corporation, for the sum of One
thousand nine dollars and sixty-seven cents
(\$1,009.67) on the first count, Four hundred three
dollars and eighty-seven cents (\$403.87) on the
second count, Thirty-seven dollars and eighty- 30
five cents (\$37.85) on the third count and Sixty-
three dollars and seventy-eight cents Costs of
Suit.

Judgment Signed and Entered January 24,
1931.

WILLIAM S. GUMMERE,

Book 112, page 367 C.C. Judgments. C. J.

**NOTICE OF APPEAL TO THE COURT OF
ERRORS AND APPEALS AND GROUNDS**

Filed February 10, 1931.

To BENJAMIN WEINBERG,
Attorney of Plaintiffs

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Lefcourt-Newark Building,
Newark, N. J.

Take notice that the defendants appeal to the
Court of Errors and Appeals from so much of
the judgment of the Circuit Court, because the
Circuit Court erred in giving judgment for the
plaintiffs on the pleadings and affidavits and
against the said defendant, so far as the same
concerns the First Count set forth therein:

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a. Because the pleadings and the affidavits
in support of the same show that a question of
fact for trial by Jury was raised, and that the de-
fendant was released from any debt to the plain-
tiffs by operation of law under the facts set
forth and therein the Judge of the Circuit Court
erred in law.

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HARRY T. DAVIMOS,
Attorney for Defendant.

SERVICE OF A COPY OF THE WITHIN NOTICE OF
APPEAL IS HEREBY ACKNOWLEDGED this 6th day of
February, 1931.

BENJAMIN M. WEINBERG,
Attorney for Plaintiffs.

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COUNTY CLERK'S CERTIFICATE

ESSEX COUNTY CLERK'S OFFICE

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

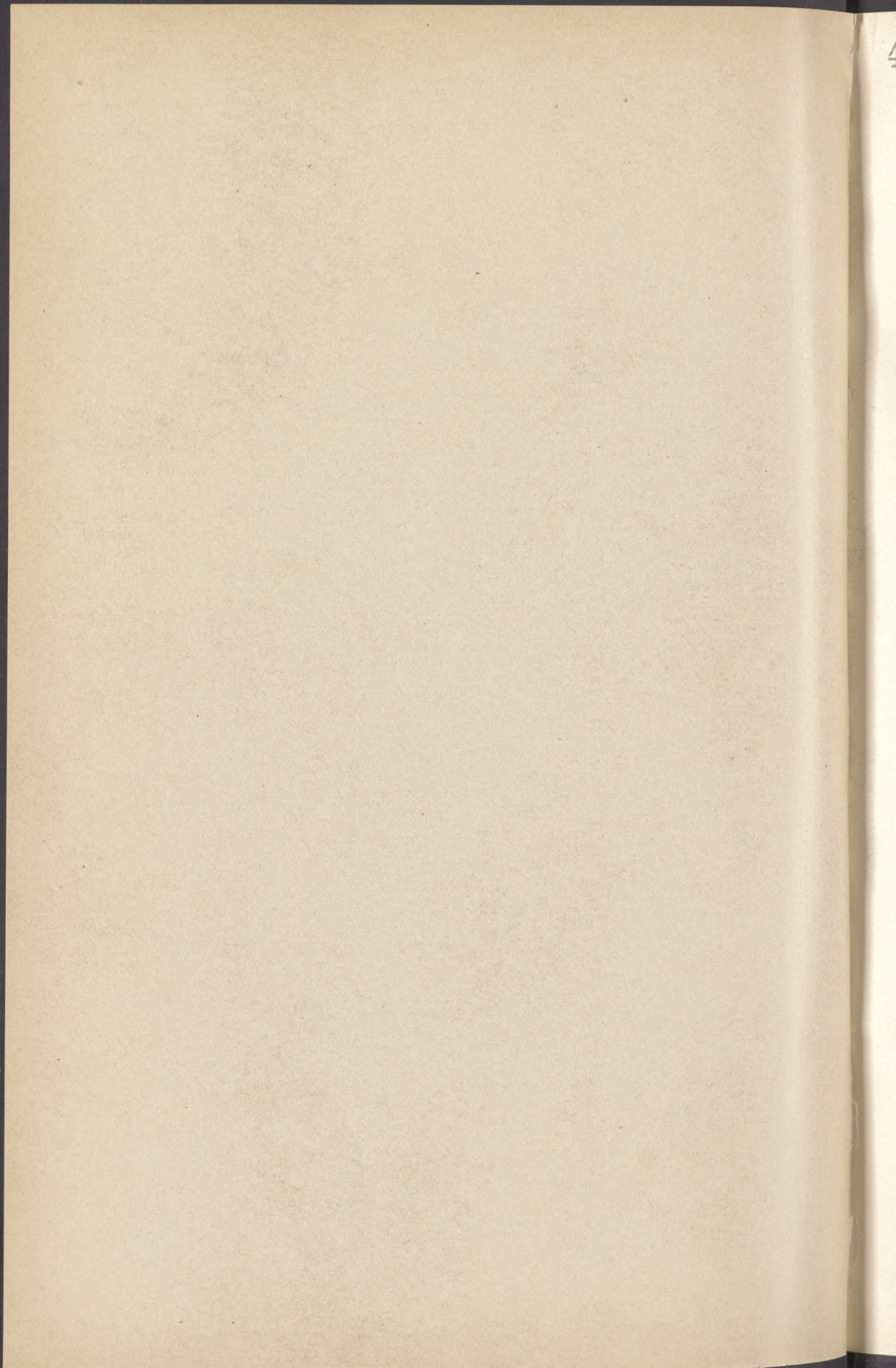
I, John H. Scott, Clerk of the Circuit Court, 10
in and for the County of Essex in the State of
New Jersey DO HEREBY CERTIFY that
the foregoing is a true and correct copy of all the
pleadings in the case of Herman Z. Baum and
Freda Baum, his wife, Plaintiffs vs. Lincoln
Highway Building & Loan Association, a cor-
poration, Defendant, together with a copy of the
judgment record entered on January 24, 1931, in
Book 112, Page 367 of Circuit Court Judg- 20
ments and the same is taken from and compared
with original copies of all records and as the
same now remains on the files of said Court.

In Testimony Whereof, I have hereunto set
my hand and affixed the official seal of said
Court and County at Newark, N. J., this Fourth
day of March, A.D., 1931.

JOHN H. SCOTT, *Clerk.* 30

The papers on the appeal confined to the
FIRST COUNT are set forth.

(SEAL)



New Jersey Court of Errors and Appeals

HERMAN Z. BAUM, and
FREDA BAUM, his wife,

Plaintiffs-Respondents,

vs.

LINCOLN HIGHWAY BUILD-
ING & LOAN ASSOCIATION, a
Corporation,

Defendants-Appellants.

*On Appeal
Brief for the
Defendants-
Appellants.*

The defendants leased a store from the plaintiffs. There was a clause in the lease imposing a penalty of One thousand dollars against the defendants upon surrendering the premises before the end of the term.

The plaintiff Baum was one of the Directors of the defendant, and attended a meeting where he agreed to accept a surrender of the premises, under the facts set forth in the affidavit filed herein. This agreement between the plaintiffs and the defendant ended the lease by operation of law. The question of fact, raised by the affidavits filed, was one which should have been submitted to the Jury, and a summary judgment in favor of the plaintiffs and against the defendant was error in law.

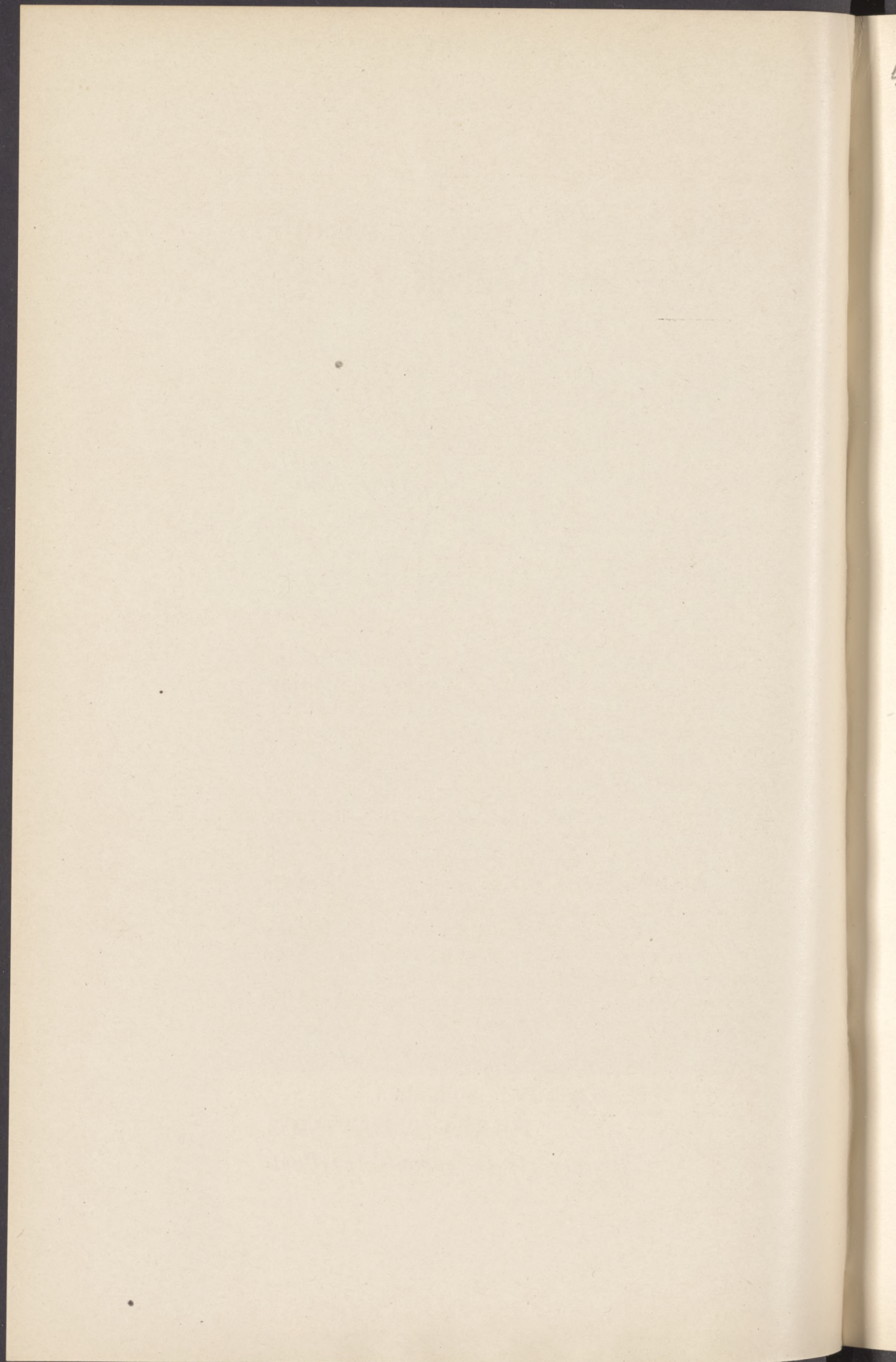
Dennis vs. Miller, 68 N. J. Law 320

The entry of summary judgment was legal error because the Respondent's affidavit was insufficient in law.

Birkenfeld vs Ginsburg

146 Atl. 176

Respectfully submitted,
HARRY T. DAVIMOS,
Attorney for Defendants-Appellants



Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

HERMAN Z. BAUM and FRED A

BAUM, his wife,

Plaintiffs-Respondents,

vs.

LINCOLN HIGHWAY BUILDING &

LOAN ASSOCIATION, a corpora-

tion,

Defendant-Appellant.

*On Appeal
from Essex
County Cir-
cuit Court.*

BRIEF ON BEHALF OF PLAINTIFFS-RESPONDENTS.

(Unless otherwise stated, all italics are ours.)

Appellant's brief, though a model of brevity, lacks some essential features which respondents feel might be of some assistance to this Court.

Plaintiffs' complaint contained three counts. (See Judge's opinion on p. 10.) The matters in the other two counts having been disposed of, the First Count only is before this Court. That count claims the sum of \$1,000, alleged to be due to the plaintiffs under a condition in a lease between the plaintiffs and the defendant, which lease provided that it was agreed that

"Should the lessee desire to vacate and terminate this lease at any time during the period hereof, or its renewal, to pay the sum of One Thousand Dollars (\$1,000) to the lessors as Liquidated damages and in consideration of the privilege of so surrendering the lease herein, and in addition thereto, to notify the said lessors at least three months in advance of said intention of said declaration to surrender the lease herein." (Par. 2 Complaint, p. 3.)

Defendant's Answer admits this allegation (Par. 2 Answer, p. 6).

By way of defense to plaintiffs' claim, defendants sets forth under its "FIRST DEFENSE" (p. 6) that the plaintiff, Herman Z. Baum, who was a Director of defendant Association, at a meeting of said Association, held "some time during August or prior thereto, said plaintiff on his behalf and on behalf of his wife, joint owner, gave notice to said Building & Loan Association, publicly at said meeting that the said Building & Loan Association could, at its option surrender said premises, and that the said defendant in pursuance to said offer of said plaintiff, accepted the same in form set forth by giving notice of such intention to quit said premises, thereby accepting the tender and offer made by the said plaintiffs, to release the said defendant under the terms of said lease" (p. 6).

The "SECOND DEFENSE" alleges that the defendant gave the notice as required by the lease, which notice is made part of plaintiffs' complaint. Said defense goes on to say that "at the meeting mentioned the expenses of the Association were discussed and defendant set forth that it considered the premises too costly to continue in the same and that at that time the plaintiff made an offer to the defendant to leave the premises," etc. (p. 7).

Subsequently, the Answer was amended by setting forth a "THIRD DEFENSE" which recites that the plaintiff Herman Z. Baum, agreed with the defendants to "surrender said premises by reason of the fact that another tenant was available to the said plaintiffs, and because of the alterations and repairs of value made upon the premises of the plaintiffs by the defendants,

which alterations and repairs would remain for the benefit of the plaintiffs." Said amended Answer further sets forth that the plaintiffs requested the defendants to advance the time of surrender so that a new tenant could take possession before the date set forth in the notice.

Upon notice given to strike out the Answer under the Statute, the plaintiff Herman Z. Baum, presented his affidavit to the Court (pp. 14-16), while the defendant presented an affidavit of one of the directors of the defendant Association (found on pp. 12-13). That director, Howard Liveright, swore that at a meeting of the Association he, the deponent, *proposed vacation of the premises at once to end the cost of expense incident to its continuance*, and that at that time the plaintiff, Herman Z. Baum, stated that *if the Association wanted to vacate they could*; that they did not have to stay there on his account and that he had another tenant ready for the premises; that the Association thereupon discussed the proposal "at several meetings, and a committee was appointed to devise ways and means of solving the financial problem herein, and to report whether it should vacate premises leased from the plaintiffs." The affidavit further goes on to say that a committee was appointed to find another location which it did, and that it "accordingly notified the plaintiffs of its intention to vacate in reliance upon his statement to the Board of Directors at said meeting"; that the defendant thereupon entered into a lease to occupy new premises and vacated the leased premises. The affidavit further says, in substance, that the plaintiff, Herman Z. Baum stated that the Building & Loan Association should leave all its permanent improvements to the plaintiffs' benefit "*in return for the consent of said plain-*

tiffs' permitting the said defendant to vacate," etc. (pp. 12-13).

From the above pleadings on behalf of the defendant, and the affidavit in support thereof, the defendant urges that a defense has been made out sufficient for a jury to determine whether there was a surrender by act and operation of law. No attempt was made to comply with the Statute of Frauds and the defendant's insistence rests solely upon the argument above mentioned; viz., that if the defendant's proofs are to be believed, there was a surrender by act and operation of law.

Plaintiffs respectfully insist that no such defense can be spelled out of the defendant's allegations; **FIRSTLY**: as is shown by the pleadings and affidavit of said Howard Liveright, no conversation occurred with the plaintiff Freda Baum, but her husband, only, is shown as being the person making the arrangements mentioned, whatever they may amount to.

We do not think it necessary to cite any law to the effect that without showing any authority on the part of the plaintiff, Herman Z. Baum, to bind his wife, any such statements as have been shown to have been made by him could work a surrender of the lease, so far as the plaintiff Mrs. Baum is concerned.

Before applying any law to the situation, let us see, briefly, what the defendant contends was the agreement between it and the plaintiff Baum. It appears that the first statement in the matter came from the defendant corporation, which, according to Liveright's affidavit, was to the effect that the Association could not remain in the premises because of the expense connected therewith. That determination came from the defend-

ant. After that, the affidavit runs on "plaintiff Baum said that he would release them from the lease, that thereafter a committee of the Association was appointed *to devise ways and means of solving the financial problem herein, and to report whether it should vacate premises leased.*" There therefore was no acceptance of the proposition which it was stated was agreed to by the plaintiff at the meeting in question. The affidavit, however, says that the Association afterward found another location, so reported the same to the Association, and gave a notice required under the lease. (The giving of this notice, as required by the lease, is hardly consistent with the thought that plaintiff agreed to allow the defendant to vacate the premises.)

SECONDLY, accepting as we must, on this argument, the truth of defendant's allegations, it is respectfully pointed out that there is not a scintilla of evidence to the effect that the plaintiff offered to release the defendant from its obligations of paying the \$1,000 called for by the terms of the lease. If anything seems to be settled in the way of surrendering premises by act and operation of law, it is that the terms of the surrender must be clear and unequivocal, and that afterward they should be backed up by acts on the part of the parties which will be tantamount to a stipulation to put an end to the lease. Now what acts, and those acts as we understand the law, must, in themselves, show an intention of putting an end to the lease, took place which amounted to a stipulation of the parties to that end. Nothing seems to have been done by the defendant in the way of giving up anything for the vacation itself, let alone for the waiving of the \$1,000 fixed between the parties to the lease. The affidavit mentioned

merely shows that it was stated that if the defendant would leave all of the permanent improvements for the benefit of the plaintiffs, they would permit the defendant to vacate, without showing that anything actually was left there, or that what was left there would not have belonged to the defendant by reason of the improvements having become a part of the realty, nor that after the vacation by defendant, the plaintiffs took possession of the same, or did anything else evincing an intention to hold possession of the premises on their own account.

To effect a surrender by act and operation of law, it has oft been repeated that such a surrender occurred only

“When the minds of the parties to a lease concur in the common intent of relinquishing the relation of landlord and tenant and execute this intent by acts which are tantamount to a stipulation to put an end thereto.” *Meeker v. Spalsbury*, 66 N. J. L. 60; *Miller v. Dennis*, 68 N. J. L. 320.

Affirming the principle of law on the subject in our own state, but perhaps going a bit further to explain the principle stated, we quote from “THE LAW OF PROPERTY,” by Professor Walsh, 2nd Ed., page 327, as follows:

“SURRENDER BY ACT OR OPERATION OF LAW.— Where both landlord and tenant take some action with relation to the land covered by the lease which is necessarily inconsistent with the continuing of the term, so that the term cannot continue to exist at the same time with the new relation or estate created as a result of their acts, a surrender by act and operation of law results. *As the expression indicates, this result does not depend on whether they intend an actual surrender or not, the law declaring that such result follows from their acts irrespective of their intent. Those cases which*

assert that the surrender in such case depends upon the mutual agreement of the parties are necessarily erroneous, arising out of a failure to understand the distinction between an express surrender, which requires a writing under the statute, and a surrender by act and operation of law. If their acts are not sufficient to amount to such a surrender, their intent to accomplish that result must be ineffectual because an express surrender can be made only by writing under the statute. On the other hand if a surrender results by law from certain acts on their part creating an inconsistent situation, their intent that no surrender shall result must be ineffectual, since the surrender results automatically by operation of law, not by voluntary, and therefore express, acts of surrender on their part. The principle of estoppel is more usually assigned as the basis of surrender by operation of law."

It is, therefore, respectfully urged that testing the insistment of the defendant by the principles cited, the Court did not err in striking out the defense to the First Count on the ground that the same was sham.

The objection is not well taken by the defendant that plaintiffs' affidavit to strike out the defense, and enter summary judgment, was insufficient. The case of *Birkenfeld v. Ginsburg*, 146 Atl. 176, clearly covers the subject and is authority for the trial court's action in ordering judgment entered. The salient part of the *Birkenfeld* decision is as follows:

"Under these rules (Supreme Court rules 80-81) the plaintiff is entitled to a summary judgment upon presenting an affidavit complying with rule 81, *unless the defendant by affidavit or other proofs shows such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend.*"

If the argument hereinabove made is good, viz., that neither the Answer nor the Affidavit filed by the defendant sets forth sufficient facts to entitle the defendant to defend, it is most respectfully submitted that the judgment of the Circuit Court should be affirmed, with costs.

Respectfully submitted,

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