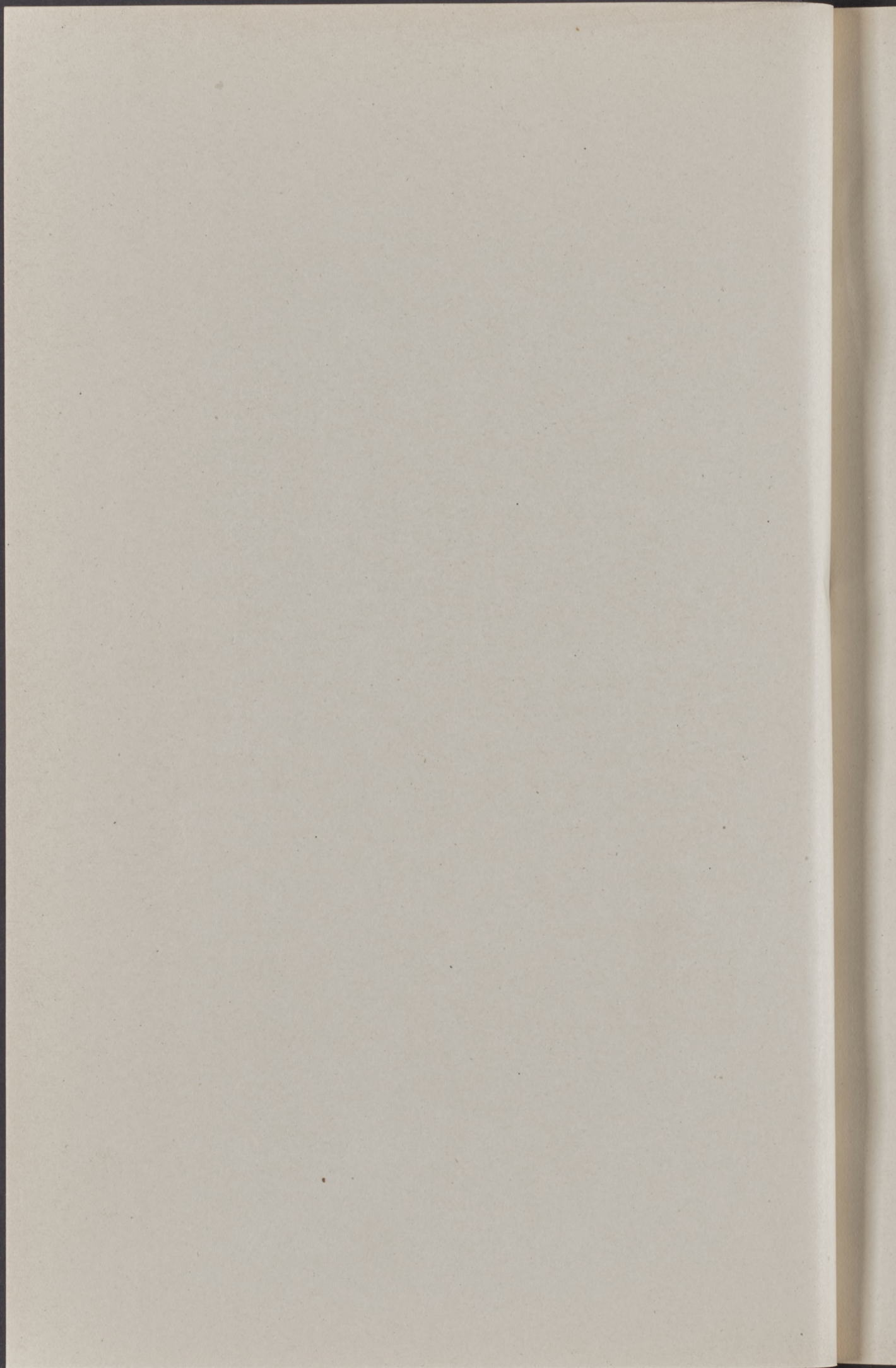


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PETITION.

IN CHANCERY OF NEW JERSEY.

Between

HUGO ROSEBERG,

Complainant,

and

AMERICAN HOTEL AND

GARDEN COMPANY,

et al.,

Defendants.

On Bill for In- 10
junction.
Petition.

*To His Honor, Edwin Robert Walker, Chancellor
of the State of New Jersey:*

20

The petition of Hugo Roseberg, complainant in
the above entitled cause, respectfully shows:

1. That your petitioner is at present and has been
for some time past managing and conducting a
hairdressing and manicuring establishment, in
premises known as No. 169 South New York Ave-
nue, in the City of Atlantic City, Atlantic County,
New Jersey.

30

2. Said premises are occupied by complainant by
virtue of the provisions of a certain lease made on
October 21, 1921, by American Hotel and Garden
Company, owner of said premises, and said Hugo
Roseberg, whereby it rented and leased to him said

premises for the term of three (3) years from January 1, 1922.

3. Subsequent thereto complainant filed his original bill of complaint in this cause, to the end that said defendants should be enjoined from making certain alterations and repairs to said building, and from interfering with the quiet and peaceful possession thereof by said Roseberg, and to which
10 said original bill of complaint your petitioner begs leave to refer.

4. On April 23, 1923, an order was entered in the above entitled cause, requiring the defendants to show cause why the prayer of said bill of complaint should not be complied with and an injunction issued, restraining said defendants from making said repairs and alterations, and from interfering with the quiet and peaceful possession of the said premises by your petitioner, complainant in the above
20 entitled cause.

5. On May 15, 1923, an order was entered in the above entitled cause, wherein defendants and each of them, their and each of their contractors, agents, servants and workmen, were enjoined and restrained "from removing the complainant from or disturbing him in or otherwise interfering with his possession or enjoyment of the store and premises
30 known as No. 169 South New York Avenue, Atlantic City, New Jersey, unless and until they shall have erected and completed, and shall have permitted the complainant to occupy or tendered him possession for occupancy by him of the said store or stores referred to in the writing bearing date March 27, 1923," &c., to which order or decree, now on file

with the clerk of this court, your petitioner begs leave to refer.

6. Thereafter, to wit, on August 30, 1923, said American Hotel and Garden Company, one of the defendants in the above entitled cause, by and through its solicitor, John C. Reed, Esq., caused to be issued out of the Atlantic County Circuit Court a summons, directed to complainant, Hugo Roseberg, demanding possession of the premises hereinbefore referred to, and requiring said Roseberg to file answer to the complaint attached to said summons within twenty days after service thereof, or otherwise judgment would be entered against him, and that he would be turned out of possession of said premises. In the suit now pending in said Atlantic County Circuit Court, wherein said summons was issued, defendant herein, American Hotel and Garden Company, appears as plaintiff, and said John C. Reed, Esq., appears as attorney of plaintiff. Said summons, with copy of plaintiff's complaint thereto attached, was served on complainant herein on September 4th, 1923. A copy of said summons and complaint is attached hereto and made a part hereof.

Wherefore your petitioner prays that the said American Hotel and Garden Company and John C. Reed, Esq., may be punished for contempt of Court, in wilfully ignoring and refusing and neglecting to comply with the said decrees of the Court made and entered herein on April 23, 1923, and on May 15, 1923, and that your petitioner may have such further and other relief as may be equitable and just.

WM. ELMER BROWN, JR.,

Solicitor for Petitioner.

EMERSON L. RICHARDS,

Of Counsel.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

10	Between HUGO ROSEBERG, <i>Complainant,</i> and AMERICAN HOTEL AND GARDEN COMPANY, <i>et al.,</i> <i>Defendants.</i>	}	On Bill for In- junction. Affidavit.
----	--	---	--

20 STATE OF NEW JERSEY, }
 COUNTY OF ATLANTIC, } ss.

HUGO ROSEBERG, of full age, being duly sworn according to law, on his oath, deposes and says:

1. I have read the foregoing petition and the statements therein made are true. I am now, and have been for some time past managing and conducting a hairdressing and manicuring establishment, in premises known as No. 169 South New York Avenue, in the City of Atlantic City, Atlantic County, New Jersey.

30

2. Said premises are occupied by me by virtue of the provisions of a certain lease made on October 21, 1921, by the American Hotel and Garden Com-

pany, owner of said premises and me, the said Hugo Roseberg, whereby it rented and leased to me said premises, for the term of three years from January 1, 1922.

3. Subsequent thereto I filed my original bill of complaint in this cause, to the end that said defendants should be enjoined from making certain alterations and repairs to said building and from interfering with the quiet and peaceful enjoyment thereof by me. 10

4. On April 23, 1923, an order was entered in the above entitled cause, requiring the defendants to show cause why the prayer of said bill of complaint should not be complied with, and an injunction issued, restraining them from making such repairs and alterations, and from interfering with my quiet and peaceful possession of said premises.

20

5. On May 15, 1923, an order was entered in the above entitled cause, wherein defendants and each of them, their and each of their contractors, agents, servants and workmen, were enjoined and restrained "from removing the complainant from or disturbing him in or otherwise interfering with his possession or enjoyment of the store and premises known as No. 169 South New York Avenue, Atlantic City, New Jersey, unless and until they shall have erected and completed, and shall have permitted the complainant to occupy or tendered him possession for occupancy by him of the said store or stores referred to in the writing bearing date March 27, 1923," &c. 30

6. Thereafter, to wit, on August 30, 1923, said American Hotel and Garden Company, one of the

defendants in the above entitled cause, by and through its solicitor, John C. Reed, Esq., caused to be issued out of the Atlantic County Circuit Court a summons, directed to me, the said Hugo Roseberg, demanding possession of the premises hereinbefore referred to, and requiring me to file answer to the complaint attached to said summons within twenty days after service thereof, or otherwise judgment would be entered against me, and
10 that I would be turned out of possession of said premises. In the suit now pending in said Atlantic County Circuit Court, wherein said summons was issued, defendant herein, American Hotel and Garden Company, appears as plaintiff, and said John C. Reed, Esq., appears as attorney of plaintiff. Said summons, with copy of plaintiff's complaint thereto attached, was served on me, the said Hugo Roseberg, on September 4th, 1923.

HUGO ROSEBERG.

20

Sworn and subscribed to before me this 11th day of September, 1923.

LEE F. WASHINGTON,
M. C. C. of N. J.

SUMMONS AND COMPLAINT.

(Filed Sept. 11, 1923.)

*The State of New Jersey to Hugo
Roseberg:*

You are summoned to answer the 10
annexed complaint of AMERICAN
HOTEL AND GARDEN COMPANY, a cor-
poration of the State of New Jersey,
in an action at law in the Atlantic County Circuit
Court, wherein said American Hotel and Garden
Company, a corporation of the State of New Jer-
sey, demands of you the possession of certain lands
and premises situate in the City of Atlantic City,
in the County of Atlantic and State of New Jersey,
and known as No. 169 South New York Avenue, and 20
particularly described in said complaint. And Take
Notice that, unless you file your answer to said
complaint with the clerk of the Atlantic County Cir-
cuit Court at Mays Landing, within twenty days
after service upon you of this writ and of the an-
nexed complaint, judgment will be entered against
you and you will be turned out of possession of
said premises.

Witness HONORABLE RALPH W. E. DONGES, Judge
of our said Atlantic County Circuit Court at Mays 30
Landing, the thirtieth day of August, nineteen hun-
dred and twenty-three.

JOHN C. REED,
Attorney.

EDWIN A. PARKER,
Clerk.

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

10	AMERICAN HOTEL AND GAR- DEN COMPANY, a corpor- ation, &c., v. HUGO ROSEBERG, <i>Plaintiff,</i> <i>Defendant.</i>	}	In Ejectment. Complaint.
----	--	---	-----------------------------

Plaintiff, American Hotel and Garden Company,
 a corporation of the State of New Jersey, demands
 20 of Hugo Roseberg, the defendant herein, the pos-
 session of certain premises in Atlantic City, New
 Jersey, known as No. 169 South New York Avenue,
 more specifically described as follows: BEGIN-
 NING at a point in the East line of New York Ave-
 nue at a point distant 116 feet North of the inter-
 section of the interior or landward side of the pub-
 lic Boardwalk and New York Avenue, and running
 thence (1) Northwardly, parallel with New York
 Avenue a distance of fifty-six and one-quarter feet;
 30 thence (2) Eastwardly and parallel with Pacific
 Avenue, fifty feet; thence (3) Southwardly parallel
 with New York Avenue fifty-six and one-quarter
 feet; thence (4) Westwardly and parallel with said
 Pacific Avenue a distance of fifty feet to the place
 of beginning, and also the sum of Ten Thousand
 Dollars for mesne profits and damages.

Plaintiff says that its right to the possession of same accrued on the twentieth day of October, nineteen hundred and twenty-one, and that the defendant wrongfully deprives it of the possession thereof, to its damage, ten thousand dollars.

JOHN C. REED,
Attorney of Plaintiff.

ORDER TO SHOW CAUSE.

10

(Filed Sept. 11, 1923.)

A true copy.

WM. ELMER BROWN, JR.,
Solicitor for Complainant.

IN CHANCERY OF NEW JERSEY.

20

Between

HUGO ROSEBERG,

Complainant,
and

AMERICAN HOTEL AND
GARDEN COMPANY,
et al.,

Defendants.

On Bill for In-
junction.
Order to Show
Cause.

30

This matter being opened to the court by Wm. Elmer Brown, Jr., Esq., solicitor for and Emerson L. Richards, Esq., of counsel with the petitioner

herein, and upon reading the petition of the said petitioner duly verified, setting forth that the American Hotel and Garden Company have failed and refused to comply with the provisions of the injunction decrees heretofore made in the above stated cause, bearing date April 23, 1923, and May 15, 1923, and upon motion of counsel as aforesaid:

It is, on this eleventh day of September, 1923, ordered that the said American Hotel and Garden
10 Company show cause before the Chancellor at the Chancery Chambers, Real Estate and Law Building, in the City of Atlantic City, on Tuesday, the eighteenth day of September, 1923, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard therein, why an attachment for contempt should not issue against them, and they be punished for their alleged misconduct in violating the said injunction.

And it is further ordered that a copy of said petition, and affidavits thereto annexed, together with
20 a copy of this order, all of which may be uncertified or marked "A True Copy" by the solicitor of the complainant, be served upon the solicitor of record of said defendant, American Hotel and Garden Company, and within two days of the date hereof.

And it is further ordered that the petitioner have the right to file and use, on the return of this rule, additional affidavits bearing upon the matter set forth in the petition herein referred to.

30

E. R. WALKER,
C.

Respectfully advised.

R. H. INGERSOLL,
V. C.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between		
HUGO ROSEBERG,	}	On Bill for In- 10
Complainant,		junction.
and		On Rule to Show
AMERICAN HOTEL AND		Cause in Con-
GARDEN COMPANY,	}	tempt.
et al.,		Conclusions (Oral).
Defendants.		

For complainant: ELMER BROWN, JR., Esq., and 20
HON. EMERSON L. RICHARDS.
For defendant: JOHN C. REED, Esq., and HON.
C. L. COLE.

INGERSOLL, V. C.:

In this case it is proper for the Court to say first
that so far as Mr. Reed personally is concerned he
seems to be absolved from any question of per- 30
sonal contempt and in the order the Court struck
his name from the order as prepared. Mr. Reed ap-
peared before me and suggested that he desired to
file a proceeding in ejectment and asked if the
Court had any objection—I do not know that this is
the exact language—and the Court promptly said

that it had no personal objection to presenting the matter in any way that counsel thought wisest in which to present it, and they thought wisest to present it in this way.

It seems very clear to me, however, that the proceeding is a violation of the order. The original bill claimed the right in Roseberg to possession by virtue of a lease made on October twenty-first of the year in question, possession to be taken on the
10 first day of January. So far as the defendant company was concerned, an affidavit was presented by its president in which he said, in effect, that Roseberg was in possession of these premises by virtue of the lease dated that day and began possession on the first day of the following January. That matter was before the Court, so far as that possession is concerned, admitted by both sides of the litigation. The matter was determined. The complainant's rights, so far as possession of the premises, was based upon the complaint, the sustaining
20 affidavits and the answering affidavit of Max Weinman, to which answering affidavit was attached a copy of the lease in question. The case was determined upon the issues then presented, which covered that particular point.

Now proceedings in ejectment are brought alleging the right of possession to be prior to the date of the execution of this lease. If that be true, the affidavit of the president of the defendant company,
30 as well as the affidavit of the complainant, must have been in error and it seems to me very clear that when that issue is raised, and answered, not only not denied but admitted by the executive officer of the company who, so far as the Court now knows had full rights and power to represent the company in the matter—at least it so appears before

the Court that he was doing so—that a proceeding practically divesting this Court of all jurisdiction over a matter which had been admitted by both sides cannot be proceeded with.

I notice, however, in the petition there is no prayer for a restraint against proceeding with this ejectment suit. It seems clear to me, however, that the defendant company, American Hotel and Garden Company, is in, as has been suggested by counsel, contempt, but only a technical contempt so far as this is concerned. Under those circumstances the Court finds the defendant company guilty of contempt. 10

While this case is before us, there is another application which has been made and has not been ruled upon. Without writing any opinion upon it, I am satisfied that a mandatory injunction cannot go against the company directing it to—I do not remember the exact words of the petition—but to make necessary repairs to protect this man's rights. I do not think under the circumstances as presented that the Court has power in this case to make such an order. 20

Mr. Cole: I might say to your Honor, of course, there is no occasion to have an actual order enjoining us from pursuing that case. Your Honor has ruled and that is the end of it.

The Court: I take it that is so. Prepare your order dismissing the mandatory application so we may have the entire matter before us. 30

Submitted: Sept. 19th, 1923.

Determined: Sept. 19th, 1923.

ORDER.

(Filed Oct. 1, 1923.)

IN CHANCERY OF NEW JERSEY.

10

Between

HUGO ROSEBERG,

Complainant,

and

AMERICAN HOTEL AND

GARDEN COMPANY,

*et al.,**Defendants.*On Bill for In-
junction.On Petition, &c.
Order.

20

It appearing that on September 11th, A. D. 1923, complainant herein filed petition duly verified, setting forth that the American Hotel and Garden Company had failed and refused to comply with the injunction decrees heretofore made in the above stated cause, bearing date April 23rd and May 15th, A. D. 1923; and that on the filing of said petition, there did issue out of said Court a rule to show cause, directed to said defendant, American Hotel and Garden Company, returnable September 18th, A. D. 1923, requiring said defendant to show cause why an attachment for contempt should not issue against it for its alleged misconduct in violating said injunction; in that it had instituted suit in ejectment in the Atlantic County Circuit Court, and

upon hearing on the return of said rule to show cause and after argument for counsel for both petitioner and defendant, it appears that the said American Hotel and Garden Company has committed the contempt with which it is charged; that the Chancellor now adjudges it to have been guilty of the misconduct alleged and that said misconduct was calculated to and had actually defeated, impaired, impeded or prejudiced the rights of the petitioner in this cause.

10

It is, on this first day of October, A. D. 1923, on motion of Wm. Elmer Brown, Jr., solicitor for, and Emerson L. Richards, of counsel with petitioner, ordered that the American Hotel and Garden Company do pay to the complainant the costs of these proceedings to be taxed, and that the imposition of further penalty for said misconduct be suspended until the further order of this Court.

Respectfully advised,

R. H. INGERSOLL,

V. C.

20

30

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

10 Between
 HUGO ROSEBERG,
 Complainant,
 and
 AMERICAN HOTEL AND
 GARDEN COMPANY,
 et al.,
 Defendants.

On Bill, &c.
 Notice of Appeal.

20

The defendant hereby appeals from the order made, adjudging the defendant, American Hotel and Garden Company, in contempt of court, for alleged misconduct in violating an injunction, in that it had instituted a suit in ejectment in the Atlantic County Circuit Court, against the complainant, Hugo Roseberg, in violation of order of restraint, dated May 15th, 1923, and from the whole and every
 30 part thereof; to the Court of Errors and Appeals, in the last resort in all causes.

JOHN C. REED,
Solicitor for Defendants.
 JOHN C. REED,
Of Counsel.

Dated October 1st, A. D. 1923.

I conceive there is good cause for appeal in the above stated cause.

JOHN C. REED,
Of Counsel with Defendants.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

Between	}		
HUGO ROSEBERG,			
<i>Complainant-</i>			
<i>Respondent,</i>			
and			
AMERICAN HOTEL AND		On Bill, &c.	
GARDEN COMPANY,		On Appeal.	
<i>et al.,</i>		Petition of Appeal.	20
<i>Defendants-</i>			
<i>Appellants.</i>			

The petition of the American Hotel and Garden Company, et al., the appellants in the above styled cause respectfully shows that your petitioners find themselves aggrieved by a decree, made in the Court of Chancery, by his Honor, Edwin R. Walker, Chancellor of New Jersey, bearing date the first day of October, A. D. 1923, wherein the said Hugo Roseberg was complainant and the said American Hotel and Garden Company, *et al.*, were defendants, in

30

this respect, to wit: Said decree adjudged the defendant, American Hotel and Garden Company, in contempt of court, for having violated an injunction, heretofore granted by the Chancellor, in that the said American Hotel and Garden Company had brought a suit, at law, in the Atlantic County Circuit Court, in ejectment, against the said Hugo Roseberg, for possession of the premises occupied by said Hugo Roseberg, and for that reason is erroneous, because the decree should have decreed that the said petitioner was not entitled to the relief prayed for in his petition. Your petitioners therefore pray that the said decree of the said Chancellor may be in the particular aforesaid reversed, set aside and for nothing holden. And your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

10 Dated: October 1st, 1923.

20

JOHN C. REED,
*Solicitor for and of Counsel
with Defendants-Appel-
lants.*

30

ANSWER.

(Filed Oct. 10, 1923.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

Between

HUGO ROSEBERG,

*Complainant-
Respondent,*

and

AMERICAN HOTEL AND
GARDEN COMPANY,
et al.,

*Defendants-
Appellants.*

On Appeal.
Answer.

20

The answer of the above named complainant-respondent, Hugo Roseberg, to the petition of the appeal of the above named defendants-appellants.

This respondent, Hugo Roseberg, not acknowledging all or any of the matters in the said petition of appeal contained to be true for answer thereto, nevertheless, says and admits that a decree was on the 1st day of October, A. D. 1923, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated, but as to the substance and form thereof, this respondent prays to refer thereto when

the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity; and he prays that the same may be affirmed with costs to be adjudged to this respondent.

WM. ELMER BROWN, JR.,
*Solicitor for and of Counsel
with Respondent.*

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NEW JERSEY COURT OF ERRORS AND APPEALS

Between

HUGO ROSEBERG,

Complainant-Respondent,

AND

AMERICAN HOTEL AND GARDEN
COMPANY, ET AL,

Defendants-Appellants.

ON BILL FOR INJUNCTION.

10

ON RULE TO SHOW CAUSE IN CONTEMPT.

ON APPEAL.

RESPONDENT'S BRIEF

This is an appeal from an order of the Court of Chancery entered October 1, 1923, wherein said American Hotel and Garden Company was adjudged in contempt for the violation of the injunctive orders of said court previously entered on April 23 and May 15, 1923, in that it had instituted suit in ejectment in the Atlantic County Circuit Court against complainant-respondent. Said order of May 15, 1923, enjoined and restrained said American Hotel and Garden Company "from removing the complainant from or disturbing him in or otherwise interfering with his possession or enjoyment of the store and premises known as No. 169 South New York Avenue, Atlantic City, New Jersey, unless and until they

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shall have erected **and completed**, and shall have permitted the complainant to occupy or tendered him possession for occupancy by him of the **said store** or stores referred to in the writing bearing date March 27, 1923, etc."

ARGUMENT

10 Defendant-appellant in its brief states: "Upon the assumption that the order was not intended to prohibit defendant from proceeding at law for possession for a breach of the covenants, it instituted ejectment for the purpose of decision as to whether or not complainant had not breached his covenants by subletting and failing to pay rent when due." This statement is not warranted in anything that transpired at the hearing on this application.

20 A reading of the summons and complaint filed in the ejectment action (State of the Case, Pages 7 and 8) will disclose that nowhere therein is there any allegation that an effort was being made to evict said Roseberg for breach of the covenants in the lease. On the other hand it may be noted that the right to the possession of said premises accrued on October 20, 1921. It is admitted that said Roseberg made a lease with said American Hotel and Garden Company, dated October 21, 1921, for the leasing of said premises for the term of three (3) years from January 1, 1922. This lease was made one day after the date when it was claimed that the right to possession accrued and a considerable time before said Roseberg entered into possession (January 1, 1922) of said premises by virtue of said lease. It is hardly likely that defendant-appellant could have had any breach of the covenants of this lease in mind as foundation for said ejectment. It should be borne in mind that this suit, instituted in said Circuit Court, was not the usual and ordinary landlord and tenant proceeding for possession of

30

leased premises.

The learned Vice Chancellor adjudged the defendant in contempt because on the face of the pleadings filed in the ejectment action it appeared that the right of possession was claimed to be prior to the date of the execution of said lease and that said proceeding was one practically divesting said Court of Chancery "of all jurisdiction over a matter which had been admitted by both sides." There can be no better argument in support of this finding than that portion of the conclusions of the court below here quoted as follows: 10

"It seems very clear to me, however, that the proceeding is a violation of the order. The original bill claimed the right in Roseberg to possession by virtue of a lease made on October twenty-first of the year in question, possession to be taken on the first day of January. So far as the defendant company was concerned, an affidavit was presented by its president in which he said, in effect, that Roseberg was in possession of these premises by virtue of the lease dated that day and began possession on the first day of the following January. That matter was before the Court, so far as that possession is concerned, admitted by both sides of the litigation. The matter was determined. The complainant's rights, so far as possession of the premises, was based upon the complaint, the sustaining affidavits and the answering affidavit of Max Weinman, to which answering affidavit was attached a copy of the lease in question. The case was determined upon the issues then presented, which covered that particular point. 20 30

"Now proceedings in ejectment are brought alleging the right of possession to be prior to the date of the execution of this lease. If that be true, the affidavit of the president of the defendant company, as well as the

10 affidavit of the complainant, must have been in error and it seems to me very clear that when that issue is raised, and answered, not only not denied but admitted by the executive officer of the company who, so far as the Court now knows, had full rights and power to represent the company in the matter—at least it so appears before the Court that he was doing so—that a proceeding practically divesting this Court of all jurisdiction over a matter which had been admitted by both sides cannot be proceeded with.”

Defendant-appellant also attacks the order here on appeal because said injunctive order of May 15, 1923, was broader in effect than the prayer of the bill on which it was entered. That question is not to be decided in this proceeding. Said order of May 15, 1923, is now before this court on separate appeal. Until that appeal is determined said order is effective and the right thereby established or protected cannot be destroyed.

Chancery Act, Section 112.

20 In view of this provision of the law the appellant could not claim the privilege of disregard for the injunctive decree and proceed by ejectment to accomplish that which it was forbidden to do.

It is respectfully submitted that the order here appealed from is well founded both in law and fact and should be sustained.

Respectfully submitted,

WM. ELMER BROWN, JR.,

EMERSON L. RICHARDS,

30

*Solicitors for and of Counsel with
Complainant.*

80

New Jersey Court of Errors and Appeals

Between

HUGO ROSEBERG,
Complainant-Respondent,

and

AMERICAN HOTEL & GARDEN COMPANY,
Defendant-Appellant.

BRIEF FOR APPELLANT, AMERICAN HOTEL
& GARDEN COMPANY.

STATEMENT.

Complainant filed a bill against appellant for an injunction and preliminary injunction was granted. An appeal was taken from the order or decree and the same is under review at this November Term by the same title as above. The order (page 71) reads:

“ORDERED that until the final hearing of this cause or this court shall otherwise order, the defendants and each of them, their and each of their contractors, agents, servants and workmen be, and they are hereby enjoined and restrained from removing the complainant from or disturbing him in or otherwise interfering with his possession or enjoyment of the store

and premises known as No. 169 South New York Avenue, Atlantic City, New Jersey, unless and until they shall have erected and completed and shall have permitted the complainant to occupy or tender him the possession or occupancy of the said store or stores referred to in the writing bearing date March twenty-seventh, nineteen hundred and twenty-three, set forth in the bill of complaint, WHEREUPON said complainants or either of them shall be at liberty to apply to this court to modify or dissolve the restraint hereby imposed."

Upon the assumption that the order was not intended to prohibit defendant from proceeding at law for possession for a breach of the covenants, it instituted ejectment for the purpose of decision as to whether or not complainant had not breached his covenants by subletting and failing to pay rent when due. After service of the papers upon defendant he filed his petition under the injunction bill praying an order to show cause on appellant why it should not be adjudged in contempt of the order herein quoted. At the hearing it was adjudged in contempt and from the order so adjudging this appeal is taken.

ARGUMENT.

There is no averment in the bill for an injunction which raised the question of the right of the defendant to eject the complainant from the leased premises for non-payment of rent or breach of the covenant that he would not sublet the premises. The

gravamen of the bill was that defendant had threatened to remove complainant from the leased premises by force or by making his premises untenable and thus drive him out of possession. In the light of the charges of the bill the Court of Chancery was without power or right to enjoin the defendant from an action at law to have its legal rights determined. And it is to be noted that in the opinion of the learned Vice-Chancellor he does not treat the subject of the non-payment of rent and subletting set up in the answering affidavits. Defendant had a clear right in the absence of plain language in the order to the contrary to assume that the learned Court did not intend to adjudge in excess of the charges and prayers contained in the bill. The prayer is (page 4):

“That said American Hotel & Garden Company and J. G. McCrory Company may be enjoined from making said alterations in said building and from interfering with the quiet and peace of possession thereof by complainant and that complainant may have such other and further relief as may be agreeable to equity.”

This language does not suggest an injunction against a subsequent proceeding at law for possession.

In truth, complainant could not well have asked for an injunction so broad because there was no suit at law then pending. Whether or not complainant might by petition pray the Court to broaden the order for the injunction to meet the pending ejectment suit is not the question. If the learned Vice-Chancellor attempted in the original case to pass upon the question of the failure to pay rent and the subletting by the complainant, he exceeded his right

under the averments of the bill, and if he intended by his order granting the injunction to enjoin an action at law, it is obvious that he has stripped defendant of his right to have a plain legal question disposed of in a court of law. The question of the right of the defendant to possession because of non-payment of rent and subletting was independent of the threatened invasion by defendant of complainant's right in the manner set forth in the bill. Our submission is that the injunctive order must be read in the light and aided by the averments and prayer of the bill, and that so read cannot be interpreted to enjoin defendant from prosecuting an action at law.

The order under review is erroneous and should be reversed.

Respectfully submitted,

JOHN C. REED,

Attorney for Defendant-Appellant.

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NOTICE.

(Filed June 12, 1923.)

IN CHANCERY OF NEW JERSEY.

Between

HUGO ROSEBERG,

Complainant,

and

THE AMERICAN HOTEL

AND GARDEN COMPANY,

and McCrory Stores

CORPORATION,

Defendants.

10

On Bill, etc.
Notice.

To William Elmer Brown, Esq., Solicitor for Hugo Roseberg: 20

Take Notice, that on Tuesday, June 12th, A. D. 1923, at ten o'clock in the forenoon, at Chancery Chambers, in the Real Estate and Law Building, Atlantic City, New Jersey, before his Honor, Vice-Chancellor, Robert H. Ingersoll, I shall move to dissolve the injunction heretofore allowed in the above styled cause; because the defendants have complied with the requirements set forth in the Vice-Chancellor's conclusions in this cause; by having completed and tendered to the said Hugo Roseberg, the store or stores mentioned in the writing between Hugo Roseberg and the American Hotel and Garden Company, dated March 27th, A. D. 1923. 30

JOHN C. REED,
Solicitor for Defendants.

[ENDORSED]

Service of the within notice acknowledged this eighth day of June, 1923.

Wm. Elmer Brown, Jr.,
Solicitor of Hugo Roseberg.

AFFIDAVIT.

(Filed June 12, 1923.)

IN CHANCERY OF NEW JERSEY.

20	Between HUGO ROSEBERG, <i>Complainant</i> and THE AMERICAN HOTEL AND GARDEN COMPANY, and McCrory Stores CORPORATION, <i>Defendants.</i>	}	On Bill, etc. Affidavit.
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30 STATE OF NEW JERSEY, }
 COUNTY OF ATLANTIC, } ss.

ALFRED C. LAM, of full age, being duly sworn, according to law, upon his oath, deposes and says:

I am the contractor employed by the American Hotel and Garden Company, to build the store or

stores located on South New York Avenue, Atlantic City, New Jersey, about one hundred feet north of the present store occupied by Hugo Roseberg.

As the contractor in charge, I examined the store or stores located about one hundred feet north of Hugr Roseberg's present store, on the 8th day of June, A. D. 1923, and after said examination I do solemnly swear that the said store or stores are fully completed and ready for occupancy.

ALFRED C. LAM.

10

Sworn and subscribed to before me, this 11th day of June, A. D. 1923.

BENJAMIN WEINMANN,

(Seal)

Notary Public.

Commission expires January 14, 1925.

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AFFIDAVIT.

(Filed June 12, 1923.)

IN CHANCERY OF NEW JERSEY.

10	Between HUGO ROSEBERG, <i>Complainant,</i> and THE AMERICAN HOTEL AND GARDEN COMPANY, and McCRORY STORES CORPORATION, <i>Defendants.</i>	}	On Bill, etc. Affidavit.
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STATE OF NEW JERSEY,	}	ss.
COUNTY OF ATLANTIC,	}	

WALTER LOWDEN, of full age, being duly sworn, according to law, upon his oath, deposes and says:

I am the superintendent of construction, employed by Alfred C. Lam, in building the store or stores on South New York Avenue, Atlantic City, New Jersey, one hundred feet north of the present store occupied by Hugo Roseberg; said store or stores being built by the American Hotel and Garden Company.

As such superintendent, in charge of the actual work, I do solemnly swear that said stores were finished and ready for occupancy on the seventh day of June, A. D. 1923.

As such superintendent, of construction, I have this eighth day of June, re-examined said store or stores, and again say that they are completed and ready for occupancy.

WALTER LOWDEN.

Sworn and subscribed to before me, this 9th day of June, A. D. 1923.

HIRAM STEELMAN,
Master in Chancery of 10
New Jersey.

AFFIDAVIT.

(Filed June 12, 1923.)

IN CHANCERY OF NEW JERSEY.

Between
HUGO ROSEBERG,
Complainant
and
THE AMERICAN HOTEL
AND GARDEN COMPANY,
and McCrory Stores
CORPORATION,
Defendants.

On Bill, etc.
Affidavit.

20

30

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

HARRY WEINMANN, of full age, being duly sworn, according to law, upon his oath, deposes and says:

I am the vice-president of the defendant American Hotel and Garden Company, and as such vice-president, I have had actual charge of the work of building the store or stores on South New York Avenue, Atlantic City, New Jersey, near the Boardwalk, about one hundred feet north of Hugo Rosenberg's present store.

I have examined the new store or stores, on this eighth day of June, A. D. 1923, and do solemnly
10 swear that said stores are now complete and ready for occupancy.

HARRY WEINMANN.

Sworn and subscribed to before me, this 11th day of June, A. D. 1923.

HIRAM STEELMAN,
*Master in Chancery of
New Jersey.*

AFFIDAVIT.

(Filed June 12, 1923.)

IN CHANCERY OF NEW JERSEY.

Between

HUGO ROSEBERG,

Complainant,

and

THE AMERICAN HOTEL

AND GARDEN COMPANY,

and McCrory Stores

CORPORATION,

*Defendants.*On Bill, etc.
Affidavit.

10

20

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

BERTRAM IRELAND, of full age, being duly sworn, according to law, upon his oath deposes and says:

I am the architect, in charge of the construction of the new store or stores being built by the American Hotel and Garden Company, on South New York Avenue, Atlantic City, New Jersey.

30

As such architect I prepared the plans and specifications of the store or stores above referred to. The said store or stores are located about one hundred feet north of the present store of Hugo Roseberg, which is located about one hundred feet from the Boardwalk, on New York Avenue.

As the architect in charge of the work, employed by the American Hotel and Garden Company, I examined the store or stores, on June 7th, 1923, and again on June 8th, 1923. These stores were at that time fully completed and ready for occupancy.

BERTRAM IRELAND.

Sworn and subscribed to before me, this 11th day of June, A. D. 1923.

10

HIRAM STEELMAN,
*Master in Chancery of
New Jersey.*

20

30

AFFIDAVIT.

(Filed June 12, 1923.)

IN CHANCERY OF NEW JERSEY.

Between

HUGO ROSEBERG,

Complainant,

and

THE AMERICAN HOTEL

AND GARDEN COMPANY,

and McCrory Stores

CORPORATION,

Defendants.

On Bill, etc.

Affidavit.

10

20

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

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

That he is the superintendent of the McCrory Stores Corporation, which is conducted at New York Avenue and Boardwalk, Atlantic City, New Jersey.

That he is familiar with the store or stores located at one hundred feet north of the present store occupied by Hugo Roseberg. That he inspected the same on June 7th, A. D. 1923, and that the said stores were completed and ready for occupancy, on that day. Deponent also says that he further inspected the said stores on June 8th, A. D. 1923,

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10

Affidavit

and that the same were fully completed and ready for occupancy.

CLYDE W. SMITH.

Sworn and subscribed to before me, this 9th day of June, A. D. 1923.

FLORENCE B. DRISCOLL,
Notary Public of N. J.

10

AFFIDAVIT.

(Filed June 12, 1923.)

IN CHANCERY OF NEW JERSEY.

20 Between
HUGO ROSEBERG,
Complainant,
and
THE AMERICAN HOTEL
AND GARDEN COMPANY,
and McCrory Stores
CORPORATION,
Defendants.

On Bill, etc.
Affidavit.

30

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

SUMNER N. SHIVERS, of full age, being duly sworn, according to law, upon his oath, deposes and says:
I am the plastering contractor, engaged by the

general contractor for the construction of the store or stores located on New York Avenue, Atlantic City, New Jersey, one hundred feet north of the store now occupied by Hugo Roseberg. As such plastering contractor, I have had charge of the plastering in said store or stores, and was the last contractor employed in and about the work on said store or stores.

I completed the work on said stores, on June 7th, 1923. On June 8th, 1923, I examined the work in 10
and about the said store or stores, and I do solemnly swear that the same were completed and ready for occupancy at that time.

S. N. SHIVERS.

Sworn and subscribed to before me, this 11th day of June, A. D. 1923.

RALPH HARCOURT,
M. C. C. of N. J.

20

30

AFFIDAVIT.

(June 12, 1923.)

IN CHANCERY OF NEW JERSEY.

10 Between
 HUGO ROSEBERG,
 Complainant,
 and
 THE AMERICAN HOTEL
 AND GARDEN COMPANY,
 and McCRORY STORES
 CORPORATION,
 Defendants.

On Bill, etc.
 Affidavit.

20

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

MAX WEINMANN, of full age, being duly sworn, according to law, upon his oath deposes and says:

I am the president of the defendant American Hotel and Garden Company. As such president, I have had actual charge and did negotiate the writing of March 27th, 1923, between the American
 30 Hotel and Garden Company and Hugo Roseberg, which writing refers to store or stores on South New York Avenue, Atlantic City, New Jersey.

At the time of the negotiation of this writing, I told Hugo Roseberg where the new store or stores were to be located, and he knew where they were

to be located, and he said that the location of said stores was satisfactory. The new store or stores are located about one hundred feet north of Hugo Roseberg's present store.

I have examined the new store or stores, and they are on the location named and pointed out to Hugo Roseberg, at the time of the signing of the writing of March 27th, A. D. 1923, and the said store or stores are now complete and ready for occupancy.

The store now occupied by Hugo Roseberg has a frontage on New York Avenue, of thirty-three feet, two inches, and is practically fifty feet in depth, and the rent is \$5,000.00 per year. The new store or stores, are thirty-two feet in front on New York Avenue, and the depth is practically fifty feet. The rent which Hugo Roseberg is to pay for the new store or stores, per year, is \$1800.00, for each store, or \$3600.00, altogether. The new store or stores, have hot water heat in each store, modern electrical fixtures, toilet and other modern arrangements that are not in the old stores.

The north line of Hugo Roseberg's present store is actually sixty-five feet, eight and one-half inches from the south line of the new store or stores. I have been offered \$2500.00 per year for each of the new stores, which are now ready for the occupancy of Hugo Roseberg.

The attached pencil sketch shows the actual figures of Hugo Roseberg's old store, and his new stores.

MAX WEINMANN.

Sworn and subscribed to before me, this 11th day of June, A. D. 1923.

FLORENCE B. DRISCOLL,
Notary Public of N. J.

AFFIDAVIT.

(Filed June 18, 1923.)

IN CHANCERY OF NEW JERSEY.

10

Between

HUGO ROSEBERG,

Complainant,

and

AMERICAN HOTEL AND

GARDEN COMPANY,

*et al.,**Defendants.*On Bill, &c.
Affidavit.

20

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

MAX WEINMANN, of full age, being duly sworn, according to law, upon his oath, deposes and says:

I am the president of the American Hotel and Garden Company. I am the Max Weinmann referred to in the affidavit filed in this cause on the twelfth day of June, instant, by one Hugo Roseberg.

30 I negotiated the writing of March 27th, 1923, with Hugo Roseberg, at the store he now occupies on South New York Avenue, Atlantic City, New Jersey. The contract was signed and delivered to me as the final arrangement, with respect to the new store or stores, in the vacation of the old store by Hugo Roseberg. There was no reservation of any

kind, and it contains all of the agreement between Hugo Roseberg and the American Hotel and Garden Company.

The store that Hugo Roseberg now actually occupies with his hair-dressing parlor, is about eighteen feet in width, by less than fifty feet in depth. The two stores that have been tendered Hugo Roseberg are the stores which he agreed to take, and are in accordance with my understanding with him.

The cash consideration mentioned in the contract of March 27th, 1923, was to be paid to Hugo Roseberg, at the time he vacated his present store and occupied the new store.

I made no agreement to have the store on the Boardwalk level.

Hugo Roseberg has been a tenant of the American Hotel and Garden Company, for the past thirteen years. During all that time he has conducted his business of hair-dressing, in the store which he now occupies, with that branch of his business, which store is about eighteen feet wide by fifty feet deep.

In 1921, Hugo Roseberg renewed his lease with the defendant company, for the original store, which he now occupies, and at the same time he leased an additional frontage on New York Avenue, of about fifteen feet. Hugo Roseberg has never occupied the additional space for his hair-dressing parlor, but has, without the written consent of the defendant company, sub-let this space for the purpose of conducting a shoe store therein.

MAX WEINMANN.

Sworn and subscribed to before me, this 18th day of June, A. D. 1923.

FLORENCE B. DRISCOLL,
Notary Public of N. J.

AFFIDAVIT.

(Filed June 18, 1923.)

IN CHANCERY OF NEW JERSEY.

10

Between
 HUGO ROSEBERG,
Complainant,
 and
 AMERICAN HOTEL AND
 GARDEN COMPANY,
et al.,
Defendants.

On Bill, &c.
 Affidavit.

Between

20

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

HARRY WEINMANN, of full age, being duly sworn, according to law, upon his oath, deposes and says:

30 I am the vice-president of the American Hotel and Garden Company. As such vice-president, I had an interview with Hugo Roseberg, sometime during March, 1923. The subject discussed was the new store which Hugo Roseberg was to take, and the vacation of the store which he now occupies.

The memorandum attached to the affidavit of Hugo Roseberg, was made by me, at the time of

this conversation; and was left with Hugo Roseberg, and he agreed to write Mr. Max Weinmann, or myself, setting forth in detail, just exactly what items in the memorandum he would require, before entering into an arrangement to vacate his present store, and occupy the new stores. He never did write to me, or to Max Weinmann.

Max Weinmann was in California at the time of my interview with Hugo Roseberg, and upon his return from California, he saw Hugo Roseberg, and negotiated the contract dated March 27th, 1923. 10

I saw Hugo Roseberg on several occasions after March 27th, 1923, and talked with him about the store or stores and he made no claim at any of these interviews, that the contract of March 27th, 1923, was not delivered for the uses and purposes therein expressed.

H. WEINMANN.

Sworn and subscribed to before me, this 18th day 20
of June, A. D. 1923.

FLORENCE B. DRISCOLL,
Notary Public of N. J.

AFFIDAVIT.

(Filed June 18, 1923.)

IN CHANCERY OF NEW JERSEY.

10

HUGO ROSEBERG,
Complainant,
 and
 AMERICAN HOTEL AND
 GARDEN COMPANY,
et al.,
Defendants.

On Bill, &c.
 Affidavit.

20

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

JOHN C. REED, of full age, being duly sworn, according to law, upon his oath, deposes and says:

I am one of the attorneys of the American Hotel and Garden Company. As such attorney, I called on Hugo Roseberg, at the time he mentions, and had with me the writing of March 27th, 1923.

30

The purpose of this call was to arrange with Mr. Hugo Roseberg to move into the McCrory Stores on the Boardwalk, temporarily, whilst the new store on the "Moulin Rouge" site was being built.

Hugo Roseberg, after discussing the situation with me, declared: "This is what I will do, I will remain here, or I will keep the contract that I made with Mr. Weinmann," which contract, was the con-

tract dated March 27th, 1923; and he had the same in his hands, at the time that he made this statement. I made no threats of any kind, either to Mr. or Mrs. Hugo Roseberg.

JOHN C. REED.

Sworn and subscribed to before me, this 18th day of June, A. D. 1923.

FLORENCE B. DRISCOLL,
Notary Public of N. J. 10

AFFIDAVIT.

(Filed June 14, 1923.)

IN CHANCERY OF NEW JERSEY.

20

HUGO ROSEBERG,	}	On Bill, &c. On Motion to Dis- solve Restraint. Affidavit.
Complainant,		
and		
AMERICAN HOTEL AND		
GARDEN COMPANY,		
et al.,	}	
Defendants		
Between		

30

STATE OF NEW JERSEY,)
COUNTY OF ATLANTIC, { ss.

HUGO ROSEBERG, of full age, being duly sworn according to law, on his oath, deposes and says:

I am the complainant in the above entitled cause.

On June 2, 1923, my counsel, Wm. Elmer Brown, Jr., showed me a letter received from John C. Reed, dated June 1, 1923, in which he referred to a writing of March 27, 1923, and stated that the new stores referred to in the writing would be completed on June 7, 1923. There was not to my knowledge any stores such as might be considered as relating to the writing of March 27, 1923. I, therefore, had my counsel inquire of the said Reed what stores were intended to be tendered to me.

On June 7, 1923, my counsel, Mr. Brown, showed me another letter, under that date, from the said Reed, which letter had attached thereto a blueprint with the words "Wm. Elmer Brown, Esq., Attorney for Hugo Roseberg" pasted thereon, and which blueprint purports to have been made by Bertram Ireland, architect, Atlantic City, N. J., and is marked "2."

The stores as tendered are two brick stores on New York Avenue, located about one hundred feet north of the present stores. I have examined the stores, and find that they in no wise conform to the tentative agreement which I had with Mr. Max Weinmann on March 27, 1923.

The circumstances surrounding the proposed agreement, whereby I was to vacate the present store for another store, are as follows: Mr. Harry Weinmann interviewed me about two weeks previous to March 27, 1923, relative to exchanging stores, so that additional accommodations could be given to the McCrory Company. I told Mr. Weinmann that I was willing to make such an exchange provided I was given equal accommodations to those that I now have and that the stores would be on the Boardwalk level. He told me that they would

erect such stores for me immediately next to the Moulin Rouge building, on the Boardwalk level. He told me that they had the consent of the City to extend the approach northward along New York Avenue, so that the stores would be on the Boardwalk level, similar to what had been done in erecting the stores on Maryland Avenue, back of the Beach Court Apartments. At that time he made a memoranda of the things that were to be agreed upon in building the stores, a copy of which memoranda is attached hereto. 10

At that time the size of the store was understood to be the same as the present store; that they were to have two bulk windows; that they were to be arranged with sky-lights; that they were to have at least the same height, so that I could have a balcony as I now have; they should have toilet accommodations; that they should have windows in the rear; that there should be a basement under the entire store where I could store my goods; and that there should be a heater in the basement. 20

There was nothing said about the rent, and I told Mr. Weinmann that I wanted to keep my present lease. I understood the rent would be the same as the rent I now pay.

If any other details occurred to me, I was to write to Max Weinmann or H. Weinmann, at 903 Widener Building. Mr. Weinmann made a memoranda of these details in his own handwriting, and left it with me.

About two weeks later, or March 27, 1923, Mr. Max Weinmann saw me at the store, and talked to me about exchanging the stores. We went over the same details that I had previously gone over with Mr. Harry Weinmann. He promised to build a new store for me with the same size as my present store, 30

and with equal facilities. In addition, it was to have a basement where I could store my goods, and was to be on the Boardwalk level.

He asked me to sign an agreement which he had drawn up. I did not want to do so without first consulting my attorney, Mr. Brown. I endeavored to get him (Mr. Brown) on the telephone, but found that he was out. I had previously consulted my counsel, Mr. Brown, about this whole matter, and
10 had agreed with him not to sign anything without his approval. Mr. Weinmann asked me to sign the writing of March 27, 1923, so that he could take it back to Philadelphia with him, with the distinct understanding that it should not be binding on anybody until a copy of it had been submitted to Mr. Brown and approved by him, and Mr. Weinmann agreed to send me a copy.

I never got the copy. I never had a chance to consult my counsel about it, and I never agreed to
20 the contents of the writing. It was distinctly understood that this was not to be an agreement in any sense, but that a regular agreement was to be drawn up, covering the change in the location of the stores, after consulting with my lawyer.

I never saw this paper again, or a copy of it, until three or four days prior to the time that we applied for the injunction, when Mr. John C. Reed showed the writing to me in my store, and then and there threatened to have me put out by the sheriff,
30 and that they would make it so uncomfortable for me that I would be glad to get out. This was the first time that I had any idea that this paper was considered to be an agreement.

The American Hotel and Garden Company, or anybody else, never paid me the six hundred dollars (\$600.00) covering an electric light bill, or three

hundred dollars (\$300.00) for repairs, or three hundred dollars (\$300.00) on account of the loss after the fire, nor any part of such sum, nor have they made any offer to remove my goods from the old store to the new.

The new stores are not as wide as the old store, and the ceilings are very much lower. There is no ventilation in the rear or at the side. There is no storage space. The store is not on the Boardwalk level, and the entrance is on an incline, about half-way between the Boardwalk level and the street level. 10

These items are very important in the conduct of my business. Unless I have a store with a high ceiling, and plenty of ventilation, it is impossible to conduct my business at all. I have six hair-drying machines, which when in operation emit a large amount of hot air. Unless there is adequate ventilation, the store would be intolerably hot, and my customers would not stay or return. I must have 20 an additional room for use as a massage parlor. There is no space suitable for that purpose in the new stores. The room in the back marked "Store Room" has no natural light nor air, and would be unsuited for my business. A great many of my customers come to my place in rolling chairs. They could not reach the new stores because the entrance is part way down the incline, and would be exceedingly dangerous to try to get to the store entrance in a rolling chair. 30

The store which I now occupy is 35 feet wide and 51 feet in depth, with a ceiling 12 feet 11 inches high. There is a large window in the rear wall, with another window on the side and in the rear, as well as three windows in the front of the store that can be used for ventilation. The ceiling of the store now

occupied by me is so high that I was able to build a balcony in the rear thereof, over which a person of ordinary height may walk without stooping, and the balcony is high enough from the floor to permit persons of ordinary height to walk under it.

The new stores which have been referred to, according to the plan or blueprint which has been mentioned, are 32 feet in width, 46 feet 11 inches in depth, and 8 feet high. There is no means of ventilation in the new stores excepting by the front door. There are no windows in the new stores excepting the front bulk window, nor are there any sky-lights in the roof thereof. The floor of the new stores is about 2 feet off the ground, with no basement underneath.

The summer season is the time when I do the most of my business. Since the issuance of the injunction in this case up until the present time, and very plainly during the balance of this summer, building operations will be going on actively on both sides of this store. The sidewalk will be virtually blocked at all times, and it will be practically impossible to reach the stores. I conduct a hair-dressing establishment and beauty parlor, catering exclusively to women of wealth and refinement. It will be absolutely impossible to attract such clientele to the place offered to me in its present condition.

My enjoyment of the present store has been very seriously interfered with by the present building operations, nor have the defendants in this case complied with the order of this court by ceasing to prevent my enjoyment of the stores. They have not protected the roof so that rain will be excluded, and during every rain, water runs into my store from the roof, damaging my stock and fixtures, and

Affidavit

25

creating a great deal of disturbance, as well as making it practically impossible to do business.

HUGO ROSEBERG.

Sworn and subscribed to before me this 12th day of June, A. D. 1923.

SARA M. SEAVER,
*Notary Public of the State of
New Jersey.*

(Seal)

10

My commission expires April 26, 1928.

COPY OF MEMORANDUM.

Size of store
2 Bulk Windows (Kind)
Sky light
Height
Toilet
Windows in Rear
Heater in Basement
Amt. of Rent
Write to M. Weinman or
H. Weinman
903 Widener Bld.

20

30

AFFIDAVIT.

(Filed June 14, 1923.)

IN CHANCERY OF NEW JERSEY.

10

Between

HUGO ROSEBERG,

Complainant,

and

AMERICAN HOTEL AND

GARDEN COMPANY,

*et al.,**Defendants.*

On Bill, &c.
On Motion to Dis-
solve Restraint.
Affidavit.

20

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

BLANCHE ROSEBERG, of full age, being duly sworn according to law, on her oath, deposes and says:

I am the wife of Hugo Roseberg, complainant in the above entitled cause. I was present at the interview between Harry and Max Weinmann and my husband. I heard the entire conversation. I was present on March 27, 1923, when Max Weinmann induced my husband to sign the writing dated that day. My husband refused to sign the paper until he had first consulted with Mr. Brown. My husband called Mr. Brown's office on the telephone, and was informed that he was not in. Mr. Weinmann

then asked my husband to sign the paper, so that he could take it with him to Philadelphia. There was a distinct understanding between Mr. Weinmann and my husband that this paper was not to be considered an agreement of any kind until it was first approved by Mr. Brown.

Mr. Weinmann promised to send us a copy of the agreement so that we could take it to Mr. Brown, and then if it were satisfactory a regular agreement, to be drawn and approved by Mr. Brown, was to 10 be made.

My husband never consented to give up the present store in exchange for the new stores, never agreed to the writing produced in this case dated March 27, 1923, and never told Mr. Weinmann that he would agree to the conditions referred to in the writing. There was absolutely no agreement of any kind entered into on that day or prior or subsequent thereto.

We never saw the writing referred to again until 20 we saw it in the hands of Mr. John C. Reed, three or four days prior to the issuance of the injunction, at which time he produced the writing and threatened to have the sheriff on us unless we moved. We had no idea that Mr. Weinmann considered the paper an agreement.

I actively help my husband in the conduct of his business. I am familiar with all of the details thereof. The stores offered to us are in no sense equal to the store that we now have, and are en- 30 tirely unsuitable for our business. It would be absolutely impossible to carry on our business under the conditions that we would encounter in the new stores. The ceilings are not high enough, there is no ventilation, the stores are not as large as the old store, their position is very different from that

of the old store, our patrons could not reach it conveniently and there is so much disturbance from the building going on all around the stores that we could not induce our clients to come there this summer.

I was present at the time of the conversation with Harry Weinmann about two weeks before March 27, 1923. At that time Mr. Weinmann made a memorandum of what the new stores were to be like, the arrangement of the bulk windows, the skylights, the heat, the windows in the rear, the basement and other details, but at that time there was no agreement that we would exchange the stores. In fact, my husband refused to make any such agreement.

Nothing was said about the amount of the rent, and at that time and thereafter my husband always said that he wanted to keep the present lease, but that he was willing to exchange the store if the Weinmann's would give him a space of the same size and equally suitable for his business, immediately next to the Moulin Rouge building. It was always understood among us that if there was to be such an arrangement, it was to be taken up with our counsel, and a definite written agreement covering the whole transaction was to be entered into before anything was done.

There were many details to be settled concerning the way the new stores were to be built, if we agreed to make the exchange. No such details were settled, and there were no consultations with us whereby the Weinmann's could anticipate what we would require. It is necessary for us to have special electrical outlets adjacent to each operating chair in the beauty parlor, and the lighting fixtures must be so arranged as to give the proper amount of light

in each booth, for the use of the operators, and special current is required for certain machines. None of these special things have been done in the stores tendered to us, and for these reasons the stores could not possibly be occupied for our business.

BLANCHE ROSEBERG.

Sworn and subscribed to before me this 12th day
of June, A. D. 1923. 10

SARA M. SEAVER,
*Notary Public of the State
of New Jersey.*

(Seal)

My commission expires April 26, 1928.

AFFIDAVIT.

(Filed June 14, 1923.)

IN CHANCERY OF NEW JERSEY.

10

Between

HUGO ROSEBERG,

Complainant,

and

AMERICAN HOTEL AND
GARDEN COMPANY,*et al.,**Defendants.*

On Bill, &c.

On Motion to Dis-
solve Restraint.

Affidavit.

20

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

RONALD A. REILLY, of full age, being duly sworn according to law, deposes and says:

I am a resident of the City of Atlantic City, and there conducting the business of photography.

30 On Saturday, June 9, 1923, I personally took 3 photographs of construction work going on at South New York Avenue, near the Boardwalk, at a place where until recently the building formerly known as "Moulin Rouge" stood. The plates upon which these photographs were made were subsequently developed, and prints made therefrom, which have been mounted, and delivered to Mr. Hugo Roseberg.

On the back of each of said prints there appears the following:

“Photo taken between 1 and 2 P. M. June 9, 1923.

Ro. A. Reilly”

Said photographic prints truly and correctly depict the situation as it existed at the place aforesaid, on the day and at the time before mentioned.

RONALD A. REILLY.

10

Sworn and subscribed to before me this 12th day of June, A. D. 1923.

SARA M. SEAVER,
*Notary Public of the State
of New Jersey.*

(Seal)

My commission expires April 26, 1928.

20

30

CONCLUSIONS.

(Filed July 2, 1923.)

IN CHANCERY OF NEW JERSEY.

10

Between

HUGO ROSEBERG,

Complainant,

and

AMERICAN HOTEL AND

GARDEN COMPANY,

*et al.,**Defendants.*On Bill for In-
junction.
Conclusions.

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For complainant: W. ELMER BROWN, JR., Esq.,
and EMERSON L. RICHARDS,
Esq.For defendants: JOHN C. REED, Esq., and Hon.
CLARENCE L. COLE, SR.

30 INGERSOLL, V. C.:

On May 15th, 1923, an order was advised, restraining the defendants from removing the complainant from, or disturbing him * * * in the possession of a store known as 169 South New York Avenue in Atlantic City "unless and until they have erected and completed, and shall have permitted the

complainant to occupy or tendered him possession for occupancy by him, of the said store or stores referred to in the writing bearing date March 27th, 1923, * * * whereupon said defendants or either of them shall be at liberty to apply to this Court, to modify or dissolve the restraint hereby imposed."

On May 16th, 1923, the defendants gave notice of appeal from the said order, "and from the whole and every part thereof" and filed their petition of appeal dated the same day.

10

Application is now made to me to dissolve said injunction "because the defendants have complied with the requirements set forth in the Vice-Chancellor's conclusions in this cause, by having completed and tendered * * * the store or stores mentioned in the writing between the parties" and referred to in the conclusions.

The complainant, in addition to a denial of the right of the defendants to have the restraint dissolved or modified on the merits of the case, objects to the consideration by this court of the application, claiming that the appeal to the Court of Errors and Appeals has divested the Court of Chancery of jurisdiction over the subject matter.

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Penna. R. R. Co. v. Nat'l Docks, &c., Co.,
54 N. J. Eq. 647;

Bell v. International Power Co., 84 N. J.
Eq. 209; and

Van Houten v. Hall, et al., 66 Atl. Rep.
1085;

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are cited in support of this contention.

The Chancellor, then Vice-Chancellor, in *Ashby v. Yetter*, 78 N. J. Eq. 173, after an "extended examination of the subject" stated that the apparently unlimited scope of the National Docks case had been curtailed and modified, and called attention also to

the fact that as to injunctions the Legislature of 1902 had intervened and by statute established the practice.

In *Bell v. International Docks Co.*, the Chancellor cited *Ashby v. Yetter*, and permitted an amendment to the decree pending an appeal.

10 In *Van Houten v. Hall*, *ibid*, after stating he could find no precedent permitting a partial execution of a decree in a cause removed to, and now within, the jurisdiction of the appellate court by the act of the party asking its partial enforcement.

V. C. Bergen said, "I am of the opinion that during the pendency of this appeal this Court ought not to partially execute it in behalf of one who by his own act, has removed the proceedings to another jurisdiction," and stated that "application should be made to the Court of Appeals."

20 This application is so important that although I am unable to find precedent authorizing this Court to do so, upon the insistence of the defendants, I have considered it upon the merits.

The contention of the defendants is that they have completed and tendered to the complainant the possession of the two stores referred to.

30 The affidavits of Alfred C. Lam, contractor; Walter Lowden, superintendent of construction; Harry Weinmann, vice-president of the hotel company; Bertram Ireland, architect; Clyde W. Smith, superintendent of McCrory Stores Company and Sumner N. Shivers, plastering contractor, are all to the effect that said store or stores were completed on June 7th, 1923, and were ready for occupancy on June 8th, 1923.

That of Max Weinmann, president of the hotel company, is that the store or stores were at the location named to Roseberg; that the store now oc-

cupied by Roseberg has a frontage of 33 feet and 2 inches on New York Avenue and is practically 50 feet in depth and the rent is \$5000 per year; that the new store or stores are 32 feet in front by practically 50 feet in depth, and the rent is \$1800 for each store. Each of said stores, as shown on the sketch attached to the affidavit, being 16 feet in width.

The answering affidavit of the complainant states, that the store he now occupies is 35 feet wide and 51 feet in depth with a ceiling 12 feet 11 inches high, with a large window in the rear wall, and another window on the side and in the rear, as well as three windows in the front of the store, that can be used for ventilation; that the ceiling "is so high that I was able to build a balcony in the rear thereof over which a person of ordinary height may walk without stooping, and the balcony is high enough from the floor to permit a person of ordinary height to walk under it." 10 20

That the new stores according to the blue print, which had been delivered to counsel of complainant by counsel of defendants, are 32 feet in width by 46 feet 11 inches in depth and 8 feet in height; there is no means of ventilation in the new stores excepting by the front doors. There are no windows in the new stores excepting the front bulk windows, nor are there any skylights in the roof, and that they are in other ways unsuitable for his business (that of hair dresser, &c.), in which he is corroborated by the affidavit of his wife, Blanche Roseberg. 30

The defendants were permitted to file further affidavits which they did on June 18th, 1923, but the charges made by the complainants as to the physical size and conditions of the "new stores" are not denied.

It is not necessary to consider whether the offer of two stores each of 16 feet in width at a rental of \$1800 each, is a compliance with the agreement mentioned.

10 It is clear that a tender of stores so entirely different in size (at least as to height of ceiling and cubical content, that being less than 65% of the original store) and so unsuitable for the use to which they were to be put, is not a compliance "with the requirements set forth in the Vice-Chancellor's conclusions in this cause."

An order will be advised, dismissing the application to dissolve the injunction heretofore allowed in this cause.

Submitted: June 14th, 1923.

Determined: June 26th, 1923.

ORDER.

(Filed Oct. 1, 1923.)

IN CHANCERY OF NEW JERSEY.

Between

HUGO ROSEBERG,

Complainant,

and

AMERICAN HOTEL AND
GARDEN COMPANY,
*et al.,**Defendants.*On Bill for In-
junction.
Order.

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This matter coming on for hearing on Tuesday, June 12, 1923, upon motion and application of John C. Reed, Esq., solicitor for and Clarence L. Cole, Esq., of counsel with the defendants, to dissolve the injunction theretofore allowed in this cause, because it was alleged that defendants had complied with the requirements set forth in the Vice-Chancellor's conclusions in this cause, by having completed and tendered to complainant the store or stores mentioned in the writing between complainant and defendants, the American Hotel and Garden Company, dated March 27, A. D. 1923, and the Court having read the affidavits filed by both complainant and defendants in connection with said application, and having considered the oral testi-

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mony produced in support of said motion, and having heard the arguments of counsel of the respective parties, complainant and defendants, and duly considered the same, and the matter having been determined on June 26, 1923, when written conclusions of this Court bearing on said application were filed, and the Court being of the opinion, as expressed in said conclusions, that the defendants herein had not complied "with the requirements set
10 forth in the Vice-Chancellor's conclusions in this cause," as claimed in said application:

It is thereupon, on this first day of October, 1923, on motion of Wm. Elmer Brown, Jr., solicitor for, and Emerson L. Richards, of counsel with complainant, ordered that the application to dissolve the injunction heretofore allowed in this cause be dismissed, and that the defendants pay to the complainant, or his solicitor, the costs upon this application to be taxed.

20

Respectfully advised,

R. H. INGERSOLL,

V. C.

NOTICE OF APPEAL.
IN CHANCERY OF NEW JERSEY.

Between	}		
HUGO ROSEBERG,			10
<i>Complainant,</i>			
and		On Bill, &c.	
AMERICAN HOTEL AND		Notice of Appeal.	
GARDEN COMPANY,			
<i>et al.,</i>			
<i>Defendants.</i>			

The defendants hereby appeal from the order 20
made, refusing to dissolve the injunction heretofore
issued in the above styled cause, enjoining and re-
straining the defendants from removing the com-
plainant from, or disturbing him in, or otherwise
interfering with the complainant's possession or
enjoyment of the premises described in the bill of
complaint, and from the whole and every part there-
of; to the Court of Errors and Appeals, in the last
resort in all causes.

JOHN C. REED, 30
Solicitor for Defendants.
JOHN C. REED,
Of Counsel.

Dated October 3rd, 1923.

I conceive there is good cause for appeal in the above stated cause.

JOHN C. REED,
Of Counsel with Defendants.

PETITION OF APPEAL.

10 NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between		
	HUGO ROSEBERG,	
	<i>Complainant-</i>	
	<i>Respondent,</i>	
	and	
20	AMERICAN HOTEL AND	
	GARDEN COMPANY,	
	<i>et al.,</i>	
	<i>Defendants-</i>	
	<i>Appellants.</i>	
		On Bill, &c. On Appeal. Petition of Appeal.

The petition of the American Hotel and Garden Company, *et al.*, the appellants in the above styled
30 cause respectfully shows that your petitioners find themselves aggrieved by a decree, made in the Court of Chancery, by his Honor, Edwin R. Walker, Chancellor of New Jersey, bearing date the first day of October, A. D. 1923, wherein the said Hugo Roseberg was complainant and the said American Hotel and Garden Company, *et al.*, were defendants, in

this respect, to wit: Said decree ordered that the application to dissolve the injunction be denied, because the decree should have decreed that the said injunction be dissolved. Your petitioners therefore pray that the said decree of the said Chancellor may be in the particular aforesaid reversed, set aside and for nothing holden. And your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

Dated October 3rd, 1923.

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JOHN C. REED,
*Solicitor for and of Counsel
with Defendants-Appellants.*

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ANSWER.

(Filed Oct. 10, 1923.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

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Between

HUGO ROSEBERG,

*Complainant-
Respondent,*

and

AMERICAN HOTEL AND
GARDEN COMPANY,
et al.,

20

*Defendants-
Appellants.*On Appeal.
Answer.

The answer of the above named complainant-respondent, Hugo Roseberg, to the petition of the appeal of the above named defendants-appellants.

30 This respondent, Hugo Roseberg, not acknowledging all or any of the matters in the said petition of appeal contained to be true for answer thereto, nevertheless, says and admits that a decree was on the 1st day of October, A. D. 1923, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated, but as to the substance and form thereof, this respondent prays to refer thereto when the

same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity; and he prays that the same may be affirmed with costs to be adjudged to this respondent.

WM. ELMER BROWN, JR.,
*Solicitor for and of Counsel
with Respondent.*

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78

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

HUGO ROSEBERG,

Complainant-Respondent,

AND

AMERICAN HOTEL AND GARDEN
COMPANY, ET AL,

Defendants-Appellants.

ON BILL FOR INJUNCTION.

10

ON MOTION TO DISSOLVE INJUNCTION.

ON APPEAL.

RESPONDENT'S BRIEF

This is an appeal from an order of the Court of Chancery entered October 1, 1923, refusing to dissolve injunctive order entered May 15, 1923. Said restraining order was at the time of said application on appeal to this court.

It was contended by complainant-respondent upon the hearing of said motion in the court below and is also urged here that the Court of Chancery is without power to alter, amend or modify in any substantive way the order theretofore made in this cause.

20

ARGUMENT

When the order was removed to the Court of Errors by the appeal, the Court of Chancery lost all substantive

control over the order. The 112th paragraph of the Chancery Act provides that "no appeal taken from an order or decree granting an injunction shall suspend or modify the operation of the injunction without an order of the Chancellor or of the Court of Errors and Appeals for that purpose, and such suspension or modification shall extend only so far as may be necessary to preserve the subject of the appeal and shall not in any case be allowed to destroy the right established or protected by the order or decree appealed from." This section of the act was passed subsequent to the decision of the Court of Errors and Appeals in the case of Pennsylvania Railroad vs. National Docks Company, 54 N. J. E. 647.

In that case the Court of Chancery undertook to punish the plaintiff-in-error for contempt in violating an order of restraint issued out of that Court and which order of restraint had been appealed to the Court of Errors. Justice Beasley, speaking for the Court, said that "the decree in question lost for the time all its force and the appellant could not fall into contempt by resisting its execution." It was also the opinion of the Court that "an appeal in all cases will have that effect given to it which shall be necessary to preserve the subject to which the appellate procedure relates in such a condition as will enable this Court to render an efficacious decree in the premises, that for this purpose an injunction decree will be suspended or continued or a previous injunction revived by the act of filing an appeal whenever such construction shall be necessary for the end just stated." The reasoning of this decision proceeded upon the theory that the appellant Court had never "permitted anything to be done in the lower court that in any degree has restricted or curtailed the power of this Court to control, preserve and to adjudicate the entire appellant controversy."

The Court also says: "*Touching the contention that*

power rests in the discretion of the Chancellor to execute or refrain from executing the decree in his Court during the pendency of the appeal, the conclusive answer is that such a function would be wholly inconsistent with the paramount cognizance given to this Court over the subject. Such a theory would have the effect of reducing the absolute right of appeal so clearly created by the statute to a merely conditional right, such condition being the pleasure of the Chancellor. If the inferior court can destroy the subject of the appeal, it necessarily follows that the remedy is not of right but of grace." This case is the leading authority upon the question of the right of the Court of Chancery to in any wise control the order or decree while such order or decree is in the hands of the appellant court, and such right is absolutely denied.

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This case has been followed in a series of other decisions, the most important of which is *Van Hauten vs. Hall*, 66 Atlantic Reporter, Page 1085. In this case Vice Chancellor Bergen held that "where the Court of Chancery has entered a final decree of distribution in a suit construing a will and determining the rights of beneficiaries thereunder, the Court has no jurisdiction pending an appeal from a part of the decree to permit on the petition of the appellants the enforcement of the other part of the decree." The Vice Chancellor clearly recognizes that the decree being in the hands of the appellant court that he could make no order affecting the decree even on the motion of the appellants. The Vice Chancellor pertinently remarks that the appellant court might, by its findings, determine the cause in a way at variance with the views of all the parties, and the Vice Chancellor further remarks that since any order he might make affecting the decree would also be subject to appeal, that only confusion would result and the Court of Errors have two controversies upon its hands instead of one.

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Another authority recognizing the force of the leading case is *Bull vs. International Power Company*, 84 N. J. E., 209. In that case the Chancellor, in permitting an amendment in form to the decree, decided that the physical "papers" in the case were still in the hands of the Court of Chancery, and that he had the power *nunc pro tunc* to amend the decree by inserting the formal words "prayed for" accordingly; but he clearly recognized the doctrine of the leading case, declaring that "an appeal from this Court to the Court of Errors and Appeals, while it removes the *cause* and the *potential* record, does not actually remove the physical record" and that the jurisdiction of the Court of Chancery over the record pending appeal is ousted only to the extent of preventing the decree in the Court of Chancery *from destroying or impairing the subject of the appeal* or being in any degree used for that purpose."

The effect of an appeal to the Court of Errors in any case, either at law or equity, is to remove the controversy to that forum. It may be that the appellee may be equally dissatisfied with the judgment of the Court below and that he has an interest in having the appellant court adjudicate the controversy, even where the judgment has been removed in the Court of Errors by his opponent.

It is therefore contended that pending the appeal from the decree sought to be dissolved, the Court of Chancery was without power to modify or dissolve the decree and that the only power to deal with the controversy at all resides in the Court of Errors.

Upon this point the learned Vice Chancellor observed that there was no legal right in that Court to grant the relief applied for and in his conclusions remarked: "This application is so important that although I am unable to find precedent authorizing this Court to do so, upon the

insistence of the defendants, I have considered it upon the merits." (State of the Case, Page 34.)

On the merits of the case the Court found as a fact that there had not been a compliance "with the requirements set forth in the Vice Chancellor's conclusions in this cause," as was claimed by the Hotel and Garden Company. For argument in support of this finding the attention of the Court is respectfully directed to the conclusions of the court below as appear in the State of the Case, Pages 34, 35 and 36. Any other argument which might be here made would be mere repetition. 10

Respectfully submitted,

WM. ELMER BROWN, JR.,

EMERSON L. RICHARDS,

*Solicitors for and of Counsel with
Complainant-Respondent.*

insistence of the defendant, I have considered it upon the merits." (State of the Case, Page 34)

On the merits of the case the Court found as a fact that there had not been a compliance with the requirements set forth in the Vice-Chancellor's conclusions in this cause, as was claimed by the Hotel and Garden Company. For argument in support of this finding the attention of the Court is respectfully directed to the conclusions of the court below as appear in the State of the Case, Pages 34 and 36. Any other argument which might be made would be mere repetition.

10

Respectfully submitted,

Wm. Elmer Brown, Jr.

Frederick L. Richards

Attorneys for and of Counsel with

Complainant-Respondent.

78

New Jersey Court of Errors and Appeals

Between

HUGO ROSEBERG,
Complainant-Respondent,

and

AMERICAN HOTEL & GARDEN COMPANY,
Defendants-Appellants.

ON APPEAL FROM CHANCERY.

BRIEF FOR APPELLANTS.

STATEMENT.

Complainant filed a bill for injunction against American Hotel & Garden Company and McCrory Stores Corporation. The prayer of the bill was, "that said American Hotel and Garden Company and J. G. McCrory Stores Corporation may be enjoined from making said alterations in said building and from interfering with the quiet and peaceable possession thereof by complainant, and that complainant may have such other and further relief as may be agreeable to equity."

The order was:

“It is thereupon, on this 15th day of May, 1923, on motion of said counsel with the complainant, ORDERED that until the final hearing of this cause, or this court shall otherwise order, the defendant, and each of them, their and each of their contractors, agents, servants and workmen, be and they are hereby enjoined and restrained from removing the complainant from or disturbing him in, or otherwise interfering with his possession or enjoyment of the store and premises known as No. 169 South New York Avenue, Atlantic City, New Jersey, unless and until they shall have erected and completed and shall have permitted the complainant to occupy or tender him possession for occupancy by him of the said store or stores referred to in the writing bearing date March 27th, 1923, set forth in the bill of complaint, whereupon said defendants or either of them shall be at liberty to apply to this court to modify or dissolve the restraint hereby imposed.”

See page 4 and 71 of case No. — this term. It will appear in the state of the case cited, that American Hotel & Garden Company leased certain premises to complainant, that the leased premises were damaged by fire, that thereafter said hotel company entered into an agreement with defendant McCrory Stores Corporation and that complainant alleged that said defendants were attempting to evict him from his leased premises. Answering affidavits were filed and at page 16 of the case there is set up in the answering affidavit of Max Weinmann the agreement referred to in the Vice-Chancellor's order as the one set forth in the bill of complaint. In fact,

it is set up by defendant hotel company. Pending the appeal from the order in the original bill, the hotel company proceeded to complete the stores as it agreed, and tendered possession to complainant. After having done this and complainant having refused to accept the stores and surrender the premises originally leased, an application was made to the Vice-Chancellor to dissolve the restraint as provided in the quoted order. On the hearing of the motion, affidavits and answering affidavits were used, and the Vice-Chancellor refused to modify or dissolve the preliminary injunction, and from the order or refusal this appeal is taken. In the answering affidavit of the complainant and his wife the agreement referred to was expressly repudiated. See pages 22-28 of this case.

ARGUMENT.

As we understand the opinion of the Vice-Chancellor in the main case, he allowed an injunction because of the agreement of March 27, 1923, his view being that until the hotel company had provided stores therein referred to, the complainant was entitled to hold possession of the premises originally leased. At the time of the making of said agreement as appears in the main case, complainant had defaulted in payment of rent, and had sublet in violation of the terms of the lease, which gave the hotel company the right to possession. Moreover, as abundantly appears in the affidavits, these premises were partially destroyed by fire and the hotel company could not make the repairs which it had a right to make on its own premises without entering into

and taking possession of the premises leased to complainant. In the absence of said agreement, it seems to us the court was without power to enjoin the hotel company from proceeding to evict the complainant. It will be noted at page 63 of the main case that the Vice-Chancellor treats the foregoing defaults of complainant as follows:

“If either of these acts would have been sufficient to have terminated the lease, it is sufficient to say that the agreement of March 27, 1923, was entered into after each of said alleged default or violations of terms. It is clear that an adjustment was made and money paid by the company to the complainant and arrangements made when he was to vacate the premises in question upon the completion of the new stores,” &c.

No counter-affidavit was filed by the complainant in the main case, repudiating the agreement of March 27th, and at that time the Vice-Chancellor was undoubtedly justified in treating it as a binding agreement on the complainant. It now appears that he and his wife distinctly repudiate the agreement. His position is this, he procured an injunction upon the faith of the existence and binding effect of the agreement of March 27th, 1923, and now when the defendant asserts that it has performed that agreement and tenders the stores in question, he now says that the agreement is not binding upon him. Notwithstanding this inconsistent and inequitable attitude of the complainant was pressed before the Vice-Chancellor it seemed not to impress him. If the agreement of March 27th is out of the way, then the original case stands as one where complainant has in two important respects violated the terms

of his lease which lease in express language gives defendant the right to re-enter. Its language is (page 21 main case):

“Provided that if rents shall be due and unpaid or if default shall be made in any of the covenants, conditions and rules herein contained, then it shall be lawful for the said party of the first part at his option without notice and without any demand for said rent or for the performance of said covenants, conditions, rules and regulations, to declare this lease null and void and said term ended, and to re-enter the said premises and remove all persons therefrom or to proceed by action for the recovery of the possession thereof or otherwise however.”

The affidavits on behalf of the defendant show that the complainant was tendered the kind of stores referred to in the agreement of March 27, 1923, and its affidavits are as persuasive as those of the complainant.

When we consider the willingness of the complainant to take advantage of the agreement of March 27th in the main case and his eagerness to repudiate it under the motion to modify and dissolve the injunction, and when we consider the further fact set up in the affidavit of Weinmann in the main case (page 18), that he will do nothing to aid the hotel company unless he is paid \$11,500 and which statement has not yet been denied by complainant, it seems that his statements ought not to be credited.

And again, the affidavits in this case made by Max Weinmann, Harry Weinmann and John C. Reed, a member of the bar, all indicate the untruthfulness of the statement of the complainant that the agreement is not binding upon him. From the standpoint

of equity the primary question is, ought the injunction be continued in favor of the complainant who stands before the Court in the dual attitude of taking advantage of an agreement when it is helpful and repudiating it when it may be injurious to his claim. It is our contention that he is not before this court with clean hands, that he has not done and is not willing to do equity and that he should be left to his remedy at law for damages.

The order appealed from should be reversed to the end that an order may be entered dissolving the injunction.

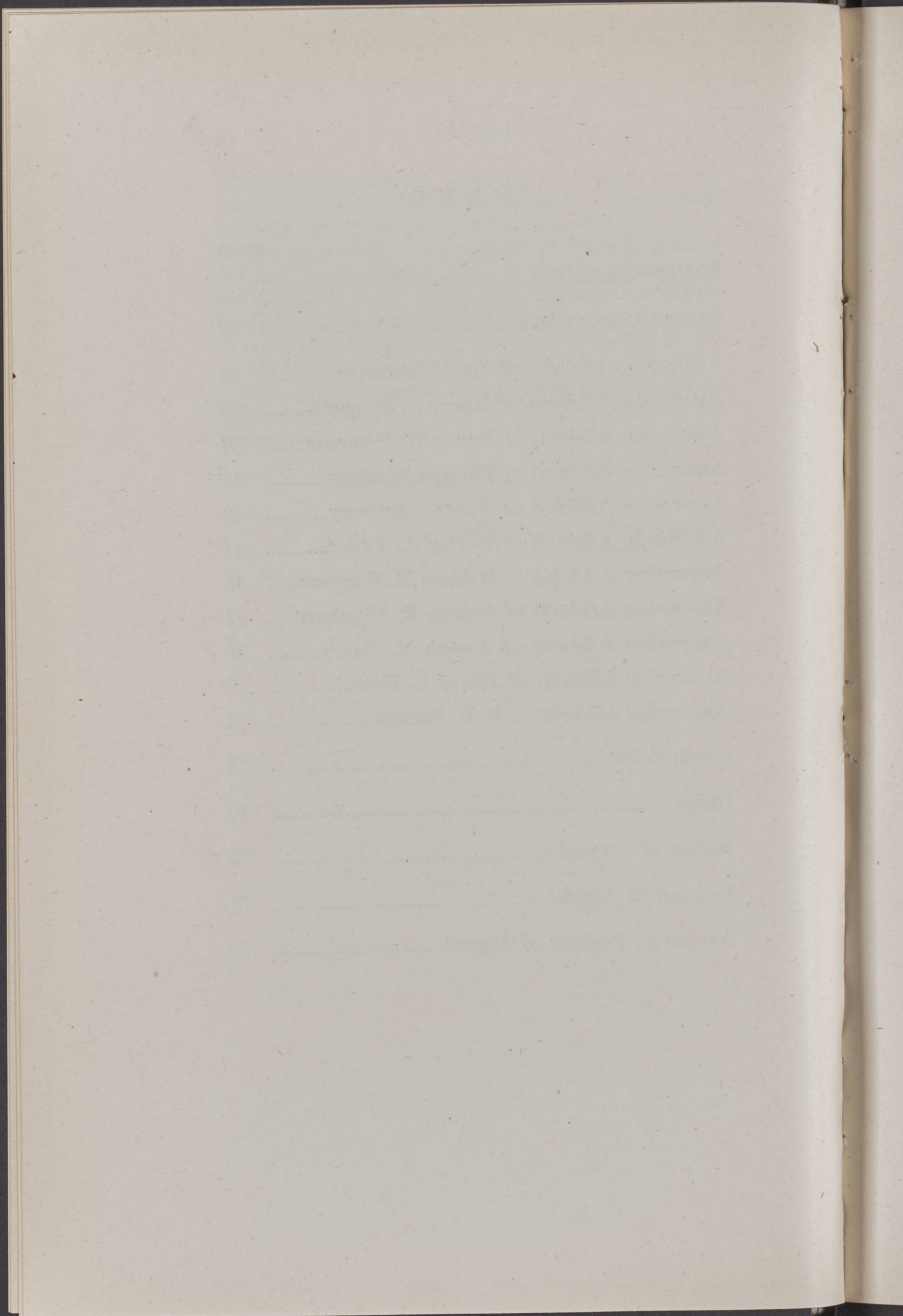
Respectfully submitted,

JOHN C. REED,

*Solicitor for and of Counsel
with Appellants.*

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BILL OF COMPLAINT.

(Filed April 23, 1923.)

IN CHANCERY OF NEW JERSEY.

A true copy.

WM. ELMER BROWN, JR.,
Solr. for Complt.

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*To His Honor, Edwin Robert Walker, Chancellor of
the State of New Jersey:*

Complainant, Hugo Roseberg, of Atlantic City,
New Jersey, respectfully shows that:

20

1. The American Hotel and Garden Company, a corporation of the State of New Jersey, is the owner of certain premises located on the easterly side of New York Avenue and near the Boardwalk, known as No. 169 So. New York Avenue, in said City of Atlantic City.

2. On October 21, 1921, said American Hotel and Garden Company entered into written lease with complainant, whereby it rented and leased to him said premises known as No. 169 So. New York Avenue, in said City of Atlantic City, and adjoining premises up to the hotel entrance, space formerly occupied by Harry Katz as bar and restaurant, for the term of three years from January 1, 1922, at the annual rent of five thousand (\$5,000.00) dollars,

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payable as follows: Twelve hundred fifty (\$1250.00) dollars on the first day of January, April, June and August.

3. Complainant is now in possession of said premises, by virtue of the terms and provision of said written lease.

10 4. On December 31, 1922, the premises herein mentioned were damaged by fire, which started in other parts of the building of which said premises form a part. The damages resulting from said fire in and to the premises occupied by complainant were immediately thereafter repaired, and the premises placed in condition as they were previous to said fire damage.

20 5. Subsequent thereto said American Hotel and Garden Company entered into agreement with J. G. McCrory Company, whereby it rented to said McCrory Company the entire building owned by it, of which the premises occupied by complainant form a part. Said entire building has been so rented and leased for a long term of years, and said American Hotel and Garden Company has given its consent to the making of certain alterations in said building, to meet the requirements and suit the convenience of said McCrory Company.

30 6. Previous hereto said American Hotel and Garden Co., as well as said J. G. McCrory Co., have endeavored to make agreement with complainant, whereby complainant would give up possession of said premises occupied by him, in order that said alterations in said building might be made, but complainant has at all times refused to comply with the requests and demands of said American Hotel

and Garden Co. and said McCrory Co., because to have complied therewith would have resulted in considerable damage to complainant.

7. On April 20, 1923, said American Hotel & Garden Co. caused to be served upon complainant a written notice, a copy of which is attached hereto and made a part hereof. Said written notice demands that complainant remove from his said premises, and advises that immediate steps will be taken for the making of alterations in said building, which will completely destroy premises occupied by complainant, for the purposes of the conducting of his business which is a hair-dressing parlor and manicuring establishment. Said American Hotel & Garden Co. attempt to justify said alterations by calling them repairs, and alleging that said repairs are necessary by reason of the damage caused by said fire.

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8. No repairs are necessary to be made in and to the said premises of complainant, or the building of which his premises form a part, by reason of the damage caused by said fire. All of the damage caused by said fire has been repaired, as hereinbefore alleged. Complainant charges that the work which American Hotel & Garden Co. states, in its notice, will be done, is nothing more than the alterations in said building which are desired to be made for the benefit and convenience of said McCrory Co.

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9. Said American Hotel & Garden Co. and said J. G. McCrory Co., either or both of them, through their agents, employes and workmen, have started the work of making said alterations. The work has proceeded so far as to leave a space in the rear

wall of complainant's premises open and exposed to the weather; all the windows in said building have been removed, so that in case of rain or other storm, there is nothing to prevent said storms working damage in and to complainant's premises.

10 10. The interference of said American Hotel & Garden Co. and said J. G. McCrory Co. with complainant's possession of said premises as aforesaid is now, and will in the future, result in irreparable damage and injury to complainant.

Complainant is without adequate remedy in the courts of law and, therefore, prays:

1. That American Hotel & Garden Co. and J. G. McCrory Co., who are the defendants to this suit, may answer this bill of complaint without oath, and each statement therein made.

20 2. That said American Hotel & Garden Co. and J. G. McCrory Co. may be enjoined from making said alterations in said building, and from interfering with the quiet and peaceful possession thereof by complainant, and that complainant may have such other and further relief as may be agreeable to equity.

30 3. That a writ of subpoena may issue, commanding said defendants to answer this bill and to abide by such decree as this Court may make in the premises.

WM. ELMER BROWN, JR.,
*Solicitor for and of Counsel
with Complainant.*

TO: HUGO ROSEBERG,

In accordance with the Act of the New Jersey Legislature, P. L. A. D. 1874, Page #27, you are hereby notified that the rent for the premises which you now occupy, known and described as #167 South New York Avenue, Atlantic City, New Jersey, and adjoining premises up to the Hotel entrance—Space formerly occupied by Harry Katz as Bar and Restaurant, will cease on and after the service of this notice until such time as the building shall be put in complete repair and you shall be moved into your new store. Said repairs being made necessary by reason of the damage caused by the recent fire. In order to put the building in complete repair it will be necessary for us to remove the roof and all inside structures except the front wall. 10

New foundations, new footings and new steel are required to be put in.

It will be necessary for us to proceed immediately to make these repairs. You are advised that during the course of these repairs, it will be necessary for you to secure new quarters elsewhere for the purpose of conducting your business and to remove your personal property in order that the said personal property may not be damaged by the elements or otherwise. In order to avoid loss of business to you, we have provided space in the McCrory store at the corner, where you can continue to conduct your business. We will arrange to move your personal property and appliances necessary for the conduct of your business and we will pay all cost incurred in the removing and setting up the same at the McCrory store. We will further arrange to store any additional personal property for you free of cost to you. When the new store is completed we will move the appliances used in the conduct of 30

your business to the new store and install them free of cost to you. You will not be required to pay rent for the use and occupation of the McCrory store.

We regret the inconvenience caused you by the damages done by the recent fire and we are anxious to have you co-operate with us in order that the inconvenience and loss will be made as light as possible.

Very truly yours

10 AMERICAN HOTEL & GARDEN COMPANY
H. WEINMANN V. Pres.

Dated April 20th, A. D. 1923.

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

20 HUGO ROSEBERG, of the City of Atlantic City,
County of Atlantic, and State of New Jersey, of full
age, being duly sworn according to law, on his oath,
deposes and says:

1. The American Hotel & Garden Co., a corporation of the State of New Jersey, is the owner of certain premises located on the easterly side of New York Avenue and near the Boardwalk, known as No. 169 So. New York Avenue, in said City of Atlantic City.

30 2. On October 21, 1921, said American Hotel & Garden Co. entered into written lease with me, whereby it rented and leased to me said premises known as No. 169 So. New York Avenue, in said City of Atlantic City, and adjoining premises up to the hotel entrance, space formerly occupied by

Harry Katz as bar and restaurant, for the term of three years from January 1, 1922, at the annual rent of five thousand (\$5,000.00) dollars, payable as follows: Twelve hundred fifty (\$1250.00) dollars on the first day of January, April, June and August.

3. I am now in possession of said premises, by virtue of the terms and provisions of said written lease.

4. On December 31, 1922, the premises herein mentioned were damaged by fire, which started in other parts of the building of which said premises form a part. The damages resulting from said fire in and to the premises occupied by me were immediately thereafter repaired, and the premises placed in condition as they were previous to said fire damage.

5. Subsequent thereto said American Hotel & Garden Co. entered into agreement with J. G. McCrory Co., whereby it rented to said McCrory Co. the entire building owned by it, of which the premises occupied by me form a part. Said entire building has been so rented and leased for a long term of years, and said American Hotel & Garden Co. has given its consent to the making of certain alterations in said building, to meet the requirements and suit the convenience of said McCrory Co.

6. Previous hereto said American Hotel & Garden Co., as well as said J. G. McCrory Co., have endeavored to make agreement with me, whereby I would give up possession of said premises occupied by me, in order that said alterations in said building might be made, but I have at all times refused

to comply with the requests and demands of said American Hotel & Garden Co. and said McCrory Co., because to have complied therewith would have resulted in considerable damage to me.

7. On April 20, 1923, said American Hotel & Garden Co. caused to be served upon me a written notice, a copy of which is attached hereto and made a part hereof. Said written notice demands that
10 I remove from my said premises, and advises that immediate steps will be taken for the making of alterations in said building, which will completely destroy premises occupied by me, for the purposes of the conducting of my business which is a hair-dressing parlor and manicuring establishment. Said American Hotel & Garden Co. attempt to justify said alterations by calling them repairs, and alleging that said repairs are necessary by reason of the damage caused by said fire.

20

8. No repairs are necessary to be made in and to the premises occupied by me, or the building of which my premises form a part, by reason of the damage caused by said fire. All of the damage caused by said fire has been repaired, as herein before alleged; and I hereby charge that the work which American Hotel & Garden Co. states, in its notice, will be done, is nothing more than the alterations in said building which are desired to be made
30 for the benefit and convenience of said McCrory Co.

9. Said American Hotel & Garden Co. and said J. G. McCrory Co., either or both of them, through their agents, employes and workmen, have started the work of making said alterations. The work has proceeded so far as to leave a space in the rear

wall of my premises open and exposed to the weather; all of the windows in said building have been removed, so that in case of rain or other storm, there is nothing to prevent said storms working damage in and to my premises.

10. The interference of said American Hotel & Garden Co. and said J. G. McCrory Co. with my possession of said premises as aforesaid is now, and will in the future, result in irreparable damage and 10 injury to me.

HUGO ROSEBERG.

Sworn and subscribed to before me this 23rd day of April, 1923.

LEE F. WASHINGTON,
M. C. C. of N. J.

ORDER TO SHOW CAUSE.

(Filed April 23, 1923.)

IN CHANCERY OF NEW JERSEY.

10

A true copy.

WM. ELMER BROWN, JR.,

Solr. for Compl't.

20

Between

HUGO ROSEBERG,

Complainant,

and

AMERICAN HOTEL & GAR-
DEN Co. and J. G. Mc-
CRORY Co.,*Defendants.*On Bill for Injunc-
tion.

Order to Show Cause.

30

Upon reading and filing the bill of complaint in said cause and the affidavit thereto annexed, and on motion of Wm. Elmer Brown, Jr., solicitor for and of counsel with complainant:

It is on this twenty-third day of April, 1923, ordered that the defendants, American Hotel & Garden Co. and J. G. McCrory Co., show cause before the Chancellor, at Chancery Chambers, Real Estate and Law Building, Atlantic City, New Jersey, on the

first day of May next, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue, restraining the defendants, American Hotel & Garden Co. and J. G. McCrory Co., their contractors, agents, servants and employes, from making, building or completing any repairs or alterations to the building owned by said American Hotel & Garden Co., and located on the easterly side of So. New York Avenue and on the Boardwalk, and particularly that part thereof 10 which is now occupied by Hugh Roseberg, complainant herein, as tenant, and better known as No. 169 So. New York Avenue, in the manner described in said bill of complaint, and from interfering with the quiet and peaceful enjoyment of the possession thereof by complainant, as is in said bill of complaint alleged.

And it is further ordered that the said American Hotel & Garden Co. and J. G. McCrory Co., their contractors, agents, servants and employes, in the 20 meantime and until the further order of this Court in the premises, desist and refrain from making said repairs and alterations to said building or said premises occupied by complainant herein as aforesaid, or from interfering with the quiet and peaceful enjoyment of possession thereof by complainant, in the manner alleged in said bill of complaint.

And it is further ordered that a copy of said bill of complaint, affidavit, and of this order, which shall be certified by the solicitor of the complainant, be 30 served upon the said defendants or their solicitor within two days from the date of this order.

E. R. WALKER,
C.

Respectfully advised.

R. H. INGERSOLL,
V. C.

ANSWERING AFFIDAVIT.
IN CHANCERY OF NEW JERSEY.

10	Between HUGO ROSEBERG, <i>Complainant,</i> and AMERICAN HOTEL AND GARDEN COMPANY, <i>et</i> <i>al.,</i> <i>Defendants.</i>	}	On Bill, etc. On Order, etc. Answering Affidavit.
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20 STATE OF PENNSYLVANIA, }
 PHILADELPHIA COUNTY, } ss.

MAX WEINMANN, being duly sworn, on his oath,
deposes and says:

30 1. I am president of American Hotel and Garden
 Company, one of the defendants in this cause above
 entitled, which-defendant is a corporation, organ-
 ized under the laws of New Jersey, and I have been
 such president of said corporation defendant, from
 the date of its organization. I know Hugo Rose-
 ber, the complainant, and have known him for at
 least thirteen years last past.

2. The said corporation defendant, owns a parcel
of land, in the City of Atlantic City, New Jersey,

at New York Avenue and the Boardwalk, described as to location, as follows:

BEGINNING, at a point on the Northeast side of New York Avenue and the Boardwalk, at the intersection of said Northeasterly side of New York Avenue, with the Northwesterly line of the property described as #1, and running thence (1) along said Northeasterly line of New York Avenue, in a Northwesterly direction, One hundred feet, more or less, to the Northwesterly line of the American Hotel and Garden property; thence (2) running in a Northeasterly direction, along the said Northwesterly line of the American Hotel and Garden property, fifty feet, more or less, thence (3) running in a Southeasterly direction, parallel with New York Avenue, One hundred feet, more or less, to the said Northwesterly line of the property described as #1; thence (4) running along said Northwesterly line of the property described as #1, in a Southwesterly direction, fifty feet, more or less, to the aforesaid mentioned point or place of beginning.

Prior to December 31st, 1922, there was erected and stood upon said land, a structure or building, designed and occupied for hotel purposes, formerly known as "American Hotel and Garden," and more recently called "Moulin Rouge," which structure covered the entire lot of land, and had been theretofore leased, for a period of years, at a large rental.

3. On December 31st, 1922, aforesaid, a fire occurred on said property, which completely destroyed the said hotel building, and its furnishings, leaving nothing of the structure unconsumed and

standing, save the exterior walls, which were of brick. The loss suffered by the company defendant, by reason of said fire, was approximately fifty-five thousand dollars (\$55,000), against which it was insured in the sum of fifteen thousand dollars (\$15,000). Said outer walls are still standing, but are in danger of falling, and require shoring up for the safety of passers by, and persons happening to be in the vicinity of the ruins of said building.

4. Hugo Roseberg, the complainant, at the time of said fire, was in possession of and occupied a small portion of the ground floor space, nearest the Boardwalk of said property, under a lease, made between him and said defendant corporation, bearing date October 21st, 1921, for the term of three years, from January 1st, 1922, at the annual rent or sum of five thousand dollars (\$5,000), payable
20 in four installments of twelve hundred and fifty dollars (\$1250.00), on the first days of January, April, June and August, in each year during said term, a copy of said lease is annexed hereto and hereby made a part of this affidavit, marked Exhibit "A." The fire, to which I have above referred, completely destroyed the hotel and the super-structure above the room or space occupied by the complainant, was greatly damaged and is still in a dangerous condition. Immediately after
30 the fire was extinguished, paper roofing was placed over the part of the premises rented to and occupied by the complainant, and temporary repairs were made to enable him to continue the business of hair-dressing, in which he was engaged in carrying on, prior to and at the time of the fire, but the hotel part of said building and the super-structure above the part occupied by complainant, was al-

lowed to remain in the condition in which the fire left it, awaiting the adjustment of the loss by the fire insurance company, in which condition it still remains.

5. After the making of said temporary repairs of the roof of that part of said building, occupied by complainant, the defendant J. G. McCrory Company, who is lessee of the Boardwalk front of said property, approached the officers of the defendant American Hotel and Garden Company, and proposed that said last named company, lease to it, for a term of years, said property, formerly used as a hotel, including that portion or space occupied by the complainant, upon terms highly advantageous to said American Hotel and Garden Company, and upon such proposal being made, I, on behalf of and representing said last named company, called on the complainant and informed him, that on behalf of said American Hotel and Garden Company, I could negotiate a lease with the McCrory Stores Corporation, for the property, including the space occupied by him, but that I would not do so, nor enter into any agreement or arrangement with the McCrory Company, involving any lease of the property, until I should have first made satisfactory arrangements with him, as to the part of the premises occupied by him, and I proposed to him at that interview, that I would give him a new store in exchange for the store he then occupied, that such new store would have new heating and a toilet, that I would arrange with the McCrory Company, to put a sign on their building at the corner of New York Avenue and Boardwalk, with his name upon it, and a hand pointing to his place of business, and endeavor in every way, to treat him fairly, in the matter of the proposed exchange of

stores by him, and he then said he would not stand in the way of the making of the proposed lease, by the American Hotel and Garden Company, to the McCrory Stores Corporation. Shortly after the interview just described, I left for California, leaving the matter of the completion of the arrangements with complainant, for the removal of his establishment to be perfected by the vice-president of said American Hotel and Garden Company, during my
10 absence. On my return, about March 26th, 1923, I learned that the negotiations with the complainant were still pending, and incomplete, and I again visited the complainant, with the intention of finally settling the matter; and on March 27th, 1923, the complainant and the American Hotel and Garden Company, through me, its president, agreed, and made and signed a writing, embodying the agreement as follows:

“March 27th, 1923.

20 We the undersigned, agree to the following arrangements. The American Hotel and Garden Company to pay Mr. Hugo the sum of \$600 which is an electric light bill, for repairs amounting to \$300 and allow him sum \$300 on account loss after fire, and on completion of the new store or stores, rent of store or 2 stores to be \$1800 each. They will have the option to take one or two. We agree to install all
30 fixtures, electric fixtures and plumbing, papering and painting, and remove all goods in old store to new. I will vacate my present store on completion of the new store.

American Hotel & Garden Co.

M. Weinmann, Pres't.

Hugo Roseberg.

Witness:

Mary O'Donnell.”

6. After the making, signing and delivery of the agreement just mentioned, I resumed negotiations with the McCrory Stores Corporation, touching the leasing to that company of the hotel property, with the result that on April 11th, 1923, a lease in writing between American Hotel and Garden Company and McCrory Stores Corporation, was formally signed and delivered, covering the premises on the Boardwalk, and the premises damaged by the fire, including the space rented to and occupied by complainant. 10

7. The term granted by the lease last mentioned is twenty years, from May 1st, 1923, at the yearly rent of sixty thousand dollars (\$60,000), to be paid in equal monthly installments of five thousand dollars (\$5,000) each, during said term, and there is contained in said lease, amongst other covenants, and provisions, a covenant and provisions which reads as follows:

“It is understood and agreed that the said lessee is to be given untenanted possession of said premises, on the first day of May, nineteen hundred and twenty-three, and that the lessee will immediately, upon obtaining possession of the hereby demised premises, and as rapidly as is reasonably possible, restore or rebuild the old hotel building on the rear of the demised premises, to such condition and for such legitimate purposes as the lessee may desire. It being understood and agreed that the insurance money, in the amount of not less than \$15,000 accruing by reason of the recent fire, in the hotel property, on the rear of the demised premises, is to be paid to the lessee by the lessor, upon the signing of this lease, the 20 30

same to be applied to the restoration or rebuilding of the old hotel building by the lessee."

- After the execution and delivery of said lease the said McCrory Stores Corporation, the lessee, notified me, as president of the said lessor company, that it was desired and intended by said lessee corporation to immediately commence the work of restoring the building damaged by fire, as aforesaid,
- 10 which would necessitate tearing down the entire remaining part of the structure a part of which is occupied by complainant. I thereupon called upon the complainant, having previously given him a notice in writing, a copy of which, marked Exhibit "B" is annexed hereto and made a part hereof; and told him that I had arranged for temporary quarters for him, in the McCrory store, and that we would move him to that location, and from there
- 20 to the new store, to be built by the American Hotel and Garden Company, as soon as the same could be completed, all of which would be done without expense to him. But, he refused to move into the McCrory store, and said he would not move anywhere, or give up the possession of the place he then occupied, and would not agree to anything, or do anything, unless he was paid by the American Hotel and Garden Company, eleven thousand five hundred dollars (\$11,500); that he had been advised
- 30 that the American Hotel and Garden Company had made a long term lease with the McCrory Stores Corporation, at a large rental, and that he proposed to be paid well for the inconvenience caused him by reason of the fire.

8. Said fire completely destroyed the American Hotel and Garden Company's said building. The

same cannot be rebuilt in accordance with ordinances in force in Atlantic City, governing the subject without demolishing the foundations, putting in new footings and new steel, and rebuilding the entire roof, which is impossible, with the complainant occupying the part of the premises he now occupies.

9. Said fire occurred without fault or neglect on the part of the American Hotel and Garden Company, its officers or servants. Said company and the officers thereof, have always acted toward complainant, and dealt with him in the utmost good faith, and have endeavored to assist him, and extricate the company from the embarrassment, inconvenience and loss, occasioned by said fire. The complainant well knows that it is impossible to make the repairs necessitated by said fire, without his co-operation; that he occupies only a small portion of the entire premises, and that unless said company defendant is permitted to proceed with said repairs, or restoration, almost immediately with the improvements already commenced, it will incur a loss of approximately fifty thousand dollars (\$50,000), in addition to such cause of action as may arise out of its inability to perform its covenants, contained in said lease, entered into by it, with the McCrory Stores Corporation, as aforesaid. And yet, notwithstanding this writing, signed by him, by means of which defendant company was induced to contract with and incur a legal liability to said defendant McCrory Stores Corporation, complainant refused to carry out the arrangement so assented to by him, and is taking advantage of the situation in which defendant, by relying upon his written engagement, has placed itself to exhort a large sum of money from defendant company.

10 10. The complainant sublet to one Minnie Allen, a part of the premises leased to him, as aforesaid, without the written consent of the defendant company, his lessor. On April 1st, 1923 the sum of twelve hundred and fifty dollars (\$1250), became due and payable, under the terms and provisions of the lease held by complainant, as rent for the premises occupied by him, which lease provides that, in cash of any breach of any of the covenants contained therein, by the lessee, the American Hotel and Garden Company, the lessor, may elect to declare the said lease null and void. On April 24th, 1923, said American Hotel and Garden Company elected to declare said lease null and void, and notified the complainant of its said election, by written notice thereof, served upon him personally, setting forth the covenants and the breaches thereof, upon which its said election was founded, a copy of which notice is hereto annexed, as Exhibit "C," and is made a
20 part hereof.

MAX WEINMANN.

Sworn and subscribed to before me, this 30th day of April, A. D. 1923.

ANNA M. DORNAN,
Notary Public.

My commission expires April 1, 1927.

30 THIS INDENTURE,
Made the twenty-first day of October-1921-A. D.
BETWEEN AMERICAN HOTEL & GARDEN.,
of the City of Atlantic in the County of Atlantic
and State of New Jersey of the first part, and
HUGO ROSEBERG of the City of Atlantic in the

County of Atlantic and State of New Jersey of the second part.

WITNESSETH, that the said party of the first part hath let, and by these presents doth grant, demise and to farm let unto the said party of the second part Premises known as #169 New York Ave., and adjoining premises up to the Hotel entrance—Space formally occupied by Harry Katz as Bar and Restaurant. with the appurtenances, for the term of Three years from the first day of January nineteen hundred and twenty-two at the annual rent or sum of Five Thousand (5000) Dollars to be paid as follows:

Twelve Hundred and Fifty (1250) Dollars on the first days of January, April, June, and August; PROVIDED, that if any rents shall be due and unpaid, or if default shall be made in any of the covenants, conditions and rules herein contained, then it shall be lawful for the said party of the first part, at his option, without notice and without any demand for said rent, or for the performance of said covenants, conditions and rules and regulations, to declare this lease null and void and said term ended, and to re-enter the said premises and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof, or otherwise however.

AND the said party of the second part doth hereby covenant and agree to and with the said party of the first part to pay the said rent in the proportions and upon the conditions aforesaid; and not to assign this lease, and further agrees to observe the following, which are hereby agreed to be not only covenants, but also rules and regulations governing said premises, viz: not to underlet said premises, or any part thereof, nor permit any person or per-

sons to occupy the same, or any part thereof, nor use or permit any part thereof to be used for any other purpose than

nor make or suffer to be made any alterations therein, without the written consent of the said party of the first part; and also, at the expiration of said term, to yield up and surrender possession thereof, with the appurtenances, in as good state and condition as the same now are, or may be put into by the said party of the first part, reasonable wear and tear thereof and accidents happening by fire or other casualties excepted.

AND IT IS FURTHER AGREED, that the acceptance of rent by the party of the first part, after knowledge of any breach by the party of the second part of said covenants, conditions, rules and regulations, or of any of them, or suffering said party of the second part to remain in possession thereafter, shall not operate as a waiver by said party of the first part of said covenants, conditions, rules and regulations, or of any of them, or of any breach thereof.

And the said party of the first part doth covenant that the said party of the second part, on paying said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

30 IN WITNESS WHEREOF, the said parties have interchangeably set their hands and seals hereto the day and year first written.

AMERICAN HOTEL & GARDEN CO., (CORP.)
(SEAL)

M. Weinmann, President.
Hugo Roseberg.

SIGNED, SEALED AND DELIVERED }
IN THE PRESENCE OF }

H. Weinmann
Mary M. O'Donnell.

LEASE

American Hotel & Garden Co.,

&

Hugo Roseberg.

Dated January 1, 1922.

10

Expires January 1, 1925.

TO: HUGO ROSEBERG,

In accordance with the Act of the New Jersey Legislature, P. L. A. D. 1874, Page #27, you are hereby notified that the rent for the premises which you now occupy, known and described as #167 South New York Avenue, Atlantic City, New Jersey, and adjoining premises up to the Hotel entrance-Space formally occupied by Harry Katz as Bar and Restaurant, will cease on and after the service of this notice until such time as the building shall be put in complete repair and you shall be moved into your new store. Said repairs being made necessary by reason of the damage caused by the recent fire. In order to put the building in complete repair it will be necessary for us to remove the roof and all inside structures except the front wall. 20

New foundations, new footings and new steel are required to be put in.

It will be necessary for us to proceed immediately to make these repairs. You are advised that during the course of these repairs, it will be necessary 30

for you to secure new quarters elsewhere for the purpose of conducting your business and to remove your personal property in order that the said personal property may not be damaged by the elements or otherwise. In order to avoid loss of business to you, we have provided space in the McCrory store at the corner, where you can continue to conduct your business. We will arrange to move your personal property and appliances necessary for the
10 conduct of your business and we will pay all cost incurred in the removing and setting up the same at the McCrory store. We will further arrange to store any additional personal property for you free of cost to you. When the new store is completed we will move the appliances used in the conduct of your business to the new store and install them free of cost to you. You will not be required to pay rent for the use and occupation of the McCrory store.

20 We regret the inconvenience caused you by the damage done by the recent fire and we are anxious to have you co-operate with us in order that the inconvenience and loss will be made as light as possible.

Very truly yours,
 AMERICAN HOTEL & GARDEN COMPANY,
 H. WEINMANN, VICE-PRES.
 Dated April 20th, A. D. 1923.

30

TO: HUGO ROSEBERG:

TAKE NOTICE, that your lease, made the twenty-first day of October, 1921, contains the following provisions:

“PROVIDED, that if any rents shall due an unpaid, or if default shall be made in any of

the covenants, conditions and rules herein contained, then it shall be lawful for the said party of the first part, at his option, without notice and without any demand for said rent, or for the performance of said covenants, conditions and rules and regulations, to declare this lease null and void and said term ended, and to re-enter the said premises and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof, or 10 otherwise however.

AND the said party of the second part doth hereby covenant and agree to and with the said party of the first part *to pay the said rent in the proportions and upon the conditions aforesaid*; and not to assign this lease, and further agrees to observe the following, which are hereby agreed to be not only covenants, but also rules and regulations governing said premises, viz: *not to underlet* said premises, 20 or any part thereof."

Further Take Notice, that you have failed to pay the rent due April 1st, 1923, and that you have underlet a part of the premises, without written consent.

Therefore, in accordance with the provisions above recited, and exercising the option therein reserved, the lessor does hereby declare your lease null and void, and the term ended.

DATED April 24th, 1923.

AMERICAN HOTEL AND GARDEN COMPANY, 30

BY: H. WEINMANN, Vice-Pres.

THIS INDENTURE made this 11th day of April, Nineteen Hundred and Twenty-three (1923), by and between THE AMERICAN HOTEL AND GARDEN COMPANY, a Corporation existing under and by virtue of the laws of the State of New Jersey, hereinafter throughout called the lessor, and the McCrory Stores Corporation, a Corporation existing under and by virtue of the Laws of the State of Delaware, hereinafter throughout called the lessees.

10 WITNESSETH: That the said party of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained on the part and behalf of the party of the second part, it successors or assigns, to be paid, kept and performed, hath leased and demised and to farm let, and by these presents doth lease, demise and farm let, unto the said party of the second part, its successors or assigns, all
20 those two (2) certain lots or tracts of land, together with all the buildings, improvements or appurtenances thereto, or as now erected thereon, lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey, as follows:

30 1. Beginning at a point on the Northeast side of New York Avenue, at the intersection of said northeasterly side of New York Avenue, with the northwesterly line of the Boardwalk; thence running (1) along said northeasterly line of New York Avenue in a northwesterly direction One Hundred and ten feet (110') more or less to the southeasterly line of the American Hotel and Garden property; thence (2) running in a northeasterly direction along the said northwesterly line of the lessor's property fifty feet (50'); thence (3) running in

a southeasterly direction parallel to New York Avenue One Hundred and ten feet (110') more or less to the said Northwesterly line of said Boardwalk; thence (4) running along said northwesterly line of said Boardwalk; in a southwesterly direction fifty feet (50') more or less to the first mentioned point or place of beginning; being the same premises as now occupied by the lessee.

2. Beginning at a point on the northeast side 10
of New York Avenue at the intersection of said
northeasterly side of New York Avenue with
the northwesterly line of the property de-
scribed above as #1; thence running (1) along
said northeasterly line of New York Avenue,
in a Northwesterly direction One Hundred feet
(100') more or less to the Northwesterly line
of the American Hotel and Garden property;
thence (2) running in a Northeasterly direc-
tion along the said northwesterly line of the 20
American Hotel and Garden property fifty feet
(50') more or less; thence (3) running in a
southeasterly direction parallel to New York
Avenue, One Hundred feet (100') more or less
to the said northwesterly line of the property
described above as #1; thence (4) running
along said northwesterly line of the property
described/above as #1 in a southwesterly di-
rection fifty feet (50') more or less to the first
mention point or place of beginning; being the 30
same property as now occupied by or was for-
merly known as "The American Hotel and
Garden," or, or more recently as the "Moulin
Rouge."

TO HAVE AND TO HOLD the said above men-
tioned and described premises with all buildings,

improvements and appurtenances unto the said party of the second part, its successors or assigns from the first day of May, Nineteen Hundred and Twenty-three, for and during, and until the full end and term of Twenty years thence next ensuing, and fully to be completed and ended, yielding and paying therefor, unto the said party of the first part, its successors and assigns, yearly, and every year, during the said term hereby granted, the
10 yearly rent or sum of SIXTY THOUSAND and 00/1000 (\$60,000) DOLLARS, payable in Twelve (12) monthly installments of FIVE THOUSAND (\$5,000) DOLLARS per month on the last day of each month during the said term.

And the said lessee, for itself and its successors or assigns, doth covenant and agree, to and with the said Lessor to pay the said yearly rent in the proportions and upon the conditions aforesaid; and the said Lessee does covenant and agree that it
20 will not at any time use or employ or cause, procure, permit or suffer to be used or employed on said premises, or any part thereof any brewery, distillery, slaughter house, smith shop, carpenter shop, forge or furnace, steam engine, brass foundry, nail or other foundry, soap, candle, starch or other factory, or for any other dangerous—noxious or offensive purpose or establishment whatsoever; not for any business deemed extra hazardous, on account of fire; without the written consent of the
30 Lessor; and also at the expiration of said term or sooner termination thereof, to yield up and surrendered the possession thereof with the appurtenances that may be put in by the said Lessee, excepting trade fixtures, reasonable wear and tear and accident happening by fire or other casualties excepted.

And the said Lessor does covenant that the said

Lessee on paying the said rent, and performing the covenants aforesaid shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

And the said Lessor does covenant and agree to pay all taxes, and assessments that may be levied on said realty. It being understood and agreed by and between the parties hereto that should the net taxes paid by the Lessor for any year of the term of this lease, exceed the sum or amount of TWELVE 10 THOUSAND (\$12,000) DOLLARS, that the Lessee will pay to the Lessor upon demand any such excess over \$12,000, paid by the Lessor.

And the said Lessee doth hereby covenant, promise and agree to pay all bills rendered for gas, electricity, sewerage or water consumed in or about the said demised premises during the continuance of this lease, or any renewal thereof.

Said Lessee further covenants and agrees to indemnify and keep harmless the said Lessor from 20 any and all claims or actions for damages, or injuries, either to person or property, resulting from the careless or negligent occupancy or use by the said Lessee, or his employees or servants, of said premises or elevators, machinery, boilers, electric, steam or other appliances now in or hereafter to be placed in or used about or on said premises, or in the conduct of the business of said Lessee or subtenant, or from any claim or claims, action or actions, arising from the absence or insufficiency of 30 any requirements or regulations that now are or hereafter may be enacted or promulgated with reference to buildings.

Said Lessee further waives the benefit of any laws now in force or hereafter to be enacted exempting property from execution and distress for rent.

Provided, that if any rent shall be due and unpaid for a period of fifteen days after its due date, that the said Lessor shall thereupon give the Lessee a written demand for said rent; and upon failure of the said Lessee to pay the said rent within thirty days after the service upon him of said written demand for the same, this lease shall at the option of the Lessor, cease and determine; and it shall thereupon be lawful for the said Lessor to re-enter
10 the said premises and to remove all persons therefrom and take possession thereof, or to proceed by action for the recovery of the possession thereof, or otherwise howsoever; provided, however, that if the said Lessee shall at any time before its actual dispossession pay or offer to pay all arrearages in rent and costs of said proceedings, that this lease will remain in full force and effect.

It is further provided that if default shall be made by said Lessee in any of the covenants herein
20 contained that the Lessor may give written notice to the said Lessee of the violation of said covenant or covenants; and upon failure of the said Lessee to correct the said violation within thirty days after the service of said written notice upon him, this lease shall at the option of the Lessor cease and determine; and it shall thereupon be lawful for the said Lessor to re-enter the said premises and to remove all persons therefrom and to take possession thereof.

30 The Lessee, shall at its own proper cost and expense keep every part of the premises, including the interior and exterior, in good order and repair; keep the drain and waste pipes clean and clear of obstructions and keep the premises free from ashes and other refuse, and further at the Lessor's request comply with any lawful require-

ments under any notice from any of the constituted authorities, including the Board of Health.

Should the premises become deserted or vacated, the Lessor may enter the same, either by force or otherwise, having the consent of the Lessee by virtue of this lease, to break open locked doors or shutters for that purpose, without the Lessor being liable to any prosecution or action therefor, and may distrain for rent and also relet the premises as agent of the Lessee for any unexpired portion 10 of the term and receive the rent therefor.

The Lessee shall and will permit an examination of the premises upon an order from the Lessor, or its authorized agent, during regular business hours.

The Lessee doth covenant and agree that it will, during the term of this lease, keep the building or buildings as are now or may hereafter be erected on the demised premises or any part thereof, insured in its name, against fire and tornado to an amount covering the cost of the erection of the 20 building or buildings; in the event of the said buildings or buildings being partially or entirely destroyed by fire or any other casualty the said Lessee doth covenant to use and apply all of the insurance money that shall accrue in and towards the rebuilding of said building or buildings; it is provided that the said Lessor, at its option may require the insurance company insuring said building or buildings to pay the insurance money accruing in the event of a fire to any national or state 30 bank in Atlantic City or any Trust Company, organized under the laws of the State of New Jersey, and with a place of business at Atlantic City, as trustee; the said trustee to pay the said insurance money to the contractor or contractors for the rebuilding of said building or buildings or to the materialmen or workmen, in the manner and form

that is usually followed in New Jersey in the making of construction or advance money loans on buildings.

The Lessee doth covenant and agree that it will use every precaution against fire, and will not do, or willingly suffer to be done any act, matter or thing, whereby or in consequence whereof the fire insurance or other insurance on the demised premises, or any part thereof shall become void or suspended, or by which the said premises shall be
10 rated as a more hazardous risk than when first erected, and shall and will, during the said term, and at the termination thereof deliver up the said premises in the same good order and repair, reasonable wear and tear and damage by accidental fire, the elements, or other casualty excepted.

In event of the building or buildings now erected or which may hereafter be erected upon said premises being totally destroyed by fire or
20 other casualty, the rent shall cease from the happening of said destruction for a period of not more than three months, during which time the premises shall be rebuilt by the Lessee; provided that if the building or buildings are not finished in three months, the Lessee shall resume paying rent.

It is understood and agreed that the said Lessee is to be given untenanted possession of said premises on the first day of May, Nineteen Hundred and Twenty-three, and that the Lessee will
30 immediately, upon obtaining possession of the hereby demised premises and as rapidly as is reasonably possible, restore or rebuild the old Hotel building on the rear of the demised premises to such condition and for such legitimate purposes as the Lessee may desire. It being understood and agreed that the insurance money, in an amount to be not less than Fifteen Thousand and 00/100 (\$15,000.00)

accruing by reason of the recent fire in the Hotel Property on the rear of the demised premises, is to be paid to the Lessee by the Lessor upon the signing of this lease, and same to be applied in the restoration or rebuilding of the old Hotel Building, by the Lessee.

Any alterations, improvements or additions to the building or buildings as now or which may hereafter be erected upon the demised premises are to be built in accordance with the requirements of the Municipal Authorities; and upon the completion of the alterations, improvements, or additions to the said building or buildings, release of liens are to be furnished to Lessor covering the entire cost of material, labor and construction; and at the end of this lease, or sooner termination thereof, the building or buildings and all fixtures, except shelvings, counters, mirrors, desks, gas and electric fixtures or other trade fixtures, shall remain and revert to the Lessor.

It is understood and agreed by and between the parties hereto that upon the execution of this lease by all the parties hereto, and the delivery of a copy thereof to each of the parties hereto, that a certain Indenture of Lease dated December 3rd, 1909, by and between the American Hotel and Garden Company, as Lessor, and J. G. McCrory, as Lessee, is to become null and void and of no effect as of May 1st, 1923.

It is understood and agreed that the Lessee has the right to make such improvements, alterations and additions to the premises leased as it requires for its purpose and that all such improvements, alterations and additions made to the buildings proper are to become a part of the property and are to remain at the termination of this lease.

It is understood and agreed that any materials

such as Brick, Wood, Glass, Iron, Stone, or any other material now a part of the property may be used by the Lessee or disposed of to the best advantage by the Lessee in making the new improvements.

It is further mutually agreed by and between the parties hereto that the Lessee may have the privilege and right to sublet any or all of the premises hereby leased for any or all the term hereof, but
 10 that the Lessee shall at all times remain responsible for the rent and other conditions and covenants mentioned herein, and in no event may this lease be assigned without the written consent of the Lessor.

All notices herein provided, to be given by either party to the other, are to be given by Registered United States Mail addressed to the last known Post Office address of the party to whom it is sent.

This agreement shall be binding upon the successors or assigns of the parties hereto.

20 IN WITNESS WHEREOF, the Lessor has caused the due execution of this lease by the President, duly attested by its Secretary, and has caused its corporate seal to be duly affixed, and the Lessee has caused the due execution of this Lease by its Vice-President, duly attested by its Secretary and has caused its corporate seal to be duly affixed, the day and date first above written.

THE AMERICAN HOTEL AND GARDEN
 COMPANY

30

By

President.

McCRORY STORES CORPORATION

By

Vice-President.

ATTEST:

Secretary.

ATTEST:

Secretary.

ANSWERING AFFIDAVITS.

IN CHANCERY OF NEW JERSEY.

Between	}		
HUGO ROSEBERG,			
Complainant,		On Bill, etc.	10
and		On Order, etc.	
AMERICAN HOTEL AND		Answering Affi-	
GARDEN COMPANY, et	davits.		
al.,			
Defendants.			

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } ss. 20

HARRY WEINMANN, being duly sworn, on his oath,
deposes and says:

1. I am the vice-president of the American Hotel and Garden Company, one of the defendants in this cause above entitled, which defendant is a corporation, organized under the laws of New Jersey, and I have been such vice-president of said corporation, defendant, from the date of its organization. I know Hugo Roseberg, the complainant, and have known him for at least thirteen years last past. 30

2. The said corporation defendant owns a parcel of land in the City of Atlantic City, County of At-

lantic and State of New Jersey, at New York Avenue and the Boardwalk; said parcel of land is fifty feet in front, on the Boardwalk, by about five hundred and twenty feet, more or less, on New York Avenue. The value of this land is one million dollars (\$1,000,000.00). There is a first mortgage against the Boardwalk front, running back one hundred feet on New York Avenue, of ninety thousand dollars (\$90,000.00.) The land from that point to
10 the extent of the company's ownership on New York Avenue, is free and clear of debt. The company's net worth, is more than one million dollars (\$1,000,000.00). It's rating in Dunn and Bradstreet's, at the present time, is from three hundred thousand dollars, to four hundred thousand dollars, A. A. The mortgage mentioned above, is the only lien against the company's property.

3. The improvements on the property of the defendant, the American Hotel and Garden Company,
20 were as follows: prior to the fire of December 31st, 1922: The Boardwalk front, extending back to Hugo's hair-dressing parlor, was improved by a store and apartments over the same, leased to the McCrory Stores Corporation. This is about one hundred feet on New York Avenue, by fifty feet on the Boardwalk. Then comes the American Hotel and Garden: This building was about fifty by one hundred and five feet; was a brick structure, three
30 stories high; contained forty bed rooms, lobbys, parlors, kitchens, etc. Then adjoining this, was the Café Bal Tabarin: This was a one story building, with a basement, and occupied a space of fifty by one hundred and twenty feet, more or less, on New York Avenue. The Café Bal Tabarin and the American Hotel and Garden structures, were com-

pletely gutted by the fire which occurred on the date above mentioned.

4. Hugo Roseberg's hair-dressing parlor occupies a small space of one room, in the structure known as the American Hotel and Garden, located nearest the Boardwalk, on the ground floor. The roof and that portion of the hotel structure over Hugo's hair-dressing parlor, was completely gutted by the fire. No attempt was made to completely repair the damage done by the fire, at the Hugo premises; merely temporary repairs were made; a paper roof was put on, and the damage to the superstructure was allowed to remain. 10

5. The location of the new store, which Hugo has agreed to take, by his written agreement of March 27th, 1923, is in the new structure, which is being erected on the site formerly occupied by the Café Bal Tabarin. The contracts for this work have been let, and it is expected that the new stores will be completed with six weeks from May 1st, 1923. 20

HARRY WEINMANN.

Sworn and subscribed to before me, this 30th day of April, A. D. 1923.

HIRAM G. STEELMAN,
M. C. C. of N. J.

ANSWERING AFFIDAVITS.
IN CHANCERY OF NEW JERSEY.

	Between		
10	HUGO ROSEBERG,	}	
	<i>Complainant,</i>		
	and		
	AMERICAN HOTEL & GAR-		
	DEN Co. and J. G. MC-		
	CRORY COMPANY,		On Bill.
	<i>Defendants.</i>		Answering Affi-
			davits.

20 STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } ss.

JAMES W. PETERSON, of full age, being duly sworn according to law, on his oath says:

30 I am the superintendent of building of the City of Atlantic City, County of Atlantic and State of New Jersey. Acting in my official capacity as such superintendent, I made a careful inspection of the buildings damaged by fire at New York Avenue and Boardwalk, I made this inspection on or about the twenty-first day of April, A. D. 1923. I found that the buildings known as the American Hotel and Bal Tabarin Café, occupy a space on New York Avenue of about two hundred feet by fifty feet in depth. This is the area of fire damage. I found that the hotel building was fifty per cent destroyed,

that the interior of said building was ninety per cent destroyed beyond the point of repair, the exterior of the hotel building is in good condition with the exception of the poor construction and condition of the bay windows at each end of the hotel building. To completely repair the damage done by the fire, it will be necessary to demolish the interior completely and to put in new footings, new foundations, new steel and new floors. It will be necessary to take down the bay windows at each end 10 of the hotel building and continue the wall in a straight line to each corner. The roof of the entire building will have to be removed and a new roof put on. One of the circular bay windows above referred to is directly over the room on the ground floor, occupied by the Hugo hair-dressing parlor.

I have as superintendent of building of Atlantic City, condemned the circular bay window and roof over Hugo's hair-dressing parlor and the roof of the entire building and the circular bay window 20 nearest Pacific Avenue, and have ordered this removed before proceeding with interior construction. Attached hereto is a copy of the order of condemnation.

JAMES W. PETERSON.

Sworn and subscribed to before me this 30th day of April, A. D. 1923.

HIRAM G. STEELMAN,
M. C. C. of N. J. 30

40 *Answering Affidavit of James W. Peterson*

April 23rd, 1923.

Mr. Thomas Blakely,
Superintendent of Construction,
J. G. McCrory Co.,
New York & Boardwalk,
Atlantic City.

Dear Sir:

After careful inspection of the roof and circular
bay windows on each of the front corners I find
10 them in an unsafe and dangerous condition.

You are hereby notified to remove same as once
before proceeding with the interior construction.

Yours very truly,

JAMES W. PETERSON,
Superintendent of Building.

JWP:MEM

20

30

ANSWERING AFFIDAVIT.
IN CHANCERY OF NEW JERSEY.

Between		
HUGO ROSEBERG,	}	On Bill, etc. 10
Complainant,		
and		
AMERICAN HOTEL AND		
GARDEN COMPANY, et		
al.,		On Order, etc.
Defendants.		Answering Aff- davit.

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } ss. 20

THOMAS BLEAKLEY, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am the superintendent of the McCrory Stores Corporation. As such superintendent, I have charge of the repairs and improvements to be made on the property at New York Avenue and the Boardwalk, Atlantic City, New Jersey.

30

2. This is the property which has been damaged by fire, I am experienced in construction work, and have had charge of operations of this character, for a number of years.

3. I have made an inspection of the American

Hotel and Garden Building and the Café Bal Tabarin. These are the properties which were damaged by the fire. I find that the hotel building was fifty per cent destroyed, and the interior of said building was more than ninety per cent destroyed. The exterior of the hotel building is in poor condition, and I have had to shore the same up, to prevent it from falling in. The superstructure, over that part of the premises occupied by
 10 Hugo, has been completely gutted by fire, and the roof over Hugo's place was a temporary roof, consisting of nothing but roofing paper. To repair the damage done by the fire, it would be necessary to demolish the interior of the American Hotel and Garden building, and to put in new footings, new foundations, new steel, new floors and roofing. All bay-window construction, over Hugo's has been condemned. It is in a dangerous condition now, and should be removed.

20

4. Deponent further says that the repairs and alterations made necessary by reason of the fire, cannot be made, unless Hugo Roseberg's premises are torn down and rebuilt as part of the whole improvement.

30

5. Deponent further states that he has actual charge of the work, and has the plans of the proposed changes and alterations and repairs. The repairs and improvements which he is authorized to make will cost upwards of sixty thousand dollars (\$60,000.00).

THOMAS BLEAKLEY.

Sworn and subscribed to before me, this 30th day of April, A. D. 1923.

HIRAM G. STEELMAN,
M. C. C. of N. J.

ANSWERING AFFIDAVITS.

IN CHANCERY OF NEW JERSEY.

HUGO ROSEBERG, <i>Plaintiff,</i>	}	On Bill. Answering Affi- davits.	10
v.			
AMERICAN HOTEL & GAR- DEN Co. and J. G. MC- CRORY COMPANY,			
<i>Defendants.</i>			

STATE OF	}	ss.	20
COUNTY OF			

VAN C. MCCRORY, of full age, being duly sworn according to law, upon his oath, says that:

He is the vice-president of the J. G. McCrory Company and that as such vice-president he has never negotiated with Hugo Roseberg for an agreement whereby the said Roseberg would give up possession of the premises occupied by him at or near New York Avenue and the Boardwalk, Atlantic City, N. J.

Deponent further says that he called upon the said Hugo Roseberg in company with Mr. Max Weinman, president of the American Hotel and Garden Company, but that he was there merely as a spectator, or witness.

Deponent further states that no officer of the

J. G. McCrory Company was empowered to negotiate with the said Roseberg.

Sworn and subscribed to before me this day
of , 1923.

ANSWERING AFFIDAVITS.

IN CHANCERY OF NEW JERSEY.

20

STATE OF }
COUNTY OF } ss.

PURLEY A. PRYOR, of full age being duly sworn
30 according to law, upon his oath, says that:

He is one of the vice-presidents of the J. G. McCrory Company, one of the defendants in the above styled cause, that as such vice-president he has had charge and carried on negotiations with the American Hotel and Garden Company for a lease of the premises at New York Avenue and the Boardwalk, Atlantic City, N. J., that he has never at any

time negotiated with Hugo Roseberg for agreement whereby the said Roseberg would give up possession of the premises occupied by the said Roseberg.

Deponent further says that the repairs to be made on the premises leased from the American Hotel and Garden Company by the J. G. McCrory Company, on that part of the premises damaged by fire, will cost the said J. G. McCrory Company upwards of \$60,000.

PURLEY A. PRYOR. 10

Sworn and subscribed to before me this day
of 1923.

ANSWERING AFFIDAVITS.

IN CHANCERY OF NEW JERSEY.

20

HUGO ROSEBERG,
Plaintiff,

V.

AMERICAN HOTEL & GAR-
DEN Co. and J. G. MC-
CRORY COMPANY,
Defendants.

On Bill.
Answering Affi-
davits.

30

STATE OF
COUNTY OF

} ss.

WILLIAM M. SIMPSON, of full age, being duly sworn according to law, upon his oath, says that:

46 *Answering Affidavit of William M. Simpson*

He is the architect employed by the J. G. McCrory Company, that he has full charge of the construction work on the property at New York Avenue and the Boardwalk, Atlantic City, New Jersey, which was lately damaged by fire, and that as such architect he has prepared the plans for the repairs and alterations and improvements made necessary by the fire and that the cost of the said alterations, repairs and improvements to the J. G. McCrory Company will be upwards of \$60,000.

WILLIAM M. SIMPSON.

Sworn and subscribed to before me this day
of , 1923.

20

30

ANSWERING AFFIDAVITS.
IN CHANCERY OF NEW JERSEY.

HUGO ROSEBERG, <i>Plaintiff,</i>	}	On Bill. Answering Affi- davits.	10
v.			
AMERICAN HOTEL & GAR- DEN Co. and J. G. MC- CRORY COMPANY,			
<i>Defendants.</i>			

STATE OF	}	ss.	20
COUNTY OF			

GEORGE E. MUSCHERT, of full age, being duly sworn according to law, upon his oath, says that:

He is the assistant secretary of the J. G. McCrory Company, one of the defendants of the above styled cause, and that as such assistant secretary of the J. G. McCrory Company, he has had immediate charge of the leasing, repairing and improvement of that part of the premises damaged by fire, situate at New York Avenue and the Boardwalk, Atlantic City, N. J., and that as such person in charge he has never negotiated or endeavored to make any agreement with Hugo Roseberg whereby Roseberg would give up possession of the premises which the said Roseberg now occupies. 30

Deponent further states that the cost to the J. G. McCrory Company will be upwards of \$60,000 to

48 *Answering Affidavit of Joseph M. Barry*

repair and improve the premises in suit by reason of said damage caused to said premises by the late fire.

Deponent further states that no officer of the J. G. McCrory Company was empowered to negotiate with the said Roseberg.

GEORGE E. MUSCHERT.

Sworn and subscribed to before me this day
10 of , 1923.

ANSWERING AFFIDAVITS.

IN CHANCERY OF NEW JERSEY.

20 HUGO ROSEBERG,
Complainant,
v.
AMERICAN HOTEL & GAR-
DEN Co. and J. G. MC-
CRORY COMPANY,
Defendants.

On Bill.
Answering Affi-
davits.

30 STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } ss.

JOSEPH M. BARRY, of full age being duly sworn according to law upon his oath says that:

On Friday, April 20th, 1923, at 4.45 o'clock in the afternoon, he served personally upon Hugo

Roseberg the notice a copy of which is hereto attached. That at the time above set out, he handed Hugo Roseberg a copy of said notice and told him the contents thereof. Deponent further says that on Tuesday, April 24th, 1923, he served personally upon Hugo Roseberg the notice, a copy of which is hereto attached. That at the time above set out, he handed Hugo Roseberg a copy of said notice and told him the contents thereof.

JOSEPH M. BARRY. 10

Sworn and subscribed to before me this 30th day of April, A. D. 1923.

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

HARRY L. KATZ, being duly sworn according to law, upon his oath says that he is familiar with the premises now rented to Hugo Roseberg known as 169 South New York Avenue, Atlantic City, New Jersey; that the premises consist of two stores immediately at the rear of the present McCrory five and ten cent store situated on the corner of New York Avenue and the Boardwalk. Part of the premises is occupied by Roseberg as a hair-dressing establishment, consisting of an L-shaped part facing on New York Avenue. The balance of the two stores is occupied as a shoe store. The stores are on the level of the Boardwalk and are reached by an elevated sidewalk connecting with the Boardwalk along New York Avenue, which elevated sidewalk continues at the Boardwalk level to the end of the present building, where an incline or ap- 20 30

proach reaches the level of the sidewalk at New York Avenue. Deponent is familiar with the whole of the structure because he was the former tenant and vacated that part of the building in order that the same might be rented to said Roseberg.

Deponent was in the said store shortly after the fire on December 30; that the only damage done to the stores was done to the paper and the paint and the loosening of some plaster; that this damage
10 was all repaired by the American Hotel and Garden Company repapering the hair-dressing department, repainting the ceiling and repairing the plaster. No damage to the structure itself other than that enumerated above had occurred, the balance of the damage being to the fittings and decorations supplied by the tenants; nor was there any damage done to the balance of the structure above the stores. The building above the stores was occupied
20 as a hotel and apartments and none of this part of the building was injured except by smoke and water. All of the damage done to the building was at the north end of the building and none of the structure was consumed beyond the center entrance. The brick walls at no part of the building were damaged and only the interior woodwork was partially burned. All of the damage to the entire building could be repaired without difficulty.

Deponent further says that the said stores are very desirable locations, being in the main business
30 district along the Boardwalk, very close thereto, and therefore much more desirable than any stores located at a greater distance from the Boardwalk; that the main value of the store on New York Avenue or any avenues adjacent thereto, is their proximity to the Boardwalk, the nearer they are to the Boardwalk the more valuable they become, and

these being the first stores on New York Avenue are undoubtedly of far greater value than those situated further up the street. Deponent is familiar with values in this neighborhood as a former lessee of the entire building in question, and at that time and since has operated the hotel property at the corner of Ocean Avenue and the Boardwalk, and is familiar with rents and values of real estate in the neighborhood.

Deponent further says that all of the damage to the structure so far as it related to the said stores was repaired within three weeks after the same occurred, and that the tenant, Mr. Roseberg, was again in possession after the said three weeks' period, had redecorated the same and gone to much expense to repair all the damage done to his furnishings, both in the hair-dressing store and in the shoe parlor, and that undoubtedly a large sum of money was expended in making the repairs to the said furniture and fixtures; that all of these repairs and redecorations were done with the consent and approval of Max Weinman, the president of the American Hotel and Garden Company, and of Harry Weinman, the vice-president. That he was present at some of the conversations between the said Weinmans and the tenant and that they both approved of the repairs and redecorations being made by the tenant.

Sworn and subscribed to before me this second day of May, 1923.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, }

I, B. H. STENZEL, being duly sworn, deposes and says that I am the secretary of the McCrory Stores and have been for more than five (5) years last past.

10 Annexed hereto and marked "A" is a copy of the annual statement of the McCrory Stores Corporation for the year ending December 31st, 1922, and the same is in all respects true and correct.

B. H. STENZEL,
Secy.

Sworn to before me this 20th day of April, 1923.

(Seal) FORDEN P. PERRY,
Notary Public,
New York.

20 No. 292—#4295.

—
"A."

McCRORY STORES CORPORATION
BALANCE SHEET DECEMBER 31st, 1922

ASSETS

McCRORY REALTY CORPORATION:

30 Common stock—3,170 shares par value \$100 each	\$325,020.00
Advances for acquisition and improvement, taken subject to mortgages of \$545,100	726,757.52
	————— \$1,051,777.52

PERMANENT IMPROVEMENTS AND FURNI-
TURE AND FIXTURES, less depreciation..... 2,039,103.78

CURRENT ASSETS:

Merchandise and supplies at cost or market, whichever is lower.....	\$3,856,533.87	
Due from employees, account of stock subscriptions, etc.	93,830.73	
Accounts receivable, less reserves....	24,142.35	
Cash surrender value of life insurance policies	123,389.83	
Cash in banks and on hand.....	448,187.57	10
	4,546,084.35	

RENTS PAID IN ADVANCE AND OTHER PRE- PAID ITEMS	129,577.87	
GOODWILL	4,000,000.00	
	\$11,766,543.52	

LIABILITIES

CAPITAL STOCK:

Preferred 7 per cent cum- ulative	\$1,250,000.00	20
Less—Retired	298,600.00	
	\$ 951,400.00	
Common—Issued and out- standing	7,059,900.00	
	\$ 8,011,300.00	

CURRENT LIABILITIES:

Bills payable	797,809.00	
Accounts payable and ac- cruals	1,201,331.59	
Deposits of employees...	35,121.70	30
Reserves for income tax for the fiscal year 1922	171,000.00	
	2,205,262.29	

Answering Affidavit of B. H. Stenzel

SURPLUS APPLIED TO
RETIREMENT OF PRE-
FERRED STOCK

330,000.00

SURPLUS:

At January 1, 1922..... \$1,045,416.03

Profits for the year end-

ing Dec. 31, 1922, as

per profit and loss

statement	1,185,069.70
---------------------	--------------

10

\$2,230,485.73

DEDUCT:

Cash dividends on pre-

ferred stock \$ 66,503.50

Stock dividends on com-

mon stock of which

\$36,731 was paid in

cash for fractional

shares	889,031.00
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Provision for retirement

20

of 500 shares preferred

stock, less net discount

of \$30 on 10 shares

purchased during the

year 1922	54,970.00
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1,010,504.50

1,219,981.23

\$11,766,543.52

30 We have audited the books and accounts of the McCrory Stores Corporation for the year ending December 31, 1922, and we certify that, in our opinion, the foregoing balance sheet is properly drawn up so as to show the true financial position of the corporation as at that date, and the accompanying statement of profit and loss is correct.

(Signed) PRICE, WATERHOUSE & CO.

56 Pine Street, New York

February 19, 1923

McCROBY STORES CORPORATION

PROFIT AND LOSS ACCOUNT

FOR THE TWELVE MONTHS ENDING DECEMBER 31, 1922

Sales \$17,123,252.69

Less cost of sales 11,797,153.98

GROSS TRADING PROFIT..... \$5,326,098.71

DEDUCT:

Selling and general expenses, insurance,

salaries, rents, taxes, including provision

for all Federal taxes 4,141,029.01

NET PROFIT as per balance sheet..... \$1,185,069.70

B. H. Stenzel

Secty.

10

20

30

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

10	Between HUGO ROSEBERG, <i>Complainant,</i> and AMERICAN HOTEL AND GARDEN COMPANY, <i>et</i> <i>al.,</i> <i>Defendants.</i>	}	On Bill for Injunction. Conclusions.
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20 APPEARANCES:

For complainant: W. ELMER BROWN, JR., ESQ.,
 and EMERSON L. RICHARDS, ESQ.

For defendants: JOHN C. REED, ESQ., and HON.
 CLARENCE L. COLE, SR.

INGERSOLL, V. C.:

30 The defendant American Hotel and Garden Company, which will hereafter be called the hotel company, is the owner of a tract of land at the northeast corner of New York Avenue and the Boardwalk, Atlantic City, having a frontage of over 300 feet on New York Avenue and a depth of fifty feet measured at right angles to said avenue.

A tract about 115 feet in depth at the easterly or Boardwalk end has been leased to the defendant,

McCrory Stores Corporation, which will hereafter be called the stores corporation. On the 100 feet adjoining thereto is erected a three story building known as the American Hotel, more recently called the Moulin Rouge and will hereafter be called the hotel, and on the remaining land was erected a one story and basement building known as the American Garden or Café Bal Tabarin—and will be called the garden.

The complainant is a tenant of the defendant, 10 hotel company, by virtue of a written lease entered into between them bearing date October 21st, 1921, whereby the hotel company leased to him "Premises known as #169 New York Avenue and adjoining premises up to the hotel space *formally* occupied by Harry Katz as bar and restaurant" for a term of three years from January 1st, 1922, at the annual rent of \$5000. He is in possession of said premises, which were described in an affidavit of the vice-president of the hotel company as a hair- 20 dressing parlor occupying a small space of one room in the structure known as the American Hotel and Garden located nearest the Boardwalk on the ground floor.

On December 31st, 1922, a fire occurred in the garden and hotel buildings seriously damaging each of them.

Shortly after the fire, repairs were made either permanently or temporarily to the hotel in which was located the room or store occupied by complain- 30 ant, and he resumed his business (that of hair-dresser, etc.), and continued such until shortly before the filing of the bill.

Some time after the fire negotiations were entered into between the defendant stores corporation and the hotel company for the leasing of the prem-

ises known as the hotel (including that space leased to and occupied by the complainant). The president of the hotel company thereupon entered into negotiations with the complainant with the result that an agreement was entered into between them as follows:

“March 27th, 1923.

10 We the undersigned, agree to the following arrangements. The American Hotel and Garden Company to pay Mr. Hugo the sum of \$600 which is an electric light bill, for repairs amounting to \$300 and allow him sum \$300 on account loss after fire, and on completion of the new store or stores, rent of store or 2 stores to be \$1800 each. They will have the option to take one or two. We agree to install all fixtures, electric fixtures and plumbing, papering and painting, and remove all goods in old store to new. I will vacate my present store on completion of the new store.

20

American Hotel & Garden Co.
M. Weinmann, Pres't.

Witness:

Mary O'Donnell.

Hugo Roseberg”

30 On the 11th of April an agreement was entered into between the hotel company and the stores corporation, whereby the former leased to the latter the property already occupied by the stores corporation and an additional 100 feet on New York Avenue by 50 feet in depth, being the premises occupied by the hotel building, including the space occupied by the complainant, for the term of 20 years—from the 1st day of May, 1923, at the yearly rent or sum of sixty thousand dollars. Untenanted possession to be given on May 1st, 1923.

Included in the lease was the following clause:

"Lessee will immediately, upon obtaining possession of the hereby demised premises, and as rapidly as is reasonably possible, restore or rebuild the old hotel building on the rear of the demised premises, to such condition and for such legitimate purposes as the lessee may desire. It being understood and agreed that the insurance money, in the amount of not less than \$15,000 accruing by reason of the recent fire, 10 in the hotel property, on the rear of the demised premises, is to be paid to the lessee by the lessor, upon the signing of this lease, the same to be applied to the restoration or rebuilding of the old hotel building by the lessee."

On April 20th, 1923, a notice was served by the hotel company on the complainant as follows:

"TO: HUGO ROSEBERG, 20

In accordance with the Act of the New Jersey Legislature, P. L. A. D. 1874 Page #27, you are hereby notified that the rent for the premises which you now occupy, known and described as #167 South New York Avenue, Atlantic City, New Jersey, and adjoining premises up to the Hotel entrance—Space formally occupied by Harry Katz as Bar and Restaurant, will cease on and after the service of this notice until such time as the building shall be put 30 in complete repair and you shall be moved into your new store. Said repairs being made necessary by reason of the damage caused by the recent fire. In order to put the building in complete repair it will be necessary for us to remove the roof and all inside structures except the front wall.

New foundations, new footings and new steel are required to be put in.

10 It will be necessary for us to proceed immediately to make these repairs. You are advised that during the course of these repairs, it will be necessary for you to secure new quarters elsewhere for the purpose of conducting your business and to remove your personal property in order that the said personal property may not be damaged by the elements or otherwise. In order to avoid loss of business to you, we have provided space in the McCrory store at the corner, where you can continue to conduct your business. We will arrange to move your personal property and appliances necessary for the conduct of your business and we will pay all cost incurred in the removing and setting up the same at the McCrory store. We will further arrange to store any additional
20 personal property for you free of cost to you. When the new store is completed we will move the appliances used in the conduct of your business to the new store and install them free of cost to you. You will not be required to pay rent for the use and occupation of the McCrory store.

30 We regret the inconvenience caused you by the damage done by the recent fire and we are anxious to have you co-operate with us in order that the inconvenience and loss will be made as light as possible.

Very truly yours,

AMERICAN HOTEL & GARDEN
COMPANY.

H. Weinmann, Vice-Pres."

Dated April 20th, A. D. 1923.

On or about April 24th, 1923, the following notice was served on the complainant:

"TO: HUGO ROSEBERG:

TAKE NOTICE, that your lease, made the twenty-first day of October, 1921, contains the following provisions:

'PROVIDED, that if any rents shall due and unpaid, or if default shall be made in any of the covenants, conditions and rules herein contained, then it shall be lawful for the said party of the first part, at his option, without notice and without any demand for said rent, or for the performance of said covenants, conditions and rules and regulations, to declare this lease null and void and said term ended, and to re-enter the said premises and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof, or otherwise however. 10

AND the said party of the second part doth hereby covenant and agree to and with the said party of the first part *to pay the said rent in the proportions and upon the conditions aforesaid*; and not to assign this lease, and further agrees to observe the following, which are hereby agreed to be not only covenants, but also rules and regulations governing said premises, viz: *not to underlet* said premises, or any part thereof.' 20

Further Take Notice, that you have failed to pay the rent due April 1st, 1923, and that you have underlet a part of the premises, without written consent. 30

Therefore, in accordance with the provisions above recited, and exercising the option there-

in reserved, the lessor does hereby declare your lease null and void, and the term ended.

DATED April 24th, 1923.

AMERICAN HOTEL AND GARDEN
COMPANY,

BY:

H. WEINMANN, Vice-Pres."

10 Shortly before the filing of the bill, one or both of the defendants, by employees and workmen commenced the work of making said repairs or alterations, and at the time of the filing of the bill had proceeded so far as to leave a space in the rear wall of the complainant's premises open and exposed to the weather. All of the windows in said building had been removed so that in case of rain or other storm, there was nothing to prevent said storms working damages to the complainant's premises.

20 At the time of the hearing the defendants presented a map of the premises in question and the complainant presented 5 photographs of the premises, all of which were received without objection and by consent.

Three of these photographs are endorsed as having been taken on April 23rd, 1923, the date of the filing of the bill and two the day following.

30 These photographs shows the condition of the windows as above described, and one taken the day after the filing of the bill shows a portion of the roof immediately over the Roseberg store as having been partly removed.

It perhaps should here be mentioned, that on April 23rd, 1923, the superintendent of construction Thomas Bleakley was informed that the order to show cause with the restraint had been advised, and a copy thereof shown to him, and that the photos

marked as having been taken on April 24th, 1923, show workmen engaged in removing the roof over the complainant's premises.

It is unnecessary however to consider these photographs as evidential for the purpose of now considering the application before me.

In these applications for injunctions there are two elements which must be shown. One is the settled right of the complainant; the other is, that this right in the thing in dispute will be irreparably 10 damaged if the relief be not granted.

Oliphant v. Richman, 67 N. J. Eq. 280.

The right of the complainant is clear unless as claimed by the defendants, he has lost same by reason of any one of the following conditions:

1. That the defendant had the right to dispossess him for the purpose of making repairs made necessary by the fire of December 31st, 1922.

Although notice was served "in accordance with 20 the statute of Public Laws 1874, page 27" I find that the demolition of the structure as being done by the defendant stores corporation is not within that statute, and cannot be justified thereby.

2. That he has defaulted in the payment of rent which became due on April 1st, 1923, and

3. That he has violated the terms of his lease by subletting a portion of the leased premises. 30

If either of these acts would have been sufficient to have terminated the lease it is sufficient to say that the agreement of March 27th, 1923, was entered into after each of said alleged default or violation of terms. It is clear that an adjustment was made and money paid by the company to the complainant,

and arrangement made when he was to vacate the premises in question upon the "completion of the new store or stores," which the vice-president of the hotel company, Harry Weinmann, in his affidavit states, "is in the new structure, which is being erected on the site formerly occupied by the Café Bal Tabarin" that is the garden property. He further states in the same affidavit, dated April 30th, 1923, "The contracts for this work have been
10 let, and it is expected that the new stores will be completed *with* (in) six weeks from May 1st, 1923." The fact that the structure which is to include the "new store or stores" can be completed within six weeks and that the contract with the defendant was dated March 27th, 1923, and the lease with the McCrory Stores Corporation agreed to give "un-tenanted possession" of the property on May 1st, 1923, is indicative that the hotel company expected or hoped to be able to give Roseberg's possession
20 of the new store in about 5 weeks from the date of the agreement.

Possession has never been given of the "new store or stores."

The fourth reason given why Roseberg should not be entitled to relief, is that some time after April 20th, 1923, the president of the hotel company called upon the complainant "and told him that I had arranged for temporary quarters for him in the McCrory store, and that we would move him to that
30 location, and from there to the new store, to be built by the hotel company, as soon as the same could be completed, all of which would be done without expense to him. But he refused to move into the McCrory store, and said he would not move anywhere, or give up the possession of the place he then occupied, and would not agree to anything, or do anything, unless he was paid by the American

Hotel and Garden Company, eleven thousand five hundred dollars (\$11,500); that he had been advised that the American Hotel and Garden Company had made a long term lease with the McCrory Stores Corporation, at a large rental, and that he proposed to be paid well for the inconvenience caused him by reason of the fire," and that by reason of the complainant's statements, he is not entitled to relief in this court.

This is not well taken. The complainant had already entered into an agreement with the defendant company, which had not been carried out, and he was at liberty to refuse to make other changes in his contractual relations, and has not by reason of his refusal to accede to the demands of the defendant, tainted himself with "unclean hands" as insisted by the solicitors of the defendants in their arguments. 10

I find the right of the complainant is settled in his favor.

The contention is made by the defendants, that the complainant will not suffer irreparable damages, should he be compelled to vacate the premises. The claim being that each of the defendants are financially able to respond in any damages, which he could sustain, and that he must rely upon his right in the law courts. While it is true that "a court of equity will not interfere by injunction in a case of naked trespass, where there is a full remedy at law." 20

Kerlin v. West, 4 N. J. Eq. 449; 30
Ballantine v. Harrison, 37 N. J. Eq. 560;
Myers v. Kelly, 83 N. J. Eq. 474.

The Court has jurisdiction.

In cases where the object of the bill is to prevent an injury which will be destructive of the inheri-

tance, or which equity deems irreparable, i. e., one for which the damages that may be recovered according to legal rules do not afford adequate compensation.

- Hart v. Leonard, 42 N. J. Eq. 416, p. 421;
 Morris C. & B. Co. v. Jersey City, 11 N. J. Eq. 13;
 Franklinite Co. v. Zine Co., 12 N. J. Eq. 215;
 10 Zinc Co. v. Franklinite Co., 12 N. J. Eq. 322;
 Zinc Co. v. Franklinite Co., 15 N. J. Eq. 418;
 Southmayd v. McLaughlin, 24 N. J. Eq. 181;
 Manko v. Chambersburgh, 25 N. J. Eq. 168;
 Johnston v. Hyde, 25 N. J. Eq. 454;
 Thomas Iron Co. v. Allentown Mining Co., 28 N. J. Eq. 77;
 20 Fulton v. Greacen, 36 N. J. Eq. 216;
 Lord v. Carbon Iron M. Co., 38 N. J. Eq. 452;
 Oliphand v. Richman, *supra*;
 Kiernan v. Jersey City, 76 N. J. Eq. 114;
 McGann v. La Brecque Co., Inc., 90 N. J. Eq. 530.

Chancellor Runyon in *Whitecar v. Michenor*, 37 N. J. Eq. 6-14, said:

- 30 "While the jurisdiction of the Court to interfere by way of mandatory injunction should be exercised with the greatest possible caution, yet where the right to restrain the violation of which the injunction is asked for is clearly made out, and there is a present want of the use of that right, the Court should not hesitate.

The Court is always very reluctant to grant a mandatory injunction on an interlocutory application, but where extreme or very serious damage would ensue from withholding it, as in cases of interference with easements or other cases demanding immediate relief, it will be granted."

Joyce Prin. Inj. 57;

Rogers Locomotive Works v. Erie R. R. Co., 20 N. J. Eq. 379;

10

Thropp v. Field, 26 N. J. Eq. 82;

Longwood Valley R. R. Co. v. Baker, 27 N. J. Eq. 166.

A very similar case in the Michigan Supreme Court, reversing the Circuit Court (in Chancery) which had refused an injunction. The Court said:

"The bill charges in positive language that defendant has threatened to tear down and utterly destroy the building, eject complainant, and terminate the tenancy, and complainant fears such threats will be executed unless restraint by the Court.

20

* * * Irreparable injury means that the injury would be a material one, in its nature serious and grievous, and such that it is extremely difficult or impossible to definitely ascertain the resulting damages and adequately make just reparation."

Injunction will lie against the ejection of a tenant of upper stories of a building who is not in default, and the destruction of the building during the term of the lease to prevent irreparable injury to the lessee.

30

Minnis v. Newbro-Gallogly Co., Mich. 140, N. W. 980, 44 L. R. A. N. S. 1110. Bottom 1st Co. 1115.

The characteristics certainly making an injury as irreparable are:

1. That the injury is an act which is a serious change of, or is destructive to, the property it affects either physically or in the character in which it has been held and enjoyed.

10 2. That the property must have some peculiar quality or use such that its pecuniary value, as estimated by a jury, will not fairly recompense the owner for the loss of it.

Pomeroy's Eq. Remedies, Par. 495.

The same author in Eq. Jurisprudence, par. 1367,

20 "If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable—that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced, by means of compensation in money—then the wrong will be prevented or stopped by injunction."

Book 52 L. R. A. p. 757:

30 "Where the injury complained of is such as to destroy plaintiff's property, or render it entirely worthless for his purposes, it may properly be regarded as irreparable." 1 Beach. Inj. par. 35. In Kerr, Inj. 14, it is said: "By the term 'irreparable injury' is not meant that there must be no physical possibility of repairing the injury; all that is meant is that the injury would be a grievous one, or at least a material one, and not adequately reparable

by damages; and by the term 'the inadequacy of the remedy by damages' is meant that the remedy by damages (obtainable at law) is not such a compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood. If the act complained of threatens to destroy the subject-matter in question, the case may come within the principle, even though the damages may be capable of being accurately measured." 10

I think it is clear that the complainant is entitled to relief. The restraint should not be as broad as prayed for but should be to the extent of preventing the interference with the store of the complainant until he is permitted to take possession of the "new store or stores" referred to in the agreement.

It might be said that the interest of the complainant is small as compared with that of the defendants. It is sufficient to say that even if the interest of the complainant in a "small store" which rents for \$5000 per year, should be said to be not great enough to give him an equitable claim (although it is) the entire remedy is in the hands of the defendant, the hotel company, that is—to place the complainant in possession of the "new store or stores" which "can be completed in about six weeks." 20

It Is Thereupon, on this fifteenth day of May, 1923, on motion of said counsel with the complainant, Ordered that until the final hearing of this cause, or this Court shall otherwise order, the defendants and each of them, their and each of their contractors, agents, servants and workmen, be and they are hereby enjoined and restrained from removing the complainant from or disturbing him in, or otherwise interfering with his possession or enjoyment of the store and premises known as No. 10 169 South New York Avenue, Atlantic City, New Jersey, unless and until they shall have erected and completed, and shall have permitted the complainant to occupy or tendered him possession for occupancy by him, of the said store or stores, referred to in the writing bearing date March 27th, 1923, set forth in the bill of complaint, whereupon said defendants or either of them shall be at liberty to apply to this Court, to modify or dissolve the restraint hereby imposed. 20

And It Is Further Ordered, that the defendants pay to the complainant or his solicitor, the costs upon the said order to show cause, to be taxed.

R. H. INGERSOLL,

V. C.

Respectfully advised.

NOTICE OF APPEAL.
IN CHANCERY OF NEW JERSEY.

10	Between HUGO ROSEBERG, <i>Complainant,</i> and AMERICAN HOTEL AND GARDEN COMPANY, <i>et</i> <i>al.,</i> <i>Defendants.</i>	} On Bill, &c. Notice of Appeal.
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20 The defendants hereby appeal from the order made, enjoining and restraining the defendants from removing the complainant from, or disturbing him in, or otherwise interfering with the complainant's possession or enjoyment of the premises described in the bill of complaint, and from the whole and every part thereof; to the Court of Errors and Appeals, in the last resort in all causes.

JOHN C. REED,
Solicitor for Defendants.

JOHN C. REED,
Of Counsel.

30 Dated May 16th, 1923.

I conceive there is good cause for appeal in the above stated cause.

JOHN C. REED,
Of Counsel with Defendants.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between		10
HUGO ROSEBERG,	}	
Complainant-		
Respondent,		
and		On Bill, &c.
AMERICAN HOTEL AND		On Appeal.
GARDEN COMPANY, et	Petition of Appeal.	
al.,		
Defendants-		
Appellants.		20

*To the Honorable, the Court of Errors and Appeals,
in the Last Resort in all Causes:*

The petition of the American Hotel and Garden Company, et al., the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin R. Walker, Chancellor of New Jersey, bearing date the fifteenth day of May, A. D. 1923, wherein the said Hugo was complainant and the said American Hotel and Garden Company, et al., were defendants, in this respect, to wit: Said decree adjudges that the defendants should be restrained from disturbing the

complainant in the use and occupancy of certain premises occupied by him and for that reason is erroneous, because the decree should have decreed that said complainant was not entitled to the relief prayed for in his bill of complaint. Your petitioners therefore pray that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden. And your petitioners may have such relief in the premises as
10 to this Honorable Court shall seem meet.
Dated May 16th, 1923.

JOHN C. REED,
*Solicitor for and of Counsel
with Defendants-Appel-
lants.*

Answer

ANSWER.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

HUGO ROSEBERG,

Complainant,

and

A M E R I C A N HOTEL AND

GARDEN COMPANY, *et*

al.,

Defendants.

On Appeal.

Answer.

The answer of the above named complainant-respondent, Hugo Roseberg, to the petition of the appeal of the above named defendants-appellants.

This respondent, Hugo Roseberg, not acknowledging all or any of the matters in the said petition of appeal contained to be true for answer thereto, nevertheless, says and admits that a decree was on the 15th day of May, A. D. 1923, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated, but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity; and he prays that the same may be affirmed with costs to be adjudged to this respondent.

WM. ELMER BROWN, JR.,

*Solicitor for and of Counsel
with Respondent.*

ANSWER TO PETITION OF APPEAL.
NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between		10
HUGO ROSEBERG,	}	
Complainant-		
Respondent,		On Bill, &c.
and		On Appeal.
AMERICAN HOTEL AND		Answer to Petition
GARDEN COMPANY, <i>et</i>		of Appeal.
<i>al.</i> ,		
Defendants-		
Appellants.		

20

The answer of the above-named respondent to the petition of appeal of the above-named appellants.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a final decree was, on the fifteenth day of May, 1923, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, thus respondent prays to refer thereto when the same shall be produced, and this respondent is advised and believes, that the said decree is agreeable

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to equity, and he prays that the same may be affirmed with costs to be adjudged to this respondent.

WM. ELMER BROWN, JR.,
*Solicitor for and of Counsel
with Respondent.*

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between
HUGO ROSEBERG,
Complainant-Respondent,
and
AMERICAN HOTEL AND GARDEN COMPANY,
et al,
Defendants-Appellants.

On Bill for Injunction, &c.

10

ON APPEAL

RESPONDENT'S BRIEF.

STATEMENT OF FACTS.

This appeal is taken from an order or decree of the Court of Chancery, allowing an interlocutory injunction restraining appellants from removing the respondent from or disturbing him in or otherwise interfering with his possession or enjoyment of a certain store and premises now occupied by him, and hereinafter more particularly referred to.

20

The appellant, American Hotel and Garden Company, is the owner of a tract of land at the northeast corner of New York Avenue and the Boardwalk, Atlantic City, New Jersey, having a frontage of more than 300 feet on New York Avenue and a depth of 50 feet measured at right angles to said Avenue. A tract about 115 feet in depth, at the easterly or Boardwalk end, has been leased to the defendant, McCrory Stores Corporation. On the 100 feet adjoining thereto is erected a three story building, known as the American

30

Hotel, more recently called the Moulin Rouge, and on the remaining land was erected a one story building, known as the American Garden or Cafe Bal Tabarin.

10 The respondent is a tenant of the defendant, Hotel Company, by virtue of a written lease entered into between them, bearing date October 21, 1921, whereby the Hotel Company leased to him "premises known as No. 169 New York Avenue and adjoining premises up to the Hotel space formerly occupied by Harry Katz as bar and restaurant," for a term of three years from January 1, 1922, at the annual rental of Five Thousand Dollars (\$5,000.00). Respondent is now in possession of said premises and is there conducting a hairdressing parlor and manicuring establishment. Said premises are a portion of the structure known as the American Hotel, located nearest the Boardwalk, on the main floor.

20 On December 31, 1922, a fire occurred in the Garden and Hotel buildings, resulting in damage to each of them, the extent of which damage, as appears from the affidavits offered on the return of the rule to show cause, is in dispute. Shortly after the fire, repairs were made to the Hotel building, in which complainant's premises are located, and he resumed his business as before.

30 Sometime after the fire, negotiations were entered into between the McCrory Stores Corporation and the Hotel Company, for the leasing of the premises known as the Hotel (including that space leased to and occupied by the complainant). On April 11, 1923, an agreement was entered into between the Hotel Company and the Stores Corporation, whereby the former leased to the latter the property already occupied by the Stores Corporation and an additional 100 feet on New York Avenue, by 50 feet in depth, being the premises occupied by the Hotel building, including the space occupied by the complainant, for the term of twenty years from May 1, 1923, untenanted possession to be given on May 1, 1923.

40 Previous to the making of said lease, appellant, Hotel Company, undertook and endeavored to secure from

respondent an agreement, whereby respondent would consent to surrender the lease to the premises which he then occupied, and agree to accept other premises in a portion of the property owned by appellant, Hotel Company, farther removed from the Boardwalk. Respondent refused to enter into any such agreement until he was assured that the new premises to be supplied would be equivalent at least to those which he now occupies.

On April 20, 1923, appellant, Hotel Company, served upon respondent a notice, requiring respondent to move from the premises occupied by him as aforesaid, under the guise or pretext that his removal was necessary in order that repairs, made necessary by reason of damage caused by the said fire, might be made. Immediately after the service of said notice, appellants began work upon said building, and first removed all of the windows therefrom and began to tear away the main roof thereof. By so doing, appellants took away from the respondent all the protection which had theretofore existed from the weather and storms, exposing his premises and property, as well as his business, to great damage, seriously interfering with his possession and enjoyment of the leased premises, all of which it is claimed would result in irreparable damage to him. 10 20

On April 23, 1923, respondent filed his bill in the Court of Chancery, and secured a rule to show cause, directed to appellants, requiring them to show cause on May 1, 1923, why an injunction should not issue, restraining them from so interfering with the respondent's possession and enjoyment of said premises. Service of said rule was attempted to be made immediately, but this could not be done because both appellants being corporations, and proper provision not having been made for the service of papers upon them, service could not be made on that day. On said day, April 23, 1923, however, the Superintendent of Construction and the Manager of McCrory Stores Corporation, in Atlantic City, were informed of said order to show cause and of the restraint that it contained, and a copy thereof was shown to them. Service as required by said order, however, was not made until April 24, 1923. 30 40

On the return of the rule to show cause, appellants

produced what purports to be an agreement between respondent and appellant, American Hotel Company, dated March 27, 1923, which will be hereinafter referred to and more particularly commented upon.

10 It is urged by respondent that said repairs are not necessary by reason of fire damage as alleged by appellants, but on the contrary are desired to be made to suit merely the convenience of McCrory Stores Corporation, and make possible the carrying out of the lease agreement entered into between McCrory Stores Corporation and said Hotel Company, without regard to respondent's legal rights in and to said premises.

ARGUMENT.

20 Appellant's brief commences argument with the statement that respondent made no request on the argument of the order to show cause for leave to file affidavits to answer those filed by appellant. This assertion is positively and earnestly denied. Respondent's counsel recognized at the time of the argument that appellants' affidavits brought in new matter or evidence of certain facts, to wit: an alleged attempt on the part of respondent to extract a large sum of money from appellants by fraud; the agreement dated March 27, 1923, between appellants and respondent; alleged breaches of the lease of respondent because of non-payment of rent and sub-letting; and the type, character and kind of repairs and alterations which were proposed to be made, to the building alleged to have been damaged by fire. Respondent's counsel then urged
30 that permission be given to respondent for the filing of affidavits to meet all of this new matter, which application was denied, presumably because the Court felt that even by the filing of affidavits in denial of this new matter, no material change could be made in the ultimate result of its conclusions.

Respondent did then and has ever since consistently denied that any such agreement exists as an enforceable agreement.

40 Appellants first contend that the decision of the Court below should be reversed, for the reason that

appellants' answering affidavits show conclusively that the respondent's premises were not immediately repaired after the fire, and the same placed in as good condition as before the fire, as is alleged in the bill of complaint, and that the proposed work or construction is all made necessary by reason of fire damage, and that, therefore, under the laws of 1874 (P. L. 1874, Page 27) appellants have the legal right to proceed as they had arranged.

Before taking up the argument of the facts on this point, reference should be made to the statute referred to, and upon reading this Act in conjunction with the evidence which was before the Court below, showing the work which was intended to be done, no other conclusion can be gathered than that stated in the conclusions of the learned Vice-Chancellor, (Page 63) as follows: "I find that the demolition of the structure as being done by the defendant Stores Corporation is not within that statute, and can not be justified thereby."

Respondent has always contended and here insists that appellants' apparent desire to repair fire damage is not the real nor honest reason for the doing of the anticipated work. In fact this fire occurred December 31, 1922, and although appellants now desire to impress upon the Court that as a result of the fire the entire building became unsafe thereby requiring practically total reconstruction, nothing in the way of repairs thereto was attempted until April 20, 1923, except to that portion of the building which respondent occupies. It will be noted that almost four months elapsed between the date of the fire and the date when respondent was served with notice of the necessary repairs. It is also well to here note that this notice served upon respondent was so served only nine days after the making of the McCrory Stores Corporation lease agreement. Appellants' contention that said building is unsafe is attempted to be supported by the affidavits of James W. Peterson, Building Inspector of Atlantic City, and Thomas Bleakley, Superintendent of the McCrory Stores Corporation. Referring to Peterson's affidavit (Page 38) it will be noted that the inspection upon which his conclusions are based was not made

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until April 23, 1928, which, by the way, is the date when appellants first had notice of the existence of the rule to show cause and the original restraint issued in this cause. And it appears from the Bleakley affidavit that both he and Peterson agree precisely in every particular, which warrants the conclusion that they made the inspection together and at the same time. Appellants contend that said building was completely destroyed in its usefulness, and that it is necessary to
10 demolish it entirely, except the front wall. Giving to Peterson's affidavit the most generous construction, he says that the building was "fifty per cent destroyed, that the interior of said building was ninety per cent destroyed," yet as appears from the notice attached to Peterson's affidavit, the only part of the building which was condemned by him as Building Superintendent was the roof and circular bay-windows on each of the front corners. It might be well to here stop, and inquire whether the services of the Building Superin-
20 tendent have here been obtained for the convenience and possible protection of appellants in the work which they anticipated doing. If it was not done for this purpose, then why did appellants not have this inspection at an earlier date, and is it likely that as a mere coincidence said Building Superintendent made his inspection on the date when the rule to show cause in this matter was allowed and notice thereof given to appellants?

The real reason we think can be found first in the affidavit of Max Weinmann, and particularly Para-
30 graph 5 (Page 15) wherein he says that the McCrory Stores Corporation approached the officers of the Hotel Company, proposing that said last named Company lease to it for a term of years said Hotel property, including that portion or space occupied by the complainant *upon terms highly advantageous to said American Hotel and Garden Company.*

Max Weinmann again in his affidavit, (Paragraph 7, Page 17), after calling attention to the provision in the McCrory Stores Corporation lease for the making
40 of the said repairs, says that he undertook to remove respondent from the premises which he now occupies, because of the receipt by him of *notice from the Mc-*

Crory Stores Corporation that it was desired and intended to immediately commence said work, which would necessitate tearing down the entire remaining part of the structure.

The McCrory Stores Corporation lease, among other things, provides (Page 32): "It is understood and agreed that the said lessee is to be given *untenanted* possession of said premises on the first day of May, 1923, and that the lessee will immediately upon obtaining possession of the hereby demised premises, and as rapidly as is reasonably possible, restore or rebuild the old hotel building on the rear of the demised premises *to such condition and for such legitimate purposes as the lessee may desire.*" 100

Said lease further provides (Page 33) it is understood and agreed "that the lessee has the right to make *such improvements, alterations and additions to the premises leased as it requires for its purpose, and that all such improvements, alterations and additions made to the buildings proper are to become a part of the property, and are to remain at the termination of this lease.*" Said lease also refers to the work on said building as *alterations, improvements or additions* (Page 33). 20

It is submitted that a reading of the McCrory Stores Corporation lease warrants no other conclusion than that appellants are desirous of evicting or removing respondent from the premises leased to him, in order that they may be unhampered in the performance of every term or provision of the McCrory Stores Corporation lease, which appellants both seem to consider so important to them that they are inconsiderate and unmindful of respondent's rights. 30

The photo exhibits which were introduced in evidence on the return of the rule to show cause in this matter, and which are referred to in the conclusions of the learned Vice-Chancellor, show conclusively the extent to which said building was damaged by the fire, and that appellants' statements that the building was completely destroyed by the fire were prompted by an over-zealousness on their part. Three of these photo- 40

graphs were made on April 23, 1923, the date of the filing of the bill of complaint, and two of them were made on the following day, April 24th. These photographs will also show that on April 23, 1923, before appellants were advised of the restraining order, all work on the building was on the north end thereof, farthest removed from that portion of the premises occupied by respondent. On April 24th, the day following notice to them of the said order, however, said
10 photographs show that the workmen are actually engaged in removing the roof from over the complainant's premises.

Appellants, in their brief, make point of the fact that respondent made no mention in any of his pleadings filed in this cause of the alleged agreement, dated March 27, 1923. As has been hereinbefore said and was alleged before the learned Vice-Chancellor in the argument, the respondent does not recognize any such agreement existing. The bill of complaint was filed
20 in this cause upon the theory that respondent was entitled to his relief prayed for as a tenant under his original lease, dated October 21, 1921. The agreement dated March 27, 1923, was offered into the case by means of the answering affidavits of appellants, so that the learned Vice-Chancellor was free to use said alleged agreement in conjunction with other proofs before him to arrive at his conclusions. Respondent cannot agree with appellants that the injunctive order here appealed from rested almost, if not wholly upon
30 this agreement and nothing more. What the learned Vice-Chancellor does appear to have done both in his conclusions and in the order appealed from is to have recognized the respondent's position as a tenant under his original lease, and to have found as a fact that even this position was recognized by appellants when they saw the necessity of and did secure the alleged agreement referred to. Said paper writing of March 27, 1923, assuming that it is an agreement as is alleged by appellants, is only a modification of respondent's original lease and nothing more, so that after all the order
40 was made for the protection of the rights of the respondent as a tenant under his original lease in view of said paper writing of March 27, 1923, which was a recognition of those rights.

Appellants strenuously urge that they have acted in good faith in this matter, and as proof of this contend that they offered temporary quarters to respondent in the McCrory Store, and that the removal was to be a mere temporary affair, and was to be without expense to respondent. It is difficult to see wherein the appellants are justified in compelling the respondent to accept any sort or kind of quarters they, the appellants, might choose for him. They offered him temporary quarters *within* the store of the McCrory Stores Corporation. Respondent's business is, as has been said, that of hairdressing and manicuring, and he caters particularly to women of wealth and refinement, and yet appellants claims the right to insist that he take up quarters and conduct his business within premises wherein the McCrory Stores Corporation conduct a "Five and Ten Cent Store." They say the removal is merely a temporary affair. Temporary, dependent upon what? He was not to be reinstated in his old quarters, but after he had removed from the premises leased to him and taken up these so-called temporary quarters, he was to be reinstated in new quarters, at a position farther removed from the Boardwalk, and would then be in position to accept quarters such as were offered to him, regardless as to whether or not they were sufficient in size or facilities to accommodate his business.

Appellants allege that the respondent did not appear in the Court below with "clean hands" in that he did not attempt to deny the new matter inserted in the case in the appellants' answering affidavits, particularly relating to the alleged agreement of March 27, 1923, and further as to the allegation that he attempted through fraud to take advantage of the appellants' position in making demand for the payment to him of a large sum of money. Sufficient has been said in this brief concerning the agree-

ment of March 27, 1923. We think the learned Vice Chancellor has sufficiently answered the point that respondent is endeavoring to blackmail the appellants, when he said in his conclusions (Page 65): "This is not well taken. The complainant had already entered into an agreement with the defendant Company, which had not been carried out, and he was at liberty to refuse to make other changes in his contractual relations, and has not, by reason of his refusal to accede to the demand of the
10 defendant, tainted himself with 'unclean hands,' as insisted by the solicitors of the defendants in their arguments."

There has been some question raised by defendant-appellant concerning the legal right of the complainant-respondent to the relief prayed for in the bill and granted by the order here on appeal.

In the case of *Oliphant vs. Richman*, 67 N. J. Eq., Page 280, it was held: "In these applications for injunction there are two elements which must be shown. One
20 is the settled right or title of the complainant, the other is that this right in the thing in dispute will be irreparably damaged if the relief be not granted."

The learned Vice Chancellor, after careful consideration of all the circumstances of this case found as a fact that the right of the complainant-respondent was settled in his favor, as will appear from a reading of the conclusions filed. (State of the Case, Page 56, and particularly Pages 63 to 65, inclusive.) And it will be noted that this right was held not to be lost by reason of any
30 provision of the Laws of 1874, Page 27, or by reason of any claim of breach of any condition or covenant of the existing lease.

Having disposed of the first element essential to in-

junctive relief we now approach the question of irreparable damage. The court below, in its findings, dwells at length on both the facts and legal side of this phase of the case and it is there so carefully and completely considered that we take the liberty to quote therefrom the discussion of law as appears in the State of Case, Pages 65 to 69, inclusive.

"The contention is made by the defendants, that the complainant will not suffer irreparable damages, should he be compelled to vacate the premises. The claim being that each of the defendants are financially able to respond in any damages, which he could sustain, and that he must rely upon his right in the law courts. While it is true that 'a court of equity will not interfere by injunction in a case of naked trespass, where there is a full remedy at law.'

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Kerlin vs. West, 4 N. J. Eq. 449.

Ballantine vs. Harrison, 37 N. J. Eq. 560.

Myers vs. Kelly, 83 N. J. Eq. 474.

"The Court has jurisdiction.

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"In cases where the object of the bill is to prevent an injury which will be destructive of the inheritance, or which equity deems irreparable, i. e., one for which the damages that may be recovered according to legal rules do not afford adequate compensation.

Hart vs. Leonard, 42 N. J. Eq. 416, p. 421.

Morris C. & B. Co. vs. Jersey City, 11 N. J. Eq. 13.

Franklinite Co. vs. Zinc Co., 12 N. J. Eq. 215.

Zinc Co. vs. Franklinite Co., 12 N. J. Eq. 30 322.

Zinc Co. vs. Franklinite Co., 15 N. J. Eq. 418.

Southmayd vs. McLaughlin, 24 N. J. Eq. 181.

Manko vs. Chambersburgh, 25 N. J. Eq. 168.

Johnston vs. Hyde, 25 N. J. Eq. 454.

Thomas Iron Co. vs. Allentown Mining Co., 28 N. J. Eq. 77.

10 Fulton vs. Greacen, 36 N. J. Eq. 216.

Lord vs. Carbon Iron M. Co., 38 N. J. Eq. 452.

Oliphand vs. Richman, *supra*.

Kiernan vs. Jersey City, 76 N. J. Eq. 114.

McGann vs. La Brecque Co., Inc., 90 N. J. Eq. 530.

"Chancellor Runyon in *White car vs. Michenor*, 37 N. J. Eq. 6-14, said:

20 'While the jurisdiction of the Court to interfere by way of mandatory injunction should be exercised with the greatest possible caution, yet where the right to restrain the violation of which the injunction is asked for is clearly made out, and there is a present want of the use of that right, the Court should not hesitate. The Court is always very reluctant to grant a mandatory injunction on an interlocutory application, but where extreme or very serious damage would ensue from withholding it, as in cases of interference with easements or other

30 cases demanding immediate relief, it will be granted.'

Joyce Prin. Inj. 57.

Rogers Locomotive Works vs. Erie R. R. Co., 20 N. J. Eq. 379.

Thropp vs. Field, 26 N. J. Eq. 82.

Longwood Valley R. R. Co. vs. Baker, 27 N. J. Eq. 166.

"A very similar case in the Michigan Supreme Court, reversing the Circuit Court (in Chancery) which had refused an injunction. The Court said:

"The bill charges in positive language that defendant has threatened to tear down and utterly destroy the building, eject complainant, and terminate the tenancy, and complainant fears such threats will be executed unless restraint by the Court.

* * * Irreparable injury means that the injury would be a material one, in its nature serious and grievous, and such that it is extremely difficult or impossible to definitely ascertain the resulting damages and adequately make just reparation.'

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"Injunction will lie against the ejection of a tenant of upper stories of a building who is not in default, and the destruction of the building during the term of the lease to prevent irreparable injury to the lessee.

Minnis vs. Newbro-Gallogly Co., Mich.
140, N. W. 980, 44 L. R. A. N. S.
1110. Bottom 1st Co. 1115.

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"The characteristics certainly making an injury as irreparable are:

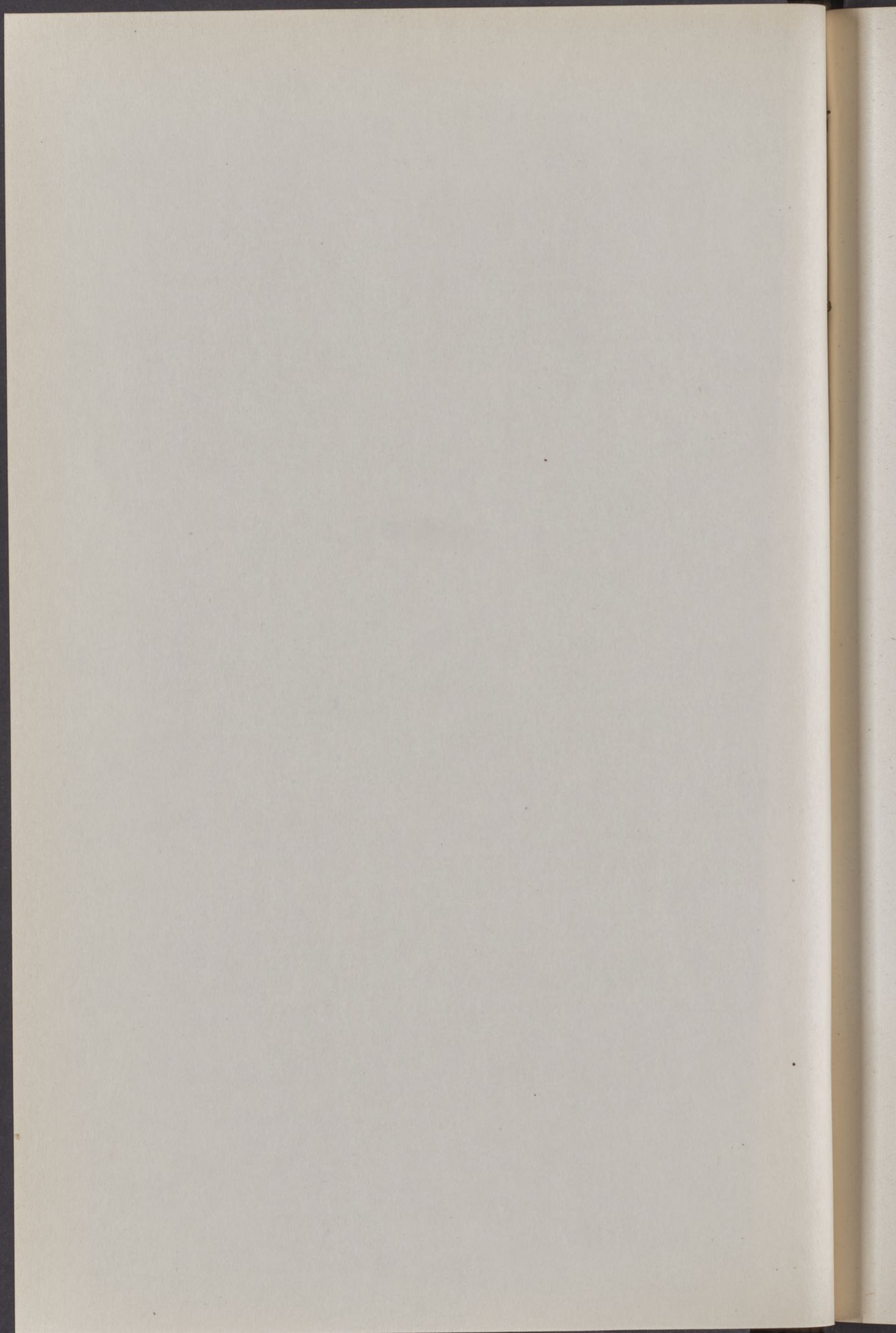
"1. That the injury is an act which is a serious change of, or is destructive to, the property it affects either physically or in the character in which it has been held and enjoyed.

"2. That the property must have some peculiar quality or use such that its pecuniary value, as estimated by a jury, will not fairly recompense the owner for the loss of it.

Pomeroy's Eq. Remedies, Par. 495.

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"The same author in Eq. Jurisprudence, Par. 1367:
'If the trespass, although a single act, is or would



NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

HUGO ROSEBERG,
Complainant-Respondent,

and

AMERICAN HOTEL AND GARDEN COMPANY, *et al.*,
Defendants-Appellants.

ON BILL FOR INJUNCTION, &c.

APPELLANTS' BRIEF.

STATEMENT.

The bill avers the relation of landlord and tenant between appellant and respondent and that appellant has threatened to evict respondent. On the filing of the bill and supporting affidavit, an order to show cause was allowed with an *ad interim* restraint, and on the coming in of the order to show cause appellant filed a number of answering affidavits. An order was advised allowing an injunction restraining appellant from interfering with respondent's possession and from such order this appeal is taken.

The bill sets up the existence of fire on the demised premises, which demised premises are but a small part of a large building of appellant in which there are a number of tenants. The averment is that the demised premises were repaired and that there is no occasion for respondent to move in order that further repairs be made, and the claim is that the alleged necessity for further repairs and the removal of the respondent while being made is a mere pretext to enable the appellant to place the McCrory Stores Corporation in possession of the premises demised to respondent. The answering affidavits set up an agreement between respondent and appellant after the fire upon the faith of which appellant acted, and it now asserts that not only is it necessary that other repairs be made to the building which the injunctive order restrains but that it is inequitable on the part of the respondent not to permit appellant to do the work necessary to place McCrory Stores Company in possession pursuant to the agreement made with it on the faith of the said agreement between appellant and respondent, and a copy of which is embodied in the answering affidavits.

ARGUMENT.

It will be noticed that the only affidavit in support of the bill is that of the respondent and that no request was made on the argument of the order to show cause for leave to file affidavits to answer those filed by appellant. The premises in question are situate at the corner of New York Avenue and the Boardwalk in Atlantic City, and the premises demised to the respondent which form a part of

said premises, are known as 169 South New York Avenue. The premises caught fire on December 31, 1922. While the bill alleges that the damages resulting from the fire, insofar as it affected respondent's premises, were immediately thereafter repaired, and the same placed in as good condition as before the fire; this is met by appellant's affidavits which we contend show the fact to be to the contrary, and that the demised premises could not be restored with the injunctive order against appellant. For this reason alone it should be reversed.

Paragraph 6 of the bill avers that appellant has endeavored to have respondent agree to give up possession of the premises demised to him in order that alterations might be made to accommodate McCrory Stores Corporation, with whom a lease has been made by appellant for the entire building owned by it and which includes respondent's premises. The bill does not set up the agreement which in fact respondent did make, and the existence of which he did not deny by counter-affidavits.

Paragraph 9 of the bill avers that appellant has started work of making alterations and that the walls of respondent's demised premises are open and exposed to the weather, the windows have been removed, so that in case of rain or other storm, there is nothing to prevent damage to respondent. The injunctive order would prevent appellant from so treating the premises as to avoid the possibility above described. The order reads:

"Ordered, that until the final hearing of this cause or this Court shall afterwards order, the defendants, and each of them, their and each of their contractors, agents, servants and workmen be, and they are hereby enjoined and restrained from removing the complainant from

or disturbing him in, or otherwise interfering with his possession or enjoyment of the store and premises known as 169 South New York Avenue, Atlantic City, N. J.," &c.

The order refers to a writing dated March 27, 1923, which is the agreement hereinabove referred to but erroneously refers to it as set forth in the bill of complaint. It was not set forth in the bill of complaint and by the bill respondent was relying upon his rights, if any, under original lease. The Court treated said agreement as though it was a part of the respondent's case when in fact it was a part of appellant's. According to the affidavit of Weinmann (page 14):

"The fire to which I have above referred, completely destroyed the hotel and the superstructure above the room or space occupied by the complainant, was greatly damaged and is still in a dangerous condition. Immediately after the fire was extinguished, paper roofing was placed over the part of the premises rented to and occupied by the complainant, and temporary repairs were made to enable him to continue the business of hair-dressing, in which he was engaged in carrying on, prior to and at the time of the fire, but the hotel part of said building and the superstructure above the part occupied by complainant, was allowed to remain in the condition in which the fire left it, awaiting the adjustment of the loss by the fire insurance company, in which condition it still remains."

His affidavit touching the condition of the demised premises after the fire is supported by Harry Weinmann, Peterson, the building inspector, and Thomas

Bleakly, superintendent of McCrory Store. In the condition the demised premises were after the fire, the landlord, by virtue of Section 31 of the Landlord and Tenant Act, Compiled Statutes, p. 3078, was charged with the duty of repairing as speedily as possible, and of course had the right to the possession of the premises unhampered by any act of the tenant, for the purpose of restoration. The injunctive order really prevents the appellant from discharging his statutory duty and denies him the right plainly inferable therefrom. Weinmann's affidavit sets forth the negotiations between him, as representing appellant, and respondent which ultimated in the agreement of March 27, 1923 (page 16). It was upon the strength of this agreement that the respondent leased to McCrory Stores Corporation the land on which the American Hotel stood and in which hotel respondent had his store.

The learned Vice-Chancellor based his injunctive order almost, if not wholly, upon the fact that the agreement in its concluding part said:

"I will vacate my present store on completion of the new store."

It was his thought that until the new store was ready for occupancy by respondent that he was under no obligation to move. Our insistence is that this interpretation is contrary to the plain spirit of the agreement reached when all the circumstances are taken into account. It is obvious from the affidavit of Weinmann, which is unmet, that the real understanding was that McCrory Stores Corporation was to have possession of respondent's demised premises, and that at once. It appears in the affidavit of Weinmann at page 18, that it is necessary to tear down the entire structure, part of which

is occupied by complainant. It also appears that this fact was communicated to respondent and he was tendered temporary quarters in the McCrory Store on the Boardwalk pending the construction of the new store referred to in the agreement and that the removal would be made without cost to respondent. The affidavit then proceeds:

"But, he refused to move into the McCrory store, and said he would not move anywhere, or give up the possession of the place he then occupied, and would not agree to anything, or do anything, unless he was paid by the American Hotel and Garden Company, eleven thousand five hundred dollars; that he had been advised that the American Hotel and Garden Company had made a long term lease with the McCrory Stores Corporation, at a large rental, and that he proposed to be paid well for the inconvenience caused him by reason of the fire."

It is our claim that apart from the question of respondent's strict legal right that in equity he should have been denied injunctive relief. Plainly, appellant acted in good faith in negotiating with him for new quarters and upon the strength of his promise entered into a lease with McCrory Stores Corporation to give possession May 1, 1923. Temporary quarters were offered him in the McCrory store and are as eligible and accessible as the damaged demised premises, and the removal was a mere temporary affair and was to be without expense to respondent. There was no thought of evicting him, or not constructing new stores for him pursuant to the written agreement. It is apparent that after making the agreement he saw an opportunity to compel appellant to pay a large sum of money which

he exacted as a consideration for his removal and to relieve appellant from possible liability to respond in damages to McCrory Stores Corporation. In this posture the fundamental equitable question is, should a court of equity assist him in his obvious ulterior purpose to exact an unwarranted sum by reason of appellant's plight. It is not a question of whether the court of equity had the power to make the order, but should it have been made.

Moreover, it appears in paragraph 8 of Weinmann's affidavit that the damaged premises cannot be rebuilt in accordance with the ordinance of Atlantic City "without demolishing the foundations, putting in new footings and new steel, and rebuilding the entire roof, which is impossible, with the complainant occupying the part of the premises he now occupies."

These averments are supported by other affidavits and will outweigh the single affidavit of respondent. In the presence of the answering affidavits, respondent's right is made doubtful and this is enough to require denial of injunctive relief.

It is important to know that the respondent nowhere in his bill or affidavit relies upon the agreement of March 27, 1923, nor does he suggest the right asserted by the Vice-Chancellor. He did not answer the affidavit of Weinmann nor deny that his sole reason for refusing to move into temporary quarters was his desire to compel appellant to pay him \$11,500. We submit that this conduct upon his part was highly inequitable and sufficient to deny the relief sought. Yet this important phase seems to have made no impression upon the learned Vice-Chancellor.

It appears in the case that both appellants are quite responsible financially and can pay any dam-

ages that may be awarded against them. Respondent could not be irreparably damaged within the meaning of the cases. In an action at law he would be permitted to show what his profits had been during the term of his lease as a basis of his loss of profits during the remaining term or he could show the difference between the amount of rent agreed upon and the fair rental value of the property to him, keeping in mind the profits earned. Moreover, as the record stands, the damages to appellant by reason of not being able to tender to McCrory Stores Corporation may be greater than any possible damage to respondent. If nothing more be considered than the balancing of equities the case is in favor of appellant.

It will also be noted that the answering affidavits set up a breach of the lease on the part of the complainant in that he sublet without permission of defendant and defaulted in payment of rent. Complainant was also notified of the necessity of his temporarily removing from the leased premises in order that they might be repaired pursuant to statute. Despite the fact that no counter-affidavit was filed by the complainant denying that he had breached the lease and which breach by the plain terms of the lease gave the defendant the right to possession, a preliminary injunction was granted. The terms of the decree are so broad as to admit of the interpretation that no action at law could be brought by defendant against the complainant for possession. In a subsequent proceeding by the complainant against the defendant by way of petition to have defendant adjudged in contempt for instituting an ejectment suit for possession, the learned Vice-Chancellor ruled that such action was in violation of the order or decree here under review and de-

fendant was adjudged in contempt. It seems clear that in the light of the answering affidavits of the defendant which are unmet, the Court should not have made the injunctive order or decree so broad as to deny to defendant the right to proceed at law for possession.

Taking the record as a whole, it is respectfully submitted that on this preliminary hearing and all the affidavits considered and weighed, that respondent has not shown himself entitled to the high equitable relief afforded him by the order under review, and that it should be reversed

Respectfully submitted,

JOHN C. REED,

*Solicitor for and of Counsel
with Defendants-Appellants.*

