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New Jersey Supreme Court,

Action at Law.

CHARLES H. LEONARD,
Plaintiff-Appellant,

VS.

SPICER MANUFACTURING COMPANY,
Defendant-Appellee.

Notice of Appeal, Filed April 16, 1926.

To Walter L. Hetfield, Jr., Esq., Attorney for Defendant:

Sir:

TAKE NOTICE that the plaintiff above named hereby appeals from the final judgment entered in the above entitled cause on November 10, 1925, in favor of the plaintiff and against the defendant for $963.64, to the New Jersey Court of Errors and Appeals in the last resort in all causes, and assigns the following as its grounds of appeal:

1. Because the Court granted defendant's motion for a non-suit on plaintiff's second cause of action.

2. Because the Court charged the jury, in substance, that the plaintiff was limited in his right to recover against the defendant to rent for one month amounting to $583.34, or for the use and occupation of plaintiff's premises during the period of one month only.

3. Because the Court excluded from the consideration of the jury plaintiff's claim for rent for the period of one year for the premises described in the complaint.

4. Because the Court erred in charging the jury, as follows: "if you are satisfied from the preponderance of the evidence in the case that there were any repairs of an extraordinary nature made necessary by the use of these premises by the defendant which the plaintiff paid for, then he is entitled to what is a reasonable charge for any making of those extraordinary repairs, in addition to the sum that you may find is due for rent, $583.34, or for the use during the month of the premises, if the tenant was a mere trespasser, together with any damage that he did as a result of his being a trespasser", without leaving it to the jury to find for the plaintiff rent for the term of one year from July 15, 1921, less the amount realized by the plaintiff during that period from the premises.

Respectfully yours,

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Plaintiff-Appellant.

Complaint.

NEW JERSEY SUPREME COURT,

UNION COUNTY.

Action at Law.

CHARLES H. LEONARD,

Plaintiff,

VS.

SPICER MANUFACTURING COMPANY,

Defendant.

Plaintiff, Charles H. Leonard, residing in the City of Elizabeth, Union County, New Jersey, complaining against the defendant, Spicer Manufacturing Company, a body corporate created by and existing under the laws of the State of Virginia, says:

FIRST CAUSE OF ACTION:

1. At all times herein stated plaintiff was the owner of a certain factory premises situate at the northwest corner of Berckman Street and North Avenue, in the City of Plainfield, in the County of Union and State of New Jersey, designated and known as Numbers 633-635 North Avenue, Plainfield, N. J.

2. Under date of July 15, 1919, plaintiff and defendant entered into a written agreement of lease wherein and whereby plaintiff rented to defendant the aforesaid premises for the term of two years, to commence on the fifteenth day of

July, 1919, at the yearly rental of $7,000, payable in quarterly installments of $1,750 each, in advance, on the fifteenth days of July, October, January and April in each year, and the defendant did expressly agree to pay said rent and also to pay all water rents for water consumed on said premises, and further that it would make all extraordinary repairs, including both interior and exterior repairs, and that in case the defendant failed to make such repairs the plaintiff might make the same and add the cost thereof to the rent, which items defendant agreed to pay as additional rent. Said parties did therein further agree that the defendant should have the option to renew said lease for a further period of three years upon the same covenants and agreements as contained in said lease, provided, however, that the defendant should give to the plaintiff written notice of its intention to exercise said option at least three months prior to the termination of said lease.

3. Defendant entered upon the demised premises as tenant and continued in the possession of said premises under said lease throughout the period commencing July 15, 1919, and ending July 15, 1921, and upon the expiration of said period continued in the possession of the demised premises as a tenant under said lease with the consent of the plaintiff, and the plaintiff did waive its right to insist upon the notice of election of intention to renew said lease as prescribed by the terms thereof, and the said defendant at the expiration of the period on July 15, 1921, elected to renew or extend said lease for a further period of three years until July 15, 1924, upon the same covenants and agreements contained in the agreement

of lease above referred to; and the plaintiff did agree to the continuation of said tenancy. By reason of the premises defendant became liable to pay rent to the plaintiff for three years from July 15, 1921, at the rate of $7,000 per year, payable in quarterly installments of $1,750 each in advance, beginning July 15, 1921, and continuing thereafter on the fifteenth days of October, January, April and July in each year, the last payment being due on April 15, 1924.

4. Notwithstanding the premises, defendant refused to pay the rent accruing as aforesaid from July 15, 1921, to July 15, 1924, and the full amount thereof, to wit, $21,000, is now due and owing to the plaintiff from the defendant, with interest from the several dates of maturity of the quarterly payments above specified.

SECOND CAUSE OF ACTION:

1. Plaintiff repeats the allegations of paragraphs numbered 1 and 2 of the first cause of action.

2. Defendant continued in possession of the demised premises holding over upon expiration of the term of said lease with the consent of the plaintiff.

3. By reason of the premises, defendant on July 15, 1921, became a tenant from year to year of the plaintiff at the yearly rental of $7,000 per year, payable quarterly, for the year ending July 15, 1922. Defendant did not pay the yearly rental as aforesaid for the year ending July 15, 1922, and

the full amount thereof, viz., $7,000, is now due and owing from the defendant to the plaintiff, together with interest thereon.

THIRD CAUSE OF ACTION:

1. Plaintiff repeats the allegations of paragraphs numbered 1 and 2 of the first cause of action.

2. Notwithstanding the premises, defendant neglected and refused to make certain extraordinary repairs to the demised premises covering damages thereto accruing during the term of said lease, and plaintiff was thereupon required to make the same, and the defendant damaged said premises during the period of its occupancy and committed waste thereon in all amounting to the sum of $186.20, for which amount defendant is indebted to the plaintiff.

Plaintiff demands judgment against the defendant upon the first cause of action in the sum of $21,000, besides interest; in the alternative, upon the second cause of action in the sum of $7,000, besides interest; upon the third cause of action in the sum of $186.20, with interest from July 15, 1921.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Plaintiff.

Answer, Filed June 20, 1925.

The answer of defendant, a corporation organized under and by virtue of the laws of the State of Virginia, and having an office and place of business at South Plainfield, Middlesex County, New Jersey, to the complaint of the plaintiff says:

FIRST CAUSE OF ACTION:

1. It admits the first paragraph.

2. It admits the second paragraph.

3. It denies the third paragraph, with the exception of that part thereof which states that the defendant entered upon the premises as tenant and continued in the possession of said premises under said lease throughout the period commencing July 15, 1919 to July 15, 1921, which the defendant admits.

4. It denies the fourth paragraph.

SECOND CAUSE OF ACTION:

1. It admits the first paragraph.

2. It admits that it continued in possession of said premises after the expiration of the term of said lease, but states that it did so under and by virtue of an agreement with the plaintiff, whereby plaintiff rented to defendant the said premises for the term of one month to commence on the 15th day of July, 1921, and ending on the 15th day of August, 1921.

3. It denies the third paragraph.

Answer.

THIRD CAUSE OF ACTION:

1. It admits the first paragraph.

2. It denies the second paragraph.

FIRST DEFENSE:

1. That the said plaintiff did on or about the 26th day of July, 1921, enter into an agreement with the defendant whereby the plaintiff rented to the said defendant the said premises for the term of one month to commence on the 15th day of July, 1921, and ending on the 15th day of August, 1921, at a rental of $583.34, for the said period.

WALTER L. HETFIELD, JR.,
Attorney for Defendant.

Reply, Filed June 23, 1925.

The reply of plaintiff to the answer and First Defense of the defendant.

FIRST CAUSE OF ACTION:

Plaintiff joins issue.

SECOND CAUSE OF ACTION:

Plaintiff denies the allegation of Paragraph 2 that he ever entered into an agreement with the defendant whereby he rented to defendant the aforesaid premises for the term of one month to commence on the fifteenth day of July, 1921, and ending on the fifteenth day of August, 1921.

REPLY TO FIRST DEFENSE:

Plaintiff denies that he at any time entered into an agreement with the defendant as alleged in Paragraph 1 of defendant's First Defense.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Plaintiff.

Postea.

The above entitled cause was tried at the Union Circuit on October 31st and November 2nd, 1925, before Hon. Peter F. Daly, Circuit Judge, to whom it was regularly referred for trial, and a jury.

The jury returned a verdict in favor of the plaintiff and against the defendant for the sum of $963.64.

PETER F. DALY,
Circuit Court Judge.

Judgment.

Whereupon it is adjudged that the plaintiff, Charles H. Leonard, do recover of the said defendant Spicer Manufacturing Company, the sum of nine hundred and sixty-three dollars and sixty-four cents damages, together with his costs, which have been taxed at the sum of dollars and cents, making in the whole the sum of dollars and cents.

Judgment entered November 10, 1925.

WM. S. GUMMERE,
C. J.

Testimony.

Transcript of stenographer's notes of evidence in the above entitled cause taken before Hon. Peter F. Daly, Circuit Court Judge, and a Jury, at the Union County Court House in the City of Elizabeth, New Jersey, on the thirtieth day of October, A. D. 1925.

APPEARANCES:

McDERMOTT, ENRIGHT AND CARPENTER, JOHN MULFORD ENRIGHT, ESQ. (Present), Counsel for the Plaintiff.

WALTER L. HETFIELD, JR., ESQ., FRANCIS A. GORDON, ESQ. (Present), Counsel for the Defendant.

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

Mr. Enright: I wish to amend the complaint in the third count. I have made a mistake in the figures used in that paragraph. I spoke to Mr. Gordon and he has no objection to the amendment. I must apologize to the Court for not having the certified copy.

The Court: Why?

Mr. Enright: Well, it is a neglect in not ordering it in time.

The Court: Have you copies of these?

Mr. Gordon: Yes, sir.

Mr. Enright: The answer is a certified copy.

Mr. Gordon: I assume you want to explain the amendment to the Court.

Mr. Enright: I have explained it to him.

Mr. Gordon: There is no objection with the understanding that the same denial as to the first complaint should stand as the denial to the amendment.

(Mr. Enright opens the case for the plaintiff.)

(Mr. Gordon opens the case for the defendant.)

CHARLES H. LEONARD, the plaintiff, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Enright:

Q. Mr. Leonard, where do you live? A. Elizabeth, New Jersey.

Q. Where? A. 161 Styles Street.

Q. How long have you lived in Elizabeth? A. I guess about thirty-five years.

Q. Are you the plaintiff in this action? A. Yes, sir.

Q. You own a large factory building in Plainfield at the corner of Barkman Street and North Avenue? A. Yes, sir.

Q. Did you lease that to the Spicer Manufacturing Company, the defendant in this action, under a written lease, July 15, 1919? A. I did.

Q. Is this the paper? I show you the lease. A. Yes, sir.

Mr. Gordon: No objection.

Mr. Enright: I offer in evidence agreement of lease dated July 15, 1919, signed by Charles H. Leonard and Spicer Manufacturing Company, signed by C. A. Daner.

The Court: There being no objection it is admitted.

(Paper referred to entered in evidence and marked Plaintiff's Exhibit P-1.)

Q. Did the defendant go into possession under this lease? A. Yes, sir.

Q. During the running of the lease you visited the factory, did you, from time to time? A. No.

Q. But do you know that the defendant was in possession during the lease? A. Yes, sir.

Q. Did you render bills for the rent quarterly? A. Quarterly, yes, sir.

Q. During the running of the lease? A. Yes, sir.

Q. The quarterly amount was how much? A. $1,750.

Q. How were you accustomed to render those bills? A. I, at their request, sent them a bill.

Q. But you sent them through the mail, or did you hand them to them? A. Through the mail.

Q. Where did you mail them? A. New York or Elizabeth.

Q. No, I mean to what address did you mail them? A. Spicer Manufacturing Company, Plainfield or South Plainfield, New Jersey.

Mr. Enright: Will the defendant produce letter from Mr. Leonard dated April 6, 1921?

Mr. Gordon: We have no such letter. April 6th?

Mr. Enright: April 6th.

Mr. Gordon: Not August 6th?

Mr. Enright: April.

Mr. Gordon: We have no such letter.

Q. Mr. Leonard, did you under date of April 6, 1921, address a letter to the Spicer Manufacturing Company, South Plainfield, N. J., of which I show you what purports to be a carbon copy? A. Yes, sir.

Q. Was that letter mailed in accordance with the address appearing thereon? A. Yes, sir.

Mr. Gordon: Objected to, if your Honor please, unless it appears that the witness knows of his own knowledge.

Q. Did you mail it yourself? A. Yes, sir.

Q. Will you state whether it was enclosed in an envelope with the return address? A. Yes, sir, it was.

Q. Did it ever come back to you? A. No, sir.

Q. The original was typewritten and this is a carbon copy? A. Yes, sir.

Mr. Enright: I offer the letter in evidence.

Mr. Gordon: May I interrogate the witness, your Honor?

The Court: Certainly.

Special cross examination by Mr. Gordon:

Q. Mr. Leonard, who typewrote this letter, the original of which this is a carbon? A. The stenographer at the store.

Q. What is her name? A. Stella Fallick. She is now married.

Q. She lives where? A. Up in the Bronx somewhere, I don't know.

Q. Did you make any effort to subpoena her in this case? A. I did not.

Q. This letter was written in April, 1921? A. Yes, sir.

Q. Do you recognize this as a carbon copy of the letter that you dictated? A. Well, it is on the kind of paper that we use, and I know the letter. Hold on; wait a moment. This wasn't from the store. This was from 120 Broadway.

Q. What is 120 Broadway, Mr. Leonard? A. That is the office of the Manhattan Rubber Company in which I am interested, and they have got five stenographers, and one of these girls wrote that letter.

Q. Which stenographer wrote that letter? A. I couldn't tell you that. There are five there. I thought I was at the store.

Q. Then you wish to correct yourself in that respect? A. Yes, sure.

Q. Did you make any inquiry among the stenographers as to which one wrote this letter? A. No, I did not.

Q. And you knew this case was coming up for trial? A. Sometime, yes. This was away back.

Q. And you have had this carbon copy in your possession? A. Yes.

Q. Now, do you know of your own knowledge whether the contents of this carbon copy are exactly what you dictated to the stenographer in April, 1921, or whether the original was changed before it was mailed? A. No, I think not. I see no occasion for it.

Q. Well, do you know? A. I don't know.

Q. You don't know. Now, Mr. Leonard, have you a mailing clerk at 120 Broadway that works for you or the company there? A. Well, I put letters that I wrote in the mail, in the general

mail. I don't know who mailed them. It is a large office and a great many employes, and I may have carried it out in my pocket and mailed it here in Elizabeth.

Q. There is a box at 120 Broadway? A. A chute, yes.

Q. How many clerks are there with this company with which you were associated there? A. Probably twelve or fifteen, I guess.

Q. There are clerks whose duty it is to mail letters? A. There is a boy there that does that, but I usually, as I walked out I dropped the letter in the chute. It is the Equitable Building.

Q. But you haven't any distinct recollection of mailing the original letter of which this is a carbon copy, have you? A. I feel pretty sure, yes.

Mr. Enright: I can probably save you some trouble. I have what apparently is an acknowledgment of it.

Mr. Gordon: Why didn't you tell me that? But I don't know that that letter acknowledges this letter. I object at this point to the introduction of this carbon copy as secondary or parole evidence of the contents of the letter purported to have been sent by the plaintiff to the defendant upon the ground that the witness——

The Court: You don't have to state your grounds. The objection is sustained. It has not been sufficiently proved.

By Mr. Enright:

Q. Did you receive through the mail following the mailing of a letter which you say you mailed

this letter from the Spicer Manufacturing Corporation? A. Yes, sir; I received that.

The Court: Let me look at both of them, will you, Mr. Enright?

Mr. Enright: I will elaborate on this proof if there is any question that he got them.

Q. Now, Mr. Leonard, at the time of those letters were you actively engaged in business? A. No, I had gone out in business in 1920.

Q. But you had some interest in this rubber company, you say? A. Yes.

The Court: Have you read these letters?

Mr. Gordon: I haven't seen either one, your Honor.

The Court: Suppose you do that. They both seem to refer to the same invoice, so-called.

By Mr. Enright:

Q. I will ask you whether you can say from your own knowledge that you dictated, signed, and mailed, either from New York or Elizabeth, a letter addressed to the Spicer Manufacturing Company of which you have seen what purports to be a copy? A. I used to write them out in lead pencil and pass them out to one of the girls to write. I didn't dictate.

Q. Having written it in lead pencil and sent it to the girl did you sign such a letter? A. Yes, sir.

Q. And mailed it? A. Yes, sir.

Q. Were you at that time calling at the office of the rubber company there? A. About every day.

Q. About every day? A. Every day.

Q. Did you receive mail at that address? A. I certainly did.

Q. Did you ever receive through the mail any return of that letter? A. No, never.

Q. In handling your business and having your letters written in this way did you see carbon copies of the letters which were typewritten for you? A. Always.

Q. What? A. Always.

Q. Is that carbon copy taken from your office? A. Yes, sir.

Mr. Gordon: I have no objection to that correspondence going in. We may have received that letter of April 6th, but we haven't got it.

Q. Did you enclose in that letter a bill for the quarter's rent as stated there? A. Yes.

Mr. Gordon: It refers to two quarters.

Q. Well, for the two quarters' rent? A. Yes, sir.

Q. And this reply letter from the Spicer Manufacturing Company which you have identified came about the time of this date? A. Yes, sir.

Q. And you received it at the address 120 Broadway there stated? A. Yes, sir.

Mr. Enright: I offer the two letters in evidence.

Mr. Gordon: No objection.

The Court: There being no objection they are admitted.

(Letter of April 6, 1921, entered in evidence and marked Plaintiff's Exhibit P-2.)

(Letter of April 8, 1921, entered in evidence and marked Plaintiff's Exhibit P-3.)

(Mr. Enright reads letter marked Exhibit P-2 to the jury.)

(Mr. Enright reads letter marked Exhibit P-3 to the jury.)

Q. Did you receive any letter or communication referring to that part of your inquiry in the letter of April 6th sending their advice of their decision in the matter of renewal of the lease? A. Never.

Mr. Enright: I call on the defendant to produce letter dated April 11, 1921.

Mr. Gordon: We have no such letter here. I have no objection to its going in evidence.

Q. I ask you to look at what purports to be a carbon copy of a letter addressed to Spicer Manufacturing Company, South Plainfield, with the initials at the bottom, C. H. L., dated April 11, 1921, and I ask you whether you had the original of that typewritten and mailed to the defendant at the address stated. A. Yes.

Q. Did you mail it yourself? A. Yes.

Q. About the time of its date? A. Yes.

Q. Did it ever come back to you through the mail? A. No, sir.

Q. And did you receive what purports to be a reply thereto on the letterhead of the Spicer Manufacturing Company, dated April 25, 1921, signed Spicer Manufacturing Company, B. Secor? A. Yes, sir.

Q. Did you receive any other reply than that which I show you? A. No, sir.

Mr. Enright: I offer in evidence the carbon of the letter sent and the original of the reply.

Mr. Gordon: No objection.

The Court: There being no objection they are admitted.

(Letter dated April 11, 1921, entered in evidence and marked Plaintiff's Exhibit P-4.)

(Letter dated April 25, 1921, entered in evidence and marked Plaintiff's Exhibit P-5.)

(Mr. Enright reads letter marked Exhibit P-4 to the jury.)

(Mr. Enright reads letter marked Exhibit P-5 to the jury.)

Q. Both of these are produced from the file you kept relating to this matter? A. Yes.

Q. Did you hear anything further from the de-

fendants respecting their occupation of this property or anything else? A. No, sir.

Q. From that time on up to July 15, 1921? A. No, sir.

Q. Now, following July 15, 1921, what if anything did you do to ascertain whether or not the defendant was still staying in possession? A. Why, I went at that time and I found——

Mr. Gordon: Just a moment. I would like to have the time fixed.

Q. About how soon, to the best of your recollection? A. About the time of the expiration of the original lease, which was July 15th. I can't say what day it was. I went at that time and I found there were no workingmen in the place, but their watchman, whom I knew very well, Mr. Saunders, and I said, "What is happening here?"

Q. Was their machinery there? A. Their machinery was all there, yes.

Adjourned until Monday, November 2, 1925, at 9:30 A. M.

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

October Term, 1925.

[SAME TITLE.]

Transcript of stenographer's notes of evidence in the above entitled causes taken before Hon. Peter F. Daly, Circuit Court Judge, and a Jury, at the Union County Court House in the City of Elizabeth, New Jersey, on the second day of November, A. D. 1925, at 9:30 A. M.

APPEARANCES:

MCDERMOTT, ENRIGHT and CARPENTER (John Mulford Enright, Esq., present) Counsel for the Plaintiff.

WALTER L. HETFIELD, JR., ESQ. (Francis A. Gordon, Esq., present) Counsel for the Defendant.

CHARLES H. LEONARD, resumed.

Direct examination by Mr. Enright (continued):

Q. Mr. Leonard, following your visit to the factory in July, 1921, did you send a bill to the defendant for rent? A. I did.

Mr. Enright: Will the defendant produce a rent bill dated July 25, 1921?

Mr. Gordon: We have one here that was received August 18th.

Mr. Enright: No, the earlier one.

Mr. Gordon: We have no such one.

Q. Was that bill typewritten? A. Yes, sir.

Q. Was it written in the same way that you have previously testified to with respect to these letters? A. Yes, sir.

Q. And was a carbon copy retained by you at the time? A. Yes, sir.

Q. Did you personally mail it? A. Well, I don't know as to that. The postman may have taken it out of the house. That I think was sent from Elizabeth.

Q. Is this paper I show you, this carbon copy, a carbon copy which you produced from your files of that rent bill? A. Yes, sir.

Q. And is that pencil memorandum at the bottom in your handwriting? A. Yes, sir.

Q. Did you make that pencil memorandum at the time? A. Yes, sir.

Q. And by reference to that memorandum can you fix the date upon which you mailed that? A. Well, two or three days afterwards.

Q. By reference to that pencil memorandum will you say whether you can fix the date upon which you mailed that paper? A. July 27th.

Q. In what sort of envelope was that enclosed? A. Small envelope.

Q. I mean, what was on the outside? Was there any return address on the outside? A. Yes, return to C. H. Leonard, 161 Styles Street, Elizabeth, New Jersey.

Q. That is your residence in Elizabeth? A. Yes, sir.

Q. Was it ever returned to you? A. No, sir.

Q. To what address did you mail it? A. Spicer Manufacturing Company, South Plainfield, New Jersey.

Q. That is the same address to which you had always mailed other communications to them? A. Yes, sir.

Mr. Enright: I offer the carbon copy in evidence.

Mr. Gordon: May I ask a question or two, your Honor?

The Court: Certainly.

Special cross examination by Mr. Gordon:

Q. Do you recall, Mr. Leonard, where you mailed it, at what box? A. Why, I think it was put on the table in the hall and the postman usually takes it out in the morning right from that table, the letter carrier.

Q. Then you didn't go to a post box and deposit it in the post box? A. Well, I don't know. I generally go down the corner of Styles and Chilton.

Q. You have no definite recollection whether you deposited the original of this letter in the post box or whether it was left in the hallway and the mailman called for it? A. I couldn't say that.

Q. You don't know whether or not you took the original of this to the post office at North Broad Street? A. No, Styles Street and Chilton.

Q. That is a post office? A. No, I didn't take it to the post office.

Q. You didn't take it to the post office? A. No.

Q. This pencil memorandum—you are positive

that this was mailed from Elizabeth? A. Yes, sir.

Q. Now, I show you this memorandum and ask you if it does not state that it was mailed here in New York City? A. That is true. That is an error on my part.

Q. You have no independent recollection of how that was mailed, have you? A. Well, it is either one of the two. I don't know.

Mr. Gordon: I object to the introduction of this carbon copy.

Direct examination by Mr. Enright (continued):

Q. I will ask you to look at that memorandum again and I will ask you to listen to the question. Did you make that memorandum at the time, you yourself, the pencil memorandum? A. Yes, sir.

Q. You have no doubt that it is in your handwriting? A. That is my handwriting.

Q. Does that memorandum which you made at the time refresh your recollection as to what you did with the original of that? A. Well, I might have carried it to New York——

Q. Does it refresh your recollection or does it not? A. No, states it was mailed in New York City, so I must have carried it to New York and mailed it there.

Q. Looking at the memorandum now which you made at the time I ask you to testify from your refreshed recollection as refreshed by your memorandum, as to what you did with it. A. It states here it was mailed on July 27, 1921, at New York City.

Q. What do you state about it? A. Well, I had so many letters I couldn't—I must have mailed it in New York City then.

Q. Well, did you or did you not, as your recollection is refreshed by your memorandum? A. It states that I did there, so I must have done that.

Q. Was that a correct memorandum at the time you made it? A. Yes, sir.

Mr. Enright: I renew the offer.

Mr. Gordon: I renew the objection, if your Honor please. The witness has not stated that he mailed it. He says he must have.

The Court: Objection sustained.

Mr. Enright: I pray an exception. I ask to have this marked for identification.

(Carbon copy of bill dated July 25, 1921, marked Plaintiff's Exhibit P-6 for Identification.)

Q. Now, whether or not the paper which has been referred to is in evidence, regarding the mailing of that, will you state how shortly—I want to fix a date after this visit to the factory at Plainfield—did you prepare that bill? A. It must have been two or three days I guess.

Q. That is your best recollection? A. Yes, sir.

Q. Now, how shortly after the making out of that bill was it when you next went to the factory? A. It was about August 12th I guess, I think. I made two visits there.

Q. You made two visits? A. Yes.

Q. Do you recall whether the second visit was

after the 1st of August or not? A. Yes, because they were moving the stuff out.

Q. What was the condition of the factory on the second visit? A. Why, the machinery, belting and everything had been taken out, excepting three or four lathes, two or three lathes, big tools, and they were busy working them out.

Q. What was the condition of the sidewalk? A. Well, it was very, very bad. I received notice from the City to repair it.

Q. You say it was very bad. What was the condition? A. The stones were all crushed, the flag stones, from the big heavy trucks that were backed up to the factory, in two or three places. I was ordered by the City to repair it.

Q. What was the condition of the rest of the property? A. Oh, there was holes in the floor, different things that I fixed up.

Q. Whom did you see on this second visit to the factory? A. I saw the watchman there, Mr. Saunders, and Mr. Secor.

Q. That is Mr. Secor? A. That gentleman there (indicating).

Q. What does he have to do with the Spicer Manufacturing Company? A. I think he is the treasurer, is he?

Q. Do you know or don't you know? A. I don't know.

Q. You simply know he had something to do with the company? A. Yes. And one of their workmen.

Mr. Enright: Will the defendant produce letter from Mr. Leonard to the Spicer Manufacturing Company dated August 6, 1921?

Mr. Gordon: Yes, sir.

Q. Did you send this letter to the Spicer Manufacturing Company on or about the day of its date, August 6th?

Mr. Gordon: We admit having received it. Let us speed it up a little.

Mr. Enright: I think that is the first one you admitted you received.

Mr. Gordon: I might state that your notice to produce did not call for the letter of April, and the July letter has not been proven to be sent even.

A. Yes, sir.

Mr. Enright: I offer this in evidence.

Mr. Gordon: No objection.

(Letter dated August 6, 1921, entered in evidence and marked Plaintiff's Exhibit P-7.)

(Mr. Enright reads letter marked Exhibit P-7 to the jury.)

Q. Did they make those repairs that you suggest there to be made for your account? A. No. They put a piece of box board to cover a hole, a large hole. That is all I could say they did.

Q. I ask you whether you asked them in your letter to do certain things for your account. A. No. They didn't do a thing.

Q. Did they do any things that you wanted done on your account, that you offered to pay for? A. No.

Q. As to the other repairs which you refer to

there, not the ones to be made for your account, were they done? A. No, except the putting of the piece of board.

Q. Did you have to do them yourself? A. Yes, sir.

Q. Following that letter did you receive a reply dated August 16th, which I show you? A. Yes, sir.

Mr. Gordon: No objection to this going in evidence.

(Letter dated August 16, 1921, entered in evidence and marked Plaintiff's Exhibit P-8.)

Q. This is the reply dated August 16th.

(Mr. Enright reads letter marked Exhibit P-8 to the jury.)

Q. Did you answer that letter?

Mr. Enright: I call on the defendant to produce a leter from Mr. Leonard to the Spicer Manufacturing Company, August 17, 1921.

Mr. Gordon: No objection to its offer.

(Letter dated August 17, 1921, entered in evidence and marked Plaintiff's Exhibit P-9.)

(Mr. Enright reads letter marked Exhibit P-9 to the jury.)

Mr. Enright: Will the defendant kindly produce duplicate bill?

Mr. Gordon: We produce the enclosure. Whether it is a duplicate bill is a matter in issue.

Mr. Enright: I ask that the enclosure now produced be marked.

(Paper bearing date July 25, 1921, entered in evidence and marked Plaintiff's Exhibit P-10.)

(Mr. Enright reads Exhibit P-10 to the jury.)

Q. Is this letter which I now show you dated August 22, 1921, the reply you received? A. Yes, sir.

Mr. Gordon: No objection.

(Letter dated August 22, 1921, entered in evidence and marked Plaintiff's Exhibit P-11.)

(Mr. Enright reads letter marked Exhibit P-11 to jury.)

Q. Referring your attention to your letter to Spicer dated August 17th, marked Exhibit P-9 in evidence, in which you refer to the rent bill as having been sent to them, I will ask you whether anybody connected with the Spicer Manufacturing Company in any way ever claimed to you that they did not receive that rent bill which you referred to, the first rent bill. A. No, sir.

Q. And referring you to your statement in that letter in which you say that you sent "a bill about July 27th for the rent for the quarter from July

15th to October 15th, 1921, amounting to $1,750, this wasn't in any way repudiated by you." Is that a true statement? A. Yes, sir.

Q. That bill was not, as you stated there, in any way ever repudiated by anybody connected with the Spicer Manufacturing Company?

Mr. Gordon: I object upon the ground it is leading and self-serving.

The Court: He has already said that it wasn't.

Mr. Enright: I renew the offer of the carbon copy previously marked for identification.

Mr. Gordon: The same objection.

The Court: Let me look at it? What is the objection to this?

Mr. Gordon: My objection is, if your Honor pleases, that there is no evidence that the original of that bill was sent.

The Court: On what grounds do you offer it, taking that objection into consideration?

Mr. Enright: Why, it is offered as evidence as showing that so far as the landlord was concerned the continuance of the tenant in possession was——

The Court: I am talking now about the proof of the sending. Where is the proof of sending it?

Mr. Enright: The witness testified with his memory refreshed from his own memorandum that he enclosed that bill in an envelope addressed to these people at the regular place of business, and he says that it was mailed at the date, his recollection

not being now entirely clear upon the subject, but as refreshed, he says from New York City, and it being mailed in an enclosure properly addressed.

The Court: But do you prove the mailing?

Mr. Enright: Well, he says that—in substance he says he has no recollection except as his memorandum refreshes it. That is the situation that you very frequently have.

The Court: He says he doesn't know whether he personally put it in the box or whether he left it on the table.

Mr. Enright: That was his first recollection, but when I recalled his memorandum to him, which of course after this length of time naturally is the reliable thing, he says that it was mailed in New York City.

The Court: I know, but as I understand the position of the defendant, they deny that they ever received it. Now, you can't prove that they did, that it was mailed to them, unless this man mailed it or unless you know just who put it in the post office box.

Mr. Enright: In substance he says that he mailed it in New York.

The Court: You may examine him further on that. I didn't get it, that he says he mailed it.

Mr. Enright: Then the offer is renewed at this time, because there is this further evidence now before the Court that in a later communication which they admit they

received he refers to this as having been sent July 27th, which is the date of his memorandum there, and he says to them, "And you never repudiated it."

The Court: Then as I understand your position you prove mailing by a man who says he doesn't know whether he put it in a box or not, but it is corroboration that he did put it in a box by the fact that he mentions it in a subsequent letter? He has got to prove that he put it in a mailing box in view of their contention that they never received it.

Mr. Enright: He says this: "With my recollection refreshed from a memorandum made at the time I now testify——"

The Court: Now, we will see. These general statements don't go as proof of the mailing.

By the Court:

Q. Did you mail that letter, that bill? A. Yes.

Q. How? A. Dropping in the chute at 120 Broadway if I mailed it from New York. I had desk room there.

Q. Now you are putting conditions on it again, if you did, if you mailed it from New York and dropped it in the chute. A. I was mailing lots of letters all the time, and I could not positively swear that I put that actually in the chute or one of the boys in the Manhattan company did it. If I thought there was going to be any question about that thing I would have been very careful to get proofs.

Mr. Gordon: I move to strike the last portion of the witness's answer as irresponsive.

The Court: Yes, of course. Proceed.

Mr. Enright: Is the renewed offer excluded?

The Court: Why, of course it is rejected. He has not said that he put it in the mailing box. If the man says that he put it in the post office box, why that is a different proposition, but he won't say it.

By Mr. Enright:

Q. Now, what repairs did you make? A. Carpenter work all around the doors, and the roof, about 250 feet of sidewalk, and charged them with $60 I believe.

Q. Did you afterwards send them a bill? A. General repairs, and then I put in afterwards the 39,000 square feet of concrete flooring.

Q. Did you afterwards send them a bill including that? A. Yes, sir.

Mr. Enright: Have you got that, Mr. Gordon?

Mr. Gordon: No, sir; I haven't any such bill.

Q. Did you make up a memorandum at about the time of these repairs as to what they were? A. Yes, sir.

Q. Does that refresh your recollection? A. Yes, sir.

Q. Will you state what they were? A. Yes, sir.

Mr. Gordon: I object to it if your Honor pleases, upon the ground in the first place that the lease calls for an obligation upon the part of the tenant to make extraordinary repairs, and the foundation has not yet been laid for any such proof as this.

Mr. Enright: The lease covers two things. It is an obligation to make all the extraordinary repairs to the premises, including both interior and exterior repairs. There is a covenant that at the expiration of the lease the tenant will quit and surrender in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. Now, I am asking the witness what he did, and that will show, I take it, from the description whether they are of a character which would be denominated extraordinary or whether they were necessary to return the property to the same good state and condition as reasonable use and wear thereof would permit.

Mr. Gordon: My objection is urged now, if your Honor pleases, that it doesn't appear what the condition of the premises was when the tenant vacated, and when that condition was.

Mr. Enright: Well, I will ask him:

Q. What defects, if any, were there in the property, in the building, after the Spicer people went out?

Mr. Gordon: If your Honor pleases, that is objected to——

Q. (Continued) Which weren't there when they went in, other than such as might be the result of wear and tear?

Mr. Gordon: That is objected to upon the ground the time has not been fixed. He says when the Spicer people went out, but the time has not been fixed.

Q. At the time of your second visit there that you say was somewhere around the 1st of August. A. No, about August 12th.

Q. Well, will you say what the condition was at that time? A. Well, I found the floor broken in many places, I found the big partitions, about twelve or fourteen foot high, taken away entirely. I found a great many panes of glass broken, a great many, and roof leaking.

Q. How about the sidewalk? A. And the sidewalk all crushed, so the City notified me it was dangerous.

Q. Where was the sidewalk crushed? In front of what particular part? A. In front of the entrances where big trucks backed right up with very heavy merchandise—cement, they had about two tons stored in there.

Q. Now, did you have the glass repaired? A. Yes.

Q. And the roof? A. Yes.

Q. And the sidewalk? A. Yes, sir.

Q. Did you make up a memorandum at about the time of this, showing what you had done and the cost of it? A. Yes, sir.

Q. Did you replace the partitions which they had taken down? A. No, but I got a price to do so.

Q. First take up the items that you had fixed up. A. Cost of partitions——

Q. Leave out partitions. A. Forty panes of glass, eighty-six broken—I charged them with forty. Cost of material and labor to repair roof.

Mr. Gordon: I object to this method of proving the cost of repairs. It is not the best proof of the fair and reasonable value of what the repairs were, if they were made. This man has not qualified as a glass man or repair man or carpenter or artisan in any way to connect with the matters he is referring to in his testimony.

Q. Are you familiar with the expense of making repairs to buildings of this character? A. I made very extensive repairs there, about nine or ten thousand dollars, and we used the workmen—343 workmen there.

By the Court:

Q. You are not answering the question. You are asked what experience you have had that enables you to tell whether or not a certain amount paid for repairs is reasonable. A. I was in the general supply business for very many years. I knew about what costs were.

By Mr. Enright:

Q. Have you had experience in managing this and other properties? A. Why, yes.

Q. Buildings? A. Sure.

Q. You say you had extensive repairs made there at that time? A. Yes, on my own account.

Q. And the amount which you have charged in this bill—will you say whether or not that was a fair pro-rating of these general expenses that you had? A. Yes, sir.

Mr. Gordon: That is objected to as incompetent.

The Court: Oh, of course it is incompetent. But I believe that he is qualified to say specific rates charged for these things that he claims he incurred as an expense for the making of repairs, and the reasonable amount; but don't ask him to prorate.

Mr. Gordon: For the purposes of the record I would like to enter an objection.

The Court: Yes, you may have your objection.

Q. Will you state the amounts, Mr. Leonard? A. Cost of partitions removed by Spicer Manufacturing Company, $208.60. There is the estimate for that. Forty panes of glass at forty cents, $16; 240 square feet, sixty running feet of sidewalk, $72; cost of materials and labor for repairing roof, $56; fittings and labor connecting heating system, water pipes, which was $83.60. Now, that is a joke to what I paid out and did up there.

Q. What is the total of that now, sir? The total is— A. Well, this includes the rent business.

Q. Leave out the rent. A. $2,186.20, deduct $1,750.

Q. That makes $436.20. A. Yes, sir; $436.20.

Q. During the year following July 15, 1921, to

July 15, 1922, were you able to get any tenant for the prpoerty?

Mr. Gordon: I object to that as calling for a conclusion.

Q. Did you get any tenant? A. Well, yes.

Q. For the year? A. No, not for the year.

Q. July 15, 1921, to July 15, 1922, did you rent the property or have a tenant in there? A. Why, the people across the street had a fire and they went in.

Q. During that year July 15, 1921, to July 15, 1922? A. Yes, they went in there for four months and paid $500.

Q. When was that? A. They entered February 21st.

Q. Do you mean—you say February 21st. It was after the Spicer people went out? A. Oh, yes.

Q. It was during that year? A. Yes, sir.

Q. And you received $500? A. Yes, four months' rent. They had a fire. They stored stuff there.

Q. And you got $500? A. Yes.

Q. Is that all you received during that period? A. Subsequently the Public Service——

Q. I am not asking you about subseqently. I am asking you about that period. A. That is all.

Mr. Enright: Cross examine.

The Court: You haven't asked him what efforts he made to get other tenants.

Mr. Enright: Well, I will.

Q. What efforts did you make? A. Why, I had agents all over. Brooklyn, Newark, Passaic, Paterson, Plainfield, Elizabeth—everywhere.

Mr. Enright: That is all.

I may say at this time that we will withdraw the first cause of action, which is for a renewal for the full term, and stand on the second.

Mr. Gordon: Claiming just a tenancy for a year?

Mr. Enright: Yes.

Cross examination by Mr. Gordon:

Q. Mr. Leonard, you have been engaged in business how long? A. Last forty-four years in the supply business.

Q. During that period of time you have bought and sold in large quantities in several items that are mentioned on your letterhead? A. Yes.

Q. And in connection with the purchase and sale of such items you have had occasion to receive and give options? A. For what?

Q. For the purchase or sale of commodities that you handle. A. Why, the people order the stuff and I fill the orders and charge them for it.

Q. Did you ever give options? A. No.

Q. Ever take options? A. No.

Q. You have handled considerable real estate in the last twenty or thirty years? A. Yes, some.

Q. And you have owned real estate in the City of Elizabeth and in Plainfield? A. Yes.

Q. Do you know what an option is? A. Sure.

Mr. Gordon: No further cross examination, your Honor.

Mr. Enright: That is all. That is the plaintiff's case.

MOTION FOR NONSUIT.

Mr. Gordon: On the second cause of action, if your Honor pleases, I move for a nonsuit upon the ground that it affirmatively appears from the plaintiff's case, particularly with reference to Exhibit P-9, that the plaintiff in this case insisted upon looking into the tenant under a renewal of the old lease. The basis upon which there can be a tenancy created for a year is that of consent, and it is apparent in this case that so far as consent was concerned the only consent that the plaintiff relied upon on his part was a consent to the insistment of a renewal of the old lease. The matter is covered in the case of Yetter v. King. Here is a case where the tenant was in possession apparently a few days over the expiration date—I am talking of the case at bar—the landlord, an experienced business man, fully apprised of the contents of the lease, very apprehensive of the full knowledge of the state of facts at the plant, because three months before the expiration date he was writing letters about their continuance after the expiration date, seeking to impose upon the tenant—not a condition that could be implied by law, but a definite position is taken by him that the tenant is a tenant for three years. He has renewed under the lease and he bills them under the lease. He so testifies.

Under those circumstances the case now resting with the plaintiff that they no longer rely upon the renewal or claim for renewal, I respectfully submit that the condition of the landlord is such that he has stopped himself from claiming for a year. There is a decided lack of the element of mutuality in this situation. Assuming for the sake of argument that we wanted to stay for a

year in August, 1921, with the position of the landlord definitely taken that he was going to hold them for a renewal of the lease, we could not hold him for a period of one year because he had not bound himself in any way. Now, it is an elementary proposition that where parties seek to hold obligations against one another there must be mutuality of contract, and the element of consent in this case is entirely lacking. I respectfully submit that from the proofs offered in this case so far as the second cause of action is concerned the tenancy was merely one, if anything at all of sufferance, or we were trespassers and Mr. Leonard had his remedy either to evict or to serve notice upon us. I respectfully submit that he has no remedy under the second cause of action.

(Mr. Enright replies to Mr. Gordon's motion.)

The Court: So that the plaintiff may have the full benefit of any subsequent action he might care to take, this paper marked Exhibit P-6 for Identification, which I have refused up to the present time to permit in evidence, I will allow in evidence; and you may take an exception, Mr. Gordon.

(Paper heretofore marked Plaintiff's Exhibit P-6 for Identification entered in evidence and marked Plaintiff's Exhibit P-6.

(Argument by counsel.)

The Court: In this case the first question is: When did the lease end? This lease was for a term of two years from July 15, 1919, to July 15, 1921. The rental was $7,000 a year payable in quarterly payments of $1,750 in advance. It

was provided for by the terms of the lease that the lessee would have a right to an extension or a continuance of the two-year term for three years more provided he gave to the landlord a written notice at least three months before the termination of the two years that he wanted the continuance, that he would take advantage of his right of extending for three years more. Communications were sent by the landlord to the tenant calling his attention to the fact that such a notice had not been given, and those communications, or at least one, was given before the end of the two years. Since this notice was not given this lease positively terminated at the end of the two years.

Now, where a lease terminates or at least the time fixed has expired, there may be through operation of the law and the conduct of the parties a continuance under the lease known as a tenancy from year to year. When a lease is terminated as this lease terminated, then the very day, the very minute after that lease terminated, or a substantial time after that lease terminated, the next day, the landlord could have treated the tenant as a trespasser; but if the landlord allowed that trespasser—and he was a trespasser after the lease ended—to stay there without the express agreement of the landlord with authority from the landlord, if he consented to the continuance upon the part of the tenant, and accepted rent, there was a relationship of a tenancy from year to year created between the landlord and the tenant. If he consented to the continuance of possession by the tenant after the termination of

the lease there was such a tenancy from year to year.

So in this case the question is: Did the landlord consent to this continuance? The evidence, and the only evidence that he had, is that he never consented to a tenancy from year to year. Two days after the tenant became a trespasser, two days after the end of the two years, the landlord mailed, as he claims, either from Elizabeth or from New York, a bill for $1,750, a call for a quarter's rent, which showed clearly that he regarded the tenant as having continued under the lease for the three years' option under the lease; and every bit of testimony that we have here shows a repudiation upon the part of the landlord that there was any tenancy from year to year, insisting all the way through that the tenant was bound to a three years' extension. Now, that being so where was there the consent upon the part of the landlord that created a tenancy from year to year? Where was there anything upon the part of the landlord that barred him from ejecting the tenant at any time after the termination of the two years? Absolutely none. He took the position that he had no right there excepting for three years, and excepting under an obligation to pay rent for three years.

Now, then, even though the law says that after the expiration of a fixed term this tenancy may be created by the negative acts or by express consent from year to year, yet there must be a meeting of the minds through the acts of the landlord and the tenant that there is a tenancy from year to year; and there was absolutely nothing in this case to show a meeting of the minds between the

landlord and the tenant. On the contrary every act, every communication of the landlord shows a rejection of anything except an obligation upon the part of the tenant for three years' rent. That being the situation, this landlord cannot as a matter of rent look for anything legally in my conclusion excepting compensation for the time that the trespassers stayed in there.

Now, then, there is the other question, however, as to the damages claimed, damages done to the property beyond wear and tear. The motion as to the nonsuit as to the rent in the second count, I believe it is.

Mr. Gordon: The second count, yes.

The Court: In the first cause of action, whatever cause it is, the second cause of action.

Mr. Enright: The first is withdrawn.

The Court: The first is withdrawn, looking for rent for the whole three years.

Mr. Enright: It is the second cause of action.

The Court: The second cause of action for the year's rent. That motion for a nonsuit is granted. Counsel for the plaintiff may have an exception.

Mr. Gordon: Now, as to the repairs I assume there is just that remaining issue, were these repairs necessary and were they made?

The Court: Well, there is also the question of what the plaintiff is entitled to for the time that the tenant stayed there.

Mr. Gordon: That is not pleaded.

The Court: That is all right. It is broad enough in my judgment to cover that just the same. They claim that they are entitled to a year's rent. Now, if they are entitled to any part

of that year's rent, why of course they are entitled to that verdict for that.

Mr. Gordon: If they amend their pleading to confirm that claim.

The Court: All right. I am going to allow that to go to the jury. The defendant asks for a year's rent, and if they are entitled to any part of that year's rent, why they are entitled to a judgment for it. The pleading is broad enough for that in my opinion. The only question of fact, it seems to me, is the question as to the reasonableness of their claims and the legality and the reasonableness of the claim for the repairs made to this property, which they say was the result of the damages or waste done by the defendant.

Mr. Gordon: Going back to the item, if your Honor please, here charged for that period of time that the tenant occupied the property, to what extent is that to be measured? In other words, what are we charged with. How much? We must be prepared to meet such an issue. It may be reasonable use for that month was one item. We might show another item now in the absence of the claim as to what their claim is.

The Court: Oh, I think you can safely leave that to the jury.

Mr. Gordon: I would like to have the record in such shape that when the issue is submitted to the jury it is based upon a charge in the second count.

The Court: I passed upon your motion. We will take up one thing at a time.

DEFENDANT'S CASE.

BERT SECOR, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, said:

Direct examination by Mr. Gordon:

Q. Mr. Secor, you are the purchasing agent connected with the Spicer Manufacturing Company? A. I am.

Q. You were connected with the company in August, 1921? A. I was.

Q. Did you shortly prior to the 12th of August meet Mr. Leonard at the plant of the Spicer Manufacturing Company? A. I did.

Q. That was the plant that had been leased from Mr. Leonard by the Spicer Manufacturing Company? A. That is right.

Q. What did you do there with Mr. Leonard? A. Why, we went over——

Q. With reference to repairs in the property. A. We looked over the repairs that he suggested. He suggested repairs to the floor. He suggested repairs to the skylight and some repairs to the roof and sidewalks.

Q. Now, were you familiar with the condition of this property when the Spicer Company moved in? A. Why, not very. I would not want to testify on that point.

Q. Now, with reference to these repairs that Mr. Leonard pointed out to you, what happened? A. We made the repairs.

Q. Who paid for them? A. Excepting the sidewalks.

Q. Who paid for these repairs? A. Spicer Manufacturing Corporation.

Q. What have you to say with reference to the partitions that Mr. Leonard claims were taken away? A. I can't say anything about that.

Q. Were there any taken away to your knowledge? A. Not that I know of.

Q. What have you to say with reference to the roof leaking? A. We made repairs to the roof.

Q. Did you make repairs to the roof? A. Extensive repairs to the roof.

Q. After these repairs what was the condition of the roof? A. In good condition.

Q. With reference to the glass that Mr. Leonard charges here what have you to say? A. I don't care to say anything about the glass. I am not familiar with it.

Q. Was there any bill presented to you by Mr. Leonard for repairs that he claimed to have made? A. No, sir.

Q. Did you ever hear from Mr. Leonard after that as to repairs that you had not made? A. No, sir.

Q. Did Mr. Leonard say anything to you at that time about partitions? A. No, sir.

Q. Or about the heating system? A. Nothing was said.

Q. Was there anything the matter with the heating system when you left? A. Not that I know of.

Q. What was your purpose in meeting Mr. Leonard there at that time?

Mr. Enright: I object to that.

Mr. Gordon: I withdraw the question.

Q. Was there any discussion at that time regarding the repair of glass? A. Not that I recall.

Q. Well, was there or wasn't there? A. No.
Mr. Gordon: Cross examine.
Mr. Enright: No cross.

Mr. Gordon: That is all. Defendant rests.

Mr. Enright: No rebuttal.

(Mr. Gordon sums up the case for the defendant.)

(Mr. Enright sums up the case for the plaintiff.)

Court's Charge to the Jury by Hon. Peter F. Daly, Circuit Court Judge, as follows:

Gentlemen of the Jury: So far as the claim for rent in this case is concerned, the plaintiff made claim, as you know, in his pleadings first that there was a renewal for three years, and then another and second count that the effect of the continuance of the defendant in his premises was to make a tenancy from year to year. The defendant by his pleadings claims that at or about the expiration of the two years there was an agreement entered into between the plaintiff and the defendant whereby the plaintiff, the landlord, agreed to allow the defendant to continue in the tenancy for a term of a month. As a matter of fact according to the evidence the tenant went out within the month after the expiration of the two years. Therefore, according to the pleadings, the defendant himself admits there was a tenancy for a month. The rent had been $7,000, and ac-

cording to his plea it involves an admission that that month's rent of $583.34 is due to the defendant. If you find that the defendant, the tenant, was a mere trespasser against the will of the plaintiff afterwards, then the plaintiff would be entitled as landlord to such compensation as would pay him for the use of the premises and the damages, if any, done by the trespasser during the time that he improperly occupied the premises.

Now, as to the repairs: There was a peculiarity about this lease in the sense that it used an expression that is a rather vague one when it said that any extraordinary repairs, either interior or exterior, should be made by the tenant. What they intended by the expression "extraordinary" I don't know. There was the usual clause in this lease that the tenant was to leave the premises in as good state and condition as he found them, reasonable wear and tear from use and from the elements excepted. There is nothing stated in the pleadings, however, that damages are claimed for anything but extraordinary repairs. The plaintiff claims that there were extraordinary repairs made necessary to this property, which were not made by the tenant. He claims that there were partitions in this factory building which were removed by the tenant and never replaced, and that it cost him $208.60 to make the repairs to his building—that is, to put the building in the same substantial condition that it was at the time he rented it to the defendant. $208.60 was the cost of these partitions.

Now, then, he also alleges that the use of these premises by the defendant so far as the sidewalk

was concerned caused the sidewalk to be broken up in such a way that it cost $72 to repair that sidewalk, and that that is an extraordinary repair for which he is entitled to be reimbursed; that they—at least this is the inference that I get from his testimony—that they substantially changed the heating system so far as connections were concerned, and that in order to return the heating system back to the substantial state it was in at the time he rented it to the tenant in the first place, it cost him $83.60 because of the extraordinary repairs necessary; and that there were extraordinary repairs to the amount of $56 on the roof.

Now, mind you, extraordinary repairs do not mean the repairs that are necessary as the result of ordinary wear and tear. That he did not obligate himself to under his promise to do extraordinary repairs. The tenant says through the witness called that they did repair the roof and that they left the roof in fine condition.

In passing upon these repairs you will remember that the repairs, if any, that the plaintiff is entitled to be reimbursed for are such as you find were extraordinary repairs—not the result of mere wear and tear of the premises.

There are these items to pass upon which have been specifically testified to: Partitions, $208.60; forty panes of glass—what was the $16 for?

Mr. Gordon: The forty panes of glass.

The Court: Oh, yes. Forty panes of glass, $16; 240 square feet of sidewalk, $72; repairing roof, $56; and the connection of the heating system, $83.60. You will take those items, and if you are satisfied from the preponderance of the

evidence in the case that there were any repairs of an extraordinary nature made necessary by the use of these premises by the defendant which the plaintiff paid for, then he is entitled to what is a reasonable charge for any making of those extraordinary repairs, in addition to the sum that you may find is due for rent, $583.34, or for the use during the month of the premises, if the tenant was a mere trespasser, together with any damage that he did as a result of his being a trespasser.

You may take the case.

Mr. Enright: May the total of those items be told the jury, your Honor?

The Court: If you have no objections I will let these figures go to the jury. We cannot expect them to carry it.

Mr. Gordon: Merely as a memorandum of the figures.

The Court: No, it is not proof of the evidence. I am just giving you the claims that were made.

Mr. Gordon: I except to that portion of your Honor's charge reading, "together with any damage that he did as a result of being a trespasser."

Mr. Enright: I would like to except to that part of the charge in which the Court limited the recovery to $583.34 and excluded from the consideration of the jury the claim for a year's rent.

Exhibit P-1.

THIS AGREEMENT made the 15th day of July, 1919, between CHARLES H. LEONARD of the City of New York, County of New York and State of New York, party of the first part, and Spicer Manufacturing Company, a corporation of the State of Virginia, party of the second part, WITNESSETH:

That the said party of the first part has hereby let and rented to the said party of the second part, and the said party of the second part has hereby hired and taken from the said party of the first part all that certain property situated on the Northwest corner of Berckman Street and North Avenue, being designated and known as Nos. 633-635 North Avenue, in the City of Plainfield, in the County of Union and State of New Jersey, for the term of two years, to commence on the 15th day of July, 1919, at the yearly rental of $7,000, payable in quarterly installments of $1,750 each in advance on the 15th days of July, October, January and April of each year.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and to remove all persons therefrom, in which event the party of the first part may at his option terminate the said lease, or relet the said premises as the agent of the party of the second part and receive the rent thereof, applying the same first to the payment of such expense as he may be put to in re-entering, and then to the payment of the rent due under this lease, and the party of the

second part shall be liable to the party of the first part for any deficit.

And the said party of the second part covenants to pay to the said party of the first part the said rent as herein specified, to wit, the sum of $7,000 per year, payable in quarterly installments of $1,750 each, in advance, on the 15th days of July, October, January and April of each year.

The party of the second part covenants and agrees that it will pay all water rents, for water consumed on the said premises, and that it will make all extraordinary repairs to said premises, including both interior and exterior repairs. Should the party of the second part neglect to pay the water rent or make such repairs as are necessary the party of the first part may pay such water rents or make such repairs as are necessary, as the case may be, and add the cost thereof to the rent, which items the party of the second part agrees to pay as additional rent, upon demand by the party of the first part.

Should the party of the second part fail to pay any rent at the time it is payable, the party of the first part may at his option bring summary proceedings in the proper District Court to evict the party of the second part from the premises.

The party of the first agrees that the party of the second part may have the option to renew this lease for a further period of three years upon the same covenants and agreements as contained in this lease, provided, however, that the party of the second part gives to the party of the first part written notice of its intention to

Exhibit P-1.

exercise said option, at least three months prior to the termination of this lease.

And the said party of the second part further covenants that it will not assign this lease or underlet the said premises or any part thereof to any person or persons whomsoever, without first obtaining the written consent of the party of the first part;

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

IN WITNESS WHEREOF the party of the first part has hereunto set his hand and seal and the party of the second part has caused its corporate seal to be hereto affixed and attested by its secretary, and these presents to be signed by its president, the day and year first above written.

CHAS. H. LEONARD.

SPICER MFG. CORPORATION,
By C. A. DANA,
Pres't.

Signed, sealed and delivered
in the presence of:

DWIGHT LEWIS.

(Corporate Seal)

Exhibit P-1.

State of New York,
County of New York—ss.:

BE IT REMEMBERED that on this 23 day of July, 1919, before me the subscriber personally appeared Charles H. Leonard, who I am satisfied is the person who executed the within lease as the party of the first part, and I having first made known to him the contents thereof, he thereupon acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

E. LEWIS JOHNSON,
143 Liberty St., N. Y. City.
Notary Public Kings Co. No. 13.
Certificate filed New York Co. No. 38.

(Notarial Seal)

Exhibit P-1.

State of New York,
County of New York—ss.:

BE IT REMEMBERED that on this 23 day of July, 1919, personally appeared C. A. Dana, who being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of Spicer Manufacturing Company, a corporation of the State of Virginia, the party of the second part named in the foregoing agreement; that the seal thereto affixed is the proper corporate seal of said company and that the same was so affixed thereto and the said deed signed and delivered by C. A. Dana, who was at the date and execution thereof president of said company, in the presence of said deponent as the voluntary act and deed of the said company, and that the said deponent signed the same as subscribing witness.

C. A. DANA,
Pres't.

Sworn and subscribed before me
this 23 day of July, 1919.

E. LEWIS JOHNSON,
143 Liberty St.,
N. Y. City.
Notary Public, Kings Co. No. 13.
Certificate filed New York Co. No. 38.
(Notarial Seal)

Exhibit P-2.

ROOM #1626
#120 BROADWAY, N. Y.

Apr. 6, 1921.

Spicer Manufacturing Corporation,
South Plainfield, N. J.

Gentlemen:

Please accommodate me with check for rent of Factory premises, Cor. North Ave. and Berkman Street, Plainfield, N. J., for quarter ending April 15th, 1921.

Enclosed find bill for quarter ending July 15, 1921, and as at that date your lease expires unless you decide to avail yourself of the option of the further term of three years. Will you kindly advise me at once of your decision in the matter and very much oblige.

Yours very truly,

L.

Exhibit P-3.

SPICER MFG. CORPORATION

South Plainfield, N. J., April 8, 1921.

Mr. Charles H. Leonard,
Room #1626,
120 Broadway,
New York City.

Dear Sir:

We have your invoice dated April 7th covering rent for factory premises corner North Ave., and Berkman St., Plainfield, N. J., for the quarter ending July 15th, 1921, amounting to $1750, and note that same is marked "corrected". Kindly advise why this invoice is marked this way.

We also have your invoice dated March 18th covering rent on these premises for the quarter ending April 15, 1921, amounting to $1750.00 which has been passed to our Accounting Department for payment. Please let us have this information at your earliest convenience in order that same may be passed through for payment and oblige

Yours truly,

SPICER MFG. CORP.,
B. SECOR,
Purchasing Dept.
R. J. P.

BS:PB

Exhibit P-4.

ROOM 1626

No. 120 BROADWAY

April 11, 1921.

Spicer Manufacturing Corporation,
South Plainfield, New Jersey.

Gentlemen:

Replying to yours of the 8th instant, would say that invoice sent to you marked "Corrected" was for the reason that the original invoice had amount through error of typist as $175.00 whereas it should have been $1750.00.

Please advise me as to your decision about further occupancy of the premises after July 15th next.

Yours very truly,

C. H. L.—SC.

Exhibit P-5.

SPICER MFG. CORPORATION

SOUTH PLAINFIELD, NEW JERSEY

April 25, 1921.

Mr. Chas. H. Leonard,
120 Broadway,
New York City.

Dear Sir:

Under date of April 8th we wrote you regarding your invoice dated April 7th which you had marked "corrected". To date we have not heard anything from you regarding this matter. Won't you kindly give this letter your immediate attention and let us hear from you?

Yours truly,

SPICER MFG. CORP.,
B. SECOR,
Purchasing Agent.
By R. J. POWER.

RJP:PB

Exhibit P-6.

Elizabeth, N. J.,

161 Stiles Street,

July 25,1921.

Spicer Manufacturing Co.
To Chas. H. Leonard, Dr.

To rent for Factory premises, North Avenue and Berckman Street, Plainfield, N. J.; for quarter ending October 15, 1921 .....$1750

Received Payment,

(Written with pencil: Duplicate. Mailed above on July 27, 1921, at N. Y. City.)

Exhibit P-7.

#161 Stiles Street,
Elizabeth, N. J.

August 6, 1921.

Spicer Manufacturing Corporation,
South Plainfield,
New Jersey.

Attention of Mr. B. Secor.

Gentlemen:

Referring to the contemplated repairs at Factory on North Avenue, may I suggest that when

you undertake same that you have your man, who seems to be very competent, repair the floors wherever necessary, other than what you will do on your own account, and charge same to my account; also as to sidewalk repairs, while that work is being done, will you also relay two or three further down towards Filmore Place, charging cost of latter to me. I should think you could secure good relaying Flag Stones at Westfield, N. J., at a low price, where so much concrete work has been recently done.

I am negotiating with the Anchor Post Company to erect a Factory fence around the vacant land, and also, if I receive attractive figures I shall have *all* sidewalls stuccoed, my idea being to make the whole attractive so that I may secure a tenant at the earliest moment and thereby relieve you and benefit labor at Plainfield.

If your mechanic should observe anything else, he can readily do while there, have him do it for my account. Also if he has any suggestions I shall value them.

Yours very truly,

CHAS. H. LEONARD.

Exhibit P-8.

SPICER MFG. CORPORATION
SOUTH PLAINFIELD, NEW JERSEY

August 16th, 1921.

Leonard & McCoy,
161 Stiles St.,
Elizabeth, N. J.

Attention Mr. C. H. Leonard.

Gentlemen:

Answering yuor favor of August 6th, please note that we will make repairs for which we are responsible within a few days. These repairs will include slight repairs to the floor, sidewalk and one or two places in the roof near the skylight. In view of our mistake in reading the time of expiration of the lease to which you directed our attention last week, we vacated the premises August 13th, so that you might have the use of same.

We enclose herewith our check for $583.34 for the additional months rent for the use of the premises that you so kindly permitted us to continue to use.

We are holding the keys at South Plainfield awaiting your advice as to what to do with them.

Yours truly,

SPICER MFG. CORP.,
B. SECOR,
Purchasing Agent.

BS/LEP
1-Enc.

Exhibit P-9.

#161 Stiles Street,

Elizabeth, N. J.

Aug. 17, 1921.

Spicer Manufacturing Corporation,
South Plainfield, N. J.

Gentlemen:

I just have your favor of the 16th inst. with enclosure, and note your statement that you vacated the premises August 13th, and enclose your check for $583.34 "for the additional month's rent for the use of the premises that you so kindly permitted us to continue to use".

Inasmuch as the lease between us dated July 15, 1919, provides for a term of two years commencing on the 15th day of July, 1919, with option of renewal for a further period of three years upon the same covenants and agreements, and inasmuch as you remained in possession after the expiration of your lease, I considered this a renewal on your part and sent you a bill about July 27th, for the rest for the quarter from July 15th to October 15th, 1921, amounting to $1750.00. This was not in any way repudiated by you.

I therefore return your check for $583.34 which you enclosed and herewith enclose duplicate bill for rent for the quarter ending October 15th.

If your plans are now so changed that you desire to be relieved of the lease, I will do what I can to secure a tenant for your account, but must

insist upon my right to look to you as the tenant under a renewal of the old lease.

Very truly yours,

CHAS. H. LEONARD.

Encs.
L.

Exhibit P-10.

Elizabeth, N. J.,
161 Stiles Street,

July 25, 1921.

Spicer Manufacturing Co.
To Chas. H. Leonard, Dr.

To rent for Factory premises, North Avenue and Berckman Street, Plainfield, N. J.; for quarter ending October 15, 1921 ..... $1750

Received Payment,

Duplicate.

Exhibit P-11.

SPICER MFG. CORPORATION
SOUTH PLAINFIELD, N. J.

August 22, 1921.

Mr. Charles Leonard,
151 Stiles Street,
Elizabeth, N. J.

Dear Sir:

Answering your favor of August 17th, we regret that you have not accepted our check in payment of the rent that we felt was due you as being a tenant during the few days over the expiration of our lease.

We have completed the repairs that you suggested, excepting walks, and are still holding the keys to the premises, awaiting advice from you as to what to do with them. There is no watchman upon the premises, and such insurance as we effected has been adjusted and cancelled.

We regret that you continue to refuse your keys, and our check, as we are advised by Counsel that we have no liability for a continued lease that we could have secured by the means of an exercise of an option, but which we remained silent and without exercise upon.

Very truly yours,

SPICER MFG. CORP.,
B. SECOR,
Purchasing Agent.

New Jersey Court of Errors and Appeals

CHARLES H. LEONARD, Plaintiff-Appellant, *vs.* SPICER MANUFACTURING COMPANY, Defendant-Appellee.	**Action at Law.** **On Appeal.**

BRIEF FOR PLAINTIFF-APPELLANT.

Statement of the Case.

Plaintiff sued to recover a year's rent from a tenant holding over after the expiration of a term for years, upon the theory of a tenancy from year to year.

The suit also includes a small item for repairs to the demised premises, concerning which there is no dispute.

The Court below directed a non-suit under the count for a year's rent but permitted the jury to find a verdict for use and occupation equivalent to one month's rent at the rate reserved by the lease, to cover the period of actual occupation, plus the amount of the repairs.

This resulted in a verdict and judgment for $963.64, from which plaintiff appeals.

The first count of the complaint is based upon the theory of a renewal of the written lease for the period of three years, pursuant to tenant's option reserved in the lease.

This count was withdrawn at the trial, however, and the plaintiff stood upon the second count for rent for the term of one year (p. 40, fol. 10).

Defendant originally went into possession under a written lease from plaintiff dated July 15, 1919, for the term of two years, expiring July 15, 1921, "at the yearly rental of $7,000, payable in quarterly installments of $1,750 each in advance on the 15th days of July, October, January and April of each year."

The lease contains a provision that the lessee may have the option to renew the lease for a further period of three years, upon the same covenants and agreements, provided the lessee gives the lessor written notice of its intention to exercise said option at least three months prior to the termination of the lease (Ex. P-1, p. 53).

Under date of April 6, 1921, the landlord mailed to the tenant a bill for the quarter's rent to July 15, 1921, payable in advance, stating:

> "as at that date your lease expires unless you decide to avail yourself of the option of the further term of three years. Will you kindly advise me at once of your decision in the matter and very much oblige" (Ex. P-2, p. 58).

The tenant acknowledged this letter and replied concerning the bill for rent but made no comment as to the expiration or renewal (Ex. P-3, p. 59).

The landlord replied to the latter letter under date of April 11th, and asked for the tenant's "decision about further occupancy of the premises after July 15th, next" (Ex. P-4, p. 60).

There were no further communications of any kind between the parties until after the expiration of the lease.

The tenant remained in possession, however, and the landlord, upon ascertaining this fact

through a visit to the factory, mailed to the tenant, on July 27, 1921, a bill reading as follows:

> "To rent for factory premises, North Avenue and Berckman Street, Plainfield, N. J.; for quarter ending October 15, 1921..... $1750"
>
> (Ex. P-6, p. 62, admitted in evidence, p. 42).

Under date of August 16, 1921, the tenant sent a letter to the landlord stating that it had vacated the premises on August 13th, and enclosing a check for $583.34, "for the additional month's rent for the use of the premises" etc. (Ex. P-8, p. 64).

This check was returned by the landlord in a letter dated August 17, 1921, calling attention to the renewal provision of the lease, and stating:

> "inasmuch as you remained in possession after the expiration of your lease, I considered this a renewal on your part and sent you a bill about July 27th, for the rent for the quarter from July 15th to October 15th, 1921, amounting to $1750. This was not in any way repudiated by you" (Ex. P-9, p. 65).

Defendant's answer to the complaint (p. 7):

> "admits that it continued in possession of said premises after the expiration of the term of said lease, but states that it did so under and by virtue of an agreement with the plaintiff, whereby plaintiff rented to defendant the said premises for the term of one month to commence on the 15th day of July, 1921, and ending on the 15th day of August, 1921."

At the trial, however, defendant failed to offer any evidence whatever in support of the agreement for a month's renting and there was no submission to the jury on that theory.

ARGUMENT

POINT I.

The act of the tenant in holding over after the expiration of a term for years, with the consent of the landlord, established a tenancy from year to year with the consequent liability for a year's rent.

There is no possible question of the fact that the tenant held over for a month after the expiration of the term.

The holding over is expressly admitted by the answer and the time fixed by the tenant's letter (Ex. P-8).

Tenant's motive in holding over is not material, but it may be remarked that the act was not inadvertent for the landlord directly called the tenant's attention to the date of expiration in the letter of April 6th, when he asked for a decision as to the renewal, and in the subsequent correspondence the tenant evaded this decision, although repeatedly called to his attention (Exs. P-2, P-3, P-4).

Furthermore, on July 27th, the landlord mailed a bill for a quarter's rent in advance (Ex. P-6) on the assumption of a new tenancy, to which the tenant made no objection.

It is, also, an undisputed fact that the tenant remained in possession with the landlord's consent.

The landlord's letters of April show his desire to retain the tenant. The fact that the landlord, after the expiration of the lease, upon ascertaining that the tenant continued in possession, mailed to the tenant a bill for rent, is conclusive evidence

that the landlord consented to the holding over, and the phraseology of the rent bill shows that the landlord recognized a tenancy of which the payment of rent in quarterly periods and quarterly amounts of $1750. was an incident.

A tenancy defining a three months' period as a "quarter" clearly indicates an annual unit.

Furthermore, the tenant's self-serving letter of August 16th, after it had concluded to vacate the property, enclosing check for $583.34, "for the additional month's rent for the use of the premises that you so kindly permitted us to continue to use" (Ex. P-8), confirms that the holding over was with the landlord's consent.

The following authorities are cited as declaring the law applicable to such state of facts:

Decker vs. *Adams,* 12 N. J. Law, p. 99, at p. 100:

> "When the tenant, whose term has expired by efflux of time, instead of quitting the premises, as he ought to do, remains in possession holding over as it is called, he is a wrongdoer, and may be treated as such by the owner, his landlord. By the consent of his landlord, his tenancy may be continued, and if such continuance by consent be without any fixed limit, he becomes a tenant from year to year as it is called. This consent may be either express or implied; actual or constructive; by words or by some act recognizing or treating him as a tenant. . . . Blackstone says, 'If a man takes a lease for a year, and after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate, he is a tenant at sufferance and liable to be dispossessed by ejectment.' Christian, in his note, says: 'If the landlord afterward receives rent or does any act by which he proves his assent to the continuance of the tenant, this

turns the estate at sufferance into a tenancy from year to year.' ''

At p. 103:

''The general doctrine is correctly laid down in Kent's Commentaries. 'If the tenant holds over by consent, given either expressly or constructively, after the determination of a lease for years, it is held to be evidence of a new contract, without any definite period and is to be construed as a tenancy from year to year.' 4 Kent p. 110.''

In *Moore* vs. *Moore,* 41 N. J. Law, p. 515, 517, the rule in *Decker* vs. *Adams* is restated as follows (p. 517):

''It requires an assent on the part of the landlord to the subsequent occupation of the tenant to raise a relation between him and the tenant which confers upon the latter the right of compelling notification from the landlord. The consent may be either express or implied, actual or constructive; by words or some act treating him as a tenant.''

In *Yetter* vs. *King Confectionery Co.,* 66 N. J. Law, 491, Justice Garrison says:

''The question in the case was whether the holding over of the prosecutor after a term of years created a tenancy from year to year. It did create such a tenancy if the landlord consented to the continued occupancy of his property. . . . Whether the landlord has thus consented was a question of fact that might be proved directly or by legitimate inferences from the words or conduct of the parties.''

POINT II.

The Court erred in limiting plaintiff's recovery to compensation for use and occupation for one month.

Plaintiff's claim based on the theory of a tenancy from year to year by holding over with the landlord's consent, is set forth as the second cause of action in the complaint.

The Court granted a nonsuit as to the second cause of action (p. 45, f. 30).

The Court in his charge says:

> "Therefore, according to the pleadings, the defendant himself admits there was a tenancy for a month. The rent had been $7,000, and according to his plea it involves an admission that that month's rent of $583.34 is due to the defendant. If you find that the defendant, the tenant, was a mere trespasser against the will of the plaintiff afterwards, then the plaintiff would be entitled as landlord to such compensation as would pay him for the use of the premises and the damages, if any, done by the trespasser during the time that he improperly occupied the premises" (pp. 49, 50).

In conclusion, the Court charged (p. 52) permitting the finding of an amount due for repairs,

> "in addition to the sum that you may find is due for rent, $583.34, or for the use during the month of the premises, if the tenant was a mere trespasser, together with any damage that he did as a result of his being a trespasser."

The Court's theory is further elucidated in his ruling on the motion for nonsuit on the second cause of action, in which he held, as a matter of law, that the bill rendered by the landlord for the quarter's rent after the hold-over

"shows a repudiation upon the part of the landlord that there was any tenancy from year to year, insisting all the way through that the tenant was bound to a three years' extension" (p. 44, fol. 20).

"Now, then, even though the law says that after the expiration of a fixed term this tenancy may be created by the negative acts or by express consent from year to year, yet there must be a meeting of the minds through the acts of the landlord and the tenant that there is a tenancy from year to year, and there was absolutely nothing in this case to show a meeting of the minds between the landlord and the tenant. On the contrary every act, every communication of the landlord shows a rejection of anything except an obligation upon the part of the tenant for three years' rent. That being the situation, this landlord cannot as a matter of rent look for anything legally in my conclusion excepting compensation for the time that the trespassers stayed in there" (p. 44, l. 30; p. 45).

We quote the above ruling on the motion for nonsuit, because we think it points the essential error in the final charge to the jury.

We submit that the rule is that where the tenant holds over, the landlord has the option to treat him as a trespasser or recognize him as a tenant. If the landlord elects to recognize the continued relation of tenancy, *i. e.*, if he consents to the holding over, the law defines the character and extent of the tenancy as a tenancy from year to year, and the character and extent of such tenancy is not the result of express agreement requiring a meeting of the minds, but is a legal relation defined by the law as a consequence of the holding over by consent.

We submit that the rule is established in this State that the "consent" of the landlord is a question of fact and may be "either express or

implied; actual or constructive; by words or by some act recognizing or treating him as a tenant."

It may well be that in the present case the landlord misconceived the character of tenancy which flowed as a matter of law from his consent to the holdover, but that could not change the legal relation which was established when he elected not to treat the tenant as a trespasser.

Nor does the quarterly rent bill of itself and as a matter of law necessarily show a demand for rent as under a renewal or extension of the original lease.

As a holdover tenant, the defendant would be obliged to pay rent at the rate and at the periods specified by the original lease, namely in quarterly payments in advance of $1,750.

At least, the plaintiff was entitled to have the fact question submitted to the jury whether or not the defendant continued in possession after the expiration of the term, with the landlord's consent, with the instruction, in the event of an affirmative finding on such issue, to find for the plaintiff for a year's rent, amounting to $7,000.

POINT III.

The judgment should be reversed.

In the event of reversal, we submit that this is a proper case for the entry of a judgment for the correct amount in this Court, since we believe the evidence shows that the fact of consent by the landlord is not disputed but merely the legal consequence of the proven facts.

Respectfully submitted,

McDermott, Enright & Carpenter,
Attorneys for Plaintiff-Appellant.

(8816)

Pandick Press, Inc., 22 Thames St., New York, U S. A.

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New Jersey Court of Errors and Appeals

No. 46, October Term, 1926.

CHARLES H. LEONARD, *Plaintiff-Appellant,* *vs.* SPICER MANUFACTURING COMPANY, *Defendant-Appellee.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF OF DEFENDANT-APPELLEE.

Statement.

November 2, 1925, after trial before Hon. Peter F. Daly, Judge, and a jury at the Union County Circuit, a verdict was returned in favor of plaintiff against defendant for $963.64. Appeal is now made by plaintiff.

The complaint contains three counts. The first is for $21,000 and claims rental for 3 years at $7,000 per year under an alleged renewal or extension by defendant of a lease dated and commencing July 15, 1919, and originally terminating July 15, 1921 (case, p. 53) for factory premises of plaintiff at Plainfield, N. J. This count was abandoned (case, p. 40).

The second count claims $7,000 from defendant for rent as a tenant from year to year because of an alleged holding over after the original expiration date.

The third count claims $186.20, alleging defendant's neglect and refusal to make extraordinary repairs under the lease provided on its

part to be done. This count was amended (case, p. 11) and increased to $436.20 (case, p. 38).

Defendant contended all it owed plaintiff was $583.34, one month's rent for use and occupancy of premises after the original expiration. The jury under the charge by their verdict so found and added to that item the sum of $380.30 as damages to plaintiff for the repairs claimed.

Plaintiff assigns four grounds of appeal which are embraced in a single proposition, to wit, did the defendant become a tenant from year to year?

POINTS.

I.

The defendant was not a tenant from year to year.

It was conceded at the trial that there was no renewal for 3 years. On this point plaintiff's counsel withdrew the first cause of action (case, p. 40). Under the lease defendant entered into possession, and its original term ended July 15, 1921 (case, p. 53) (Exhibit P. 1). It did not send the notice of renewal provided for (case, p. 54, ll. 30-40) and the plaintiff knew the defendant did not intend to remain for a period of time because it did not send such notice.

Defendant held over in possession from July 15, 1921, until August 13, 1921 (Exhibit P. 8, case, p. 64). Plaintiff, August 17, 1921 (Exhibit P. 9, case, p. 65), elected to hold the defendant *for a renewal of the lease.* Exhibit P. 9 reads in part as follows: (Case, p. 65, and case, p. 66.)

> "Inasmuch as the lease between us dated July 15, 1919, provides for a term of two years commencing on the 15th day of July,

> 1919, with option of renewal for a further period of three years upon the same covenants and agreements, and inasmuch as you remained in possession after the expiration of your lease, *I considered this a renewal on your part* and sent you a bill about July 27th, for the rest for the quarter from July 15th to October 15, 1921, amounting to $1,-750.00."
>
> * * * *
>
> "If your plans are now so changed that you desire to be relieved of the lease, I will do what I can to secure a tenant for your account, but must insist upon my right to look to you as the tenant *under a renewal of the old lease.*" (Italics ours.)

The single question now is whether or not by holding over the defendant became a tenant from year to year.

The defendant respectfully contends (a) that the mere holding over without the payment of rent or any other circumstance to justify the assumption that the tenant intended to remain did not constitute sufficient evidence to create a tenancy for a year. (b) The plaintiff was estopped from claiming a tenancy for a year.

(A) The rule of hold over to create a tenancy from year to year does not stop with the tenant's mere continuance in possession. The Court of Errors and Appeals in *Mershon* v. *Williams,* 62 N. J. L. 779, at page 783 held as follows:

> "The weight of authority sustains that position, and, if no notice is stipulated for, the tenant's mere continuance in possession *and paying rent,* though with no express notice of his desire for the further term, entitles and binds him thereto." (Italics ours.)

(See *Batura,* vs. McBride 75 N. J. L. 480, at p. 482.)

In *Straus* v. *Robbin,* 133 Atl. 868, even the lease contained a provision that notice of the ex-

ercise of the option be given and that the lessor could waive such notice the facts showed that the tenant evidenced an intention to remain *by paying rent in addition to holding over.*

In *Maier* v. *Champion,* 97 N. J. L. 493 at page 495, the Court of Errors and Appeals again includes the element *of payment of rent* after a holdover.

In the cases where the tenant is held to have indicated an election to stay, the holdover *and the payment of rent* were the circumstances that justified the assumption that the tenant intended to remain and the landlord *accepting the rent* thereby waived the condition precedent. The question has received consideration and comment in the note to the case of

Kuhlman v. *Lemp,* 29 L. R. A. (new series) page 174, at page 177.

The note is as follows:

> "Nor is the tenant bound, where notice is required of the lessee's intention to claim the extended term, unless notice is given or the intention be otherwise manifested, and it has been held that *a naked holding over* is insufficient to warrant a finding that the lease has been extended." (Citing cases.) (Italics ours.)

In *English* v. *Murtland,* 63 Atlantic, page 882 (Supreme Court, Pennsylvania), the question came up where the tenant had the option of renewal and did not exercise it but remained over. In that case, after holding over, *he paid rent* and it was held to be a tenancy for another year.

The failure to give a written notice by the tenant of its election to accept a new term apprised the landlord that the tenant did not intend to continue under the lease when the tenant failed to pay. The failure to pay rent on July

15, 1921, was sufficient notice that the tenant was not going to remain.

In the Underhill on Landlord and Tenant, Volume 1 (1909 edition), section 164, the author says:

> "The mere silence of the Landlord for a short time after the expiration of the term, while the tenant is holding over is not enough alone to create any presumption that the tenant is anything else but a tenant at sufferance."

In *Decker* v. *Adams,* 12 N. J. Law, page 99 (cited by appellant), the Court held that the *mere continuance* by the tenant in possession did not secure to the tenant a tenancy for a new year after the original expiration.

(B) The landlord in claiming a renewal of the lease for three (3) years estopped himself. He never consented to an arrangement from year to year. He wrote the defendant that it *had renewed the lease* by holding over. The landlord billed the tenant asserting a *renewal of the lease.* In order to constitute a renting for a year by holdover the landlord must consent expressly or impliedly. By implication he denied a tenancy for *another year.* He failed to consent. He never accepted rent on such a basis and no rent was ever offered or paid on such basis. There must be consent.

See *Yetter* v. *King,* 66 N. J. L. 491.

In *Condon* v. *Barr,* 47 N. J. L. 113, a tenant held over as a trespasser. The landlord demanded rent. The Court held such demand was not conclusive evidence of consent to convert a holdover or tenancy at sufferance into a tenancy from year to year.

The landlord is estopped.

He insisted on a three-year renewal. A lack of mutuality prevents the landlord from asserting a tenancy for a year. Not having bound himself to such a tenancy, the lessee had no protection for occupancy for a year.

In *Spear* v. *Empire*, 88 N. J. L. 153, a case of a written lease not signed by the lessor, the Court held the landlord could not hold the tenant on a covenant for rent because the lease was void for want of mutuality, even though the tenant signed the lease. Until the lessor created an estate or interest in the premises that the lessee could definitely rely upon, no obligation was imposed upon either of the parties.

It is respectfully submitted that the judgment should be affirmed.

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