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Mrs. Clara B. Downer, Direct	25
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New Jersey Court of Errors and Appeals

NOTICE OF APPEAL AND GROUNDS. 10

(Filed Aug. 2, 1929)

(Service acknowledged Aug. 1, 1929)

MONMOUTH COUNTY COUNTY CIRCUIT

BERTHA A. BRIGGS and CLARA B. DOWNER, partners trading as The Misses Briggs, Plaintiffs, vs. VERONICA PANNACI, Defendant.	}	Action at Law. 20
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To Lester C. Leonard, Esq., Attorney of Defendant: 30

Take notice that the plaintiffs in the above entitled cause appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause, on the following grounds:

1. Because the trial judge erroneously refused to permit the witness Clara B. Downer to answer the following questions, which were asked to 40

Notice of Appeal and Grounds

show: (a) that the description of the store premises in the lost lease of 1924-1925 was the same incomplete and ambiguous description as that contained in the proved lease of 1926-1927; (b) that the agreed leased premises, from 1924 to 10 1927, inclusive, included not only plaintiffs' front room but also the use of part of a rear storage room controlled and occupied by defendant, together with the use in common with the tenant of the adjoining store of a passageway to and from a toilet room in defendant's storage room; and (c) that the leaking roof over defendant's storage room and over plaintiffs' store premises, and 20 which damaged plaintiffs' goods on July 23, 1927, was more or less out of repair in 1924 and 1925, viz:

“Q. Now, calling your attention to the description of the store premises which you occupied in 1926, I ask whether that was the same description which you had made in 1924 and 1925?”

Q. I will ask you this: You occupied these premises, the northerly store in the Hotel Pannaci Building, for four years, did you? 30

Q. Did you pay rent for these premises for the summer season, May 1st to November 1st, 1924, and 1925?

Q. I show you a paper and ask you whether that is a letter received by you, signed ‘Edward Pannaci,’ on February 26th, 1924?”

2. Because the trial judge erroneously directed 40 a verdict for defendant, on the uncontradicted

Notice of Appeal and Grounds

evidence of plaintiffs, and in that he erroneously ruled:

(a) That as a matter of law plaintiffs had proved no cause of action against defendant, notwithstanding that defendant's negligence and plaintiffs' damage had been proved and not contradicted. 10

(b) That the rule of law, known as the landlord's reserved control rule, that where the owner of a building rents out different portions of his building to different tenants, it is his duty to exercise reasonable care to maintain the roof of his building and the common passageways in a reasonably fit and safe condition so that the lives and property of his tenants may not be injured or damaged, applied to apartment houses only, and did not apply to plaintiffs' store premises. 20

(c) That it was not the duty of defendant to exercise reasonable care to maintain the roof over plaintiffs' store premises in a reasonably fit and safe condition, which store premises consisted of one of two adjoining stores on the ground floor of defendant's hotel building, with the right in each tenant respectively to use a small part of a rear storage room together with the use of a common passageway to a toilet room in the storage room, and which storage room and the roof over it was in the retained control, custody and possession of defendant. 30

(d) That because plaintiffs admitted that the word "appurtenances" in the written lease of 1926-1927 referred to plaintiffs' right to use part of said storage room, with a common passage- 40

Notice of Appeal and Grounds

way to the toilet room in the storage room, and there being nothing in the lease requiring the defendant to repair her roof or ceiling, she was not obligated to repair.

10 (e) That as the written lease did not require defendant to repair the roof of her building, or her ceiling, over the store premises, the common law rule applicable to a single tenant building applied to plaintiffs' store premises, and that the landlord was not obliged to repair.

(f) That proof that defendant had orally expressly agreed to repair her roof and ceiling as a condition of plaintiffs taking a further lease
20 of the store premises for 1926-1927, was not admissible, and defendant was not liable for non-performance, because such agreement was not contained in the written lease executed in March, 1926.

(g) That notwithstanding plaintiffs' proof that in the fall of 1926 defendant had again orally expressly agreed as a condition of plaintiffs exercising their option for a renewal of the lease and remaining as her tenants in 1927, she would
30 place and keep her roof and storage room ceiling in proper repair, but had failed to properly repair the roof and had not repaired the ceiling at all, yet defendant was not liable for non-performance, because such agreement was oral and not contained in a written renewal.

(h) And because the trial judge entirely ignored plaintiffs' further cause of action, and
40 proof, respecting the destruction of the good will

Judgment Record

and value of plaintiffs' business, viz: that the leaking roof and the flooding of plaintiffs' store premises and of the storage room, on July 23rd, 1927, had left the storage room plaster ceiling in such a dangerous and unsafe condition that large pieces of plaster were falling from time to time, particularly over the common passageway to the toilet room; that defendant knew of this unsafe condition, had been asked to remedy it, but refused to do so; and there thereby plaintiffs were obliged to, and did, at the expiration of their 1927 term, permanently vacate the premises as unsafe, and whereby the good will and value of plaintiffs' business built up at that place during the past four years was destroyed by defendant.

BENJAMIN J. DOWNER,
Attorney of Plaintiffs.

JUDGMENT RECORD.

Veronica Pannaci, the defendant in this cause, was summoned to answer unto Bertha A. Briggs and Clara B. Downer, partners trading as The Misses Briggs, the plaintiffs therein, in an action at law, upon the following complaint:

COMPLAINT.

(Served Dec. 2, 1927)

MONMOUTH COUNTY CIRCUIT COURT

10	BERTHA A. BRIGGS and CLARA B. DOWNER, partners trading as The Misses Briggs, Plaintiffs, vs. VERONICA PANNACI, Defendant.	}	Action at Law.
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20 1. Plaintiffs, Bertha A. Briggs and Clara B. Downer, partners trading under the firm name of The Misses Briggs, said Bertha A. Briggs residing in the Borough of Atlantic Highlands and said Clara B. Downer residing in the Borough of Rumson, in the County of Monmouth and State of New Jersey, say that:

2. Defendant Veronica Pannaci resides in the Borough of Sea Bright, Monmouth County and State of New Jersey.

30 3. Defendant is, and was during all the times hereinafter mentioned, the owner or lessee of certain lands and tenements located and designated as the Hotel Pannaci, fronting on Ocean Avenue, in Sea Bright, Monmouth County, New Jersey; a part of the ground floor of said three-story hotel building being divided into two adjoining stores, fronting on Ocean Avenue, and each with
 40 a rear entrance into a long room which was of a width equal to both stores and extended back to

Complaint

and opened on the hotel yard on the westerly side of the main hotel building; which rear room formed a one-story extension, or ell, of the main hotel building, the roof of the extension being two stories below the roof of the main hotel building; and, as a part of the water drainage system 10 on the westerly side of the hotel building at that point, there was a wooden or metal drain pipe so connected with the gutter of the top roof as to carry the rain water from the top roof wholly or partly through the drain pipe and down upon the roof of the extension; and in the rear end of the long room back of the stores was a toilet room; and which rear room was in the retained use, possession and control of defendant for the pur- 20 pose of storing therein her surplus hotel furniture and miscellaneous material, and was also furnished, arranged and maintained by defendant for the purpose of inducing prospective tenants to rent the stores by affording them not only the right of a safe and sheltered common entrance and passageway into and through said storage room to and from said toilet room, and to be used in common by the respective store 30 tenants, their customers, agents and visitors, but also the right of the store tenants to store their stocks of merchandise, in such safe and sheltered part of said room, at or near their rear doors, as defendant landlord did not from time to time require for her own storage purposes.

2. On or about February 28th, 1924, plaintiffs, then and still having a long established millinery business in Atlantic Highlands, and desiring 40 to permanently establish for their summer season 40

Complaint

a branch millinery shop on Ocean Avenue, Sea Bright, rented and occupied, as tenants of defendant, the northerly one of said two stores, in said Hotel Pannaci Building, as a millinery shop, for the term of six months beginning May 1st and ending October 31st, 1924; and plaintiffs did likewise in the following years of 1925, 1926 and 1927 rent and occupy as defendant's the same store, at the same rent, for the same purpose, on the same conditions and for the same six-month terms, the entire rent in each letting being payable in advance—about one-half thereof down as early as February or March and the remainder prior to May 1st; and the demised premises in each of said lettings were the same, and consisted of said store and the inducement held out by defendant to plaintiffs that plaintiffs, as defendant's tenants, would be afforded not only the right of a safe and sheltered common entrance and passageway from the rear door of their store into and through said storage room to and from said toilet room, to be used in common with the tenants of the adjoining store by plaintiffs, their customers, agents and visitors, but also the right of plaintiffs to store their merchandise stock in such safe and sheltered part of said storage room, at or near the rear door of their store, as defendant landlord did not from time to time require for her own storage purposes; which right of common passageway and storage plaintiffs did exercise, with defendant's knowledge and consent, during the full term of each of their several tenancies aforesaid.

Complaint

5. The defendant retained possession and was in charge and control of the roof and water drainage system of said building and of the roof and drainage system over said stores and storage room, whereby it became and was the duty of defendant to use due and proper care to keep and maintain said roofs and drainage system in proper repair and in such a condition that the same should not become dangerous and injurious to the persons or property of defendant's store tenants, or to the persons of their customers, agents or visitors. 10

6. The roof of said building over plaintiffs' store and the roof of said storage room, on or about July 23rd, 1927, and for a long time prior thereto, became so out of order and repair and dilapidated that they leaked, and were in a condition dangerous and injurious to the person and property of defendant's store tenants, and to the persons of their customers, agents and visitors; and which leaky condition of the roof of said storage room was increased from time to time by the additional volume of rain water poured down upon it by said drain pipe attached to the top roof of the main hotel building, and because the pipe was of insufficient capacity or had been permitted to become choked, of all which defendant had notice and knowledge; and it thereby became and was the duty of defendant to place, keep and maintain said roofs in a proper condition of repair and not to permit them to remain out of repair and in a condition dangerous or injurious to the person or property of defendant's store tenants, or to the persons of their customers, agents or visitors. 20 30 40

Complaint

7. On one or more occasions, prior to July 23rd, 1927, and during plaintiffs' 1927 tenancy, as well during their said prior tenancies, defendant, well knowing that said roofs had not been properly and completely repaired, attempted to
10 repair them, but did so in such a careless and negligent manner that said roofs were not in fact properly and completely repaired, as defendant well knew.

8. Defendant, well knowing the leaky condition of said roofs and her careless and negligent attempts to repair them and that they had not been properly and completely repaired, carelessly and
20 negligently permitted them to remain out of repair, and, through defendant's carelessness and negligence in so doing, on or about July 23rd, 1927, rain came through the roof and ceiling of said store, rented and occupied by plaintiffs as defendant's tenants, and rain likewise came through the roof and ceiling of said storage room, flooding the floor of said store and also the floor of said storage room, and wetting and staining plaintiffs' goods, furniture and property con-
30 tained in said store, and also wetting and staining all that part of plaintiffs' goods which they had rightfully as aforesaid stored in storage room at or near the rear door of their store; whereby and by reason of which wetting and staining plaintiffs sustained great loss, damage and injury in that said goods were wholly ruined and made unsalable and their value destroyed, so that plaintiffs were obliged to, and did, purchase new
40 goods in lieu thereof, and their said furniture and property in said store were also thereby damaged and the value thereof greatly lessened.

Complaint

9. Plaintiffs thereby sustained further loss, damage and injury in that their millinery business at Sea Bright was thereby interrupted, and for a time substantially shut down, in the height of their Sea Bright season; and in time, labor and expense necessarily expended and incurred in the examination, disposition and ascertainment of the value of the damaged goods, also in the purchase of new millinery material and the making and exhibition of new millinery; and in that they thereby lost many sales and large profits which they otherwise would have made because of their temporary inability to have on exhibition, or ready for sale, or to make to order, the superior quality, style and variety which their class of Sea Bright customers demanded, and in the prompt supply whereof their Sea Bright business had been created and progressively built up from the first opening of their shop there on May 1st, 1924. 10 20

10. Plaintiffs thereby sustained further loss, damage and injury as a consequence of rain coming through the roof and ceiling of said storage and passageway room on or about July 23rd, 1927, as aforesaid, in that a large part of the plaster ceiling of the room, and directly over the line of passage which plaintiffs were obliged to take in order to get to and from the toilet room at the rear end thereof, had been so wetted that the ceiling had cracked, had loosened from the laths and was obviously liable to fall at any time—and some of it did fall at times—thereby presenting a condition of the ceiling obviously dangerous to anyone passing under it to and from 30 40

Complaint

the toilet room; of which dangerous condition defendant had notice and well knew, but to remedy which she neglected and refused, and continued to do so throughout the remainder of plaintiffs' tenancy ending October 31st, 1927; and by reason whereof, plaintiffs, having experienced the dangers and injuries to which their persons and property had been subjected by defendant's negligent, wilful and wanton misconduct and her reckless indifference to the safety of the lives and property of her tenants, and reasonably apprehending that such misconduct would be continued, were thereby obliged to, and did, on the termination of their 1927 tenancy, permanently vacate said store premises and removed their property therefrom as unsafe premises, and knowingly maintained by defendant as unsafe, and in consequence of which the good will of plaintiffs' business created and built up in said store since May 1st, 1924, has been destroyed by defendant and lost to plaintiffs.

11. By reason of all the aforesaid premises plaintiffs have sustained damages in the sum of \$5,000.00.

SECOND COUNT

1. Plaintiffs repeat the allegations of paragraphs 1 to 4 inclusive of the First Count.

2. During the latter part of plaintiffs' tenancy of said store premises in the year of 1925 the then plaster ceiling of the store had been crumbling and becoming progressively unsafe; and, from time to time, plaster dust had sifted down

Complaint

upon some of the millinery there on exhibition, and some rain had come through the leaky roof of the storage and passageway room and damaged some of plaintiffs' goods rightfully stored therein at or near the rear door of plaintiffs' store; of all which defendant had notice and 10 knowledge, as did Edward Pannaci, her husband, who acted as defendant's authorized agent in all of said lettings of said store premises by defendant to plaintiffs.

3. Prior to March 18th, 1926, and prior to the letting in that year, plaintiffs notified defendant and her said agent that they would not again rent said store premises unless the roof and ceiling 20 of said store and of said storage and passageway room, and the drainage system of the main hotel building affecting the store premises, were placed and continuously kept and maintained by defendant in a proper and complete condition of repair at all times thereafter so long as plaintiffs continued to rent and occupy said store premises from year to year and for terms of six months; which condition so announced by plaintiffs to defendant the defendant expressly 30 accepted, agreed to and undertook to perform; and, on or about March 18th, 1926, defendant thereby induced plaintiffs to rent said store premises for a further term of six months beginning May 1st, 1926, and ending October 31st, 1926, the rent being payable in advance and prior to May 1st and with an option to plaintiffs of a renewal of the letting for a similar term of six months in 1927, and at the same rent payable as aforesaid; and plaintiffs, relying on defendant's faithful per- 40

Complaint

formance of her said undertaking, did rent and occupy said store premises during their respective terms in 1926 and 1927 and paid the rent in advance.

- 10 4. Some time prior to plaintiffs' actual occupancy of the store premises on May 1st, 1926, defendant did attempt to perform her said undertaking by laying a metal ceiling in said store, and, at various times during plaintiffs' tenancies in 1926 and 1927, did attempt to repair the roof over said store and the roof of said storage and passageway room; but defendant failed to perform her said undertaking, and her attempts to perform were so carelessly and negligently performed that, as she well knew, said roofs had not
20 been properly and completely repaired, and were and remained out of repair, and leaked, and were in a condition dangerous and injurious to the person and property of plaintiffs as defendant's tenants, and to the persons of their customers, agents and visitors; and, furthermore, that the leaky condition of the roof of the storage and passageway room had been increased from time
30 to time by the additional volume of rain water poured down upon it by said drain pipe attached to the roof of the main hotel building, and because said pipe was of insufficient capacity or had been permitted to become choked.

5. By reason of defendant's said failure to perform her said undertaking and of her careless and negligent attempts to perform as aforesaid, and by reason of the leaky condition of said
40 roofs, on or about July 23rd, 1927, rain came through the roof and ceiling of said store, rented

Complaint

and occupied by plaintiffs as defendant's tenants, and rain likewise came through the roof and ceiling of said storage and passageway room, flooding the floor of said store and the floor of said storage room, and wetting and staining plaintiffs' goods, furniture and property contained in said store, and also wetting and staining all that part of plaintiffs' goods which had been rightfully stored in said storage room at or near the rear door of plaintiffs' store; whereby and by reason of which wetting and staining plaintiffs sustained great loss, damage and injury in that said goods were wholly ruined, made unsalable and their value destroyed, so that plaintiffs were obliged to, and did, purchase new goods in lieu thereof, and their said furniture and property in said store was also thereby damaged and the value thereof greatly lessened. 10 20

5. As to the further loss, damage and injury thereby sustained by plaintiffs, they repeat the allegations of paragraphs 9, 10 and 11 of the First Count hereof.

Wherefore, plaintiffs demand of the defendant damages in the total sum of \$5,000.00, together with the costs and disbursements of this action. 30

BENJAMIN J. DOWNER,
Attorney of Plaintiffs.

ANSWER AND COUNTERCLAIM.

(Filed Dec. 22, 1927)

The defendant answered and counterclaimed as follows:

MONMOUTH COUNTY CIRCUIT COURT

10

BERTHA A. BRIGGS and CLARA B.
DOWNER, partners trading as
The Misses Briggs,

Plaintiffs,

vs.

VERONICA PANNA CI,

Defendant.

Action at Law.

20

Defendant, Veronica Pannaci, says that:

1. She admits paragraph 2.

2. Defendant admits she is the owner of the premises in question, but the other facts stated in paragraph 3 this defendant denies.

3. Defendant admits that part of paragraph marked 2, which number is apparently an error and should have been marked 4, in which plaintiffs allege that plaintiffs had occupied as tenants a store of this defendant for the years 1924, 1925, 1926 and 1927, but denies that there were any inducements held out to the plaintiffs as alleged in said paragraph. The rest of said paragraph is denied.

4. Defendant denies paragraph 5.

5. Defendant denies paragraph 6.

6. Defendant denies paragraphs 7, 8, 9, 10 and 11.

Answer and Counterclaim

AS TO THE SECOND COUNT

1. Defendant denies paragraphs 1, 2, 3, 4, 5 and also the additional paragraph marked 5, which apparently should have been marked 6.

This defendant further answering says: 10

FIRST DEFENSE

1. Defendant will object that the complaint shows no cause of action.

SECOND DEFENSE

1. All of the leases for the various years that the plaintiffs occupied the said store were written leases, and in none of the said leases did the defendant undertake to be responsible for the condition of or for any repairs or improvements to the demised premises. 20

THIRD DEFENSE

1. Defendant will object that parole evidence is not admissible to vary said written agreements or leases.

30

FOURTH DEFENSE

1. Defendant will object that the special damage claimed by the plaintiffs is too remote.

FIFTH DEFENSE

1. The premises actually demised to plaintiffs consisted only of the store on Ocean Avenue approximately 11 feet wide and 33 feet deep. In the rear of this store and in the rear of the so- 40

Answer and Counterclaim

called barber shop adjoining there is a large addition 39 feet by 20 feet, one story high, with flat roof and sides of the roof a little higher than the roof itself. This room in the rear was not included in the written leases to plaintiffs and never was leased to plaintiffs.

2. In the year 1926 the so-called barber shop had been occupied by another tenant as a novelty shop. In the year 1926 plaintiffs and the tenant of the so-called barber shop used in common a toilet in the northwest corner of the large room in the rear. Both tenants crossed said room to reach said toilet.

3. At the time of the rain in question and during all of the 1927 season, the so-called barber shop adjoining plaintiffs' store was unoccupied, and plaintiffs had the exclusive control, custody and occupation of the said rear addition, except for certain chattels and furniture of defendant which were stored in a part of said rear room.

4. The plaintiffs had taken possession and control of the rear room at their own risk and without the payment of additional rent, and the defendant permitted them to occupy it at the express request of the plaintiffs.

5. Defendant denies that she requested plaintiffs to take possession of said rear room or in any way sought to induce plaintiffs to use or assume the custody of the said room.

6. There was a leader by which water from the flat roof over the said storage room escaped to the ground below, which leader was located

Answer and Counterclaim

at the southwest corner of the said one-story addition. It was the duty of the plaintiffs to keep the said roof in repair and to keep the said leader clear, but the plaintiffs neglected their said duty on the day in question and permitted the leader to become choked, with the result that water collected on the flat roof until a small lake was formed and overflowed the flashings of the building and greatly damaged defendant's building and her furniture contained in said rear room. 10

SIXTH DEFENSE

1. The rain complained of on the said 23rd day of July, 1927, was a torrential downfall and continued nearly all day. It was sudden and overwhelming, the water descending in a flood, being an Act of God, and causing at the same time in many other parts of Monmouth County similar flooding of other buildings. 20

SEVENTH DEFENSE

1. The defendant will rely on Sections 2, 3 and 5 of the Statute of Frauds and Perjuries.

BY WAY OF COUNTERCLAIM AGAINST PLAINTIFFS, 30
DEFENDANT SAYS THAT:

1. She repeats the statements made above.
2. The plaintiffs being in the possession and control of the one-story addition, which included the large so-called storage room, were under duty as tenants to keep that part of said building in good repair.

40

Reply

3. The said plaintiffs neglected their obligation to keep the said one-story addition under their control in good repair, with the consequence that the said building was flooded and the said building and the goods and chattels of this defendant stored therein were damaged by the water and elements.

The defendant counterclaims Ten Thousand Dollars (\$10,000.00) damages.

ALSTON BEEKMAN,
Attorney of Defendant.

20

REPLY.

(Filed Jan. 6, 1928)

The Plaintiffs replied as follows:

MONMOUTH COUNTY CIRCUIT COURT

30	BERTHA A. BRIGGS and CLARA B. DOWNER, partners trading as The Misses Briggs, vs. VERONICA PANNACI, 	}	Plaintiffs, Defendant. Action at Law.
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The plaintiffs above named, in reply to the answer and counterclaim of the above named defendant, filed herein, say that:

40

Reply

AS TO THE FIRST DEFENSE

Plaintiffs will contend that the complaint does state a cause of action.

AS TO THE SECOND DEFENSE

10

Plaintiffs deny the allegations contained in the Second Defense.

AS TO THE THIRD DEFENSE

Plaintiffs will contend that the rule of evidence stated in the Third Defense does not apply to the lettings set forth in the complaint.

AS TO THE FOURTH DEFENSE

20

Plaintiffs will contend that the special damage claimed by plaintiffs is not too remote.

AS TO THE FIFTH DEFENSE

Plaintiffs deny the allegations contained in the Fifth Defense.

AS TO THE SIXTH DEFENSE

Plaintiffs deny the allegations contained in the Sixth Defense. 30

AS TO THE SEVENTH DEFENSE

1. Plaintiffs will contend that Sections 2, 3, and 5 of the Statute of Frauds and Perjuries do not apply to the lettings set forth in the complaint.

40

Reply

2. Plaintiffs deny the allegations contained in paragraphs 1, 2 and 3 of said Seventh Defense, by way of counterclaim.

10 3. Plaintiffs will object that the alleged counterclaim does not allege or disclose any cause of action against the plaintiffs, and hereby reserve their right to raise this objection at the trial of this action.

BENJAMIN J. DOWNER,
Attorney of Plaintiffs.

20 This action was tried before Judge Rulif V. Lawrence with a jury at the Monmouth Circuit on June 21 and July 15, 1929.

The case having been heard, on motion of attorneys for defendant the Court directed the jury to return a verdict of no cause of action in favor of the defendant and against the plaintiffs. Whereupon the jury returned a verdict of no cause of action in favor of the defendant and against the plaintiffs.

30 Whereupon it is adjudged that the defendant recover of the plaintiffs her costs which are taxed at the sum of Sixty-four dollars and five cents (\$64.05).

Judgment entered July 15, 1929, at 11 A. M.

JUDGMENT.

MONMOUTH CIRCUIT COURT

APRIL TERM, 1929

19469-26-114	}	Action at Law.	
BERTHA A. BRIGGS and CLARA B. DOWNER, partners trading as The Misses Briggs, Plaintiffs,		Judgment by Verdict, No Cause of Action.	10
vs.		Judgment entered July 15, A. D. 1929	
VERONICA PANNACI, Defendant.		Costs \$64.05 Alston Beekman, Atty.	20

Judgment in the above entitled action was rendered on the Fifteenth day of July, A. D. One thousand nine hundred and twenty-nine, in favor of the defendant Veronica Pannaci and against the plaintiffs Bertha A. Briggs and Clara B. Downer, partners trading as The Misses Briggs; Action at Law; Judgment by Verdict, No Cause of Action for the sum of Sixty-four dollars and Five cents costs of suit. 30

Judgment entered and signed July 15, A. D. 1929, 11:00 A. M.

CLERK'S CERTIFICATE.

State of New Jersey,
Monmouth County. ss:

10 I, Joseph McDermott, Clerk of said County, do hereby certify that the foregoing copy of Complaint, Answer and Proceedings, in the case of Bertha A. Briggs and Clara B. Downer, partners trading as The Misses Briggs, Plaintiff, vs. Veronica Pannaci, Defendant, is true and correct as the same remains on file in my office.

20 (Seal) IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said County, this 6th day of August, A. D. Nineteen Hundred Twenty-nine.

JOSEPH McDERMOTT,
Clerk.

TESTIMONY.

MONMOUTH COUNTY CIRCUIT COURT

BERTHA A. BRIGGS and CLARA B. DOWNER, trading as The Misses Briggs, vs. VERONICA PANNACI, Defendant.	}	Plaintiffs, Action at Law.	10
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Freehold, N. J., June 21, 1929.

Before: HON. RULIF V. LAWRENCE, 20
 Judge, and a jury.

Appearances:

For plaintiffs: Benjamin J. Downer, Esq.

For defendant: Lester C. Leonard, Esq.

MRS. CLARA B. DOWNER, sworn for plain-
 tiff.

Direct-examination by Mr. Downer: 30

Q. Mrs. Downer, you are one of the plaintiffs
 in this case? A. Yes.

Q. You were a partner in business with your
 sister, Bertha A. Briggs? A. Yes.

Q. Trading under the partnership name of The
 Misses Briggs? A. Yes.

Q. And you were in the millinery business at
 Atlantic Highlands? A. Yes.

Q. And you have been in that business about
 how long at Atlantic Highlands? A. About twenty-five or thirty years. 40

Clara B. Downer—Direct

Q. In about March, 1924, did you rent or did you go to Sea Bright and to the office of Edward Pannaci?

10 Mr. Leonard: Objected to on the ground that it is too remote.

The Court: I suppose you are attempting to develop what I would call a background. I will allow it. Go on.

Q. For the purpose of renting a store in the Hotel Pannaci building there? A. I did.

20 Mr. Leonard: I object to this entire line for the reason that there appears to be, according to counsel's opening, a written lease under which, by reason of their renewal clause, a tenancy commencing according to it. So what took place prior to the execution of that lease is not admissible.

The Court: Don't argue it. You may have an exception.

(Objection noted for defendant as ground of appeal.)

30 By the Court:

Q. As a result of the conversations, was a lease entered into, Mrs. Downer? Was there a lease entered into? A. Yes, sir.

Q. And was it in writing? A. It was in writing.

The Court: Where is it, Mr. Downer?

Mr. Downer: I was going to ask.

By Mr. Downer:

40 Q. There was a written lease which Mr. Edward Pannaci, the husband of the defendant, sent to you for execution? A. Yes, sir.

Clara B. Downer—Direct

Mr. Downer: Have you that written lease? I call upon him to produce the original lease in 1924.

Mr. Leonard: I don't know of any written lease. Do you say you gave me notice to produce a written lease in 1924? 10

Mr. Downer: Yes.

Mr. Leonard: Where is the notice?

Mr. Downer: We can't find the lease.

The Court: Did you give him notice to produce? Where is your notice to produce?

Mr. Leonard: Produce your secondary evidence if you have it. Have you got secondary evidence of it? 20

Mr. Downer: Yes.

Mr. Leonard: Well, go ahead.

Q. Did this lease describe the—

Mr. Leonard: That is objected to. The lease will speak for itself.

The Court: Where is the lease?

Mr. Downer: I asked him to produce that lease. 30

Q. Have you looked for that lease to see whether you could find it? A. I sent the lease back to Pannaci in 1925, to renew it and he didn't return it. He sent 1926 or 1927.

Q. No, I ask you when you first rented the store, Mrs. Downer, after you had concluded your bargain; did you have a written lease there which you signed? A. I did.

Q. And have you looked for that lease since? A. I have. 40

Q. Can you find it? A. I do not.

Clara B. Downer—Direct

Q. Now, I will ask you here just only one point. Did that lease actually describe what was included in the store premises? A. It did not.

Mr. Leonard: Objected to.

10 The Court: You see he is objecting now to any secondary evidence of the contract.

Mr. Leonard: Not only for that but in addition that it appears there was a written lease made in 1926 by this witness. What did take place in 1924 would have no bearing on this case.

20 Mr. Downer: It would have a decided bearing, first, showing—first the rule of law is you can show the preliminary negotiations under which a written lease was entered into. Now, the written lease it appears as a fact in this case did not describe the store premises.

The Court: When did the injury of which you complain occur?

Mr. Downer: In 1927.

The Court: Well, that was under the lease of 1926 then, wasn't it?

30 Mr. Downer: It was under the lease which was executed in 1926, with the renewal for 1927. Now, the reason I am asking her about the occupancy back in 1924 and 1925, is for this reason. They have set up in their answer that she had no right to use any part of the storage room. But the answer to that is that that was the use from the beginning of the
40 tenancy.

Clara B. Downer—Direct

The Court: Where is the lease which was in existence and covering the premises at the time of the injury?

Mr. Leonard: Mr. Downer, you have the lease. I have seen it.

The Witness: You have the last of it, the 1926 lease. 10

Mr. Downer: Well, I will come to that in a minute.

The Court: No, I don't want to spend too much time on the case. We have a number of cases to try yet. It is a very simple situation. The relation is shown by the lease of 1926, as I understand it. Is that right? 20

Mr. Downer: Yes.

The Court: All right. Show the lease.

(Witness shown a paper.)

Mr. Leonard: Oh, Mr. Downer, I will admit if that is the lease of 1926.

Mr. Downer: You admit this in evidence?

Mr. Leonard: That is the one you showed me, isn't it? 30

Mr. Downer: Yes.

Mr. Leonard: Yes, we will admit that.

Mr. Downer: Now, let's get at this.

Mr. Leonard: Do you offer it?

Mr. Downer: I offer this in evidence.

(Lease marked Exhibit P-1.)

By the Court:

Q. Now, showing you Exhibit P-1, Mrs. Downer, you are asked if that is the lease under which you held in 1926? A. That is. 40

Clara B. Downer—Direct

By Mr. Downer:

Q. And 1927? A. Yes.

Q. Now, calling your attention to the description of the store premises which you occupied in 1926, I ask you whether that was the same description which you had made in 1924 and 1925?

Mr. Leonard: Objected to.

The Court: Objection sustained as being immaterial. The lease speaks for itself.

Q. I will ask you this. You occupied these premises, the northerly store in the Hotel Pannaci building, for four years, did you?

20

Mr. Leonard: Objected to.

The Court: Objection sustained as being immaterial.

Mr. Downer: It is admitted in the answer.

The Court: Well, proceed.

(Objection noted for plaintiffs as ground of appeal.)

30 Q. Did you pay rent for these premises for the summer season, May 1st to November 1st, 1924 and 1925?

Mr. Leonard: Objected to.

The Court: Objection sustained.

(Objection noted for plaintiffs as ground of appeal.)

40 Q. I show you a paper and ask you whether that is a letter received by you signed "Edward Pannaci" on February 28, 1924?

Clara B. Downer—Direct

Mr. Leonard: Objected to.

The Court: Objection sustained.

Mr. Downer: The purpose of that is to show the execution of the lease at that time.

The Court: We are simply concerned 10
here, Mr. Downer, with the relation that existed between the plaintiffs and defendant at the time of the injury, and as I understand, it was during the year 1926.

Mr. Downer: He only wants 1926.

The Court: That is all we are concerned with.

Mr. Downer: Yes, but I want to show that this is a continuing situation with re- 20
gard to that roof there all during those years.

The Court: You can't do it that way.

Q. Now, you occupied the premises from May 1st to November 1st in 1926, did you? A. I did.

Q. And what rent did you pay for them? What was the rent? A. \$250 for the season.

Q. How was that rent paid? A. In advance, \$50 and \$100.

Q. \$50 when the lease was signed? A. \$50 30
when the lease was signed.

Q. And \$200 when you moved in? A. And in 1927, I paid \$100 down.

Q. Under that you had an option of renewal for 1927? A. I did.

Q. Did you exercise your option there for 1927? A. I did.

Q. For the same months? A. The same 40
months.

Clara B. Downer—Direct

Q. May 1st to November 1st? A. Yes.

Q. And was it payable at the same rent? A.
The same rent.

Q. Namely, \$250?

10 Mr. Leonard: If the Court please, if the option in the lease of 1926 were taken advantage of, necessarily the terms have to be the same.

Mr. Downer: Well, we don't want any necessarily, we want the facts.

Mr. Leonard: I object to it. He took the same as the terms of 1926.

The Court: No reason for argument.

20 Go on.

Q. Now, in 1926, when did you move in there in 1926, in the store?

Mr. Leonard: Objected to as immaterial.

The Court: You may answer; did you go in possession under the lease of 1926?

A. June 1, 1926.

By Mr. Downer:

30 Q. And you occupied the northerly store from May 1st to November 1st, 1926? A. 1926.

Q. Now, what was the store premises which you actually occupied during that period in 1926?

Mr. Leonard: Objected to, if the Court please, as immaterial, that the lease speaks for itself.

The Court: What does the lease say in that regard?

40

Clara B. Downer—Direct

Mr. Leonard: Well, the demise seems to be quite clear.

The Court: Let me see it.

(Examines lease.)

Mr. Leonard: "To the party of the second part her small store known as millinery shop;" that is all. 10

Mr. Downer: But where, where located?

Mr. Leonard: It says in Sea Bright.

Mr. Downer: Sea Bright, but what part of Sea Bright? There were two stores there. That shows that it was the same store that she occupied before.

Mr. Leonard: We will admit that. That is where the store was. 20

Mr. Downer: That lease does not describe the store premises at all; it simply says the millinery shop. Now, the millinery shop consisted of a front room with the right to use, just as stated in the complaint, that portion of the storage room right there, and it is completely competent to show the connection of the occupancy with their knowledge. 30

By the Court:

Q. What did you occupy there, Mrs. Downer?

A. I occupied the front store and part of the back store.

Q. What did you use the back store for? A. To store my goods, is the way he was supposed to give it to me. That is the way I rented it.

Clara B. Downer—Direct

By Mr. Downer:

Q. How much of that storage room from the back of your store did you use? A. Only on the side, only for what goods I had stored in there.

10 By the Court:

Q. You were permitted to do that by the landlord; is that right? A. Yes.

Q. Permitted by the landlord? A. Yes.

Q. While your lease didn't actually cover it? A. That is it.

Q. By permission? A. By permission.

Q. You used a corner of that rear room for storage purposes? A. Yes. And they took a counter from the front store and put it in the
20 back room so that I could put my goods on it.

By Mr. Downer:

Q. When you moved in there was the room arranged that way? A. It was arranged that way.

Q. Now, as to the arrangement of the adjoining store, was the storage room arranged in the same way for the tenant of the adjoining store—

30 Mr. Leonard: Objected to as immaterial and leading.

Mr. Downer: It is, because this brings it under the landlord's control of the room, two adjoining stores with a common passageway with a roof over that part. That is what he is trying to evade and he can't do it because they occupied it that way.

The Court: As a matter of fact, you haven't any need for that; you were there
40 by permission.

Clara B. Downer—Direct

Mr. Downer: With their knowledge.

The Witness: With their knowledge.

By the Court:

Q. Did you pay any rent for that storage? A. No, it isn't in effect; it is only for that store, but you couldn't get away or get back of it. 10

By Mr. Downer:

Q. When you paid your rent there was it with the understanding—

Mr. Leonard: Objected to as leading.

Q. When you paid rent for these premises was it your understanding and with the agreement that you were to use that part of the storage room back for your goods? 20

Mr. Leonard: Objected to as leading.

The Court: I am going to allow her to answer. She has already said so.

A. I rented that with the understanding that I should use my storeroom and to sew in that room if I wished to, otherwise the store would be too small, the store which I did business in, the front part. 30

Q. There was no toilet or wash room in either of the front stores, was there? A. No, it was in the back.

Q. And it was at the end of the storage room at the further end? A. The further end.

Q. Now, this storage room and the exclusive part that you used to store such of your goods as were not on exhibition in the front room, who occupied the rest of the room, the main part of the 40

Clara B. Downer—Direct

room? Who occupied it? A. No one occupied it, the main part. The store next door, Mrs. Drumpleman, the store next to me in 1926, she used during that period. A little partition was made there for a barber in 1925, and that came near
 10 where I was, where he put this counter for me to store my goods.

Q. In the back in the main part of the room whose goods and everything were stored, back in the main part of the room, except what you and Mrs. Drumpleman had there? A. There was a pool table there—

Q. Whose was that? A. That belonged to the Hotel Pannaci. Dr. Pannaci owned some bottles
 20 and some other stuff there.

Q. So that with the exception of the part which you used back there on your side and the part which Mrs. Drumpleman used on her side there, the entire place there was occupied for the storage of goods by Mrs. Pannaci, her hotel furniture?
 A. Yes, in the back.

Q. And in order to reach the toilet room you had to pass on your side? A. On my side.

Q. Both of you, in order to reach the toilet
 30 room? A. Yes.

Q. That is to say, Mrs. Drumpleman had to come around on your side to go down there?

Mr. Leonard: Objected to as leading.

The Court: Forget the rules for the time being. I want to see what the fact is.

Q. Now, you had a door in the back part of the storage room there, there was a lock on it,
 40 wasn't there? A. They were locked.

Clara B. Downer—Direct

Q. You had no key to that lock? A. Had no key.

Q. You couldn't get out there at all? You had nothing to do with that whatever? A. Not the back part.

Q. When you went in there in 1926, I mean 10
now, what did you find as to the ceiling in the front room there? Was there any change made there? A. Yes, there was a change.

Q. What was the ceiling in there? A. It was a wall palster ceiling.

Q. In 1926? A. Yes.

Mr. Leonard: Wasn't it the Court's suggestion that perhaps the matter might 20
be facilitated by no objection?

The Court: I think so.

Q. Did you find a new metal ceiling in your own front room there in 1926? A. I did.

Q. Now, you said Mrs. Elizabeth Drumpleman— A. Yes.

Q. —occupied the adjoining store next to you? A. She did.

Q. During the season of 1926? A. Yes.

Q. For what purpose? What was her business 30
there, just briefly? A. Gift books, novelty shop.

Q. How long did she stay there, about? A. From the 1st of May till the 1st of September.

Q. And you went in about June? A. June 1st, June, somewheres around there.

Q. Now, in August; were there any leaks in the storage room in August? A. There was.

Q. Leak from water overhead? A. Overhead.

Q. Where did it come from? A. From the 40
ceiling.

Clara B. Downer—Direct

Q. What part of the storage room? A. Right in the middle, right in the top of the ceiling, right down.

Q. Did you have any goods back in the storage room at that time? A. I did.

10 Q. What did they consist of, generally? A. Velvets, ribbons and a few hats were damaged and hurt \$25 worth in 1926.

Q. By damage you mean to say that they were so wetted and stained by the water that they could not be sold? A. They could not.

Q. Who managed the hotel? Who had charge of the repairs in the hotel during 1926? A. Alfred Pannaci.

20 Q. That is the son of Mrs. Edward Pannaci, Mrs. Pannaci, the defendant? A. Yes.

Q. Now, did you show him the damaged goods there at that time? A. It was so severe that Mrs. Drumpleman went out to Edward Pannaci and she couldn't find him. Alfred Pannaci, from the hotel, came in and he said—

Mr. Leonard: Objected to.

The Court: I think I will allow it. Go

30 on.

A. And the gutter was stopped up and he said, "I will go right up there and clean it all down." He said his father was not in, or out, or something, so we went up on the roof and fixed it and we showed him our damage.

Q. What did they say? Did they pay for it, or not? A. No, they didn't pay for it; didn't say anything about it or didn't do anything.

40

Clara B. Downer—Direct

By the Court:

Q. By the way, Mrs. Downer, who gave you permission to use that storeroom? A. Mrs. Pannaci and Doctor and Mrs. Walton.

Q. What did they say about it? A. They said I could use it. That went in with my renting of it. 10

Q. At the time that you rented the store? A. Yes.

Q. They said you could use the— A. Back of the place.

Q. For storage? A. For storage.

Q. You didn't pay any additional rent for that? A. Why, no. Why should I?

Q. Don't ask me. I didn't make the bargain for you. A. Well, I made the bargain. 20

Q. What you were paying rent for was the little store? A. The store and the storeroom.

By Mr. Downer:

Q. You were paying rent, as I understand you, not only for the front room but for the use of that part of the storage room immediately back of you? A. I certainly did. They took the counter and put it there. 30

Q. Together with the use of the toilet room at the end also, was it? A. Yes.

Q. And that is what you included in your rent? A. That is what I included in the rent.

By the Court:

Q. Did they say so? A. They did not.

Mr. Downer: The lease simply says the store, but the occupancy there for four 40

Clara B. Downer—Direct

years occupancy was that way, and the original agreement, negotiation, was specific on that thing, but that he is objecting to let me show that.

10 The Court: Well, she says she had permission to occupy.

The Witness: I had permission to occupy it.

The Court: I imagine there must have been a pretty heavy storm there one day in 1926.

Mr. Downer: 1926, yes; not as severe as it was in 1927.

The Court: 1927, the next year?

20 Mr. Downer: Yes.

The Court: What happened in 1927?

Mr. Downer: Well, I was just coming to that.

The Court: Well, I wish you would come to it, make it come quickly.

By Mr. Downer:

Q. When you closed the store there for the 1926 season did you see Mr. Edward Pannaci? A. I
30 did.

Q. And ask him what he was going to do?

Mr. Leonard: I object. I am somewhat embarrassed—

The Court: You and I are going to agree on the rule bye and bye. Doubtless if you see through correctly I may agree with you.

40 Q. Did you see Mr. Edward Pannaci? A. I did.

Clara B. Downer—Direct

Q. About the roof and the building there? A. I did.

Q. Now, what did he say? A. Why, they sent a man up there to put—

Q. No, this is the end of 1926? A. Well, it leaked in 1927, and he was supposed to have it all fixed. 10

Q. What did he say to you in the fall of 1926, that he was going to do about that roof, if anything? A. He was going to fix the roof and fix the ceiling in the back room.

Q. In the back room? A. Yes.

Q. That is before you exercised your option in the renewal of the lease for 1927, wasn't it? A. Yes. 20

Q. Just before you moved there? A. Just before I moved there in 1926.

Q. And was that the bargain you made with them at that time, that he should put that roof in proper condition? A. Yes.

Q. Or you wouldn't move in next year? A. Yes.

Q. Did you have that definite understanding with him? A. Yes.

Q. That is to say, he agreed to put that roof in absolutely good condition before you moved in next May? A. I have a letter that I wrote there to Mrs. Pannaci regarding about fixing the roofs and ceiling in 1926. 30

By the Court:

Q. Did she reply? Did she answer your letter? A. She didn't answer it. I haven't any reply. 40

Q. You got no reply?

Clara B. Downer—Direct

By Mr. Downer:

Q. Well, never mind. What did you say to him, he having said to you that he would put that roof in proper condition? A. He said he would.

10 Q. And then did you say that you would renew the lease for the next year? A. I did.

Q. When did you next use the premises again? A. 1927.

Q. That was about what time? A. About in February I was down there.

Q. Now, did you send forward your checks there at that time? A. I sent forward the checks.

20 Q. That is to say, February you sent a check for how much? A. \$100.

Q. And when was the balance of the money paid for the rent? A. In May or April, I don't know which it was.

Q. Well, about what? \$100 more? A. \$150 more.

Q. Did he say that he wanted \$150 that time? A. Yes, to fix the roof and things.

30 Q. Now, we will come down to July 23, 1927, Saturday morning. What happened to your goods in the store premises on that Saturday morning? A. Saturday morning I went down to the bank and it wasn't raining very hard and by the time I got down and attended to my business, the time I got back was about twenty minutes, and Dr. Pannaci had then stood outside and says, "Where have you been?"

40 Q. What happened? Was there a rain, a heavy storm? A. There was rain. The heavy storm was coming then.

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Q. Where were you while the storm was coming? A. I went down to the bank, and coming back I had some friends to see and other things, and it was about fifteen or twenty minutes, I think it was.

Q. Then you had to wait for the storm partially to subside before you came back? A. Oh, I guess I would have, to get your rubbers or anything else. 10

Q. Then what? A. When I got back Dr. Pannaci says to me, "Where have you been?"

Q. Where was he? A. He was outside the kitchen, just opening the door. He says to me, "I thought you were killed."

Q. Why? A. He says, "The whole ceiling is down in the back." He says, "What business have you leaving your store?" I says, "What is it to you?" And then when I opened the door the water was running right out of the front door. I was ankle deep when I walked into my front door. Hat boxes were floating all around in the street. And then when I went back I couldn't do anything or he couldn't do anything, because the ceiling was dangerous in the back. It would kill you. 20 30

By the Court:

Q. What ceiling was that? A. The back room.

Q. The storeroom? A. The storeroom. It was right in front of my door, and that fell and the water came in through the partition, through the store, and flooded the whole place.

By Mr. Downer:

Q. That is, you mean over the partition between your front room and the back room there? 40

Clara B. Downer—Direct

A. Yes, and then I had—there was a closet between where I kept all my orders, and they were all ruined as it came down into the partition. My goods were ruined more in the front than it was in the back.

10 Q. Were the greater part of the goods that were damaged by water in the front room or in the other room? A. They were both.

Q. Which was the greater portion of the damaged goods? A. Between the partition.

Q. That is in the front room? A. That is in the front room. They were those expensive orders. The rich people had their orders there.

20 Q. In addition to that there were back in the storage room other goods? A. Other goods.

Q. Which were not kept on exhibition in the front room? A. Yes.

Q. Well, now, who came in right after that then, in the storeroom? Who came right in? What others were there? A. Dr. Pannaci, Mrs. Pannaci, Mr. Walton and Mrs. Walton, and some clerks in the drug store. Well, all saw it and was there.

30 Q. Do you remember whether or not Officer Mills, of the Sea Bright police, came in and saw this? A. Yes.

Q. And did Mr. Pannaci and Mrs. Pannaci and Mrs. Walton come in back there and see all the damage there? Could they have seen it? A. They did see it.

Q. Now, that year Alfred Pannaci was not operating the hotel? A. He was not.

40 Q. Now, what did Mr. Edward Pannaci, the husband of the defendant, say to the doctor to do,

Clara B. Downer—Direct

if anything? What did he tell him to do, if anything? A. He told him about the roof, to fix the roof.

Q. No, about the muss there. A. What could he say? He was right there.

Q. Did he ask him to clean it up? A. He asked him to clean it up and he said a man could clean it up. 10

Q. And did he send a man in there? A. Yes, he did.

Q. How many men did they have to clean it up? A. One man.

Q. What did they do in cleaning it? A. They took out all the plaster and other stuff, some of my goods. It was wet, nothing but water, and the rugs out of the front store there. 20

Q. Took them outside to dry? A. To dry them out.

Q. Then what happened that morning? You didn't stay around there all the morning, did you? A. I didn't. I went home about one o'clock.

Q. This was Saturday? A. Saturday afternoon. Saturday morning it happened.

Q. Did I come over with you to the store after that? A. I went over after you and you came over to the store about one o'clock. 30

Q. And did I go back in there, too? A. You did.

Q. From there do you know whether I went to see Edward Pannaci or not? A. You did.

Q. Did Dr. Pannaci say anything to you at that time when he was talking with you after the others had left as to what he told his father about the roof? A. Yes, he said right there, "I told 40

Clara B. Downer—Direct

father the other day about looking after that roof."

Q. Then what? A. So he says, "This is what happened."

Q. Did he say anything else about the roof?

10 A. He said he told him that he ought to have a new roof long ago on there.

Q. Did you then—in the afternoon now, I mean—did you then go with me to see Mr. Edward Pannaci and his wife, the defendant, Mrs. Veronica Pannaci, in their hotel office, that afternoon, I mean now? A. You went yourself, didn't you?

Q. Didn't you go with me? A. I went with you that afternoon.

20 Q. Do you remember the conversation we had there at that time about the damage to the goods and how we were going to get at the value of it? Was there any such conversation? A. Yes, there was.

Q. Now, what was it? What were you going to do? A. I told them they were responsible for the damage to my goods.

30 Q. But as to the value; what were you going to do? A. I didn't know the value, for I felt bad about it that day, and I wanted an appraiser to come right down to have it done.

Q. Appraiser from where? A. From New York, that knew.

Q. From what place? A. From Aitken's Sons, where I bought my goods, and knew about it.

Q. Aitken & Sons, of New York City? A. Yes.

Q. They were wholesale milliners? A. They were wholesale milliners.

40 Q. With whom you traded many years? A. Yes.

Clara B. Downer—Direct

Q. What did Mr. Edward Pannaci and Mrs. Pannaci say in response to your suggestion that you would telephone this man to come right down?

A. They said they didn't want it, because it was too expensive, that I didn't need appraisers; that they would take my word for the damage to the goods. 10

Q. They did? A. And so I said, "All right"; and so they said they had a Miss Fery, their stenographer, and she would come Monday morning and go all over the goods with me.

Q. Proceed. And now Sunday morning did you go down to the store then? A. I was all day Sunday down there.

Q. What were you doing there at the store Sunday morning? Just tell generally. A. I was picking out my goods and straightening out things for people for Monday morning. 20

Q. Well, you didn't open the store Monday? A. I didn't open the store Monday, because I couldn't, because the rugs were all wet and everything was damaged, had to dry out and clean up.

Q. Well, you were arranging things in there ready for Miss Fery on Monday morning? A. Miss Fery to take an inventory. 30

Q. And Monday morning what did you and Miss Fery do? A. We took an inventory of all the goods.

Q. Just tell us briefly how you did it. A. Well, I picked out the hats, so many hats such a price, and I called them off and she took them down.

Q. In other words, you made a list? A. List.

Q. Item by item, each piece? A. I did. 40

Clara B. Downer—Direct

Q. Velvet hats and so on? A. Yes.

Q. And then as you did that she saw what you were taking there? A. She saw what I told her.

Q. Then she took that away and did she type-write it afterwards? A. She typewrote her list.

10 Q. And added it up to show the total? A. Added it up and gave one to me and one to Mrs. Pannaci.

Q. Now, what did you put down there as to the value of the damaged goods there in the store by reason of this flooding of the store? What did it amount to? A. About \$1,000; I don't know exactly.

20 Q. Was the correct amount \$1,195.50? A. Yes, sir.

Q. Now, in putting that amount how did you arrive at it? That was not the cost price of the goods, was it? A. It was the retail price.

Q. It was the price you were selling them at? A. Yes, the price I was selling at.

30 Q. Now, as to the quality generally of these goods, were they ordinary goods or were they what the ladies know as exclusive models? A. Exclusive models. I made a lot of models myself and did all kinds of work which the rich people required for me to do.

Q. Is it true that the class of goods that you bought of Aitkens at this time and all the time were what is known as exclusive models? A. Exclusive models.

Q. Just mention some of the names. A. Mrs. Borden, Mrs. Vetour, Mrs. Churchill—

40 Q. No, refer to some of the names of the models there. A. Well, that I don't know.

Clara B. Downer—Direct

Q. Do you remember any of the names? A. No.

Q. Now, at that time when you were in conversation with Mr. and Mrs. Pannaci did they refer, did either of them—and when you claimed that the damage to your goods was caused by the defective roof—did either of them claim that that roof was in good condition? A. They did not. 10

Q. Did they in any way deny that the reason of your damage there was caused by the water coming through the leaking roof? A. Yes, the leaking roof.

Q. Did they deny it? A. They didn't deny it.

Q. Have they ever denied it, so far as you know? A. They did not. 20

Q. Now—I am nearly done now—after you had made up this list of the damaged goods there and Mr. Pannaci received a copy and you received a copy of it— A. I did.

Q. Did you see Mr. and Mrs. Pannaci and ask them as to whether or not they were going to settle for that damage? A. I did.

Q. And when did you see them there? About when was it? A. Oh, about two or three days after. 30

Q. Well, what did they say then? A. Well, they said they would settle for \$200.

Q. Who said this? A. Mr. Pannaci.

Q. Mr. Pannaci? A. Mr. Pannaci.

Q. What did you say? A. I said I wouldn't take it.

Q. Did he say anything at that time that you hadn't had an expert appraisal made there? A. He said I would have to have an expert appraisal. 40

Clara B. Downer—Direct

Q. Now, when you heard that then what next did you do? A. I telephoned for them to come down and appraise my goods.

Q. Telephoned who? A. Steger, from Aitkens & Sons.

10 Q. George H. Steger? A. Yes.

Q. Of Aitken & Sons, wholesale millinery there? A. Yes.

Q. Now, he did come down and make an appraisal, didn't he? A. Yes.

Q. How did he do it, just briefly? A. I showed him the goods, I held them up to him and I had the list and went over the list with him and he marked them down as I did it.

20 Q. Did he go over each item? A. Went over each item.

Q. None of those goods had been changed during that time? A. They hadn't been changed. They were there just the same.

Q. Where were they, in the back room? A. In the back room.

Q. On the table? A. On the table and all along the sides on the floor.

30 Q. What was the amount he gave you as being the appraisal made? Did he agree with yours? A. He agreed with mine.

Q. Was the date when he came down there, on August 10th? A. August 10th.

Q. 1927? A. Yes.

Q. Now, you had been in this place four years there? A. Four years.

Q. And built the business up there as a French millinery business? A. I did.

40

Clara B. Downer—Direct

Q. Was there any other suitable location there for a millinery store selling the class of goods that you were selling there at that place there in Sea Bright on Ocean Avenue? A. There was not. I selected that place.

Q. Now, after this date on July 23d what was the condition of the storage room there, the storage room ceiling over the passageway which led to the toilet back there? What was the condition of that? A. It was very, very dangerous. 10

Q. In what way? A. Because the ceiling was so wet it would all fall down on you when you would go there, and a big piece struck me on the shoulder as I went through there to the toilet room. 20

Q. Did the plaster become loosened from the laths so that it was dropping? A. It did.

Q. And did large chunks of it drop down, as you say, from time to time? A. Oh, yes; about three or four feet.

Q. Now, after that date, along in August or from time to time there did you say anything to Mrs. Pannaci and Mr. Pannaci about the condition of the storage room ceiling there? A. I did.

Q. What did you say to them? A. I told them they should have it fixed or taken down, because it was very dangerous. 30

Q. Dangerous in what way? Specify. A. He said he didn't have any money to fix it.

Q. No, that it was unsafe? A. I told him that it was unsafe and he knew it was unsafe.

Q. Well, how? He had been there, had he? A. He had.

Q. So he wouldn't promise to repair that, would he? A. He didn't. 40

Clara B. Downer—Direct

Q. At that time? A. Not at that time.

Q. So when your lease expired there on October 30th, what did you do there, did you stay in any more? A. I did not. I vacated because it was unsafe.

10 Q. That is, the storage room ceiling was unsafe for you to walk under it? A. Yes.

By the Court:

Q. Did I understand you waited until your lease expired? A. Vacated.

By Mr. Downer:

Q. That is to say, you didn't renew your tenancy of that premises there? A. No.

20 Q. You permanently vacated the premises? A. I did.

Q. And you haven't been there since? A. I haven't been there since.

Q. Have you had any store at Sea Bright since? A. I have not.

Q. Why? Because that was your particular location there? A. It was.

30 Q. And because it was the only suitable location for your business you could get, right in that Hotel Panacci? A. That was it.

Q. Have you made up here or have you brought here your books of account showing your receipts and disbursements? A. I have.

Q. For those four years? A. I have.

Q. 1924, 1925, 1926 and 1927? A. I have.

By the Court:

40 Q. I understand your complaint is based upon the condition of the storeroom, Mrs. Downer; is that right? A. On the storeroom and the roof.

Clara B. Downer—Direct

Q. The roof over the—

By Mr. Downer:

Q. Over the building? A. Over the building.

Q. The entire building? A. Not the entire building. It is a flat roof.

10

By the Court:

Q. I notice in this lease of 1926, there is a provision that the party of the first part agrees to have the ceiling fixed satisfactorily to the party of the second part. Was that done? A. It was done after. It was done in 1926, the front part of the store.

Q. And it was done satisfactorily to you? A. Yes.

20

Q. And that is the ceiling referred to?

Mr. Downer: No, no.

The Court: You are not testifying.

Q. What ceiling was referred to in this lease? A. It was the ceiling in both stores, I should think.

Q. No, what was understood? A. The front room ceiling, the metal ceiling.

Q. And that is the metal ceiling that was put in there? A. That is the front part of the store, yes.

30

Q. And that is the one you referred to as being put in? A. Yes.

The Court: All right. Go on. Proceed.

By Mr. Downer:

Q. Now, right there, the drip, the leakage, came through the roof, through the ceiling, right over

40

Clara B. Downer—Direct

the partition between your room and the storage room? A. That is where it came.

Q. Now, state what were your cash receipts, first your cash receipts for six months of 1924, 1925, 1926 and 1927; first take your cash receipts
10 and then your cash disbursements and then your profits for each year? A. The 1924 was—

Q. Cash receipts. A. Cash receipts was \$2,319.30.

Q. Cash disbursements how much? A. \$2,319.30.

Q. No. A. That is what you told me.

Q. I ask you again for your cash receipts for 1924. A. Cash I took in was \$2,319.30.

20 Q. \$3,000, isn't it? A. No, it is \$2,000.

Q. Now, what were your cash disbursements for 1924? A. That was \$1,440.04.

Q. Leaving as your apparent profit there for those six months how much? A. \$879.26.

Q. Now, in 1925, cash receipts how much? A. That was \$2,356.65.

Q. Cash disbursements? A. \$1,392.29.

Q. Leaving as your apparent profit for 1925
30 how much? A. \$984.36.

Q. Now, in 1926 cash receipts how much? A. That is \$2,338.05.

Q. Cash disbursements? A. \$1,115.96.

Q. And leaving as your apparent profit for that year how much? A. \$1,222.09.

Q. Now, in 1927, cash receipts. A. \$2,281.50.

Q. Cash disbursements? A. \$1,947.47.

Q. Leaving as your apparent profit for 1927
40 for the six months how much? A. \$334.03.

Elizabeth Drumpelman—Direct

Q. And the reason your apparent profits for 1927 fell down was because of the damage caused in the storeroom and for which you had to buy new stock; is that it? A. That was what it was.

Mr. Downer: That is all. 10

Mr. Leonard: No questions, Madam.

MRS. ELIZABETH DRUMPELMAN, sworn for plaintiff.

Direct-examination by Mr. Downer:

Q. Mrs. Drumpelman, where do you reside? 20
A. New Brunswick, New Jersey.

Q. And are you in business down in New Brunswick? A. Yes.

Q. What business is it there in New Brunswick? A. Gift shop.

Q. And how long have you been in that business down there, about? A. Five years.

Q. In 1926 did you rent a store in the building of the Hotel Pannaci at Sea Bright? A. Yes.

Q. And there were two stores there, wasn't there, adjoining, two small stores? A. Yes. 30

Q. And from whom did you rent your store? A. From Mr. Pannaci.

Q. That is Edward Pannaci? A. The lease was in the name of Veronica Pannaci.

Q. Mr. Edward Pannaci was the agent for his wife there, Mrs. Pannaci? A. Yes.

Q. Did you get any lease there? A. Yes.

Q. Have you got that with you? A. No. 40

Elizabeth Drumpelman—Direct

Q. Couldn't find it? A. I didn't think it was necessary.

Q. Well, when you rented your front store what did you rent there? What were your store premises there? You know what you were renting.
 10 A. I used the front room and little back room and the large back room as far as I wanted it for storage.

Q. Well, you don't mean to say you used all the large back room? A. No, I said as far as I needed it.

Q. Well, what you actually used there and how you used it, how much of that storage room there?
 A. Well, as much as I wanted.

20 Q. Had a partition been built there right back of your front room and the storage room, a small partition there? A. Well, you see, I really had two parts to my store, you might not remember that. Mine was not exactly like Mrs. Downer's. You see I had a partition and another little room and then came the big back room. Mrs. Downer only had one partition between her store and the big back room.

30 Q. That is what I say. I understand you. What rent did you pay there for that? A. \$300 or \$350, I am not certain.

Q. That is from May 1st to November 1st?
 A. Yes.

Q. Did you pay your rent in advance? A. Partly.

Q. Well, you moved in there in May, 1926, didn't you? A. Yes, sir.

40 Q. And you stayed there till about the 1st of November, 1926? A. I think I left there perhaps the 10th of September.

Elizabeth Drumpelman—Direct

- Q. You didn't go back there, did you? A. No.
- Q. Now, back in the storage room there was an approach to the toilet room, wasn't there? A. Yes.
- Q. In order to reach the toilet room you had to pass back of your room there to get over on this side, Mrs. Downer's side, you might say? A. Yes. 10
- Q. That was the passageway which you both used in order to get to and from the toilet room? A. Yes.
- Q. No other way to get there, was there? A. No.
- Q. Whose property was it further occupied by? A. Well, I wouldn't be certain whose it was. 20
- Q. Well, was it Mrs. Downer's? A. No.
- Q. Well, was it hotel furniture and like that? A. I would presume so, but I don't know.
- Q. Were there tables? A. Everything.
- Q. Odds and ends of furniture? A. Yes.
- Q. Which occupied practically the whole room over there, didn't it? A. Yes.
- Q. Was there any rain storm there in August, 1926? A. Yes.
- Q. Well, what was the result of the rain storm as to the roof over that partition there or the addition? A. There was a very great deal of water came in from many places. 30
- Q. Was that in August, 1926? A. So far as I remember. I never made any note.
- Q. Well, about that time? A. Yes.
- Q. Now, what happened? Did you have anything damaged there? A. Yes. 40

Elizabeth Drumpelman—Direct

Q. Where? A. In the smaller room of my two rooms. You see, as I say, I had two rooms that I used.

Q. Damage to your goods in the front room?

10 A. Not in the front room, in the smaller one of my two.

Q. Was there much damage there? A. No, not what you would call much. There was some.

Q. Well, your goods there were mostly gift goods and like that? A. Well, it didn't come the way—the water didn't come in enough to do damage to my stuff, see?

Q. It stained them? A. It stained some of the things, yes.

20 Q. Where did that water come from? A. It seemed to come from all over the roof.

Q. From the roof overhead of that storage room there? A. Yes, came down the side.

Q. Now, on that damage, what did you do, if anything, about that? A. Well, I tried some way to save what stock I thought was going to be ruined.

30 Q. Then after that did you go to any one connected with the hotel property about it? A. Yes, I think I spoke to all the members of the family about it.

Q. Well, who, particularly? A. Dr. Pannaci and Alfred Pannaci, Mr. Pannaci, Sr., and Mrs. Pannaci and Mrs. Walton.

Q. Did they come in and look? A. Yes.

Q. Who? A. I think all of them.

40 Q. What did they say? A. Well, it was just a general discussion, and every one thought it was very dreadful.

Elizabeth Drumpelman—Direct

Q. What did they say where the water came from? A. Well, when the storm was at its height and I didn't know what was going to happen I ran in and told Mr. Alfred Pannaci about it and the first thing he said was, "Oh, I suppose the leader overflows. It should have been cleaned out." 10

Q. And that had choked up? A. Yes, that it had been choked up and for that reason it was overflowing. And as I remember he ran for a pole or something to clean it out. The water was coming in in such great quantities.

Q. And then did the leak stop? A. Well, I couldn't say that it stopped then.

Q. Well, did any more water come in? A. 20
There was so much more water it wouldn't have stopped for that, it just kept coming to a certain extent for some time, perhaps.

Q. You didn't rent that store again for the next year? A. No.

Q. Why? A. Because I didn't like having my stock or having my shop in a place that was of that kind.

Q. In other words, you were afraid of what might happen to your stock because of the defective roof at that time; is that it? A. Yes, that is largely the reason. 30

Mr. Leonard: No cross-examination.

George H. Steger, Jr.—Direct

GEORGE H. STEGER, JR., sworn for plaintiff.

Direct-examination by Mr. Downer:

10 Q. What is your business, Mr. Steger? A. Salesman.

Q. Salesman for whom? A. Aitken, Son & Company.

Q. Of what place? A. New York City.

Q. On Madison Avenue, aren't they? A. Yes, 385 Madison.

Q. They are wholesale milliners, aren't they? A. Milliners.

20 Q. What class of millinery do they handle up there? A. High class.

Q. Almost exclusively? A. High class copies of French things.

Q. How long have you been with them? A. For sixteen years.

Q. And how long have they been in that business just generally? A. This will be their ninety-fourth year.

30 Q. Did you, at the request of Mrs. Downer, come down to Sea Bright in her store in the Hotel Pannaci building for the purpose of making an appraisal of certain goods which she claimed had been damaged by water? A. Well, there was a message in the office for me to come down. At that time I didn't know what the message was.

Q. Well, did you come down there for that purpose? A. Yes, sir.

40 Q. And you came down August 10, 1927, wasn't that the date? A. Yes, sir.

George H. Stgee, Jr.—Direct

Q. Now, when you got down there you went in the store and saw Mrs. Downer and then what did she ask you to do? A. Well, she explained all the circumstances and asked me if I would appraise the merchandise that was damaged.

Q. Did she show you the goods which were damaged? A. She had a list and she went over the list with me showing each article. 10

Q. Did she show you the goods which were damaged? A. Yes, sir.

Q. Now, what did you see there as damaged millinery? What was it largely? A. They were made up hats and accessories, you know, ribbons and flowers and feathers and things like that.

Q. Were they just in the front room or right back in the storage room near to the rear door there? A. They were in the back room. 20

Q. Were they piled up on a table there? A. Most of them was. There was some on the floor.

Q. What did you see on the floor, any hat boxes and stuff like that? A. Well, the room was in a general disorder. You couldn't tell whether there was—

Q. Could you see from that ceiling at that time, was there any dripping water from the ceiling— no, strike out all that. It was too late. Were these goods which she showed you there of any sale value? Could they have been sold by her? A. No, not in the condition they were. 30

Q. Because they were wetted and stained by water; is that it? A. Yes, sir.

Q. Now, just state what you did in making— did you make an itemized appraisal? A. Well, I went through her list. I just took her list. 40

George H. Stgee, Jr.—Direct

Q. I show you a paper and ask you whether that was the list that was used in making up your appraisal? A. It looks similar to it.

10 Q. Well, was it this copy? A. The original list was in longhand, not typewriting, I am pretty sure. No, this is the one.

Q. Now, you took that list and you went over it item by item, did you? A. Yes, sir.

Q. And you compared each item and picked up each piece as you went along, did you? A. She did the picking.

Q. And then you checked on the side there what you considered would be the retail value of that particular item of millinery? A. Yes.

20 Q. What did it amount to all together? A. Somewhere around \$1,100, I don't know.

Q. \$1,195.50? A. \$1,195, yes.

Q. Now, in your judgment, in your opinion as a wholesale millinery salesman, were the figures which were put down on that list the actual market value of those goods, what they would sell for in the market, between a willing buyer and a willing seller? A. Yes, they were the retail value, in my opinion.

30 Q. That is what she could have got for them; is that it? A. Yes.

Mr. Downer: That is all.

Mr. Leonard: No questions.

Howard M. Pritchard—Direct

HOWARD M. PRITCHARD, sworn for plaintiff.

Direct-examination by Mr. Downer:

Q. Mr. Pritchard, you are a builder, are you?

A. Yes, sir. 10

Q. Your place is in Rumson, Monmouth County? A. Yes.

Q. How long have you been in that business, about? A. Since January 21, 1927.

Q. On Sunday, July 24, 1927, did you receive a telephone call from the Hotel Pannaci to come over there? A. Yes, sir.

Q. And to see whom? A. I didn't know who I was to see. I know who I saw. 20

Q. Well, did you go over there? A. I went over.

Q. Who did you go over and see? A. I saw Mr. Pannaci and Mr. Walton.

Q. Mr. Panacci, you mean the Edward Pannaci, the husband of Mrs. Veronica Pannaci? A. Yes, sir.

Q. And Mr. Walton, Mr. Phillip Walton? A. Yes, sir.

Q. Mr. Walton is a son-in-law of Mr. Edward Pannaci, is he? A. Yes. 30

Q. Now, what did Edward Pannaci say to you as to what he wanted you to do or what he wanted to see you about? A. They wanted me to see the roof and give my opinion as to what could be done to fix it.

Q. Roof on what? A. The flat slag roof, the flat deck.

Howard M. Pritchard—Direct

Q. Roof on what part of the hotel building, over these stores here? A. Over the back part of the stores.

10 Q. In other words, there were two small adjoining stores fronting on Ocean Avenue right under that part of the brick wing of the Hotel Pannaci; is that right? A. Yes.

Q. Did you go in there to see that? A. The next day, not Sunday.

Q. Oh, not Sunday you didn't go in? A. No, sir.

20 Q. Well, when did you go in and see what was necessary to be done? A. I looked at the deck there outside Sunday and made arrangements to fix it.

Q. Well, how did you know what wanted to be done there? A. I looked from the outside, from the top.

Q. But you didn't go in till Monday? A. No, sir.

Q. Then Monday morning you went in there? A. Yes.

30 Q. And you saw Mrs. Downer there, didn't you, Monday morning? A. No, I went in Tuesday morning. I started the work on Tuesday.

Q. Well, it was Monday or Tuesday? A. Yes.

Q. Now, you went in there and what did you see there when you went in? What did you do? What did you look at? A. Saw boxes around on the wet—

Q. Boxes where? What kind of boxes? A. On shelving and boxes on cases which she had around in the store.

40 Q. Hat boxes? A. Hat boxes, yes.

Howard M. Pritchard—Direct

Q. Did you see any damaged millinery goods there wet? A. Everything I saw was wet.

Q. Everything you saw was wet? A. Yes, sir.

Q. That was piled up on the table back in there, in that storage room there? A. Yes.

Q. Could you see where the water had come in over the ceiling? A. I saw a hole in the plaster. 10

Q. Was it still wet when you went in there, the plastering, ceiling? A. I didn't examine that. I saw the wet on the floor.

Q. Now, as to the layout of that room, did you see the toilet at the other end? Did you go back through the storage room before you went up to the roof? A. Only in the back of it, where that plaster was off. That was as far as I can— 20

Q. Didn't you go in the back part of the store-room, away back there, to see the floor beams or anything? A. No, sir; I wasn't to look at the floor beams.

Q. You didn't make any examination there at all? A. No, that is only for the roof.

Q. Oh, you were only concerned as to the roof? A. Yes.

Q. You had been asked to make an examination of the roof to see what could be done with it; is that it? A. Yes. 30

Q. Well, you went up on the roof and then what? A. I did what?

Q. You went up on the roof of this addition where you saw this plaster off; what did you do? What did you see? A. I found where it had settled up in the northeast corner and the water had evidently gone in behind the flashing and flooded the store. 40

Howard M. Pritchard—Direct

Q. Now, what do you mean by settled? What was the condition of the roof? Did you examine the floor beams of the roof? A. I saw where evidently a weight of some kind had pressed it down and where the flashing was turned up, the counter
 10 flashing comes down over it, it had settled enough to let this come out and the water went in behind.

Q. Did you examine the floor beams of that roof there? A. No, sir; I didn't take any of the roof off, the flash roof.

Q. Was there a hole in the center of the roof, you say? A. No, sir.

Q. Not a hole? A. There was a hole in the
 20 ceiling, the plaster underneath.

By the Court:

Q. Which was that, the storeroom? A. The storeroom; yes, sir.

Q. The sole question related to the storeroom roof, did it? A. Yes, sir.

By Mr. Downer:

Q. Then did you go back and see Mr. Edward Pannaci about your estimate for repairing that
 30 roof? A. I saw him Sunday and made arrangements to do the work.

Q. Did he ask you whether that could be patched up? A. Yes, he asked what was the cheapest way to fix it.

By the Court:

Q. What was the roof over the shop then, the small store in front? A. The three story.

Q. That was the three story part of the hotel?
 40 A. Yes.

Howard M. Pritchard—Direct

Q. In other words, there were hotel rooms above the store proper? A. Yes, sir.

By Mr. Downer:

Q. It is all part of the hotel property? A. All part of the hotel property.

10

By the Court:

Q. And the storeroom was a sort of addition? A. One story high.

Q. One story addition? A. Yes.

Q. In the rear? A. Yes, sir.

By Mr. Downer:

Q. Did he ask you whether you couldn't patch that up? A. He asked me the cheapest way I could fix it.

20

Q. What did you tell him the cheapest way? A. I told him to put in new beams, form a new roof altogether.

Q. That it needed new floor beams and what else? A. I told him to put on a new roof altogether, leave the old one there as it was, and he agreed to it.

Q. It would need an entire new roof; is that it? You told him that that would need an entire new roof also over there, didn't you? A. Yes, sir.

30

Q. And you agreed upon a price and then you proceeded to fix it and lay a new roof; is that it?

A. We agreed on a price and I ordered material Monday and received it Monday and started the work Tuesday and finished it Wednesday.

Q. You didn't do the tinning on the roof? A. No, sir.

40

Howard M. Pritchard—Direct

Q. Who did that? A. I had nothing whatever to do with the tinning of the roof.

Q. Do you know whether O'Brien, of Red Bank, there, did that tinning? A. I think he did.

10 Q. Now, just one question more. The storage room ceiling, where you looked at that there, the passageway where you get down to that room over there, the plaster had loosened from the roof, hadn't it, over part of it? You could see it, couldn't you, where you stood under it? A. You could see the roof.

Q. Had loosened and some plaster had already fallen down? A. Yes.

20 Q. Now, Mrs. Downer called your attention to that, didn't she, saying that it was unsafe, she was afraid to walk under it? Don't you remember that? A. She showed me that wall and said it was unsafe.

Q. And you told her that you had no orders regarding the repair of that storage room ceiling at all, didn't you? A. Yes, I had no orders.

Q. And you further said that you would report that to Mr. Edward Pannaci, didn't you?

30 A. No, sir; not that I would report it.

Q. Oh, you didn't say that? A. No, sir.

Q. Did you report it to him when you went back? A. No, sir.

Q. Did he ask you anything about the ceiling at all? A. No, nothing whatever.

Mr. Downer: That is all.

Mr. Leonard: No questions.

40 Mr. Downer: The plaintiffs rest.

Discussion

Mr. Leonard: The defendant rests. I have a motion, if the Court please.

The Court: Do you think you have made a case here showing any liability on the part of the hotel?

Mr. Downer: Yes, on two grounds. I have made a case here on the landlord's reserve control rule and I have got all the cases here and I might as well go right into it now. 10

The Court: I haven't the time to allow you to argue this for two or three hours. If you want to argue the case I think I will put it over until July 15th, when I am coming back here, and then let you finish it. I will tell you what is running through my mind; that this is one of the ordinary cases where there is a relation of landlord and tenant. The recognized rule is that there is no obligation on the part of the landlord to repair unless there is an undertaking in the lease. The written lease in this case refers to the repair of the ceiling. Now, the tenant, Mrs. Downer, has said that that referred to the ceiling of the shop, it did not refer to the roof of the storeroom. She further testifies that while the lease did not cover the storeroom she was permitted to use it for storage purposes. 20 30

Mr. Downer: Part of it.

The Court: Part of it, in connection with others. Now, the gravaman of this complaint involves the condition of lack of repair of the roof to the storeroom. That is the question.

Mr. Downer: Of the building, on any part, over the top of it. 40

Discussion

The Court: In the written lease there is no undertaking on the part of the landlord to repair that store at all.

Mr. Downer: No.

The Court: You concede that, don't you?

10 Mr. Downer: Oh, no; of course he didn't do it.

The Court: Then upon what legal theory do you say you have a right to sustain your action there?

Mr. Downer: Well, that is what I wanted. First, I thought I ought to have gone into it. I see I should have. There are two causes of action charged against the defendant in this case and the complaint is specific on it. The first
20 cause of action is that here were two adjoining stores in a building, rented out to two or more tenants, with a common passageway back to the toilet and the storage room under control of the landlord. Now, the rule of law relating to the use of an apartment house or anything of that kind where the owner of the building rents out portions of the building to two or more tenants—that is one reference to the old rule where he
30 rents out a portion of the building to two or more tenants with a common hallway or stairway or passageway—the same with a store property, no difference whatever—this thing has all been gone over repeatedly, over and over again—that it is the duty, the law casts upon the landlord the duty to see to it that he exercises reasonable care.

The Court: To do what?

40 Mr. Downer: To keep that roof and the passageway and storeroom in a reasonably safe and fit condition.

Discussion

The Court: For what?

Mr. Downer: For the use of the tenants there.

The Court: You are applying a different rule entirely. In other words, you are relying upon the rule of negligence. Of course there is no question about it at all. As far as the ordinary frame single residence, and there was nothing in the lease providing for repairs or keeping alleyways reasonably safe, of course there would be no liability. But in the case of an apartment building, where certain portions of alleyways are reserved by the owners; then it is the duty to keep them in a reasonably safe condition. That is the rule. 10

Mr. Downer: But here is a condition here, we had no control of the roof whatever. 20

The Court: I am going to let you argue this later at your leisure. I haven't the time now. The case involves a point of law. I am going to allow you all the time you want, you are so thoroughly convinced that you are right about this thing.

Mr. Downer: I am absolutely convinced.

The Court: Now, you have got to persuade me. The case will go over to July 15th, and in the meantime you send me a memorandum, between now and July 15th. I am coming back here on the 15th of July. 30

The jury in this case will be requested to return on Monday, July 15th. You won't be on that panel, but nevertheless it is an unfinished case. I am going to hold that over so that Mr. Downer may argue with me more at leisure than I have here now. 40

Hearing of July 15, 1928

July 15th, 1929.

Before: LAWRENCE, J, and a jury.

Appearances:

10

For plaintiffs: Benjamin J. Downer, Esq.

For defendant: Lester C. Leonard, Esq.

DECISION OF COURT ON MOTION FOR DI-
RECTION OF VERDICT IN FAVOR OF
THE DEFENDANTMr. Leonard: If the Court please, we made a
20 motion for a direction—

The Court: Did you rest?

Mr. Downer: Both sides rested.

(After argument.)

30 The Court: Well, now; since you admit that the appurtenances referred to in this lease as part of the leased premises included the space for storage in the rear, and there is nothing in this lease, it being a written lease, requiring the
40 landlord to repair, I am inclined to the view, as a matter of law, that the landlord is under no obligation to repair the leased premises where the agreement is in writing and there is no condition that he shall repair. I follow counsel that this case is a case regarded as an exception, namely, where the landlord rents an apartment house and reserves the hallway to his general control, such as in a number of cases which have
40 been cited here by counsel in his brief, with which

Discussion

I am familiar, of course. These cases are constantly coming up. Nevertheless, these cases involve the rule which is the exception to the general rule that there is no obligation on the part of the landlord to repair, unless it is inserted in the lease. Now, that being so, I fail to see how the plaintiff here has made a case. In any event, if there is any question to my mind it is one of law, and not of fact for the jury, and in order that counsel may take his case to the Supreme Court, if he so desires, I think that I will make the announcement that I am of the opinion that as to this particular case, the general rule that the landlord is under no obligation to repair unless he inserts it in the lease, where a written lease exists, such as here, applies, and that being so, a motion for a direction of verdict in favor of the defendant would follow. 10 20

Mr. Downer: Plaintiffs except to the ruling. Now, another thing, before we pass along: In the argument before, you will remember that it contains no motion to direct a verdict.

The Court: He just made it a moment ago.

Mr. Downer: He didn't make it at that time. 30

Mr. Leonard: I made one.

Mr. Downer: He didn't at that time.

The Court: Oh, repeat it, make the motion.

Mr. Leonard: I do move for a directed verdict on the part of the defendant.

Mr. Downer: I object to the receipt of that motion at this late day, after the testimony is closed and on this argument.

The Court: I thought that was what we were arguing about. 40

Discussion

Mr. Downer: And further, I ask the Court to state whether, in its ruling, your Honor takes the ground that the reserved control rule does not apply to this case.

10 The Court: I ought to say that I have thought over this matter since the last session of the Court, and I did have some doubt about it, as to whether or not the reserved control rule did apply, but in view of the fact that there was a definite letting here of the premises, and that
20 counsel now very frankly states that there was no doubt about what was leased under this letting here, why, of course, then I am brought back to my idea, the fundamental idea that the land-
lord is under no obligation to repair the premises, unless there is a stipulation in the written lease to that effect, and therefore, the reserved control rule does not apply in this case. You may have an exception, Mr. Downer, and the jury will return a verdict in favor of the defendant and against the plaintiff on the question of law that is involved as I see it here.

Mr. Downer: Will your Honor grant me a rule
30 to show cause?

The Court: Yes, sir. I understand that one of these jurors here does not appear. Will you agree that the matter may be disposed of by eleven jurors?

Mr. Downer: Yes.

Mr. Leonard: Yes, sir.

The Court: It is stipulated that the case may be disposed of by eleven jurors.

PLAINTIFFS' EXHIBIT 1.

LEASE

THIS INDENTURE, made the 18th day of March A. D. 1926, between VERONICA PANNACI of Sea Bright, N. J. party of the First part, and THE MISSES BRIGGS of Atlantic Highlands N. J. parties of the Second part, Witnesseth, That for and in consideration of Two hundred and fifty (250) Dollars, to be well and truly paid, as is hereafter provided, that the said party of the First part has letten and by these presents does let unto the said parties of the Second part her small store, known as the "millinery shop." 10

Party of the first part agrees to have store thoroughly cleaned and ready for occupancy, and to have the ceiling fixed satisfactory to party of the second part. 20

Party of the second part agrees to pay all electric light and gas bills for the term of this lease.

Party of the second part is to have an option for the renewal of this lease for another year till January 1st, 1927.

with the appurtenances; for the period of six months beginning the 1st day of May A. D. 1926 And the said party of the Second part does covenant to pay to the said party of the First part, the above mentioned sum of Two hundred and fifty (250) Dollars, as follows: 30

\$100.00 on delivery of this Lease duly executed.

\$150.00 on the 1st day of May, A. D. 1926.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any 40

Plaintiff's Exhibit 1

of the Covenants herein contained, then it shall be lawful for the said party of the First part to reenter the said premises, and the same to have again, repossess and enjoy said shop

- 10 And the party of the Second part agrees to quit the premises at the expiration of this Lease and surrender the same and the furniture and fixtures contained therein and thereon in as good state and condition as reasonable wear thereof will permit, damages by the Elements excepted.

- It is further agreed by the parties of these presents, that should the premises be damaged or destroyed by fire so as to render the same untenable, then the party of the Second part shall be called upon to pay only for the time (pro rata) for which they has occupied the premises, and any rent that may have been paid in excess of such pro rata shall be returned to them and in case the date of expiration is not specified in this Lease and the term is specified as for the Season of 1926 then in event of fire, the season shall be construed to terminate on the first day of October, 1926. The party of the Second part further
 20 agrees not to sublet the premises or any part thereof without the written consent of the party of the First part.
 30

And the party of the First part does Covenant that upon the faithful performance of the aforesaid Covenants, and payment of said rent, the party of the Second part may peaceably and quietly have, hold and enjoy said premises for the time aforesaid.

- 40 Should there be a renewal of this lease between the parties within named, or a releasing of said

Plaintiff's Exhibit 1

premises between said parties, the same shall be considered as having been effected by and through the agency of Edward Pannaci, and the regular commission shall be payable to him whether rentals are collected by them or not.

VERONICA PANNACI. 10

Witness:

H. V. R. Walton.

Endorsed:

VERONICA PANNACI

to

THE MISSES BRIGGS 20

LEASE.

Dated March 18th, 1926

Terms Two payments

Rent \$250.00

Begins May 1st, 1926.

Terminates November 1st, 1926.

30

EDWARD PANNACI

REAL ESTATE

Sea Bright

Monmouth Beach

Rumson Road

Long Branch

Allenhurst

Elberon

Deal Beach

40

Red Bank

SEA BRIGHT, N. J.

New Jersey Court of Errors and Appeals

BERTHA A. BRIGGS and CLARA B. DOWNER, partners trading as The Misses Briggs, Plaintiffs,	} Action at Law On Appeal from Mon- mouth Circuit Court.
vs.. VERONICA PANNAKI, Defendant.	

Brief of Plaintiffs-Appellants.

PRELIMINARY STATEMENT.

This is an appeal from the action of the Monmouth County Circuit Court, Judge Rulif V. Lawrence, in directing a jury to return a verdict for defendant, no cause of action. Plaintiffs' claim was for the value of their goods damaged by water because of defendant's negligence in failing to keep in proper repair the roof over a storage room in her retained control, use and possession and also for the value of plaintiffs' business established in their store in defendant's building and destroyed by defendant, in knowingly and negligently maintaining unsafe premises. Plaintiffs' proofs were not contradicted, defendant offering no proofs and making no cross-examination.

STATEMENT OF FACTS.

The store premises are described in the complaint (p. 6) and answer (p. 17); and in the testimony of Clara B. Downer (pp. 32-38), of Elizabeth Drumpleman (p. 55), who occupied the adjoining store in 1926, and of Howard Pritchard (pp. 63-67), defendant's builder, who laid a new roof over the old leaking roof which flooded the premises on July 23, 1927.

Defendant was the owner of the Hotel Pannaci, fronting Ocean Avenue, Sea Bright. The brick wing of the hotel was three stories high, with overhead hotel rooms. A part of the brick wing was divided into two small adjoining stores, each about 11 feet wide and 33 feet long. Each store had a rear entrance into a long, wide room known as defendant's storage room, which was approximately 20 feet wide and 39 or more feet long. It was one story high, with a flat slag roof, and formed a one-story extension of the hotel building at that point, the roof of the main hotel building being two stories higher than the roof of the extension. The storage room extended back to and opened on the hotel yard on the westerly side of the hotel building. In the northwest corner of the storage room was a toilet room; in the southwest corner were windows looking out on the hotel yard, and a door to the yard, which door was kept locked and the only key to it retained by defendant. In the southwest corner of the storage room roof was a leader through which water escaped to the ground. Plaintiffs rented and occupied the northerly one of these two stores. And adjoining plaintiffs' store on the north was a drugstore, conducted by one of de-

fendant's sons, the roof over which was the roof over the hotel rooms.

The entire storage room was in the control, use and possession of defendant. All of it, with the exceptions stated below, was used by her to store her surplus hotel furniture and miscellaneous material, and also to store supplies of the drugstore. There was no water or toilet in either of the two front shops, or rooms. They were too small to work in, or to store goods not on actual exhibition and sale in the front rooms. So the way defendant had arranged her storage room and rented the two front rooms in connection with it was this: Each tenant had the agreed right, under their respective lettings, to use a small designated space in the storage room immediately next to their respective rear doors, which space was designated by defendant, for the purpose of storing of such of their goods as were not on exhibition and sale in their front rooms. And each tenant had the further right to use in common the toilet room in the storage room and a common passageway to it. The only common passageway to the toilet room was on plaintiffs' side of the storage room. Plaintiffs rented and occupied their front room, with partial use of the storage room and common use of the toilet room and passageway, as above stated, from May 1 to November 1, six months, in each of the years 1924 to 1927, inclusive. They always paid their rent in advance, about one-third in February or March, when the leases were signed, and the balance prior to May 1st, although not actually opening their shop until June 1st. This exaction of the rent long in advance of actual occupancy is highly significant in this case, as illustrating how a dere-

lict landlord can leave her roof in a worn-out leaking condition to the injury of her tenants' goods and business, with the nonchalant notion that they will not move out, and if they do stay there, they will be assuming the risk.

In 1927 the adjoining southerly store was vacant. In 1926 Miss Drumpelman occupied it as a gift shop. In 1924 and 1925 it had been occupied as a barber shop. In 1925 defendant had built for the barber's use in the storage room, and immediately next to his rear door, a little enclosed partition which, in 1926, Miss Drumpelman used for storing her goods (pp. 36, 37). Plaintiffs' space in the storage room was not enclosed, but when they first moved in in 1924 defendant had designated their space by taking a counter from the front room and putting it in the storage room, next to their rear door, in the corner, for plaintiffs to put their goods upon it (p. 34). Plaintiffs' right to this partial use of the storage room, and for which they paid rent, was never questioned by defendant during the four years of their tenancy and use, until defendant's answer was filed. Then, for the first time, it was alleged that they had no right to use any part of the storage room because the written leases did not say so, and that their use was by "permission" only. This allegation was proved to be false.

As the complaint and proofs show, defendant is charged with negligence on three distinct grounds, on any one of which if established, she would be liable: (1) under the landlord's reserved control rule; (2) under her express agreement to repair as the condition of plaintiffs executing the 1926-1927 lease, and, again, as the condition of plaintiffs exercising their option for

a further term in 1927; and (3) that after the flooding of the store and storage room on July 23, 1927, defendant had knowingly and negligently left her storage room ceiling in such a dangerous and unsafe condition that plaintiffs were thereby obliged to, and did, permanently vacate the premises at the expiration of their 1927 term as unsafe, and whereby their business there built up and established was destroyed by defendant—the maintenance of a continuous nuisance. Although the proof as to the value of the business so destroyed was uncontradicted, and the cause of action therefor established, it was entirely ignored by the Trial Judge.

The affirmative defenses of the answer are obviously self-contradictory and ineffective (pp. 16-20). But, as the Trial Judge seems to have adopted defendant's theory of defense, they are here summarized, so as to point out at the start that, aside from the formal denial of negligence, they present no legal defense. These defenses are: (1) That as the written lease did not require defendant to repair, she was not bound to repair, and parol evidence was inadmissible to show that she had in fact expressly agreed to repair as the conditions of plaintiffs remaining as her tenants; (2) that the lease did not include the use of any part of the storage room; (3) admits the common use of the toilet room and common passageway in the storage room; (4) that because the adjoining store was vacant in 1927 plaintiffs had "exclusive" control of the storage room "except" for defendant's furniture stored therein; (5) that plaintiffs had taken possession and control of the storage room "at their own risk," and occupied it "by permission"; (6) that it was plain-

tiffs' duty to keep the roof and leader in repair, and, failing to do so, the leader choked and water accumulated in a small lake on the flat roof and overflowed and damaged defendant's building and furniture; (7) that the "rain complained of" on July 23, 1927, was a "torrential downfall and continued nearly all day," sudden, overwhelming, water descending in a flood, an "Act of God," causing similar floodings of buildings in other parts of Monmouth County; and (8) winds up with an absurd counter-claim for \$10,000—which was formally withdrawn at the trial, although the stenographer's minutes fail to show the fact.

All of the foregoing allegations may be briefly answered as follows: (1) As to the roof: different parts of the building having been rented to different tenants, the reserved control rule applies; the landlord, not the tenant, has the duty of maintaining the roof, leaders and gutters in proper repair. And this is so even in the case of a one-tenant building, at common law, because the tenant is *not* bound, in the absence of express covenant, to make substantial and lasting repairs such as putting on a new roof. (2) As to the description of the premises in the written leases: the description in the leases was not set forth in the answer, nor a copy of the lease annexed, whereby it could be seen whether or not the description was in fact complete. The only lease plaintiffs were permitted to prove, the 1926-1927 lease, showed that the description was incomplete, indefinite and ambiguous, and therefore parol evidence *was* admissible to show the intention and conduct of the parties. (3) The 3rd, 4th, 5th and 6th defenses in effect amount to an unwitting admission that the reserved control applied to the

premises. (4) The 7th defense is that the flooding of the premises was "an Act of God, a torrential downfall which descended in a flood and lasted nearly all day, choking leaders and flooding buildings all over Monmouth County." This certainly presents a meteorological phenomenon which, if true, would have promptly interested the United States Weather Bureau and the press of the country. Moreover, a roof or leader which does not withstand a heavy rainstorm is manifestly not a proper roof or leader. And it is old law that where a so-called "Act of God"—some unusual disturbance of the elements—concur with defendant's negligence in causing an injury to another, defendant is liable. (*Knauffman v. Middlesex Water Co.*, 45 Atl. 692 (not officially reported); *Clark v. Pub. Service Co.*, 86 N. J. L. 144; *Boro of Deal v. Seiling*, 102 Ib. 585).

Briefly stated, the proof is that in August, 1926, the roof of the storage room leaked, and water came through the ceiling and damaged goods of plaintiffs and of the adjoining tenant, Miss Drumpelman. Defendant's excuse then was that the leader had become choked. But this leader, according to the answer, was in the southwest corner of the roof, some 40 feet distant from the front rooms of the two stores. On Saturday morning, July 23, 1927, there was a rainstorm, lasting fifteen or twenty minutes (p. 43), not "all day," and the roof of the storage room leaked again, and this time so badly that the entire premises, including the storage room, were flooded. According to the answer, it was this same leader that had become choked on July 23, 1927, and damaged the building (p. 19, l. 10). But the stubborn fact persists that it was the

wornout, leaking roof that proximately caused the damage, and the choked leader merely accumulated more water. For Pritchard, defendant's builder, who examined the roof the following day, Sunday, July 24, 1927, and laid a new roof over the old roof Tuesday and Wednesday, said that the roof had settled in the northeast corner and that the water had evidently gone in behind the flashing and flooded the store (p. 65).

POINT ONE.

It was error for the Trial Judge to refuse to permit the witness Clara B. Downer to answer the questions stated in the first ground of appeal.

“Now, calling your attention to the description of the store premises which you occupied in 1926, I ask you whether that was the same description which you had made in 1924 and 1925?”

Q. I will ask you this: you occupied these premises, the northerly store in the Hotel Pannaci building for four years, did you?

“Q. Did you pay rent for these premises for the summer season, May 1st to November 1st, 1924 and 1925?”

Q. I show you a paper and ask you whether that is a letter received by you signed ‘Edward Pannaci’ on February 28th, 1924?” (pp. 2, 30.)

These questions were asked to show: (a) that the description of the store premises in the lost lease of 1924-1925 was the same incomplete and ambiguous description as that contained in the proved lease of 1926-1927; (b) that the agreed leased premises, from 1924 to 1927 inclusive, in-

cluded not only plaintiffs' front room but also the use of part of a rear storage room controlled and occupied by defendant, together with the use in common with the tenant of the adjoining store of a toilet room and a passageway to it in the storage room; and (c) that the leaking roof over defendant's storage room and over part of plaintiffs' store premises, and which damaged plaintiffs' goods on July 23, 1927, was more or less out of repair in 1924 and 1925 (p. 31).

Mrs. Downer testified that it was in March, 1924, that she first rented the store; that she signed a written lease sent to her by Edward Pannaci, defendant's husband; that she could not find it, because she had sent it to him in 1925 to renew it and he had not returned it; and that it did not actually describe what was included in the store premises (pp. 26-27). The 1924-1925 lease was called for, but was not produced, defendant's counsel denying that he had received notice to produce it (p. 27). The 1926-1927 lease was received in evidence (Ex. P-1, p. 29, printed at p. 75). The description of the premises in the March 18, 1926, lease, "with an option of renewal for 1927," merely states that defendant lets to plaintiffs "her small store, known as the 'Millinery shop'with the appurtenances." The lease was a printed form of Edward Pannaci, defendant's husband, who had charge of the renting of the stores as his wife's agent, with his real estate office in the hotel building. The following words were in typewriting: "her small store, known as the 'millinery shop'. Party of the first part agrees to have store thoroughly cleaned and ready for occupancy, and to have the ceiling fixed satisfactory to party of the second

part. Party of the second part agrees to pay all electric light and gas bills for the term of this lease. Party of the second part is to have an option for the renewal of this lease until January 1st, 1927." Then followed the printed words "with the appurtenances."

The description of the leased premises is plainly incomplete, indefinite and ambiguous. It does not describe the premises at all. It is a mere reference to an unlocated millinery shop, the location and confines of which could only be known by plaintiffs and defendant. The well-settled rule of evidence is that where the description of leased premises is incomplete, indefinite or ambiguous, parol evidence is admissible to show the intention and conduct of the parties as to the premises actually leased. *Chamberlain v. Letson*, 5 N. J. L. 520. Where leased premises are not defined with certainty, occupation by the tenant acquiesced in by the landlord fixes the location. *Harkavay v. Dreamland Park*, 98 N. J. Eq. 59; *Bellisfield v. Holcombe*, 6 N. J. Adv. R. 1 (not officially reported). Parol evidence has also been frequently held admissible to explain ambiguities in descriptions in deeds (*Dun v. English*, 23 N. J. L. 126), and in contracts for sale of land (*Bateman v. Riley*, 72 N. J. Eq. 316; *Wollenburger v. Rynar*, 96 *Ib.* 38; *Franklin v. Wett*, 98 *Ib.* 602; *Vassar Co. v. Wuensch*, 100 *Ib.* 148). It is well settled that where the language used in a contract is equivocal, ambiguous, or insufficient, the subsequent acts or declarations of the parties, showing the practical construction put upon the words, may be resorted to for the purpose of ascertaining their intention (10 *R. C. L.* 1077). In construing a written lease, which is doubtful in

its meaning, preliminary negotiations between the parties preceding the execution of the lease, may be considered for the purpose of ascertaining the intention of the parties, though not to vary or contradict the plain terms of the lease. (16 *R. C. L.* 698).

The word "appurtenances" in the lease, likewise clearly called for parol evidence as to its meaning. None but the parties could say what the appurtenances were. The term "appurtenant," both in common parlance and in legal acceptance, is used to signify a thing appurtenant to another as principal, and which passes as an incident to the principal thing (6 *R. C. L. Supp.* 1068). As for example, in *Agalias v. Hirschfield*, 99 *N. J. Eq.* 622, where, after parol evidence as to the meaning of "appurtenance" in a lease, the court held that a doorway leading into an alleyway pre-supposed the right of using the alleyway to get in and out of the door. So in *Hussey v. Long Dock R. R. and Erie R. R.*, 99 *N. J. L.* 380, this court held, on parol evidence as to the meaning of "appurtenances" in a railroad lease to tenants in a tenement house, that this word did not refer to the appurtenances of the adjacent railroad, as defendants contended, but did refer to those of the tenement house—an outside fire escape which, becoming loosened from a crumbling wall, fell upon plaintiff's son standing under it.

The 1926-1927 lease states that the defendant "agrees to have the ceiling fixed satisfactory" to plaintiffs. Which ceiling? Ceiling of the front room, or of the storage room? The second count of the complaint (p. 12, l. 30) alleges in substance that in the fall of 1925 the then plaster ceiling

(in the front room) had been crumbling and becoming progressively unsafe, and that plaster dust had sifted down upon plaintiffs' millinery there on exhibition; that plaintiffs' execution of the 1926-1927 lease was conditioned on defendant's express agreement to repair the roof and ceiling of the store (the front room) and the roof and ceiling of the storage room. A new metal ceiling was put up in the front room, prior to plaintiffs opening their shop in June, 1926 (p. 37). But that was all defendant ever did in the way of repairs.

The exclusion of proof as to what took place prior to 1926 was material error. The negligence charge against defendant was that she failed to exercise reasonable care to maintain her roof and ceilings in proper repair. Therefore, plaintiffs were entitled to show to the jury, in the chronological order of events, that the leak in the roof on July 23, 1927, was not merely a solitary, unforeseen leak, but a continuous leaking condition, known to defendant, which began in 1925, grew worse in 1926, and culminated in the virtual breaking down of the roof on July 23, 1927. It was only because of plaintiffs' persistence that they were able to prove the leaking condition of the roof in 1926. The colloquy between the court and counsel (p. 31) shows that the court thought that the injury charged occurred in 1926; consequently, when counsel said that he wished to show the continuous condition of the roof during all those years, the court said "You can't do it that way" (p. 31). So then plaintiffs were obliged to start their case with 1926, in the middle as it were. And it was not until later on (p. 40) that the court discovered, notwithstanding the

specific allegation of the complaint, that the injury complained of occurred not in 1926, but on July 23, 1927. The net result to plaintiffs was a barricade in front of their proof as to the terms of the original letting in 1924 and also as to defendant's continuous negligence, beginning in 1925. Said exclusion also shielded defendant against proof that the lease-provision of 1926 "to have the ceiling fixed satisfactory" to plaintiffs, did not in fact express the actual agreement made in the fall of 1925, namely, that not only was the front room ceiling to be repaired but also the storage room roof and ceiling.

As this Court said in 1896 in *Consolidated Traction Co. v. Scott*, 58 N. J. L. 170:

"Negligence is not a fact which is subject to direct proof, but an inference from facts to be drawn by the jury; and in order to withdraw such a case from the jury, the facts should be not only undisputed, but the inferences, in respect to defendant's failure of duty, should be indisputable."
(20 R. C. L. 171, to the same effect.)

In this case, rarely enough, the proof was direct, and uncontradicted, that the roof was worn out and defendant knew it.

POINT TWO.

It was error for the Trial Judge to rule that the reserved control rule applied to apartment houses only, and did not apply to the premises in question.

See second ground of appeal, a, b, c, d (p. 3); ruling (p. 74). As this disposed of the first cause of action, it will be first considered.

In *Siggins v. McGill*, 72 N. J. L. 263, this Court stated the rule as follows:

“Where a landlord lets out portions of his building to several tenants, retaining in his own possession or control the passageways or stairways, and the like, for the common use of his tenants and those having lawful occasion to visit them, he is under the general responsibility of an owner of land who holds out an invitation to enter upon and use his property, and is bound to see that reasonable care is exercised to have such hallways, stairways, passageways, and the like, reasonably fit and safe for such use.”

Examples of application of the rule: Hole in oilcloth on stairs (*Gilloon v. Reilly*, 50 N. J. L. 26). Unguarded excavation in pathway to water closet in yard (*Phillips v. Library Co.* 55 *Ib.* 307). Defective water closet in yard (*Ryan v. D. L. & W.*, 72 *Ib.* 266). Outside cellar door (*Kelly v. Lembeck*, 86 *Ib.* 471). Hole in stair carpet (*Johnson v. Lembeck*, 75 *Ib.* 475). Defective dumb waiter (*Timlan v. Dilworth*, 76 *Ib.* 568; *Battischinger v. Robinson*, 83 *Ib.* 317). Leaking roof, ceiling fell (*Perry v. Levy*, 87 *Ib.* 670). Heavy box in yard (*Burnett v. Realty*, 90 *Ib.* 660). Falling fire escape in yard (*Hussey v. Long Dock*, 99

Ib. 380). Leaking roof, patched (*O'Brien v. Staiger*, 101 *Ib.* 526). Defective step binder (*Hahner v. Bender*, 101 *Ib.* 102). Cellar stairway (*Farley v. Mikusky*, 101 *Ib.* 127). Rule explained (*Barthelmess v. Bergamo*, 103 *Ib.* 397).

In the leaking roof case of *Perry v. Levy*, *supra*, this Court said:

“The defective roof of a building containing several apartments is governed by the same rule of law as applies to passageways, stairways and the like. The tenant has no control of the roof. The landlord is the only one who had such control, and it is his duty to keep the roof in such repair that its condition will not be a source of injury to the tenants underneath.”

To the same effect in the leaking roof case of *O'Brien v. Staiger*, *supra*.

Now, it is true that the foregoing New Jersey decisions were apartment or tenement house cases, except *Phillips v. Library*, and *Kelly v. Lembeck*, *supra*. But that is because it so happens that this Court has never before been asked whether the rule also applied to a building containing stores. To any one familiar with the subject such a question would be hardly conceivable. For the rule is universal in the several states, and has been so frequently stated and widely applied by appellate courts, and quoted in the digests, that there can be no doubt whatsoever that the rule does apply to store buildings. The reason of it is that modern housing is so entirely different from the bygone days of rural housing when land was cheap and buildings occupied by a single tenant, that the courts will not permit a modern landlord to split up his building

into small parts, confine his tenants to such parts, and cast upon them the burden of keeping in repair the common roof, halls, stairways, passageways, drainage system, heating system, store rooms, and the like, over all of which he alone has the control.

The following, gathered from the decisions in New Jersey and elsewhere, is submitted as a comprehensive statement of the rule, and its incidents:

(a) Where a landlord rents out different parts of his building to different tenants, retaining in his possession or control certain parts of the building for the common use of the tenants, in whole or in part, it is his duty to exercise reasonable care to see to it that such parts so retained are at all times maintained in a reasonably fit and safe condition for the use of the tenants.

(b) That as to the roof, gutters, leaders, or drainage system, over or affecting such common parts, the tenant has no right of access to, or possession of, or control over them, because the landlord only has such right, possession and control.

(c) That the landlord cannot escape his liability for failing to make needed repairs by pleading lack of notice or knowledge of needed repairs, because he is bound to make reasonable inspection from time to time in order to ascertain whether or not repairs are necessary.

(d) That the landlord cannot escape his liability for failing to make needed repairs by delegating them to an agent or independent contractor, because their negligence, if any, will be imputed to him.

16 *R. C. L.* 1037: It is generally held that where the landlord retains possession of a portion of the leased premises for use in common by different tenants, a duty is by law imposed on him to use ordinary care to keep in safe condition this particular part of the leased premises, and if he is negligent in this regard, and personal injury results to the tenants by reason thereof, he is liable therefor. * * * This rule has been applied to porches, landings of outside stairways, roofs, cisterns, cesspools, water closets, and elevators, used in common by the tenants (*Ib.* 1038-1043). In the case of a lease of part of a building, such as the ground floor store, or an upper floor, this would not carry any interest in the roof. The lessor retains full control of the roof, and may use it for such purposes as he chooses so long as he does not endanger or interfere with the tenant's use of the premises leased to him. As, where the tenant had the lower floor and cellar, the landlord reserving a scuttleway; and where the tenant had the store and basement, with four other tenants in the building, and between his ceiling and the roof there was an opening for an air shaft and scuttle (*Ib.* 722, citing *Shipley v. Fifty Associates*, 101 Mass, 251, reaffirmed on second appeal 106 Mass. 194; *MacNair v. Ames*, 29 R. I. 45, 68 Atl. 950).

Corpus Christi (Landlord and Tenant) 212: Where the landlord leases separate portions of the same property to different tenants, and reserves under his control certain parts to be used in common by all the tenants, he is under an implied obligation to keep such parts over which he so reserves control in repair. So it has been held that where a landlord reserves control of

a portion of a building, the other parts of which are leased to several tenants, he will be liable for injuries arising from the condition of such reserved portion, *even though such other portion is not reserved for the common use of the tenants.* And where a landlord who has let a building to several tenants, but has not demised certain portions of a building to which the tenants have no right of access and concerning which they have no right to make repairs, the landlord will be liable to a tenant for the defective condition of such portions due to his neglect to make repairs. Where a landlord has furnished agencies, appliances or instrumentalities for the common use of the several tenants of a building, he is in general liable for any injuries arising from such neglect to keep the same in proper repair. * * *

The landlord will not be relieved by the employment of an independent contractor (*Ib.* sec. 889). The fact that the premises are only occupied partly, does not diminish the landlord's liability, and he will be held liable where a building is *arranged and has been used by two tenants if one vacates* (*Ib.* sec. 888, citing *Flannagan v. Walsh*, 220 Mass. 186, 107 N. E. 979; *Dillehay v. Melor*, 188 Iowa, 37, 175 N. W. 888). Inasmuch as one of several tenants of a building has not the right of access to or the right to repair the roof, the landlord of such a building is *deemed in control* of that portion of the building, and will be held liable to the tenant for injuries arising from his neglect to repair. * * * Thus, a landlord will be liable for injuries resulting from a falling ceiling, where the accident happened by reason of the landlord's failure to keep the room in repair (*Ib.* sec. 898). See also cases collected in Am.

Digest, Cent. Ed., vol. 32, p. 718; *Ib.* 2nd Decennial Ed., vol. 14, p. 162; *Ib.* 3rd Decennial, vol. 17, p. 1400.

STORE BUILDINGS, AND ROOFS. SOME EXAMPLES OF WHERE RESERVED CONTROL WAS APPLIED.

NEW JERSEY. Two story building. Basement let for school and public exhibitions. First floor used as a public library. Second floor used by lodges. Excavation in pathway to water closet in yard left unguarded. A lodge member fell into it (*Phillips v. Library Co.*, 55 N. J. L. 307). Saloon on ground floor, and rooms overhead. Defective outside cellar doors, flush with sidewalk, and used for taking ashes from furnace in basement. Landlord, not saloon tenant, held liable to pedestrian slipping on cellar door (*Kelly v. Lembeck*, 86 N. J. L. 47, aff'd. 87 *Ib.* 696).

CONNECTICUT. Store on ground floor of three story rear building; second floor occupied by different tenants; outside stairway defective (*Koskoff v. Goldman*, 85 Atl. 588). Store goods damaged by water from leaking roof over show window (*Rumberg v. Cutler*, 86 Conn. 8, 84 Atl. 107).

GEORGIA. Stores on ground floor which extended back beyond the upper floors. Gutters choked, store goods damaged by water. (*Center v. Davis*, 39 Ga. 210; *Marshall v. Cohen*, 44 Ga. 48) cited in 32 Am. Dig. 727.

MAINE. Store on ground floor rented for storage, and part of upper floor. Goods damaged by

leaking roof (*Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 54; *Meyer v. Pepperall*, 122 Me. 265, 119 Atl. 625).

MASSACHUSETTS. Store and basement, with other tenants in building; leaking roof (*Shipley v. Fifty Associates*, 101 Mass. 251) cited in 16 R. C. L. 722. Where the roof and drain pipe in control of the landlord are in good repair when the building is leased, it is his duty to maintain them during the tenancy (*Helden v. Naylor*, 223 Mass. 290, 111 N. E. 848).

NEW YORK. The general rule is that in the absence of fraud, the owner may let a building, or a portion of it, if it is out of repair, and if the tenant will take it in that condition. But there is an exception to this rule, to the effect that where the subject of the lease is part of the building, then a duty is imposed upon the lessor to use reasonable care in keeping in a suitable condition of repair the hallways, roof and other parts of the building intended for the general use of all the tenants and which are subject to the landlord's control. A clause in a lease absolving the landlord from liability to lessees for damage caused by leakage of the roof unless the landlord neglects to repair within a reasonable time, does not apply where the landlord by his active negligence or affirmative wrong has created the defect (New York Appeals in *Hirsch v. Radt*, 228 N. Y. S. 100, 126 N. E. 653; *Botwin v. Rothkoff*, 217 N. Y. Supp. 192).

Bursted water pipe in landlord's loft over tenant's store. Goods damaged (*Adler v. Nelson*, 210 N. Y. S. 437, 17 Am. Dig. 3rd Ed. 1437).

Store extension; roof and gutters out of repair; goods damaged; landlord liable because he had control of roof and gutters (*Kuperschmid v. Taussig*, 208 N. Y. S. 464; aff'd. 214 N. Y. S. 868; 17 Am. Dig. 3rd Ed. 1049).

Water pouring through hole in roof from bursted pipe in water tank on roof; the proximate cause is the defective roof (*Kelly v. Stark*, 161 N. Y. S. 350; 17 Am. Dig. 3rd Ed. 1410; *Epstein v. Manning*, 163 N. Y. S. 1087).

Basement store, and rooms overhead; defective house drain pipe situated under the basement and drained other portions of the premises. Although lease provided that store tenant should keep the premises in repair, held that landlord was liable for not repairing drain pipe (*Nash v. Rocktaschel*, 200 N. Y. Supp. 88).

Defective condition of leader pipe causing water to accumulate in cellar; not repaired for two weeks; and damaged store goods; this proof makes a *prima facie* case of negligence against landlord (*Smith v. Chemical Co.*, 198 N. Y. Supp. 224; *Lorenson v. Klebansky*, 193 N. Y. S. 224).

Tenant has no right to go on roof to repair it (*Phillips v. Ehrman*, 28 N. Y. Supp. 519; 32 Am. Dig. 719; *Woodward v. Jones*, 36 N. Y. Supp. 775, 32 Am. Dig. 719).

Notice of defective roof is unnecessary (*Pratt v. Tiler*, 186 N. Y. S. 417, 98 N. E. 328).

Landlord must make inspection—roof—goods damaged (*Cohen v. Coltheal*, 215 N. Y. S. 659, 109 N. E. 1070; 8 Am. Dig. 657; *Tailler v. Davis*, 11 N. Y. Superior Ct. 187; 32 Am. Dig. 187).

Show window of store extended into entrance of the building, in which entrance there was a stairway leading down to subway station; plaintiff looking into window fell down subway stairs (*Murphy v. Broadway Imp. As'tn.* 178 N. Y. S. 860; 17 Am. Dig. 3rd Ed. 1415).

Store on ground floor, upper floor occupied by another tenant; store goods damaged by leaking roof; store tenant had notified landlord he would move unless roof was repaired; landlord promised that if tenant would remain he would put roof in proper repair; tenant remained but only slight repair was made; plaintiff's goods were again seriously damaged, and he finally abandoned premises. Held, landlord was liable for the damage to plaintiff's goods, both on the ground of his obligation to maintain the roof in a reasonably safe condition, and on his promise to put the roof in proper repair (*Rauth v. Davenport*, 14 N. Y. Supp. 69; 32 Am. Dig. 718).

SOUTH DAKOTA. Store, and storage room in one-story extension, clogged drain pipe in center of roof. This is close to an "all fours" case (*Jas. Moodie Drygoods Co. v. Gilruth*, 35 So. D. 567, 153 N. W. 383).

Defendant owned the building, 165 feet long by 51 feet wide. It was two stories high in front to a depth of about 130 feet, the remaining 135 feet being one story. The first floor was a storage room, 165 by 50. The roof over the one story part, and directly over the back portion of the store room, was 135 by 50. This roof was saucer shaped, sloping down and inward from the outer edges to the center in the middle of the roof. In this center of the roof was a 6-inch diameter drain pipe leading from the center of the roof

through the store room to the sewer under the building; the water flowing upon the roof, and running to the center thereof, and thence into the drain pipe and sewer. Moodie occupied a portion of the building with a stock of merchandise for retail sale, which portion was described in the lease as "the south half of the first floor and the undivided half of the second floor." The middle of the first floor was divided by pillars, or posts, Moodie occupying the south half. The drain pipe was entirely on the north half of the store room, no part of it being over or through any part of the building occupied or leased by Moodie. He claimed that during a heavy rain, the drain pipe, because of defendant's negligence, became clogged and accumulated so much water on the roof that the roof, its supports and the first floor gave way, precipitating the water through and into the store room, thereby damaging his goods. Verdict for plaintiff. On appeal defendant contended that it was plaintiff's duty to go on the roof and prevent the clogging of the drain pipe; and that even if the drain pipe, roof, or leased premises were defective, plaintiff could not recover, because as to all of such defects a tenant takes property under a lease *caveat emptor*, unless the defects or dangers are of such a nature that they are known to the landlord and unknown to the tenant. Held, not so. That the other portions of the building not covered by plaintiff's lease was as foreign to and as disconnected with the lease as if they were on entirely separate and distinct premises; that plaintiff had no control of, or any business upon, the portion of the premises not leased to him; that as to the portion of the building and premises not leased to him, it was the same situation as any stranger or third party.

POINT TWO.

It was error for the Trial Judge to rule that as the written lease did not require the defendant to repair the roof of her building, or her ceiling, over the store premises, the common law rule applicable to a single tenant building applied to plaintiff's store premises, and that the landlord was not obliged to repair.

Second ground of appeal, e (p. 4), ruling (pp. 69-74). The common law rule applied to one-tenant buildings only. And it never was the common law rule that such a tenant was obliged to make substantial and lasting repairs, such as putting on a new roof, unless he expressly agrees in his lease to do so. The lease in this case, contains no agreement by plaintiffs to make any repairs. Their only agreement is to "surrender the premises * * * in as good state and condition as reasonable wear and tear thereof will permit, damages by the elements excepted" (p. 76).

16 *R. C. L.* 1085: Absence of Argeement to repair. Independent of any contract or express agreement, at common law a tenant must treat the premises in such a manner that no substantial injury shall be done them through any negligent or wilful misconduct on his part. The implied obligation is part of the contract itself; and it results from the relation of landlord and tenant between the parties which the contract creates. The tenant must make fair and tenantable repairs; such as putting fences and buildings in order, by putting up or relaying the one when necessary, and replacing doors or windows broken in the other during his occupation or

term. * * * The bare relation of landlord is a sufficient consideration for an implied promise to treat the premises occupied by him in a good and proper manner, according to the custom of the country or place where they are located, and to make *ordinary repairs, not new or permanent, of course*, but such as will keep them from going to decay and dilapidation, and which reasonable care will dictate. This is, however, the extent of the tenant's obligation; and if the landlord wishes to impose upon the tenant the duty of making repairs beyond these he can do so only by express covenant in his lease to that effect. *The tenant is not, merely by reason of the relationship, bound to make substantial and lasting repairs such as putting on a new roof; or to rebuild premises which may have become ruinous or accidentally destroyed; neither is he liable for mere wear and tear of the premises, nor bound to replace any portion thereof worn out by time.*

3 *R. C. L. Supp.* 625, reconstruction is not obligatory on tenant.

6 *R. C. L. Supp.* 990, duty of tenant to make substantial repairs can be imposed only by his express covenant.

Corpus Juris (Landlord and Tenant, p. 128): The tenant is not at common law impliedly liable for the ordinary wear and tear of the premises, or to make substantial and lasting repairs such as are called general repairs * * * In the absence of express covenant, the tenant's obligation is only to repair generally, but is in effect a covenant against voluntary waste.

Hancett v. O'Reilly, 76 N. J. L. 212; aff'd. 78 *ib.* 555. Plaintiff was lessee of a coal yard, upon

which there was a trestle for railroad cars to deliver coal to plaintiff's coal chutes. He replaced rotten timber, and sued for the amount. Held, that an express covenant by landlord to repair and restore demised premises in case they were injured by the elements, includes natural and gradual decay. Tenant was not at common law impliedly for ordinary wear and tear or to make substantial and lasting repairs, such as called general repairs. Tenant's covenant to surrender premises in as good a condition as he found them, is not broken by his failure to make reparation for natural and unavoidable decay. Injuries to building by wind, rain, frost and heat, are spoken of as injuries by the elements, and all ordinary decay from natural causes is classed in the same category (*Braem v. Washington Dye Works*, 126 Atl. 461).

POINT THREE.

It was error for the Trial Judge to rule that defendant was not bound to perform an agreement to repair her storage room roof and ceiling because such agreement was not contained in the written lease of 1926 nor in a written exercise by plaintiffs of their option for a further term in 1927.

Second ground of appeal, f and g (p. 4), ruling (pp. 69, 73). The second cause of action set forth in the complaint is that plaintiffs' execution of the March 18, 1926, lease was expressly conditioned on defendant's oral agreement to place and maintain her storage room roof and ceiling in proper repair so long as plaintiffs remained there (p. 13). Proof of this agreement was ex-

cluded (pp. 30-31). Plaintiffs then proved that the storage room roof leaked in August, 1926, and damaged goods of plaintiffs, and also damaged goods of Miss Drumpelman who in 1926 occupied the adjoining store, and that the storage room ceiling had been left unrepaired (pp. 37, 57). And that again, in the fall of 1926, plaintiffs' exercise of their option for a further term in 1927 was expressly conditioned on defendant's oral agreement to put the storage room roof and ceiling in proper repair (pp. 41-42).

A. A renewal of a written lease, or an exercise of an option for a further term, need not be in writing.

16 *R. C. L.* 703: It has been held that where the written lease contains one or more obligations imposed on the lessee, parol evidence is admissible to show an agreement on the part of the landlord to put the premises in safe condition prior to the commencement of the term (3 *R. C. L.* Supp. 617; 4 *Ib.* 1084; 5 *Ib.* 895, 907).

16 *R. C. L.* 889: A distinction is made between a covenant to renew and a lease for a stated term with the privilege given for a further term; in the latter case, where the privilege is claimed, the original lease operates as a present demise for the additional term without any necessity for a new lease. The renewal may be accomplished by an endorsement on the back of the original document, *and may rest in parol.* Where a tenant has such an option to renew, and there is no particular method prescribed in the lease for giving notice of the exercise of option, the tenant may adopt any reasonable method at the end of his term to indicate that he elects to renew, and may

give this notice orally or in writing, or his election may be implied from his holding over (*Foster v. Stewart*, 188 N. Y. S. 196; *Orr v. Doubleday*, 233 N. Y. S. , 119 N. E. 552; Am. Dig. 3rd Ed., vol. 17, p. 255; *Ib.* vol. 32, p. 290). Option for a further term; no writing necessary (*Kahn v. Am. Stores*, 94 N. J. L. 367; aff'd 196 *Ib.* 292; *Hurley v. White*, 84 N. J. Eq. 60).

B. Where a landlord has by agreement or conduct undertaken to keep the premises in proper repair, he is liable for damages sustained because of his negligent failure to carry out his undertaking.

16 *R. C. L.* 1045: It is the generally accepted rule that whether there is a covenant to repair or not, the lessor will be liable for injuries caused by his negligence or unskillfulness, or that of his servants or employees, in making repairs to the leased premises; and it has been held that a landlord undertaking to repair the leased premises, at the request of the tenant, when under no obligation so to do, and he assures his tenant that such repairs have been made, is answerable if the latter relying on such assurance suffers injury by reason of the defects not being properly repaired (see also Am. Dig., 2nd Ed., vol. 14, p. 164).

NEW JERSEY CASES.

Where a landlord undertakes to keep the demised premises in repair, or by analogy to keep them warm for the use of his tenant, and negligently fails to do so, he is liable for personal injury or illness caused by such failure (*Pabst v. Schwartzstein*, 101 N. J. L. 431). This case

cites *Frank v. Conradi*, 50 Ib. 23 (rotten balcony rail); *La Brasca v. Hinchman*, 81 Ib. 367 (rotten stable floor. Here, the defense was that the landlord had not promised in the written lease to repair the stable floor and therefore it was the tenant's duty to repair it. But the court said plaintiff's claim was not based on the actual want of repair, but on the landlord's tortfeasance in undertaking to repair, and doing the work negligently, and that the liability, if any, arose entirely *ab extra* the lease). Also cites *Braeme v. N. J. Conference*, 83 Ib. 621 (cesspool cover); *Le Pritchard v. Thurber*, 84 Ib. 193 (defective heating of garage). See also *Charney v. Cohen*, 94 Ib. 381 (defective guard railing on back porch); *Ingwensen v. Rankin*, 47 Ib. 18 (defective water pipe in saloon above basement floor rendering basement uninhabitable. Held, to be a continuing nuisance for which landlord, not tenant, was liable).

CONNECTICUT.

Stevens v. Yale, 127 Atl. 283, Court of Errors. Melting snow was carried from main roof to ell roof, thence through broken leader onto uncovered platform in back yard, and froze; plaintiff slipped in the dark and fell. Landlord held liable on two grounds, viz: reserved control rule, and agreement to repair. That landlord's promise, whether in lease or after its making, to repair defect in drainage system, and tenants acquiescence in landlord's request that she remain as his tenant in consideration of such promise, is supported by a valuable consideration. This decision reviews the cases in Connecticut, Massachusetts and elsewhere, on the subject of landlord's agreement to repair.

POINT FOUR.

The Trial Judge ignored plaintiffs' further cause of action and proof respecting the value of their business destroyed by defendant negligently leaving her storage room ceiling over the common passageway in a dangerous and unsafe condition, thereby compelling plaintiffs to vacate the premises.

Second ground of appeal, h. (p. 4); complaint (p. 11, line 20). The answer failed to meet the allegation of the complaint; except inferentially "that plaintiffs had control of the storage room" (pp. 18, 19).

The proofs disclose that the storage room ceiling had never been repaired during plaintiffs' entire tenancy, from June, 1924, up to the time they permanently vacated the premises in October, 1927.

The roof leaked in August, 1926 (Mrs. Downer, p. 37; Miss Drumpelman, p. 57). When plaintiffs went into the store in June, 1926, the only change made was that a new metal ceiling had been laid in the front room (p. 37). The leak in the storage room ceiling in 1926 was in the middle of it (p. 37). When Mrs. Downer closed the store in the fall of 1926, she told Edward Pannaci, defendant's husband and agent, that she would not move in next year, or exercise her option for a further term in 1927, unless the storage room roof and ceiling were put in proper condition; that he agreed to do it, and that she wrote to Mrs. Pannaci to that effect, who did not answer the letter (pp. 41-42). As a result of the flooding of the premises on July 23, 1927, the whole storage room ceiling was down, right in

front of plaintiffs' rear door; the ceiling in the back was dangerous (p. 43). On July 23, 1927, Mr. and Mrs. Pannaci, Dr. Pannaci, and Mr. and Mrs. Walton, were in the front room and back in the storage room, and saw the damage (p. 44). The condition of the storage room ceiling over the passageway was very dangerous; the plaster had become loosened from the laths, large pieces of plaster about three or four feet were dropping from time to time, a large piece of plaster struck Mrs. Downer upon the shoulder as she went to the toilet room (p. 51). Along in August, 1927, and from time to time, Mrs. Downer told Mr. and Mrs. Pannaci that the storage room ceiling was unsafe; that it should be fixed or taken down, because it was very dangerous; that Mr. Pannaci knew it was unsafe because he had been there; that he would not promise to repair it (p. 52). Mrs. Downer vacated the premises October 30, 1927, because the storage room ceiling was unsafe to walk under it; this particular location in the Hotel Pannaci was the only suitable location for her business in Sea Bright (p. 52).

Pritchard, defendant's builder, went inside the store premises Monday, July 25, 1927, after examining the roof Sunday, July 24; saw a hole in the plaster ceiling of the storage room; only examined the ceiling, not the floor beams; had not been asked to look at the floor beams (p. 65).

"The plaster had loosened from the roof and fallen down; Mrs. Downer showed me the wall and said it was unsafe; I told her that I had no orders regarding the repair of the storage room ceiling; I did not report it to Edward Pannaci when I went back; he asked me nothing about the ceiling" (p. 68).

Proof of the value of the business created and established in the store was made by production of plaintiffs' books, showing the annual cash receipts and disbursements and profits for each of the four years from 1924 to 1927 inclusive. The annual profits aggregated \$3,419.74—being about \$1,000 up to 1927, when, because of the destruction of \$1,195.50 worth of millinery on July 23, 1927, and loss of business, the profit for 1927 shrunk to \$334.03 (pp. 47, 48, 54).

If the case had been submitted to the jury on this cause of action, they would not have been limited in their finding of damages to \$3,419.74. They could have found exemplary damages.

One of the most important elements of good will in the case of a trade or business of a commercial character is that of place or location (12 *R. C. L.* 977, 8 *Ib.* 486-489; *Hilton v. Hilton*, 99 *N. J. Eq.* 182; *Kremelberg v. Thompson*, 87 *Ib.* 655; *Holt v. Security Co.*, 76 *N. J. L.* 585; *Smith v. Public Service*, 78 *Ib.* 12; *Bartow v. Erie R. R.*, 73 *Ib.* 12). Destruction of business by landlord forcing tenant from premises (*Standard Amusement Co. v. Champion*, 76 *N. J. L.* 771). Exemplary damages (*Hintz v. Roberts*, 98 *Ib.* 768). Wilful or wanton negligence defined (*Staub v. Public Service Co.*, 97 *Ib.* 297). Proximate cause of damage (*Migliaccio v. Public Service Co.*, 101 *Ib.* 496).

POINT FIVE.

The proof is direct and conclusive that defendant did not exercise reasonable care to maintain her storage room roof and ceiling in a reasonably fit and safe condition of repair.

There is no proof that the roof or ceiling was ever repaired, or attempted to be repaired during plaintiffs' tenancy. The proofs have already been pretty well gone over, but perhaps it may be convenient to have them here summarized. The roof leaked in August, 1926, and water from the ceiling damaged goods of both the plaintiffs and of the tenant of the adjoining store. The excuse then was that the leader had become chocked (Mrs. Downer, p. 37; Miss Drumpelman, pp. 58-59). Miss Drumpelman would not rent her store again because of the defective roof (p. 59). The answer sets up the same defense to the flooding on July 23, 1927, that the leader had become choked, which leader, observe, was in the southwest corner and was some forty feet distant from the two front rooms (p. 19). Saturday morning, July 23, 1927, the roof leaked again, and this time water flooded the entire premises including the storage room, and part of the storage room ceiling fell. All of plaintiffs' goods in their front room, next to the partition separating it from the storage room, and all their goods in the storage room, were ruined by water; most of the goods damaged being in the front room (pp. 43-44). Mr. and Mrs. Pannaci, Dr. Pannaci, and Mr. and Mrs. Walton, were there and saw the damage (pp. 42-44). After the others had left, Dr. Pannaci said to Mrs. Downer, "I told father the other day about looking after that roof. This

is what happened." He said he told him he ought to have a new roof long ago on there (p. 46). That afternoon Mrs. Downer and her husband saw Mr. and Mrs. Pannaci in their hotel office. Mrs. Downer said that she would telephone for an expert appraiser to come down from New York and appraise the damage, but they objected to it, saying it was too expensive; that if she would make up a list of the items of damage, with their stenographer, Miss Fery, they would take her word as to the value of the damaged goods. Then, on Monday, July 25, Mrs. Downer and Miss Fery made up the list, the total value of the damaged goods being \$1,195.50; Mrs. Downer and Mrs. Pannaci each having a typed copy (p. 49). Two or three days later, Mrs. Downer asked Mr. and Mrs. Pannaci for a settlement. Mr. Pannaci offered \$200 in full settlement, which Mrs. Downer refused. Then Mr. Pannaci told Mrs. Downer she would have to have an expert appraisal (p. 44). Mrs. Downer then telephoned George H. Steger, salesman for the ninety-four-year-old wholesale millinery firm of Aitken Son & Co., of New York City, and of whom plaintiffs had bought the goods, to come down and make an appraisal. His appraisal was made August 10, 1927, and his valuation of the damaged goods was the same as Mrs. Downer's (p. 50, Steger, pp. 60-62).

The testimony of Howard Pritchard, defendant's builder, shows conclusively that the roof was old and worn out (pp. 63-68). Sunday, July 24, 1927, having been telephoned to come to the Hotel Pannaci, he did so, and saw Edward Pannaci and Walton, his son-in-law. They wanted him to see the roof of the store room and give his opinion as to what could be done to fix it.

This was the flat, slag roof, the flat deck (p. 63); the roof over the back part of the two adjoining stores in the brick wing of the Hotel Pannaci. The roof over the small store in front, that was the three-story part of the hotel; there were hotel rooms above the store proper; it is all part of the hotel property; the store room was a sort of a one-story addition in the rear (pp. 66-67). He went up on the storage room roof that day, Sunday, and examined it.

“I found where it had settled up in the northeast corner and the water had evidently gone in behind the flashing and flooded the store (p. 65). I saw where evidently a weight of some kind had pressed it down and where the flashing was turned up, the counter flashing comes down over it; it had settled enough to let this come out and the water went in behind.”

He did not examine the floor beams; did not take any of the roof off, the flash roof (p. 66).

“Edward Pannaci asked me whether it could be patched up; he asked what was the cheapest way to fix it (p. 66). I told him to put in new beams, form a new roof altogether, leave the old one there as it was, that an entire new roof was needed, and he agreed to it.”

That then they agreed on a price; he ordered and received the material Monday, started the work Tuesday and finished it Wednesday (p. 67).

Never was there a plainer case of a derelict landlord. And here the wrong did not arise from ignorance of conditions, but was deliberate, wanton, and dishonest. The roof and ceiling was in essence a continuous nuisance, knowingly maintained (*Imwersen v. Rankin*, 47 N. J. L. 18).

The brief of plaintiffs' counsel, sent to the Trial Judge at his request (pp. 69, 71) contained the following extract from the opinion of this court in *Consolidated Traction Co. v. Scott*, 58 N. J. L. 170:

“It is insisted in support of this assignment of error that the plaintiff below failed to establish any facts from which the jury would be justified in finding negligence on the part of the defendant. But this insistence is scarcely in accord with the well-settled rule regulating the action of the Trial Judge upon such a motion. It is not for him to say whether there are any facts proven in a given case from which the jury would be justified in finding negligence on the part of the defendant, but, rather, whether any facts have been established by evidence from which the negligence might be reasonably inferred by a jury.”

“As stated by Justice Magie in delivering the opinion of this court in *Railway Co. v. Block*, 55 N. J. L. 605:

“‘In performing this function, the Trial Judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence, but whether negligence can be reasonably and legitimately inferred therefrom by the jury.’

“In applying this general rule to the examination of the facts, it must be remembered that ‘negligence is not a fact which is the subject of direct proof, but an inference from the facts put in evidence.’

“‘Now, negligence,’ says Dr. Wharton, may be disputed when the facts are disputed, and the question in such case, where the dispute is real and serious, is eminently

one for the jury, under the direction of the Court' (Whart, Neg. 3420). 'Whether the facts are disputed or undisputed, if different minds might honestly draw different conclusions from them, the case should properly be left to the jury, and that in order to withdraw such a case from the jury the facts should not only be undisputed, but the inferences, in respect of defendant's failure of duty, which arises from these facts, should be indisputable' (2 Thomp. Trials, 1208). "This same doctrine has been repeatedly laid down by this Court."

POINT SIX.

The judgment below should be reversed and final judgment entered in this court in favor of plaintiffs-appellants, with costs.

If the court decides that the law of this case is as contended by plaintiffs-appellants, then why should it merely reverse the judgment below and leave the burden on plaintiffs of the further expense and delay of a new trial, before the same judge, and on the same admitted facts?

Defendant's whole case on the merits and the law is contained in her answer. It presents no defense whatsoever. Defendant offered no evidence, did not even cross-examine. The motion for the directed verdict itself, in effect, admitted the truth of plaintiffs' evidence and of every inference to be legitimately drawn therefrom and favorable to plaintiffs (*Hunke v. Hunke*, 103 N. J. L. 645). Defendant's negligence was proved conclusively. And so were plaintiffs' damages, viz: value of damaged goods, \$1,195.50 (pp. 48, 62); value of business destroyed (total annual profits, p. 54), \$3,419.74; aggregate dam-

ages, \$4,615.24. Defendant's sole contention was that as a matter of law plaintiffs had no cause of action—a pure speculation by an obvious wrongdoer.

This court has power to enter final judgment. In *Lehigh Valley R. R. Co. v. McFarland*, 44 N. J. L. 674, Depue, J., speaking for this court, said:

“The court is not restricted to a general affirmance or reversal, and may, on a reversal of the judgment below, give a new judgment in favor of the plaintiff in error, or award a *venire de novo*, as the justice of the case may require. If the whole merits of the case are fully and finally determined by the decision of the court above, the court will finally decide the controversy by giving such a judgment in favor of the plaintiff in error, as should have been given in the court below. On the other hand, if the judgment is not reversed upon the whole merits of the case, but upon some collateral or incidental question not involving the substantial grounds of the litigation or covering the whole case, the court in reversing the judgment below, will simply direct a *venire de novo*, in order that the case may be put to a retrial upon the merits.”

In the present case, the directed verdict did involve the substantial grounds of litigation and covered the whole case.

Illustrations of final judgments: *Horsey v. City of Paterson*, 40 N. J. L. 186 (claim for counsel fees); *Smith v. Ocean Castle*, 59 Ib. 198 (that Supreme Court having awarded final judgment should also give execution, with costs); *Sullivan v. Visconti*, 68 Ib. 543 aff'd. 69 Ib. 452 (action on assigned claim); *National Bank v. Berral*, 70 Ib.

757 (action on check, findings by trial judge); *Boniewsky v. Polish Home*, 103 Ib. 323 (negligence action, plaintiff's complaint and verdict molded, execution directed with costs); *Sarson v. Mueller*, 6 N. J. Adv. R. 1531—not officially reported (law of the case on third appeal, directed verdict for defendant reversed).

Illustrations of final judgments in Supreme Court: *Vrath v. Burke*, 63 N. J. L. (landlord's negligence, counter-weight on door, judgment for plaintiff reversed, and non-suit entered); *Taylor v. Reed*, 68 Ib. 178 (action on mechanics lien stop-notice); *Schuster v. Arena*, 83 Ib. 79 (action against surety on body execution bond); *Kendel v. Guterl*, 84 Ib. 533 (false imprisonment); *Frank v. Dailey*, 93 Ib. 76 (garage lien); *Licker v. Rudd*, 7 N. J. Misc. R.—not officially reported (landlord's negligence in failing to heat apartment); *Dade v. Reilly*, 102 Ib. 268 (husband and wife; a judgment which is an entity, and not severable, must be reversed in its entirety).

Costs: In *Lynch v. Public Service Rwy. Co.*, 83 N. J. L. 783, this court said that since the decision in *Lehigh Valley v. McFarland*, *supra*, and by virtue of P. L. 1911, p. 756, the prevailing party in this court was entitled to costs, unless otherwise ordered. There, the court had reversed a judgment for defendant; and plaintiff having applied for costs, the application was denied because the reversal was due solely to mistakes of law of the trial judge, which did not finally determine any issue. But, in the present case, the trial judge's mistakes of law did finally determine all the issues, and consequently plaintiffs-appellants should have costs.

BENJAMIN J. DOWNER,
Attorney and Counsel of
Plaintiffs-Appellants.

The following is a list of the names of the persons who have been appointed to the various offices of the Board of Directors of the [Company Name] for the year ending [Year].

[The text in this section is extremely faint and largely illegible. It appears to be a list of names and titles, possibly including names like 'John D. Rockefeller', 'John G. Thompson', and 'John A. B. [?]', but the details are too light to transcribe accurately.]

BY ORDER OF THE BOARD OF DIRECTORS,
[Name of Secretary or Treasurer]
[Title]

New Jersey Court of Errors and Appeals.

BERTHA A. BRIGGS and CLARA
B. DOWNER, Partners trading
as The Misses Briggs,
Plaintiffs-Appellants,
vs.
VERONICA PANNACI,
Defendant-Respondent.

*Action
at Law.
On Appeal
from
Monmouth
Circuit
Court.*

BRIEF OF DEFENDANT-RESPONDENT.

PRELIMINARY STATEMENT.

Plaintiffs appeal from a verdict directed against them in an action to recover from their landlord the value of certain millinery goods damaged by rain water.

RE-STATEMENT OF FACTS.

In 1926 plaintiffs, under a written lease (Ex. P-1, p. 75), entered into possession of certain premises owned by the defendant and situate in Sea Bright, New Jersey, just across the street from the Atlantic Ocean.

The lease contained a renewal clause, by virtue of which plaintiffs went into possession in 1927, when occurred the damage now complained of.

The premises occupied by the plaintiffs consisted of a small store facing the ocean. A doorway in

the rear of this store led into a large room which adjoined the rear of other stores. In this large room plaintiffs stored their surplus stock. Plaintiff's counsel admitted that the space for storage in the large room was part of the leased premises (p. 72, l. 23).

In July, 1927, a heavy storm caused rain water to rise over the roof flashings (p. 65). Once behind the flashing the water came in the large room as well as the store, damaging some of plaintiffs' goods in both places.

I.

That the Plaintiffs Failed to Bring Their Case Within the Exceptions to the General Rule That a Landlord Is Not Under a Duty to Make Repairs.

The main contention in plaintiffs' brief seems to be that if some of the goods damaged were in the large room liability should be imposed upon the landlord for the damage to the goods in both rooms. The theory they rely upon to justify this position is the familiar exception known as the apartment or tenement house rule. This rule has been succinctly stated by Mr. Justice Magie in the leading case of *Gleason v. Boehm*, 58 N. J. L., 475, as follows:

'The defendant landlord is "bound to take reasonable care to have the hall and stairway reasonably fit for the passage to and fro of his tenants and their visitors. But no duty was imposed upon him in respect to the safe use of the means of passage provided by him. If those means were such as the rule required to be provided he had performed his duty. If the stairway was fit for use in ascending and descending, the responsibility of safely using it was upon the person using it. If to use it safely at night, a light was requisite, he must provide it and not the landlord" '.

The foregoing excerpt was quoted with approval

by this Court in *Leech v. Atlantic Delicatessen Co.*,
140 Atl., 423 at 424.

It is significant that the courts of this State have confined this doctrine to cases of personal injuries. The plaintiffs make no claim for personal injuries, nor do they even insist that the large room, insofar as a portion of it afforded a passageway to a toilet, was unfit as a common passageway.

Their claim seems to be that the large room, and hence the portion which their store occupied, was unfit as a storeroom. In making the claim they confront two obstacles: First; their counsel's admission and claim that the portion of the large room occupied by the plaintiff's stock was part of the premises intended to be demised, and over which, therefore, the tenant would have control (p. 72, l. 27; p. 39, ll. 20-32); and secondly; that even though not part of the demised premises, the floor space containing the plaintiffs' stock could not in any sense be deemed a common area or passageway. Already containing the goods of one, the same space could not very well be occupied by the goods of another, or, indeed, be used as a passageway, common or otherwise. If the confines of the demised premises stopped on the threshold of the door leading from them to the large room, the relation of the parties, as to the stock, was a relationship which neither the law nor the plaintiffs have undertaken to recognize or define.

If this insistence of the plaintiffs is to rise to the dignity of a rule of law, the rule must find support from some source other than from the cases in this State concerning personal injuries sustained as a result of a landlord's failure to make common passageways reasonably fit and safe as passageways.

II.

**That the Trial Court Properly Confined the Plaintiffs
to the Terms of Their Written Lease.**

Under Point Three plaintiffs have erroneously

assumed that the Trial Court excluded proof of a renewal of the least of 1926 which contained a renewal clause. It was plaintiff's insistence that they occupied under a renewal of the 1926 lease and the Court's direction embodied this view.

Under the same point error is assigned to the exclusion of certain facts relating to what was said by the parties before the execution of the written lease of 1926. On page 26 of plaintiffs' brief the assertion is made that proof of such an oral agreement was excluded on page 30 and page 31 of the record. An examination of these pages reveals no exclusion.

On page 41, one of the plaintiffs testified to an oral 'bargain' made with defendant's son before they entered upon the lease for the 1926 term. This agreement was alleged in the pleadings (p. 13). In their brief plaintiffs would have it appear that the so-called oral bargain was entered into in the Fall of 1926, just prior to the renewal of the 1926 lease (p. 27 of brief). There is no testimony to support the claim. Only one of the plaintiffs testified, and she said that the so-called bargain was made, 'just before I moved there in 1926', (p. 41, l. 22).

They admit a written lease was subsequently made barren of any express covenants to repair (Ex. P-1, p. 75). The lease does mention a ceiling, but the plaintiff explained that the ceiling therein referred to was the one in the store which was replaced by a metal ceiling before possession was taken in 1926 (p. 53, l. 11, and see court's comment, p. 69, l. 26). The work in this connection they pronounced satisfactory (p. 53, l. 19).

Plaintiff's final claim, that the conditions complained of constituted a nuisance (p. 35 of brief), is quite out of place. This exception to the general rule of a landlord's non-liability was neither factually alleged in the complaint nor was it suggested during argument.

Throughout plaintiff's brief, especially under Point Four, an effort is made to convey the thought that plaintiffs vacated the premises immediately after their stock was damaged. They go so far as to claim damages for being forced to vacate. They were not forced to vacate and they did not vacate. On the contrary they remained in possession until October 30th, 1927, when their lease expired (p. 52).

III.

The Plaintiffs Assumed the Inconveniences and Disadvantages Incident to the Premises Which They Nevertheless Chose to Occupy for Four Years.

The plaintiffs occupied the premises in question for the summer seasons of 1924, 1925, 1926 and 1927. In 1926 occurred a storm which plaintiffs' counsel said was not as severe as the one in 1927, but severe enough to cause damage to some of the plaintiffs' stock in the large room (p. 40 and p. 38).

In the second count of their complaint, plaintiffs alleged that also during the latter part of 1925 some rain came in the large room.

After two experiences plaintiffs were not without notice that a severe storm would likely cause rain water to come through the flashing and into the large room. With this knowledge they 'chose to occupy and use the premises'. In doing so, their conduct is not dissimilar from the situation in *Barthelmess v. Bergamo*, 103 N. J. L., 397 at 399, where an effort was made by a tenant to bring her case within one or all of the exceptions to the general rule exempting a landlord from liability. Judgment for the plaintiff was reversed, the court saying:

"The case *sub judice* manifestly is not brought within either of the recognized exceptions to the established rule; for here the tenant accepted and occupied the premises as she found them, devoid of the

very protecting essentials of which she complains, presenting a deficiency in construction as conspicuous and apparent to her as it was to the landlord. With this knowledge she chose to occupy and use the premises, and necessarily to assume the inconveniences and disadvantages incident to such use, conjoined with the risks obviously attendant thereon, thus creating a legal status of knowledge and consent tantamount to estoppel *in pais*, which must be held to operate as an insuperable barrier to recovery. *Mullen v. Rainear*, 45 N. J. L., 520; *Naumberg v. Young*, *supra*; *Vorath v. Burke*, 63 *Id.*, 188; *Saunders v. Smith Realty Co.*, 84 *Id.*, 276.

* * * * *

It is respectfully submitted that the learned Trial Court committed no error in finding as a matter of law that the plaintiffs had failed to escape the rigor of the common law rule exempting a landlord from liability.

Respectfully submitted,

APPLEGATE, STEVENS FOSTER
& REUSSILLE,

Attorneys of Defendant-Respondent.

LESTER C. LEONARD,
Of Counsel.



