INDEX

NOTICE OF APPEAL.

Filed February 23, 1928.

Essex County Circuit Court

NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff,* *vs.* CHARMS COMPANY, a corporation, *Defendant.*	*Action at Law.* *Notice of Appeal to New Jersey Supreme Court.*

To Lum, Tamblyn & Colyer, attorneys for plaintiff:

TAKE NOTICE that defendant appeals to the New Jersey Supreme Court from the order striking out answer and entering summary judgment, entered in this cause.

CHAS. S. SMITH,
Attorney for Defendant-Appellant.

Dated, February 14, 1928.

Service of a copy of the within notice of appeal acknowledged this 17th day of February, 1928.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Filed February 23, 1928.

JOHN H. SCOTT,
Clerk.

SUMMONS.

Issued December 22, 1927.

State of New Jersey to Charms Company, a corporation:

(SEAL) YOU ARE SUMMONED to answer the annexed complaint of New Jersey Aluminum Company, a corporation, in an action at law in the Essex County Circuit Court. AND TAKE NOTICE, that unless you file an answer to said complaint with the Clerk of the Essex County Circuit Court at Newark within twenty days after service upon you of this writ and the annexed complaint, the plainiff may proceed in the suit and judgment may be entered against you.

WITNESS, WORRALL F. MOUNTAIN, Judge of the Essex County Circuit Court, at Newark, this 22nd day of December, 1927.

JOHN H. SCOTT,
Clerk.

LUM, TAMBLYN & COLYER,
Attorneys.

COMPLAINT.

Filed.

ESSEX COUNTY CIRCUIT COURT.

NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff*, *vs.* CHARMS COMPANY, a corporation, *Defendant*.	*Action at Law.* *Complaint.*

Plaintiff, a corporation organized under the laws of the State of New Jersey, having its principal office at No. 17 Academy street, in the City of Newark, in said State, says that:

1. On or about the first day of November, 1923, plaintiff and defendant entered into a written indenture whereby plaintiff agreed to lease to defendant, and defendant agreed to rent from plaintiff the main building and factory and all the land upon which said buildings are erected known as Nos. 699-711 Springfield avenue, Newark, New Jersey, for the term of five years from the first day of November, 1923, at a yearly rental of twelve thousand dollars ($12,000.00) for the first two years of said term, payable in advance in equal monthly installments of one thousand dollars ($1,000.00) on the first day of each month and at a yearly rental of fourteen thousand dollars ($14,000.00) for the third and fourth years of said term, payable in equal monthly installments of one thousand one hundred sixty-six dollars and sixty-six cents ($1,166.66) on the

first day of each month, and at a yearly rental of fifteen thousand dollars ($15,000.00) for the fifth year of said term, payable in advance in equal monthly installments of twelve hundred and fifty dollars ($1,250.00) on the first day of each month.

2. By the terms of the lease mentioned in paragraph 1, defendant also agreed not to use or permit the premises to be used for any purpose which would increase the cost of insuring the buildings upon the premises against loss or damage by fire with responsible insurance companies except upon paying the increase in the fire insurance rate over the rate existing at the time of the original occupancy of the demised premises under a lease of August 14, 1919.

3. On the first day of October, 1927, the sum of eleven hundred and sixty-six dollars and sixty-six cents ($1,166.66); on the first day of November, 1927, the sum of twelve hundred and fifty dollars ($1,250.00) and on the first day of December, 1927, the sum of twelve hundred and fifty dollars ($1,250.00) became due as rental for the above-mentioned premises and remained unpaid and, although often requested to do so, defendant has entirely failed to pay the same.

4. Defendant did use or permit the premises to be used for purposes which added to its hazard as a fire insurance risk and which increased the cost of insuring the buildings upon the premises against loss or damage by fire and plaintiff was obliged to and did pay out on March 1, 1927, the sum of eight hundred and thirty-five dollars and two cents ($835.02) over and above the sum which was originally paid to insure the demised premises under the lease of August 14, 1919. Pursu-

ant to the lease mentioned in paragraph 1, defendant became obliged to pay the said sum of eight hundred and thirty-five dollars and two cents ($835.02) to the plaintiff and, although often requested to do so, has entirely failed to pay the same.

Plaintiff demands the sum of four thousand five hundred and one dollars and sixty-nine cents ($4,501.69) besides lawful interest.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

To the above-named defendant:

TAKE NOTICE that if you intend to make a defense, you must file an affidavit of merits within ten days after the service hereof upon you, and an answer within twenty days therefrom, and in default thereof judgment will be entered against you.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

To the above-named defendant:

TAKE NOTICE that if you intend to make a defense you must file an affidavit of merits within ten days after the service hereof upon you and an answer within twenty days therefrom and in default thereof judgment will be entered against you.

LUM, TAMBLYN & COLYER,
Attys. for Plaintiff.

Sheriff's fees $3.78.

Complaint.

I hereby appoint and depute Charles Breummer, to serve the within writ.

Witness my hand and seal this 23rd day of Dec., 1927.

CONRAD DEUCHLER,
Sheriff.

By Rupert F. Mills,
Under Sheriff.

(SEAL)

Sheriff's fees.

Served the within Summons and Complaint Dec. 28th, 1927 by delivering a true copy thereof to Mr. Macham as agent in charge of Charms Co. a Corp. the within named defendant at his place of business Bloomfield Avenue, Bloomfield, N. J.

CONRAD DEUCHLER,
Sheriff.

By Chas. Breummer,
Special Deputy.

AFFIDAVIT OF MERITS.

Filed January 5, 1928.

ESSEX COUNTY CIRCUIT COURT.

NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff,*	*Action at Law.*
vs.	*Affidavit of Merits.*
CHARMS COMPANY, a corporation, *Defendant.*	

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

WALTER W. REID, JR., of full age, being duly sworn according to law, on his oath deposes and says:

I am the president of Charms Company, a corporation, the defendant in the above-entitled cause, and I believe that the said defendant has a just and legal defense to the action on the merits of the case.

WALTER W. REID, JR.

Subscribed and sworn to before me
this 31st day of December, 1927.

(N. P. Seal) ELBERT L. SCHOONOVER.

ANSWER AND COUNTER-CLAIM.

Filed January 16, 1928.

ESSEX COUNTY CIRCUIT COURT.

NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff,*	*Action at Law.*
vs.	*Answer and Counter-claim.*
CHARMS COMPANY, a corporation, *Defendant.*	

Defendant, Charms Company, a corporation of the State of New Jersey, having its principal office in Bloomfield, in said State, says that:

1. It admits the first and second paragraphs of the complaint.

2. It denies the third paragraph, and says that all and any sums of money due or to become due for the rental of said premises, according to said lease, were fully paid to the plaintiff prior to the first day of October, 1927, and prior to the commencement of this action, and that at the times mentioned, its lease had been terminated by the plaintiff by reason of plaintiff's violation thereof. It was expressly agreed in said lease that all repairs to the roof of said premises were to be made and paid for by the plaintiff. Almost from the beginning of its occupancy of said premises under said lease, defendant was seriously inconvenienced and embarrassed by the leaky condition of the roof. From time to time defendant notified the plaintiff of the state of disrepair of the roof, and although minor repairs

were made, this was done only after persistent demand by the defendant. Such repairs as plaintiff made were wholly inadequate, and the plaintiff continually neglected to maintain the roof in a condition necessary to keep the premises tenantable. Whenever it rained, or snow accumulated on the roof and thawed, water penetrated through the leaks in the roof, ran down inside of the walls and formed in pools on the floors of the premises. This interfered with the production of finished merchandise, and defendant was required to place devices at the walls on the floors to divert the flow of water and deflect it into kettles and other containers. Such water as was not controlled in this manner had to be mopped up from the floors. As a result, the premises became thoroughly permeated with dampness, and unsuitable for the manufacture of candy and large quantities of candy were spoiled with resultant loss, and defendant was virtually evicted and forced to vacate.

3. It denies that part of paragraph 4 which alleges that it used or permitted the premises to be used for purposes which increased its hazard as a fire insurance risk, and says that at no time has it used or permitted said premises to be used for any purpose more hazardous on account of fire than the manufacture and wrapping of candy, as contemplated and agreed to in said lease. It has no knowledge or information sufficient to form a belief that plaintiff paid the sum of $835.02 for excess insurance premium, as alleged, and says that it was compelled to vacate the premises on or about July 1, 1927, and that if any excess premiums were so paid by plaintiff, it is obligated to pay to the plaintiff only that

portion thereof as was earned at the time defendant vacated the premises as aforesaid.

By way of counter-claim against the plaintiff, the defendant says that:

1. It repeats the statements in paragraph 2 of the answer which describe the untenantable condition of the premises, and says that although the defendant contemplated continued occupancy of said premises for the full term of its lease, and desired to remain in possession until the termination thereof, the neglect of the plaintiff to make the required repairs to the roof as aforesaid, resulting in the premises becoming unsuitable for its purposes, and thereby untenantable, eventually caused the defendant to realize that it would have to secure other quarters. Sometime before it was finally evicted defendant was forced to purchase other premises for the reason that it was unable to effect a suitable leasehold. When the defendant had no alternative than to vacate or to suffer continuous loss due to the unfit condition of said premises, it was compelled to remove its machinery and plant equipment, transporting them to its new site and setting up the same therein, at a time when the said change seriously interfered with and interrupted its business, causing great expense and damage to the defendant.

2. By reason of the influx of water in said premises through the leaks in the roof over a period of at least four years, large quantities of merchandise were either ruined or rendered unsuitable for the market, and thereby became unsalable to the great damage of the defendant.

The defendant counter-claims ten thousand dollars ($10,000.00) as damages.

CHAS. S. SMITH,
Attorney for Defendant.

NOTICE OF MOTION TO STRIKE OUT AND ENTER JUDGMENT.

Filed February 7, 1928.

ESSEX COUNTY CIRCUIT COURT.

NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff,* *vs.* CHARMS COMPANY, a corporation, *Defendant.*	*Action at Law.* *Notice of Motion to Strike Out and Enter Judgment.*

To Charles S. Smith, attorney for defendant, or to whom it may concern:

TAKE NOTICE, that on Saturday, February 4, 1928, at ten o'clock in the forenoon on that day, or as soon thereafter as counsel can be heard thereon, we shall apply to Honorable Worral F. Mountain, Judge of the Essex County Circuit Court, at the Court House in the City of Newark, to strike out the defendant's answer and counter-claim in the above-entitled cause on the following grounds:

1. That the same are sham and frivolous.

2. That they constitute no legal defense to the cause of action in the complaint.

3. That they are vague, uncertain, indefinite, irregular, defective and so framed as to embarrass and delay a fair trial.

We shall at that time submit the original of the affidavits hereto annexed and made a part hereof.

We shall apply to said Court at that time to enter summary judgment in favor of the plaintiff and against the defendant for the amount demanded in the complaint, to wit, the sum of four thousand five hundred and one dollars and sixty-eight cents ($4,501.68) with interest.

Yours, etc.,

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Service of a copy of the within notice is hereby acknowledged this 25th day of January, 1928.

CHAS. S. SMITH,
Atty. for Deft.

AFFIDAVIT ATTACHED TO NOTICE OF MOTION TO STRIKE OUT AND ETNER JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff,*	*Action at Law.*
vs.	*Affidavit of Gustav A. Kruttschnitt.*
CHARMS COMPANY, a corporation, *Defendant.*	

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

GUSTAV A. KRUTTSCHNITT, being duly sworn upon his oath according to law, deposes and says that he is President of the plaintiff company, New Jersey Aluminum Company, a corporation, and was such President during the times as stated in the complaint.

That annexed hereto and made a part hereof is a true copy of the lease made between the plaintiff and the defendant for the premises in question as stated in the complaint made on the first day of November, 1923.

That said lease, among other things, contains the following clause:

> "It is further agreed between the parties hereto that all interior repairs to the said premises shall be made at the cost and expense of the lessee, excepting the roof of said building, the repairs to which shall be made and paid for by the lessor."

Deponent further says that the defendant, Charms Company, vacated the premises in question by removing their manufacturing plant therefrom on or about the first day of May, 1927, and then continued to pay rent from then on as specified in the lease up to and including the month of September, 1927.

That all during this time and prior thereto from the inception of said lease this deponent made inspection trips approximately once in every three months to said premises for the purpose of examining the same to ascertain their condition.

Deponent denies that at any time during the period of said lease the roof of said premises needed any repairs and denies that there were any leaks in said roof, as alleged in the answer filed in this cause.

This deponent denies that he ever received, either orally or in writing, any complaints from the defendant company in reference to the roof needing repairs or the roof leaking.

This deponent further says that there is due from the defendant company the rent for the month of October, 1927, amounting to one thousand one hundred and sixty-six dollars and sixty-six cents ($1,166.66), for the month of November, 1927, amounting to one thousand two hundred and fifty dollars ($1,250.00) and for the month of December, 1927, amounting to one thousand two hundred and fifty dollars ($1,250.00), all as alleged in the plaintiff's complaint, together with the sum of eight hundred and thirty-five dollars and two cents ($835.02), the amount due for increase in the fire insurance premiums, as alleged in said complaint, making

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a total due of four thousand five hundred and one dollars and sixty-eight cents ($4,501.68).

That no part of said sum has been paid by the defendant and the full amount is due and owing.

GUSTAV A. KRUTTSCHNITT.

Sworn and subscribed to before me
this 26th day of January, 1928.

WILLIAM F. GORMAN,
Master in Chancery of N. J.

THIS INDENTURE made this first day of November, one thousand nine hundred and twenty-three, Between NEW JERSEY ALUMINUM COMPANY, a corporation organized under the laws of the State of New Jersey, having its principal office in the City of Newark in said State, (hereinafter called the Lessor), party of the first part, and CHARMS COMPANY, a corporation organized under the laws of the State of Delaware, having its principal office in the City of Newark, in the County of Essex and State of New Jersey, (hereinafter called the Lessee), party of the second part,

WITNESSETH: In consideration of the mutual covenants hereinafter set forth and of the sum of One Dollar each to the other paid, the receipt whereof is hereby acknowledged, the parties hereto mutually agree as follows: The lessor hereby demises, leases and farm lets unto the said lessee the main building and factory and all the land upon which said buildings are erected, which is now fenced in, situate in the City of Newark, County of Essex and State of New

Lease.

Jersey, and known as Nos. 699 to 711 Springfield Avenue; said plot having a frontage on Springfield Avenue of approximately 106 feet and a frontage on South Nineteenth Street of approximately 320 feet, for the term of five (5) years from the first day of November one thousand nine hundred and twenty-three, to the first day of November, one thousand nine hundred and twenty-eight, at a yearly rental of twelve thousand dollars ($12,000.00) for the first two years of said term, payable in advance in equal monthly installments of one thousand dollars ($1,000.00) on the first day of each month, and at a yearly rental of fourteen thousand dollars ($14,000) for the third and fourth years of said term, payable in advance in equal monthly installments of one thousand one hundred and sixty-six dollars and sixty-six cents ($1,166.66) on the first day of each month and at the yearly rental of fifteen thousand dollars ($15,000.00) for the fifth year of said term, payable in advance in equal monthly installments of one thousand two hundred and fifty dollars ($1,250.00) on the first day of each month.

It is expressly understood and agreed that said lessee is to take over said buildings in the condition in which they are at the present time; that said lessee will make all repairs, changes and alterations of every kind, at its own expense, during the continuance of this lease, as hereinafter set forth, and that said lessee will not store on said premises at any time during the continuance of this lease, any acids or combustibles, or anything which may damage or deface the buildings, or be noxious or dangerous to the people living in the vicinity of said premises. And the

Lease.

lessee further agrees to repair any damages to the buildings or to the water pipes or heating plant which may arise from any cause, particularly arising out of the failure of the said lessee to protect said water pipes or heating plant from freezing during the continuance of this lease.

Said lessee hereby agrees to pay to said lessor the yearly rental aforesaid, at the time and in the manner aforesaid; and not to use or permit the demised premises to be used for any purpose more hazardous on account of fire than the manufacture and wrapping of candy, nor use or permit the demised premises to be used in the conduct of the said business so as to add to its hazard as a fire insurance risk, or which would increase the cost of insuring the buildings upon the premises against loss or damage by fire with responsible insurance companies except upon paying the increase in the fire insurance rate over the rate existing at the time of the original occupancy of the demised premises under lease of August 14, 1919. The said lessee, however, shall be at liberty to under-let the said premises, in whole or in part, but such subletting or underletting shall in no manner or form impair or diminish the liability of the tenant hereunder, provided, however, that if the manner in which said premises are used by such sub-lessee or under-lessee shall increase the fire hazard and cause an increase in the rate of insurance in excess of the rate established at the time of the original occupancy of the building under lease of August 14, 1919, the lessee shall pay such excess fire insurance rate, as additional rental, and the lessor shall have all rights for the recovery of same as herein provided for the recovery of rent.

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The lessee shall keep the interior of the demised premises in as good repair as the same may be at the time of the original occupancy under lease dated August 14, 1919 (reasonable wear and tear and damage by the elements excepted). The lessee, however, shall not make any structural repairs or improvements without the written consent of the owner of said premises, and if consent is given, said structural repairs and improvements are to be made in a good workmanlike manner, in accordance with the plans and specifications of a competent architect or engineer, and in compliance with the rules, regulations and orders of all municipal, State and Governmental departments.

On the surrender of the demised premises, the lessee agrees to repair the floor of the demised premises so as to remove holes cut in the floor since the original occupancy under lease of August 14, 1919, also to replace on the Nineteenth Street side of the said premises the side wall that has been broken through, and to remove the concrete foundation placed in the demised premises to support machinery.

The said lessor or the owner shall have the right to enter the demised premises at reasonable hours in the day-time to examine the same or to make such repairs, alterations or additions that it shall deem necessary for the preservation or restoration of the said premises or for the safety or convenience of the occupants thereof, and also in the case of the owner to exhibit the said premises at any time during the last three months of the said term from ten o'clock in the morning to five o'clock in the afternoon (Sunday excepted) and to display "To Let" and "For Sale" signs; if the said premises shall become vacant during

Lease.

the said term the said lessor may enter the same at its option and relet them and receive and apply the rent so received to the payment of the rent due by these presents.

The said lessee further agrees at the expiration of the demised term to yield up the peaceable possession of the demised premises to the owner; to pay during the demised term the water rent charges which may be assessed upon the demised premises as additional rent when the same shall fall due; and to pay in like manner any excess fire insurance premiums if, because of the conduct of the business upon the demised premises, as herein mentioned, the cost of fire insurance thereon shall be increased above the rate existing at the time of original occupancy under the lease dated August 14, 1919; and if the said lessee shall fail to pay the water rents and the said increased cost of fire insurance, the said lessor may recover the same upon demand or evict the said lessee as in other cases of non-payment of rent.

The lessee shall comply with all the regulations and requirements of the Building Department and the Board of Health of the City of Newark in so far as they apply by reason of the occupancy of the lessee, and with the regulations and requirements of every public body exercising control over the demised premises in so far as they apply by reason of the occupancy of the lessee, and shall do or cause to be done every matter or thing whatsoever in and about the demised premises which now or hereafter may become obligatory upon the lessor to do because of the requirements of any rate, regulation or order made pursuant to lawful authority, or which otherwise may be required by law, in so far as

they apply by reason of the occupancy of the lessee; and shall further comply, in the conduct of its business, with the requirements of the Board of Underwriters or insurance companies writing risks against loss by fire in the City of Newark, to procure the carrying of policies of insurance upon the demised premises at a minimum cost. It is further agreed between the parties hereto that all interior repairs to the said premises shall be made at the cost and expense of the lessee, excepting the roof of said building, the repairs to which shall be made and paid for by the lessor.

The lessee shall keep the sidewalk in front of and surrounding the demised premises clean and free from snow and ice or other obstructions.

It is further understood and agreed that the lessee shall have the right to repaint the outer walls of said demised premises, and to erect on said building suitable moveable advertising signs, to be removed at the end of the occupancy. No lettering to be printed on the building itself.

This lease is made subject to any and every mortgage which the owner may place upon the demised premises during the term of the demise in substitution of or addition to any mortgage now encumbering the same, and the said lessee agrees, upon request, to execute proper legal instruments postponing the within lease to the lien of any such mortgage or mortgages, which said mortgage or mortgages, however, shall not exceed seventy per cent. of the value of the land and buildings.

If at any time during the term herein demised the lessee shall become bankrupt, or shall compound its debts or assign over its estate or effects for the payment thereof, or if any execution shall

issue against it or any of its effects, which shall remain unsatisfied for five days or which shall not be stayed, or if a receiver or trustee shall be appointed over its property, or if this lease shall by operation of law devolve upon or pass to any person or persons other than the said lessee, or its successors or assigns, except as hereinbefore mentioned, then and in either of such cases this lease shall, at the option of the lessor, cease and come to an end three days after notice of such election shall be sent to the said lessee, by mail, addressed to the premises herein demised with the proper postage prepaid.

The said lessee further agrees to carry on the said premises general liability insurance, at its own cost and expense.

It is understood and agreed between the parties hereto that in the event of no heat being required by the lessee, the lessee will take the necessary precautions to prevent freezing of the steam heating plant, water pipes, toilets, etc. throughout the demised premises; and if requiring heat, which is to be furnished at its own cost and expense, in any portion of the demised premises, that the same caution will be exercised as to damage from freezing in any unheated portion of the building.

The lessor agrees that upon the payment of the rent reserved herein, and complying with all the terms and conditions herein contained, the lessee shall have the quiet and peaceable possession of the demised premises during the term of this lease.

It is expressly agreed between the parties hereto that the lessee will not leave the premises unoccupied without providing a watchman or caretaker for the same.

Lease.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be duly signed, sealed and attested the day and year first above written.

NEW JERSEY ALUMINUM COMPANY,

By JAMES C. COLEMAN,
President.

Attest:

G. A. KRUTTSCHNITT,
Secretary.

CHARMS COMPANY,

By W. W. REID, JR.,
President.

Attest:

E. L. SCHOONOVER,
Cashier.

Affidavit of S. Willard Coleman.

ESSEX COUNTY CIRCUIT COURT.

NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff,* *vs.* CHARMS COMPANY, a corporation, *Defendant.*	*Action at Law.* *Affidavit of S. Willard Coleman.*

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

S. WILLARD COLEMAN, being duly sworn upon his oath according to law, deposes and says that he is Treasurer of the plaintiff company, New Jersey Aluminum Company, and has acted in that capacity during the times mentioned in the complaint.

Deponent further says that in accordance with a provision of the lease the defendant paid the increased fire insurance premiums above the rate which existed on August 14, 1919, up to the year 1927. That the average rate of insurance for the year 1919 was .6262, which was gradually increased, and that the rate for the year 1926 was $1.16. That on March 1, 1927, by reason of the condition of the said premises as maintained by the defendant, the rate was increased over the year 1926 from $1.16 to $1.554, making an increase over the rate existing in 1919 of .9278. That the insurance carried on said premises at that time amounted to ninety thousand dollars ($90,000.00), fifteen thousand dollars ($15,000.00) in the Massachusetts Fire and Marine Insurance Company, sixty-five thousand dollars ($65,000.00)

in the Alliance Insurance Company and ten thousand dollars ($10,000.00) in the Newark Fire Insurance Company. That the same amount of insurance in the same companies as hereinbefore stated was carried for the year 1927, so that there became due to the plaintiff under the terms of said lease .9278 on ninety thousand dollars ($90,000.00), equalling eight hundred and thirty-five dollars and two cents ($835.02). The plaintiff immediately notified defendant of the increase in premium and made demand therefore upon the defendant.

The defendant wrote to the plaintiff on March 8, 1927, in reference thereto, a true copy of which said letter is hereto annexed and made a part hereof. The detailed information requested by the defendant in that letter was submitted to it by this deponent and he received another letter from the defendant dated March 18, 1927, a true copy of which is hereto attached and made a part hereof.

This deponent subsequently, at the request of the defendant, made application to the rating bureau for a lower rate on said premises, which application was denied and the rate as originally fixed by the rating bureau on said premises, to wit, $1.554, is still in existence.

The full sum of eight hundred and thirty-five dollars and two cents ($835.02) for the increased premium of said fire insurance is still due, no part thereof having been paid by the defendant, and there is now due to the plaintiff, including said item and the items due for rent as set forth in the complaint, a total of four thousand five hundred and one dollars and sixty-eight cents ($4,501.68) with interest, no part thereof having been paid by the defendant.

Affidavit of S. Willard Coleman.

This deponent further says that prior to the lease annexed to the affidavit submitted herewith dated November 1, 1923, the defendant occupied the same premises by sub-letting from the plaintiff's former tenant and that in the month of March, 1922, the defendant company advised this deponent that the roof required some repairs, as per letter under date of March 20, 1922, hereto annexed and made a part hereof. That subsequently, in the month of May, 1922, and before the execution of the lease sued upon in the complaint, a new roof was constructed on said premises, which the plaintiff paid for, by Conrad Oechler, who is in the roofing business with his place of business at Irvington, N. J.

Deponent further says that from the time of the execution of the new lease, to wit, November 1, 1923, until the time of the starting of the present litigation he never received any complaints, oral or written, from defendant in reference to leaks in said roof or any repairs required to leaks in said roof or any repairs required to it.

Deponent further says that the defendant moved from said premises on or about the first of May, 1927, but continued to pay the rent due under said lease for the months of May, June, July, August and September. That the payment of said rent was made without objections on the part of the defendant and without any contention or claim such as is now inserted in the answer and counter-claim filed in this suit.

S. WILLARD COLEMAN.

Sworn and subscribed to before me
this 26th day of January, 1928.

RICHARD LUM,
Notary Public of N. J.

Affidavit of S. Willard Coleman.

CHARMS COMPANY
699-711 Springfield Ave., Newark, N. J.

March 8th, 1927.

New Jersey Aluminum Co.,
911 Essex Building,
Newark, N. J.

Gentlemen:

We are in receipt of your invoice of March 2nd, in the amount of $835.02 covering increase in rate of insurance on building occupied by the Charms Company.

We are quite surprised to receive invoice showing such an excessive rate as compared to the increase as noted on invoice rendered last year. Before approving same for payment we must request detailed information, which, off-sets this exorbitant increase on the property.

Very truly yours,

CHARMS COMPANY.

(Signed) E. L. Schoonover,
General Office Manager.

ELS:IS

Affidavit of S. Willard Coleman.

CHARMS COMPANY
699-711 Springfield Ave., Newark, N. J.

March 18th, 1927.

Mr. S. Willard Coleman,
809 Essex Building,
Newark, N. J.

Dear Sir:

We are returning herewith schedule from the Rating Bureau, which, sets forth the increase in rate on the insurance of the building occupied by the Charms Company at the present time. In as much, as we are vacating the building within the next 10 days, and, as all manufacturing will be discontinued as of the 19th, we feel that the rate in question should not be applied after the 19th.

We therefore, suggest having the Rating Bureau make another survey, for the purpose of giving you a lower rate at which time you will forward us credit to offset the high rate from March 19th.

Very truly yours,

CHARMS COMPANY.

(Signed) E. L. SCHOONOVER,
General Office Manager.

ELS:IS

Affidavit of S. Willard Coleman.

CHARMS COMPANY
699-711 Springfield Ave., Newark, N. J.

March 20, 1922.

Mr. Jas. C. Coleman,
31 Clinton Street,
Newark, N. J.

Dear Sir:

This is to advise you that the roof on building located at Springfield Ave., cor 19th Street leaks in several places.

We are also notifying Mr. Kruttschnitt to this effect.

It will be necessary that this roof be repaired at once as it causes considerable inconvenience and damage every time it rains.

Yours very truly,

CHARMS COMPANY.

(Signed) W. W. Reid, Jr.,
Receiver.

WWR:F

ON MOTION TO STRIKE OUT AND ENTER JUDGMENT.

DEFENDANT'S AFFIDAVITS.

Filed February 4, 1928.

ESSEX COUNTY CIRCUIT COURT.

NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff,* *vs.* CHARMS COMPANY, a corporation, *Defendant.*	*Action at Law.* *Affidavit.*

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

WALTER W. REID, JR., being duly sworn according to law, upon his oath deposes and says:

1. I am president of Charms Company, the above-named defendant. In November, 1923, Charms Company executed a lease with the New Jersey Aluminum Company, the above plaintiff, whereby Charms Company was to occupy premises known as #699-711 Springfield avenue, Newark, New Jersey, for the term of five (5) years ending November 1, 1928. The said lease provided that Charms Company, the lessee, was to take over the said buildings in the condition they were at the time the said lease was executed, and that all interior repairs to the said premises were to be made at the cost and expense of the lessee, except the roof of said buildings, the repairs to which were to be made and paid for by the lessor.

2. At the beginning of the term of said lease, the roof was not watertight, but Charms Company expected that the lessor would make the necessary repairs to the roof as contemplated in the covenant in the lease which required the lessor to do so. From time to time I observed that the buildings were gradually becoming damp. I made inquiry of the Works' Manager, Ray W. Krout, who informed me that this was due to the leaky condition of the roof. I directed him to inform the lessor of this fact, and was informed by Mr. Krout that he had made numerous complaints to the lessor in order to have the roof put in proper condition. Mr. Krout told me that these complaints had sometimes been made in writing, and more often by telephone to Mr. Kruttschnitt, the secretary of plaintiff company.

3. Notwithstanding these communications, conditions became worse, but were tolerated by the defendant company, which continued its occupancy of the said premises because its only alternative was to vacate and find suitable quarters, and it was feared that such a change would subject the Charms Company to a loss more serious than was being sustained through its occupancy of the said premises which had become untenantable as a result of excessive dampness which permeated the entire plant.

4. The proper manufacture of candy requires that the atmosphere be free of dampness or humidity. The presence of these elements is necessarily detrimental and generally fatal to the production of this kind of merchandise. In order to insure correct working conditions in said premises, Charms Company installed a dehumidifying system at a cost of something like $20,000. In

spite of this, the water which penetrated through the roof allowed dampness to invade the conditioning rooms and the operation of the air-drying apparatus became entirely ineffective. The result was that large quantities of candy in all stages of production were spoiled, and the business of Charms Company was seriously interfered with due to its inability to fill existing orders.

5. Charms Company was reluctant to vacate the said premises because in addition to the installation of the dehumidifying system, it had also gone to great expense to make other improvements in said premises, among which were the installation of a 2,500-lb. capacity Otis electric elevator; a new boiler and stack; fireproof brick partitions; improved toilet facilities; a complete replacement of old electric wiring, and light system, with a modern system of conduit wiring; the extension of the electric, steam, gas and water service to all parts of the building; the installation of fire doors, and the re-enforcement of floors in various parts of the building. All of these improvements had been made at great expense by Charms Company in contemplation of its continued occupancy of the said premises. But in the early part of 1926, it became more apparent to me that the said premises were unsuitable for the purpose of manufacturing candy; in fact, had become untenantable. The Charms Company decided to acquire a new plant rather than to continue to subject itself to the severe losses encountered in the said premises, and about May, 1927, conditions in said premises became so progressively worse, that Charms Company was forced to vacate and move elsewhere, at which time it was compelled to purchase other premises

because it could not effect a suitable leasehold. The removal of its plant equipment and machinery, the transportation of them to new quarters and reassembling the same at such a time, greatly interrupted Charms Company's business, and thereby increased its loss considerably.

6. Charms Company continued to pay rent of the said premises for the months of May, June, July, August and September, and during that time made earnest efforts to rent said premises, but were unable to do so on account of the damp condition of the premises, and in the latter part of September, upon consulting counsel, was advised that its eviction from said premises constituted a termination of said lease and relieved it of the liability for the payment of rents subsequent to the date it vacated the said premises.

WALTER W. REID, JR.

Subscribed and sworn to before me
this 31st day of January, 1928.

CHAS. S. SMITH,
A Master in Chancery of N. J.

May 9, 1924.

New Jersey Aluminum Co.,
809 Essex Building,
Newark, N. J.

Gentlemen:

Quite a lot of water, every time there is a rain, leaks in through the side walls of the building, causing us considerable loss and inconvenience.

It is my understanding of our lease with you that this matter is for you to take care of.

I trust that you will do so at your earliest convenience.

Yours truly,

President,

WWR:JC CHARMS COMPANY.

ESSEX COUNTY CIRCUIT COURT.

NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff,* vs. CHARMS COMPANY, a corporation, *Defendant.*	*Action at Law.* *Affidavit.*

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

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

1. I am works manager of Charms Company, and have been employed by said defendant company for the last nine years.

2. The roof of the factory building owned by the New Jersey Aluminum Company, situated at Springfield avenue and Nineteenth street, Newark, N. J., formerly used by the Charms Company, is in a very leaky condition, causing water to run down the side walls onto the floors and causing the building to be damp, the floors to be water-soaked and the building untenantable. This

condition is not a new one, and has existed for a period of five years, to my knowledge, and never has it at any time been fully rectified. I knew of this condition for five years previous to our vacating the building because of my daily attendance there in the capacity of works manager, and I know that this condition has continued to exist since we vacated the building, as I have visited the building on an average of more than once a week during this period.

3. During the last five years of the Charms Company's occupancy of the building, it was necessary for them to make provisions to take care of the inflowing water due to the leaky roof whenever there was a heavy rainstorm or a severe thaw. On such occasions, the water would run down the side walls and across the floors. It was the Charms Company's custom to put tin baffles on the walls to deflect the water as much as possible into large kettles and to mop up the water not caught in this manner so as to prevent its damaging merchandise and material in process and in stock. On many occasions when, during the night, there was not sufficient force on hand to take care of this condition, they have had goods damaged by the water coming in from the leaky roof. This condition was so chronic that the supervisors in charge of the various floors were instructed where not to locate material in process and tarpaulins were purchased to throw over large piles of stock so as to prevent loss during the night or over the week end. The Charms Company expended, during this period, a considerable amount of money and labor in taking care of this condition, and repiling and relocating stock so as to prevent possible loss.

4. A damp or humid condition hampered the manufacturing process of the Charms Company to such an extent that they went to an expense in excess of $20,000 for the installation of a dehumidifying system. The leaky condition of the roof allowed water to get into the conditioning room and the operation of this air drying system was nullified by the incoming water.

5. In the winter time, I have seen formations of ice at the top of the leaders, weighing fully five or six hundred pounds, which formed there because of the inability of the leaders to carry away the water from the roof. This condition became so critical at times as to be a considerable hazard to passersby. In the summer time I have seen this inability of the leaders to carry away the water cause a stream of water to spurt out practically to the middle of Nineteenth street, necessitating passersby to cross the street to avoid it.

6. During the last five years I have constantly called this condition to the attention of Mr. Kruttschnitt of the New Jersey Aluminum Company in an attempt to get it rectified. I wrote him on several occasions, but most of my complaints were made through telephone communications, as Mr. Kruttschnitt's home is but a short distance from the factory. For quite a period it was impossible to get any action, but finally the New Jersey Aluminum Company had some roofers work on the roof and the leaders, but the repairs made never entirely remedied the condition.

7. Attached to this affidavit are copies of letters addressed to Mr. G. A. Kruttschnitt, dated September 24, 1924; October 27, 1924; October

26, 1925; November 27, 1925, and one addressed to the New Jersey Aluminum Company, dated September 7, 1927, subsequent to the date Charms Company vacated the said premises, and prior to the commencement of this suit. In each of these letters complaint is made of the condition of the roof of said premises, and in the letter of September 24, 1924, attention was directed to the fact that merchandise was getting wet, and that relief was necessary. In the letter of September 12, 1927, addressed to deponent, a copy of which is annexed hereto, Mr. Kruttschnitt refers to my notice concerning the roof and leader "at the factory," and says that they had tried to have this work done during the winter of 1926. The said letter concludes with the statement that the matter was forgotten by them "and not having heard anything more about it from you, we supposed it was not bad." During the winter of 1926-1927 and until the Charms Company vacated the said premises I repeatedly called Mr. Kruttschnitt on the telephone and complained about the condition of the leaders and roofs of the buildings because the inadequacy of the leaders caused large quantities of water to collect upon the roofs, and this in turn would leak through the side walls of the buildings into the premises.

8. The Charms Company installed fireproof partitions around three of the stairways in the building, making them comply with the requirements of the State Labor Department. They also installed a 2,500-lb. capacity Otis electric elevator and elevator shaft, the building having no elevator when they took it over.

9. There was also installed at the expense of the Charms Company, a new boiler and stack and

fireproof brick partition in the one-story building in the rear of the premises, as the old boiler installation was condemned by the State boiler inspectors.

10. The toilet facilities were greatly increased and bettered at the expense of the Charms Company.

11. The electric lighting system, when the Charms Company took over the building, was very inadequate and of the old knob and tube system, which was entirely replaced with an up-to-date system wired in conduit.

12. Electric power, steam, gas and water were run to all parts of the building.

13. Fire doors were installed in accordance with the State requirements.

14. Two floors were reinforced so as to give them additional carrying capacity.

15. I believe it is a conservative estimate to say that the Charms Company expended $25,000 in improving the building, which improvements the owner of the building will enjoy after the termination of the Charms Company's lease.

16. In the affidavit of S. Willard Coleman, submitted by plaintiff, reference is made to application to the Rating Bureau for a lower rate on said premises, which application was denied, and that the present rate of 1.554 is still in existence. I have been informed by the Rating Bureau, according to a letter dated February 2, 1928, a copy of which is annexed hereto, that an application was made, and that it was acted upon, and a new rate was issued, and that the rate now applying to the said premises is $3.00

per annum without co-insurance, and $2.25 per annum with the 80% co-insurance clause.

17. The defendant company was compelled to vacate said premises in May, 1927. This was the beginning of the busy season in the candy trade, and such vacating interfered with the production of merchandise and prevented the filling of orders, and resulted in a reduction of the volume of business and a lessening of profits. Even though business conditions were good, Charms Company suffered a loss of $4,000.00 during 1927 for the reasons stated, and approximately $10,502.00 was lost through merchandise ruined by moisture during the last five years, as shown in statement marked "Schedule A" annexed hereto.

18. Charms Company continued to pay rent after it vacated said premises until the month of October, 1927. It did not know that its eviction relieved it of its obligation to pay rent, and, therefore, tried to mitigate its losses in this respect by renting the premises to a sub-tenant, and also to lessen the cost of excess insurance premiums, as it had been informed that the rate on a vacant building is greater than on one that is occupied.

19. On several occasions, especially toward the last part of 1925, Mr. Kruttschnitt came to the office of Charms Company, generally to complain about conditions arising out of the occupancy of the premises. At these times Mr. Kruttschnitt invariably remarked that the expense of maintaining the premises, such as the payment of taxes, interest on the money invested, etc., made the return from rentals so small that it did not pay the New Jersey Aluminum Company

to rent it to the Charms Company; that they were practically getting nothing out of the lease, and that the Aluminum Company could do better if it were able to change the premises over into stores and apartments. At all times Mr. Kruttschnitt allowed us to understand that the Aluminum Company was not at all pleased with Charms Company as tenants. These conversations generally took place in the presence of Mr. Reid, the president of Charms Company, and I honestly believe that the plaintiff by its neglect to keep the roof watertight, intended to render the premises untenantable, and thereby cause the Charms Company to vacate, and so re-gain possession in order that the Aluminum Company might obtain a greater rental than was payable under the Charms Company's lease. In this connection Mr. Kruttschnitt also mentioned that he desired to get possession of the vacant lands included in the Charms Company's lease, as he had plans for a large garage which would bring him in a substantial income, and that, therefore, plaintiff meant to evict the Charms Company and regain possession, inasmuch as renting conditions during 1926 and the early part of 1927 were favorable to the obtaining of increased rent. The damp condition of the premises, however, have made it impossible to obtain a new tenant.

RAY W. KROUT.

Subscribed and sworn to before me
this 3rd day of February, 1928.

CHAS. S. SMITH,
A Master in Chancery of N. J.

SCHEDULE A.

1923

Damage to 5 oz. cans, including cost of inspection, re-handling, loss of candy, loss on cans, overhead, loss in profit on approximately:—	
36,000 cans	$750.00
4,000 lbs. candy damaged by water which showed a complete loss	400.00
Labor of making candy, filling cans, handling, re-handling, carting cans to dumps, indirect labor and overhead	320.00
Loss due to water damaging pop items	300.00
Damage to machinery and equipment, repairs, maintenance and mechanical labor	275.00
General factory labor expended in moving material, catching and mopping up water leaking in from the roof; loss due to the ineffective operation of our dehumidifying system because of the water admitted through the leaky roof; also additional damage to goods; slowing up of production of automatic machines, delay in manufacture	625.00
	$ 2,670.00

1924

Damage to 8,000 Charms Kiddie boxes, 7,500 boxes lost, 80 re-shipping cartons	$145.00
Damage to 7,500 small glassine bags Dainties; loss of bags, cartons and candy	275.00
7,000 boxes pops damaged, candy lost, loss labor, re-wrapping, re-inspecting, and re-handling; loss in overhead, profit, etc.	500.00
3,000 lbs. Penny Pops in bulk partially damaged, loss in candy, labor, cost of re-inspecting, re-handling, etc.	180.00
Damage to equipment, mechanical and maintenance labor expended; general factory labor expended in taking care of incoming water, relieving roof condition, extra work on equipment because of water and dampness	260.00
Damage to starch in basement	100.00

General loss through ineffective operation of dehumidifying system, causing loss in production, increasing overhead, reducing profit, etc.	475.00	
		$ 1,935.00
Loss for 1923 and 1924		$ 4,605.00

1 9 2 5

2,400 boxes 5c Pops partially damaged, 200 shipping cartons lost, 1,975 boxes lost, wrappers, labels, sticks, candy, including re-inspection, re-handling	270.00	
Damage to pop sticks from water leaking from roof, 100 cartons, 9,000 sticks to carton	275.00	
Loss to pops in process, including loss of labor, candy, material, including re-inspecting and re-handling	320.00	
Loss to unpacked candy on cooling tables in Dainty Department, 750 lbs.	87.00	
Damage to Peanuts stored in basement	300.00	
Damage to equipment, mechanical and maintenance labor expended; general factory labor expended in taking care of incoming water, relieving roof condition, extra work on equipment because of water and dampness	275.00	
General loss through ineffective operation of dehumidifying system causing loss in production, increasing overhead, reducing profit, etc.	570.00	
Loss for 1925		$ 2,097.00

1 9 2 6

840 boxes 5c DeLuxe Pops damaged, loss of cellophans paper, candy, labor, other material	$280.00	
700 shipping cartons in basement damaged	70.00	
Sticks damaged, 75 cartons	220.00	
2,500 boxes Golf balls, loss of candy labor shiping cartons, waxed wrappers, sticks, other material, cost of re-handling, re-inspecting, etc.	380.00	
60 cases Charms, re-inspected with partial loss, loss to candy, labels, foil wax-paper, cartons, shipping, cases, cost of re-inspecting, re-handling, etc.	160.00	

Damage to equipment, mechanical and maintenance labor expended; general factory labor expended in taking care of incoming water, relieving roof condition, extra work on equipment, because of water and dampness	250.00
General loss through ineffective operation of dehumidifying system causing loss in production, increasing overhead, reducing profit, etc.	670.00
Loss for 1926	$ 2,030.00

1927

Damage to pops and other items in process, loss of candy, loss of re-handling, re-inspecting, material loss, increase in overhead and reduction of profits	$720.00
Damage to equipment, mechanical and maintenance labor expended; general factory labor expended in taking care of incoming water, relieving roof condition, extra work on equipment because of water and dampness	350.00
General loss through ineffective operation of dehumidifying system causing loss in production, increasing overhead, reducing profit, etc.	700.00
Loss for 1927	$ 1,770.00

Loss for 1923	$2,670.00
Loss for 1924	1,935.00
Loss for 1925	2,097.00
Loss for 1926	2,030.00
Loss for 1927	1,770.00
Total	$10,502.00

Affidavit of Ray W. Krout.

September 24, 1924.

Mr. G. A. Kruttschnitt,
43 Harrison Place,
Irvington, N. J.

Dear Sir:

In reference to my conversation with you, the roof on the foundry is in very bad shape and as we are carrying in the foundry merchandise that has considerable value it is essential that this roof be fixed before the winter sets in.

We have had considerable damage because of merchandise getting wet in the foundry and it is essential that we get relief very soon.

Yours truly,

RWK:JC Work's Manager.

October 27, 1924.

Mr. G. A. Kruttschnitt,
43 Harrison Place,
Irvington, N. J.

Dear Sir:

I have called your attention several times to the need of a new roof or a repair on the roof of our foundry building.

We have had considerable loss, because of this roof being in such a leaking condition, for some time and have stood this loss ourselves. However, in the future, we will be justified in charging any damages that we might incur through the leaking of this roof up to the rent due you. Kindly give us some action so that this will not be necessary.

In reference to the attached circular, we have considerable seepage of water through the walls

of the basement. This is exceptionally bad when we have heavy rains or when we have snow which is followed by a thaw. We, at times, have had as much as five inches of water due to this. I believe this could be remedied by you if some kind of a cement, similar to that advertised in the enclosed folder, would be applied to the basement walls as high as the ground level.

Kindly let me know at once in reference to this.

Yours truly,

October 26, 1925.

Mr. Herbert Kruttschnitt,
32 Harrison Place,
Irvington, N. J.

Dear Sir:

The roof of the foundry building leaks quite badly. As this was fixed only recently, you no doubt have some kind of a guarantee from the man who did the job.

I wish you would get after him to get it in shape before the winter sets in.

Yours truly,

R. W. Krout/d Work's Manager.

Affidavit of Ray W. Krout.

November 27, 1925.

Mr. Herbert Kruttschnitt,
32 Harrison Place,
Irvington, N. J.

Dear Sir:

I wrote you sometime ago about the condition of the foundry roof. This leaks very badly and as we are now using the foundry for manufacture and are working people in there, it makes it very inconvenient.

Kindly see that this is taken care of immediately.

Yours truly,

R. W. Krout/d Work's Manager.

September 7, 1927.

New Jersey Aluminum Company,
809 Essex Building,
Newark, N. J.

Att'n. Mr. Coleman

Gentlemen:

We have constantly complained about the condition of the roof at the Springfield Avenue factory. Whenever it rains there is a considerable quantity of water that runs down the walls and on the floors, which, if allowed to lay there, would rot the floors out.

This condition was never at any time fully rectified and is more critical now that we are not manufacturing in the building and are not in a position to give it immediate attention during and after each rainstorm.

This also causes a damage to some of the equipment we still have in the factory. Kindly see that this is taken care of before additional damage is done.

Yours truly,

CHARMS COMPANY.

R. W. Krout/d Works Manager.

G. A. KRUTTSCHNITT
43 Harrison Place, Irvington, N. J.

Sept. 12th 1927.

R. W. Krout, Mgr. Charms Co.
Newark, N. J.

Dear Mr. Krout

Glad to have you remind us of the roof leader at the factory.

We tried to have this work done during the winter of 1926 but the roofers said it could not be done properly in cold weather or some other fool excuse. In the meantime the matter was forgotten by them and not having heard anything more about it from you, we supposed it was not so bad. Mr. Lawrence of Irvington will give estimate tomorrow.

Yours very truly,

G. A. Kruttschnitt.

Affidavit of Ray W. Krout.

THE SCHEDULE RATING OFFICE OF N. J.
31 Clinton Street, Newark, N. J.

Newark, N. J., February 2, 1928.

Charms Company,
c/o Mr. Charles S. Smith,
Counselor at Law,
Room 918 Prudential Bldg.,
Newark, New Jersey.

Gentlemen:

Att: Mr. Ray W. Krout, Works Manager

Re:—Charms Company, 699-705 & Rear Springfield Ave., Newark, New Jersey, File #1557.

In accordance with the request of your Attorney Charles S. Smith, I hand you herewith my reply to two questions submitted by him.

Question #1 Whether upon application, or notice, that Charms Company had vacated premises at #699-711 Springfield Avenue, Newark, New Jersey, you would inspect and re-rate the premises as an insurance risk, notwithstanding that a policy or policies of insurance bearing a specified rate were then in existence?

My answer to the above question is that upon notice in writing that Charms Company had vacated the premises in question, it would be the duty of this office to inspect and promulgate new fire insurance rates thereon. The existence of policies of insurance on the premises at the time of re-rating would have no bearing upon our action.

Question #2 Whether or not application had been made at any time since March, 1927, for an inspection and re-rating of said premises and if so, whether such application was denied?

My answer to this question is that we have record of an application for re-rating having been filed under date of July 29th. This application was not denied, but on the contrary was accepted and on October 7 a new rate was issued. A copy of the Rate Card showing this rate is enclosed. You will note that the rate now applying to this location is 3.00 per annum without co-insurance and 2.25 per annum with the 80% co-insurance clause.

General word of explanation in regard to the practice of this office in accepting applications for re-inspection and re-rating may be in order. If the office is notified of a change in occupancy in writing, it is our invariable practice to list the location for inspection and verification of the changes in conditions. If upon inspection, changes are noted, a new rate is then published forthwith, contemplating the new condition. An application for re-rating on account of change in occupancy may be made by any person having knowledge of such a change.

Trusting that the foregoing will explain our position to you, we are

Very truly yours,

J. E. T. McClellan, Supt.
Rating and Inspection Dept.

6-McC-2 Enc.

Affidavit of Leo Flaster.

Card Attached:—

699-705 & Rear Springfield Ave. Newark

	Without Co-Ins.	With 80% Co-Ins.
N. J. Aluminum Co., owner;		
brick 3 and 1 story (building)..	3.00	2.25
Vacant mfg. plant	3.00	2.25

Note—Specific amount to be insured on and in each bldg.
Note—Change in occupancy
Revision—October 7, 1927 Bulletin No. 1357
File No. 1557 Map 5, page 520
This Card No. 37566 replaces 3 cards, Nos. 33989, 33989A and 33989B

STATE OF NEW JERSEY,
COUNTY OF ESSEX.

I, Leo Flaster, of full age, being Manager of the Factory Department of the Real Estate Firm of Feist & Feist, being actively associated in the commercial real estate business for 14 years, being duly sworn according to law, upon my oath depose and say:

That on the 6th day of December, 1927, I visited the factory owned by the New Jersey Aluminum Company, at Springfield Avenue and 19th Street, Newark, N. J. and inspected the inside of the building and found the following conditions,—

The roof was leaking very badly in three places in the front of the building and two places in the rear of the building; water was running down the side walls at these locations and pools of water had formed on the 3rd, 2nd and 1st floors, watersoaking the floors at these points

causing them to rot and make the building damp and untenantable.

The general cleanliness of the building was good and in my estimation cleaner than at least 80% of the buildings that have been in the market for rental or sale in my experience.

I found considerable glass broken on the first floor but in my estimation it would be foolish to replace this until the building was occupied. This condition is quite commonly found in vacant buildings. It is to be expected and in my estimation does not detract from the rental possibilities of the building.

With the exception of the roof and the broken glass, I believe the general condition of the building is at least as good if not better than when I rented it to the Charms Company. The only apparent signs of deterioration were the floors and this last in my estimation is no more than the result of eight years of normal wear and tear from a business such as the Charms Company's business.

The exterior of the building when I rented it to the Charms Company was covered with large unattractive lettering put on by the McGann Company. I find at this time that the exterior of the building has been painted and its general appearance is better than when taken over by the Charms Company.

I find that the interior of the building has practically been painted throughout and that the general apperance of the interior is at least as good if not better than when I rented it to the Charms Company.

In my opinion the building is being allowed to deteriorate very rapidly because the leaky roof condition is being allowed to continue and

it was apparent to me that this condition has been going on for some time as the side walls where the leaks occur are discolored to a great extent which would be caused by this continued condition.

The building at this time was very damp from the water admitted through the leaky roof and was in my estimation in an untenantable and unrentable condition due entirely to the leaky roof.

I also found that the following improvements had been made to the building during the Charms Company's occupancy,—

A fireproof partition had been built around the stairways; a modern electric elevator and elevator shaft had been installed; there having been no elevator in the building before; floors had been reinforced on two floors so that they could carry additional weight; a new high pressure boiler had been installed.

(Signed) LEO FLASTER.

Subscribed and sworn to before me
this 15th day of December, 1927.

EMMA LAUTENSCHLAGER,
A Notary Public of New Jersey.

STATE OF NEW JERSEY,
COUNTY OF ESSEX.

I, Leo Samuels, of full age, being duly sworn according to law, upon my oath depose and say:

That during the month of Aug. 1927 I made an agreement with the Charms Company to act as caretaker of the building they had vacated which is owned by the New Jersey Aluminum Company, situated on the corner of Springfield

Avenue and Nineteenth Street, Newark, N. J.; that during the period from Aug. up to the present time the roof of said building has been in a very leaky condition, water leaking through the roof and running down the sidewalls in five different places to such an extent that large puddles of water would form on all three floors, causing the floors to be watersoaked and the building to be very damp. The water leaked through the roof to such an extent that I placed large kettles to catch some of the water which was deflected off the side walls by tin baffles which had been put there by the Charms Company and that during a severe rainstorm these kettles had to be emptied very frequently, but at best they only would catch a part of the water.

During the month of September I showed a representative of the Royal Manufacturing Company of Pennsylvania through the building as a prospective tenant. He stated that he could not consider renting the building because of its dampness. I explained to him that the building was not normally damp, that the damp condition was due to the leaky roof, and was in evidence now because it had rained for two or three days previous. He stated that they carried a number of pulverized drugs which if stocked in a damp place would cake and become unsalable and that they could not consider a building that had any possibility of dampness. It is my opinion that with this exception he was favorably inclined toward the building.

I have repeatedly called this condition of the roof to the Charms Company and have been told by Mr. Krout that he had called it to the attention of the owner of the building and had been unable to get any action.

Affidavit of Louis Safirstein.

To my knowledge, no attempt to remedy this condition has been made while I have been in charge of the building and it is my opinion that the building has deteriorated from this condition and will continue to deteriorate until it is remedied.

I have shown others through the building who have commented on the condition of the water on the floors and in my opinion they have not been favorably impressed because of this condition as the building is, in my estimation, untenantable and that the likelihood of its being rented is greatly reduced because of this condition.

With the exception of this condition and the fact that there are several windows broken, I believe the building to be in as good a condition as could be expected of an unoccupied building. I have heard no adverse comments by any prospective tenants whom I have shown through the building as to its condition outside of the condition of the leaky roof and the broken windows.

(Signed) LEO SAMUELS.

Subscribed and sworn to before me
this 12th day of December, 1927.

ELBERT L. SCHOONOVER,
A Notary Public of New Jersey.

STATE OF NEW JERSEY,
COUNTY OF ESSEX.

I, Louis Safirstein, of full age, having been in the employ of the Charms Company for five years, being duly sworn according to law, upon my oath depose and say:

Affidavit of Louis Safirstein.

That on the 2nd day of December, 1927, I visited the factory premises owned by the New Jersey Aluminum Company situated at Springfield avenue and 19th street, Newark, N. J., used by the Charms Company, and inspected the inside of the building and found that the roof was leaking badly in five places; the water running down the side walls, across the floors on the 3rd, 2nd and 1st floors, causing large puddles of water to form and watersoaking the floors at these points. This condition has existed continuously for a period of five years to my knowledge and was never remedied, with the result that while operating as foreman or head checker in this plant, I was compelled to locate the merchandise in process so as to avoid the water that always came in through the roof in case of rain or in the winter time in case of a heavy thaw. In fact, it was my first duty when reporting to work every morning after a rainstorm during the night to go around to see what got wet and I recall many instances where merchandise was spoiled and had to be scrapped because of its getting wet from water from the leaky roof. I also recall that during the day when there was a heavy rainstorm or thaw that I had to detail men to catch the water in pails and to mop it up as it came in so as to prevent it from reaching the merchandise and damaging it. This condition was always a considerable handicap to our operating and a continual source of annoyance and anxiety.

With the exception of the leak in the roof and some broken glass, the building in my estimation was in a very clean and rentable condition.

(Signed) LOUIS SAFIRSTEIN.

Affidavit of Lloyd Croutch.

Subscribed and sworn to before me
this 12th day of December, 1927.

ELBERT L. SCHOONOVER,
A Notary Public of New Jersey.

STATE OF NEW JERSEY,
COUNTY OF ESSEX.

I, Lloyd Croutch, of full age, having been employed by the Charms Company for eight years in the capacity of head porter, being duly sworn according to law, on my oath depose and say:

That during the last five years the Charms Company used their old factory at Springfield avenue and 19th street, Newark, N. J., owned by the New Jersey Aluminum Company, I was constantly called upon to prevent water leaking through the roof from spoiling candy and material on the different floors. I have seen water from the leaky roof run down the side walls and across the floors on all three floors and have seen merchandise that was damaged by this water leaking from the roof.

I have often worked with several other men during a rainstorm, catching the water in kettles and mopping up the water that ran onto the floors. I have also helped to move material out of the way of leaks so as to prevent it from being damaged.

I have often told Mr. Krout of these leaks and he has told me that he was trying to get the owner of the building to fix it, but in my experience the roof has never been free from leaks.

(Signed) LLOYD CROUTCH.

Affidavit of Fred Weise.

Subscribed and sworn to before me
this 29th day of December, 1927.

ELBERT L. SCHOONOVER,
A Notary Public of New Jersey.

STATE OF NEW JERSEY,
COUNTY OF ESSEX.

I, Fred Weise, being of full age, having been in the employ of the Charms Company for eight years as master mechanic, being duly sworn according to law, depose and say:

That on December 5, 1927, I visited the factory premises owned by the New Jersey Aluminum Company at Springfield avenue and 19th street, Newark, N. J., used by the Charms Company, and found the roof leaking badly in five places; water running down the side walls across the floors on the first, second and third floors.

It has been my experience that during the last four or five years every time there was a heavy rainstorm or sudden thaw, the water would back up on the roof and leak through at various places. It has been my duty during this time to go up on the roof to attempt to release this water so as to prevent it from running down the side walls on the inside of the building and damaging the merchandise. In my estimation, the leaders were inadequate for carrying away the roof drains and I have seen water shoot out into the middle of 19th street from the roof because of this condition.

I have also seen large cakes of ice form on the leaders from the overflowing water.

It was my duty to make galvanized iron baffles which were put against the walls so as to deflect the water running down them into kettles.

Affidavit of Elbert L. Schoonover.

I have come in in the morning on several occasions and found that water leaking through the roof had run across the floors of the building and damaged merchandise.

I know that this condition was constantly called to the attention of the New Jersey Aluminum Company, as I have explained this condition to various roofers they sent there to look it over, and I know that the condition was never entirely corrected.

(Signed) FRED WEISE.

Subscribed and sworn to before me
this 12th day of December, 1927.

ELBERT L. SCHOONOVER,
A Notary Public of New Jersey.

STATE OF NEW JERSEY,
COUNTY OF ESSEX.

I, Elbert L. Schoonover, of full age, being duly sworn according to law, upon my oath depose and say:

That on the 14th day of December, 1927, on my own volition, I visited the factory premises owned by the New Jersey Aluminum Company situated at Springfield avenue and Nineteenth street, Newark, N. J., used by the Charms Company. I was very much surprised on entering the building to note the dampness emanating therefrom. Upon walking throughout the building, I noticed that puddles of water of various sizes were on each of the floors in both the front and rear of the building, making the building untenantable. It was also noticed that the flooring was considerably watersoaked and the walls

streaked where the water had leaked through from the roof. As general office manager of the Charms Company I have full knowledge of the leaking condition of the roof for the past three years, and on one occasion called Mr. Coleman of the New Jersey Aluminum Company and advised him of this condition, and to the best of my knowledge this condition was never rectified.

With the exception of the conditions as outlined, the building in my estimation was in a better condition than when the Charms Company rented same from the McGann Company.

(Signed) ELBERT L. SCHOONOVER.

Subscribed and sworn to before me
this 31st day of December, 1927.

LEO SAMUELS,
A Notary Public of New Jersey.

ORDER STRIKING OUT ANSWER AND ENTERING SUMMARY JUDGMENT.

Filed February 7, 1928.

ESSEX COUNTY CIRCUIT COURT.

NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff*, *vs.* CHARMS COMPANY, a corporation, *Defendant.*	*Action at Law.* *Order Striking Out Answer and Entering Summary Judgment.*

This matter coming on to be heard on the application of Lum, Tamblyn & Colyer, attorneys for the plaintiff, to strike out the second paragraph of the defendant's answer upon the ground that it does not constitute a defense to the plaintiff's cause of action, and enter summary judgment for the rent due for the months of October, November and December, 1927; and Charles S. Smith, the attorney for the defendant, having been heard thereon and admitting in open court that the rent for the month of October, 1927, amounting to one thousand one hundred and sixty-six dollars and sixty-six cents ($1,166.66) was not paid, and that the rent for the month of November, 1927, amounting to twelve hundred and fifty dollars ($1,250.00) was not paid, and that the rent for the month of December, 1927, amounting to twelve hundred and fifty dollars ($1,250.00) was not paid, and it appearing to the Court after argument that the said second para-

graph of the defendant's answer does not constitute a defense to the plaintiff's cause of action;

It is on this seventh day of February, nineteen hundred and twenty-eight, on motion of Lum, Tamblyn & Colyer, attorneys for the plaintiff, ORDERED that the second paragraph of defendant's answer be and the same hereby is stricken out, and that judgment be and hereby is entered for the plaintiff, the New Jersey Aluminum Company, a corporation, against the defendant, Charms Company, a corporation, for the sum of three thousand six hundred and sixty-six dollars and sixty-six cents ($3,666.66) and sixty-eight dollars and seventy-four cents ($68.74) interest, making a total of three thousand seven hundred and thirty-five dollars and forty cents ($3,735.40) and costs.

WORRALL F. MOUNTAIN,
Judge.

I hereby consent to the form of the above order.

CHAS. S. SMITH,
Attorney for Defendant.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

44953 NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff,* *vs.* CHARMS COMPANY, a corporation, *Defendant.*	*Action at Law.* *On Order Striking Out Answer.*

Judgment entered February 7, 1928.

Damage	$3,735.40
Costs	66.43
Total	$3,801.83

Judgment on order striking out answer in the above-entitled action was entered on the seventh day of February, A. D. nineteen hundred and twenty-eight, in favor of the plaintiff, New Jersey Aluminum Company, and against the defendant, Charms Company, for the sum of three thousand seven hundred and thirty-five dollars and forty cents ($3,735.40) damage and sixty-six dollars and forty-three cents ($66.43) costs of suit.

Judgment entered and signed February 7, 1928.

WILLIAM S. GUMMERE,
Judge.

JOHN H. SCOTT,
Clerk.

Book 104, Circuit Court Judgments, page 133.

GROUNDS OF APPEAL.

Filed March 1, 1928.

ESSEX COUNTY CIRCUIT COURT.

NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff*, *vs.* CHARMS COMPANY, a corporation, *Defendant*.	*Action at Law.* *On Appeal from Essex County Circuit Court to New Jersey Supreme Court.* *Grounds of Appeal.*

The defendant-appellant states the following grounds of appeal from the judgment of the Essex County Circuit Court in the above-entitled cause:

1. The Court erred in granting the motion of plaintiff-respondent to strike out the second paragraph of the defendant's answer.

2. The Court erred in striking out the second paragraph of defendant's answer and entering judgment for three thousand seven hundred and thirty-five dollars and forty cents ($3,735.40) and costs.

3. The Court should have denied the motion of plaintiff-respondent to strike out the second paragraph of defendant's answer because the

said second paragraph sets forth a legal defense to the plaintiff's cause of action.

4. The affidavits filed in this cause by the defendant-appellant presented questions of fact as to its defense which should have been submitted to a jury.

CHAS. S. SMITH,
Attorney for Defendant-Appellant.

Service of a copy of the within grounds of appeal acknowledged this 1st day of March, 1928.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff-Respondent.

ESSEX COUNTY CLERK'S OFFICE.

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

I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, do hereby certify that the foregoing is a true and correct transcript of all of the record of the proceedings in the cause entitled New Jersay Aluminum Company, a corporation, plaintiff, *v.* Charms Company, a corporation, defendant, as the said record now appears in the files of this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said court and county at Newark, N. J., this 12th day of March, A. D. 1928.

JOHN H. SCOTT,
Clerk.

(SEAL)

OPINION OF SUPREME COURT.

Filed January 4, 1929.

NEW JERSEY SUPREME COURT.

No. 118, October Term, 1928.

NEW JERSEY ALUMINUM COMPANY,
Plaintiff-Respondent,
vs.
CHARMS COMPANY,
Defendant-Appellant.

Appeal from Essex Circuit.

Submitted October Term, 1928; decided January 3, 1929.

Before Justices MINTURN, BLACK and CAMPBELL.

For appellant, Charles S. Smith, Merritt Lane.

For respondent, William A. Wachenfeld.

PER CURIAM:

This is an appeal from a summary judgment entered upon the striking out of the second paragraph of the answer filed in this cause.

The parties entered into a written lease on November 1, 1923, for premises 699-711 Springfield avenue, Newark, for a term of five years. Defendant occupied the premises until May, 1927, when it vacated but continued to pay rent to and including September, 1927.

The action was brought to recover the rent for October, November and December, 1927, amounting to $3,735.40, and an increase in cost of insurance amounting to $835.02.

The lease contained the following provisions:

> "It is further agreed between the parties hereto that all interior repairs to the said premises shall be made at the cost and expense of the lessee except to the roof of said building, repairs to which shall be made and paid for by the lessor"

and

> "It is expressly understood and agreed that said lessee is to take over said buildings in the condition in which they are at the present time; that said lessee make all repairs, alterations, changes of any kind at its own expense during the continuance of this lease as hereinafter set forth * * *."

The defendant answered and counter-claimed. The answer admits the lease and by its second paragraph denies any rent due because it says the premises became unsuitable for its business by disrepair and faulty repair of the roof.

We are not in this appeal concerned with the remaining portion of the answer because it is directed at the right of the lessor to recover extra cost of insurance and the summary judgment under review is for rent only. Neither are we here concerned with the counter-claim.

The second paragraph of the answer was struck out because it presented no facts constituting a legal defense to the action for rent.

Appellant urges that it presented facts amounting to constructive eviction and at least presented a question of fact.

We think not, and that on the contrary the question involved is settled by Stewart *v.* Childs Co., 86 N. J. L. 648. There was, therefore, no

error in striking out this portion of the answer and in ordering summary judgment.

Appellant further contends that if the answer was not sufficient leave should have been extended to it to amend. The case before us does not show any application for such leave and it is therefore not a matter that may be argued here.

The judgment below is affirmed, with costs.

RULE FOR AFFIRMANCE.

NEW JERSEY SUPREME COURT.

NEW JERSEY ALUMINUM COMPANY, *Plaintiff-Respondent,* *vs.* CHARMS COMPANY, *Defendant-Appellant.*	*On Appeal from Essex County Circuit Court.* *Rule for Affirmance.*

This cause having been duly argued at the October term (1928) of this court by Messrs. Charles S. Smith and Merritt Lane, of counsel with the appellant, and William A. Wachenfeld, Esquire, of counsel with the respondent, and the Court having duly considered the same and finding no error in the record or proceedings in the Essex County Circuit Court;

It is thereupon, ORDERED and ADJUDGED, that the judgment of the Essex County Circuit Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

Entered Jan. 24, 1929. On motion of:

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff-Respondent.

NOTICE OF APPEAL AND GROUNDS OF APPEAL.

Filed March 18, 1929.

NEW JERSEY SUPREME COURT.

NEW JERSEY ALUMINUM COMPANY, a corporation of New Jersey, *Plaintiff,* *vs.* CHARMS COMPANY, a corporation, *Defendant.*	*Action at Law.* *On Appeal from New Jersey Supreme Court to Court of Errors and Appeals.* *Notice of Appeal and Grounds of Appeal.*

To Lum, Tamblyn & Colyer, Esqs., attorneys of plaintiff-respondent.

SIRS:

TAKE NOTICE, that the defendant-appellant hereby appeals from the whole of the judgment of the New Jersey Supreme Court in the above-entitled cause to the Court of Errors and Appeals in the last resort in all causes, upon the ground that the New Jersey Supreme Court erred in refusing to reverse the judgment of the Essex County Circuit Court in favor of plaintiff-respondent for one or more of the reasons assigned in the New Jersey Supreme Court, and erred in

affirming the judgment instead of reversing the same.

CHAS. S. SMITH,
Attorney of Defendant-Appellant.

Service of a copy of the within notice of appeal and grounds of appeal is acknowledged this 18th day of February, 1929.

LUM, TAMBLYN & COLYER,
Attorneys Plaintiff-Respondent.

No 87
Brief

New Jersey Court of Errors and Appeals

NEW JERSEY ALUMINUM COMPANY, a corporation, Plaintiff-Appellee, *vs.* CHARMS COMPANY, a corporation, Defendant-Appellant.	On Appeal from New Jersey Supreme Court affirming judgment of Essex County Circuit Court entered after rule striking out answer. Sat in Essex County Circuit Court, Mountain, J. Sat in Supreme Court, Minturn, Black and Campbell, JJ.

BRIEF OF DEFENDANT-APPELLANT.

(Italics, etc., ours, except where otherwise noted.)

Statement of the Case.

Plaintiff sued for rent. The complaint is found on p. 3; the answer and counterclaim, p. 8; the notice of motion to strike out answer and counterclaim and enter judgment, p. 11; the affidavits of plaintiff upon the motion, p. 13; the affidavits of defendant upon the motion, p. 29; the rule striking answer and directing the entry of summary judgment, p. 59; the judgment, p. 61; the grounds of appeal in the Supreme Court, p. 62; the opinion of the Supreme Court, p. 64; the rule for affirmance, p. 67.

The action was for rent and for insurance premiums paid by plaintiff for which it seeks reimbursement from defendant according to the terms of a written lease.

In November, 1923, plaintiff and defendant entered into a lease of premises No. 699-711 Springfield Avenue, Newark, New Jersey. The term of the lease was from November 1, 1923, until No-

vember 1, 1928. The rent was to be paid monthly in advance. The lease provided that defendant was to pay any excess in fire insurance premiums due to the increase in fire insurance rates on the demised premises over the rate existing at the time the lease was executed. The lease also contained a *specific covenant that all repairs to the roof of the said premises were to be made and paid for by the plaintiff.*

Defendant occupied the premises until about May 1, 1927. At that time it was compelled to vacate through the conduct of plaintiff, although defendant continued to pay rent until October 1, 1927. Thereafter it refused to pay rent, and plaintiff brought suit.

In answer to the complaint, defendant specially pleaded its eviction (p. 9) and set up that it was not obliged to pay insurance premiums which accrued thereafter, and then counterclaimed for damages it sustained by reason of the plaintiff's neglect to keep the premises tenantable (p. 10).

On plaintiff's motion, the Circuit Court struck out paragraph 2 of the answer which pleaded the eviction on the ground that this did not constitute a defense (p. 59), notwithstanding defendant's contention that the affidavits (pp. 29, 33, 49, 51, 55, 56, 57) which it filed at the hearing clearly raised questions of fact in support of its defense which it should have been allowed to present to a jury under proper instructions. The Court declined to strike out defendant's counterclaim, although it ordered summary judgment against defendant.

The defendant relied in the Supreme Court upon the following specifications of points to support its contention that the matter was one of fact.

Point I. Eviction by construction of law is a legal defense to an action for rent.

Point II. The plaintiff's intentional violation of its covenant to repair the roof rendered the premises unfit for the purpose for which they were leased, and constituted an eviction of defendant by construction of law. The matter was one of fact to be submitted to a jury.

Point III. Constructive eviction results where there has been a fraudulent misrepresentation or concealment as to the state of the demised premises, or the premises prove to be uninhabitable by some intentional wrongful act or default of the landlord himself.

Point IV. Rent voluntarily paid subsequent to an eviction is not a waiver of the defense of eviction.

Point V. The answer was sufficient, but in any event, the case was considered upon the affidavits and if the answer, as such, was insufficient defendant should have been permitted to amend by setting up sufficient facts to plead the defense exhibited by the affidavits.

The Supreme Court affirmed the judgment on the authority of *Stewart* v. *Childs Co.*, 86 N. J. L. 648.

The contention of appellant that, even if the answer as such was insufficient, affidavits presented by defendant upon the motion to strike presented a sufficient defense and that, when the answer was struck, it should have been with leave to amend, is answered by the Supreme Court by the statement that the case did not show any application for such leave and that it was, therefore, a matter which could not be argued.

We submit that the Supreme Court erred for the reasons hereinafter stated.

POINT I.

Eviction by construction of law is a legal defense to an action for rent.

THE LAW.

In *Murray* v. *Albertson,* 50 N. J. Law 167, 13 A. 394, the doctrine of constructive eviction was expressed in the syllabus (by the Court) as follows:

> "Par. 1.
>
> On a demise of a house or lands, there is no contract or condition *implied* that the premises shall be fit and suitable for the use for which the lessee requires them; consequently their unfitness for such a purpose will not justify the tenant in abandoning the premises, and, on such grounds, making defense to an action for rent, unless there has been a fraudulent misrepresentation or concealment by the lessor as to the state or condition of the premises, *or the premises are uninhabitable by reason of some wrongful act or default of the lessor.*"

This was an action for rent. The tenant defended on the ground that he quit the premises because the cellar was damp and unhealthy due to water which came in through a hole in the floor. The Court of Errors and Appeals affirmed the overruling of the defense by the trial Court *because there was no pretense of a false representation or fraudulent concealment by the lessor.*

Meeker v. *Spalsbury,* 66 N. J. Law 60, 48 A. 1026, further enunciated the doctrine of constructive eviction. This, too, was an action for rent. There was a lease of premises and the lessor reserved permission to make such repairs or alterations in the demised premises as should be

necessary for their preservation. The lessee abandoned the premises and subsequently the lessor entered and remodeled the building, making extensive alterations beyond any necessity for preservation. The case was certified from the Circuit Court and the Supreme Court was asked to advise whether the facts constituted an eviction or a surrender. The Supreme Court, opinion by Collins, *J.*, defined a constructive eviction as follows:

> "The leading case on constructive eviction is Upton *v.* Townsend, 17 C. B. 30, accepted by this court as declarative of the law in Morris *v.* Kettle, 57 N. J. Law, 218, 30 Atl. 879. In that case, Jarvis, *C. J.* (p. 64), said that eviction must be,
>
> > 'not a *mere* trespass, but something of a grave and permanent character, done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises';
>
> and Willis, *J.* (p. 72), more fully and accurately defined it as
>
> > 'an act of a permanent character, done by the landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the thing demised, or a part of it.'
>
> This definition has been generally approved in this country. Tayl. Landl. & Ten. P. 377, Note 3."

and the Court then held that there had been a surrender of the demised premises.

Metropole Const. Co. v. *Hartigan,* 83 N. J. Law 409, 85 A. 313, was an appeal to the Supreme Court, and in that case Mr. Justice Minturn has collected the authorities on the doctrine of constructive eviction, citing

> *Morris* v. *Kettle,* 57 N. J. Law, 218, 30 Atl. 879;

Meeker v. *Spalsbury, supra;*
Hunter v. *Reiley,* 43 N. J. Law, 480;
Upton v. *Townsend, supra.*

Quoting the authorities Justice Minturn said:

> "Thus the learned editor of the American and English Cases Annoted, in a valuable foot-note to the case of Wade *v.* Herndl, 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855, 7 Ann. Cas. 591, says: 'Formerly nothing short of actual expulsion of the tenant from the demised premises operated as an eviction.' Townsend *v.* Gilsey, 1 Sweeney (N. Y.) 155.
>
> 'But in modern times the rule has been liberalized in favor of the tenant, and now *any* act of the landlord or of any one who acts under authority or legal right given him by the landlord *which renders the demised premises unfit for the purpose for which they were leased, or which seriously interferes with the beneficial enjoyment thereof,* in consequence of which the tenant abandons the premises, constitutes an eviction by construction of law; and whenever it takes place the tenant is released from the obligation under the lease to pay rent accruing thereafter.'

And in referring to *Meeker* v. *Spalsbury, supra,* the Court said that "to work a constructive eviction there must be an actual giving up of possession of the whole or part of the demised premises as a result of the landlord's act."

Stewart v. *Childs Co.,* 86 N. J. Law 648, 92 A. 392, upon which the Supreme Court relied, was an appeal from a judgment for the plaintiff at the Circuit. This was an action for rent due under a written lease, in which lease the landlord had covenanted that the basement of the demised premises should be waterproof and that he guaranteed to keep the cellar waterproof at his own

expense. The tenant alleged a breach of covenant by the landlord and contended that the demised premises became unfit for the purpose for which they were leased, in consequence of which the tenant abandoned the premises, and that this constituted an eviction by construction of law. Mr. Justice Black, for this Court, said:

> "There are numerous cases in this and other jurisdictions illustrating the principle of eviction, both actual and constructive, applied as a defense, to an action for the nonpayment of rent. Chief Justice Jarvis, in the case of Upton *v.* Townsend and Greenless, 17 C. B. 30, 51, after speaking of a physical expulsion or a motion, in reference to a constructive eviction, said:
>
> > 'I think it may be taken to mean this: Not a *mere* trespass and *nothing more,* but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.'
>
> This definition of a constructive eviction was cited with approval by our Supreme Court in the cases of Meeker *v.* Spalsbury, 66 N. J. Law, 63, 48 Atl. 1026; Metropole Construction Co. *v.* Hartigan, 83 N. J. Law, 411, 85 Atl. 313."

This Court held that no constructive eviction had been shown (the result below had been a direction of a verdict for plaintiff), because "We are unable to find in the record, any evidence that shows that the landlord, or by his procurement, did *anything,* with the intention of depriving the tenants of the enjoyment of the premises."

In *Goldberg* v. *Reed,* 97 N. J. Law, 170, 116 A. 429, this Court, in an opinion by Gummere, *C. J.,* after referring to the evidence of fraudulent misrepresentations, held:

> "Where the fraudulent misrepresentations relate to the conditions of the demised premises, that is, where, as in the present case, they are represented to be in good condition, when in fact they are offensive to the sense of smell and unsanitary, the tenant has a legal right to move out, and the conduct of the landlord is evidence of a constructive eviction in answer to his claim for rent accruing after such abandonment by the tenant. Weiler *v.* Pancoast, 71 N. J. Law, 414, 58 Atl. 1084."

And see *McCurdy* v. *Wyckoff*, 73 N. J. Law 368, 63 A. 992, wherein Garrison, *J.*, for the Supreme Court, held that "a landlord may evict a tenant by a constructive eviction consisting of a wrongful act of *omission* that substantially interferes with the tenant's possession." This was an action for rent and the defense was an eviction by reason of the maintenance by the plaintiff of a nuisance on the demised premises. The nuisance consisted of a clogged waste pipe. The Court said: "This defense is good if made out." Citing *Weiler* v. *Pancoast, supra.*

Weiler v. *Pancoast*, 71 N. J. L. 414, 58 Atl. 1084, held in an action for rent, where there was evidence that the landlord had allowed another tenant to occupy an apartment in the same building for unlawful purposes, that this was an (constructive) eviction in answer to the claim for rent.

In *Hunter* v. *Reiley*, 43 N. J. Law 480, the Supreme Court, in an opinion by Scudder, *J.*, held:

> "*If the acts proven amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises, they will constitute an eviction.* Upton *v.* Townsend, 17 C. B. 30."

Morris v. *Kettle*, 57 N. J. Law 218, 30 A. 879, was an action upon a covenant in a lease for the

recovery of rent. The defense was that the defendant had been evicted from a part of the demised premises before any of the unpaid rent became due. The plaintiff took possession of a strip of land which defendant contended was part of the demised premises. The Court held:

> "This act of the plaintiff was, in a legal sense, an eviction (Upton *v.* Townsend, 17 C. B. 30-64) if in fact this strip of land was included in the premises demised to the defendant."

The answer of appellee to this point in the Supreme Court was that there was not a sufficient allegation in the answer to bring this rule into play, *but it was not argued that there was not sufficient proof in the affidavits filed by appellant upon the motion to strike.* This matter will be hereafter considered under a separate point.

POINT II.

The plaintiff's intentional violation of its covenant to repair the roof, rendered the premises unfit for the purpose for which they were leased, and constituted an eviction of defendant by construction of law.

Defendant leased the premises in question for use as a candy manufacturing plant. It was so specified in the lease. The landlord expressly assumed the duty of making all repairs to the roof, the lessee assuming the duty of making all interior repairs (p. 20). In the affidavits submitted by defendant (p. 23, *et seq.*) it is shown that almost from the beginning of its occupancy, it was inconvenienced and its business seriously interfered with by the leaky condition of the roof;

that this condition became progressively worse, notwithstanding notice thereof to plaintiff; that whenever it rained, or snow accumulated on the roof and thawed, water entered the building, until finally the whole premises became saturated with moisture and unsuitable for the manufacture of candy, and therefore, untenantable for the purpose leased, and that eventually its losses by reason of spoiled merchandise due to the presence of excessive moisture compelled it to abandon the premises.

The proper manufacture of candy requires that the atmosphere be free of dampness or humidity as the effect of these elements is harmful and fatal to this class of merchandise. To control atmospheric conditions, as much as possible, defendant installed a dehumidifying system at an expense of $20,000.

The instant case is within the doctrine of constructive eviction as established in the alternative proposition of the definition thereof laid down by this Court in *Murray* v. *Albertson,* 50 N. J. L. 167, 13 Atl. 394. There the Court held that a tenant was not justified in abandoning the premises on the grounds that they were unfit for the use for which the lessee required them,

> "unless there has been a fraudulent misrepresentation or concealment by the lessor as to the state or condition of the premises, *or the premises are uninhabitable by reason of some wrongful act or default of the lessor.*"

In the Supreme Court, appellee made the same answer as it did to Point I and we make the same comment.

POINT III.

Constructive eviction results where there has been a fraudulent misrepresentation or concealment as to the state of the demised premises or the premises prove to be uninhabitable by some intentional wrongful act or default of the landlord himself.

Murray v. *Albertson,* 50 N. J. Law 167, 13 Atl. 394;

Meeker v. *Spalsbury,* 66 N. J. Law 60, 48 A. 1026, at page 1027;

Metropole Const. Co. v. *Hartigan,* 83 N. J. Law 409, 85 A. 313, at page 315, reiterating the rule in *Meeker* v. *Spalsbury, supra;*

Stewart v. *Childs Co.,* 86 N. J. Law 648, 92 A. 392, at page 393;

Goldberg v. *Reed,* 97 N. J. Law 170, 116 A. 429, at page 429, and cases heretofore cited.

POINT IV.

Rent voluntarily paid subsequent to an eviction is not a waiver of the defense of eviction.

Defendant abandoned the demised premises shortly after May 1, 1927, and continued to pay rent until October 1, 1927. In view of the decisions on this question there cannot be said to have been a waiver by defendant of its defense of constructive eviction.

Morris v. *Kettle,* 57 N. J. Law 218, 30 A. 879, at page 880.

> "The common law rule that, upon an eviction by the landlord from part of the premises, the entire rent and all remedy for its collection will be suspended during the continuance of the eviction, was expressly recognized by this court in Hunter *v.* Reiley, 43 N. J. Law 480-482."

And

> "The tenant may continue in possession of the remainder of the premises, and his possession will not be construed as consent to the eviction; *nor will the subsequent payment of rent, according to the terms of the lease, as a voluntary act, operate as a waiver.* Nothing but a new contract by the tenant to pay rent, in substitution for the original lease, will renew his obligation to pay."

Metropole Const. Co. v. *Hartigan,* 83 N. J. Law 409, 85 A. 313, at pages 313-314, this Court said:

> "This court has held that the fact that the tenant continued in possession of the demised premises after the commission of the alleged acts of eviction does not preclude him from setting up the claim of a constructive eviction in answer to the landlord's demand for rent."

POINT V.

The matter of constructive eviction under the law was one of fact to be submitted to a jury.

In the case at bar there was a written lease. Defendant, according to the terms of the lease, agreed to accept the premises as they were at the time the lease was executed. One of plaintiff's representations which induced defendant to sign the lease was the express covenant therein that plaintiff would make repairs to the roof. The defendant required this covenant to be placed

in the lease because it had knowledge of the condition of the roof and knew that the premises would be unfit for its purposes, as expressed in the lease, unless the roof was kept in repair. The lease contained the following provision:

> "It is expressly understood and agreed that said lessee is to take over said buildings in the condition in which they are at the present time; that the said lessee will make all repairs, changes and alterations of every kind, at its own expense * * *"

and

> "It is further agreed between the parties hereto that all interior repairs to the said premises shall be made at the cost and expense of the lessee, *excepting the roof of said buildings, the repairs to which shall be made and paid for by the lessor.*"

Also

> "The lessee shall keep the sidewalk in front of and surrounding the demised premises clean and free from snow and ice and other obstructions."

It is significant that although defendant agreed to make all repairs as above specified it insisted that plaintiff agree to repair the roof, and it is quite apparent from the tenor of the lease, wherein defendant undertook to make and pay for practically all other repairs and alterations and maintenance, that this concession was made by plaintiff in order to persuade the defendant to execute the lease. Viewed in the light of the remaining covenants which are clearly in the interest of plaintiff, it is not difficult *to infer a reluctance on the part of plaintiff to agree to repair the roof,* and this reluctance effectually bespeaks a reservation in the minds of the officers of plaintiff company to disregard the performance of the covenant.

The affidavit of Walter W. Reid, Jr., president of defendant (p. 29), says:

> "At the beginning of the term of said lease, the roof was not water-tight, but Charms Company expected that the lessor would make the necessary repairs to the roof as contemplated in the covenant in the lease which required the lessor to do so. From time to time I observed that the buildings were gradually becoming damp. I made inquiry of the Works Manager, Ray W. Krout, who informed me that this was due to the leaky condition of the roof. I directed him to inform the lessor of this fact, and was informed by Mr. Krout that he had made numerous complaints to the lessor in order to have the roof put in proper condition. Mr. Krout told me that these complaints had sometimes been made in writing, and more often by telephone to Mr. Kruttschnitt, the secretary of plaintiff company."

Continuing, Mr. Reid said:

> "Notwithstanding these communications, conditions became worse, * * *"

And on May 9, 1924, Reid himself made a written protest to the New Jersey Aluminum Co., about the water which leaked into the building, calling attention to the fact that this was a matter for the plaintiff to take care of.

In his affidavit, Ray W. Krout (p. 33), works manager of defendant company, referring to the "very leaky condition" of the roof of the demised premises, said:

> "On several occasions, especially toward the last part of 1925, Mr. Kruttschnitt came to the office of Charms Company, generally to complain about conditions arising out of the occupancy of the premises. At these times, Mr. Kruttschnitt *invariably remarked that the expense of maintaining the premises, such as the payment of taxes, interest on*

money invested, etc., made the return from rentals so small that it did not pay the New Jersey Aluminum Company to rent it to the Charms Company; that they were practically getting nothing out of the lease, and that the Aluminum Company could do better if it were able to change the premises over into stores and apartments. At all times Mr. Kruttschnitt allowed us to understand *that the Aluminum Company was not at all pleased with Charms Company as tenants.* These conversations generally took place in the presence of Mr. Reid, the president of Charms Company, and I *honestly believe that the plaintiff by its neglect to keep the roof water-tight, intended to render the premises untenantable, and thereby cause the Charms Company to vacate, and so regain possession in order that the Aluminum Company might obtain a greater rental than was payable under the Charms Company's lease. In this connection Mr. Kruttschnitt also mentioned that he desired to get possession of the vacant lands included in the Charms Company's lease, as he had plans for a large garage which would bring him in a substantial income.* * * *"

The exhibits annexed to the affidavit of Krout (p. 43) consisting of correspondence between Krout and plaintiff corporation, are demonstrative of the persistent efforts made by defendant to have plaintiff perform its covenant, and the failure of plaintiff to respond to defendant's communications, much less repair the roof, manifests its intent to ignore the matter and to make no repairs. Indeed, the only letter in evidence from plaintiff, relating to the subject of repairs, dated September 12, 1927, suggests that plaintiff considered the matter of no importance and gave it scant attention, if any.

Referring to a complaint by defendant, in this instance having to do with a leader which, ac-

cording to the affidavit of Krout, was inadequate to drain water from the roof of the premises, Kruttschnitt, for plaintiff, writing under date of September 12, 1927, mentions the failure to have work done by roofers in the winter of 1926 (p. 46), and says:

> "We tried to have this work done during the winter of 1926 but the roofers said it could not be done properly in cold weather or some other fool excuse. In the meantime the matter was forgotten by them and not having heard anything more about it from you, we supposed it was not so bad."

The matter here is not whether defendant was bound to prevail upon its claim of eviction, but whether there was sufficient in the answering affidavits of defendant to indicate that the proof which it could produce would be sufficient to go to a jury.

The jury is the judge of the facts and of inferences which may be drawn from the facts. Assuming now that the law is as stated by this Court in *Stewart* v. *Childs Co.,* 86 N. J. L. 648, that to show a constructive eviction there must be either false representations or an act by the landlord with the intention to deprive the tenant of the enjoyment of the premises, there was sufficient in this case, as disclosed by the affidavits, to require the submission of the matter to a jury. *Stewart* v. *Childs Co.,* 86 N. J. L. 648, must be read in the light of *Goldberg* v. *Reed,* 97 N. J. L. 170, also decided by the Court of Errors and Appeals, and of *McCurdy* v. *Wyckoff,* 73 N. J. L. 368, decided by the Supreme Court.

Also *Pabst* v. *Schwarzstein,* 101 N. J. L. 431.

Also *Higgins* v. *Whiting,* 102 N. J. L. at p. 279, in which case Mr. Justice Black, delivering the opinion of the Supreme Court, said:

"In 24 Cyc. 918, it is said that covenants are to be construed as dependent or independent according to the intention and meaning of the parties and the good sense of the case. Technical words should give way to such intention. 7 R. C. L. 1090, sec. 7. So, the rule is thus stated; where the acts or covenants of the parties are concurrent, and to be done or performed at the same time, the covenants are dependent, and neither party can maintain an action against the other, without averring and proving performance on his part. 13 Corp. Jur. 567.

There is a distinction between this and such cases as Stewart *v.* Childs Co., 86 N. J. L. 648; see Pabst *v.* Schwarzstein, 101 N. J. L. 431."

Also *Reporting Corporation* v. *Deshere,* 4 Misc. 65, 131 Atl. 635, in which case there was a covenant by the landlord to furnish the building for the occupancy of the tenant by making certain repairs.

The Supreme Court expressly indicated that it did not intend to decide whether the failure of the landlord to make the repairs would, if the tenant left the premises, support a claim of constructive eviction.

The Court said:

"The court overruled this defense and directed the jury to return a verdict for the plaintiff. This, of course, involves the assumption that the plaintiffs did not make the improvements covenanted to be made, and therefore it is necessary to determine, first, the meaning of the covenant; and, secondly, whether, if it means what the defendants claim it was an independent covenant under the ruling in Stewart *v.* Childs Co., 86 N. J. Law 648, 92 A. 392, L. R. A. 1915C 649.

The tenants, in fact, did not vacate the premises, and, consequently, the question of constructive eviction is not in the case."

It would seem, therefore, that the question as to whether the covenant involved in this case, under the circumstances of this case, is one which is to be considered as an independent covenant within the meaning of *Stewart* v. *Childs Co.,* 86 N. J. L. 648, or a dependent covenant is not clear. As stated by Mr. Justice Black, in *Higgins* v. *Whiting,* 102 N. J. L. 279, it is a matter of *intention* and meaning of the parties and the good sense of the case and that means that each case stands upon its own facts. What we shall next say with respect to the method of proof of the intent with which the landlord failed to perform his duty under the lease applies to the proof of intent as bearing upon whether the covenant is independent or dependent.

It is almost impossible to prove intention by direct evidence of witnesses, for intention resides in the mind. Intention is a matter to be inferred from proven facts and the tribunal to draw that inference is the jury. So with respect to fraudulent representations, the intent to defraud may be inferred from proven facts.

33 C. J. Title Intent (p. 168);
22 C. J. Title Evidence (p. 175, sec. 114; p. 173, sec. 108).

In *Haggerty* v. *Haggerty,* 186 Iowa 1329, 1334, 172 N. W. 259, the Court said, "Intent is an act or emotion of the mind seldom, if ever, capable of direct or positive proof, but is arrived at by such just and reasonable *deductions* from the acts and facts proven as a reasonably prudent and cautious man would ordinarily draw therefrom." In *Hooker* v. *Hooker,* 103 Misc. 66, 72, 170 N. Y. Supp. 570, the Court said that intent "can usually be shown by acts, declarations and circumstances known to the party charged with the in-

tent''. In *Huskin* v. *Griffin,* 75 N. H. 245, 74 Atl. 596, 139 Am. St. Rep. 718, 27 L. R. A. N. S. 966, it was held proof of the absence of any good reason for performing an act, will support a finding of malicious intent.

That fraud may be inferred, see *Cole* v. *Taylor,* 22 N. J. L. 59; *Berkowitz* v. *Lyons,* 98 N. J. L. 198.

When the Courts speak of an act ''of the landlord'' which must be performed with the *intent* that the property will become so uninhabitable as that the defendant will leave, the Courts do not, we submit, mean an act of commission only. The act may be one of *omission,* as in *McCurdy* v. *Wyckoff,* 73 N. J. L. 368; that is to say, a refusal to comply with a duty assumed by contract or one imposed by law. Apparently, under the cases, the *intent* is the important matter. We do not agree that constructive eviction should be so circumscribed. The law has been very much broadened in modern days. See the annotation in 4 A. L. R., p. 1453, and *Metropole Cons. Co.* v. *Hartigan,* 83 N. J. L. 409.

We submit that, certainly, if a landlord with knowledge that his act, either of omission or commission, will result in the premises becoming unfit for the use for which they were leased, omits or commits the act there is a constructive eviction. This may be put upon the ground that, although an intent that the tenant leave is required under the law, a person is conclusively presumed to intend the consequences of his act if the natural consequences are known to him.

But even if constructive eviction is to be strictly circumscribed, there was sufficient in this case, as disclosed by the affidavits, to go to the jury.

Fraud and the required intent could be inferred from the following facts: The premises

were leased for the express purpose of manufacturing and wrapping candy; the manufacturing and wrapping of candy require a dry building; at the time of the leasing the roof of the building was not watertight; although defendant assumed the making of practically all other kind of repairs, the landlord assumed, under the lease, the duty of making all repairs to the roof; almost from the beginning of the tenancy of defendant, defendant called upon plaintiff to make repairs; it directed the attention of plaintiff to the fact that the roof was in such a leaky condition as that it was suffering loss to its merchandise, and the letters written by defendant to plaintiff clearly indicate that the condition of the building was such as that defendant could not continue; defendant was desirous of continuing in the building and spent upwards of $20,000 for the installation of a dehumidifying system in an attempt to remedy the situation so that it might continue; with knowledge of these conditions, plaintiff ignored the demand of defendant that it perform its duty under its contract, with the result that defendant was finally forced to vacate.

The question is—why did plaintiff ignore its duty? It had knowledge of what the result would be; there was no doubt as to its duty under the lease; yet it ignored that duty. If there were no other evidence than these bare facts, it is submitted that the matter would be one for the jury. Two inferences are permissible upon these facts —one, that plaintiff desired not to expend, at the particular moment, the monies necessary to repair the roof. But is this inference reasonable? Its duty was clear under the lease; there was no doubt as to the facts (if we are considering now, as we must, only the affidavits of defendant); it was bound to respond at some time; it was merely

postponing the day that it would be obliged to pay for the repairs—this seems to be a very inadequate reason for the conduct of plaintiff. The second inference which may be drawn is that plaintiff deliberately desired, for purposes of its own, that defendant should leave and that plaintiff might regain possession of the property. It was bound by lease for a term of five years at a fixed rental. The lease was made in 1923, when it is common knowledge that property values were increasing in Newark. It is not at all an unusual thing for landlords, under such conditions, to attempt to break leases. This inference supplies an *adequate* reason for the conduct of plaintiff. The other does not.

We submit that the least that can be said is that these facts so speak of the intent of plaintiff, if not *res ipsa loquitur,* then *res ipse dixit, Bahr* v. *Lombard, etc.,* 53 N. J. L. 233; *Newark Electric* v. *Ruddy,* 62 N. J. L. 505, 63 N. J. L. 357. They were at least sufficient to call upon plaintiff, the intent of which was the subject-matter of the investigation, for an explanation.

Even if defendant could not produce affidavits speaking to intent, the Court was not justified in determining, as it did when it ordered summary judgment, that defendant, at the trial, could not prove intent, for the intent resided in the mind of plaintiff, and defendant might, in its own case, have been able to prove the intent by calling and examining plaintiff's officers, the affidavits of whom it could not produce.

But the proof did not rest with the facts above stated, for we have the affidavit of Krout, that upon several occasions, especially toward the last part of 1925, Kruttschnitt, who is the president of plaintiff, came to the office of defendant and:

> "At these times Mr. Kruttschnitt invariably remarked that the expense of maintain-

ing the premises, such as the payment of taxes, interest on the money invested, etc., made the return from rentals so small that it did not pay the New Jersey Aluminum Company to rent it to the Charms Company; that they were practically getting nothing out of the lease, and that the Aluminum Company could do better if it were able to change the premises over into stores and apartments. At all times Mr. Kruttschnitt allowed us to understand that the Aluminum Company was not at all pleased with Charms Company as tenants.

* * * * * *

In this connection Mr. Kruttschnitt also mentioned that he desired to get possession of the vacant lands included in the Charms Company's lease, as he had plans for a large garage which would bring him in a substantial income, and that, therefore, plaintiff meant to evict the Charms Company and regain possession, inasmuch as renting conditions during 1926 and the early part of 1927 were favorable to the obtaining of increased rent."

We have, therefore, *proof* that renting conditions were such as were favorable to the obtaining of increased rentals and *proof* that plaintiff desired to break the lease.

We submit that, under these circumstances, the matter was clearly one for a jury to determine, after having heard the whole case, what the real intent of plaintiff was; and also whether plaintiff, at the time it assumed the obligation to make the repairs to the roof, ever had any intention of fulfilling its engagement, for fraud may be predicated upon a promissory representation where the intent is, at the time of making it, not to perform. That is the underlying principle of *Perry* v. *Orr,* 35 N. J. L. 295.

Weiler v. *Pancoast,* 71 N. J. Law 414, 58 A. 1084, is authority for the rule that if a landlord lets

apartments in his building to a tenant as a dwelling, and then *knowingly* permits another part to be used for lewd purposes, which render the tenant's apartments unfit for occupancy by a respectable family, when he has the legal power to prevent such use, and for that reason the tenant moves away, the conduct of the landlord becomes evidence of an eviction, in answer to his claim for rent accruing after such removal.

POINT VI.

The answer was sufficient, but, in any event, the case was considered upon the affidavits and if the answer, as such, was insufficient, defendant should have been permitted to amend by setting up sufficient facts to plead the defense exhibited by the affidavits.

Examining paragraph 2 of the answer, p. 8, which was stricken out by the Court by the order of February 7, 1928, p. 59, we find that it alleges that: the lease had been terminated by plaintiff by reason of plaintiff's violation thereof; it was expressly agreed that all repairs to the roof should be made and paid for by plaintiff; almost from the beginning of its occupancy defendant was seriously inconvenienced and embarrassed by the leaky condition of the roof; plaintiff was notified from time to time of the state of disrepair and did not repair the roof, but continuedly neglected to do so to the extent necessary to keep the premises tenantable; water penetrated through the leaks in the roof, ran down in the inside of the walls and formed pools; this interfered with defendant's business; as a result, the premises became unsuitable for the manufacture of candy and defendant was virtually evicted.

In paragraph 3 it is alleged that defendant was compelled to vacate on or about July 1, 1927.

It is true that in this answer there is no *express* allegation that plaintiff refused to perform its duty to repair the roof, with the *intent* and *purpose* of rendering the premises uninhabitable, so that defendant would be obliged to vacate, nor is there, *in terms,* an allegation that plaintiff, at the time it made the contract to repair, had no intent to perform and therefore was guilty of making false representations. But *eviction is pleaded in terms* and the fact of the continued refusal of plaintiff to perform, with the result that the premises *were* rendered uninhabitable, *is* pleaded; and, from the facts pleaded, the jury might find the fraud or the intent.

But, however that may be, plaintiff did not content itself by moving to strike out the answer as not disclosing a defense upon its face; on the contrary, it moved to strike upon affidavits (p. 11), with the result that the merits of the case, as distinct from the formal pleadings, were presented to the Court and no *summary judgment* should have been granted if the affidavits disclosed a case which *might* go to the jury, for it is only where there is *no* merit in the defense as such, we submit, that the court is justified in entering summary judgment.

To warrant a Court in striking out a plea as false or sham, it must be so palpably false or insufficient in law as to enable the Court to conclude that the defendant is seeking delay or trifling with the process of the law.

Muhlenbeck v. *West Hoboken,* 2 Misc. 7;
Fidelity Ins. v. *Wilkes-Barre, etc.,* 98 N. J. L. 507;
Wittemann v. *Giele,* 99 N. J. L. 478.

POINT VII.

If the notice to strike be treated as a general demurrer to the answer under the old practice, the judgment of the Court was erroneous.

In the Supreme Court, appellee did not argue but that a sufficient defense was disclosed by the affidavits of appellant. It took the position that, although its notice to strike was three-fold (p. 11) to strike out defendant's answer and counter claim on the grounds (1) That the same are sham and frivolous. (2) That they constitute no legal defense to the cause of action in the complaint. (3) That they are vague, uncertain, indefinite, irregular, defective and so framed as to embarrass and delay a fair trial, and, although it notified appellant that it would apply to *"enter summary judgment in favor of the plaintiff,"* the Circuit Court acted only upon the second ground, *i. e.,* that the answer constituted no legal defense to the cause of action, and that the affidavits were not considered, notwithstanding the fact that the notice states that appellee will "submit the original of the affidavit hereto annexed and made a part hereof", and notwithstanding the fact that affidavits in opposition *were presented and filed.*

In other words, appellee, in the Supreme Court, insisted that the case be treated as if there were a *general* demurrer to the answer. The Supreme Court adopted the view of appellee (p. 66).

Referring to the second paragraph of the answer which was stricken out by the Circuit Court we find that, in its first sentence, it *denies* the statements contained in the third paragraph of the complaint (p. 8).

The third paragraph in the complaint alleges (p. 4) that, on the 1st day of October, 1927, the

sum of so much money, and, on the 1st day of November, 1927, the sum of so much money and, on the 1st day of December, 1927, the sum of so much money "became due *as rental* for the above-mentioned premises and remained unpaid, and, although often requested to do so, defendant has entirely failed to pay the same."

The denial of these statements in the second paragraph of the answer amounts to a general issue under the old practice. It is fundamental, of course, that, under the old practice, the general issue could not be demurred to. The *only* remedy of the plaintiff was to move to strike as *sham* or *frivolous.*

That the second paragraph of the answer contains statements of fact which might seem to indicate that defendant could not prevail upon the general issue does not obliterate the fact that, contained within the second paragraph, *is the general issue.*

The second paragraph of the answer also contains a specific statement that "defendant was virtually evicted and forced to vacate" (p. 9).

It, therefore, pleads *eviction.*

That it also contains statements of fact which it may be argued indicate that, if the facts set forth were the *only* facts which defendant could prove, the plea of eviction would not be good, does not obliterate the fact that eviction *is,* in terms, *pleaded.*

In *Wallis Iron Works* v. *Coster,* 56 N. J. L. 351, there was a plea containing many "superfluous and immaterial allegations" and it was "plainly irregular, for if sustainable it is only as containing a denial of a material allegation of that count, and it should conclude to the contra and not with a verification," and yet it was sustained as against a *general* demurrer upon the ground that it contained a "*substantial denial*"

of the allegation of the count, etc., although argumentative.

In the case at bar, we have in the second paragraph of the answer a *direct denial* of the allegations of the third paragraph of the complaint.

True, defendant proceeds, after the denial, to assert facts which would indicate that it would attempt to prove an eviction, but, *upon the face of the pleadings* (to which we are confined on general demurrer) it does not appear that, if defendant failed to prove an eviction, it would also fail to sustain the denial that the rent was due. By this denial, aside from anything else that is contained in the second paragraph of the answer, plaintiff was put to its proof that the moneys demanded became due *as rent.*

It does not meet this to say that defendant, on the argument, admitted the amount of rent unpaid for if *that* admission is relied on the court must have stricken the answer as *sham,* and if it did *that* then it was *obliged* to consider the affidavits, and if the *affidavits* disclosed a defense *summary judgment should not have been granted.*

Nor does it appear that defendant would not have been able to sustain its *affirmative allegation of an eviction* contained in the second paragraph of the answer for, although *certain* facts are set forth in the second paragraph of the answer upon the issue of eviction, it does not appear, *upon the face of the pleadings,* that these are the *only* facts which could be proven. As matter of fact, the plea of eviction and the facts stated in the second paragraph with respect to eviction are not properly pleaded in the second paragraph. Either defendant, under the general issue contained in the first few words of the second paragraph, could show eviction, or eviction

In debts for rents it was optional in the defendant either to plead an eviction or to give it in evidence upon nil debit, though in covenant he must have pleaded it

is a separate defense and should have been so pleaded.

The result is that, if the pleading *alone* is to be considered as upon a *general demurrer,* these facts must be excluded from consideration with the result that the answer would, at common law, stand as a plea of the general issue and be good as against a general demurrer.

See

Eichlin v. *The Holland Tramway Co.,* 68 N. J. L. 78;

De Long v. *Spring Lake Co.,* 74 N. J. L. 250;

Brooks v. *Metropolitan Life Insurance Co.,* 70 N. J. L. 36.

The defects in the second paragraph of the answer, if any, are defects of *form, i. e.,* that, besides denying essential allegations of the complaint, *it* proceeds to attempt to set up a separate defense, and that, in setting up that separate defense, although in terms pleading an eviction, it proceeds to set up facts which do not include *all* of the elements of an eviction. Such defects could, under the old practice, be reached only by *special* demurrer, but upon a special demurrer the specific defects complained of must have been pointed out else the demurrer was bad.

State v. *Covenhoven,* 6 N. J. L. 396.

By section 127 of the Practice Act, title "Demurrer", 3 Compiled Statutes of New Jersey, p. 4093, it was provided:

> "No pleading shall be deemed insufficient for any defect which could heretofore be objected to only by special demurrer. * * *."

This does not mean that a party was without relief if pleadings were defective in form. Under the old practice there might be a motion to make more certain, strike out redundant or argumentative matter, etc., but the pleading *as such* could not be stricken out and *final judgment entered.*

And so, under the present practice, if the objection to the pleading is one which goes to the form, the motion is not to strike out and enter final judgment but to correct the defect in form.

Plaintiff's motion under the old practice would be defective as a special demurrer. The objection that a pleading is "vague, uncertain, indefinite, irregular, defective and so framed as to embarrass and delay a fair trial" points out no specific defect in form.

If the order of the Court striking out the second paragraph of the answer is to be considered, therefore, as an order which in effect, sustained a *special* demurrer, it was wrong.

It canot be sustained as an order, which, in effect, sustained a *general* demurrer, for the second paragraph of the answer is good as against a motion to strike under Supreme Court Rule 40, on the ground that "it discloses no * * * defense", which motion is equivalent to the old *general* demurrer.

The order must, we submit, be sustained if at all upon the ground that it is a striking of the answer as *sham* or *frivolous,* in which event there is to be considered, not only the pleadings as such, but the very right of the case as appears from the affidavits.

POINT VIII.

Plaintiff having moved, at the same time it moved to strike the answer upon the ground that it constituted no legal defense to the cause of action, for summary judgment upon affidavits, the Court could not, unless the affidavits disclosed there was no legitimate defense, strike the answer and enter summary judgment.

Under the old practice, judgment upon a general demurrer to a plea in favor of plaintiff was *in chief* for plaintiff but

> "upon general principles, wherever a demurrer is filed in good faith or for the purpose of settling a question of law involved in the controversy, justice requires that, upon the decision of that point of law, either party should be permitted to amend his pleadings, in such mode as to present for determination the substantial cause of action, *or the real ground of defense.* The object of pleading is not to defeat, but to advance the ends of justice; not to destroy, but to protect the substantial rights of parties. * * * Leave to amend, it is true, is not a matter of right, but rests in the sound discretion of the Court. Where, however, the demurrer appears to have been filed in good faith, and there has been no verdict upon an issue of fact, leave to amend is granted very much as a matter of course, wherever it is material to the cause of action or to a substantial defense. * * * Under these circumstances, had the demurrer been sustained, and the plea adjudged insufficient by this court, the Court by its *well settled and uniform course of practice* would have *permitted the defendant to plead anew,* either by amending the plea demurred to, or by adding such new plea as might be deemed material to the defense."

Hale v. *Lawrence,* 22 N. J. L. 72.

By the Practice Act, Sec. 127, 3 Compiled Statutes of New Jersey, p. 4093, it is provided:

> "where issue is joined on a demurrer the Court shall give judgment according to the *very right of the cause* and matter in law shall appear *without regarding any imperfection, omission, defect in or lack of form.*"

Upon these principles, had the motion of plaintiff been *confined* to striking the answer upon the ground that it constituted no legal defense to the cause of action, the right to amend would have been granted "*very much as matter of course.*" But plaintiff, at the time it moved to strike, also moved under rule 80 for a *summary judgment.*

The record shows (p. 11) a notice of motion to strike and a notice of motion for *summary judgment upon affidavits.* There is no question but that the affidavits of both sides were filed.

All that the record shows is the notice of motion (p. 11) which contains the application for summary judgment, the filed affidavits and the order striking out the answer and entering judgment (p. 59).

The form of the order striking out the answer does not indicate that judgment was entered for want of an answer, the answer filed having been stricken out upon a motion equivalent to a general demurrer.

While the order refers to the fact that the application to strike was upon the ground that the second paragraph constituted no defense to the action, it also refers to the fact that the application was for *summary judgment,* and there is nothing in the order indicating that the affidavits were *not* before the Court.

The notice of motion was for summary judgment *upon affidavits.* By adopting the course of procedure which it did appellee deprived ap-

pellant of the opportunity to obtain leave to amend the answer, assuming it to have been stricken out only because it did not, considered as a formal pleading, constitute a defense to the action, which leave, according to the settled practice, would be granted if the affidavits disclosed a meritorious defense *"very much as matter of course"*, for the summary judgment followed immediately at the heels of the striking out of the answer and was directed in the same order. The settled practice is, upon objections to pleadings, to have regard to *substance* rather than to form, and certainly, upon the entry of judgment, to have regard to the very *right of the case.*

As the Chief Justice said in *Hale* v. *Lawrence,* 22 N. J. L. 72, "the object of pleading is not to defeat, but to advance the ends of justice; not to destroy, but to protect the substantial rights of parties."

Assuming now that the answer was bad upon a motion to strike equivalent to a general demurrer, the Court had before it, *when it was asked to enter summary judgment,* the affidavits of the parties which, if our contention is correct, indicated that defendant had a meritorious defense which it was entitled to have put in proper form and the issue of fact submitted to the jury. Instead of, in the order striking the answer, granting leave to appellant to amend or plead anew or at least giving it an opportunity to apply for leave to amend, which should be granted *almost as matter of course,* in the same order, *it directed summary judgment to be entered.*

The form of the order was consented to by appellant but *not the substance.* It must be assumed that the Court stated what it would do and that the order embodies the Court's direction. *The direction to enter summary judgment with-*

out calling upon appellant to plead anew goes to substance not form.

It must be assumed, we submit, that the Court considered the affidavits and came to the conclusion that, upon the very right of the case, respondent was entitled to judgment.

As before indicated the Court had to go outside the pleading to enter summary judgment because the answer denied that rent was due. The admission of defendant referred to in the order does not change the formal pleading. The Court must therefore, if it relied *only* on that admission have stricken the answer *as sham. But if it did that it should have considered the admission in the light of the affidavits and, so considered, a defense appeared.*

While it is true, as the Court said in *Hale* v. *Lawrence,* 22 N. J. L. 72, that the right to amend, after the sustaining of a general demurrer, is not a matter of right but of discretion yet, according to the "well settled and uniform course of practice," leave to amend is granted very much as a matter of course, wherever it is material to the cause of action or to a substantial defense (*Hale* v. *Lawrence,* 22 N. J. L. 75), and a refusal to permit appellant to plead anew or to amend under the circumstances of the instant case, would be such an abuse of discretion as would be reviewable on error.

So that, even if it be considered that the Court in striking the answer did *not* do so because it was sham or frivolous, but because it did not constitute a legal defense to the action, and if it be considered that the Court was right in holding that it did not constitute a legal defense to the action, the *entry of summary judgment was error.*

But we reiterate that it is apparent that the Court entered *summary judgment* because it felt that the answer, considered in the light of the affi-

davits, was *frivolous,* that is to say, assuming that the statements contained in the affidavits presented by appellants were true, *no legal defense was set up.*

An order striking out a pleading upon the ground that it discloses no defense (Supreme Court rule 40) and an order permitting the entry of summary judgment (Practice Act 1912, paragraph 15) are both appealable after final judgment.

Under rule 40, which abolishes demurrers and which provides that any pleading may be struck out on motion on the ground that it discloses no cause of action, defense or counter-claim respectively, a plaintiff may, in lieu of the motion to strike out, make the objection in its answering pleading in which event the Court "on motion of either party, may determine the question so raised before trial, *and if the decision be decisive of the whole case the Court may give judgment for the successful party or make such order as may be just.*" It is submitted that the same rule governs the Court when a motion is made to strike out prior to the filing of any answering pleading and that the Court may not give judgment unless the decision be decisive of the whole case and the burden is upon the Court to make such order as may be *just.*

Upon matter of substance, assuming that the answer was vulnerable upon attack by the equivalent of a general demurrer, the decision was *not decisive* of the whole case for the Court had before it affidavits which indicated that appellant had a substantial defense which it should be permitted to interpose.

For a case in which the practice on application for summary judgment is fully considered see Birkenfeld vs. Ginsburg, in this court decided May 20, 1929, 7 N.J.A.R.745.

POINT IX.

In any event, that portion of the rule ordering summary judgment is erroneous and the summary judgment should be reversed and the record remitted to the Circuit Court to the end that defendant may there apply to amend the answer if, in fact, the answer be not sufficient.

There was no necessity for application by defendant for leave to amend the answer for, upon the motion in the form in which it was made, the Circuit Court had before it not only the pleadings but the affidavits and, in determining whether *summary judgment* should be entered it was the duty of the Court to consider all of the facts before it and to order judgment entered only if it appeared that the very right of the case required such a judgment to be entered.

Our contention is that the rule which, at the same time, strikes the answer and enters summary judgment is, at least to the extent that it orders summary judgment, wholly erroneous. If it is set aside to that extent, and if, under the circumstances of this case, there is an obligation, as the Supreme Court held, upon the defendant to apply to amend, such an application may then be made. The result would then be as if the Supreme Court and this Court had sustained a plea as bad upon general demurrer and, in such a case, leave to amend may be granted a defendant even after decisions of both appellate courts sustaining the action of the Trial Court in holding the plea bad. *Hale* v. *Lawrence,* 22 N. J. L. 72.

If the pleading of defendant was defective, but a case was disclosed by the affidavits which indicated that defendant might, upon a trial, make a case for the jury, then we submit the proper order would be one striking out the answer but permit-

ting defendant, within a limited space of time, to amend the pleading to set up the meritorius defense indicated by the affidavits. The Court, by its rule, not only struck the answer but ordered summary judgment upon the theory that neither the complaint nor the affidavits disclosed facts indicating that the defendant might be able to present facts upon the trial, either from the mouths of its own witnesses or from the mouths of defendant's officers, which would make a case for a jury.

Conclusion.

It is submitted that it is clear from the record that, by the judgment of the Court, appellant has been prevented from submitting a substantial defense and that the matter is of importance. There is other rent which has accrued for which suits may be brought and there are other claims between the parties, and it will be argued that this judgment is *res adjudicata* against appellant, although it has not had an opportunity to have its meritorious defense considered.

We were criticized by appellee for stating in the Supreme Court that the Circuit Court declined to strike out defendant's counterclaim. It states that the Court was not asked to strike out the counterclaim, as the record shows. The record shows a notice of motion to strike the counterclaim (p. 11) and an order striking out the answer and entering summary judgment with no reference to the counterclaim. We assume that the failure of the Court to strike out the counterclaim is tantamount to a denial of the motion.

It is respectfully submitted that the judgment of the Essex County Circuit Court should be reversed.

Respectfully submitted,

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MERRITT LANE,
Of Counsel with Appellant.

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New Jersey Court of Errors and Appeals

NEW JERSEY ALUMINUM COMPANY, a corporation, *Plaintiff-Appellee,* *vs.* CHARMS COMPANY, a corporation, *Defendant-Appellant.*	*On Appeal from New Jersey Supreme Court Affirming Judgment of Essex County Circuit Court entered after Rule Striking Out Answer.* Sat in Essex County Circuit Court, MOUNTAIN, *J.* Sat in Supreme Court, MINTURN, BLACK and CAMPBELL, *JJ.*

BRIEF FOR PLAINTIFF-RESPONDENT.

Facts.

On November 1, 1923, plaintiff and the defendant entered into a written lease for the premises 699-711 Springfield avenue, Newark, New Jersey, for the term of five (5) years. Said lease contained the following clause:

> "It is further agreed between the parties hereto that all interior repairs to the said premises shall be made at the cost and ex-

pense of the lessee except to the roof of said building, repairs to which shall be made and paid for by the lessor." (Case, p. 20.)

Said lease also provided:

"It is expressly understood and agreed that said lessee is to take over said buildings in the condition in which they are at the present time; that said lessee make all repairs, alterations, changes of any kind at its own expense, during the continuation of this lease as hereinafter set forth * * *" (Case, p. 16).

The defendant entered the premises and continued to occupy them up to May, 1927, when the defendant vacated said premises.

The defendant, however, continued to pay rent from then on as stipulated in the lease up to and including the month of September, 1927.

The plaintiff in its case asks to recover for the rent due for the months of October, November and December, 1927, totalling Three Thousand Seven Hundred and Thirty-five Dollars and Forty Cents ($3,735.40). (Case, p. 4.)

The defendant filed an answer and counter-claim. The counter-claim is not in issue and therefore need not be considered. The only issue raised is in reference to the second paragraph of the defendant's answer which in substance sets forth that plaintiff agreed to repair the roof; that the defendant was inconvenienced and embarrassed by the leaky condition of the roof; that the plaintiff, after being notified, made minor repairs; that such repairs were inadequate and the plaintiff continually neglected to maintain the roof in a condition necessary to keep the premises tenantable, the last sentence being, "as a result the premises became entirely permeated with dampness and unsuitable for the making of candy

and large quantities of candy were spoiled with the resulting loss and defendant was forcibly evicted and forced to vacate."

Plaintiff moved to strike out the defendant's answer and counter-claim and enter summary judgment on the grounds:

1. That they were sham and frivolous.
2. That they constituted no legal defense.
3. That they were vague, uncertain, indefinite, illegal, defective and so formed as to embarrass and delay a fair trial.

Affidavits showing that the answer was sham and frivolous were served upon the defendant and the defendant in turn served upon the plaintiff answering affidavits.

On the motion heard before Judge Mountain the plaintiff abandoned its motion as to the answer and counter-claim being sham and the motion was confined entirely to the second paragraph of the answer which it moved to strike out upon the ground that it constituted no legal defense.

All this appears from the order made in this Court (Case, p. 59) form of which was consented to by counsel for the defendant, which recites: "This matter coming on to be heard on the application * * * to strike out the second paragraph of the defendant's answer upon the ground that it does not constitute a defense to the plaintiff's cause of action * * * And it appearing to the Court, after argument, that said second paragraph of the defendant's answer does not constitute a defense to the plaintiff's cause of action * * * It is on this seventh day of February, Nineteen Hundred and Twenty-eight * * * ORDERED that the second paragraph of

the defendant's answer be and the same is hereby stricken out * * *"

Counsel for the defendant in the order admitted the amount due for rent which was the sum for which summary judgment was entered. The appellant in its brief says: "The Court declined to strike out defendant's counter-claim."

This is not true because the Court was not asked to strike out the counter-claim as the records show.

The appellant also says in its brief: "But however that may be, plaintiff did not content itself by moving to strike out the answer as it discloses a defense upon its face; on the contrary it moved to strike upon affidavits with the result that the merits of the case as distinct from the former pleadings, were presented to the Court * * *"

This is not true as appears from the record. The order made by the Circuit Court judge was made entirely upon the one ground that the answer set forth no legal defense. The affidavits printed in the state of case were not argued by counsel on either side at the hearing, and the Court was not asked to consider them because the motion was confined to the one ground as above stated.

The affidavits printed in the State of Case need, therefore, not be considered by this Court. They are wholly immaterial and have nothing to do with the question as to whether or not the answer filed by the defendant sets forth a legal defense.

Counsel for the defendant admitted in open court that the rent for the months of October, November and December, 1927, were not paid and

that the amount due was Three thousand six hundred and sixty-six dollars and sixty-six cents ($3,666.66) and Sixty-eight dollars and seventy-four cents ($68.74) interest, totalling Three thousand seven hundred and thirty-five dollars and forty cents ($3,735.40) (Order, Case, p. 59).

The Court thereupon made an order striking out the second paragraph of the defendant's answer entering a summary judgment for that amount. (Case, p. 59.)

ARGUMENT.

Point I.

The question involved has already been decided by our Court of Errors and Appeals in the case of *Stewart* v. *Childs Co.*, 86 N. J. L. 648. Opinion by Justice Black supported by the entire court.

Head Note.

> A covenant in a lease to pay rent by the tenant and a covenant by the landlord to keep the cellar waterproof are independent covenants the breach of the latter is not a defense to an action for the non-payment of rent under the covenant.

In that case the landlord guaranteed that he would at all times during said lease keep the cellar waterproof at his own expense. The cellar was necessary for the conducting of the defendant's business and it was undisputed that at times there were three feet of water in the cellar, the presence of the water in the cellar being, of course, due to the fact that the walls and foundations were not waterproof.

Trial court held that the covenants were independent and that the breach of the covenant

to keep the cellar waterproof was not a defense to an action for rent.

> The court said (p. 650): "There are numerous cases in this and other jurisdictions illustrating the principle of eviction, both actual and constructive, applied as a defense to an action for the non-payment of rent. Chief Justice Jarvis, in the case of Upton *v.* Townsend and Greenless, 17 C. B. 30, 51, after speaking of a physical expulsion or a motion in reference to a constructive eviction, said: 'I think it may be taken to mean this—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.' This definition of a constructive eviction was cited with approval of our Supreme Court in the cases of Meeker *v.* Spalsburg, 66 N. J. L. 60; Metropole Construction Co. *v.* Hartigan, 83 *Id.* 409. * * * There is no evidence that the landlord in any way was responsible for water in the cellar, except that the walls and foundations were not waterproof according to the guarantee. The facts in the record on which the judge at the trial was called upon to make a ruling, tested by the rule above cited, fall short of making out either an actual or constructive eviction. We are unable to find in the record any evidence that shows that the landlord, or by his procurement, did anything with the intention of depriving the tenant of the enjoyment of the premises."

So, in the present case there is absolutely no allegation in the answer which alleges that the landlord, or by his procurement, has done anything with the intention of depriving the tenant of the enjoyment of the premises. The only allegation is that he attempted to repair the roof but that said repairs were inadequate and that the plaintiff neglected to maintain the roof

in a proper condition. It is respectfully insisted that under this authority the answer of the defendant sets forth no defense and that the order of the Court was properly made.

Point 2.

The answer was stricken out only upon the ground that it set forth no legal defense as indicated in the argument above, to wit, that there was no allegation in the answer which alleged that the landlord did anything with the intention of depriving the tenant of the enjoyment of the premises. The affidavits referred wholly to the question as to whether or not the counterclaim was sham which motion was not argued before the court below because it was abandoned. The affidavits cannot be used to supplement or add to the pleadings as filed by the appellant. There was no motion made to amend the pleadings and apparently the appellant desired to review the lower court's ruling on the question as it then stood.

Point 3.

There is no allegation in the defendant's answer that there was any fraudulent misrepresentation or concealment by the landlord, and we think the point made by the appellant is wholly immaterial and irrelevant.

Point 4.

The appellant, in its brief, is attempting to convey to this court that the lower court decided a question of fact. This is not so. There was no question of fact involved, the only question being whether or not the answer as filed by the defendant constituted a legal defense.

The appellant now complains that it should have been permitted to amend its answer in the event the Court decided it to be insufficient. The record does not disclose any application to amend, and as a matter of fact, no application was made for permission to file an amended answer. The appellant apparently desired to have the question ruled upon by the Supreme Court and has taken it here for that purpose. It can, therefore, not complain that the Court refused permission to amend when no such permission was requested.

Among the grounds of appeal filed by the appellant herein is the following:

> "The affidavits filed in this cause by the appellant presented questions of fact as to its defense which should have been submitted to a jury."

Evidently the contention of the appellant is that the affidavit presented questions of fact relative to the defense attempted to be made in the second paragraph of the answer. Whatever defenses the defendant could make to the action must be found in the pleadings filed by it. Whatever affidavits may have been presented by the appellant would not strengthen or change in any way the actual defense made under the second paragraph. In other words it is elementary that the defenses to an action must be made in the pleadings, and there is nothing in the common law system or under the modern rules to permit affidavits of this nature to have the effect of or stand in lieu of formal pleadings. The Court below considered the legal effect of the allegations set forth in the second paragraph, and determined that they were insufficient in the point of law to constitute a defense. The Court could only consider the allega-

tions of this paragraph and under no possible theory could the allegations of the affidavits constitute a pleading in the action.

Point 5.

The defendant, in its brief, by Points 7, 8 and 9, raises questions which are not properly arguable under the grounds of appeal filed, and it is, therefore, unnecessary to consider these points unless it is the contention of the defendant that these points are applicable to the Fourth Ground of Appeal: "The affidavits filed in this cause by the defendant-appellant presented questions of fact as to its defense which should have been submitted to a jury." (Case, p. 63.) It is obvious that if such contention is seriously made that the defendant is asking this court to supplement, alter or add to the pleadings filed, by affidavits submitted.

It is respectfully contended that such is not the law and that whatever defenses the defendant could or wished to make to the action must be found in the pleadings filed by it. It is apparent that no affidavits presented by the defendant regardless of their number or their content could have in any way changed or increased the actual defenses made out in its answer, and more particularly the actual defense made out in the second paragraph.

We again call to this Court's attention, at the risk of seeming redundant, the fact elemental and propaedeutic to a knowledge of legal procedure, that the defenses to any action must be made in the defendant's pleadings filed in such action and may not be made by collateral or supplemental affidavits. There is nothing in the common law or in the modern rules of practice to

indicate that affidavits of the nature filed in this case ever had or were intended to have the effect of, or stand in lieu of the formal pleadings. From the very nature of the argument before the Court below it may readily be seen that the Court was bound only to consider the allegations of the second paragraph of the answer inasmuch as it was to the sufficiency or insufficiency of this paragraph that the motion of the plaintiff was addressed, and it is equally apparent, therefore, that under no possible theory could the allegations contained in the affidavits filed by the defendant be considered or constituted a pleading in the action.

It is respectfully submitted, therefore, and contended that the Supreme Court of this state in its opinion by which it affirmed the judgment of the Circuit Court stated therein (Case, pp. 64, 65, 66) the proper law applicable to the situation and the correctness of its application by the Circuit Court before whom this motion was heard. A proper understanding of this opinion precludes any such argument as is advanced by the defendant in Points 7, 8 and 9 of their brief, and it is respectfully submitted and insisted that the order of the Circuit Court was properly made and that the opinion of the Supreme Court in affirming the order was proper and is well substantiated by the law in the opinion rendered set forth, and, therefore, that the ruling of the Supreme Court should be affirmed.

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