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**BILL OF COMPLAINT.**

Filed January 29, 1929.

**In Chancery of New Jersey**

*To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:* 10

Complainant Gar S. Sparks, residing at No. 36 Grant avenue, in the City of East Orange, Essex County, New Jersey, respectfully shows:

1. That on March 4, 1922, Leonard Lorentowicz, who is the defendant to this bill, being then the owner of premises situated in the City of Newark, County of Essex and State of New Jersey, known and designated as No. 921 Broad street, in said city, made and entered into a written lease with complainant whereby defendant leased and demised to complainant the said parcel of land and premises with the building thereon for a term of twenty-one (21) years to commence on May 1, 1924, at the rental of \$10,000 per year for the first five years of said term, payable in equal monthly installments of \$833.33 per month in advance on the first business day of each and every month respectively, and at an increased rental during the remainder of said term as by reference to said lease will more fully appear, a true copy thereof being hereunto attached and made a part hereof and marked Schedule "A." 20 30

2. That on or about April 17, 1924, complainant and defendant entered into a further written agreement bearing that date whereby the commencement of the aforesaid demised term was made June 1, 1924 instead of May 1, 1924 as by 40

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reference thereto will more fully appear, a true copy of said agreement dated April 17, 1924 being hereto attached and made a part hereof and marked Schedule "B."

10 3. That on or about May 5, 1924 complainant and defendant made and entered into a further supplemental written agreement whereby the description of the demised premises as contained in said original lease dated March 4, 1922 was modified and amended so as to include therein certain additional vacant land in the rear of said building and whereby the rent reserved thereunder was increased \$15 per month as by reference thereto will more fully appear, a copy of said supplemental agreement dated May 5, 1924  
20 being hereto attached and made a part hereof and marked Schedule "C."

4. That upon the execution and delivery of said original lease dated March 4, 1922, complainant deposited with defendant as security therefor the sum of Five Thousand Dollars (\$5,000), as in and by paragraph No. 7 of said original lease will more fully appear, of which said sum \$2,000 has been applied toward the rent reserved under said lease and of which said deposit the  
30 defendant still holds and retains the sum of Three Thousand Dollars (\$3,000).

5. That complainant entered into and took possession of said demised premises on June 1, 1924 under and pursuant to said lease and said amendments thereof and supplements thereto and ever since then has been and still is in possession thereof.

40 6. That complainant has paid all the rent reserved under said lease from the commence-

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ment of said term up to and including the installment thereof which fell due in the month of December, 1928, and has tendered to the defendant, as hereinafter more particularly set forth, the installment thereof which fell due for the month of January, 1929, which tender defendant refused and still refuses to accept, as hereinafter more particularly set forth, and complainant has in all respects fully kept and performed all other covenants and agreements by him in said lease and in the said agreements supplementary thereto and amendatory thereof he covenanted and agreed to keep and perform. 10

7. That complainant since the commencement of said term has expended large sums of money altering, remodeling, decorating and equipping the interior of said demised building and in building an addition in the rear thereof so as to adapt the demised premises to use as a restaurant, and candy and soda shop and has expended further large sums of money in advertising the business which complainant conducts on the demised premises and in building up his said business and an extensive patronage of his said restaurant and candy and soda shop in the demised premises. 20

8. That complainant's said leasehold has become and is of great value to complainant, and complainant is informed and verily believes and charges the fact to be that defendant regrets having made and entered into said lease to complainant and that for his own gain and purposes and without regard to the rights of complainant the defendant is desirous of evicting complainant and of regaining possession of said demised premises; that defendant is the owner of a large tract 30 40

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of land in the rear of said demised premises which said tract of land fronts on Halsey street and part of which runs in an L southerly to a frontage on Hill street; that as conditions have developed in the neighborhood of said demised premises since the making of said lease it would  
10 be to the gain and advantage of defendant to be able to use the demised premises as an entrance from Broad street to his said larger tract of land which lies in the rear of the demised premises and which larger tract of land might well be developed as a theatre site or for commercial purposes if an entrance thereto might be had from Broad street; and that such possibilities as aforesaid have just recently been suggested and brought to the attention of defendant.

20 9. That complainant has paid all the rent reserved under said lease from the making and execution thereof and the entry of complainant upon the demised premises up to and including the month of December, 1928; that at the time said lease was made the rental therein reserved was a high rental for the premises in relation to other rentals of Broad street property in the vicinity thereof; that defendant knew that there  
30 was uncertainty as to whether complainant would be able to build up a sufficient business and realize sufficient therefrom to enable him to pay the said rent reserved and knew that complainant's ability to pay the rent would be dependent upon the building and success of his business in the demised premises; that complainant experienced much difficulty, particularly during the years first after his entry into the demised premises, in paying the monthly installments of said rent as they fell due; that defendant at all times  
40 until the serving of the notice by him as herein-

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after mentioned, exhibited toward complainant a very friendly attitude and displayed a willingness and disposition to accommodate complainant and to facilitate the development of his business on the premises by permitting complainant to pay said rent in such manner as complainant was able, and from time to time accommodated complainant to the extent of taking notes in lieu of cash for said monthly installments of rent, which notes complainant at a later date paid and satisfied; that during the years 1927 and 1928 complainant was better able than he at first was to meet said payments of rent more promptly, but that even during the years 1927 and 1928 complainant frequently was not able to pay the whole of said monthly installments in one payment on or about the first of the month but paid same in two or more installments during the calendar month and in some instances certain portions of the rent due in one month were carried over until and paid in the following month; that attached hereto and marked Schedule "D" is a detailed statement of the dates on which payments of rents were made by complainant to defendant and accepted by him, and the respective amounts thereof, during the years 1927 and 1928.

10. That on June 17, 1927, complainant had not paid the monthly installment of rent which fell due upon the first business day of that month, and defendant's secretary wrote a letter to complainant bearing that date stating that "Beginning July 1st Mr. Lawrence (meaning the defendant) insists that the rent be paid the first of each month"; that complainant on June 18, 1927, went to the office of defendant and delivered to defendant a check bearing that date in the sum of \$348.33 which, together with the \$500 allowance which

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complainant was then entitled to have credited on account of rent out of the aforesaid deposit, paid and satisfied said installment of rent in full; that the complainant then and there talked with defendant about complainant's business and explained to defendant the facts and circumstances thereof, and defendant did not insist in said conversation that the said rent should thereafter be paid promptly upon the first of each month, but on the contrary defendant again expressed a friendly attitude toward complainant and disposition to help and accommodate complainant in respect to the payment of the said rent and urged merely that complainant try to pay the monthly installments of rent as promptly in each month as possible; that thereafter complainant paid the monthly installments of rent in the amounts and on the dates respectively as set forth in the foregoing Schedule "D" hereto attached, and never thereafter, until the serving by defendant upon complainant of the notice hereinafter mentioned, did complainant have any knowledge or did defendant in any way indicate or intimate to complainant that defendant was dissatisfied with the manner in which complainant had been and was paying the rent reserved under said lease, but on the contrary by his course of conduct long continued and by his often expressed interest in and desire to accommodate and help complainant defendant had induced complainant to believe and complainant did believe that he might continue the course of payments as they had previously been pursued as aforesaid; that when the monthly installment of rent for the month of January, 1929, fell due on the 2nd day of the month complainant was ready, willing and able to pay said rent and the same would have been paid on or about the 1st of the month if it had not been

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for the fact that complainant's bookkeeper and accountant whose duty it then was to draw checks for the payment of rent and other bills, was confined to his home by sickness as were also other employees of complainant with the result that up to January 15th, 1929, said January installment of rent had not been paid; that (except as aforesaid) during all the preceding months of the term of said lease there had been nothing in the course of the relations between complainant and defendant to put complainant on his guard or to in any way indicate to complainant that the defendant would insist upon a literal compliance with provisions of the lease relative to the payment of the monthly installments of rent on the first day of each month, and complainant was thereby lulled into a sense of security and relied upon the course of dealings which had transpired between him and defendant and consequently did not personally inquire or give attention to the payment of rent for said month of January promptly on the first business day of that month.

11. That on January 15, 1929, said January installment of rent being then still unpaid, without previous demand therefor and without notice or warning of any such intention, the defendant on that day served upon complainant a notice purporting to terminate said lease and the term thereby granted for the reason and upon no other ground than that said January installment of rent had not been paid, a copy of which said notice is hereto attached and marked Schedule "E" and made part hereof.

12. That immediately upon receipt from the defendant of the aforesaid notice complainant went to the defendant's office and the defendant being then absent therefrom complainant offered

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and tendered to defendant's secretary, who was in charge of said office and customarily attended to the collection of said rent, a check in the sum of \$848.33 in payment of the January rent, but was informed by defendant's said secretary that she had been instructed not to accept said rent; 10 that thereupon complainant consulted counsel and on the morning of January 16th, 1929, went with his counsel again to defendant's office and tendered to the defendant the said last mentioned sum in cash, to wit, legal tender, together with \$3.00 additional as interest thereon from January 1st, 1929, to that date; that defendant refused to accept said tender and thereupon defendant stated to complainant that he intended to declare a forfeiture of the said term and to 20 pursue all legal remedies open to him to secure possession of the premises.

13. That complainant is ready, able and desirous of paying said January, 1929, installment of rent due defendant and hereby further tenders the same to defendant together with interest thereon from January 1st, 1929.

14. That in pursuance of his said declared intention the defendant caused to be instituted in the Second District Court of the City of Newark a certain proceeding against the complainant to dispossess him from the demised premises and to recover possession thereof, and thereupon there issued out of said Second District Court of the City of Newark under the seal thereof and under the hand of the Clerk on the 23rd day of January, 1929, a certain summons in a proceeding in said court pending wherein the said defendant was complainant and this complainant is defendant, directed to any constable of said 30 county or to the Sergeant-at-Arms of the said 40

*Bill of Complaint.*

Court, commanding him to require this complainant to forthwith remove from the demised premises or show cause before said court on Wednesday the 30th day of January, 1929, why possession of said premises should not be delivered to the defendant herein; a copy of the affidavit filed in the said proceeding in the said Second District Court of the City of Newark and made by the said defendant herein and upon which the said summons issued is hereunto annexed marked Schedule "F" and made a part hereof. 10

15. That if defendant should be permitted to or should succeed in terminating the term by said lease demised, and in recovering possession of the demised premises complainant would not only pursuant to the terms of the said lease lose the \$3,000 of deposit which the defendant still holds as security, as aforesaid, but complainant would lose also the many thousands of dollars which he has expended in remodeling and equipping the demised building for the use of his said business and in advertising and building up his said business in the demised premises and would lose not only his said leasehold but also the good will of his said business in the demised premises, and complainant would thereby suffer great and irreparable injury. 20 30

16. That by reason of the attitude of the said defendant and his course of dealing with the complainant herein since the commencement of the said demised term and from thence hitherto and by reason of the acquiescence of the defendant and the course of his conduct with respect to the payment of the said rent reserved, as hereinabove set forth, it is unjust and unconscionable on the part of the said defendant to now attempt to enforce any provision in the said 40

*Bill of Complaint.*

lease for the forfeiture of the same by reason of said alleged failure on the part of the complainant herein to pay said installment of rent upon the precise day on which it fell due, and by his said acquiescence and course of conduct defendant is in equity estopped from taking advantage of said alleged default in payment of said January rent as a ground of forfeiture of said lease.

17. That complainant is advised that he may not be able to make these defenses in said action at law so pending against him or in any other action at law which said defendant may institute to recover possession of the demised premises, but that only in this Honorable Court can complainant have advantage of the defenses hereinabove set forth; and complainant is further advised and believes and charges that under the terms and provisions of said lease the breach and default in the payment of said January installment of rent alleged by defendant does not either at law or in equity entitle defendant to terminate said demised term or to re-enter or repossess said demised premises, but that to defendant's said claim and attempt to recover possession of said premises complainant has, as aforesaid, defenses which are not cognizable at law and which are available to complainant only in this Honorable Court where matters of such nature are properly cognizable and relievable; and that complainant ought not to be put to the hazard of his limited defenses at law and ought not to be subjected to such further and other proceedings at law as defendant may and has threatened to institute against complainant in the event that said proceedings now pending in said District Court shall either be discontinued by the defendant hereto or shall be dismissed by said District Court

*Bill of Complaint.*

or shall by said District Court be determined adversely to the defendant herein.

Complainant, by reason of the inadequacy of relief in any other court, hereby prays:

a. That the defendant Leonard Lorentowicz may without oath (answer under oath being hereby waived) specifically answer each of the allegations herein contained. 10

b. That the said defendant and his agents and attorneys may be enjoined and restrained from further prosecuting the said proceedings instituted by him and now pending in the said Second District Court of the City of Newark against complainant to dispossess complainant and to recover possession of the said demised premises, and from instituting and from prosecuting any other suit, action or proceedings in any court of law to enforce a forfeiture of said lease or to repossess said demised premises in any way based upon or by reason of said alleged default of complainant in the payment of said installment of rent which by the terms thereof fell due on the 1st business day of January, 1929. 20

c. That it may be decreed that said alleged default of complainant in the payment of said installment of rent which by the terms of said lease fell due on the 1st business day of January, 1929, does not entitle defendant to exact a forfeiture of the demised term or to re-enter or repossess said demised premises; and that it may be decreed that defendant by his aforesaid acquiescence and course of conduct with respect to the payment of the rent reserved under said lease, as hereinabove set forth, is estopped from taking advantage of said alleged default in payment of 30

*Bill of Complaint—Schedule A.*

said January rent as a ground of forfeiture of said lease.

d. That the complainant may have such other and further relief as may be equitable and just.

10 e. That a writ of subpoena may issue commanding the defendant to answer this bill of complaint and abide by such decree as this Court may make in the premises.

LUM, TAMBLYN & COLYER,  
Solicitors for Complainant.

CHESTER W. FAIRLIE,  
of Counsel.

## SCHEDULE A.

20 LEONARD LORENTOWICZ THIS INDENTURE OF  
LEASE, Made this  
AND fourth day of March,  
Nineteen Hundred and  
GAR S SPARKS Twenty-two (1922), by  
and between Leonard  
Lorentowicz, of the City of Newark, Essex  
County New Jersey, hereinafter called the  
"Landlord," of the First Part; and Gar S.  
30 Sparks, of the City of Newark aforesaid, hereinafter called the "Tenant," Party of the Second  
Part, WITNESSETH:

(1) For the term, at the rental and upon the conditions and covenants hereinafter set forth the Landlord hereby rents and demises to the Tenant and the Tenant hereby takes and hires from the Landlord all that certain tract and parcel of land and premises with the building thereon, known and designated as #921 Broad  
40 Street, in the City of Newark, Essex County,

*Bill of Complaint—Schedule A.*

New Jersey, which is more particularly described in the Schedule hereto attached and made a part hereof.

(2) The term and period of this lease is twenty one (21) years, to commence on the First day of May, Nineteen Hundred and Twenty four (1924) and ending at noon on the First day of May, Nineteen Hundred and Forty five (1945). 10

(3) The annual rental for said premises reserved to the Landlord and hereby covenanted by the Tenant to be paid is Ten Thousand Dollars (\$10,000.) per year for the first five (5) years of said term, payable in equal monthly installments of Eight Hundred and Thirty three Dollars and Thirty three Cents (\$833.33) per month; Eleven Thousand Dollars (\$11,000.) per year for the second five (5) year period of said term, payable in equal monthly installments of Nine Hundred and Sixteen Dollars and Sixty seven Cents (\$916.67) per month; Twelve Thousand Dollars (\$12,000.) per year for the third five (5) year period of said term, payable in equal monthly installments of One Thousand Dollars (\$1,000.) each; and Thirteen Thousand Dollars (\$13,000.) per year for the last six (6) years of said term, payable in equal monthly installments of Ten Hundred and Eighty three Dollars and Thirty three Cents (\$1083.33) per month; each and every of the aforesaid monthly installments to be paid in advance on the first business day of each month, respectively. 20 30

(4) The performance by the Landlord of each of the covenants herein made by him is a condition precedent to the obligation of the Tenant to perform the covenants herein made by the

*Bill of Complaint—Schedule A.*

Tenant; and the Landlord hereby covenants with the Tenant as follows:

(a) That at the beginning of said term said building and premises shall be in as good repair and condition as the same are now in.

10 (b) That at the beginning of said term there shall exist in said building and premises no violation of any law, ordinance, regulation or requirement of the governmental authorities of the City of Newark or of the County of Essex or of the State of New Jersey or of any other governmental authority having jurisdiction over said premises.

20 (c) That he is now the sole and rightful owner of said premises in fee simple absolute, and that this lease constitutes an encumbrance thereon subsequent only to the lien of a mortgage which is now a lien thereon in the sum of Forty Thousand Dollars (\$40,000.) and to the lease under which the present occupant of said premises is in possession thereof, the term of which expires on May First, Nineteen Hundred and Twenty four (1924).

W. G. Paragraph D. inserted on the reverse side.

30 (d) That if the present occupant of said premises or any other person or corporation shall be in possession thereon on May 1st, 1924, the landlord, at his own expense, will immediately institute necessary proceedings to oust such occupant thereof and prosecute said proceedings with all due, possible speed and deliver the possession of said premises to the tenant thereof; and that if possession thereof is not delivered to tenant on May 1st, 1924, rent abate until such time as possession is delivered to the tenant.

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*Bill of Complaint—Schedule A.*

(e) That he will not suffer or permit any mortgage lien upon said premises to which this lease may be subsequent or subordinate to be foreclosed or to in any way impair the rights of the tenant in said premises during the full term of this lease; and if he shall default in any payments of principal or interest in any such mortgage the Tenant may pay the same and deduct the amount so paid from the rent reserved hereunder. 10

(f) That during the term of this lease he will pay all taxes and assessments which may be levied or made against said premises and will not suffer or permit any sale of said premises for unpaid taxes or assessments; and if he shall fail to do so the Tenant may pay the same and deduct the amount so paid from the rent reserved hereunder. 20

(g) That the Tenant may assign this lease or sub-let the said premises or any part thereof and use or permit the same to be used for any lawful purpose; that the Tenant shall not by assigning this lease be released or discharged from his liability to the Landlord hereunder.

(h) That upon the payment of the rent herein reserved and the performance of the covenants and conditions herein provided to be kept and performed by the Tenant, the Tenant shall at all times during the term hereby demised peaceably and quietly have, hold and enjoy said demised premises, without eviction or disturbance by any person or persons, corporation or corporations, having a right to or lawfully claiming the same or any part thereof. 30

(5) This lease is made upon the following conditions and covenants, all and each of which the Tenant agrees to keep and perform, viz: 40

*Bill of Complaint—Schedule A.*

(a) That he will pay the said rent at the times and in the manner aforesaid.

10 (b) That he will pay all water rents assessed or metered upon said premises during said terms as additional rent hereunder, payments to be made promptly when charges fall due and before any penalties or interest are chargeable thereon, and that if he fails to make such payments at such times the Landlord may pay the same and the amount so expended by him shall be immediately due and payable from the Tenant as additional rent.

20 (c) That if any additions or extensions to the demised buildings shall be built or erected during said term the Tenant will pay to the Landlord annually thereafter as additional rent hereunder a sum equal to the tax rate in force in the City of Newark for each year of the term, respectively, applied to the cost of such additions and extensions to the demised building, the intent thereof being to relieve the Landlord from any possible increase in taxes resulting from any additions or extensions which the Tenant may make to the demised building.

30 (d) That he will at his own expense replace any and all glass in said demised building which may be broken during said term with glass of equal quality; and will carry adequate plate glass insurance in a responsible insurance company or companies to cover the risk of breakage of plate glass in the demised building, the policies of which insurance shall be carried in the name of the Landlord and the proceeds of which shall be applied to replacing any glass which may be broken; and if the Tenant shall fail to effect such insurance the Landlord may do so and the amount so expended by him for premiums for  
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*Bill of Complaint—Schedule A.*

such insurance shall be immediately due and payable from the Tenant as additional rent hereunder.

(e) That he will at all times during the term of this lease comply with all the ordinances, orders and requirements of the governmental authorities of the City of Newark and of the County of Essex and of the State of New Jersey and of any and all departments thereof having jurisdiction over said premises respecting licenses, sanitary and health requirements, police regulation, fire prevention and all other matters. 10

(f) That he will throughout said term keep the sidewalk and gutter in front of said premises in good repair and cleared of ice and snow.

(g) That he will indemnify and save the Landlord harmless from any and all action or actions and causes of action, suits and causes of suits and claims and demands whatsoever arising from any injury to any person or persons while upon or near the demised premises during the said term for which the Landlord might be liable by reason of his being the owner of said demised premises, excepting, however, any claims arising from any injury caused by any act of the Landlord or of his agents or servants. 20

(h) That if said premises or any part thereof shall be used for any purpose which shall increase the fire hazard therein beyond that which would exist in using said premises for the purpose of a candy and confectionery store and the manufacture of candy and ice cream and the conduct of a restaurant, the Tenant shall pay the Landlord as additional rent hereunder the increase in premiums for fire insurance on said building resulting by reason of such increased fire hazard; and such additional rent shall be due 30  
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*Bill of Complaint—Schedule A.*

and payable to the Landlord immediately upon the payment by him of the said premises.

10 (i) That he will make all necessary repairs to the demised building during the term of this lease, and upon the expiration of the term hereby granted, or upon the termination of this lease for any cause whatsoever, he will surrender and deliver up peaceable possession thereof to the Landlord in as good condition as it shall be in at the time of the entry of the Tenant wear and tear arising from reasonable use thereof, damages by the elements and taking by eminent domain or other public authority excepted.

20 (j) That he will permit the Landlord or his agents to enter the said premises at reasonable hours to examine the same and to make such repairs and alterations therein as the Landlord shall deem necessary for the safety, preservation or restoration of the demised building, and to exhibit the demised premises at any time during the last six months of the said term from ten o'clock in the morning until five o'clock in the afternoon (Sundays excepted) to any person or persons and to put up notices "To Let" or "For Sale" on the outside walls thereof.

30 (k) If the said premises shall become vacant or be deserted during said term and the Tenant shall be in arrears in payment of the rent reserved hereunder, the Landlord or his agents may enter the same without being liable for any prosecution therefor and may re-let the same and apply the rent so received first to the payment of the expenses of re-entering and then to the payment of the rent due by these presents, rendering the surplus, if any, to the Tenant.

40 (l) That if at any time during said term the Tenant shall be adjudicated bankrupt, then this

*Bill of Complaint—Schedule A.*

lease and all Tenant's rights hereunder, shall at the option of the Landlord cease and come to an end three (3) days after notice in writing of such election shall have been given to the Tenant by the Landlord, which notice may be sent by mail addressed to or delivered personally at the demised premises.

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(m) That at any time after the cancellation of the mortgage which is now a lien on said premises this lease shall be postponed and made subsequent and subordinate to any mortgage or mortgages which the Landlord may thereafter make or execute as a lien against said premises in an aggregate sum not exceeding Forty Thousand Dollars (\$40,000) and that the recording of any such mortgage or mortgages shall have preference and precedence over and the lien thereof shall be superior and prior to the lien and encumbrance of this lease irrespective of the date of recording; and the Tenant shall properly execute, without cost or charge to the Landlord, his successors or assigns, any such instrument as the Landlord may be advised is necessary or desirable to further effect the subordination and postponement of this lease to any such mortgage or mortgages; the refusal of the Tenant to execute such instrument shall entitle the Landlord to the option of cancelling and terminating this lease or of recovering from the Tenant all costs and damages that shall or may be incurred by the Landlord as a result of the Tenant's refusal.

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(n) That upon a breach by the Tenant of any of the covenants herein provided to be kept and performed by him and failure to fully perform and comply therewith within thirty (30) days after the receipt of written notice from the Landlord delivered to the demised premises, the Tenant shall at the option of the Landlord forfeit

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*Bill of Complaint—Schedule A.*

said term and all rights hereunder and the Landlord may re-enter and recover immediate possession of said premises, and shall also have an action for all damages arising from any such breach or breaches. The failure of the Landlord to exact a forfeiture for any breach or breaches  
 10 hereof by the Tenant shall not be deemed or construed as a waiver of the right of the Landlord to exact a forfeiture for any subsequent breach or breaches by the Tenant; no notice, however, shall be required of the non-payment of any of the above mentioned installments of rent, which are due and payable on the first business day of each and every month, respectively; and in the event that dispossess proceedings be instituted either for a breach of any covenant or condition  
 20 herein contained or for defaulting in payment of rent and the Landlord shall repossess himself of said premises, the Tenant shall nevertheless continue to be liable for any deficiency in the rentals herein reserved for the unexpired term hereby granted.

(5) It is further agreed that the Tenant is hereby given the right and privilege to make alterations, additions and improvements in the demised building according to plans and specifications which shall be submitted to the Landlord  
 30 for his approval, all of which alterations, additions and improvements shall be made at the expense of the Tenant, and the right to make such alterations, additions and improvements is hereby granted upon the express condition that at no time shall the demised land and premises be subjected to any mechanics' lien for any work and labor done or material supplied in connection therewith, and the Tenant shall indemnify and  
 40 hold the Landlord harmless from any lien claim or demand whatsoever by reason thereof.

*Bill of Complaint—Schedule A.*

(6) It is further covenanted and agreed that in case the building or buildings on the demised premises shall be damaged by fire or other casualty to such extent that the damage shall be considered by the Insurance companies issuing the policies of insurance in force on said premises as a fifty per cent. (50) loss or more, this lease may be terminated at the option of the Tenant, but if in such event the Tenant shall not elect to terminate the lease, the Landlord shall either repair and rebuild the demised premises or shall permit the Tenant to do so and shall apply to the cost thereof all moneys which may be collected from insurance covering such loss. If such damage shall be less than a fifty per cent. (50) loss, the Landlord shall repair the same as speedily as possible, and if the damage shall be so extensive as to render the demised building untenable, the rent shall cease until such time as the building shall be put in complete repair, but in the event that the damage to said building shall not render it untenable, the rent shall not abate provided the Landlord repairs the damage as speedily as reasonably may be done.

(7) The sum of Five Thousand Dollars (\$5,000) is deposited by the Tenant with the Landlord upon the signing and delivery hereof, receipt whereof is hereby acknowledged by the Landlord, of which sum Five Hundred Dollars (\$500) shall be applied on account of rent for the month of May, Nineteen Hundred and Twenty five (1925), and Five Hundred Dollars (\$500) on account of rent for the month of May in each of the succeeding nine (9) years, making ten (10) such yearly applications of Five Hundred Dollars (\$500) each on account of rent. The Tenant shall be entitled to no interest on said deposit. If at

*Bill of Complaint—Schedule A.*

any time prior to May First, Nineteen Hundred and Thirty four (1934) this lease shall be terminated for any default on the part of the Tenant, whatever balance of said deposit may then remain unapplied on account of rent shall be absolutely forfeited to the Landlord. If the Landlord shall  
 10 default in any of the covenants herein provided to be kept and performed by him, said entire sum of Five Thousand Dollars (\$5,000) with interest thereon at the rate of six per cent. (6%) per annum from the date hereof shall be repaid and refunded to the Tenant, for which payment the land and premises hereinabove demised are hereby charged and subjected to a lien.

(8) Wherever the words "Landlord" or "Tenant" appear in the foregoing lease, the  
 20 same shall be read as if the words "his heirs, executors, administrators or assigns" were inserted immediately after the word "Landlord" or "Tenant." This agreement of lease applies to and binds the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, in duplicate, the day and year first above written.

30 Leonard Lorentowicz (Seal)  
 Gar S. Sparks (Seal)

Signed, Sealed and Delivered  
 in the presence of

As to Gar S. Sparks  
 Chester W. Fairlie.

As to Leonard Lorentowicz  
 Wm. Greenfield.

*Bill of Complaint—Schedule A.*

## SCHEDULE.

## Description of demised premises.

The foregoing demised premises are so much of the land conveyed to the said Leonard Lorentowicz by Fred M. Barnet and wife by deed dated April 5th, 1919, and recorded in Book K 61 of Deeds for Essex County on pages 58-60, as runs from the line of Broad Street to a line eight feet westerly from the rear line of the present building standing thereon and including the whole width thereof. 10

Gar S. Sparks,  
Leonard Lorentowicz.

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

BE IT REMEMBERED, That on this 6th day of March, in the year of Our Lord One Thousand Nine Hundred and Twenty two (1922), before me, the subscriber, a Master in Chancery of N. J. personally appeared Leonard Lorentowicz, who I am satisfied is the person mentioned as the "Landlord" in the foregoing Indenture of Lease, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed. 30

Wm. Greenfield,  
Master in Chancery of N. J.

*Bill of Complaint—Schedule B.*

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

10 BE IT REMEMBERED, That on this fourth day of March, in the year of our Lord One Thousand Nine Hundred and Twenty two (1922) before me, the subscriber, a Master in Chancery of N. J. personally appeared Gar S. Sparks, who I am satisfied is the person mentioned as the "Tenant" in the foregoing Indenture of Lease, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

Chester W. Fairlie,

a Master in Chancery of New Jersey.

20 Received in the office March 6, A. D. 1922, at  
 12:18 P. M. No. 15.

## SCHEDULE B.

To all and to whom these presents shall come,  
 WITNESSETH:

30 WHEREAS, on the 4th day of March, 1924, Leonard Lorentowicz, has executed a Lease to Gar S. Sparks, of the City of Newark, County of Essex and State of New Jersey, for land and premises known and designated as #921 Broad street, in the City of Newark, County of Essex and State of New Jersey; and

WHEREAS, by the terms of the said lease, the said Leonard Lorentowicz agreed to give possession of the said premises on the first day of May, 1924; and

40 WHEREAS it appears that the said premises are leased to the Liberty Cut Glass Works, and that the said lease to the said Liberty Cut Glass

*Bill of Complaint—Schedule B.*

Works does not expire until the first day of June, 1924;

Now, therefore, in consideration, the said Leonard Lorentowicz waiving the rent for the month of June, 1924, the payment of rents to commence on the first day of July, 1924, in accordance with the terms of the said lease, the said Gar S. Sparks does hereby consent to take possession of the said premises in accordance with the terms, conditions, covenants and agreements in said lease, mentioned and specified and assumed and agreed to by the said Gar S. Sparks, from and after the first day of June, 1924, and the said Leonard Lorentowicz hereby waives the rent for the month of June, 1924, and the lease to continue with all other terms, covenants, agreements and undertakings, mentioned and specified therein, in full force and effect.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this Seventeenth day of April, Nineteen Hundred and Twenty-four.

Gar S. Sparks (L. s.)  
Leonard Lorentowicz (L. s.)

Signed, Sealed and Delivered  
in the presence of  
William Greenfield.

*Bill of Complaint—Schedule C.*

## SCHEDULE C.

THIS AGREEMENT, Made this 5th day of May, Nineteen Hundred and Twenty-four (1924) BETWEEN LEONARD LORENTOWICZ, hereinafter called the Landlord, of the First Part; and GAR S. SPARKS, hereinafter called the  
10 Tenant, of the Second Part, is intended as an amendment of and a supplement to the lease entered into between said parties, dated March 4, 1922, and demising premises #921 Broad Street, Newark, Essex County, New Jersey, which original lease is recorded in the Essex County Register's Office in Book I 66 of Deeds for said County, pages 110-114, WITNESSETH:

WHEREAS the premises demised by said original lease "runs from the line of Broad Street to a  
20 line eight feet Westerly from the rear line of the present building standing thereon and including the whole width thereof"; and whereas the parties hereto have now agreed that the said demised premises shall run from the line of Broad Street to the extreme rear line of the building which adjoins said demised premises on the south and which is now occupied by "Herud's", the said rear line of said Herud's building being intended for the purposes hereof as extended across the  
30 entire width of the premises demised by the lease between the parties hereto.

IN CONSIDERATION of said additional space the Tenant hereby agrees to add Fifteen Dollars (\$15) to each of the monthly installments of rent reserved in said original lease.

Said original lease shall be read and construed with like effect as if the demised premises described therein had been originally described as herein provided, and as if each of the monthly  
40 installments of rent therein reserved had been increased Fifteen Dollars (\$15.)

*Bill of Complaint—Schedule D.*

Nothing herein contained shall in any way alter the supplemental agreement entered into between the parties hereto, dated April 17, 1924, in respect to said lease.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written. 10

Leonard Lorentowicz,  
Gar S. Sparks.

Signed, Sealed and Delivered  
in the presence of

Alex T. Schneck,  
as to G. S. S.

20

## SCHEDULE D.

Rent Payments made by Sparks to Lorentowicz  
April, 1927, to December, 1928.

\$848.33—January 14, 1927.  
848.33—February 15, 1927.  
848.33—March 15, 1927.  
848.33—April 12, 1927.  
848.33—May 13, 1927.  
348.33—June 18, 1927. 30  
500.00—June 1927 (paid out of deposit.)  
848.33—July 2, 1927.  
848.33—August 16, 1927.  
848.33—September 15, 1927.  
848.33—October 14, 1927.  
500.00—November 15, 1927.  
348.33—November 24, 1927.  
500.00—December 14, 1927.  
348.33—December 20, 1927.  
400.00—January 18, 1928. 40

*Bill of Complaint—Schedule E.*

- 448.33—January 28, 1928.  
 348.33—February 25, 1928.  
 500.00—February 15, 1928.  
 500.00—March 20, 1928.  
 348.33—March 26, 1928.  
 348.33—May 17, 1928.  
 10 542.00—May 19, 1928 (\$42 of which was on account of taxes.)  
 848.33—June 19, 1928.  
 500.00—July 10, 1928.  
 348.33—July 21, 1928.  
 500.00—August 11, 1928.  
 348.33—September 1, 1928.  
 500.00—September 18, 1928.  
 348.33—September 28, 1928.  
 500.00—October 15, 1928.  
 20 348.33—October 24, 1928.  
 400.00—November 14, 1928.  
 448.33—November 22, 1928.  
 500.00—December 10, 1928.  
 348.33—December 26, 1928.

## SCHEDULE E.

To Gar S. Sparks,  
 921 Broad Street,  
 30 Newark, N. J.

Sir:

This is to notify you that the Lease made and entered into by and between you, as tenant, and Leonard Lorentowicz, as Landlord, on the 4th day of March, 1922, and the supplement thereto dated May 5th, 1924, for the land and premises known and designated as #921 Broad Street, in the City of Newark, County of Essex and State of New Jersey, for the term of twenty-one years  
 40 from the 1st day of May, 1924, and ending at

*Bill of Complaint—Schedule E.*

noon on the 1st day of May, 1945, is hereby terminated for the reason that you have failed and refused to pay the rent in accordance with the terms of said lease, due on the 1st day of January, 1929, and payment of which rent was demanded of you on the 2nd day of January, 1929, after same became due and payable, which is in violation of the provisions of said lease wherein it requires you to pay the monthly rental on the first business day of each and every month in advance, and which Lease provides as follows: 10

“Upon breach by the tenant of any of the covenants therein provided to be kept and performed by the tenant, the tenant shall at the option of the landlord forfeit said term and all rights thereunder and the landlord may re-enter and recover and repossess himself of immediate possession of the said premises.” 20

And I do hereby demand that you move and vacate said premises and deliver up same to me within three days from date of service of this notice upon you.

Dated January 15, 1929.

Respectfully yours,

Leonard Lorentowicz,  
Landlord. 30

*Bill of Complaint—Schedule F.*

## SCHEDULE F.

SECOND DISTRICT COURT OF THE  
CITY OF NEWARK.

10	LEONARD LORENTOWITZ, <div style="text-align: right;"><i>Landlord,</i></div> <div style="text-align: center;"><i>vs.</i></div> GAR S. SPARKS, <div style="text-align: right;"><i>Tenant.</i></div>	}	<i>In Tenancy Affidavit.</i>
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STATE OF NEW JERSEY }  
 COUNTY OF ESSEX } ss.

20 LEONARD LORENTOWITZ, of full age, being duly sworn according to law, on his oath deposes and says:

30 That he is the true and lawful owner of premises known and designated as No. 921 Broad Street, Newark, Essex County, New Jersey. That on the 4th day of March, 1922 deponent who was then and now is the owner of said premises entered into a written lease with Gar S. Sparks, whereby deponent leased and let unto said Gar S. Sparks a parcel of land and premises with the building thereon and known and designated as

40 #921 Broad Street, in the City of Newark, County of Essex and State of New Jersey, for a term of twenty-one (21) years to commence on the 1st day of May, 1924 at the annual rental of \$10,000 per year for the first 5 years of said term, payable in equal monthly installments of \$833.33 per month, \$11,000 per year for the second five year period of said term payable in equal monthly installments of \$916.67 per month, \$12,000 per year for the third five year period of said term pay-

*Bill of Complaint—Schedule F.*

able in equal monthly installments of \$1,000 each and \$13,000 per year for the last six years of said term payable in equal monthly installments of \$1,083.33 per month, each and every said monthly installments to be paid in advance on the first business day of each and every month respectively, all of which terms and conditions of the letting and leasing of said premises by deponent to the said Gar S. Sparks is more particularly described, mentioned and set forth in the lease and supplement thereto which is hereto annexed and made a part of this affidavit at the additional rental of \$15 per month to each of the monthly installments of rent reserved in the original lease. That the said lease contained the following clause.

“That upon a breach by the tenant of any of the covenants herein provided to be kept and performed by him and failure to fully perform and comply therewith within 30 days after the receipt of written notice from the landlord delivered to the demised premises, the tenant shall at the option of the landlord forfeit said term and all rights thereunder and the landlord may re-enter and recover immediate possession of said premises, and shall also have an action for all damages arising from any such breach or breaches. The failure of the landlord to exact a forfeiture for any breach or breaches hereof by the tenant shall not be deemed or construed as a waiver of the right of the landlord to exact a forfeiture for any subsequent breach or breaches by the tenant; no notice, however, shall be required of the non-payment of any of the above mentioned installments of rent, which are due and payable on the first business day of each and every month, respectively; and in the event that dispossession proceedings be instituted either for a breach of any covenant or condition herein contained or for

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*Bill of Complaint—Schedule F.*

default in the payment of rent and the landlord shall repossess himself of said premises, the tenant shall nevertheless continue to be liable for any deficiency in the rentals herein reserved for the unexpired term hereby granted." Deponent further deposes and says on his oath that under  
10 and by virtue of the terms of the foregoing mentioned lease, said Gar S. Sparks was to take possession of said land and premises herein mentioned and described and leased unto him on the first day of May, 1924.

Deponent further deposes and says that on or about the 17th day of April, 1924, under and by virtue of a mutual agreement made and entered into by and between deponent and the said Gar S. Sparks the time for delivery of possession by  
20 this deponent and taking possession by said Gar S. Sparks of said premises herein mentioned and described, and leased and let unto Gar S. Sparks was extended to the 1st day of June, 1924 which will more particularly appear in the memorandum agreement hereto annexed and made part of this affidavit.

Deponent further deposes and says on his oath that on the 5th day of May, 1924, a supplemental lease was made and entered into by and between  
30 this deponent and said Gar S. Sparks, whereby this deponent let and rented additional space to the space mentioned and described in the lease bearing date March 4, 1922 and which lease for the additional space was made part of the original lease bearing date March 4, 1922, a true copy of which is hereto annexed and made part of this affidavit.

Deponent further deposes and says on his oath that on June 1, 1924 the said Gar S. Sparks entered into possession of the premises mentioned  
40 and described in the lease bearing date March 4,

*Bill of Complaint—Schedule F.*

1922 and the supplemental lease bearing date May 5, 1924 and still is in possession of the said demised premises under and by virtue of said lease and the supplement thereto for the aforementioned land and premises.

Deponent further deposes and says on his oath that the said Gar S. Sparks breached the terms of said lease in that he has failed and refused to pay the rent due on the 1st business day of each month and that on the 2nd day of January, 1929 deponent demanded the said rent of the said Gar S. Sparks for the premises described and leased unto him by this deponent as described in the annexed lease and the supplement thereto, and that on the 15th day of January, 1929, this deponent exercised his option to terminate said lease in accordance with the terms therein and on the said 15th day of January, 1929, deponent caused a written notice to be served upon the said Gar S. Sparks, personally, by delivering the said notice to him at No. 921 Broad Street, Newark, Essex County, New Jersey, and explaining the contents thereof to him the said Gar S. Sparks, of which notice a true copy is hereto annexed and made part hereof, requiring the said Gar S. Sparks to remove from said premises within three days from the service of notice of such demand upon him, in accordance with the provision of the pamphlet laws of 1920, chapter 260. That deponent is now entitled to the possession of said premises but nevertheless the said Gar S. Sparks still holds over and continues in possession of said premises up to the present time without the permission or authority from this deponent.

(Signed) Leonard Lorentowicz.

*Affidavit of Gar S. Sparks.*

Sworn and Subscribed to be- )  
 fore me this 22nd day of )  
 January, A. D. 1929, at )  
 Newark, New Jersey. )

10 Rachel A. Lyons,  
 Notary Public of New Jersey,  
 Commission Expires November 1, 1929.

IN CHANCERY OF NEW JERSEY.

20	<p><i>Between</i></p> <p>GAR S. SPARKS,  <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>LEONARD LORENTOWICZ,  <i>Defendant.</i></p>	}	<p><i>On Bill, &amp;c.</i></p> <p><i>Affidavit.</i></p>
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STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } *ss.*

GAR S. SPARKS, of full age, being duly sworn on his oath according to law, deposes and says:

30 1. I reside at No. 36 Grant avenue, in the City of East Orange, Essex County, New Jersey. I am the complainant named in the foregoing bill of complaint. I have read said bill of complaint, and the same is in all respects true.

40 2. The leases and agreements dated respectively March 4, 1922, April 17, 1924 and May 5 1924, referred to in paragraphs 1, 2 and 3 of the foregoing bill of complaint were executed and entered into by and between me and the defendant, Leonard Lorentowicz, and the foregoing cop-

*Affidavit of Gar S. Sparks.*

ies thereof, hereto attached, are true copies thereof respectively.

3. The \$5,000 deposit referred to in paragraph 4 of the foregoing bill of complaint was made by me as therein alleged, and the defendant still holds the sum of \$3,000 thereof.

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4. I entered into and took possession of said demised premises on June 1st, 1924, under and pursuant to the said lease and said amendments thereof and supplements thereto, and ever since then I have been and still am in possession of said demised premises.

5. I have paid to defendant all the rent reserved under said lease and amendments thereof and supplements thereto from the commencement of said demised term up to and including the installment thereof which fell due in the month of December, 1928, and I have tendered to the defendant, as hereinafter more particularly set forth, the installment of said rent which fell due for the month of January, 1929, which tender defendant refused and still refuses to accept, as hereinafter more particularly set forth, and I have in all respects fully kept and performed all other covenants and agreement by me in said lease and the said agreements supplementary thereto and amendatory thereof covenanted and agreed to keep and perform.

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6. That since the commencement of said term I have built a kitchen on the rear of the demised building at a cost of between \$1,700 and \$2,000, and installed a modern and expensive store front in said building, and repaired skylights in the roof thereof, and have torn off the rotted and useless metal covering from the walls in the store in said demised premises and in lieu thereof have

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*Affidavit of Gar S. Sparks.*

plastered, panelled and decorated said walls, and have put an entire new floor in the basement of said building, and have shored up and supported the store floor, and have installed a toilet and plumbing fixtures and otherwise have expended thousands of dollars permanently improving the demised building, and in all have expended upwards of \$60,000 in remodeling, adding to, decorating, furnishing and equipping the demised premises for use as a restaurant and candy and soda shop, and have expended further large sums of money in advertising my business in said demised premises by newspaper advertisements, street car advertisements, hand bills, circulars and other means of advertising, and have built up a large business and extensive patronage.

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20 When said lease was entered into defendant knew that I would have to rely very largely upon credit to furnish, equip and put said demised premises in proper condition for the purposes of my business, and at all times throughout said term has known that I had and still have a very large indebtedness by reason thereof, and that the necessity of paying interest thereon and of making constant payments in reduction of the principal thereof has made it difficult for me to meet the rent promptly upon the first of each month, but that I have in less than five years that have elapsed since said term began paid off a large part of said indebtedness besides having my rent paid in full to this date.

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7. At the time said lease was entered into the rental therein reserved was a very high rental for the demised premises in comparison to other rentals of Broad Street property in the vicinity thereof. Defendant knew there was uncertainty as to whether I would be able to build

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*Affidavit of Gar S. Sparks.*

up a sufficient business and realize sufficient there-  
from to enable me to carry said indebtedness  
and to pay the said rent, and knew that my ability  
to pay the rent would be dependent upon the  
building up and success of my business in the  
demised premises. I experienced much difficulty  
particularly during the years first after my entry  
in the demised premises in paying the monthly  
installments of rent as they fell due. Neverthe-  
less defendant at all times (until the serving of  
the notice by him as hereinafter mentioned) ex-  
hibited toward me a very friendly attitude and  
expressed a willingness and disposition to ac-  
commodate me and to facilitate the development  
of my business on the demised premises by per-  
mitting me to pay the rent in such manner as I  
was able, and from time to time defendant ac-  
commodated me to the extent of taking notes in  
lieu of cash for the monthly installments of rent  
which notes I paid and satisfied at a later date.  
During the years 1927 and 1928 I was better  
able to meet said payments of rent more promptly  
than I had been during the first years after my  
taking possession of the premises, but even dur-  
ing the years 1927 and 1928 I frequently was not  
able to pay the whole of said monthly install-  
ments in one payment on or about the first of the  
month but paid the same in two or more install-  
ments during the calendar month and in some  
instances certain portions of the rent due in one  
month were carried over until and paid in the  
following month, as is more particularly set forth  
and shown in the foregoing Schedule "D" hereto  
attached, which is a detailed statement of the  
dates on which I made payments of rent and the  
respective amounts thereof during the years 1927  
and 1928.

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*Affidavit of Gar S. Sparks.*

8. Only once from the beginning of said term until the time of the serving by defendant of the notice hereinafter mentioned on January 15th, 1929, did the defendant in any way mention to me the matter of paying said rent promptly on the first of each month, and that one instance occurred in June, 1927. On the 17th day of that month my rent for that month was still unpaid and defendant's secretary wrote me a letter under that date stating "Beginning July 1st Mr. Lawrence insists that the rent be paid the first of each month," (Lawrence being the name by which defendant is sometimes known.) Immediately upon receipt of that letter I went to defendant's office and took to him a check dated June 18, 1927 in the sum of \$348.33 which together with the sum of \$500 which I was then entitled to have credited on account of rent out of the aforesaid deposit, paid said June installment of rent in full. When I talked with defendant on that occasion I found that his attitude was not what the said letter of his secretary might imply or indicate, but in my conversation with him he displayed the same attitude that he had displayed on all other occasions when I talked with him and that he continued to display thereafter, as aforesaid. I talked with him about my business and the circumstances thereof and he urged me not to permit the rent to get in arrears but to do my best to keep it paid up, and again assured me that he was desirous of accommodating me and helping me all he could. From that time on the rent was paid at the times and in the amounts as shown in the aforesaid Schedule "D", rarely before the middle of the month in which it fell due and sometimes in two or three installments. In all instances except one (viz. the month of August, 1928, when the summer lull

*Affidavit of Gar S. Sparks.*

was on) the month's rent was paid in full before the end of the month in which it fell due and in September, 1928, I paid not only the September rent but paid also the balance which had been carried over from August. Not once during all of that time did defendant in any way indicate any dissatisfaction with the manner in which I was paying the rent or express any insistence that it be paid strictly on the first business day of each month. Frequently during that period I took personally the rent checks to defendant at his office and on such occasions chatted with him concerning my business and concerning real estate developments and conditions in the neighborhood of the demised premises, and other general matters, but never once did he say or in any way express an intention to hold me to a strict and literal compliance with the provisions of the lease relative to the payment of rent upon the first business day of the month. Defendant sometimes came to my restaurant for his lunch and I talked with him on such occasions, and sometimes when I talked with him in my restaurant my rent or part of it was in arrears, but he made no complaint or demands in respect to it.

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9. In the early part of January, 1928, (in which month my rent was paid in two installments, one on the 18th and the other on the 28th of the month) defendant submitted to me a form of postponement of my said lease to the lien of a new mortgage which he proposed to put upon the demised premises in a sum, as I recall it, of \$90,000.00. Inasmuch as the lease required postponement to a mortgage of \$40,000, I realized that I was under no obligation to execute such postponement but I expressed to him my appreciation of the help and consideration which he

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*Affidavit of Gar S. Sparks.*

had shown me throughout and assured him that in consideration thereof I was glad to accommodate him by executing the postponement which he requested, and he in turn then assured me that he had been glad to accommodate and help me. He made no complaint as to the manner  
10 in which I had been paying the rent or even as to the rent for that month being unpaid.

10. In May, 1928, defendant took up with me the matter of the payment of taxes as provided in paragraph "c" of clause 5 of the lease, none of which taxes had ever prior to that time been billed to me or requested by the defendant, and I paid the amount demanded by him, to wit, the sum of \$542.00, for the taxes as he computed them for the years 1924, 1925, 1926 and 1927.  
20 This I did in reliance upon defendant's demand and without consulting counsel and under a misapprehension as to meaning of said clause in the lease, and I now find that defendant demanded of me and that I paid him approximately twice as much as he was entitled to for said taxes. However, up to that time defendant had been so fair in his dealings with me and the relations between us were such that I did not question his demand. My rent for said month of May, 1928,  
30 was paid in two installments, one on the 17th and the other on the 19th of the month, as had been the case for several months preceding but he made no mention of any dissatisfaction with the manner in which the rent was being paid and throughout the adjustment of said taxes there was no sign of any disagreement between us or of any complaint on the defendant's part.

11. In the early part of December, 1928, I found that I had mislaid my copies of the lease and agreements which I had with defendant, and  
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*Affidavit of Gar S. Sparks.*

I called at his office relative to getting copies thereof from him. At that time my rent for that month (which was subsequently paid in two installments, one on the 10th and the other on the 26th of the month) was unpaid but he made no mention of it nor indicated any complaint or dissatisfaction whatsoever but on the contrary assured me that he would be glad to accommodate me in respect to the papers for which I asked but that the papers had been left originally with his attorney, who keeps many of defendant's papers, and that I should get in touch with his attorney to procure copies thereof. My attorney, Chester W. Fairlie, thereupon procured a copy thereof from Mr. William Greenfield, attorney for the defendant, and I am advised by Mr. Fairlie that Mr. Greenfield made no mention at that time or at any other time prior to the service of the notice hereinafter mentioned, of any complaint or dissatisfaction which defendant had relative to the manner in which the rent was being paid by me.

12. By his course of conduct long continued and by his often expressed interest in and desire to accommodate and help me, defendant had induced me to believe and I did believe that I might continue the course of payments as they had previously been made by me. When the monthly installment of rent for the month of January fell due on the 2nd day of that month it happened that I was ready, willing and able to pay said rent and the same would have been paid on or about the 1st of that month if it had not been for the fact that my bookkeeper and accountant whose duty it then was to draw checks for the payment of rent and other bills, was confined to his home by sickness as were also other of my employees,

*Affidavit of Gar S. Sparks.*

with the result that up to January 15th, 1929, said January installment of rent had not been paid. No demand had been made for the rent either personally or by letter. During all of the preceding months as aforesaid there had been nothing in the course of relations between me  
10 and defendant to put me on guard or to in any way indicate to me that the defendant would insist upon a literal compliance with the provisions of the lease relative to the payment of the monthly installments of rent on the first day of each month, and I was thereby lulled into a sense of security and relied upon the course of dealings which had transpired between me and defendant, and consequently I did not personally inquire or give attention to the payment of rent for said  
20 month of January promptly on the first business day of that month.

13. On January 15th, 1929, said January installment of rent being then unpaid, without previous demand therefor and without notice or warning of any such intention, the defendant on that day served upon me a notice purporting to terminate said lease and the term thereby granted for the reason and upon no other ground than that said January installment of rent had not  
30 been paid. The foregoing Schedule "E" hereto attached is a true copy of said notice.

14. Immediately upon receipt from the defendant of the aforesaid notice I went to his office and he being then absent therefrom I offered and tendered to his secretary, who was in charge of said office and who customarily attended to the collection of said rent, a check in the sum of \$848.33 in payment of the said January rent but I was informed by defendant's said  
40 secretary that she had been instructed by him

*Affidavit of Gar S. Sparks.*

not to accept said rent. Thereupon I consulted counsel and on the morning of January 16th, 1929, I went with Chester W. Fairlie, my attorney, again to defendant's office and tendered to the defendant the said last mentioned sum in cash, to wit, legal tender, together with \$3.00 additional as interest thereon from January 1st, 1929 to that date. Defendant refused to accept said tender and in the course of our conversation with him he stated that he intended to put me out and get possession of the premises. We explained to him the effect which such attempt on his part and the institution of legal proceedings against me might have upon me, and we explained to him how the mere institution of such proceedings might be ruinous to me under the circumstances even though I should ultimately succeed in defeating his attempt, but he remained obdurate and insisted that the matter was now entirely out of his hands and in the hands of his attorney, Mr. William Greenfield.

15. It seems self-evident that defendant is not attempting to terminate said lease or to dispossess me because of any injury that he has suffered by reason of the few days delay in the payment of the January rent, but that he is snatching that alleged default as a ground for forfeiture because as conditions have developed in the neighborhood of the demised premises my leasehold has become very valuable and the defendant could put the demised premises to uses which would yield him much more than the rent reserved thereunder. He is the owner of a large tract of land in the rear of said demised premises which tract fronts on Halsey Street and part of which runs in an L southerly to a frontage on Hill Street. I am creditably informed by persons familiar with real estate transactions and condi-

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*Affidavit of Gar S. Sparks.*

tions in the City that it would be to the gain and advantage of defendant to be able to use the demised premises as an entrance from his Broad Street property to his larger tract of land which lies in the rear of said premises and which larger tract of land might well be developed as a theatre site or for commercial purposes if an entrance thereto might be had from Broad Street over the demised premises.

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16. I am ready, willing and able to pay defendant the said January rent, and hereby again tender the same to him with interest and I am ready and willing to do whatever may be necessary to be done to save the defendant from any loss or damage which he may have sustained by reason of my not having paid said January installment of rent promptly on the first business day of the month when it fell due.

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17. If defendant should be successful in terminating said term and dispossessing me from said premises I shall not only lose said leasehold which has become very valuable but shall also lose the \$3,000 which the defendant still retains of said deposit, and shall lose all the many thousands of dollars which I have put into the improvement and equipment of the demised premises and the advertising of my business thereon, and the valuable goodwill which I have built up in connection with my business conducted therein—all without any hope of redress from any source or any possibility of recovering my loss.

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GAR S. SPARKS.

Sworn to and Subscribed before me this 29th day of January, 1929.

Morris B. Allen,

A Notary Public of New Jersey.

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*Answering Affidavit of Leonard Lorentowicz.*

**ANSWERING AFFIDAVIT.**

IN CHANCERY OF NEW JERSEY.

*Between*

GAR S. SPARKS,

*Complainant,*

*and*

LEONARD LORENTOWICZ,

*Defendant.*

*On Bill, etc.*

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*Answering  
Affidavit.*

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

LEONARD LORENTOWICZ, of full age, being duly sworn according to law on his oath deposes and says, that he is the defendant in the above-entitled cause of action and the plaintiff in the suit pending in the Second District Court of Newark, wherein the above named complainant is defendant therein, which suit is based on breach of the terms of the lease mentioned and set forth in the bill of complaint in the above cause.

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Deponent further deposes and says that he has heard read the bill of complaint and affidavit annexed thereto and knows the contents thereof. Answering paragraph 1 of the complainant's bill of complaint, this deponent avers that it is true that he entered into a lease for the premises 921 Broad street, Newark, New Jersey (a copy of which lease is annexed to the complainant's bill of complaint), for a period of twenty-one years, under the terms as set forth in the complainant's bill of complaint and lease annexed thereto, and as set forth in paragraphs 1, 2 and 3 of the said bill of complaint.

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*Answering Affidavit of Leonard Lorentowicz.*

Answering paragraph 4 of the complainant's bill of complaint, this deponent avers the allegations therein to be true, that he has received the sum of \$5,000, as security from the complainant for the faithful performance of the terms of said lease, and that the sum of two thousand dollars  
10 has been applied towards the rent reserved under said lease in accordance with the terms thereof.

Answering paragraph 5 of the complainant's bill of complaint, this deponent admits the allegations set forth therein.

Answering paragraph 6 of the complainant's bill of complaint, wherein the complainant avers that he has paid all the rent reserved under said lease from the commencement of said term up to and including the installment thereof which fell  
20 due in the month of December, 1928, and has tendered the rent for the month of January, 1929. this deponent avers and in fact says, that from the commencement of said term deponent has had considerable trouble and annoyance, by reason of the fact, that the complainant required deponent to make repeated demands for the payment of the monthly rentals due on the first business day of each and every month in advance in accordance with the terms thereof. Deponent repeatedly warned the complainant that he would  
30 no longer tolerate such annoyances by requiring him to make repeated demands for the monthly payment of said rentals, and not only has deponent made repeated demands for said monthly rentals, but deponent's secretary, Rachael A. Lyons as well, who was instructed by deponent to make demands for said monthly rentals, and messengers who were sent by deponent and deponent's secretary, informing the complainant, that some day he, the complainant, would find  
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*Answering Affidavit of Leonard Lorentowicz.*

himself without a lease and out of possession of the premises.

Deponent further deposes and says that on January 2, 1929, deponent again demanded the rent from the complainant, and wanted to know what he, the complainant, intended to do. That deponent received no satisfactory reply or answer that he would pay the rent for the month of January, 1929. Deponent waited for the January, 1929 rent, until January 15, 1929, when deponent caused a notice to be served upon the complainant, Gar S. Sparks, putting an end to the lease and demanding that he, Gar S. Sparks, vacate the said demised premises and surrender possession thereof to deponent, and that then and then only, after the notice was served, on the 16th day of January, 1929, Gar S. Sparks, complainant, tendered a check to this deponent, as to the amount of said check, deponent does not know, and thereafter, when the check was refused, the said Gar S. Sparks, complainant herein, accompanied by counsel tendered cash in payment of the rent including interest as alleged in the bill of complaint and affidavit annexed to the bill of complaint, but that was after deponent elected to cancel the lease and demand possession of the said premises. Deponent admits that all rentals were paid from the commencement of said term to and including December, 1928, but deponent avers, that at no time was any monthly installment of rent or any part of said rent paid on the first business day of the month.

Deponent further deposes and says that he repeatedly warned the complainant that he was entitled to payment of the rents on the first business day of each month in advance, and unless he was more careful in paying the rents when due,

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*Answering Affidavit of Leonard Lorentowicz.*

in accordance with the lease annexed to complainant's bill of complaint, deponent would terminate said lease. Deponent has been informed that the complainant has opened two additional stores elsewhere, and whether the complainant, Gar S. Sparks conducts the stores in his  
10 own name or some other name, deponent has no knowledge. Deponent objected to the complainant herein, using deponent's rental money, for the operation of complainant's other business.

Deponent further deposes and says, that the allegations alleged in complainant's bill of complaint, that he, complainant has no adequate defense at law in the proceedings now pending in the Second District Court of Newark, are not  
20 true, on the contrary, if the complainant has any defense, the same defense can be set forth in the District Court.

Deponent further deposes and says on his oath, that the allegations set forth in the complainant's bill of complaint and his affidavit, is an admission of breach by the complainant of the terms of said lease, and this deponent denies that he led the complainant to believe or lulled him into the belief that he, deponent, would continue to accept  
30 rentals at the time and when the complainant saw fit to pay, for the occupancy and possession of the said demised premises. On the contrary, and as set forth in the complainant's bill of complaint and affidavit, the complainant received letters from deponent, sent under the direction of deponent, warning the complainant to pay the rentals promptly in accordance with the lease, and that he, complainant, would be ousted for his failure to do so, the complainant saw fit to ignore the said letters and warnings, and by  
40 reason thereof, complainant is not entitled to any relief in the Court of Equity.

*Answering Affidavit of Leonard Lorentowicz.*

Deponent further deposes and says, that complainant defaulted in the payment of the rent for the month of April, 1928, and that deponent was about to institute proceedings, but at the earnest pleadings of the complainant, deponent deferred action. Deponent further says, that the rent for the month of June, 1928, was not paid until June 19, 1928; that the rent for the month of August, 1928, was partly paid in the month of August, 1928, and the balance on September 1, 1928. Complainant continued to pay the rentals in installments, although he knew that deponent objected to same, as set forth in the schedule of rentals annexed to the bill of complaint and prepared by complainant, and after repeated warnings from this deponent and ignored by complainant, deponent informed complainant that he would put an end to the lease.

Answering paragraph 7 of complainant's bill of complaint, that he, complainant has expended large sums of money in altering, remodeling and decorating the said premises, this deponent has no knowledge thereof.

Answering paragraph 8 of the complainant's bill of complaint, wherein complainant set forth that deponent is anxious to repossess himself of said premises by reason of improvements or pretended improvements or developments in the vicinity of 921 Broad street, Newark or Halsey street, in rear of said demised premises, are wholly untrue. Deponent has not been informed nor heard of any theatre building to be erected in that vicinity, nor has anyone inquired of deponent for the leasing of said premises for such purposes, nor for the purpose of using the demised premises as an entrance from Broad street to Halsey street or Hill street. As to the allega-

*Answering Affidavit of Leonard Lorentowicz.*

tions alleged by complainant as to developments in said neighborhood are nothing but imaginary, and merely an after-thought on the part of the complainant, and which thought came to complainant, after notice was served upon the complainant demanding possession of said premises.

10     Answering paragraph 9 of the complainant's bill of complaint wherein it avers that the complainant paid all the rent reserved under said lease up to and including the month of December, 1928, this deponent admits said allegation but avers that said payments were made in an unsatisfactory manner, in that the said rentals were paid in installments and that this deponent gave repeated notice and warnings to the complainant that he objected to the method pursued by complainant by paying the monthly rentals in installments, and deponent informed the complainant that if he persisted in doing so, he would declare the lease forfeited.

20     As to the allegations set forth in paragraph 9 of the complainant's bill of complaint, wherein the complainant alleges that this deponent knew that there was uncertainty as to whether complainant would be able to build up a sufficient business and realize sufficient therefrom to enable him to pay the said rent reserved, this deponent avers and says, that he had no such knowledge nor did he have any interest in the restaurant, confectionery and soda business conducted by complainant, nor was deponent concerned that complainant's ability to pay the rent would be dependent upon the building and success of complainant's business in the demised premises.

30     This deponent admits the allegation set forth in paragraph 10 of the complainant's bill of complaint, that on June 17, 1927, this deponent

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*Answering Affidavit of Leonard Lorentowicz.*

caused a letter to be written and sent to the complainant advising him that unless he makes prompt payments on the first day of each month, deponent would declare the lease forfeited and demand possession of the premises.

Answering paragraph 11 of complainant's bill of complaint, this deponent avers that he demanded payment of the rent on January 2, 1929 from the complainant, but that deponent received no satisfactory answer as to when complainant would pay the rent, and deponent waited until January 15, 1929, and since the rent was not paid, deponent caused a notice to be served on complainant, declaring the lease forfeited and exercising his right to repossess himself of the said premises. 10

Answering paragraph 16 of complainant's bill of complaint, this deponent denies that he acquiesced in the conduct and method pursued by the complainant in the payment of the rentals due under the terms of the lease, but on the contrary, and as set forth in paragraph 10 of complainant's bill of complaint, this deponent strenuously objected to the method pursued by complainant, all of which facts, complainant had previous warning from this deponent that he insists upon strict performance of the terms of the lease, and by reason thereof, deponent caused a notice to be served on the complainant on January 15, 1929, declaring a forfeiture of the lease and possession of the premises. 20 30

Answering paragraph 5 of complainant's affidavit, wherein he avers that he paid to deponent all the rent reserved under the said lease up to and including the installment which fell due in the month of December, 1928, and that complainant tendered to this deponent the rent for the 40

*Answering Affidavit of Leonard Lorentowicz.*

month of January, 1929, this deponent avers that the said tender was made after deponent elected to repossess himself of said premises and after notice was served upon the complainant, to wit; January 15, 1929, demanding possession of said premises.

10     Answering paragraph 6 of complainant's affidavit, this deponent admits that the complainant built a kitchen in the rear of the demised building, as to the amount of cost and installation, tools, implements and kitchen utensils, this deponent has no knowledge thereof, but all of which was expended by complainant with the full knowledge of the terms, conditions, covenants and agreements in said lease undertaken and agreed to be kept and performed by the complainant,  
20     but that complainant saw fit to ignore the terms of said lease, with the risk of forfeiting said lease, no fault of this deponent, but wholly the fault of complainant. If complainant would have paid the rent in accordance with the terms of said lease, deponent could not even though he wanted to, to demand possession of the said premises or demand a forfeiture of the lease.

30     Further answering paragraph 6 of complainant's affidavit, wherein he avers that he expended the sum of \$60,000 in remodeling, adding to, decorating, furnishing and equipping the demised premises, and that complainant expended large sums of money in advertising his business in the demised premises by newspaper advertisements, street car advertisements, hand bills, circulars and other means of advertising, this deponent has no knowledge, nor is it to deponent's interest or benefit, as the owner of the said demised premises. That complainant knew, had  
40     knowledge and should have known that a breach

*Answering Affidavit of Leonard Lorentowicz.*

of the terms of the lease, would mean a forfeiture of the lease, and since complainant persisted in taking such chances by not paying the rents promptly in accordance with the terms of the lease, deponent is in no way at fault.

Answering paragraph 7 of complainant's affidavit, this deponent avers and says, that complainant knew and had knowledge of the fact that deponent objected to the methods pursued by complainant in the payment of the rentals, and that complainant received notices and warnings that unless he complied with the terms of the lease, deponent would declare a forfeiture of the lease. Therefore, complainant cannot now plead surprise, cannot plead that he was lulled into silence or that deponent in any way acquiesced in the method pursued by complainant in the payment of his monthly rentals, on the contrary, deponent avers and says, that complainant received warnings and letter from this deponent, that deponent insisted upon strict compliance of the terms of the lease.

Answering so much of the allegations alleged in paragraph 8 of complainant's affidavit, wherein complainant admits that he received a letter sent by deponent's secretary, which letter was sent under the direction of deponent, therefore, complainant had notice that deponent demanded payment of the rent on the first business day of each month, and that he would no longer tolerate payment of the rentals in installments. This deponent avers and says, that complainant cannot now plead surprise that he was not warned or apprised of the fact, that deponent insisted upon prompt payment of the monthly rentals, in accordance with the terms of the lease.

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*Answering Affidavit of Leonard Lorentowicz.*

As to further allegations alleged in paragraph 8, that this deponent came to his restaurant and made no complaint or demand in respect to payment of the rentals, are not true, on the contrary, deponent spoke to complainant on a number of occasions, while he did not speak in a boisterous manner to attract any attention, deponent told complainant and firmly impressed upon complainant's mind, that the rent must be paid when due, and a number of times came to complainant's restaurant for lunch, to impress upon his mind, to pay the rent on the first business day of each month and not whenever he pleased.

Answering paragraph 9 of complainant's affidavit, this deponent admits that he requested complainant to execute a postponement of his lease to a \$90,000 mortgage, but denies that the \$90,000 mortgage was to cover the demised premises on 921 Broad street, Newark, only, complainant knew and had knowledge that the \$90,000 mortgage was to cover 921 Broad street and 292 and 294 Halsey street, Newark, in other words, it was to be a blanket mortgage, and that the mortgage on Broad street, Newark, would not have been in excess of \$40,000, but that the said mortgage was not consummated and the matter was cancelled, all of which required explanation to the complainant before obtaining said postponement.

Answering paragraph 10, so much therein, wherein complainant avers that he paid the sum of \$542 for taxes, deponent avers that that was the amount calculated in accordance with the terms of the lease, wherein said lease required complainant to pay additional taxes, for the additional structure erected by him.

*Answering Affidavit of Leonard Lorentowicz.*

Answering paragraph 11 of complainant's affidavit, this deponent admits that the complainant called at deponent's office for a copy of the lease and agreements, and deponent avers that he called complainant's attention to the fact that his rent was unpaid, and that he should be careful, to which complainant responded, "That's all-right, I will pay the rent sometime this month." Thereupon deponent answered, "sometime this month," is not on the first business day of the month, and he left. As to the allegation alleged therein, that my attorney, William Greenfield, made no mention of the unpaid rentals or the manner in which the rentals were paid, are true, by reason of the fact, that no mention of said rentals were called to the attention of William Greenfield, as these matters were taken care of by my secretary, Rachael A. Lyons, up to the time legal proceedings were necessary, and then and then only was the matter referred to my attorney, William Greenfield.

Deponent further deposes and says, that the allegations alleged in paragraph 12 of complainant's affidavit are not true, on the contrary, deponent did make demand for the payment of the rent, did call up complainant at the store, and when informed complainant was not in, deponent left word for complainant to call back, although complainant did not call back. Under the terms of the lease, deponent was not obliged to make any demand or serve any notice upon complainant for the rent. When complainant failed to call back, deponent again called up and spoke to complainant over the telephone, about payment of the rent, complainant answered, "I will pay it sometime this month."

*Answering Affidavit of Leonard Lorentowicz.*

Answering paragraph 13 of complainant's affidavit, this deponent denies so much of the allegations averred therein that no previous demand was made for the payment of the January rent, on the contrary, the same was demanded on January 2, 1929.

- 10     Answering paragraph 15 of complainant's affidavit, this deponent denies each and every allegation set forth therein, on the contrary, this deponent has determined to exercise his right of option to terminate this lease, by reason of the dilatory tactics pursued by complainant during the entire period and term of his occupancy in said premises under said lease. Deponent has had considerable trouble and annoyance from complainant, from the very first month that he entered into possession of the premises for the payment of the said rentals, paying the monthly rentals whenever he pleased and in installments. Deponent got disgusted with complainant's tactics and repeatedly informed complainant of same.
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- 30     Deponent prays that the complainant's bill of complaint be hence dismissed, as the complainant can obtain adequate relief in the Second District Court of Newark, if he is entitled to any, where the suit is now pending on the ouster for the forfeiture of the lease.

LEONARD LORENTOWICZ.

Sworn and subscribed to before me  
on this 31st day of January A. D.,  
1929 at Newark, N. J.

ANNA ROTHMAN,  
Notary Public of N. J.

**ANSWER.**

Filed February 25, 1929.

## IN CHANCERY OF NEW JERSEY.

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*Between*

GAR S. SPARKS,

*Complainant,**and*

LEONARD LORENTOWICZ,

*Defendant.*

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*On Bill, etc.,  
Answer.*

The defendant, Leonard Lorentowicz, residing in the Town of Irvington, County of Essex and State of New Jersey, answering the complainant's Bill of Complaint says: 20

1. Answering Paragraph 1 of the complainant's bill of complaint, this defendant admits the allegations therein set forth.

2. This defendant admits the allegations set forth in Paragraphs 2, 3, 4 and 5 of the complainant's bill of complaint.

3. This defendant admits so much of the allegations set forth in Paragraph 6 of the complainant's bill of complaint, wherein it avers that the complainant has paid all the rent reserved under said lease from the commencement of said term up to and including the installment thereof which fell due in the month of December, 1928, and avers and in fact says, that the said monthly rentals were not paid in accordance with the terms, conditions, covenants, agreement and undertakings contained in said lease and undertaken to be performed by the complainant, in 30  
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*Answer.*

that the said monthly rentals were due and payable on the first business day of each and every month in advance, but that the complainant failed, refused and neglected to pay the said monthly rentals when the same became due and payable, on the contrary, the complainant paid the  
10 monthly rentals long after the same became due and payable and said monthly rentals were paid in installments over the objections and protests of this defendant.

Further answering Paragraph 6 of the complainant's bill of complaint wherein the complainant avers that he tendered to the defendant the rent for the month of January, 1929, and the defendant refused to accept the same, this defendant admits the allegation and avers, that the said  
20 monthly rental was tendered to this defendant, after this defendant exercised his rights under said lease and served written notice on the complainant, that he has elected to declare the lease forfeited and at an end and demand repossession of the said premises by reason of the breach of the terms of said lease on the part of the complainant.

4. Answering Paragraph 7 of the complainant's bill of complaint, this defendant has no  
30 knowledge that the complainant since the commencement of said term has expended large sums of money as alleged in said Paragraph 7, and this defendant avers, that if the complainant has expended large sums of money it was done with the knowledge of the fact that the rentals became due and payable on the first business day of each month in advance, and upon failure, refusal or neglect to pay when due, said lease may be declared at an end, and by reason thereof said complainant was obliged to and should have paid the  
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*Answer.*

monthly rentals when the same became due and payable.

5. Answering Paragraph 8 of the complainant's bill of complaint, so much therein wherein it avers, that the defendant is the owner of a tract of land in the rear of the demised premises which said tract of land fronts on Halsey street and part of which runs in a southerly direction fronting on Hill street, this defendant admits the allegations, but denies each and every other allegation set forth in Paragraph 8 of the complainant's Bill of Complaint, and avers and in fact says, the reason this defendant has determined to exercise his rights under said lease and reclaim possession of said property, was by reason of the fact that the complainant never performed the terms of said lease, and never paid the monthly rentals when due and payable, but that the said defendant was compelled to make repeated demands for the payment of said monthly rentals, and which said monthly rentals were paid in installments long after the same became due. 10  
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6. Answering so much of Paragraph 9 of the complainant's bill of complaint, wherein the complainant avers that he has paid all the rent reserved under said lease from the making and execution thereof and the entry of complainant upon the demised premises up to and including the month of December, 1928, this defendant admits the allegation that he has paid the rental reserved in said lease, but avers and in fact says, that after repeated demands and calls for the collection of said rentals, the same would be paid in two installments each month against the protest of the defendant, and repeated warnings of the defendant to the complainant that unless he 30  
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*Answer.*

changes his method of paying the monthly rentals long after it became due and in installments, the complainant would find himself without a lease, and that the defendant would claim the right of possession to the said premises herein demised, and that this defendant exercised his  
10 right to and did on the 15th day of January, 1929, declare the terms of said lease at an end by reason of the breach of the covenants and undertakings agreed to by the complainant.

Further answering Paragraph 9 of the complainant's bill of complaint, wherein the complainant avers that the defendant accepted notes in lieu of cash for said monthly rentals at the commencement of the term of the lease, this defendant admits the acceptance of said notes for  
20 accommodation only, with the distinct understanding and arrangement that the notes would have to be paid when due, and all future rentals would be paid on the first business day of each month in advance, all of which terms and arrangements were merely as an accommodation and not to vary or waive any of the rights of the defendant under the terms of the said lease, wherein he, the complainant was to pay the monthly rentals on the first business day of each  
30 month in advance, but that the said complainant disregarded the warnings of this defendant.

7. Answering so much of Paragraph 10 of the complainant's bill of complaint, wherein the complainant avers that on June 18, 1927, he received a letter from the defendant demanding the payment of the monthly rental, this defendant admits the allegation, and of which letter, a true copy is hereto annexed and made part hereof.

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*Answer.*

Further answering Paragraph 10 of the complainant's bill of complaint, wherein the complainant avers that after receiving the letter from the defendant bearing date June 17, 1927, this complainant called at the office of the defendant and interviewed this defendant and that the defendant expressed a friendly attitude towards him, this defendant admits that a friendly relation always existed between complainant and defendant. This defendant avers that he has reiterated and warned the complainant that in the future all monthly rentals would have to be paid on the first business day of each month in advance, otherwise, he, the complainant would have to take the consequence, as this defendant would declare the lease forfeited and repossess himself of the said premises as set forth in complainant's bill of complaint.

Further answering Paragraph 10 of the complainant's bill of complaint wherein the complainant avers, that he was ready, willing and able to pay said rent on the first day of January, 1929, but owing to the fact, that his bookkeeper was sick and by reason thereof was unable to draw the check for same, this defendant has no knowledge whether or not his bookkeeper was ill, but this defendant avers and in fact says, that the complainant never paid the rent when the same was due, and at numerous times this defendant warned the complainant that he would have to forfeit his said lease and rights to the possession of the premises if he, the complainant continued to pay his monthly rentals in the manner as heretofore.

8. This defendant admits the allegations set forth in Paragraphs 11 and 12 of the complainant's bill of complaint.

*Answer.*

9. Answering Paragraph 13 of the complainant's bill of complaint, this defendant denies the averments in said Paragraph 13, that the complainant was ready and willing to pay the rent on the first day of January, 1929, on the contrary, this defendant avers, when the said rental was demanded for the month of January, 1929, on the date when it became due, the complainant refused, failed and neglected to pay the same.

10. Answering Paragraph 14 of the complainant's bill of complaint, this defendant admits the allegations set forth in said Paragraph.

11. Answering Paragraph 15 of the complainant's bill of complaint, wherein the complainant avers, that if the defendant should be permitted to or should succeed in terminating the term by said lease demised, the complainant would lose the \$3,000 deposit which the defendant holds as security, and many thousands of dollars which he has expended in remodeling and equipping the demised building for the use of his said business, this defendant avers that the complainant had received repeated warnings and notices that the said rentals would have to be paid on the first business day of each month, and more particularly set forth in Paragraph 10 of complainant's bill of complaint wherein the complainant admits receiving a letter from the defendant dated June 17, 1927, but that the complainant ignored the same, and if the complainant should sustain any loss, it would be through his own acts, negligence and conduct of his failure and refusal to pay the monthly rentals on the first business day of each month as provided and agreed to by the complainant under the terms of said lease, and his failure and refusal to pay the monthly rent on the first business day in

*Answer.*

January, 1929, when so demanded by the defendant of the complainant.

12. This defendant denies each and every allegation set forth in Paragraph 16 of complainant's bill of complaint and on the contrary this defendant avers and in fact says, that this defendant repeatedly warned the complainant of the dangerous position he would find himself, if he, the complainant would continue and persist in paying the rentals as heretofore, but that the said complainant ignored these warnings.

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13. This defendant denies the allegations alleged in Paragraph 17 of the complainant's bill of complaint, and avers, that any legal and lawful defense that the complainant may have, may be set up in the courts of law, namely, Second District Court of Newark, where able and capable judges preside, and his rights will be protected in the district court, where the dispossession proceedings are now pending, and denies that the complainant will receive inadequate relief in any other court, except in the Court of Equity, and on the contrary avers, if he has an adequate defense in the courts of law wherein the dispossession proceedings are now pending he can and could set it up in said district court.

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Wherefore this defendant prays that the restraining Order be dissolved and that the defendant be permitted to proceed with the suit now pending in the Second District Court of Newark, wherein the complainant is defendant and the defendant herein, is the plaintiff and that the said complainant's bill of complaint be dismissed with costs and reasonable counsel fee to be taxed against the complainant.

WM. GREENFIELD,  
Solicitor for and of counsel with defendant.

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*Answer.*

June 17, 1927.

Sparks,  
921 Broad St.,  
Newark, N. J.

Dear Mr. Sparks:—

10     Beginning July 1 Mr. Lawrence insists that the  
rent be paid the first of every month.

Thanking you to give this your attention, we  
are

Very truly yours,

(Signed) Leonard Lorentowicz.

LL:LG

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**REPLICATION.**

Filed February 26, 1929.

IN CHANCERY OF NEW JERSEY.

72-130.

<p><i>Between</i></p> <p>GAR S. SPARKS,  <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>LEONARD LORENTOWICZ,  <i>Defendant.</i></p>	}	<p><i>On Bill, &amp;c.</i></p> <p><i>Replication.</i></p>	10
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The complainant, GAR S. SPARKS, joins issue on the answer of the defendant, Leonard Lorentowicz. 20

LUM, TAMBLYN & COLYER,  
 Solicitors for and of Counsel  
 with Complainant.

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## ORDER OF REFERENCE.

Filed March 5, 1929.

IN CHANCERY OF NEW JERSEY.

72-130.

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*Between*

GAR S. SPARKS,

*Complainant,**and*

LEONARD LORENTOWICZ,

*Defendant.**On Bill, &c.,  
Order of  
Reference.*

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It is on this fifth day of March, 1929, on motion of Lum, Tamblyn & Colyer, Solicitors for complainant, ORDERED that the above stated cause be referred to Hon. Alonzo Church, one of the Vice Chancellors to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein.

E. R. WALKER,

C.

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I hereby consent to the entry of the foregoing order.

WM. GREENFIELD,  
Solicitor for Defendant.

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**DESIGNATION.**

Filed March 11, 1929.

IN CHANCERY OF NEW JERSEY,

72-130.

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*Between*

GAR S. SPARKS,

*Complainant,**and*

LEONARD LORENTOWICZ,

*Defendant.*

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*On Bill, &c.,  
Designation.*

The solicitor for the defendant consenting here-  
to, it is on this 11th day of March, 1929, on mo-  
tion of Messrs. Lum, Tamblyn & Colyer, solici-  
tors for complainant, ORDERED that Thursday, the  
28th day of March 1929, at ten o'clock in the fore-  
noon of that day and the Chancery Chambers in  
the City of Newark, be and the same hereby are  
designated as the time and place, respectively,  
for the hearing in the above entitled cause.

20

ALONZO CHURCH,

V. C. 30

I hereby consent to the entry of the foregoing  
order.

WILLIAM GREENFIELD,

Solicitor for Defendant.

40

## NOTICE OF HEARING.

Filed June 22, 1929.

IN CHANCERY OF NEW JERSEY.

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*Between*

GAR S. SPARKS,

*Complainant,**and*

LEONARD LORENTOWICZ,

*Defendant.**On Bill, etc.  
Notice of  
Hearing.*To WILLIAM GREENFIELD, Esquire,  
Solicitor for Defendant:

20

Sir:

30 TAKE NOTICE that Honorable Alonzo Church, the Vice-Chancellor to whom the above entitled cause has been referred for hearing, has designated Thursday, the twenty-eighth day of March, 1929, at ten o'clock in the forenoon of that day, and the Chancery Chambers in the City of Newark, as the time and place respectively for the hearing in the above entitled cause, and that at said time and place we shall bring on the final hearing thereof.

Dated: March 11th, 1929.

Yours, etc.,

LUM, TAMBLYN & COLYER,  
Solicitors for Complainant.

40

*Gar S. Sparks, direct.*

**TESTIMONY.**

IN CHANCERY OF NEW JERSEY.

March 28, 1929.

<p><i>Between</i></p> <p>GAR S. SPARKS, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>LEONARD LORENTOWICZ, (Also Lawrence), <i>Defendant.</i></p>	}	10
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Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, Alonzo Church, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Lum, Tamblyn & Colyer (by Mr. Fairlie) for complainant; William Greenfield for defendant. 20

GAR S. SPARKS, sworn for complainant.

*Direct examination* by Mr. Fairlie. 30

Q Mr. Sparks, how long have you been in business in Newark? A About twelve years.

Q In 1922, what sort of business were you engaged in? A I had a store in Branford place.

Q And that was the year in which the lease in question was negotiated? A Yes, sir.

Q Did you have conference with Mr. Lorentowicz personally in the course of those negotiations? A A great many of them in Mr.—in his lawyer's office. 40

*Gar S. Sparks, direct.*

Q In Mr. Greenfield's office? A Mr. Greenfield's office.

Q And in the course of your talks with Mr. Lawrence, did he make any inquiries as to your ability to pay the rent for this store? A Yes, sir.

10

Mr. Greenfield: I object to that as immaterial. The lease has been entered and that is binding.

The Court: Yes. The lease speaks for itself.

20

Mr. Fairlie: Yes. It is not with any view to changing it, but merely to show the course of conduct. There is a course of conduct. There is a course of conduct that I am proving throughout the term, and it is dealt with in several of the cases.

The Court: I think the course of conduct ought to begin after the lease was executed. What the negotiations leading up to the lease were is of no importance.

Mr. Fairlie: Yes.

30

Q At the time of signing the lease, was a deposit of any kind paid? A Yes. I had to put up five thousand dollars in cash.

Q And, when you took possession of the premises, what did you do to them by way of fixing them up? Was there anything done with respect to a kitchen? A Yes. I built—(interrupted)

Mr. Greenfield: I object, if the Court please. The lease provides that they shall do all that. You are not interested in that.

40

The Court: If the lease so provides, that is the end of it.

*Gar S. Sparks, direct.*

Mr. Greenfield: It provides all that he has got to do. Whatever is to be done has to be done at his own cost and request. The question is: Were the terms complied with? That is the whole issue before the Court.

The Court: Yes. I don't care about that. If the lease says he shall put in a kitchen, and so forth and so on, why, we assume that he did. 10

Mr. Fairlie: Your Honor, it is one of the allegations that Mr. Sparks has a property interest there to the extent of about sixty thousand dollars, that he has spent in fixing that property and improving it. If Mr. Greenfield will admit that, we will pass by the attempt to prove it. It is the fact.

The Court: What does the lease say, that they must put in these things? 20

Mr. Fairlie: No, not that he must.

Mr. Greenfield: If he wants to—he has the privilege of doing anything he wants with the property.

The Court: Well, I will allow to be put in evidence that he expended sixty thousand dollars on it.

Mr. Fairlie: Do you admit that? 30

Mr. Greenfield: No, I don't admit it.

The Court: Well, ask him what he spent.

Q How much did you spend in improving and equipping the premises in question? A I spent twelve thousand dollars actually in improving the property and I spent all together sixty thousand dollars in getting the store ready for my business.

Q Including in the sixty thousand dollars furniture and fixtures? A Yes, sir. 40

*Gar S. Sparks, direct.*

Q Were those fixtures all with a view to the use of this particular property or were they not?

A Yes, sir.

Mr. Greenfield: I object to that as immaterial.

10 The Court: I will allow it. I do not think it is material, either, but I will allow it. It seems to me, the whole point is, he, not having complied with the terms of the lease, was the strict compliance of it waived by the other side? That is the point.

Mr. Greenfield: That is the whole issue, I take it.

The Court: Yes, that is the whole thing.

20 Mr. Fairlie: And the cases, your Honor, recognize a course of dealing between parties as involved in such a situation, because, as the cases say—our New Jersey cases—a landlord cannot lull a tenant into a sense of—  
(interrupted)

The Court: That is all right. I am perfectly willing to hear that.

Mr. Fairlie: Well, that is what I am—  
(interrupted)

30 The Court: What he put in hasn't anything to do with it.

Mr. Fairlie: I want to try to develop this thing as a whole and not just have him say, "He lulled me into a sense of security." I want the facts on that.

The Court: All right. Go ahead on that line as much as you want to.

40 Q Now, after you got the store equipped and were engaged in business there, did you have or

*Gar S. Sparks, direct.*

did you not have any difficulty in paying the rent? A I had a great deal of difficulty, the first two years, because this money that I had expended for—and contracted to spend to fix up the building was all—had to be paid in the way of notes, month by month, and it ran about a thousand dollars a month, and I couldn't always have the money ready on the first of the month for the rent, and I went to Mr. Lawrence every month, many times, and told him that I could not pay it on the first and would it be all right if I paid it on the middle of the month or the tenth or the fifteenth, and Mr. Lawrence and I had always been very friendly, and he was perfectly willing to do it and said that he wanted to help me along all that he could.

10

Q Were there ever any occasions on which he took your notes for the rent? A Yes, sir. During the first two years, part of the time, I could not get the cash and so I give him part cash and a note for the rest, and then, later on, I would take up the notes. He was satisfied to do that.

20

Q And was the rent paid in installments during the months or was one month's rent paid in a whole sum during the month? A Sometimes all in one payment, but most of the time—in fact, most of the time, ever since I have been there, almost five years, it has been paid in two payments.

30

Q Now, attached to the bill of complaint there is a schedule of debts and amounts of rent that you paid during 1927 and 1928. Have you examined that? A Yes, sir; and it is correct, with the exception of April, 1928, which we forgot to put in there. We have the cancelled checks to show that the rent was paid.

Q Was it omitted in copying? A Sir?

40

*Gar S. Sparks, direct.*

Q Was that omitted in copying? A It was omitted in making it out.

Mr. Fairlie: Do you admit it is, Mr. Greenfield?

10 Mr. Greenfield: What is that?

Mr. Fairlie: That April, 1928, rent—1928, or 7 rent was paid in two installments and on April 17th and April 25th, 1928—

Mr. Greenfield: 1927?

Mr. Fairlie: Yes.

Mr. Greenfield: Yes, that is the time we got that letter. Yes, we will admit—that is the reason the letter followed.

20 Mr. Fairlie: April, 1928, it was. April, 1928, do you admit that?

Mr. Greenfield: I can't say. I don't know. Wait, I will ask the bookkeeper.

Mr. Fairlie: Well, I have the checks here. Do you admit it?

Mr. Greenfield: Show it to me. I can't say. Yes.

30 Q Now, in June, 17th, 1927, did you receive a letter from Mr. Lawrence or his secretary? A Yes, sir; I got a letter from Mr. Lawrence's office, signed by either the secretary or the stenographer.

Q I show you this. Is that the letter? A Yes, sir; that is it.

Mr. Fairlie: I would like to have it marked for identification.

The Court: I suppose you admit it in evidence, Mr. Greenfield?

40 Mr. Greenfield: True. I asked for its production.

*Gar S. Sparks, direct.*

(Letter marked Exhibit C. 1.)

(Letter read.)

Q Upon receipt of that letter, Mr. Sparks, what did you do? A I went over to Mr. Lawrence's office—(interrupted)

Q On what day? A The next day, the eighteenth. At that time I had five hundred dollars owing from him to me on account of deposit. 10

Q Let me show you these two checks, one dated 4/17/1928 and the other dated 4/25/1928. Are those checks in payment of the April 1928 rent? A Yes, sir.

Q And when you went on June 18th, did you have either of those checks with you? A Why, that I don't recall. I know that I paid the rent. I must have had the check with me—I think that those checks you showed me are 1928. 20

Q Yes. A We are talking about a letter we got in 1927.

Q Oh, you are right. Excuse me. Yes. Tell us the conversation that you had with Mr. Lawrence when you went there. A Well, I want to say that I gave them a check that month for \$333 or something of that sort, and \$500 that I had coming to me, that paid the rent for that month, and I talked to Mr. Lawrence, we always had a nice little friendly chat when I was over there, and I didn't and I don't recall, and he didn't say anything about putting me out if I didn't pay my rent on the first of the month. 30

Q Did you—(interrupted) A (Continuing) I explained to him that we were getting along much better, but it was still hard to have the rent promptly on the first day of the month and he said that it was all right and that he didn't want me to get behind in my rent, but, as long as he got it during the month, he was satisfied. 40

*Gar S. Sparks, direct.*

Q Did you have the letter with you when you went? A Yes, sir; I took the letter over.

Q Did you show it to him? A Yes, sir.

Q And what did he say? A I asked him what he meant by that letter. He said, "Oh, well, we don't want you to get behind in your rent."

10 Q And who attended to collecting the rent for Mr. Lawrence? A Miss Lyons, usually.

Q Did Mr. Lawrence personally pay attention to collecting the rent? A Mr. Lawrence never collected rent from me personally. That is, I mean to say that he never came into my office and asked for the rent. Of course, when I took the check to the office, I either gave it to Miss Lyons or to Mr. Lawrence.

20 Q And how was the check sent to him, ordinarily? A The first few years I was there, I most always took the checks over myself, but lately I have been mailing them—most of the time.

Q Now, in the early part of January, 1928, did you have any conference with Mr. Lawrence relative to a postponement of this lease to a mortgage on the premises? A Yes.

Q Tell us about it.

30 Mr. Greenfield: I object to that as immaterial. I cannot see how it is relevant to the issue. That is all provided in the lease.

Mr. Fairlie: On that point, your Honor, admittedly, his rent had been paid in installments up to that time—I am speaking now of before 1928—paid the installments and dragged on. It was that way even after this letter had been written. Now, if the landlord had any idea of dispossessing the tenant, terminating the term, or evicting them,

40

*Gar S. Sparks, direct.*

it certainly is inconsistent that instead of terminating the term and having the property himself he should go and postpone the lease to a lien of that mortgage that he wanted to put on—circumstantial fact. This thing has to be built up on a chain of circumstances, as I conceive it, to corroborate Mr. Sparks' contention. 10

The Court: I will allow the testimony.

Mr. Greenfield: In this case, this postponement—the lease provides that, if he fails to give a postponement, he would have a right to oust. Now, he only did that which he was obligated to do in that instrument—nothing more.

The Court: All right.

Mr. Greenfield: If we were patient with him, that does not say we should be punished for it. 20

The Court: I will receive the evidence, but if the lease says that, when he is requested to postpone, he must postpone, it is very unimportant.

Q The lease provides, Mr. Sparks, for the postponement to a mortgage of \$40,000. How much was the mortgage that Mr. Lawrence asked you to postpone to? A I believe it was \$90,000. 30

Q And did you have any conversation with him relative to your willingness or unwillingness to postpone the lease to a \$90,000 mortgage? A I did.

Q What was that conversation?

Mr. Greenfield: Wait a minute. Did you sign a postponement?

Witness: Yes. 40

*Gar S. Sparks, direct.*

Mr. Greenfield: To a ninety thousand?

Witness: Well, I don't recall the exact figure. I know that it was a big sum of money.

Mr. Greenfield: It is no such thing.

10

The Court: What was the mortgage?

Mr. Greenfield: \$40,000.

Mr. Fairlie: Your Honor, that was subsequently—I myself—(interrupted)

Mr. Greenfield: \$65,000.

Mr. Fairlie: I took the acknowledgement. It was a much larger amount than the lease.

Mr. Greenfield: That mortgage was never put on, never went through.

Mr. Fairlie: I don't question that.

20

Q What was your conversation with Mr. Lawrence relative to your willingness or unwillingness to postpone the lease to a mortgage larger than the sum stipulated in the lease? A Well, let me say this: Of course, I was not familiar enough with the lease or with the law to know that I was required to do that. I thought that I was conferring some sort of a favor to sign that paper.

30

Q What was your conversation? A So I said to him that I was very glad to do it, because he had been very good to me in the past, and he said that he had been glad to help me, so that was all there was to that.

Q Did he say anything about terminating your lease? A No, sir.

40

Q Now, in May, 1928, did you have any conversation with him relative to taxes? A Yes. We had not received the bill for taxes from him since we have been there and so—I think it was

*Gar S. Sparks, direct.*

the whole four years at once had to be paid, so, of course, I saw him several times on that and I didn't question—I thought it was a little high and said so, but I did not go any further into it and I paid it.

Q Why didn't you question it? A Because he had been—always been very nice to me. 10

Mr. Greenfield: I object to that, if the Court please, what was in his mind.

Q Well, was anything said to Mr. Lawrence at the time of the negotiations of paying these taxes? A Well—(interrupted)

Q Relative to your arrears of rent. A Nothing at all.

Q And during that month, May, 1928, the schedule shows your rent was paid in two installments. Is that right? A Yes, sir. 20

Q And in January preceding, when he asked for the postponement, the schedule shows that your rent was paid in two installments; is that right? A That is right.

Q And you were in arrears in rent both of those times when these conferences were had with Mr. Lawrence, is that right? A That is right.

Q Now, in the early part of December, 1928, did you have any conference with Mr. Lawrence relative to your lost copy of the lease in question? A Why, yes; some time previous to that, someone had broken in our store and taken a box that contained our papers, and in the papers was the lease to 921 Broad street, or, we thought so. Later we found it. We thought it was lost and I wanted to get a copy of it and I went to Miss Lyons and Mr. Lawrence in their office and asked them if they would let me have 30 40

*Gar S. Sparks, direct.*

it so I could make a copy of it. Well, they didn't have it. They said that Mr. Greenfield had their lease. Nothing was said about rent at that time. I had not paid my rent.

10 Q The schedule shows that your rent for that month of December was paid in two installments; is that correct? A That is right.

Q And some of it was unpaid when you requested this copy of the lease? A That is right.

Q Was anything said about your being in arrears? A Nothing said about it.

Q Or about terminating the lease? A Nothing.

20 Q Was anything said to Mr. Lawrence at that time relevant to your sale of the—possible sale of the business, or taking in a partner, or any other business deal of that sort? A Well, I don't recall that. I know that there was—about that time I had a chance to enter negotiations and sell the business and I talked about it in the neighborhood. No doubt, he heard it.

Q But you do not recall mentioning it to Mr. Lawrence? A No, I do not.

30 Q Now, on January 2nd, 1929, did you have the money and could you have paid the rent for that month if it had been demanded of you? A Yes, sir. That is the one month since I have been there that I actually had the money in the bank to pay the rent with.

Q That was right after the Christmas trade? A Yes, sir.

Q And is this paper that I show you your Franklin Washington Trust Company balance as of December 31, 1928? A Yes.

40 Q And the balance that is shown there, \$4,321.75, as of December 31, 1928—(interrupted)

*Gar S. Sparks, direct.*

Mr. Greenfield: If the Court please, is that material or binding upon the defendant in this case—his bank account? We haven't got any legislative investigation now.

Mr. Fairlie: Your Honor, this is a mosaic, to some extent, and the picture appears in the mosaic not as each piece is picked up and looked at, but as the pieces are put together. 10

The Court: I will listen to it.

Q Did you have that balance in the bank on January 2nd? A Yes, sir.

The Court: Now, what he is proving is that, although he had the money, he did not pay it. That is just exactly what he is proving now. 20

Mr. Fairlie: Yes, yes, sir.

The Court: All right.

Q Now, why, if you had the money in the bank, wasn't it paid promptly, on January 2nd? A We had a great deal of sickness in the store; there was a lot of flu and colds; we had four or five people out, and one of the people that was out was Mr. Georges, who is here, and he is my accountant and he sees that the checks are made out and mailed. He was out sick and I, of course, having a lot of people out sick I—I had a lot of things to think about, and I did not pay the rent. I had not been in the habit of paying the rent on the first day of the month, so it just went along as usual. 30

Q Was there anything that occurred to suggest to you that there was any different situation on this date from what had existed on the 40

*Gar S. Sparks, direct.*

first business day of other months? A Nothing at all.

Q Had you personally been accustomed to attend to the payment of rents, or was that in any way connected with the duties of Mr. Georges, the bookkeeper?

10

Mr. Greenfield: I object. It is immaterial. It was up to him to see it was paid.

The Court: I will allow it.

Mr. Fairlie: You are in a court of equity.

A Yes, I signed all checks, but I did not make them out, and I did not apportion what was to be paid to the creditors, but that was the work of Mr. Georges and of the bookkeeper under him.

20

Q Did you have anything in the world that was more valuable to you on January 2nd, 1929, than this leasehold? A Nothing in the world.

Mr. Greenfield: I object to that. (Laughing.) He is married.

Witness: Well, I mean in a business way.

Mr. Fairlie: Your Honor, I am glad to have counsel object to my question, but I do not like to make a farce of this thing; it is a very serious matter to Mr. Sparks.

30

The Court; I know, Mr. Fairlie; I appreciate what it means to this man, and, although I think a good deal of it is immaterial, I am allowing you to go ahead.

Mr. Fairlie: I appreciate some leeway, because this is my only chance of getting it not only before you, but before the Court of Appeals, if there should be a Court of Appeals.

40

The Court: All right. Go on.

*Gar S. Sparks, direct.*

Q Now, having the money on hand on January 2nd, 1929, if Mr. Lawrence had demanded the January rent of you on that day, would you have paid it? A Absolutely. Would have rushed over there with it, if he had made a demand.

Q As a matter of fact, did he demand it? A He did not. 10

Q Did he, at any time prior to that, after this letter way back a year and nine months previously, indicate to you that you would have to pay the rent on the first day of that month or be put out? A He did not.

Q And when was the first that you actually heard from Mr. Lawrence with respect to the January, 1929, rent? A On the 15th day of January.

Q And what happened then? A I got a letter from him saying that because he had demanded the rent on the first day of the month and I had not paid that, the lease was cancelled. 20

Q And had he demanded it? A He had not.

Q And what did you do, upon receipt of that notice? A I immediately went over to his office with a check and Mr. Lawrence was not there. I offered to give Miss Lyons the check and she refused to take it. She said Mr. Lawrence told her not to take it. 30

Mr. Greenfield: We admit that. There is no use of wasting time on that.

Q Then what did you do after that? A Then I saw you—

Q Yes. A—counsel, and explained it to you, and then, the next day, we went to the office again with the rent money in cash and interest, and they refused to take it. 40

*Gar S. Sparks, cross.*

Q And tendered it with interest? A Yes, sir.

Q Has your rent since up to and including the present month of March been paid in full?

A Yes, sir.

10 Mr. Greenfield: Just a minute.

Mr. Fairlie: That is, pursuant to stipulation and without prejudice.

Mr. Greenfield: Yes, I have got the money.

The Court: Without prejudice?

Mr. Greenfield: Without prejudice, in accordance with the order of the Vice Chancellor.

The Court: All right.

20 Mr. Greenfield: And the money is with me.

Mr. Fairlie: We have not lost any right except this subsequent rent.

The Court: All right.

Q And you went and tendered that rent, you say, immediately upon receipt of this notice? A Yes, sir.

30 *Cross examination by Mr. Greenfield.*

Q Mr. Sparks, you said in your direct examination that you had nothing to do with payment of the rent. A Well, I signed the checks, yes.

Q You signed the checks; the apportionment where the money should go and how much should go. That had to do with your accountant? A Yes, sir; but understand I—(interrupted)

40 Q Just a minute. Then the apportionment would have been in January if there would not

*Gar S. Sparks, cross.*

have been sufficient funds to pay all the creditors in full, including the rent, that would have been apportioned, too, wouldn't it? A Well, I don't understand the question.

Q Oh, you don't understand the question? A No, I don't understand the question.

Q Well, your answer to counsel's question was that your accountant had to do with the apportionment of your funds to the creditors. A Well, I don't—(interrupted) 10

Q And you said, "Yes"; is that right? Now, was that right?

Mr. Fairlie: Read it until we find out.

A You will have to say it over. I don't know what you asked me. 20

The Court: Did this bookkeeper of yours apportion the money you had around among the various people to whom you owed money?

Witness: Yes, sir; he did.

The Court: And was there enough on the first of January to pay all the creditors in full?

Witness: No, sir. 30

The Court: Including the landlord.

Witness: There was enough to pay the landlord, and, of course, to pay the regular, current, weekly bills.

The Court: Well, that is what you want.

Mr. Fairlie: Yes, sir.

Q Now, Mr. Sparks, you were in the store there on the 2nd of January? A Yes, sir. 40

*Gar S. Sparks, cross.*

Q Yes. And you knew that on the second of January, it was rent day? A I knew that, of course, that the first of the month is rent time.

Q Yes. And you also knew by this letter, Exhibit C. 1, dated June 17, 1927, that there was a protest of your method of paying? A Well, I  
10 certainly had forgotten all about that letter.

Q You forgot that? A Yes.

Q And, now, isn't it a fact, Mr. Sparks, that Miss Lyons, who had charge of this, had been around to see about the rent, went there several times a month to get the rent? A No, sir; that is not so.

Q And didn't she repeatedly tell you that "Some day, Mr. Sparks, you will find yourself out of the store, if you persist in that method."

A Miss Lyons never told me that.  
20

Q And didn't Mr. Lawrence—the defendant, Mr. Lorentowicz—call you up a number of times on the phone and tell you that you must pay your rent on the due date? A I never talked to Mr. Lawrence on the telephone as long as I have known him.

Q Never spoke to him on the phone? A No, sir. I never did.

Q Did you speak to him directly? A Yes, sir; in his office many times.

Q And at your place? A A few times he  
30 came to lunch.

Q Yes? A He never talked rent when he came to my store.

Q And isn't it a fact that he told you, Mr. Sparks, that "you had enough money to open another store"? A I borrowed the money to open another store.

Q "I will insist that you pay your rent on the first." Didn't he tell you that? A He did  
40 not tell me that.

*Gar S. Sparks, cross.*

Q But you did open another store? A Yes, sir.

Q You were short of money? A Yes, sir.

Q Didn't have enough to pay the rent in time?

A There was enough—I never believed that I had to pay.

Q You didn't have enough money to pay the rent in time, did you? A I could have always paid the rent on time if I thought it was absolutely necessary, that I would have been thrown out if I did not; yes, I could have always done that. 10

Q Well, you knew of this threat in that letter. A Well, that is—(interrupted)

Q That did not impress upon your mind at all, did it? A It did at the time.

Q Yes. A I told you what happened then. 20

Q You say the help in your office was sick on the first of the year? A The accountant, Mr. Georges, yes.

Q How long had he been away? A He was away about two months.

Q Two months? A Yes.

Q Well, did you pay the bills during those two months? A Certainly.

Q You paid your rent during those two months? A Yes, sir.

Q Without the accountant being there? A Yes, sir. 30

Q You testified, on direct examination, that Mr. Lawrence did make a demand and a threat—

A Only in that—

Q —for the rent? A—that letter.

Q What letter? A That I got on June the 17th, 1927.

Q Yes. And did he make a threat personally to you, besides that letter? A No, sir; he never did. 40

*Gar S. Sparks, re-direct.*

Q At any time? A Never.

Q Miss Lyons? A No, ma'am—no, sir. She did not.

Mr. Greenfield: That is all.

The Court: That is all, sir.

10

*Re-direct examination by Mr. Fairlie.*

Q Let me ask you, Mr. Sparks: You were asked whether, on January 2nd, 1929, you had money enough to pay all the creditors in full. About how much did your debts amount to on that date, approximately? A About forty one or two thousand dollars.

Q You didn't have enough to pay them all in full. A No, sir.

20

Q Did you have any assurance from any of your friends and business associates as to being able to get the money from them, if any of your creditors pressed you to the extent that you needed it? A Yes, sir.

Mr. Greenfield: I object to that. That certainly is a self serving declaration.

The Court: Let him ask it and let it be answered.

30

Mr. Greenfield: All right.

Q Had you ever had any conversation with me about getting money in the event that your creditors pressed you to the wall? A Many times.

Q Had you any assurance from me— A Plenty.

Q —that you could get help? A Plenty of assurance from you.

40

Q Do you know Mr. Val Braun? A Yes.

*Gar S. Sparks, re-direct.*

Q Of the Haussling Soda Water Company?

A Yes, sir.

Q Had you ever had any assurance from him? A He told me if I ever got in any difficulties to come to him.

Mr. Greenfield: Is that binding, if the Court please? 10

The Court: No, not at all.

Mr. Greenfield: I think counsel ought to know that.

Q And you say that by use of your credit you could always have paid the rent, if you had understood that it was required to be paid on the first of the month? A Yes, sir.

Q Or lose your term, A Yes. 20

Q By way of forfeiture for non-payment? A Yes.

Q Where is Mr. Lawrence's office? A Why, it is on Halsey street, right back of my store, on the same lot.

Q And this new store that you own is on Broad street, near the corner of Market? A Broad and Market, yes.

Q And did you have any conversation with Mr. Lawrence about the opening of that store, at or about the time you opened it? A Yes; we discussed it in his office, when I was going to open the store. 30

Q And what did he say about it? A He said he thought it was too much rent to pay for it.

Q To pay for the Broad & Market store? A Yes, sir.

Q As a matter of fact, have you or have you not made money at that Broad street store? A I have. 40

*Valentine Braun, direct.*

Mr. Greenfield: I object to that.

The Court: I am going to allow full latitude.

Mr. Greenfield: All right.

10      Witness: I did. I have made money there.

Q Has it helped you in paying your rent to Mr. Lawrence or has it hindered you? A Well, while we have made money in both stores, yet, when you are still paying off the equipment in stores at so much a month, it is not always easy to have the rent on the first day of the month.

Mr. Fairlie: That is all.

The Court: That is all.

20      Mr. Greenfield: Is that your case?

Mr. Fairlie: No.

Mr. Braun.

VALENTINE BRAUN, sworn for complainant.

*Direct examination by Mr. Fairlie.*

30      Q What is your business, Mr. Braun? A I am connected with the Haussling Soda Fountain.

Q And after Mr. Sparks got his business at 921 Broad street, city, did you or did you not have any conversation with Mr. Lawrence, the landlord? A At first, I talked to the young lady.

40      Q About when was that? A That was during the—we were installing the fixtures. For

*Valentine Braun, direct.*

some reason, Mr. Sparks could not get in immediately; there was some delay.

Q What was the reason for your going over to Mr. Lawrence's office? A Well, Mr. Sparks was short of money. He came to see me, so I said, "Well, what did you do?" He said, "Well, I put up five thousand dollars." I said, "Why don't you ask the landlord to apply one month's rent to that five thousand?" I saw the young lady—(interrupted) 10

Mr. Greenfield: I object to any conversation with Mr. Sparks when Mr. Lawrence was not present.

Mr. Fairlie: This is simply going into the—(interrupted)

Mr. Greenfield: I know, but he can go and explain ancient history. 20

The Court: I will allow it.

Q And then what happened? Continue. A Well, I came back and told him that it would be all right, "Those people will help you along the same as I will." And they talked very nicely—the lady did. Then I met Mr. Lawrence in front of the store, about two or three days after, and he spoke very highly of him. I recommended Mr. Sparks and told him that whatever agreement he had, or whatever came along, he was good for it; he was a hustler and he would make good; and they took notes for the rent instead of taking that one month. 30

Q Was anything said in that conversation between you and Mr. Lawrence relative to Mr. Sparks' ability to get money to pay the rent if he had to? A I told him any time Sparks wanted any help I would give it to him. 40

*Valentine Braun, cross.*

Q And did Mr. Lawrence ever thereafter speak to you and demand of you the rent? A I have not seen him since.

Mr. Fairlie: That is all.

10 The Court: These conversations were in 1922, were they?

Witness: Yes, sir; when the—(interrupted)

Mr. Fairlie: The 1924 business—the term began—

The Court: And the term began in 1924.

Witness: Whatever time—(interrupted)

The Court: When the lease was just started.

20 Witness: Yes, sir.

*Cross examination by Mr. Greenfield.*

Q Mr. Lawrence did not ask you for the rent, did he? A If he had, I would have gave it to him.

Q You didn't lend it to him? A Oh, no, but I would have paid it.

Mr. Greenfield: That is all.

30 The Court: That is all, Mr. Braun.

Mr. Fairlie: That is all. Complainant rests.

Mr. Greenfield: Now, in a court of law, I would ask for a non-suit.

The Court: You know what the rule is in the court of equity. If you want to rest your case on this—(interrupted)

Mr. Greenfield: No.

40

*Colloquy.*

The Court: —and I deny your motion, why, you cannot go on.

Mr. Greenfield: No, I am not. Miss Lyons, take the stand.

The Court: Have either one of you any legal memoranda? Have you that case that I decided, which went to the Court of Appeals, and I was sustained? I never can remember names of cases. Blake, wasn't it? Judge Grice was on one side. 10

Mr. Fairlie: No, I haven't got that case.

The Court: And that was a very similar case to this, as I recollect it. Mr. Davimos was in it.

Mr. Greenfield: Oh, the Green case, wasn't it? Wasn't that a bill for specific performance? 20

The Court: No, no. This man did not pay his rent, as I recollect it, and he claimed it was due to being dispossessed and I held that he should be and the Court of Appeals agreed with me. Now, that is as I recollect it, but it may be there were other points in the case.

Mr. Greenfield: I didn't see that.

The Court: But you better look it up. 30

Mr. Fairlie: I didn't run across that.

Mr. Greenfield: The Davimos case?

The Court: I don't know whether it was Davimos. You can call up Horace Grice. He was the successful party in the case, so he will probably remember the name of it.

Mr. Greenfield: That is former Judge Grice?

The Court: Yes. Horace S. Grice. All right. Let the lady be sworn. 40

*Rachael A. Lyons, direct.*

Mr. Greenfield: Also there is a later case, a case before Vice Chancellor Backes, and the Court of Errors sustained him, that he ousted the tenant for a breach of the terms of the lease. That is the case of *Bernstein v. the Lincoln Furniture Company*.

10 The Court: We will look those cases up after we get the testimony.

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RACHEL A. LYONS, sworn for defendant.

*Direct examination by Mr. Greenfield.*

20 Q Miss Lyons, you are employed by the defendant, Leonard Lorentowicz? A Yes.

Q Trading as L. Lawrence? A Yes.

Q And how long have you been employed by him? A Twelve years the first of this coming July.

Q And what is your position there? A Well, I am private secretary.

Q And, as private secretary, you have charge of the rentals, collection of rentals and general work? A All of this property I have collection of the rents, paying of the taxes and interest of all this property.

30 Q Now, you know Mr. Sparks. A Yes, very well.

Q You had charge of collecting rent from him? A Yes.

Q Now, you went to see him a number of times did you? A I used to go over around—Mr. Lawrence used to ask me if Mr. Sparks paid his rent and I would say, "He has not paid it yet." He would say, "When do you expect to get it?"  
40 "Why don't you go around and get it?" I would

*Rachael A. Lyons, direct.*

go around and sometimes I see Mr. Sparks and sometimes I didn't. I went in one time and saw him and he asked his bookkeeper if she had any money to pay the rent with and she said, "Well, not just now." I said, "Mr. Sparks, you better begin paying your rent on the first of the month, because Mr. Lawrence is kind of a hard man when you persist in not paying the rent." Then he said to the bookkeeper, he said, "Well, we will be throwed out of here one of these days if we don't pay our rent." 10

Q He said that to his own bookkeeper? A Yes. They have a store at 921 Broad street.

Q Now, how many times did you go to see him about it? A Well, I can't—I don't remember just how many times. Mr. Lawrence would say to me, "Has Mr. Sparks paid his rent yet?" I would say, "No," and he would say, "Well, you see that you get it." 20

Q Now, did you have anything to do with that letter, Exhibit C. 1? A No.

Q (Showing witness paper.) This letter, did you have anything to do with it? A No. Mr. Lawrence was real mad at me because I didn't get the rent when he told me I should and he said, "Well," he says—he called in the stenographer and he says, "I will dictate a letter to her and get it myself if you ain't able to get it." 30

Q And was that dictated to the stenographer? A Mr. Lawrence dictated it—

Q In your presence? A Yes; because he did it to punish me because I didn't look after his business the way I should.

Q Now, that letter went out. Did you see Mr. Lawrence after that? A Yes. Mr. Sparks came in the next day and he went right in to Mr. Lawrence—(interrupted) 40

*Rachael A. Lyons, direct.*

Q Were you there when they conversed? A Yes. I went right in.

Q What took place? A Mr. Lawrence said to him, "What do you think, I am going to wait for my rent all the time?" And Mr. Sparks says, "Well, I have my notes to meet on my fixtures and stuff, and," he says, "they are pressing me and it is pretty hard." He said, "I will try to get it to you by the first of the month after this." And then, at that time, they had this—  
10 some money coming to him on that deposit and we fixed it up and got the month's rent.

Q Now, did you ever see him after that? A I went over after him. I met him in front of the New store one time. I says to him, "Mr. Lawrence feels kind of sore that you opened this  
20 store and don't pay your rent on the first of the month." "Later," he says, "we will be coming along all right." I met him in the street several times and I always called him up around the first of the month.

Q Did you speak to him about rent? A I almost always spoke to him, because Mr. Lawrence was always speaking to me about it.

Q And after that—were you there in January, 1929, the beginning of January? A Yes.

Q I mean, were you in the place of business? A No. I had been away from about the middle  
30 of December.

Q Up till when, about? A Well, till some time after the first part of the year, because I lost my father.

Mr. Greenfield: All right. That is all.

The Court: Cross examine?

*Rachael A. Lyons, cross.*

*Cross examination by Mr. Fairlie.*

Q You did not always telephone Mr. Sparks on the first of the month, did you? A If I did not, Miss Geller did. We have another girl. Mr. Lawrence would say, "Has Sparks paid his rent?" And we would say, "No," and he says, "Why didn't you get it?" And I don't always like to run after him and I called him. 10

Q Do you mean to swear you phoned on the first business day of every month? A No, I do not, because maybe—(interrupted)

Q You phoned some time during the first business day to get the rent? A No. Toward the first part of the month, because after the first Mr. Lawrence asked me to get up his rent—because he has other property, because he has other rent and he said, "If you don't tend to your business, I will get somebody that can." 20

Q He didn't want Mr. Sparks to run behind in the rent? A No, sir; he wanted the money. first of the month. He is kind of hard like that.

Q He didn't want Mr. Sparks to run behind in the rent? A No, sir; he wanted the money

Q Didn't he ever tell you to let it go? A No, sir; he told me, "the rent is due on the first and I want it." 30

Q What property has Mr. Lawrence? A He owns two houses—(interrupted)

The Court: No, no. Now that isn't right. You cannot investigate Mr. Lawrence's private affairs.

Mr. Fairlie: No.

Q And adjoining property there, what property has Mr. Lawrence adjoining the demised premises? 40

*Rachael A. Lyons, cross.*

The Court: No. I won't allow it.

Mr. Fairlie: It is admitted in the bill of complaint, in the answer.

Mr. Greenfield: You allege.

Mr. Fairlie: It is alleged and admitted.

10

Mr. Greenfield: We answered it.

The Court: What has the adjoining property to do with this bill?

Mr. Fairlie: It has a great deal to do.

The Court: Well, why?

Mr. Fairlie: Let me answer the question. He has in the rear, as alleged in the bill of complaint and admitted in defendant's answer, a large tract that runs back to Halsey street, and an L that runs out to Hill street, and in making this lease to complainant, he has cut off his only possibility of a Broad street entrance to that big tract which he has acquired in the rear. Now, that is the situation, and it is perfectly manifest that after the rent has been paid as proved now, it has been paid in these installments up to this time that he gave this notice of the termination because the rent was not paid on the first day of that particular month, what he is doing is looking for some way to oust this complainant. It all goes to make up a picture of the thing, and the inequity of it.

20

30

The Court: I won't allow it. I have been very generous with you in this mosaic of yours, but I can't see what the adjoining property has to do with the lease on this property. It is merely an assumption on your part that, because he wants to get into this L, he is going to fire this man. Well, that

40

*Leonard Lorentowicz, direct.*

may be. That may be perfectly true, but, if he has got a right to fire him, that doesn't make any difference what his motive is. If you read that case of Alamac Hotel Company, the Chancellor says, "Even if spite is shown, if he has any right in equity, it doesn't make a particle of difference what— (interrupted) 10

Mr. Fairlie: No questions.

Mr. Greenfield: That is all. Mr. Lawrence.

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LEONARD LORENTOWICZ, sworn for defendant.

*Direct examination by Mr. Greenfield.* 20

Q Mr. Lorentowicz you are the defendant in this case, and you are the landlord. Did you ask for your rent on January, 1929, on the second day? A I have been in the store of Mr. Sparks. Really, I had some bills to pay myself and I thought I would go myself. Miss Lyons had been away and I better stop myself, so Mr. Sparks came out right away. I said, "I will give you a few days." I thought I would wait a few days. I said, "You know, I have to pay my bills right away." 30

Q And he didn't pay in a few days? A He didn't pay, to the fifteenth I been waiting, and then I came down and couldn't get it and called up and couldn't get it on the 15th.

Q And that is the time you gave your notice. Now, I show you Exhibit C. 1, a letter. It is signed by Geller, L. P. Geller, the initials. A That is Miss Geller. 40

*Leonard Lorentowicz, cross.*

Q Yes. Who dictated that letter? A I dictated and told her she better go after the rent, we can't wait every month the same thing.

Q Why did you dictate that letter to Miss Geller? A Miss Lyons been away; her father died that time and she been not home.

10 Q I am talking about the letter of 1927. A Oh, 1927, yes. I couldn't get her; every time I went for the rent he say he kick me in the jaw and I get kind of disgusted and don't want to come any more and then I get the other girl to write a letter.

Q This month you insisted on the rent being payable on the first day? A Yes, and then I met Sparks after, and I say, "Mr. Sparks, I get sick and tired; every month I have to come for the money; every week; every combination; some day we are going to close you up." He said, "Don't do that." I said, "We will have to get the rent."

20

Q You told him that? A He knows that, he can't admit it himself.

Q Now, you say you asked on the second of January and you did not get the rent until after the notice was served upon him? That is, it was made a tender to you? A Yes.

30

*Cross examination by Mr. Fairlie.*

Q Mr. Lawrence, you have \$3,000 of that deposit still in your possession?

Mr. Greenfield: I object to that as immaterial.

The Court: I will allow it.

Mr. Greenfield: The lease provides it.

40

*Leonard Lorentowicz, cross.*

Q Have you offered to return it to Mr. Sparks? A No; that is supposed to be done—pay \$5,000, and supposed—

Q Just answer questions. Have you offered to return it to Mr. Sparks? A Well, he not supposed—supposed—(interrupted)

Q Yes or no. A No; don't ask me.

10

Mr. Fairlie: I insist that he answer the question.

Mr. Greenfield: He said no.

The Court: He said no.

Witness: Don't ask me.

Mr. Fairlie: The answer is "No."

Q Do you intend to return it to him?

20

Mr. Greenfield: Now, I object to that.

The Court: I will sustain the objection.

Mr. Greenfield: I will say this, in open court, if counsel wants to accept, I will give you the money right now to get out. We will give it to you.

Mr. Fairlie: No.

Q Now, in January, 16, 1929, the day after you served the notice on Mr. Sparks, did I come with Mr. Sparks to your office?

30

Mr. Greenfield: That is admitted. I have admitted that on direct.

The Court: Yes.

Mr. Fairlie: Now, your Honor, I want to cross examine the witness. I cannot cross examine—

The Court: All right. Go on.

Mr. Greenfield: Go ahead.

40

*Leonard Lorentowicz, cross.*

Mr. Fairlie: —unless counsel will keep quiet.

The Court: Well, counsel has the right to object.

Mr. Fairlie: To object, yes, but not to converse.

10

The Court: He is not conversing, he is objecting.

Q Did I come to your office with Mr. Sparks on that day? A I think you been up there on the 17th.

Q It was the day after you served the notice, wasn't it? A The notice been served, I think, the 16th—you have been the 17th.

Q It was the day after you served the notice? A Yes.

20

Q Do you remember the conversation that day? A Yes.

Q Do you remember our rehearsing the whole history of the development of this thing? A No. You came down—(interrupted)

Q Do you remember that? A I can tell what you just asked me. You came down with the money, with the envelope. I said, "No, that is not the case. Go see Mr. Greenfield."

30

Q Do you remember in my talk with you rehearsing the history of your dealings with Mr. Sparks? A No.

Q You deny that you did? Do you remember my saying to you that you had always been interested in helping Mr. Sparks to develop that business? A Yes.

Q And to accommodate him? A That has been just at the beginning.

Q Do you remember my saying that? A Just in the beginning when he started the place;

40

*Leonard Lorentowicz, cross.*

he had the notes and put in the fixtures and asked me for a few months—I could have done it—and after I asked every first of the month the rent and I couldn't get it and every time the same thing.

Q Now, isn't it a fact that when I spoke of the way in which you had accommodated him, and so forth, you said that you had been glad to do it? A On what? I am not— 10

Q Now, after this letter you wrote, C. 1, the same irregularity in payment of rent continued for the next year and eight months, didn't it? Yes or no? A It has been the same way, every month we had to call up or to send somebody.

Q Now, you never actually threatened to institute proceedings against him to collect the rent, did you? A What do you mean, collect the rent? 20

Q Did you ever actually threaten? A Collecting the rent?

Q Yes. A Yes, and I have been myself, and after I couldn't see Mr. Sparks, he has been away and Miss Lyons went up there and we couldn't collect it. He generally came down himself.

Q Did you threaten proceedings to collect it? A I didn't take in the money.

Q What? A I didn't receive money. 30

Q You cannot understand that? A No, I don't know what you mean by that.

The Court: Did you say you would sue him for the rent?

Witness: Yes.

Q You did. Now, when was the first time that you told him that? A Well, that—that was that time he got that letter, 1927.

Q About that time? A Yes. 40

*Leonard Lorentowicz, cross.*

Q Was that the first time you told him you would sue him for the rent? A We have been talking before I would like to get the money, but he always put me out, that is, when I would go to ask him for the money, he generally put me out. He say, "Tomorrow."

10

Mr. Greenfield: He means, put him "off."

Witness: All the time.

Q And you repeated that threat afterwards from time to time did you? A After the letter from—

Q Yes. A Yes.

Q And you then spoke to Mr. Greenfield about it, didn't you? A Due the money?

20

Q Yes. About Sparks being behind in his rent. A Yes.

Q And spoke to Mr. Greenfield about collecting the rent from him. A Mr. Greenfield said, "We will have to put him out." He said, "There is no way—"

Q When did you first speak to Mr. Greenfield about it? A Well, I have been there sixteen—seventeen, when we got the letter. I have been to Mr. Greenfield and asked Mr. Greenfield what to do. He said, "Well, write him a letter; he is supposed to pay you the first of the month the money."

30

Q And afterwards from time to time did you speak to Mr. Greenfield about it? A No, no.

Q Well, you did speak to him some time later on about collecting the rent? A No, we didn't speak nothing, but we try and collect it ourselves, but we couldn't do it; they always put it off.

Q Well, now, in April, 1928, did you threaten  
40 Sparks in that month? A Why, yes.

*Leonard Lorentowicz, cross.*

Q To institute proceedings against him? A Yes.

Q And did you speak to Mr. Greenfield about those proceedings? A No.

Q How do you know it was April as you allege in your affidavit? A Well, I know that is the time—you mean, 1928? 10

Q Yes. A Isn't that the time they didn't twice pay?

Q Two installments. A Well, he didn't have no money and they gave me that, "and I will have to give you the rest," and I have to accept it what he give me; I couldn't go on and take nothing.

Q And you made an affidavit in this case, did you? Do you remember it? A Yes.

Q Yes. You remember saying this— 20

Mr. Greenfield: What date is that?

Mr. Fairlie: On page 10 of your answering affidavit.

Mr. Greenfield: Page 10.

Mr. Fairlie: As to the allegation alleged therein that, "My attorney, William Greenfield, made no mention of the unpaid rentals or the manner in which the rentals were paid are true, by reason of the fact that no mention of said rentals were called to the attention of William Greenfield, as these matters were taken care of by my secretary, Rachel A. Lyons, up to the time legal proceedings were necessary." Now, do you recall having sworn that the matter of rent had not been mentioned to Mr. Greenfield, up to the time the proceedings in this case—(interrupted) 30

Witness: I don't remember that. 40

*Leonard Lorentowicz, cross.*

Q You don't remember that, but you did swear to it, did you? A I couldn't remember that, it is so far away.

Q Now, you say that on January second, 1929, you personally stopped in at Mr. Sparks' store because Miss Lyons was away at that time, you  
10 personally stopped in at the store and asked him for the rent, did you? A Yes.

Q Now, you swore to that. A Saw Mr. Sparks right in the store.

Q Saw him in the store and talked to him in the store? A Yes. And he said, "I will settle up in a few days and bring it down."

Q And you have a clear recollection of that, have you? A Yes.

Q Have you been accustomed to telephone Mr. Sparks about the rent yourself or did you leave  
20 it to your secretary to do? A No, leave it to her to go to the store and she tried to get it, but most of the time he isn't there.

Q But January 2nd you went in the store and saw him? A Went in the store myself.

Q And remember it very distinctly? A Yes.

Q Now, how do you know it was Mr. Sparks you were talking to over the telephone that day?  
A Which day?

Q January second. A I been in the store.  
30

Q Oh, it was not over the telephone? A No. I been talking to him myself.

The Court: He says he went in the store.

Mr. Fairlie: He will tell me anything, as I will demonstrate now.

The Court: Cut that out.

Q In this affidavit, on page 10, I will read:  
40 "Deponent did make demand for the payment of the rent" referring to January 2nd, 1929—and

*Leonard Lorentowicz, cross.*

the allegations in paragraph 12 of the bill of complaint: "Did call up complainant at the store and when informed complainant was not in, deponent left word for complainant to call back, although complainant did not call back." Do you remember swearing to that? A Well, the complainant, what do you mean, Sparks? 10

Q Sparks. A He don't call back.

Q Do you remember swearing to that? A Yes, sir.

Q Do you remember that—you remember this affidavit? A Yes.

Q "When Sparks, complainant, failed to call back deponent"—that is you—"again called up and spoke to complainant over the telephone." Do you remember that? A Yes.

Q "About payment of the rent and complainant answered, 'I will pay it some time this month.'" Do you remember that? A Yes. 20

Q You swore to that, didn't you? A Yes.

Q And that is all the conversation there was to it. He simply said, "I will pay it some time this month" is that right? A No, he told me in a few days he will give me a check, and I wait until the 15th and I have my bills to meet and I couldn't meet it.

Q Didn't he say, "I will pay it some time this month"? A He said, "A few days" and I waited. 30

Q In your affidavit you said his reply was he would pay it some time this month. Do you remember swearing to that? A Well. (Witness mumbles something unintelligible.)

Q And that is all the conversation he is saying? A Yes.

Mr. Fairlie: That is all.

40

*Margaret Myslivec, direct.*

The Court: That is all, sir.

Mr. Greenfield: That is all. That is our case.

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10 MARGARET MYSLIVEC, sworn for complainant.

*Direct examination by Mr. Fairlie.*

Q On January 2nd, 1929, by whom were you employed? A Mr. Sparks.

Q And what was your position there? A Well, I am assistant bookkeeper and I take care of the tea room for Mr. Sparks.

20 Q And is the telephone by your desk? A Yes.

Q And do you have anything to do with the sending out of rent checks? A Well, Mr. Georges takes care of that. He usually—he tells me when to send them out and what to do.

Q You do it under his direct? A I do.

Q Now, on January 2nd were you in the store? A I was.

30 Q Did Miss Lyons, when she phoned for rent from time to time—did she talk to you about it on the phone ever? A Several times she spoke to me on the phone, but not on January the second.

Q Do you answer the phone when the calls come in? A When I am there I answer it, and if there is anything important on the phone, they always get me.

Q And were you there all day January second? A I was.

40 Q Did any call come in from Mr. Lawrence or his secretary concerning rent? A No, sir.

*Margaret Myslivec, cross.*

Q To your knowledge? A No, sir.

Q Did Mr. Lawrence come into the store that day to your knowledge? A No, sir; I have not seen him.

Mr. Fairlie: That is all.

10

*Cross examination by Mr. Greenfield.*

Q You take care of the tea room, you say? A I do.

Q Yes. You are not always in the front there by the desk? A I very seldom go up at the desk.

Q But you do go up at times? A Well, I do go up there, but I am not always up there.

20

The Court: She says she is very seldom at the desk.

Q Oh, so you don't know whether Mr. Lawrence was at the desk there or not, on the second of January, do you? A Well, not at the desk, but he was not in the back. I have not seen him.

Q Oh, he was not at the back. The desk is at the front? A Well, my desk is at the front.

30

Q But the desk of Mr. Sparks, where the cashier is there, that is in the front? A That is in the front.

Q So when Mr. Sparks is in the store he is generally there in the front? A No; he comes to the back; he always comes to the back.

Mr. Greenfield: That is all.

The Court: That is all.

40

*Lawrence O'Connor, direct.*

*Re-direct examination by Mr. Fairlie.*

Q The cashier's desk is in the front? A Yes, sir.

Q And where is Mr. Sparks' desk? A He comes to the back.

10 Q And where is your desk? A In the back.

Q And when Mr. Sparks is in the store is he, as a rule at his desk or not at his desk? A Yes, he comes to the back; he always comes to the back.

Mr. Fairlie: That is all.

Mr. Greenfield: That is all.

The Court: That is all.

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LAWRENCE O'CONNOR, sworn for complainant.

*Direct examination by Mr. Fairlie.*

Q On January 2nd, 1929, by whom were you employed? A Mr. Sparks.

Q In what capacity? A Cashier.

30 Q What store? A 921 Broad street.

Q And where is your desk? A Front part of the store.

Q Is it near the Broad street entrance of the store? A Right at the entrance.

Q Were you at the store that day? A I was.

Q What hours were you there? A I was there from nine until five.

Q Did you go out of the store for lunch? A No.

40

*Lawrence O'Connor, cross.*

Q Were you in the store all day long? A Yes, sir.

Q From nine to five? A All day; I had lunch there.

Q Did you see Mr. Lawrence in the store that day? A No, sir; I did not, not to know him.

Q If he had come in there, what is the likelihood of your seeing people that come into the store? A Yes. 10

Q Would you have seen him? A I would have seen him.

Q Was there any telephone call, to your knowledge, from Mr. Lawrence or his secretary on that day? A Not at the front part of the store.

Mr. Fairlie: That is all. 20

*Cross examination by Mr. Greenfield.*

Q Well, if somebody else answered the phone and asked for Mr. Sparks, they would not tell you who it was on the other end of the wire, would they? A No; not unless I asked them.

Q I beg your pardon? A No.

The Court: Is that all? 30

Q And were you there all day? A All day.

Q Do you know Mr. Lawrence? A No.

Q You don't know him at all? A No.

Mr. Greenfield: That is all.

Mr. Fairlie: That is all.

The Court: Is that the case?

Mr. Greenfield: Mr. Lawrence, just take the stand. 40

*Leonard Lorentowicz, recalled, direct.*

LEONARD LORENTOWICZ, recalled.

*Examined by Mr. Greenfield.*

Q Mr. Lawrence, what time of the day were  
you there on the second of January? A After  
10 twelve o'clock.

Q Twelve o'clock? A Yes.

Mr. Greenfield: That is all.

Mr. Fairlie: That is all.

Mr. Greenfield: That is the case. Does  
your Honor want the memoranda? I want  
to look at that case your Honor suggested.

The Court: You can look at it, and I  
have about come to the conclusion of what  
20 decision I will reach in the matter. If you  
gentlemen want to come into my chambers  
this afternoon and argue it, why, all right, I  
will listen to you.

Mr. Fairlie: I wish we might, your  
Honor, because I feel so keenly the serious-  
ness of it.

The Court: Well, I feel keenly the ser-  
iousness of it also, but there is another ser-  
ious aspect to this thing: this man admits  
30 himself that he violated the terms of this  
lease and what you are trying to make me  
do now, apparently, is to make a new lease.

Mr. Fairlie: Yes, I do want—the cases  
are so—(interrupted)

The Court: All right. You can come in  
at three or four o'clock. In the meantime  
look up that case.

Mr. Greenfield: Yes, sir.

The Court: I cannot remember, to save  
40 my life; Davimos on one side and Grice on  
the other.

*Notice to vacate premises.*

To Gar S. Sparks,  
921 Broad Street,  
Newark, N. J.

SIR:

This is to notify you that the Lease made and entered into by and between you, as tenant, and Leonard Lorentowicz, as Landlord, on the 4th day of March, 1922, and the supplement thereto dated May 5th, 1924, for the land and premises known and designated as #921 Broad Street, in the City of Newark, County of Essex and State of New Jersey, for the term of twenty-one years from the 1st day of May, 1924, and ending at noon on the 1st day of May, 1945, is hereby terminated for the reason that you have failed and refused to pay the rent in accordance with the terms of said lease, due on the 1st day of January, 1929, and payment of which rent was demanded of you on the 2nd day of January, 1929, after same became due and payable, which is in violation of the provisions of said lease wherein it requires you to pay the monthly rental on the first business day of each and every month in advance, and which Lease provides as follows:

“Upon breach by the tenant of any of the covenants therein provided to be kept and performed by the tenant, the tenant shall at the option of the landlord forfeit said term and all rights thereunder and the landlord may re-enter and recover and repossess himself of immediate possession of the said premises.”

And I do hereby demand that you move and vacate said premises and deliver up same to me within three days from date of service of this notice upon you.

Dated January 15, 1929.

Respectfully yours,  
LEONARD LORENTOWICZ,  
Landlord.

*Indenture of Lease.*

THIS INDENTURE OF LEASE, Made this 4th day of March, Nineteen Hundred and Twenty-two (1922), by and between LEONARD LORENTOWICZ, of the City of Newark, Essex County, New Jersey, hereinafter called the "Landlord," of the First Part; AND GAR S. SPARKS, of the City of Newark aforesaid, hereinafter called the "Tenant," Party of the Second Part, WITNESSETH:

(1) For the term, at the rental and upon the conditions and covenants hereinafter set forth the Landlord hereby rents and demises to the Tenant and the Tenant hereby takes and hires from the Landlord all that certain tract and parcel of land and premises with the building thereon, known and designated at #921 Broad Street, in the City of Newark, Essex County, New Jersey, which is more particularly described in the Schedule hereto attached and made a part hereof.

(2) The term and period of this lease is twenty-one (21) years, to commence on the First day of May, Nineteen Hundred and Twenty-four (1924) and ending at noon on the First day of May, Nineteen Hundred and Forty-five (1945).

(3) The annual rental for said premises reserved to the Landlord and hereby covenanted by the Tenant to be paid is Ten Thousand Dollars (\$10,000.) per year for the first five (5) years of said term, payable in equal monthly installments of Eight Hundred and Thirty-three Dollars and Thirty-three Cents (\$833.33) per month; Eleven Thousand Dollars (\$11,000.) per year for the second five (5) year period of said term, payable in equal monthly installments of Nine Hundred and Sixteen Dollars and Sixty-seven Cents (\$916.67) per month; Twelve Thousand

*Indenture of Lease.*

Dollars (\$12,000.) per year for the third five (5) year period of said term, payable in equal monthly installments of One Thousand Dollars (\$1,000.) each; and Thirteen Thousand Dollars (\$13,000.) per year for the last six (6) years of said term, payable in equal monthly installments of Ten Hundred and Eighty-three Dollars and Thirty-three Cents (\$1,083.33) per month; each and every of the aforesaid monthly installments to be paid in advance on the first business day of each month, respectively. 10

(4) The performance by the Landlord of each of the covenants herein made by him is a condition precedent to the obligation of the Tenant to perform the covenants herein made by the Tenant; and the Landlord hereby covenants with the Tenant as follows: 20

(a) That at the beginning of said term said building and premises shall be in as good repair and condition as the same are now in.

(b) That at the beginning of said term there shall exist in said building and premises no violation of any law, ordinance, regulation or requirement of the governmental authorities of the City of Newark or of the County of Essex or of the State of New Jersey or of any other governmental authority having jurisdiction over said premises. 30

(c) That he is now the sole and rightful owner of said premises in fee simple absolute, and that this lease constitutes an encumbrance thereon subsequent only to the lien of a mortgage which is now a lien thereon in the sum of Forty Thousand Dollars (\$40,000.) and to the lease under which the present occupant of said premises is in possession thereof, the term of which expires on May First, Nineteen Hundred and Twenty-four (1924). 40

*Indenture of Lease.*

(d) That if the present occupant of said premises or any other person or corporation shall be in possession thereon on May 1st, 1924, the landlord, at his own expense, will immediately institute necessary proceedings to oust such occupant thereof and prosecute said proceedings with all  
 10 due, possible speed and deliver the possession of said premises to the tenant thereof; and that if possession thereof is not delivered to tenant on May 1st, 1924, rent abate until such time as possession is delivered to the tenant.

(e) That he will not suffer or permit any mortgage lien upon said premises to which this lease may be subsequent or subordinate to be foreclosed or to in any way impair the rights of the Tenant in said premises during the full term  
 20 of this lease; and if he shall default in any payments of principal or interest on any such mortgage the Tenant may pay the same and deduct the amount so paid from the rent reserved hereunder.

(f) That during the term of this lease he will pay all taxes and assessments which may be levied or made against said premises and will not suffer or permit any sale of said premises for unpaid taxes or assessments; and if he shall fail  
 30 to do so the Tenant may pay the same and deduct the amount so paid from the rent reserved hereunder.

(g) That the Tenant may assign this lease or sub-let the said premises or any part thereof and use or permit the same to be used for any lawful purpose; that the Tenant shall not by assigning this lease be released or discharged from his liability to the Landlord hereunder.

(h) That upon the payment of the rent herein reserved and the performance of the covenants  
 40

*Indenture of Lease.*

and conditions herein provided to be kept and performed by the Tenant, the Tenant shall at all times during the term hereby demised peaceably and quietly have, hold and enjoy said demised premises, without eviction or disturbance by any person or persons, corporation or corporations, having a right to or lawfully claiming the same or any part thereof. 10

(5) This lease is made upon the following conditions and covenants, all and each of which the Tenant agrees to keep and perform, viz.:

(a) That he will pay the said rent at the times and in the manner aforesaid.

(b) That he will pay all water rents assessed or metered upon said premises during said terms as additional rent hereunder, payments to be made promptly when charges fall due and before any penalties or interest are chargeable thereon, and that if he fails to make such payments at such times the Landlord may pay the same and the amount so expended by him shall be immediately due and payable from the Tenant as additional rent. 20

(c) That if any additions or extensions to the demised buildings shall be built or erected during said term the Tenant will pay to the Landlord annually thereafter as additional rent hereunder a sum equal to the tax rate in force in the City of Newark for each year of the term, respectively, applied to the cost of such additions and extensions to the demised building, the intent hereof being to relieve the Landlord from any possible increase in taxes resulting from any additions or extensions which the Tenant may make to the demised building. 30

(d) That he will at his own expense replace any and all glass in said demised building which 40

*Indenture of Lease.*

may be broken during said term with glass of equal quality; and will carry adequate plate glass insurance in a responsible insurance company or companies to cover the risk of breakage of plate glass in the demised building, the policies of which insurance shall be carried in the name of the Landlord and the proceeds of which shall be applied to replacing any glass which may be broken; and if the Tenant shall fail to effect such insurance the Landlord may do so and the amount expended by him for premiums for such insurance shall be immediately due and payable from the Tenant as additional rent hereunder.

10 (e) That he will at all times during the term of this lease comply with all the ordinances, orders and requirements of the governmental authorities of the City of Newark and of the County of Essex and of the State of New Jersey and of any and all departments hereof having jurisdiction over said premises respecting licenses, sanitary and health requirements, police regulation, fire prevention and all other matters.

20 (f) That he will throughout said term keep the sidewalk and gutter in front of said premises in good repair and cleared of ice and snow.

30 (g) That he will indemnify and save the Landlord harmless from any and all action or actions and causes of action, suits and causes of suits and claims and demands whatsoever arising from any injury to any person or persons while upon or near the demised premises during the said term for which the Landlord might be liable by reason of his being the owner of said demised premises, excepting, however, any claims arising from any injury caused by any act of the Landlord or of his agents or servants.

*Indenture of Lease.*

(h) That if said premises or any part thereof shall be used for any purpose which shall increase the fire hazard therein beyond that which would exist in using said premises for the purposes of a candy and confectionary store and the manufacture of candy and ice cream and the conduct of a restaurant, the Tenant shall pay the Landlord as additional rent hereunder the increase in premiums for fire insurance on said building resulting by reason of such increased fire hazard; and such additional rent shall be due and payable to the Landlord immediately upon the payment by him of the said premiums. 10

(i) That he will make all necessary repairs to the demised building during the term of his lease, and upon the expiration of the term hereby granted, or upon the termination of this lease for any cause whatsoever, he will surrender and deliver up peaceable possession thereof to the Landlord in as good condition as it shall be in at the time of the entry of the Tenant, wear and tear arising from reasonable use thereof, damages by the elements and taking by eminent domain or other public authority excepted. 20

(j) That he will permit the Landlord or his agents to enter the said premises at reasonable hours to examine the same and to make such repairs and alterations therein as the Landlord shall deem necessary for the safety, preservation or restoration of the demised building, and to exhibit the demised premises at any time during the last six months of the said term from ten o'clock in the morning until five o'clock in the afternoon (Sundays excepted) to any person or persons and to put up notices "To Let" or "For Sale" on the outside walls thereof. 30

*Indenture of Lease.*

(k) If the said premises shall become vacant or be deserted during said term and the Tenant shall be in arrears in payment of the rent reserved hereunder, the Landlord or his agents may enter the same without being liable for any prosecution therefor and may re-let the same and apply the rent so received to the first payment of the expenses of re-entering and then to the payment of the rent due by these presents, rendering the surplus, if any, to the Tenant.

(l) That if at any time during said term the Tenant shall be adjudicated bankrupt, then this lease and all Tenant's rights hereunder, shall at the option of the Landlord cease and come to an end three (3) days after notice in writing of such election shall have been given to the Tenant by the Landlord, which notice may be sent by mail addressed to or delivered personally at the demised premises.

(m) That at any time after the cancellation of the mortgage which is now a lien on said premises this lease shall be postponed and made subsequent and subordinate to any mortgage or mortgages which the Landlord may thereafter make or execute as a lien against said premises in an aggregate sum not exceeding Forty Thousand Dollars (\$40,000.), and that the recording of any such mortgage or mortgages shall have preference and precedence over, and the lien thereof shall be superior and prior to the lien and encumbrance of this lease irrespective of the date of recording; and the Tenant shall properly execute, without cost or charge to the Landlord, his successors or assigns, any such instrument as the Landlord may be advised is necessary or desirable to further effect the subordination and postponement of this lease to any such mortgage

*Indenture of Lease.*

or mortgages. The refusal of the Tenant to execute such instrument shall entitle the Landlord to the option of cancelling and terminating this lease or of recovering from the Tenant all costs and damages that shall or may be incurred by the Landlord as a result of the Tenant's refusal.

(n) That upon a breach by the Tenant of any of the covenants herein provided to be kept and performed by him and failure to fully perform and comply therewith within thirty (30) days after the receipt of written notice from the Landlord delivered to the demised premises, the Tenant shall at the option of the Landlord forfeit said term and all rights hereunder and the Landlord may re-enter and recover immediate possession of said premises, and shall also have an action for all damages arising from any such breach or breaches. The failure of the Landlord to exact a forfeiture for any breach or breaches hereof by the Tenant shall not be deemed or construed as a waiver of the right of the Landlord to exact a forfeiture for any subsequent breach or breaches by the Tenant; no notice, however, shall be required of the non-payment of any of the above mentioned installments of rent, which are due and payable on the first business day of each and every month, respectively; and in the event that dispossess proceedings be instituted either for a breach of any covenant or condition herein contained or for default in the payment of rent and the Landlord shall repossess himself of said premises, the Tenant shall nevertheless continue to be liable for any deficiency in the rentals herein reserved for the unexpired term hereby granted.

(5) It is further agreed that the Tenant is hereby given the right and privilege to make

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*Indenture of Lease.*

alterations, additions and improvements in the demised building according to plans and specifications which shall be submitted to the Landlord for his approval, all of which alterations, additions and improvements shall be made at the expense of the Tenant, and the right to make  
10 such alterations, additions and improvements is hereby granted upon the express condition that at no time shall the demised land and premises be subjected to any mechanics' lien for any work and labor done or material supplied in connection therewith, and the Tenant shall indemnify and hold the Landlord harmless from any lien claim or demand whatsoever by reason thereof.

(6) It is further covenanted and agreed that in case the building or buildings on the demised premises shall be damaged by fire or other  
20 casualty to such extent that the damage shall be considered by the insurance companies issuing the policies of insurance in force on said premises as a fifty per cent. (50) loss or more, this lease may be terminated at the option of the Tenant, but if in such event the Tenant shall not elect to terminate the lease, the Landlord shall either repair and rebuild the demised premises or shall permit the Tenant to do so and shall apply to the cost thereof all moneys which may be  
30 collected from insurance covering such loss. If such damage shall be less than a fifty per cent. (50) loss, the Landlord shall repair the same as speedily as possible, and if the damage shall be so extensive as to render the demised building untenable, the rent shall cease until such time as the building shall be put in complete repair, but in the event that the damage to said building shall not render it untenable, the rent shall not abate provided the Landlord repairs the  
40 damage as speedily as reasonably may be done.

*Indenture of Lease.*

(7) The sum of Five Thousand Dollars (\$5,000.) is deposited by the Tenant with the Landlord upon the signing and delivery hereof, receipt whereof is hereby acknowledged by the Landlord, of which sum Five Hundred Dollars (\$500.) shall be applied on account of rent for the month of May, Nineteen Hundred and Twenty-five (1925), and Five Hundred Dollars (\$500.) on account of rent for the month of May in each of the succeeding nine (9) years, making ten (10) such yearly applications of Five Hundred Dollars (\$500.) each on account of rent. The Tenant shall be entitled to no interest on said deposit. If at any time prior to May First, Nineteen Hundred and Thirty-four (1934) this lease shall be terminated for any default on the part of the Tenant, whatever balance of said deposit may then remain unapplied on account of rent shall be absolutely forfeited to the Landlord. If the Landlord shall default in any of the covenants herein provided to be kept and performed by him, said entire sum of Five Thousand Dollars (\$5,000.) with interest thereon at the rate of six per cent. (6%) per annum from the date hereof shall be repaid and refunded to the Tenant, for which payment the land and premises herein above demised are hereby charged and subjected to a lien.

(8) Wherever the words "Landlord" or "Tenant" appear in the foregoing lease, the same shall be read as if the words "his heirs, executors, administrators or assigns" were inserted immediately after the word "Landlord" or "Tenant." This agreement of lease applies to and binds the heirs, executors, administrators and assigns of the respective parties.

*Indenture of Lease.*

In witness whereof, the parties hereto have hereunto set their hands and seals, in duplicate, the day and year first above written.

Leonard Lorentowicz (L. s.)  
Gar S. Sparks (L. s.)

10 Signed, Sealed and Delivered  
in the presence of

As to Gar S. Sparks  
Chester W. Fairlie

As to Leonard Lorentowicz  
Wm. Greenfield

20

## SCHEDULE.

Description of demised premises.

The foregoing demised premises are so much of the land conveyed to the said Leonard Lorentowicz by Fred M. Barnet and wife by deed dated April 5th, 1919, and recorded in Book K 61 of Deeds for Essex County on pages 58-60, as runs from the line of Broad Street to a line eight feet westerly from the rear line of the present building standing thereon and including the whole width thereof.

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Gar S. Sparks  
Leonard Lorentowicz

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*Indenture of Lease.*

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

Be it remembered, That on this fourth day of March, in the year of Our Lord One Thousand Nine Hundred and Twenty-two (1922), before me, the subscriber, a Master in Chancery of N. J., personally appeared Leonard Lorentowicz, who I am satisfied is the person mentioned as the "Landlord" in the foregoing Indenture of Lease, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed. 10

Wm. Greenfield,  
 Master in Chancery of N. J. 20

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

Be it remembered, That on this fourth day of March, in the year of Our Lord One Thousand Nine Hundred and Twenty-two (1922), before me, the subscriber, a Master in Chancery of N. J., personally appeared Gar S. Sparks, who I am satisfied is the person mentioned as the "Tenant" in the foregoing Indenture of Lease, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed. 30

Chester W. Fairlie,  
 Master in Chancery of New Jersey.

*Agreement of May 5, 1924.*

THIS AGREEMENT, Made this 5th. day of May, Nineteen Hundred and Twenty-four (1924), BETWEEN LEONARD LORENTOWICZ, hereinafter called the Landlord, of the First Part; AND GAR S. SPARKS, hereinafter called the Tenant, of the Second Part, is intended as an  
 10 amendment of and a supplement to the lease entered into between said parties, dated March 4, 1922, and demising premises #921 Broad Street, Newark, Essex County, New Jersey, which original lease is recorded in the Essex County Register's office in Book I 66 of Deeds for said County, on pages 110-114, WITNESSETH:

WHEREAS the premises demised by said original lease "runs from the line of Broad Street to a line eight feet Westerly from the rear line  
 20 of the present building standing thereon and including the whole width thereof"; and whereas the parties hereto have now agreed that said demised premises shall run from the line of Broad Street to the extreme rear line of the building which adjoins said demised premises on the South and which is now occupied by "Herud's", the said rear line of said Herud's building being intended for the purposes hereof as extended across the entire width of the premises demised  
 30 by the lease between the parties hereto.

IN CONSIDERATION of said additional space the Tenant hereby agrees to add Fifteen Dollars (\$15.) to each of the monthly installments of rent reserved in said original lease.

Said original lease shall be read and construed with like effect as if the demised premises described therein had been originally described as herein provided, and as if each of the monthly installments of rent therein reserved had been  
 40 increased Fifteen Dollars (\$15.).

*Agreement of April 17, 1924.*

Nothing herein contained shall in any way alter the supplemental agreement entered into between the parties hereto, dated April 17, 1924, in respect to said lease.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

10

Signed, Sealed and Delivered  
in the presence of

Alex T. Schenck as to G. S. S.

Leonard Lorentowicz, (L. s.)

Gar S. Sparks. (L. s.)

To ALL AND TO WHOM THESE PRESENTS shall come, Witnesseth:

20

WHEREAS, on the 4th day of March, 1924, Leonard Lorentowicz has executed a Lease to Gar S. Sparks, of the City of Newark, County of Essex and State of New Jersey, for land and premises known and designated as #921 Broad Street, in the City of Newark, County of Essex and State of New Jersey; and

WHEREAS, by the terms of the said lease, the said Leonard Lorentowicz agreed to give possession of the said premises on the first day of May, 1924; and

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WHEREAS it appears that the said premises are leased to the Liberty Cut Glass Works, and that the said lease to the said Liberty Cut Glass Works does not expire until the first day of June, 1924;

Now, therefore, in consideration, the said Leonard Lorentowicz waiving the rent for the month of June, 1924, the payment of rents to commence on the first day of July, 1924, in accordance with

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*Agreement of April 17, 1924.*

the terms of the said lease, the said Gar S. Sparks does hereby consent to take possession of the said premises in accordance with the terms, conditions, covenants and agreements in said lease, mentioned and specified and assumed and agreed to by the said Gar S. Sparks, from and after the  
10 first day of June, 1924, and the said Leonard Lorentowicz hereby waives the rent for the month of June, 1924, and the lease to continue with all other terms, covenants, agreements and undertakings, mentioned and specified therein, in full force and effect.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this seventeenth day of April, Nineteen Hundred and Twenty-four.

20 Signed, Sealed and Delivered  
in the presence of

Wm. Greenfield.

Gar S. Sparks, (L..S.)  
Leonard Lorentowicz. (L..S.)

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*Opinion of Vice-Chancellor.*

**OPINION.**

IN CHANCERY OF NEW JERSEY.

*Between*

GAR S. SPARKS,

*Complainant,*

*and*

LEONARD LORENTOWICZ,

*Defendant.*

*On Bill, &c.*

*Opinion.*

10

(Decided June 17th, 1929.)

Syllabus:

1. The Court of Chancery has jurisdiction to prevent unjust forfeitures. 20

2. The Court of Chancery has and will assume jurisdiction where there is a remedy at law if the remedy at law be inadequate.

3. Breach of covenant to pay rent does not, in the absence of an appropriate stipulation to that effect in the lease, entitle the landlord to declare the term ended and the lease forfeited.

4. In such case the landlord has only two remedies. First, to sue the tenant for the rent which does not disturb tenant's possession, and second, to institute proceedings to dispossess tenant, in which case tenant may terminate proceedings by paying rent. 30

5. Equity does not favor forfeitures and will construe contracts and the acts which might justify such a course of conduct strictly against the attempted forfeiture.

40

*Opinion of Vice-Chancellor.*

6. The case of Harld Holding Co. *vs.* Laird, 101 New Jersey Equity 101, examined and distinguished.

Lum, Tamblyn & Colyer for complainant.

William Greenfield for defendant.

10 CHURCH, *V. C.*

This bill is filed by complainant to restrain a suit at law instituted by defendant to oust complainant from premises 921 Broad street, Newark, and to forfeit a lease heretofore entered into between them.

20 Two of the questions argued by counsel in the case, as far as this Court is concerned, have been disposed of by Vice Chancellor Berry in a memorandum filed by him on the return day of the order to show cause for a preliminary injunction: *i. e.* the jurisdiction of this Court to prevent unjust forfeiture, and adequacy of the remedy at law. The learned Vice Chancellor continued the preliminary injunction until final hearing because of the irreparable damage that could result from a refusal. He then continues "The jurisdiction of the Court of Chancery to prevent unjust forfeiture in matters of this kind cannot be questioned and it is not necessary to cite any  
30 authorities on this point. Their number is legion. While it is quite possible that there may be a defense to the suit at law under a proper construction of sub-section N of Section 5 of the lease, the remedy in equity is undoubtedly more complete."

I shall therefore consider those points as settled and proceed to a discussion of the lease itself and the circumstances leading up to this suit.

40 On March 4, 1922, defendant, whom I shall for convenience hereafter designate as Lawrence,

*Opinion of Vice-Chancellor.*

leased the premises to the complainant Sparks. As finally amended the lease was to run for 21 years, and the rental was to be in monthly installments of \$848.33. Upon the execution of the lease complainant deposited as security therefor \$5,000. Of this defendant still holds \$3,000.

The clause in the lease, which is important in the determination of this case, reads as follows: 10

“That upon a breach by the Tenant of any of the covenants herein provided to be kept and performed by him and failure to fully perform and comply therewith within thirty (30) days after the receipt of written notice from the Landlord delivered to the demised premises, the Tenant shall at the option of the Landlord forfeit said term and all rights thereunder and the Landlord may re-enter and recover immediate possession of said premises, and shall also have an action for all damages arising from any such breach or breaches. The failure of the Landlord to exact a forfeiture for any breach or breaches hereof by the Tenant shall not be deemed or construed as a waiver of the right of the Landlord to exact a forfeiture for any subsequent breach or breaches by the Tenant; no notice, however, shall be required of the non-payment of any of the above mentioned installments of rent, which are due and payable on the first business day of each and every month, respectively; and in the event that dispossess proceedings be instituted 20 30 either for a breach of any covenant or condition herein contained or for defaulting in payment of rent and the Landlord shall repossess himself of said premises, the Tenant shall nevertheless continue to be liable for any deficiency in the rentals herein reserved for the unexpired term thereby granted.”

Complainant spent \$12,000 in improving the property, and expended also \$60,000 in preparing it for store purposes putting in furniture, store fixtures, &c. 40

*Opinion of Vice-Chancellor.*

On January 15, 1929, the January installment of rent being unpaid, defendant served on complainant a notice which purported to terminate the lease, on the ground and only on the ground that the January rent had not been paid. Defendant admits in his answer that this is the  
10 only ground for termination. Immediately on receipt of the notice complainant went to the office of defendant and tendered the rent to defendant's secretary, who has charge of his rent collections. Acceptance was refused. On January 16, complainant went to defendant's office and tendered to defendant, in legal tender, the rent with \$3 additional as interest from January 1st to that date. This was refused. Dispossess proceedings were then instituted at law by defendant.  
20 From the beginning of the term to the time of serving notice the rent was paid irregularly usually in two or more instalments. Defendant sometimes took notes in lieu of cash, which notes were later paid by complainant. Complainant says that he and Mr. Lawrence were on very friendly terms and Mr. Lawrence never made any serious objection to his delay in making payment after the first of each month. There is no dispute about the fact that on June 17, 1927 Mr. Sparks received a letter from Lawrence—written  
30 and signed by Lawrence's secretary, which said "Beginning July 1st Mr. Lawrence insists that the rents be paid the first of each month." It is to be observed that this letter contains no notice to quit on failure to pay and no notice of forfeiture. It also should be noted that Lawrence continued to receive without protest, the rent at irregular intervals for a year and a half after the letter was written. This corroborates Sparks' testimony that as soon as he received the letter  
40 he called Lawrence, and Lawrence told him

*Opinion of Vice-Chancellor.*

that it would be all right as long as Sparks paid sometime during the month. Sparks also says that Lawrence never demanded the January rent and that he first knew of Lawrence's decision not to continue further the usual method of making payments any time during the month when the notice to dispossess was served. Lawrence and his secretary say that they never willingly acquiesced in the delayed payments, repeatedly protested against it, and Lawrence says that on January 2nd, he made a demand for the rent personally. 10

This is a brief outline of the testimony on both sides. It is clearly inconsistent and I base my conclusion in the first place on the character of the witnesses and their attitude on the stand. Sparks was clear and straightforward, unshaken by cross examination and borne out by what little corroboration he could produce. Lawrence, on the contrary, was evasive, self-contradictory and I believe, untruthful. The character of his testimony can be illustrated by the following quotation: 20

"Every time I went for the rent he say he kick me in the jaw and I get kind of disgusted, and don't want to come any more." And again when confronted with and asked to explain a direct contradiction in his testimony, the record reads "Ans. Well—witness mumbles something unintelligible." 30

But more important still is his flat contradiction of himself as to the alleged demand of January 2nd. In the same month in which the alleged demand was said to have been made Lawrence swore in an affidavit that it was made over the telephone. On the witness stand he swore he made the demand personally in the store. He also swore in his affidavit, that Sparks said he 40

*Opinion of Vice-Chancellor.*

“would pay sometime this month.” On the witness stand he testified Sparks said he “would pay in a few days,” and so he began proceedings on January 15th. These discrepancies utterly unexplained on a point of such importance in the case lead me to place no value on any of  
 10 Lawrence’s testimony. I believe Mr. Sparks when he swears he received no notice save the one to dispossess. In this, moreover, he is in part at least, corroborated by his clerk’s in the store who swear that Lawrence neither came to the store or telephoned on January 2nd.

Breach of a covenant to pay rent does not, in the absence of a proper stipulation to that effect, entitle the landlord to declare the term ended and the lease forfeited. In such case the  
 20 landlord has two, and only two remedies, viz: (1) to sue the tenant for the rent (which does not disturb the tenant’s possession), or (2) to institute the statutory proceedings to dispossess the tenant for non-payment of rent, in which event the tenant may come in and pay the rent and dismiss the proceedings.

“The mere breach of the covenant can give the landlord no right of re-entry, unless there be a stipulation in the lease that such a breach of covenant shall work a forfeiture or determination of the tenant’s interest.  
 30 No ejectment can be maintained by the landlord for a mere breach of covenant not coupled with a proviso for re-entry. His only remedy would be an action for breach of covenant. \* \* \* \* The mere fact that the covenants of the lease were violated by the tenant \* \* \* \* by non-payment of rent gives the landlord no right of re-entry, except in the mode or under the circumstances particularly prescribed by the statute for non-payment of rent.” *Bockover v. Post*  
 40 (Green, C. J. Sup. Ct. 1855) 25 N. J. L. 285

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at 292, approved and quoted by the Court of Errors & Appeals in *Ocean Grove Ass'n v. Sanders*, 68 N. J. L. 631 at 637.

There must be an express stipulation in the lease that on failure to pay rent on the due day the landlord can forfeit the lease without demand for rent. 10

The only forfeiture or re-entry clause in the lease is that which is contained in the first sentence. It requires default to continue for thirty days.

Then, in a new sentence, is a non-waiver provision and following a semi-colon after the non-waiver provision are the words upon which the landlord relies, viz:

“no notice, however, shall be required of the non-payment of any of the above mentioned installments of rent, which are due and payable on the first business day of each and every month, respectively.” 20

Those words say that no notice of the non-payment of rent shall be required, but they say nothing about a right of re-entry or termination in the event of non-payment. To make them mean what the defendant contends, it is necessary to *imply* and *read into* the lease words which are not there, to wit (after the words last above quoted) the words 30

“and if not paid when due the landlord shall have the right to declare the term ended and the lease forfeited.”

Courts always endeavor to avoid a forfeiture, and in construing a lease will, if possible, construe it against the one seeking a forfeiture.

In the leading case of *Kansas City Elevator Co. vs. Union P. R. Co.* (1881) 3 *McCrary* 463, 17 Fed. 200 the Court said:

“As a proposition pervading this doctrine of the right of re-entry by the forfeiture of a 40

*Opinion of Vice-Chancellor.*

lease of land, it is to be observed that the power to be exercised is a very strong power, and it is one which is exercised without the judgment of a court of justice or of anybody else but the party who is exercising it. The party determines for himself whether he has the right of re-entry, without any resort to a court of justice. This is always a harsh power. *It has always been considered that it was necessary to restrict it to the most technical limits of the terms and conditions upon which the right is to be exercised.* Hence it is that the old common law provided in this class of contracts that it was the duty of the court to see that no injustice was done. It is reasonable, it is natural, that when a contract puts it into the power of one man to say that under certain contingencies, of which he is to be the judge, he shall enter upon the house, or home, or property of another, and eject him instantly, and take possession—it is reasonable, it is proper, *that the contract and the acts which justify such a course of conduct should be construed rigidly against the exercise of the right.* A court of equity when necessary, when this power has been exercised, will come in and afford relief.”

It is contended that the words “No notice, however, shall be required of the non-payment of any of the above mentioned installments of rent which are due and payable on the first business day of each and every month respectively” refer back to the thirty day notice mentioned in the first part of the paragraph. I do not think so. They are part of an entirely new sentence, and there is nothing to indicate that they were intended to have any bearing on the landlord’s right of re-entry. They merely mean as I read the clause, that the landlord shall not be obliged to notify the tenant of non-payment of rent. Even if the words in question are referred back to the first sentence the result is the same as far as de-

*Opinion of Vice-Chancellor.*

fendant is concerned. The first sentence makes the right of re-entry conditioned upon the tenant's breach of any covenant "and failure to fully perform and comply therewith within thirty days after the receipt of a written notice." If the portion I have quoted relates back to the first sentence so as to eliminate therefrom the requirement of notice, the result is that the words "after written notice" are eliminated and the landlord's right of re-entry is left conditioned upon the tenant's breach of the covenant to pay rent "and failure to fully perform and comply therewith within thirty days": that is, within thirty days after the due date instead of thirty days after receipt of notice. The rent was tendered and refused on the thirteenth day after its due date and on the same day the written notice was received. I believe, therefore, that there is no right of re-entry stipulated in the lease, unless the tenant shall fail to perform within thirty days. Whether it be thirty days from receipt of notice or thirty days from date of default makes no difference because the condition that might entitle the landlord to a forfeiture does not exist in this case. Moreover, it will be observed, that the notice of termination served by the landlord on January 13th does not quote the re-entry clause of the lease as it is written. It omits from it the words "and failure to fully perform and comply therewith within thirty days."

Under all the circumstances above enumerated, I believe complainant is entitled to the relief he seeks. On the supposition that he was to have as the lease provided, he expended a very large sum on the property. He was led to believe by the landlord that he could pay his rent any time during the month, and the landlord repeatedly accepted it after the due day—sometimes

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*Opinion of Vice-Chancellor.*

taking notes for it. Moreover, the legal construction defendant seeks to give to the disputed clause in the lease is, to say the least, so strained that I do not feel justified in adopting it in the face of the overwhelming weight of authority to the effect that in cases of attempted forfeiture

10 the Court will construe the contract and the acts which justify such a course of conduct rigidly against the exercise of the right as was held in *Kansas City Elevator Co. vs. Union P. R. Co. supra.*

There are many cases to this effect upon our books. I shall refer only to a few.

In *Thropp v. Field*, 26 New Jersey Equity, 82, the Court said:

20 “The complainants appear not to have observed strictly the provision of the lease as to payments of the rent \* \* \* \* The bill alleges that the rent has, from the commencement of the term, been paid at irregular intervals, sometimes once a month and sometimes once in two months; that the defendant never strictly enforced the covenant for payment of the rent according to the terms of the lease, and that the last payment was made some time in May last, and was in full to the first of that month. It further states that since that payment the defendant has never either demanded or requested

30 payment of the rent. The defendant, by his answer, admits that sometimes the payment went over to the following month, or was paid by promissory note, but alleges that he remonstrated, at different times, with the complainants against such delay, and claimed that they had forfeited their lease. \* \* \* \*

If the defendant, by his acquiescence, induced the complainants to believe that strict observance of their covenant to pay their rent was not required by him, it is inequitable in him, under the circumstances, to seek to

40 enforce the forfeiture. Besides, full com-

*Opinion of Vice-Chancellor.*

pensation can be made to the defendant for the failure of which he complains, and under such circumstances equity will relieve." Citing Story's Eq. Jr. Par. 1314, 1315. Taylor's Ld. Ten. Par. 495. *Atkins vs. Chilson*, 11 Metc. 112.

Justice Scudder in delivering the opinion of the Court of Errors and Appeals in *Grigg v. Landis*, 21 N. J. Eq. 494, quoted the following with approval: 10

"The result of all the cases on this subject seems to be that slight circumstances are sufficient in a court of equity to prevent a party from taking the benefit of such stipulation, and that whenever a party has done any act inconsistent with the supposition that he continues to hold his opponent strictly to his part of the agreement, he is taken to have waived it altogether." Citing: *Hipwell v. Knight*, 1 You. & Coll. Eq. Ex. 401, *Seton v. Slade*, 7 Ves. 265, and notes 3 Lead. Cas. in Eq. 49. 20

In an annotation in 16 A. L. R. at 443 under the heading "Acquiescence of the Lessor in irregular payments," the following is found:

"When a landlord, by a course of dealing in accepting over-due rent, has put a tenant off his guard, a forfeiture of the lease for a delayed payment of rent cannot be enforced, unless notice has been given to the tenant calling on him for a compliance with the strict terms of the lease; and equity will relieve from such a forfeiture." 30

Numerous cases are cited in said note. In *Fleming v. Fleming Hotel Co.*, 69 New Jersey Equity 69, the Court held:

"It is well settled that the clause of re-entry is mainly inserted for the landlord's security, and will not be enforced when the lessee, upon proper demand, satisfies the rent due and compensates the landlord for any damages he may have sustained because of 40

*Opinion of Vice-Chancellor.*

a breach of the covenant, and a court of equity would protect a defendant where the breach results from the neglect to pay money, the interest upon which can readily be calculated and the landlord thereby compensated for the inconvenience sustained because of the payment withheld."

10 and in *Fulton v. Greacen*, 36 New Jersey Equity 216, Vice Chancellor Van Fleet said:

20 "A default such as by the literal terms of the grant effected its forfeiture, is admitted. Equity does not favor forfeitures; on the contrary, one of its earliest and most salutary inventions was to provide a remedy against harsh injustice. If the case is not marked by any countervailing equities, it is now the common practice for courts of equity to give relief against a right to re-enter for non-payment of rent, on payment of the rent in arrear. They do so on the theory that the clause of forfeiture is simply intended as a penalty to secure the payment of the rent, with interest and costs, he gets all he can, in justice, ask, and should not, therefore, be permitted to void the lease." Kerr on Inj. 83: *Thropp vs. Field*, 11 C. E. Gr. 82.

The case of *Harld Holding Co. v. Laird*, 101 New Jersey Equity 94 decided by me and affirmed by the Court of Errors and Appeals has been cited as sustaining defendant's contention.

30 It is, however, readily distinguishable from the case at bar. In the Laird case the forfeiture was conditioned upon the rent remaining unpaid "for a period of fifteen days after written notice." It was sustained because the required notice had been given and forfeiture had not been declared until after the fifteenth day period had expired. As I have stated such is not the situation in the case at bar. In the Laird case, at least two demands for rent were made. In the present case,

40 none. In the Laird case the rent was not tend-

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ered until five days after the forfeiture period. In the present case, immediately on receipt of notice to dispossess, the rent was tendered and refused. In the Laird case the tenant refused to pay the rent. That was not the situation in the present case, but the fact as I have found it was that the landlord told tenant he could pay any time during the month. 10

I will advise a decree according to the prayer of Complainant's bill directing the acceptance of the rent by defendant with proper interest and permanently restraining defendant from dispossessing the complainant and forfeiting the lease for failure to pay on the 1st of January the rent in question.

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## FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

72-130.

10	<i>Between</i> GAR S. SPARKS, <div style="text-align: right;"><i>Complainant,</i></div> <div style="text-align: center;"><i>and</i></div> LEONARD LORENTOWICZ, <div style="text-align: right;"><i>Defendant.</i></div>	} <i>On Bill, &amp;c.</i> <i>Final Decree</i>
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20 This cause coming on to be heard before the Chancellor upon bill, answer, replication and proofs in the presence of Chester W. Fairlie, Esquire, of counsel with the complainant, Gar S. Sparks, and of William Greenfield, Esquire, of counsel with the defendant, Leonard Lorentowicz, and the pleadings and proofs having been read, and the argument of counsel heard and considered, and the Chancellor being of the opinion that the complainant is entitled to the relief prayed for in his said bill of complaint,

30 It is thereupon, on this 22nd day of June, 1929, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the said defendant and his agents and attorneys, be and they hereby are permanently and perpetually enjoined and restrained from further prosecuting the proceedings instituted by defendant and now pending in the Second District Court of the City of Newark against complainant, to dispossess complainant from the demised premises mentioned in  
 40 complainant's bill of complaint, and from forfeiting said lease, and from instituting and from

*Final Decree.*

prosecuting any other suit, action or proceedings in any court of law or otherwise to enforce a forfeiture of said lease or to repossess said demised premises in any way based upon or by reason of the non-payment of said installment of rent, which by the terms of said lease fell due on the first business day of January, 1929. 10

And it is FURTHER ORDERED that should an appeal from this decree be taken by the defendant, then and in such event, the payment by the complainant and the acceptance by the defendant of rent under said lease pending determination of such appeal shall not be deemed to be and shall not constitute a waiver by the defendant of the default alleged by him herein, and shall be without prejudice to the rights of the defendant with respect to said alleged default. 20

And it is FURTHER ORDERED and DECREED that the defendant pay to the complainant the costs of this suit to be taxed, including therein a counsel fee in the sum of \$1,000.00 and that execution issue therefor according to the practice of this court. 20

And it is FURTHER ORDERED that a copy of this decree (which copy may be certified by complainant's solicitors to be a true copy) be served upon said defendant, or upon defendant's said solicitor, within three days from the date hereof. 30

E. R. WALKER,  
C.

Respectfully advised,

ALONZO CHURCH,  
V.-C.

We hereby certify the foregoing to be a true copy of the original decree.

LUM, TAMBLYN & COLYER,  
Solrs for Complt. 40

**AMENDED NOTICE OF APPEAL.**

Filed July 5, 1929.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> <div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: center;">           GAR S. SPARKS,  <i>Complainant,</i>    <i>and</i>            LEONARD LORENTOWICZ,  <i>Defendant.</i> </div> <div style="font-size: 3em; line-height: 1; padding: 0 10px;">}</div> <div style="text-align: left;"> <i>On Bill, &amp;c.</i>    <i>Amended</i>  <i>Notice of</i>  <i>Appeal.</i> </div> </div>	
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20 The defendant, Leonard Lorentowicz, hereby appeals from the final decree made in the above entitled cause on June 22nd, 1929, by his Honor, Edwin Robert Walker, Chancellor, on the advice of Alonzo Church, Vice Chancellor, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: July 3rd, 1929.

WM. GREENFIELD,  
Solicitor for and of counsel with Defendant.

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

WM. GREENFIELD,  
Of counsel with Defendant.

Due and legal service of a true copy of the within notice is hereby acknowledged this 3rd day of July, A. D. 1929.

LUM, TAMBLYN & COLYER,  
Solicitors of Complainant.

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**PETITION OF APPEAL.**

Filed July 1, 1929.

**NEW JERSEY COURT OF ERRORS  
AND APPEALS.**

GAR S. SPARKS,  
*Complainant-Respondent,*

*vs.*

LEONARD LORENTOWICZ,  
*Defendant-Appellant.*

*On Appeal  
from the  
Court of  
Chancery  
Petition of  
Appeal.*

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To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

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The petition of Leonard Lorentowicz, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date June 22nd, 1929, in a certain cause in said Court of Chancery wherein the said Gar S. Sparks was complainant and the said Leonard Lorentowicz was defendant, in this respect, to wit: that the said decree adjudges that the defendant be enjoined from prosecuting his action in the Second District Court of the City of Newark to dispossess the defendant (complainant-respondent herein) from the store and from forfeiting said lease for said store due to the alleged breach of the terms of said lease:

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And further that the counsel fee of \$1000. allowed to complainant's counsel is excessive.

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*Petition of Appeal.*

And petitioner appeals from the decree of the Chancellor which decree as aforesaid, upon the ground that the same is erroneous in that the defendant is entitled to the relief sought, that is: that the lease be forfeited, and was in fact forfeited by the complainant's own negligence, and  
 10 that the defendant-appellant is entitled to re-enter and repossess himself of the land and premises in accordance with the terms of said lease.

Petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this court shall seem proper.

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WM. GREENFIELD,  
 Solicitor for and of counsel with Defendant-Appellant.

Service of a certified copy of the within Petition of Appeal is hereby acknowledged on this 5th day of July, A. D. 1929.

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LUM, TAMBLYN & COLYER,  
 Solicitors for and counsel with  
 Complainant-Respondent.

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## ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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*Between*GAR S. SPARKS,  
*Complainant-Respondent,**and*LEONARD LORENTOWICZ,  
*Defendant-Appellant.*

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*Answer to  
Petition of  
Appeal.*

The answer of Gar S. Sparks, respondent, to the petition of appeal of the above named appellant.

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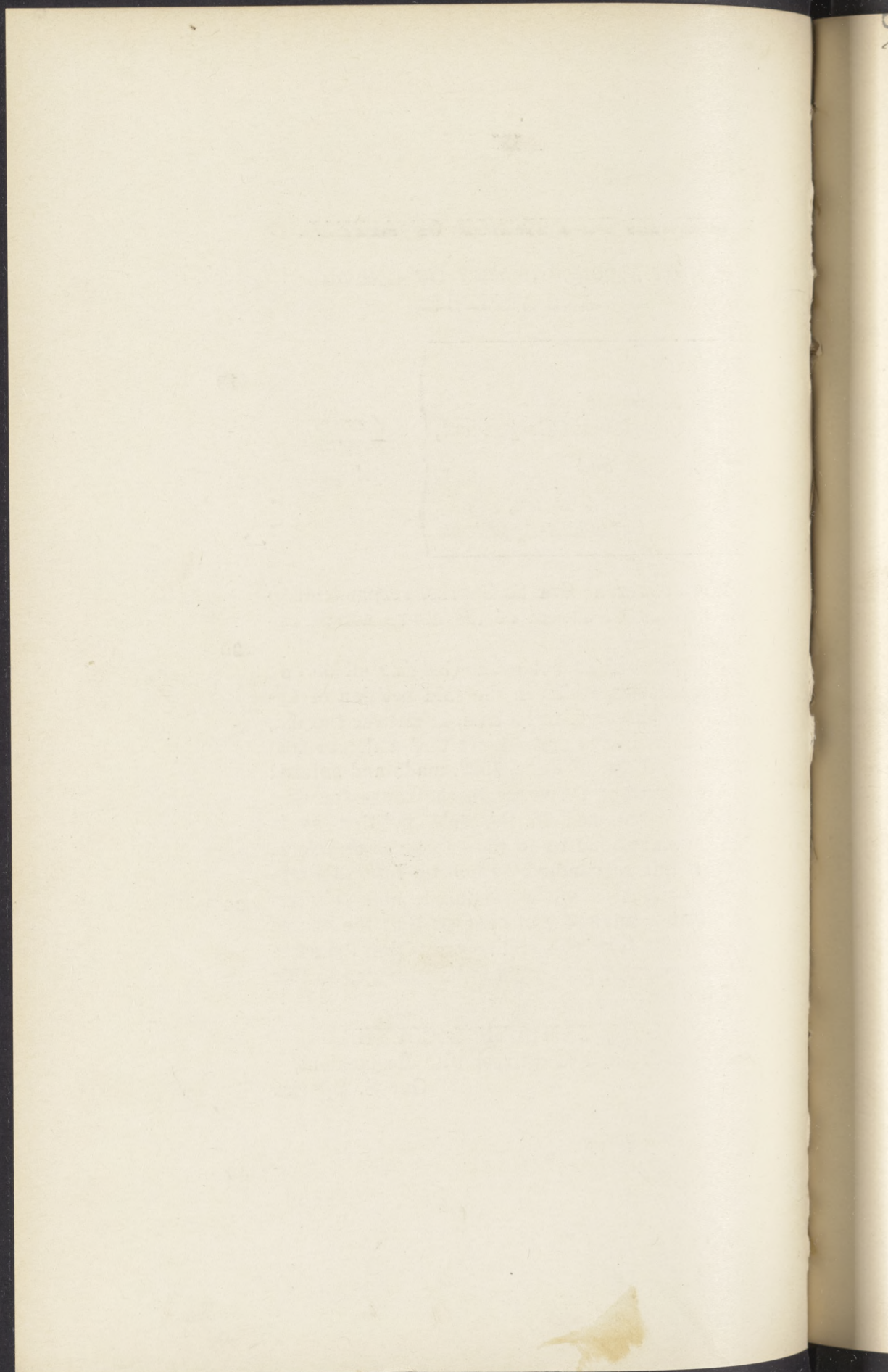
This respondent not acknowledging all or any of the matters, which in the said petition of appeal are contained, to be true, in answer thereto, nevertheless, says and admits that a decree was on the 22nd day of June, 1929, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated, but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced, and this respondent is advised and believes that the decree is agreeable to equity, and he prays that the same may be affirmed with costs to be adjudged to this respondent.

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LUM, TAMBLYN & COLYER,  
Solicitors for and of counsel with Respondent,  
Gar S. Sparks.

CHESTER W. FAIRLIE,  
of Counsel.

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## New Jersey Court of Errors and Appeals

GAR S. SPARKS, <i>Complainant-Respondent,</i>  <i>and</i>  LEONARD LORENTOWICZ, <i>Defendant-Appellant.</i>	}	<i>On Bill, &amp;c.</i>
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### BRIEF OF DEFENDANT-APPELLANT.

This is an appeal from the decree entered in the Court of Chancery in the opinion of the learned Vice-Chancellor Church to whom the above case was referred. The object of the bill was to restrain the dispossession proceedings in the Second District Court of Newark wherein the defendant-appellant instituted suit to oust the respondent for a breach of one of the covenants in the lease bearing date March 4, 1922, and supplements thereto. See copy of lease and supplements annexed to the bill of complaint pages 12 to 27 inclusive of the printed State of the Case.

The covenant breached, on which suit was instituted in the District Court and pending at the time of the filing of the bill of complaint and restraint obtained, was sub-division N of paragraph 5 of the lease, page 19 and top of page 20 of the printed State of the Case, which in part is as follows:

“The tenant shall at the option of the landlord forfeit said term and all rights hereunder and the landlord may re-enter and recover immediate possession of said premises, and shall also have an action for all damages arising from any such breach or breaches. *The failure of the landlord to exact a forfeiture for any breach or breaches*

hereof by the tenant shall not be deemed or construed as a waiver of the right of the landlord to exact a forfeiture for any subsequent breach or breaches by the tenant; *no notice, however, shall be required of the non-payment of any of the above mentioned installments of rent, which are due and payable on the first business day of each and every month, respectively.*"

The sole question to be determined before this court is, whether or not it is within the province of the Court to abrogate the terms of a lease entered into between the parties under the advice of eminent counsel and then substitute another if one of the parties should find it inconvenient, hard or oppressive against him, although finding no objection except as to the performance of the terms. It is respectfully submitted that that is prohibited by the Federal and State Constitution wherein it provides under Section 10, Article 1, as follows:

*"No State shall pass any Bill of Attainder, ex post facto law or law impairing the obligation of contracts."*

Our own State naturally follows the Federal Constitution which makes the following provision under Section 7, Article 4:

*"The Legislature shall not pass any bill of attainder, ex post facto law or law impairing the obligation of contracts or depriving a party of any remedy for enforcing a contract which existed when the contract was made."*

The learned Vice-Chancellor at the conclusion of the hearing, on page 100 of the printed State of the Case rightfully expressed his opinion in the following language:

*"The Court: You can look at it, and I have about come to the conclusion of what decision I will reach in the matter. If you gentlemen want to come into my chambers*

this afternoon and argue it, why, all right, I will listen to you.

Mr. Fairlie: I wish we might, your Honor, because I feel so keenly the seriousness of it.

The Court: Well, I feel keenly the seriousness of it also, but there is another serious aspect to this thing; this man admits himself that he violated the terms of this lease and what you are trying to make me do now, apparently, is to make a new lease."

To the utter surprise of the defendant-appellant the Court overruled its mind and opinion expressed in the first instance and granted the prayer of the bill by issuing a restraint and permanent injunction against the defendant-appellant, restraining him from prosecuting the action in the court of law to oust the respondent from his premises, for violation of sub-division N of paragraph 5 of the lease, Exhibit D. 1, pages 102-116 of the printed State of the Case. I respectfully submit that the learned Vice-Chancellor erred in his opinion and in granting the restraint.

#### POINT 1.

The sole question before this court can be divided into two points in behalf of the defendant-appellant; and this appeal, it is respectfully submitted by the appellant, can be decided on the interpretation of sub-division N of paragraph 5 of the lease, page 109 of the printed State of the Case, folios 20-30, by reason of the fact that the respondent admits in his bill of complaint, that at no time was the rent paid on due date. See Schedule D, page 27 of the Printed State of the Case. In conjunction with the schedule we must bear in mind the notice sent by the defendant-appellant relative to the payment of rent which

is annexed to defendant's-appellant's answer, page 52 of the printed State of the Case, marked Exhibit C. 1 and admitted by the respondent in his testimony that he received the letter, which is in the following language:

June 17, 1927.

Sparks,  
921 Broad St.,  
Newark, N. J.

Dear Mr. Sparks:—

Beginning July 1, Mr. Lawrence insists that the rent be paid the first of every month.

Thanking you to give this your attention, we are

Very truly yours,  
Leonard Lorentowicz.

See testimony of respondent, page 62, Folio 30 of the printed State of the Case as follows:

“Q Now, in June 17, 1927, did you receive a letter from Mr. Lawrence or his secretary? A Yes, sir; I got a letter from Mr. Lawrence's office signed by either the secretary or the stenographer.

Q I show you this. Is that the letter? A Yes, sir; that is it.

Mr. Fairlie: I would like to have it marked for identification.

The Court: I suppose you admit it in evidence, Mr. Greenfield?

Mr. Greenfield: True. I asked for its production.

Q Upon receipt of that letter, Mr. Sparks what did you do? A I went over to Mr. Lawrence's office (interrupted).”

The respondent throughout his testimony admits that he failed to pay the rent although he had the money. The letter, marked Exhibit C. 1, did make an impression on the respondent.

See testimony of respondent page 75 of the printed State of the Case which is as follows:

“Q You were short of money? A Yes, sir.

Q Didn't have enough to pay the rent in time? A There was enough—I never believed that I had to pay.

Q You didn't have enough money to pay the rent in time, did you? A I could have always paid the rent on time if I thought it was absolutely necessary, that I would have been thrown out if I did not; yes, I could have always done that.

Q Well, you knew of this threat in that letter. A Well, that is (interrupted).

Q That did not impress upon your mind at all, did it? A *It did at the time.*”

With all that respondent continually disregarded his obligation by paying the rents in amounts and at times when it pleased him and not within the terms of this lease, although objected to by appellant. Upon the interpretation of sub-division N, of paragraph 5 of the lease, page 19, folio 40 and top of page 20 of the printed State of the Case, the defendant-appellant rests his appeal. It is respectfully submitted that the appellant should prevail and that the decree should be reversed with directions that the bill of complaint be dismissed.

The suit brought in the District Court to oust the respondent from the premises, is for a breach committed by the respondent of one of the terms of the lease. His wilful, malicious failure and neglect to pay the rent when due started at the inception of the lease to which the defendant-appellant objected. He was notified that the appellant would no longer tolerate his tactics as to the payment of the rent when and in whatever amounts he pleased. That fact was forcibly brought to his attention by Exhibit C. 1, page 52 of the Printed State of this Case.

See testimony of Rachel Lyons, secretary of appellant (relative to Exhibit C. 1, page 52 of the printed State of the Case), testifying at page 83, folio 20, of the printed State of the Case as follows:

“Q Now, how many times did you go to see him about it? A Well, I can’t—I don’t remember just how many times. Mr. Lawrence would say to me, ‘Has Mr. Sparks paid his rent yet?’ I would say, ‘No,’ and he would say, ‘Well, you see that you get it.’”

Q Now, did you have anything to do with that letter, Exhibit C. 1? A No.

Q (Showing witness paper). This letter, did you have anything to do with it? A No, Mr. Lawrence was real mad at me because I didn’t get the rent when he told me I should and he said, ‘Well,’ he says—he called in the stenographer and he says, ‘I will dictate a letter to her and get it myself if you ain’t able to get it.’” See testimony of Rachel A. Lyons, pages 83 to 85 inclusive of the printed State of the Case.

## POINT 2.

That the respondent has violated the terms of the lease willfully, maliciously and fraudulently is admitted by the respondent in that he had the money, he could have paid it if he wanted to, he knew when the rent became due, he knew that the *First* was rent day, but with all that, he did not fulfill the terms of the lease. See testimony of respondent, page 68, folio 30 of the printed State of the Case as follows:

“Q Now, on January 2, 1929, did you have the money and could you have paid the rent for that month if it had been demanded of you? A Yes, sir. That is the one month since I have been there that I actually had the money in the bank to pay the rent with.

Q That was right after the Christmas trade? A Yes, sir.

Q And is this paper that I show you your Franklin Washington Trust Company balance as of December 31, 1928? A Yes.

Q And the balance that is shown there, \$4,321.75 as of December 31, 1928—(interrupted).

On page 69:

Mr. Greenfield: If the Court please, is that material or binding upon the defendant in this case—his bank account?

Mr. Fairlie: Your Honor, this is a mosaic, to some extent, and the picture appears in the mosaic not as each piece is picked up and looked at, but as the pieces are put together.

The Court: I will listen to it.

Q Did you have that balance in the bank on January 2nd? A Yes, sir.

The Court: Now, what he is proving is that, although he had the money, he did not pay it. That is just exactly what he is proving now.

Mr. Fairlie: Yes, yes, sir.

The Court: All right.

Page 70, folio 20:

A Yes, I signed all checks, but I did not make them out, and I did not apportion what was to be paid to the creditors, but that was the work of Mr. Georges, and of the bookkeeper under him.

Q Did you have anything in the world that was more valuable to you on January 2, 1929, than this leasehold? A Nothing in the world.

Page 71:

Q Now, having the money on hand on January 2, 1929, if Mr. Lawrence had demanded the January rent of you on that day, would you have paid it? A Absolutely. Would have rushed over there with it, if he had made a demand.

Q As a matter of fact, did he demand it? A He did not.

Q Did he, at any time prior to that, after this letter way back a year and nine months previously, indicate to you that you would have to pay the rent on the first day of that month or be put out? A He did not.

Q And when was the first that you actually heard from Mr. Lawrence with respect to the January, 1929 rent? A On the 15th day of January."

Now it seems to counsel that the respondent has established beyond doubt not only by his pleadings wherein he admits that he never paid the rent when due, further admitting that he received a letter dated June 17, 1927, insisting that the rent be paid, he also admits that the rent was due, and he had the money with which to pay it and did not pay the rent. Hence, under the decision of the case of

*Bonfils, et al. v. Ledoux, et al.*, 266 Federal Reporter, 507, cited in American Law Reports Annotated 16, page 430 at page 447, citing *Crawford v. Texas Improvement Co.*, Texas Co. App. 196 S. W. 195,

"Where it appeared that a default in the payment of rent was wilful, relief from a forfeiture was denied. The Court said: 'The evidence detailed show beyond controversy that Crawford was persistently delinquent in the payment of his rent. The rent installments were obligations which he was legally and morally bound to meet *in advance on the 1st day of every month.* When a man ought to pay, can pay and won't pay, this is sufficient to warrant a find that his conduct is wilful. Of itself, it evidences a bad motive and evil intention. Especially when he persists in such conduct without adequate justification.'"

Surely, the Court of Equity, a Court of Conscience and Justice, by its arm of the law of Equity outstretched should not tear asunder all terms of a solemn written contract (lease) and deprive either party of the right to enforce it or

make new terms in the contract not consented to by either party. The defendant-appellant in the case at bar did not consent to any provision in the contract (lease) that the respondent should pay the rent when he pleases. It is respectfully submitted that the Court of Chancery has no such power and it has erred by restraining defendant-appellant to pursue his rights in the court of law, namely Second District Court of Newark. If the respondent in the case at bar has any defense he can enter such defense in the District Court without invoking the power of the Court of Equity. Should the District Court be ousted of its jurisdiction of the suit wherein it has a lawful and legal right to retain and the defendant-appellant at bar be deprived of his right to trial in a Court of Law where it rightfully belongs? To sustain the bill of complaint and grant a permanent injunction restraining the appellant from proceeding with the ouster is, respectfully submitted to this learned court, error and should be reversed.

In the case at bar the lease provides various specific terms that on failure of the tenant to perform any one of the terms or in breach thereof, the landlord reserves the right to re-enter and repossess himself of the premises. It is true that sub-division N, paragraph 5 of the lease, provides thirty days' notice, but not relative to the payment of rent, on the contrary, the rent question makes a specific exception, namely, "*That the rent is to be paid on the first business day of each month without notice.*" If the Court should construe that the "thirty days" means that the tenant should have thirty days' time in which to pay the rent, after demand served upon him by the landlord demanding the payment of the rent, it is respectfully submitted, that that was not the intention of the parties. The parties

to the lease were specific and particular in their terms, and made a specific provision that the rent is payable on the first business day of each month in advance without notice.

### POINT 3.

Can the Court of Equity read into this contract new terms not agreed to by either party to the contract?

Can it be said that the landlord is to give thirty days' notice demanding the payment of the rent? That was not the intention of the parties at the time of the execution of the lease in question. By the granting of the restraint, restraining the defendant-appellant from prosecuting the ouster proceedings in the District Court, the Court reads into the lease such terms that neither party agreed to. The paramount question at the time of the making of the lease was the payment of the rentals on time and all other terms were secondary.

Counsel is not unmindful of the decision of Chancellor Runyon, in *Thropp v. Field*, 26 N. J. Eq., 82, that the only punishment that may be visited upon the tenant is to make him pay interest for his breach of non-payment of the rent when due. It is respectfully submitted that that was not the paramount question, object and subject in mind when the lease was made. A specific provision was made that the rent is to be paid without demand, and on failure to do so, ouster and repossession should follow. If the tenant was to pay interest for his delay in the payment of the rent, both parties would have provided so in the lease. On the contrary, they were specific in the making of the lease, and provided that the landlord should have the right

to re-enter and repossess himself of the premises upon such breach. If this court should sustain the injunction, it is respectfully submitted, it would deprive the landlord of his right to his own property, on breach of the terms of a solemn contract (lease) entered into by and between competent parties. The landlord could not have instituted any proceedings if the tenant would have observed the terms of the lease. If he (tenant) thought so much of the lease, with money in his possession and knowledge of the fact that the rent was due and payable on the first of the month, why did he not pay the rent until notice to vacate was served upon him on the 15th of the month? Rent was due on the first day of January. It is respectfully submitted that the injunction and restraint is error and the learned Vice-Chancellor should be reversed with a direction that the bill of complaint be dismissed and the defendant-appellant be permitted to proceed with his action at law.

#### POINT 4.

*What is the right and power of the Court of Equity?* Has the Court of Equity the power to substitute its own contract contrary to the terms agreed upon by competent parties to the contract, what the learned Vice-Chancellor may think should be convenient for the respondent, although it may become an instrument of oppression against the landlord? The contract (lease) was entered into by parties represented by counsel at the time of the making of the lease. Can the Court tear asunder and destroy that which two competent parties have entered into? It is respectfully submitted that that is not equity nor justice and written contracts such as in the case at bar would become a mere scrap of paper.

Counsel is not unmindful of the fact that the ouster of the respondent in the Court of Law may be a hardship or that it may ruin him, nevertheless, it was the doing of the respondent, through his own act, conduct and negligence, malicious and wilful on the part of the respondent. Since it is through his own act, wilful and malicious as it is, he should take the consequences. That it was wilful and malicious is construed by the case of *Bonfils, et al. v. Ledoux, et al., supra*.

I am sure the learned Vice-Chancellor has been carried away by the voluminous brief of counsel for respondent and the sympathetic and weeping pleas of the respondent that he would be ruined. It seems to me that the learned Vice-Chancellor lost sight of the rights of the defendant-appellant.

No doubt, respondent will prepare a voluminous brief and will cover considerable space in finding discrepancies with the testimony given by the defendant-appellant. The Court will bear in mind that the defendant-appellant is a man of foreign birth, finding it difficult to express himself in the English language, but honest and truthful in his testimony. In fact, the defendant-appellant did not have to testify. We could have rested our case on respondent's own testimony, his pleadings, that he repeatedly breached the terms of the lease, not paying the rent when due, although repeatedly demanded, although such demands were not required by the landlord, and yet ignored by the tenant. It is respectfully submitted that the defendant-appellant should have prevailed in the court below and should prevail in this court by reversal of the decree.

Counsel desires to call the Court's attention to respondent's testimony on page 73, folio 20, of the printed State of the Case as follows:

"The Court: Did this bookkeeper of yours apportion the money you had around among the various people to whom you owed money?

Witness: Yes, sir; he did.

The Court: And was there enough on the first of January to pay all the creditors in full?

Witness: No, sir.

The Court: Including the landlord.

Witness: There was enough to pay the landlord, and, of course, to pay the regular current weekly bills.

The Court: Well, that is what you want?

Mr. Fairlie: Yes, sir.

Q Now, Mr. Sparks, you were in the store there on the 2nd of January? A Yes, sir.

Page 74:

Q Yes. And you knew that on the second of January, it was rent day? A I knew that, of course, that the first of the month is rent time.

Q Yes. And you also knew by this letter, Exhibit C. 1, dated June 17, 1927, that there was a protest of your method of paying?

A Well, I certainly had forgotten all about that letter.

Q You forgot that? A Yes."

It is very apparent that he was not concerned about paying the rent on time, although he had the money, but that it was up to the landlord to bother himself. The lease does not provide that we are to make demands for the payment of the rent, on the contrary, it contains a special provision, sub-division N, of paragraph 5 of the lease, p. 109 of printed State of Case, folio 25, as follows:

"No Notice, however, shall be required of non-payment of any of the above-mentioned

installments of rent, which are due and payable on the first business day of each and every month respectively.”

and which the respondent ignored and repeatedly failed to pay his rent on time.

It is respectfully submitted that the learned Vice-Chancellor erred in granting a restraint, restraining the defendant-appellant in the Court of Law and from prosecuting his action to oust the respondent.

#### POINT 5.

##### Question of Law.

We will now take the law as to the rights of the landlord, in the case of

*W. D. Cashin & Co. v. Alamac Hotel Co. Inc.*, 131 Atl. Rep. page 117; opinion by Walker, Chancellor.

In that case there was an attempt made to restrain the Banker's Trust Company, mortgagee, from the sale of the hotel property after the decree alleging among others, that to sell the property would be unconscionable and would ruin the creditors.

The Chancellor in his opinion on page 119 defining "Equity" says:

“'Equity' as a noun, is defined to be 'an equitable claim or right' and such a claim or right a party possessing it has a right to enforce, and the adversary party *has no right* to thwart that enforcement by anything less than a countervailing right. An 'Equity' is not a chancellor's sense of moral right, or any vague or indefinite opinion as to altruism, but is a right cognizable in a court of Chancery, governed by established rules and fixed precedents.

“The time within which payment might be made in exoneration of the mortgaged prem-

ises from the debt due from the mortgagor to the mortgagees was *nominated in the bond and stipulated in the mortgage.*"

The time for the payment of the rent in the case at bar was provided for in the lease and has been nominated and stipulated between the respondent (tenant) and defendant (landlord), which provision is known as paragraph "N" of the lease. Can the respondent (Sparks) change or alter the time to pay the rent at his convenience, or can the landlord insist upon his rights? No matter how oppressive it may be so long as there was no fraud, deceit or misapprehension practised at the making and entering of the lease. Hence, it is respectfully submitted, the landlord cannot be deprived of his property rights. The landlord has obligations to meet and other expense in the upkeep of the property and the tenant cannot take that attitude to pay whenever he pleases and thereby ruin the owner of the property, as decided by the learned Chancellor in the case of *Cashin & Co. v. Alamac Hotel Co. Inc., supra*, wherein the Chancellor further says:

"The argument on behalf of the receiver is to the effect that it is inequitable and unconscionable not to give the Alamac Hotel Company additional time before selling the property which it pledged for the repayment of the loan to it by the Banker's Trust Company, and that therefore more time should be extended. The trouble with this claim is that it does not rise to the level of a right. The rights and equities of the parties to the mortgage were settled by the final decree of foreclosure."

Do the rights of the respondent in the case at bar rise above the rights of the appellant in respect to his property rights? They have settled the time when to pay, they have entered into a

solemn written obligation, surely, the landlord is entitled to enforce it.

On page 120, section 4, the Chancellor cites the case of *Davis v. Flagg*, 35 N. J. Equity, 491, as follows:

*“The legal pursuit of one’s right no matter what may be the motive of the promotor of the action, cannot be deemed either illegal or inequitable. In the present case, whatever the purpose of this second mortgagee may have been, he did no illegal act; the purchase of the first mortgage was legal; and the prosecution founded on it was legal; and the consequence is, that his suit cannot be stayed unless the rule is to be sanctioned, that an assignee of a mortgage has no right to foreclose it, provided it be shown that in obtaining such incumbrance he was actuated by ill will or other immoral feeling. The abstract precepts of the moral code, disconnected from property and the rights of persons, are neither enforced nor noticed by courts of law or by courts of equity.”*

In the case at bar, will the Court say that Lorentowicz, the owner of the property had no legal right to enforce his rights under the very terms agreed to by respondent at bar? If he has, the Court of Equity cannot stay his right. If the Court of Equity will stay the defendant’s-appellant’s right to enforce it, the Court can readily see that the lease will become an oppressive instrument to the landlord and will become a *mere scrap of paper to the tenant*. He could and would refuse to pay the rent on the due date and the landlord would be forced each and every month to appeal to the Court to enforce payment of his rent. A precedent by this Court would be established by restraining the defendant-appellant in this cause and plaintiff in the District Court from proceeding to enforce his legal, moral

and equitable right and which would indirectly deprive the landlord of his property rights.

Again in the case of *Cashin & Co. v. Alamac Hotel*, 131 Atl. Rep. page 117, the Chancellor cites the case of *Morris v. Tut-hill*, 72 N. Y. 575, as follows:

“The motives of the former owner of the mortgages in selling or of the plaintiffs in buying them, are not material, and the appellant has no concern with the consideration of the assignment. It is sufficient that the mortgage debt is due, and is now owned by the plaintiff. He may have bought the mortgages from motives of malice toward the defendant solely with a view to sue upon them and the former owner from a like motive may have transferred them without a consideration. This did not constitute a defense to the action.”

Assuming that the landlord at bar has a wrongful motive to insist upon his legal rights, can the Court say that he is attempting to enforce an illegal or wrongful right? The landlord may be guilty of a moral wrong, yet, he is entitled to his property when the tenant wilfully violates his obligations, no matter how oppressive to the tenant. It is the tenant who entered into the lease with his eyes open. Was the rent due on the first business day of the month and does the lease provide a forfeiture and a right of re-entry? If it does, then the landlord should not be restrained and the bill should be dismissed.

Counsel for respondent has taken upon himself to divide sub-division N of paragraph 5 of the lease, into three parts and reads into the said paragraph the thirty-day written notice of forfeiture, by reason of the breach of the payment of rent. There is no such provision and the Court of Equity cannot and should not add to the lease new terms when it specifically provides

that no notice for rent shall be necessary or required.

If respondent's contention is right, why fear the Court of Law?

Why fear going to trial before the Second District Court of Newark?

If the landlord is not legally entitled to the possession of the property, that question can, should and would be raised and the District Court is well-nigh capable to decide. If the Court should perchance be in error, he has a right to a writ of certiorari to the Supreme Court where errors are corrected if errors are committed. But on the contrary, counsel and the respondent know that he (tenant) is in wrong.

He knows that he breached the terms of the lease. He knows that he is guilty of wilful and malicious conduct in failing to pay the rent when due as expressed in the case of *Bonfils, et als. v. Ledoux, et al., supra.*

In the case at bar, Sparks testified that he had the money. See pages 68 to 69 inclusive of the Printed State of the Case. If he did not, he could have raised the money. He had ample friends who would have come forward, but he disregarded the rights of the landlord.

It is respectfully submitted by reason of his conduct, he has not come into the Court of Equity with clean hands and his bill and restraint should be dismissed and the decree advised by the learned Vice-Chancellor reversed.

## POINT 6.

We will now take the case of *Harld Holding Company v. Laird, et al.*, 136 Atl. Rep. page 731 citing the case of *Ye Old Staten Island, etc. v. Barrett, etc.*, 98 N. J. Eq. 702, wherein Vice-Chancellor Church says:

“The material facts in the bill upon which the complainant’s equity depends, are met by a full, explicit and circumstantial denial under oath. Such being the case, a preliminary injunction should not have been granted.”

It is true that in the case at bar Vice-Chancellor Berry on the motion on the return date of the rule to show cause said as follows:

“I have examined the bill of complaint, attached affidavits, defendant’s answering affidavits and complainant’s and defendant’s reply affidavits and have examined and considered the briefs submitted by respective counsel in *Sparks v. Lorentowicz* and this is to advise you that in my judgment the complainant is entitled to a continuance of the restraint *pending final hearing of this cause*, and I have advised the order continuing such restraint, in the form submitted by counsel for complainant. There is a sharp conflict in the statements in the affidavits submitted by complainant and defendant and under the circumstances I deem it my duty to preserve the subject of the controversy until the *final hearing*. A refusal of a preliminary injunction would undoubtedly result in the destruction of the complainant’s rights, *if he has any*. The jurisdiction of the Court of Chancery to prevent unjust forfeiture in matters of this kind cannot be questioned and it is not necessary to cite any authorities on this point. Their number is legion. While it is quite possible that there may be a defense to the suit at law under a proper construction of sub-section N of Section 5 of the lease, the remedy in equity is undoubtedly more complete.”

The Court will perceive that this was merely a continuance of the restraint until final hearing. What has the final hearing developed? Nothing, except an admission on the part of the respondent that he has breached in the terms of the lease. An admission on the part of the respondent that as early as June 17, 1927, he was notified that the rent is due and should be paid on the first business day of each month. It does not decide the question of the learned Vice-Chancellor on the return of the Rule to Show Cause as final, that the Court of Chancery should retain the District Court and the Court of Equity take jurisdiction. It is a well established principle of law, that where a party has a legal defense at law, he can advance the same defense in the Law Court. If the Law Court has obtained jurisdiction prior to the Court of Equity, it is respectfully submitted that the parties should be left to the tribunal which first obtained such jurisdiction of the parties as well as over the matter in question.

In the case of *Harld Holding Company v. Laird*, et al., Vice-Chancellor Church cites the following:

36 Corpus Juris, page 599:

“Under an express provision in the lease the landlord may re-enter for non-payment of rent, provided a sufficient demand for payment has been made before entry.”

It is respectfully submitted that it becomes an obligatory duty on the part of the landlord to demand rent where the lease does not provide otherwise. In the case at bar the lease specifically provides that no demand for rent should be necessary. See sub-division “N” of paragraph 5 of the lease in question, (page 109 of the Printed State of the Case).

Counsel for respondent cannot say that we can only claim the right of possession upon a breach of a particular term or condition, where a lease specifically provides, "*the failure of the landlord to exact a forfeiture for any breach or breaches hereof.*" It does not say "herein" or "hereinafter" but the lease provides "*hereof.*" What does that mean? What interpretation can the Court give to the expression "hereof." The lease provides that the rent is due and payable on the first business day of each month and on failure to comply therewith, it is a breach of one of the terms of the lease. We will take paragraph 5 of the lease, sub-division "N" which provides that no notice or demand for rent shall be required. It is therefore self-evident that both parties had in mind that the rent was paramount and vital and that it should and must be paid on due date *without notice* to which the tenant represented by able counsel acquiesced to that term. The landlord's virtue of patience was gradually getting exhausted by the method pursued by the tenant in the payment of rent and it came to an end on June 17, 1927, when a letter was sent by the defendant-appellant to the respondent, that thereafter the rent is to be paid on the first of each month in accordance with the terms of the lease. Can it be said that the Court of Equity and Conscience, which deals out justice to all parties as all American courts do, in view of the fact, that the landlord was indulgent and considerate, until his patience gave way by reason of the dilatory tactics of the respondent which became intolerable as evidenced by the letter sent to the tenant; would decide that the landlord should be punished because of his patience? Should the landlord be deprived of his property, the right to possession of the premises in accordance with the terms of the lease

entered into and signed under able, competent and legal advice? It is respectfully submitted that we have not reached that stage where contracts should be treated with total disregard, a solemn instrument entered into where property rights are involved should be discarded into the waste basket.

#### POINT 7.

The next question is, should the Court exercise its extraordinary power to restrain the defendant-appellant at bar, plaintiff in the District Court to enforce his contract, by the mere assertion on the part of the respondent at bar that it may ruin him or it may cause injury, for which the law gives him a right of action for damages? On that I desire to cite to the Court the case of

*Lincoln Furniture Co. v. Bornstein, et al.*,  
135 Atlantic Reporter, page 83, BACKES,  
V.-C.

“ ‘Waiver’ is the intentional relinquishment of a known right.”

Has the defendant-appellant at bar relinquished his right? It is respectfully submitted that he has not. The defendant-appellant did insist upon payment of the rent when due in accordance with the letter sent by the defendant-appellant to respondent on June 17, 1927, which letter was produced by the respondent himself. Upon receipt of the letter as testified to by Sparks (tenant) he ran over to see Mr. Lorentowicz (landlord) and talked it over with him and again he was told that the rent must be paid when due. That he (landlord) cannot wait and is not under obligation to repeatedly ask for the money and told him that he (tenant) had no right to take his money and open other stores. Can it be said that he was not forewarned? On page

84, in the case of *Lincoln Furniture Co. v. Bornstein, et als.*, the learned Vice-Chancellor further says:

"Its only redress would be by action for damages," if the defendant succeeds in the District Court and ousts the complainant.

Citing the case of *McCann v. LaBrecque*, 91 N. J. Equity, page 307, 109 A. 501.

"This predicament does not constitute a ground for equity interference *with the statutory remedy of the landlord*, to which the complainant's possession is subordinate, but its succession to the lease entitles it to appeal for equitable relief from forfeiture upon a waiver of the breach of the covenant. That a waiver is an available defense at law is settled law."

*North v. Jersey Knitting Mills*, 98 N. J. Law, page 157.

The learned Vice-Chancellor Backes held that upon any waiver of the landlord that defense is available to the complainant at bar in the courts of law. The landlord is willing to take his chances in the courts of law. The landlord is satisfied that American courts will deal out equal justice to all and render a verdict in accordance with the evidence.

It is due to the tenant's own act and conduct in disregarding his obligation and not observing the terms of his contract. The respondent complains he will be ruined and that the landlord has suddenly become harsh and oppressive. If there is any punishment to be visited upon anyone it should be upon the tenant. It was not due to the landlord's act or conduct but his own. The blame should fall upon the tenant where it belongs and not upon the owner of the property. It is respectfully submitted that it is through the wilful and malicious acts and conduct of the ten-

ant by reason of his failure to pay the rent when due throughout the term up to the time notice was served by the defendant-appellant declaring a forfeiture of the lease. If oppressive to the respondent, that should not mislead the Court and deny the owner of his property rights of possession which he is lawfully and legally entitled to.

The Court is well aware of the fact that *waiver is not an independent ground of equitable jurisdiction*. If there has been a waiver that may be set up as a defense in the Law Court, in this instance, District Court. The breach was not induced by either fraud, accident, surprise, ignorance or mistake which are recognized heads of Equity jurisdiction. Did the landlord act fraudulently? No such evidence. Was Sparks in ignorance that the rent was due on the first business day of each month? No, because he so testified on page 73, folio 40, of the Printed State of the Case as follows:

“Q Now, Mr. Sparks, you were in the store there on the 2nd of January? A Yes, sir.

Q Yes. And you knew that on the second of January it was rent day? A I knew that, of course, that the first of the month is rent time.”

Yet being in the store, having money in the bank more than sufficient to pay the rent, and having nothing more valuable in the world than the leasehold, as testified to by him on page 70, folio 20, as follows:

“Q Did you have anything in the world that was more valuable to you on January 2, 1929, than this leasehold? A Nothing in the world.”

and with all that he saw fit to ignore the terms of the lease and failed to pay the rent when due.

If the Court below should be sustained it will have the effect that the landlord has no right to institute proceedings in a District Court and that the tenant could pursue such tactics indefinitely. It is respectfully submitted it will have the effect of depriving the landlord of the speedy remedy provided by statute with respect to the possession, leaving the rights of the parties to be settled at law, which right to a speedy remedy was considered of great importance to the landlord.

See *McGann v. LaBrecque*, 91 N. J. Equity, 307.

The Legislature protects the tenant in that it has reserved the right for an action at law for damages that the tenant may sustain by reason of the wrongful or unlawful ouster that the landlord may or should institute in the District Court. Hence, in the case at bar, the tenant, if the landlord should be in the wrong, has a remedy, namely, an action at law for damages.

The case of *Walker v. Wadley*, 52 S. E. Rep. 904, holds that even after there has been a waiver of breach for a certain rent period, that waiver operates only to the end of that rent period when there is a continuing breach.

Was the failure on the part of respondent to pay the rent wilful and malicious? On that, I desire to call the Court's attention to the case of *Bonfils, et al. v. Ledoux, et al.*, *supra*.

## POINT 8.

Does he come into the Court of Equity with clean hands? No!

Take the testimony of Sparks and Valentine Braun, Mr. Spark's chief witness. Mr. Sparks testified on pages 68 and 69 that on January 1, 1929, he had \$4,300 in the bank, and that Valentine Braun, the Samaritan would have come to his rescue and helped him to pay the rent. Why didn't he pay the rent? But from the very beginning of the term he pursued his dilatory ways and methods of paying rent, namely, in two installments in the middle of the month, sometimes the end of the month, thereby one month running into another. Since his act and conduct was wilful and malicious, which evidences bad motive and evil intention (see *Bonfils v. Ledoux, et al., supra*) then, I say, that that evidence alone substantiates the defendant's-appellant's contention that the respondent is not entitled to relief in a Court of Equity. He who does not come into Court of Equity with clean hands, nay, not even with a clean conscience, relief should not be granted to him (respondent).

The authority in Federal Reports Annotated further says:

"The correctness of these authorities is unquestioned. But in order to justify the application of this doctrine in favor of a lessee who has *wilfully and persistently defaulted in the payment of his rents*, there should be some strong counter-balancing equity in his favor."

Is there a strong counter-balancing equity in favor of the respondent in the case at bar? None, that counsel for defendant-appellant can conceive. Unless the Court will say that the landlord acted contrary to good conscience

throughout the term by being patient, indulgent and considerate with his tenant giving him time in which to pay the rent, although Sparks was warned by letter dated June 17, 1927 that his rent was due and must be paid on the first business day of each month. It is respectfully submitted that the defendant-appellant by reason of his indulgence should not be punished by sustaining the restraint, restraining him from proceeding to oust the tenant and repossess himself of his property in accordance with the terms of the lease in question.

*Pershing v. Feinberg*, 52 Atl. Rep. 22.

*Warne v. Wagenor*, N. J. Court of Chancery, Vice-Chancellor Bird, 15 Atl. Rep., page 307.

“Where the rent day fixed by a lease falls on Sunday, the day is not counted, and tender of the rent on the following day is a legal performance.

A lessor declared the lease forfeited because of the alleged non-performance of its stipulations, and gave the lessees notice to quit within a stated time or he would consider them as trespassers. The lessees denied the alleged non-performance. Held, that, as the denial fully met the allegation of non-performance, no forfeiture was shown requiring equity interference, and that the expressed intention to regard the lessees as trespassers did not entitle them to an injunction restraining the lessor from proceeding to eject them.”

In the case at bar we have instituted ouster proceedings by reason of the default and breach of the terms of the lease on the part of the tenant, in that he has not only legally but also morally forfeited his lease. If he has any defense it is available to him in the Law Court (District Court), and the Court of Equity should not restrain the landlord from enforcing his rights, in the court where it rightfully belongs.

Learned Vice-Chancellor Bird cites 36 Corpus Juris, page 599.

The authorities say as follows:

#### NON-PAYMENT OF RENT.

“In the absence of a provision to such effect in the lease, non-payment of rent does not as a general rule work a forfeiture, and hence confers no right of re-entry. *Under an express provision in the lease, however, the landlord may re-enter for non-payment of rent, provided a sufficient demand for payment has been made before entry, unless the lease expressly dispenses with the necessity thereof.*”

The precise terms in the lease at bar. It dispenses with the necessity of demanding rent, wherein it provides:

“*No notice, however, shall be required of the non-payment of any of the above mentioned installments of rent.*”

Can it be said that in spite of the express provision in the lease in question, that the landlord was obliged to demand the rent or can it be said that the landlord deliberately testified to a falsehood when he said that on January 2, 1929 (by reason of the absence of his secretary due to the death of her father) he personally called on the tenant and demanded the rent although not obligated to do so? None that counsel can see. The landlord was informed by Sparks, his tenant, that the rent would be paid sometime this month and the landlord waited until the fifteenth day of January, 1929, when notice was served demanding a forfeiture of the lease and surrender of the premises. Counsel for respondent argues in his brief that Mr. Lorentowicz, the landlord, testified falsely because in the affidavit he says that he phoned to the respondent and in his testimony he says that he personally called upon

the respondent. Of course, the Court will appreciate the fact, that the tenant has a great deal at stake. He must stretch the truth. He must deny admission was made, although in his pleadings in the bill of complaint he admits that he was notified by the landlord of his delinquency in the payment of rent as early as June, 1927.

Testimony of Margaret Mysliveg (respondent's witness), on page 96, folio 28, of the Printed State of the Case, testified as follows:

“Q Did Miss Lyons (Secretary of the defendant at bar) when she phoned for rent from time to time—did she talk to you about it on the phone ever? A Several times she spoke to me on the phone, but not on January the second.

(Miss Lyons was then away by reason of the death of her father.)

Q Do you answer the phone when the calls come in? A When I am there I answer it, and if there is anything important on the phone, they always get me.”

We will admit that much that she does not answer the phone when she is not there.

“Q And were you there all day January second? A I was.

Q Did any call come in from Mr. Lawrence or his secretary concerning rent? A No, sir.”

Now qualifying.

Page 97.

“Q To your knowledge? A No, sir.”

Of course Mr. Lorentowicz testified that he called at the store of Mr. Sparks and spoke to him and not to the girl.

“Q Did Mr. Lawrence come into the store that day to your knowledge?”

Again qualifying.

“A No, sir; I have not seen him.

Mr. Fairlie: That is all.”

*Cross examination* by Mr. Greenfield.

“Q You take care of the tea room, you say? A I do.

Q Yes. You are not always in the front there by the desk? A I very seldom go up at the desk.

Q But you do go up at times? A Well, I do go up there, but I am not always up there.

The Court: She says she is very seldom at the desk.

Q Oh, so you don't know whether Mr. Lawrence was at the desk or not, on the second of January, do you? A Well, not at the desk, but he was not in the back. I have not seen him.

Q Oh, he was not at the back. The desk is at the front? A Well, my desk is at the front.

Q But the desk of Mr. Sparks, where the cashier is there, that is in the front? A That is in the front.”

We will now take the testimony of Lawrence O'Connor, a witness for Mr. Sparks, who attempts to corroborate Mr. Sparks that Mr. Lorentowicz was not in the store.

Page 99 of the Printed State of the Case, by the Court:

“Q And were you there all day? A All day.

Q Do you know Mr. Lawrence? A No.

Q You don't know him at all? A No.

Mr. Greenfield: That is all.

Mr. Fairlie: That is all.”

Counsel for defendant-appellant will admit that his testimony sounds honest and truthful, but yet susceptible to the uncertainty by reason of the

fact that he did not know Mr. Lorentowicz. Hence he did not see him.

A case on all fours with the case of *Crawford v. Texas Improv. Co.*, Tex Co. App. 196 S. W. 195, *supra*.

Sparks testifies that he would have paid the rent on January 2nd, if Mr. Lorentowicz would have persisted upon payment. Under the terms of the lease, no demand was necessary or required for the payment of the rent. We will now take the testimony of Mr. Sparks, page 70 of the Printed State of the Case, folio 14:

“Mr. Fairlie: You are in a Court of Equity?

A Yes, I signed all checks, but I did not make them out and I did not apportion what was to be paid to the creditors, but that was the work of Mr. Georges and of the book-keeper under him.

Q Did you have anything in the world that was more valuable to you on January 2, 1929, than this leasehold? A *Nothing in the world.*”

If nothing was more important and valuable to him than this lease, and having the rent in his possession, and of course knowing that the rent was due on the first business day of the month it was his duty to meet his obligations. That he failed to do. It is respectfully submitted that the case at bar is on all fours with the case of *Crawford v. Texas Improv. Co. Tex Co., supra*.

It is respectfully submitted on all the facts and authorities herein cited, no restraint should be granted. If the respondent has any defense, he has an opportunity in the courts of law to defend it. It is respectfully submitted, in spite of the fact that Mr. Fairlie, belittles Mr. Lorentowicz and makes sport of his English, that he,

Mr. Lorentowicz, as well as his secretary, Miss Lyons, have told the truth.

*Heil v. Borough of Carteret*, decided April 15, 1929;

New Jersey Advance Reports and Weekly Law Review;

Volume 7, No. 17, pages 603-604.

Opinion by Berry, V.-C.

“The complainant contends that the clause above quoted imposes a conditional limitation while the defendant contends that it is a covenant respecting use for the breach of which the defendant might be held liable for damages, or that it imposes a condition subsequent. The jurisdiction of this court is also challenged by the defendant, who contends that the complainant’s remedy, if any, is at law by ejectment. This clause cannot be construed as a covenant and a discussion of the nice distinction between a condition subsequent and a conditional limitation would it seems to me, be idle here as I believe that the *defendant’s objection to this court’s jurisdiction is well taken*. Forfeitures are not favored in equity and as a general proposition equity will neither relieve against nor enforce a forfeiture, leaving the parties to their remedy at law. (*Woodruff v. Water Power Co.*, 10 N. J. Eq. 489; *Blackwood Improvement Co. v. Public Service Corp.*, 91 N. J. Eq. 220) and, of course, where the remedy at law is adequate it is elementary that equity has no jurisdiction. That ejectment gives a complete remedy here is shown by such cases as *Cornelius v. Ivins*, 26 N. J. Law 376, and other authorities therein cited.”

In the case at bar, it is true that learned Vice-Chancellor Berry continued the temporary injunction on the return of the rule to show cause, but only until the final hearing. It is very apparent from the evidence in favor of the defend-

ant-appellant that if the respondent has any defense, his defense is at law and not in equity.

Learned Vice-Chancellor Church in the case of *Harld Holding Company v. Laird*, where counsel for respondent failed to call the Court's attention to another part of the opinion, further says:

"But it is not therefore to be supposed that a court of equity will lightly dispense with contracts made between competent parties, and substitute other agreements more in accordance with variable rules of right and conscience. Every presumption will be made in favor of such contracts, and they will be enforced according to the intention of the parties expressed and implied, unless it can be shown that thereby some hardship or wrong, not with the presumed contemplation of the parties at the time, will result from such enforcement."

Nothing here to show that if some hardship or wrong does occur, that the same was not contemplated. Since they have failed to pay the rent, ouster should take place. There is nothing in the lease requiring any notice or demand for the payment of the rent which was due on the first business day of each month.

Taylor on Landlord and Tenant, Volume 1, Ninth Edition, page 362. Section 297. Learned Author says:

"But there may, by special agreement of parties, be a re-entry for default in the payment of rent, without a demand of it. In such case, the mere failure to pay, with or without demand, constitutes the breach which works a forfeiture, and a subsequent entry at any time is good."

Precisely with the case at bar.

*Ocean Grove Ass'n v. Sanders*, 68 N. J. Law, page 631, Van Syckel, J. At bottom of page 635:

"Where there is a mere right of re-entry for non-payment of rent the seventh section

of the statute applies, and to sustain ejectment there must be proof by the landlord that no sufficient distress could be found upon the demised premises. *The seventh section has no application to the case under consideration.*

*The plaintiff's right of action rests, not upon the statute, but upon the express provisions of the contract with the defendant.*

Can it be said that this case is not precisely with the case at bar. There is nothing provided in the lease requiring any notice or demand for the payment of rent. Failure to pay the rent, and under the authorities herein cited, the landlord has a right to his property and possession should be delivered to him.

Justice Van Syckel further says in the case of *Ocean Grove Ass'n v. Sanders, supra*:

“The deed, hereinbefore recited, demises the *locus in quo* to the defendant for ninety-nine years, for a yearly rental not exceeding \$42 payable at such time as required by the lessor with a provision ‘that if the lessee shall persistently neglect or refuse to pay, it shall be lawful for the lessor to enter and hold possession and this lease shall thereupon be wholly at an end and the estate hereby granted shall cease and determine.

In this state it is well settled that, upon breach of such a covenant, the lessor and not the lessee, has the option to declare that the term is ended.

These parties, in express terms, agreed that, upon persistent failures to pay the rent as required by said deed, the term thereby granted should be at an end, and the defendant's estate should cease and determine.

The plaintiff cannot be deprived of the benefits of the contract (in the case at bar, the defendant) nor can a term be added to it, making it ineffective, unless he proves that there is no sufficient distress.

His action is based upon the deed independent of the statute.”

It seems to me that the case herein cited is precisely with the terms in the case at bar. It is a specific agreement and nothing more, and he, Lorentowicz, is entitled to his contract, as cited by Justice Van Syckel that a man is entitled to his bargain under the terms of the contract.

See *Den v. McShane*, 1 Gr. 35.

It is respectfully submitted on all the authorities herein cited, although my argument is not so brilliant as my friend, Mr. Fairlie, counsel for the tenant, yet it seems to me that eloquence with weeping tears should not prevail.

#### POINT 9.

##### Allowance of Counsel Fee.

It is respectfully submitted that in an allowance of counsel fee, the Court should always take into consideration the time consumed to prepare and try the case. It was a simple case, there was nothing extraordinary or laborious for counsel of respondent. It is therefore respectfully submitted that the \$1,000 counsel fee is exorbitant. If in the event, this Court should affirm the decree, which I sincerely hope and respectfully submit *that it should not*, the counsel fee should be reduced.

It is respectfully submitted on all facts and law herein cited, the decree should be reversed with directions of a dismissal of the bill of complaint and restraint.

WILLIAM GREENFIELD,  
Solicitor for and of Counsel with  
Defendant-Appellant.

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1. The first part of the report is devoted to a general  
description of the country and its resources.  
2. A detailed account of the principal  
industries and the progress of  
agriculture is given.

3. The next part of the report  
deals with the population and  
the social conditions of the  
country.

4. The final part of the report  
contains a summary of the  
findings and a few suggestions  
for improvement.

5. The report is well written and  
contains a great deal of  
valuable information.

6. It is a most interesting and  
useful document.

7. The report is a most  
valuable contribution to the  
knowledge of the country.

8. It is a most interesting and  
useful document.

## New Jersey Court of Errors and Appeals

*Between*

GAR S. SPARKS,  
Complainant-Respondent,

and

LEONARD LORENTOWICZ,  
Defendant-Appellant.

*On Bill, &c.*

*On Appeal  
from the  
Court of  
Chancery.*

### BRIEF OF COMPLAINANT-RESPONDENT.

#### Statement of Admitted and Uncontradicted Facts.

For convenience we shall in this brief refer to the defendant-appellant as "Lawrence," the name by which he is commonly known.

By written indenture of lease (Bk. pp. 12 to 27) Lawrence, as landlord, leased to Sparks, as tenant, the premises No. 921 Broad St., Newark, for a term of 21 years beginning June 1, 1924 (Pars. 1, 2 and 3 of the bill admitted in Pars. 1 and 2 of the answer).

Clause 3 of the lease (Bk. p. 13) fixes the annual rent reserved, payable in monthly installments, and provides that "each and every of the aforesaid monthly installments shall be paid in advance on the first business day of every month respectively."

The lease contains no provision as to *the place* at which the rent shall be paid, nor does it contain any express provision dispensing with the necessity of the landlord's *demanding* the rent.

Appellant's brief (at the middle of p. 5) says: "Upon the interpretation of sub-division N of

*paragraph 5 of the lease defendant-appellant rests his appeal.*" That clause (Bk. p. 19, l. 35) is hereinafter dealt with under the heading "The Reentry Clause."

Upon the execution of the lease Sparks deposited \$5,000 with Lawrence as security. Pursuant to Paragraph No. 7 of the lease (Bk. p. 21, l. 30) \$2,000 has been applied toward the rent, and Lawrence still holds \$3,000 (Par. 4 of the Bill admitted in Par. 2 of the Answer). Said paragraph No. 7 of the lease provides that "if at any time prior to May 1, 1934, this lease shall be terminated for any default on the part of the Tenant, whatever balance of said deposit may then remain unapplied on account of rent shall be absolutely forfeited to the Landlord."

The complainant spent \$12,000 in improving the property and spent in all \$60,000 in getting the store ready for his business, there being included in the \$60,000 the cost of furniture and fixtures all of which were with a view to the use of this particular property (Bk. p. 59, l. 32 to p. 60, l. 3. See also Par. 7 of the bill p. 3 and Par. 4 of the answer p. 46).

At the time of the serving of the notice of termination and of the filing of the bill, Sparks had paid all the rent reserved under the lease up to and including the month of December, 1928 (Par. 9 of the bill p. 4 admitted in Par. 6 of the answer p. 47).

From the very beginning of the term down to the time of the serving of notice of termination, as hereinafter mentioned, the rent was not paid on the first business day of the month, but was paid irregularly, usually in two or more installments. It is alleged in paragraph 9 of the bill (p. 5) and admitted in paragraph 6 of the

answer (p. 47) that "from time to time defendant accommodated complainant to the extent of taking notes in lieu of cash for monthly installments of rent, which notes complainant at a later date paid and satisfied."

Schedule "D" attached to the bill of complaint (Bk. p. 27) is admitted as a detailed statement of the dates on which payments of rent were made by Sparks and accepted by Lawrence, and the respective amounts thereof, during the years 1927 and 1928, excepting that in copying the schedule the two installment payments of rent for the month of April, 1928, were omitted, viz: April 17, 1928—\$500 and April 25, 1928 \$384.33 (Bk. p. 61, l. 33 to p. 62, l. 25. Par. 9 of the bill p. 4 and Par. 6 of the answer p. 47).

On January 15, 1929, said January installment of rent being then still unpaid, Lawrence on that day served upon Sparks a notice (Bk., p. 28) *purporting to terminate said lease and the term thereby granted for the reason and upon no other ground than that said January installment of rent had not been paid.* (Par. 11 of the bill p. 7 admitted in Par. 8 of the answer p. 49).

Paragraph 11 of the bill p. 7 alleges "that on January 15, 1929, said January installment of rent being then still unpaid, *without previous demand therefor and without notice or warning of any such intention,* the defendant" served the said notice of termination. Paragraph 8 of the answer p. 49 "admits the allegations set forth the Paragraphs 11 and 12 of complainant's bill."

Immediately upon receipt from Lawrence of the aforesaid notice Sparks went to Lawrence's office and (Lawrence being then absent therefrom) tendered to his secretary, who was in

charge of the office and who customarily attended to the collection of the rent, a check in the sum of \$848.33, in payment of the January rent, but was informed by the secretary that she had been instructed not to accept the rent. Thereupon Sparks consulted counsel and on the morning of January 16, 1929, went with his counsel again to Lawrence's office and tendered to him the said last mentioned sum in legal tender, together with \$3.00 additional as interest thereon from January 1, 1929 to that date. Lawrence refused to accept it, *and thereupon stated to Sparks that he intended to declare a forfeiture of said term and to pursue all legal remedies open to him to secure possession of the premises* (Par. 12 of the bill p. 7 admitted in Par. 8 of the answer p. 49).

Paragraph 8 of the bill p. 3 alleges that paragraph 5 of the answer p. 47 admits "that defendant is the owner of a large tract of land in the rear of said demised premises which said tract of land fronts on Halsey street and part of which runs in an L southerly to a frontage on Hill street." It is manifest that by the lease in question Lawrence for the term thereof cut himself off from the possibility of using the demised premises as a Broad street entrance to any theatre, office building or store that might otherwise be put on the large tract in the rear.

Under a stipulation the said January rent and rent for the succeeding months has been paid by Sparks without prejudice to the rights of Lawrence (Bk. p. 72).

In pursuance of his said declared intention Lawrence on January 23, 1929, instituted proceedings in the Second District Court in the City of Newark against Sparks to dispossess him from the demised premises and to recover possession

thereof. The proceedings were instituted under Chapter 260 of the laws of 1920 as against a tenant holding over after term ended. A copy of the affidavit signed by Lawrence in said proceedings (Bk. p. 30) is attached to the bill of complaint and marked Schedule "F" (Par. 14 of the bill p. 8 admitted in Par. 10 of the answer p. 50).

If Sparks should be successful in having the statutory proceedings in the District Court dismissed for want of jurisdiction or upon any other ground, the result would simply be that Lawrence, in accordance with his said declared intention of pursuing all legal remedies open to him, would begin an ejectment suit.

The decree appealed from (Bk. p. 130) settles the whole controversy.

#### **As to the Controverted Facts.**

We respectfully submit that under the authorities hereinafter cited the decree appealed from is justified on the basis of the above-stated facts which are admitted. *The finding of the Court below in favor of Sparks on all the controverted facts merely adds further equities entitling complainant to the decree prayed for.*

The complainant insists that on January 2, 1929, he was ready, willing and able to pay the January rent, and that if he had had any idea that a continuance of his leasehold (and incidentally his fortune or ruination) depended upon his paying the rent that very day, he would most assuredly have done so; but that during all the preceding months of the term there had been nothing in the course of the relations between him and his landlord to put him on his guard, or to in any way indicate to him that the land-

lord was not willing to have him pursue that month the same course which had been pursued through all the preceding months. The weight of the evidence supports complainant in this contention, and we submit that it is inequitable in the landlord after having waived the irregularities during each preceding month "to suddenly stop short and insist upon a forfeiture without any previous intimation that he intended to do it."

*The complainant testified:* That after having spent \$60,000 in equipping the store (p. 59, l. 34) he had a great deal of difficulty in paying the rent during the first two years, because the debts that he had contracted in equipping the store had to be paid in the way of notes, month by month (p. 61, l. 2).

"I couldn't always have the money ready upon the first of the month for the rent, and I went to Mr. Lawrence every month, many times, and told him that I could not pay it on the first and would it be all right if I paid it on the middle of the month or the tenth or the fifteenth, and Mr. Lawrence and I had always been very friendly, and he was perfectly willing to do it and said that he wanted to help me along all that he could" (p. 61, l. 10).

"During the first two years, part of the time, I could not get the cash and so I gave him part cash and a note for the rest, and then, later on, I would take up the notes. He was satisfied to do that" (p. 61, l. 21).

That sometimes the monthly rent was paid all in one payment but that "most of the time, ever since I have been there, almost five years, it has been paid in two payments" (p. 61, l. 29).

That Schedule "D" attached to the bill of complaint (as corrected) is a statement of the dates and amounts of the rent payments made

by him during the years 1927 and 1928 (bot. p. 61 to top p. 62). It is to be noted that never once during the whole of those two years was the rent paid on the very first business day of the month, seldom before the middle of the month, and usually in two installments.

*Mr. Valentine Braun testified:* that while he was installing the fixtures in the store, Mr. Sparks was short of money out of which to pay the rent, and he, Mr. Braun, suggested that the landlord be asked to apply part of the \$5,000 deposit to the payment of one month's rent (bot. p. 78 to top p. 79); that two or three days later he met Mr. Lawrence and Mr. Lawrence spoke very highly of Sparks; that Mr. Braun recommended Mr. Sparks; that Mr. Lawrence took notes for that month's rent instead of taking it out of the deposit; that Mr. Braun told the defendant that any time Sparks wanted any help, he, Braun, would give it to him (p. 79, ll. 23-40). These conversations were had about the time the term began in 1924 (p. 80, l. 15). Mr. Braun's testimony is not contradicted. The significance of it is that it goes to bear out and corroborate Mr. Sparks' testimony that from the very beginning of the term the landlord's course of conduct was not consistent with a holding of him to strict compliance in respect to the payment of rent on the first of each month.

Indeed, the defendant does not deny that the course of dealing in respect to the rent during the first part of the term was as complainant testifies, but defendant says: "That has been just at the beginning" \* \* \* "Just in the beginning when he started the place; he had the notes and put in the fixtures and asked me for a few months" &c. (p. 90, l. 36).

That makes a flat contradiction between the testimony of the two parties, for complainant testifies that the same course continued to the very day on which the notice of termination was served. We shall treat hereafter of the credibility of the witnesses and the facts and circumstances which utterly discredit the defendant.

#### Letter of June 17, 1927.

On June 17, 1927, Mr. Sparks received a letter (Exhibit C. 1) written by Mr. Lawrence's secretary, and signed and initialed by her (p. 62, l. 30). It says nothing about forfeiture or termination of the lease. It says that "Beginning July 1st, Mr. Lawrence insists that the rent be paid the first of each month," nothing else. Sparks set forth the letter in his bill (par. 10, p. 5) and alleged the circumstances connected with it.

The defendant's secretary, Miss Lyons, testified that she attended to the collection of all the defendant's rents and the paying of taxes and interest on his property (p. 82, l. 25); that "Mr. Lawrence used to ask me if Mr. Sparks paid his rent and I would say 'he has not paid it yet.' He would say 'when do you expect to get it? Why don't you go around and get it?'" (p. 82, l. 35). When asked about writing the letter, Exhibit C. 1, she said, "Mr. Lawrence was real mad at me because I didn't get the rent when he told me I should and he said 'Well,' he says—he called in the stenographer and he says, 'I will dictate a letter to her and get it myself if you ain't able to get it.'" \* \* \* "*He did it to punish me because I didn't look after his business the way I should*" (p. 83, l. 25).

The defendant's account of the writing of the letter is found on page 88. He says (p. 12):

"Every time I went for the rent he say he kick me in the jaw and I get kind of disgusted and don't want to come any more and then I get the other girl to write a letter."

Can you believe that Mr. Sparks said to him, "I will kick you in the jaw," or any other words of like kind or purport?

If Mr. Lawrence was "disgusted" and if the tenant spoke to him in such fashion "every time" he went for the rent, is it likely that he would have tolerated such treatment for more than a year and a half thereafter?

Note that he says the reason he dictated the letter to Miss Geller rather than Miss Lyons was that "Miss Lyons been away; her father died that time and she been not home" (p. 88, l. 5). And then, being corrected by counsel, he said, "*I couldn't get her.*" And yet Miss Lyons says she was right there talking to him and that he called the other stenographer in "to punish me" (p. 83, l. 35). It is a good illustration of the degree of accuracy of defendant's testimony.

Note further that he refers to "every time I went for the rent," and a few lines down on the same page (p. 88) he says, "every month *I* have to come for the money." And yet on cross examination (p. 94, l. 20) he admitted that he left the collection of rent to Miss Lyons, and she also testified that he left it to her to attend to (pp. 82-83), and complainant's testimony is to the same effect; he says: "Mr. Lawrence never collected rent from me personally, that is, I mean to say that he never came into my office and asked for the rent. Of course, when I took

the check to the office, I either gave it to Miss Lyons or to Mr. Lawrence" (p. 64, l. 13). Mr. Sparks says further that he never talked to Mr. Lawrence over the telephone as long as he had known him (p. 74, l. 25). The defendant was asked (p. 94, l. 20): "Have you been accustomed to telephone Mr. Sparks about the rent yourself or did you leave it to your secretary to do?" and he answered, "*No, leave it to her to go to the store and she tried to get it, but most of the time he isn't there.*"

And so we submit that Mr. Sparks' consistent and unimpeached testimony in respect to this letter of June 17, 1927 (as in respect to all other disputed facts) outweighs the unconvincing and discredited testimony of defendant.

The letter was a surprise to Mr. Sparks because it was not consistent with the dealing which he had had with Mr. Lawrence up to that time. The letter was dated and mailed the 17th. Sparks testified (pp. 63-64) that he went to Mr. Lawrence's office on the next day, the 18th; that he had a \$500 credit coming to him out of the deposit, and gave Mr. Lawrence a check for the balance. That paid the rent for that month. He says (p. 63, l. 30): "I talked to Mr. Lawrence, we always had a nice little friendly chat when I was over there, and I didn't and I don't recall, and he didn't say anything about putting me out if I didn't pay my rent on the first of the month." \* \* \* "I explained to him that we were getting along much better, but it was still hard to have the rent promptly on the first day of the month and he said that it was all right and that he didn't want me to get behind in my rent, but as long as he got it during the month he was satisfied."

Defendant's secretary, Miss Lyons, was present at the above-mentioned interview and her account of it is as follows (bot. p. 83, top p. 84):

"Mr. Lawrence said to him, 'What do you think, I am going to wait for my rent all the time?' and Mr. Sparks says, 'Well, I have my notes to meet on my fixtures and stuff,' and he says, 'they are pressing me and it is pretty hard,' he says, 'I will try to get it to you by the first of the month after this,' and then, at that time, they had this—some money coming to him on that deposit and we fixed it up and got the month's rent."

Miss Lyons does not deny that the balance of the conversation, as testified to by Mr. Sparks, took place, and *defendant himself did not testify in respect to the conversation*. The defendant did testify, however, that the same irregularity in payment of rent continued for the next year and eight months after the writing of that letter (p. 91, l. 15). Notwithstanding all that the defendant might testify to now, the very fact that after the conference which Mr. Sparks had with him upon receipt of the letter, Exhibit C. 1, the same course was continued for a year and eight months is the best sort of corroboration of Mr. Sparks' testimony. It clearly appears that the letter was written at a moment when the defendant was irritated. His secretary so testified. When Mr. Sparks called on him Mr. Sparks discovered that such had been the case, and found that the defendant's attitude had not changed and was not such as the letter indicated.

If after the course of conduct which had prevailed up to the time of the writing of that letter the defendant had intended that thereafter the rent should either be paid exactly on the first business day of the month or he would attempt to terminate the lease, it was incumbent

upon him to then and there apprise Sparks of that fact, but neither the defendant nor his secretary testify that anything of the sort was said to Mr. Sparks. On the contrary, Mr. Sparks' version of the interview is not contradicted and is substantiated by the circumstances.

Defendant's brief refers over and over again to the letter of June, 1927, but we submit that under the facts as proved that letter avails him nothing. It is as if the lease were entered into on that day containing the same provision in respect to payment of rent on the first business day of each month, and as if at the time of the signing of the lease the same conversation was had between landlord and tenant as that which Mr. Sparks testified he had with the defendant immediately upon receipt of said letter. The term and dealings between the parties can be treated as starting afresh from that date. The fact remains that from then until the declaration of forfeiture strict compliance was not required, demands were not made on the premises on the first of each month, no threat or notice of intended forfeiture was given, no further letters were written.

**From June 17, 1927 to January 2, 1929.**

Three significant incidents occurring after the letter of June 17, 1927, are testified to. It appears by the said Schedule "D" that the rent for the month of January, 1928, was paid in two installments one on the 18th of the month and the other on the 28th. Nevertheless the defendant took up with Sparks the matter of having Sparks execute an instrument postponing the lease to the lien of a mortgage which the defendant proposed to put upon the demised premises. The lease provided for postponement

to a \$40,000 mortgage, but Mr. Sparks was asked to and did execute a postponement to a \$90,000 mortgage. That mortgage was not recorded and the postponement was finally made to a \$65,000 mortgage (p. 64, l. 25, to p. 66, l. 37). Mr. Sparks testified (p. 66, l. 25): "Of course, I was not familiar enough with the lease or with the law to know that I was required to do that. I thought I was conferring some sort of a favor to sign that paper." \* \* \* "So I said to him that I was very glad to do it because he had been very good to me in the past, and he said that he had been glad to help me, so that was all there was to that." The defendant said nothing about terminating the lease (p. 66, l. 35). The testimony of Mr. Sparks last above quoted is not denied. The whole incident is inconsistent with the idea that the defendant was holding Sparks to a strict compliance with that provision of the lease which requires payment of rent on the first business day of the month. Instead of terminating the lease, or in any way indicating that the lease might be terminated because the rent in that very month was then unpaid, he asked a favor of Sparks instead.

Reference to Schedule "D" shows that in May, 1928, the rent for that month was paid in two installments, one on the 17th and the other on the 19th of the month. There is a provision in the lease that Sparks should pay so much of the taxes as represent the tax rate applied to the cost of the extension which Sparks built in the rear of the demised building. Defendant had never sent a bill to Sparks for the taxes and in May, 1928, took up with him the matter of payment of taxes for four years. Sparks paid the sum demanded without question and on the other hand nothing was said by the defendant about the rent for that very month not having

been paid on the first of the month, or about a termination of the lease (p. 66, l. 36, to p. 67, l. 30). This whole incident, likewise, is not denied and is inconsistent with defendant's present claim that he was at all times holding Sparks to a strict compliance.

And even in December, 1928, the month before the notice of termination was served, the rent was paid in two installments, one on the 10th and the other on the 26th. Sparks had mislaid his copy of the lease and says (p. 67, l. 30): "I went to Miss Lyons and Mr. Lawrence in their office and asked them if they would let me have it so I could make a copy of it. Well, they said they didn't have it. They said Mr. Greenfield had their lease. Nothing was said about rent at that time. I had not paid my rent." And nothing was said about being in arrears or about terminating the lease (p. 68, l. 15). This testimony is also undenied. If defendant had had any intention of holding Sparks to a strict compliance for that month, something would have been said about it on that occasion.

Sparks testified further on cross examination (pp. 74-75) and re-direct (pp. 76-78), putting questions and answers in narrative form:

"It is not a fact that Miss Lyons came around several times a month to get the rent. No, sir, that is not so. Miss Lyons never told me, 'Some day, Mr. Sparks, you will find yourself out of the store, if you persist in that method.' I never talked to Mr. Lawrence on the telephone as long as I have known him. No, sir, I never did. I spoke to him direct in his office many times, and a few times he came to lunch. He never talked rent when he came to my store. He did not tell me, 'I will insist that you pay your rent on the first.' I never

believed that I had to pay the rent on time. I could always have paid the rent on time if I thought it was absolutely necessary; that I would have been thrown out if I did not; yes, I could always have done that."

On direct examination defendant said nothing whatever relative to his dealings with Sparks during the period from June 17, 1927, to January 2, 1929, except the one answer at page 88, line 15, which relates to a conversation which he says he had with Sparks, apparently soon after the writing of the letter. He says:

"And then I met Sparks after, and I say, 'Mr. Sparks, I get sick and tired; every month I have to come for the money; every week; every combination; some day we are going to close you up!' He said, 'Don't do that.' I said, 'We will have to get the rent.'"

"Every month I have to come for the money." Of course, for rent is payable on the premises when not otherwise stipulated in the lease. But, as above pointed out, defendant did not go for the rent; his secretary attended to it.

"Every week." That is manifestly not accurate, to say the least.

"Some day we are going to close you up. \* \* \* We will have to get the rent." Of course, if Sparks proved to be unable to pay the rent, he would be closed up. If defendant ever spoke these words to Sparks it must have been at a time when it looked dubious as to whether Sparks would be able to keep going. At all events, this alleged conversation of a year and eight months previous does not overcome the fact that *the defendant in January, 1929, after having waived the irregularities during all the preceding months, suddenly stopped short and*

*insisted upon a forfeiture without any previous intimation that he intended to do so.*

Defendant testified (pp. 91-92) that he threatened to *sue* Sparks for the rent. This, however, is not believable for as we have seen it is definitely and conclusively established by his own testimony, and by that of Miss Lyons, as well as by the testimony of complainant, that the matter of collection of rents was left entirely to Miss Lyons.

But even if this testimony of defendant were taken at its face value it avails him nothing. A threat to *sue for the rent* indicates no intention to declare a forfeiture but indicates rather the contrary. Nor does it indicate any intention to hold the tenant to a strict compliance in respect to the payment of rent on the very first business day of the month. *Neither defendant nor Miss Lyons testified that any such intent was ever expressed to Mr. Sparks after the letter of June 17, 1927, and, we have seen, even that letter did not express the attitude which defendant expressed in the conference which Sparks had with him upon receipt of the letter.*

Miss Lyons, who was defendant's only witness, gave no testimony relating to the period from June 17, 1927, to January 2, 1929, except the following:

p. 82, l. 35. "I used to go over around (*i. e.* to collect Sparks' rent)—Mr. Lawrence used to ask me if Mr. Sparks paid his rent and I would say, 'He has not paid it yet.' He would say, 'When do you expect to get it?' 'Why don't you go around and get it?' I would go around and sometimes I see Mr. Sparks and sometimes I didn't."

p. 83, l. 2. (There is nothing to fix the date of the following incident, but it fits most probably in the early part of the term.) "I

went in one time and saw him and he asked his bookkeeper if she had any money to pay the rent with and she said 'Well, not just now.' I said, 'Mr. Sparks, you better begin paying your rent on the first of the month, because Mr. Lawrence is kind of a hard man when you persist in not paying the rent.' Then he said to the bookkeeper, he said, 'Well, we will be thrown out of here one of these days if we don't pay our rent.' "

p. 83, l. 17. "Q Now, how many times did you go to see him about it?" "Ans. Well, I can't—I don't remember just how many times."

p. 83, l. 19: "Mr. Lawrence would say to me, 'Has Mr. Sparks paid his rent yet?' I would say, 'No,' and he would say, 'Well, you see that you get it.' "

p. 84, l. 15. "Q Now, did you ever see him (Sparks) after that?" (*i. e.* after the letter of June 17, 1927) Ans. "I went over after him. I met him in front of the New store one time. I says to him, 'Mr. Lawrence feels kind of sore that you opened this store and don't pay your rent on the first of the month.' 'Later,' he says, 'we will be coming along all right.' I met him in the street several times and I always called him up around the first of the month."

"I almost always spoke to him (*i. e.* about the rent), because Mr. Lawrence was always speaking to me about it."

p. 85, l. 5: "If I did not (*i. e.* telephone to Sparks on the first of the month) Miss Geller did. We have another girl. Mr. Lawrence would say, 'Has Sparks paid his rent?' and we would say, 'No' and he says, 'Why didn't you get it?' and I don't always like to run after him, and I called him."

p. 85, l. 13. "Q *Do you mean to swear you phoned on the first business day of every month?*" Ans. "No, I do not, because maybe—(interrupted)." "Q You phoned some time during the first business day to get the rent?" Ans. "No. *Toward the first part*

*of the month, because after the first Mr. Lawrence asked me to get up his rent—because he has other property, because he has other rent and he said, 'If you don't tend to your business, I will get somebody that can.'"*

*The conversations she had with defendant when Sparks was not present are, of course, not competent.*

All of this amounts to nothing else than that it was her job to collect the rents and the defendant kept after her to do it, and she in turn kept after Sparks. Meanwhile Sparks was delivering the rent checks and having the talks with Mr. Lawrence that he has given an account of. Of course, Mr. Lawrence did not want Sparks to get behind in his rent and of course Sparks would be thrown out if he couldn't pay. *But Sparks had paid, and there is nothing in Miss Lyons' testimony to show that in January, 1929, Sparks had any reason to believe that the situation was in any way different from what it had been all the preceding months, or any reason to suspect that he was suddenly to be held to strict compliance, without notice, on penalty of forfeiture.*

#### January 2nd, 1929.

This brings us to the important date of January 2, 1929, and to that part of defendant's testimony that completely discredits all the rest.

*None of the irregularities in payment of rent which antedated January, 1929, can now be made the basis of the defendant's right to re-enter.* The rent was all paid to and accepted by him up to and including December, 1928. As alleged in Par. 11 of the bill and admitted in Par. 8 of the answer *defendant bases his right to termination*

*“upon no other ground than that said January installment of rent had not been paid.”*

Certainly under no circumstances, and particularly not under the circumstances which have been proved in this case, was defendant entitled to declare a forfeiture without at least making a demand for the January rent. *In the absence of satisfactory and convincing proof of such demand, the defense necessarily falls.* Let us, then, examine all the evidence that bears upon the question.

Mr. Sparks testified as follows on direct examination (p. 68, l. 28 to p. 71, l. 40)—the questions and answers being reduced to narrative form:

On January 2, 1929, I had the money and could have paid the rent for that month if it had been demanded of me. That is the one month since I have been there that I actually had the money in the bank to pay the rent with. It was right after the Christmas trade. This paper shown me is my Franklin Washington Trust Company balance as of December 31, 1928. It shows a balance of \$4,321.76 as of that date. I had that balance on January 2nd. The reason that the January rent was not paid promptly on January 2nd although I had the money in the bank was as follows: We had a great deal of sickness in the store; there was a lot of flu and colds; we had four or five people out, and one of the people that was out was Mr. Georges, who is here, and he is my accountant and he sees that the checks are made out and mailed. He was out sick and I, of course, having a lot of people out sick I—I had a lot of things to think about, and I did not pay the rent. *I had not been in the habit of paying the rent on the first day of the month, so it just went along as usual.* There was nothing at all that occurred to suggest to me that there was any different situation on this date from what had existed on the first busi-

ness day of other months. —I signed all checks, but I did not make them out, and I did not apportion what was to be paid to the creditors, but that was the work of Mr. Georges and of the bookkeeper under him. —I had nothing in the world, in a business way, was more valuable to me on January 2, 1929, than this leasehold. Having the money on hand on that day, if Mr. Lawrence had demanded the January rent of me I would have paid it—absolutely. Would have rushed over there with it, if he had made a demand. As a matter of fact he did not demand it. —He did not at any time prior to then, after this letter way back a year and nine months previously, indicate to me that I would have to pay the rent on the first day of the month or be put out. —The first that I actually heard from Mr. Lawrence with respect to the January, 1929, rent was on the 15th day of January. Then I got a letter from him saying that because he had demanded the rent on the first day of the month and I had not paid it, the lease was cancelled. He had not demanded it. Immediately upon receipt of the notice I went over to his office with a check and Mr. Lawrence was not there. I offered to give Miss Lyons the check and she refused to take it. She said Mr. Lawrence told her not to take it. Then I saw counsel, and explained it to him, and then, the next day, we went to the office again with the rent money in cash and interest, and they refused to take it.

On cross examination Mr. Sparks' testimony, so far as it related to January 2, 1929, was as follows (pp. 72-74):

“I was in the store on January 2nd. I knew, of course, that the first of the month is rent time.

Q And you also knew by this letter, Exhibit C. 1, dated June 17, 1927, that there was a protest of your method of paying? A “Well, I certainly had forgotten all about that letter.”

Q You forgot that? A Yes.

Q You testified, on direct examination, that Mr. Lawrence did make a demand and a threat for the rent? A *Only in that letter.*

Q What letter? A That I got on June 17, 1927.

Q *And did he make a threat personally to you, besides that letter?* A *No, sir, he never did.*

Q *At any time?* A *Never.*

Q *Miss Lyons?* A *No, sir, she did not.*

On re-direct examination (pp. 76-77) Mr. Sparks testified:

On January 2, 1929, my debts amounted to approximately \$41,000 or \$42,000. I didn't have enough to pay them all in full. I had assurance from my friends and business associates as to being able to get the money from them, if any of my creditors pressed me to the extent that I needed it. Mr. Val Braun, of the Haussling Soda Water Company, told me if I ever got in any difficulties to come to him. *By use of my credit I could always have paid the rent if I had understood that it was required to be paid on the first of the month.*

Mr. Sparks' assistant bookkeeper and his cashier both testified (pp. 96-99) that they were both in the store *all day* on January 2, 1929. They had charge of the two telephones in the store and one or other of them would have received any call that came in from Mr. Lawrence or his office that day, but they swear that no such call came in that day, and that they did not see Mr. Lawrence in the store that day. The cashier did not know Mr. Lawrence, but her desk is right beside the entrance door, and if Mr. Lawrence had come there to inquire for Sparks she would in all probability have known it.

At all events their combined testimony affords weighty corroboration of Mr. Sparks' explicit

and convincing testimony that Mr. Lawrence neither phoned nor called that day to demand the rent.

Against the testimony of Sparks and of his said two employees we have nothing but the uncorroborated, self-serving, self-contradictory, inherently improbable, and utterly discredited testimony of the defendant himself, concerning his alleged demand on January 2nd, as follows:

*Direct, p. 87:*

Q Did you ask for your rent on January, 1929, on the second day? A I have been in the store of Mr. Sparks. Really, I had some bills to pay myself and I thought I would go myself. Miss Lyons had been away and I better stop myself, so Mr. Sparks came right away. *I said, "I will give you a few days." I thought I would wait a few days.*

Q And he didn't pay in a few days? A He didn't pay, to the fifteenth I been waiting, and then I came down and couldn't get it and called up and couldn't get it on the 15th.

*Cross, pp. 93-95:*

Q Now, you say that on January 2, 1929, you personally stopped in at Mr. Sparks' store because Miss Lyons was away at that time. You personally stopped in at the store and asked him for the rent, did you? A Yes.

Q Now, you swear to that? A *Saw Mr. Sparks right in the store.*

Q Saw him in the store and talked to him in the store? A *Yes. And he said, "I will settle up in a few days and bring it down."*

Q And you have a clear recollection of that, have you? A Yes.

Q Have you been accustomed to telephone Mr. Sparks about the rent yourself or did you leave it to your secretary to do? A No, leave it to her to go to the store and she

tried to get it, but most of the time he isn't there.

Q But on January 2nd you went in the store and saw him? A Went in the store myself.

Q And remember it very distinctly? A Yes.

Q Now, how do you know it was Mr. Sparks you were talking to over the telephone that day—January 2nd? A I been in the store.

Q Oh, it was not over the telephone? A No, I have been talking to him myself.

Q In this affidavit, on page 10, I will read: "Deponent did make demand for the payment of the rent" referring to January 2, 1929—and the allegations in paragraph 12 of the bill of complaint: "Did call up complainant at the store and when informed complainant was not in, deponent left word for complainant to call back, although complainant did not call back." Do you remember swearing to that? A Well, the complainant, what do you mean Sparks?

Q Sparks. A He don't call back.

Q Do you remember swearing to that? A Yes, sir.

Q Do you remember that—you remember this affidavit? A Yes.

Q "When Sparks, complainant, failed to call back deponent"—that is you—"again called up and spoke to complainant over the telephone." Do you remember that? A Yes.

Q "About payment of the rent and complainant answered 'will pay it some time this month.'" Do you remember that? A Yes.

Q You swore to that, didn't you? A Yes.

Q And that is all the conversation there was to it. He simply said, "I will pay it some time this month" is that right? A No, he told me in a few days he will give me a check, and I wait until the 15th and I have my bills to meet and I couldn't meet it.

Q Didn't he say, "I will pay it some time this month"? A *He said "A few days" and I waited.*

Q In your affidavit you said his reply was he would pay it some time this month. Do you remember swearing to that? A Well. (Witness mumbles something unintelligible.)

In paragraph 12 of complainant's affidavit attached to the bill of complaint (p. 41), referring to the January, 1929, rent, Sparks swore, "No demand had been made for the rent either personally or by letter." Defendant was called upon to answer this specific allegation that no *personal* demand was made, and in the last paragraph on page 44K of his answering affidavit, as found in the State of Case, sworn to on January 31, 1929, he made answer as follows:

"Deponent further deposes and says, that the allegations alleged in paragraph 12 of complainant's affidavit are not true, on the contrary, deponent did make demand for the payment of the rent, did call up complainant at the store, and when informed complainant was not in, deponent left word for complainant to call back, although complainant did not call back. *Under the terms of the lease, deponent was not obliged to make any demand or serve any notice upon complainant for the rent.* When complainant failed to call back, deponent again called up and spoke to complainant over the telephone, about payment of the rent, complainant answered, "I will pay it sometime this month."

In the same month that the demand is alleged to have been made defendant made the affidavit swearing that the demand was made over the telephone. The facts were fresh in his mind then. If he had had a personal conference with Sparks in the store, if he had known all the detailed circumstances thereof as he now testifies to them—

the very hour of it, the reason why he went personally on this occasion, the fact that Mr. Sparks "came right away," the very words that were exchanged, "Went in the store myself," "and remember it very distinctly"—surely he would not have sworn in that affidavit that the demand was made over the telephone, that he "did call up complainant at the store, and when informed complainant was not in, left word for complainant to call back, although complainant did not call back \* \* \*". When complainant failed to call back, deponent again called up and spoke to complainant over the telephone, about payment of the rent, complainant answered, "I will pay it sometime this month." Note that the affidavit is no mere general allegation that the demand was made over the telephone, but is particularized and circumstantial, just as defendant's oral testimony was. It leaves no possibility for mistake or error. It is not the kind of thing that counsel could have put in the affidavit without first getting the detailed information from his client. And yet, on the witness stand, before being confronted with the affidavit, defendant swore unequivocally that he did not telephone.

"Q Now, how do you know it was Mr. Sparks you were talking to over the telephone that day—January 2nd? *Ans.* I been in the store. Q Oh, it was not over the telephone? *Ans.* No. I been talking to him myself."

So, the account that defendant gave on the witness stand cannot be believed; the account that he gave in his affidavit he, himself, denies; there is, therefore, no proof in the record that any demand was made; and the testimony of Mr. Sparks affirmatively establishes that the notice of termination was given without any previous demand having been made.

In appellant's brief he insists vehemently and at length that he is entitled to his legal rights regardless of his motive. Appellant's counsel concedes, however, that the motive may have a bearing upon the question of credibility and in respect to complainant he says on page 29 of his brief: "Of course, the court will appreciate the fact that the tenant has a great deal at stake. He must stretch the truth." If counsel had pointed out any inconsistency in complainant's testimony, any fact or circumstance that might tend to discredit complainant, we would say that the above quotation is fair argument; but we beg to call attention to the fact that *counsel has not been able to point out a single weakness in complainant's testimony or anything whatever to discredit him.* On the other hand, if we apply to defendant his own test of credibility as above quoted, if we consider that the rental value of the property may now be double the rent reserved in the lease, or that the lease deprives the landlord of a Broad street entrance to the large tract of land which he owns in the rear of it, it appears that the landlord also has a motive which might cause a dishonest man to "stretch the truth."

Let us assume for the time being that the situation was just as Sparks has testified, and that the friendly relation between him and the defendant continued right down to January, 1929, and that then the landlord heard of a deal which Sparks was negotiating to sell his lease and his business at a large profit, and that at the same time a very attractive proposition was submitted to the landlord for the development of his property in the rear with the use of the premises in question as a Broad street entrance, and let us assume further that the landlord was a hard, un-

principled and dishonest man willing to go to any limit in his effort to recover the property and to get the greater profit that might be derived from it. What could the tenant do in such case? What more could the tenant do in such case than Sparks has done in this case? He could do nothing more than take the stand and truthfully state all the facts to the Court. There would be very little probability of his being able to submit any more corroborative evidence than Sparks has submitted in this case. We can best appreciate the situation if we attempt to picture ourselves in the tenant's position. If the landlord swore falsely, how could we establish our word against his?

We respectfully submit that in the present case every detail, every circumstance and incident which has been proved must be thrown into the balance by which the truth is to be weighed, and that when that is done the weight of the evidence is preponderously in Sparks' favor.

**The rent must be demanded before the landlord can exact a forfeiture.**

Defendant puts a double interpretation upon the following words which are found in Clause 5, sub-section N of the lease:

"no notice, however, shall be required of the non-payment of any of the above mentioned installments of rent, which are due and payable on the first business day of each and every month respectively."

His first interpretation is that the landlord is to be given the right to *immediately* declare a forfeiture for any non-payment of rent on its due date. This first interpretation we shall deal

with later under the heading, "The Re-entry Clause."

His second interpretation is that the landlord is thereby given the right to declare a forfeiture if the rent is unpaid on any due date even though it was *not demanded* by the landlord. To say that "no notice shall be required of the *non-payment* of rent" certainly cannot be treated as equivalent to saying "no demand for the rent shall be required."

"A demand is essential before the landlord can enforce a forfeiture because of a failure to pay rent." 35 C. J. 1073, *citing a long list of U. S. Supreme Court and other decisions.*

"According to the common law, a demand for rent must be made \* \* \* on the demised premises." 35 C. J. 1074, Sect. 247, *and cases cited in Notes 2 and 3.*

"A strict compliance with the foregoing requirement is necessary as a condition precedent to a forfeiture for non-payment of rent." 35 C. J. 1075, Note 7.

"Where the landlord claims a forfeiture, he must show that he has done everything necessary to be done on his part to perfect such right." 35 C. J. 1076, Sec. 248 No. 18.

"The tenant is under no obligation to go and seek the landlord, provided the contract is silent as to the place of payment." *Taylor's Landlord & Tenant*, Sect. 392.

"It is the well recognized general rule, insofar as a forfeiture of the term is concerned under a provision therefor, for non-payment of rent, that the rent is to be deemed payable on the premises, and that a demand therefor must be there made to entitle the landlord to enforce the forfeiture, even though the periodical rents may have been paid elsewhere during the term." 16 Ruling Case Law, page 928, Sect. 435.

"When the written lease does not provide a place at which the rent is payable, it is

the duty of the landlord before he can take advantage of a forfeiture clause, to make a demand for the rent upon the demised premises, and this is so even though there had grown up between the parties a practice in which the tenant sought the landlord and paid the rent to him elsewhere." *Burgdoll v. A. G. Spaulding & Bros., Inc.* (Penna. Sup. Ct.), 83 Atl. Rep. 427.

Particularly under the circumstances of this case was it incumbent upon the landlord to demand the rent on the premises on January 2nd if he had any idea of declaring a forfeiture upon the ground that the rent for that month was not paid in strict compliance with the provisions of the lease. We submit that, under the circumstances, he was required not only to make a formal demand, but, in equity and in conscience, was under an obligation to notify the tenant that the period of indulgence had come to an end and that he intended to declare a forfeiture unless the rent was paid in strict compliance.

#### The Re-entry Clause.

Breach of the covenant to pay rent does not (in the absence of an appropriate stipulation to that effect in the lease) entitle the landlord to declare the term ended and the lease forfeited. In such case the landlord has two, and only two remedies, viz: (1) to sue the tenant for the rent (which does not disturb the tenant's possession), or (2) to institute the statutory proceedings to dispossess the tenant for non-payment of rent, in which event the tenant may come in and pay the rent and dismiss the proceedings.

"The mere breach of the covenant can give the landlord no right of re-entry, unless thereby be a stipulation in the lease that such a breach of covenant shall work a forfeiture or determination of the tenant's in-

terest. No ejectment can be maintained by the landlord for a mere breach of covenant not coupled with a proviso for re-entry. His only remedy would be an action for breach of covenant. \* \* \* The mere fact that the covenants of the lease were violated by the tenant \* \* \* by non-payment of rent, gives the landlord no right of re-entry, except in the mode or under the circumstances particularly prescribed by the statute for non-payment of rent." *Bockover v. Post* (Green, C. J., Sup. Ct. 1855), 25 N. J. L. 285, at 292, approved and quoted by the Court of Errors and Appeals in *Ocean Grove Ass'n v. Sanders*, 68 N. J. L. 631, at 637. See also *Vanatta v. Brewer*, 32 N. J. Eq. 268; 36 Corpus Juris, page 599, Sects. 1757-1758; 35 Corpus Juris, page 1065, Sect. 235.

So the present tenant's failure to pay the January rent on its due date gave the landlord no right to terminate the lease "unless there be a stipulation in the lease that such a breach of covenant shall work a forfeiture."

The landlord's contention is that failure to pay the rent on its very due date gave him the right to declare the lease forfeited. To support his contention there would have to be, therefore, an *express* stipulation in the lease to the effect that

Any failure on the part of the tenant to pay any monthly installment of rent on the very day whereon it is made payable by the terms of this lease shall entitle the landlord to declare the term ended and the lease forfeited.

Nowhere in the lease is there any such provision. The defendant seeks to spell it out of *paragraph (n) of clause 5 of the lease* which for convenience in analysis we shall paragraph and number in four sentences or clauses, to wit:

1. That upon a breach by the Tenant of any of the covenants herein provided to be kept and performed by him and failure to

fully perform and comply therewith within thirty (30) days after the receipt of written notice from the landlord delivered to the demised premises, the Tenant shall at the option of the Landlord forfeit said term and all rights thereunder and the Landlord may re-enter and recover immediate possession of said premises, and shall also have an action for all damages arising from any such breach or breaches.

2. The failure of the Landlord to exact a forfeiture for any breach or breaches hereof by the Tenant shall not be deemed or construed as a waiver of the right of the Landlord to exact a forfeiture for any subsequent breach or breaches by the Tenant;

3. no notice, however, shall be required of the non-payment of any of the above mentioned installments of rent, which are due and payable on the first business day of each and every month, respectively;

4. and in the event that dispossess proceedings be instituted either for a breach of any covenant or condition herein contained or for defaulting in payment of rent and the Landlord shall repossess himself of said premises, the Tenant shall nevertheless continue to be liable for any deficiency in the rentals herein reserved for the unexpired term thereby granted.

The only forfeiture or re-entry clause in the lease is that which is contained in the first sentence (numbered 1 above) of said paragraph (n). *It requires default to continue for thirty days.*

Then, in a new sentence, is a non-waiver provision (numbered 2 above), and following a semicolon after the non-waiver provision are the words upon which the landlord relies (numbered 3 above), viz:

“no notice, however, shall be required of the non-payment of any of the above mentioned installments of rent, which are due and payable on the first business day of each and every month, respectively.”

Those words say that no notice of the non-payment of rent shall be required, but they say nothing about a right of re-entry or termination in the event of non-payment. To make them mean what the defendant contends, it is necessary to *imply* and *read into* the lease words which are not there, to wit (after the words last above quoted) the words:

“And if not paid when due the landlord shall have the right to declare the term ended and the lease forfeited.”

Appellant argues that the Court should not make a new lease for the parties. Particularly is that true when the Court is asked to read into the lease *words of forfeiture*.

This court will lean rather to avoid a forfeiture, and in construing the lease will resolve against forfeiture on all doubts and ambiguities.

In *Kansas City Elevator Co. v. Union P. R. Co.* (1881) 3 McCrary 463, 17 Fed. 200, the Court said:

“As a proposition pervading this doctrine of the right of re-entry by the forfeiture of a lease of land, it is to be observed that the power to be exercised is a very strong power, and it is one which is exercised without the judgment of a court of justice or of anybody else but the party who is exercising it. The party determines for himself whether he has the right of re-entry, without any resort to a court of justice. This is always a harsh power. *It has always been considered that it was necessary to restrict it to the most technical limits of the terms and conditions upon which the right is to be exercised.* Hence it is that the old common law provided in this class of contracts that it was the duty of the court to see that no injustice was done. It is reasonable, it is natural, that when a contract puts it into the power of one man to say that under certain con-

tingencies, of which he is to be the judge, he shall enter upon the house, or home, or property of another, and eject him instantly, and take possession—it is reasonable, it is proper, *that the contract and the acts which justify such a course of conduct should be construed rigidly against the exercise of the right.* A court of equity, when necessary, when this power has been exercised, will come in and afford relief.”

Defendant contends that the words in question (numbered 3, above quoted) refer back to the thirty-day notice mentioned in the first part of said paragraph 5 (n). We submit that there is no possible basis for such contention. They are part of an entirely new sentence. There is nothing to indicate that they were intended to have any bearing upon or relation to the landlord's right of re-entry. They constitute in themselves a complete provision, and cannot mean anything more than they say, to wit, that the landlord shall be under no obligation to notify the tenant of non-payment of rent.

But even if we do refer the words in question back to the first sentence, defendant's case is not helped. The first sentence makes the right of re-entry conditioned upon the tenant's breach of any covenant “and failure to fully perform and comply therewith within thirty days *after the receipt of written notice.*” If the said portion numbered 3 relates back to sentence numbered 1 so as to eliminate therefrom the requirement of notice, then the result is that the words last above underscored are stricken out and *the landlord's right of re-entry is left conditioned upon the tenant's breach of the covenant to pay rent “and failure to fully perform and comply therewith within thirty days,” that is, within thirty days after the due date, instead of thirty days*

*after the receipt of notice.* The rent in question was tendered and refused on the thirteenth day after its due date, and on the same day that written notice was received from the landlord.

Clearly there is no right of re-entry stipulated *unless the tenant shall fail to perform within thirty days.* Certainly the Court will not strike those words out of the lease. Whether it be thirty days from receipt of notice or thirty days from the date of default, the condition that might entitle the landlord to a forfeiture does not exist in this case.

Note particularly the notice of termination which the landlord served on the tenant (Schedule E attached to the bill of complaint, Bk. p. 28). It will be observed that in the notice the landlord did not quote the re-entry clause of the lease as it is written in the lease. On the contrary he rewrote it, omitting from it the words "and failure to fully perform and comply therewith within thirty (30) days," and now asks this court to approve his revision. On the contrary, this court will construe the lease "*rigidly against the exercise of the right,*" and "restrict it to the most technical limits of the terms and conditions."

**The cases and authorities upon which complainant relies in addition to those above cited.**

We submit that the present case is on all fours with the case of *Thropp v. Fields*, 26 N. J. Eq. 82. In that case the bill was filed by the tenant to restrain the defendant landlord from depriving the tenants of the power requisite to run their machinery in the building demised by the landlord, and from depriving the tenant of the blast from the fan on the premises and of forges in the

blacksmith's shop, one of the demised building. By the lease the landlord had agreed to furnish at his expense the necessary power. Payment was to be made monthly, at the end of each month, or within ten days thereafter, with provision that if default should be made at any time in the payment of the rent when due and payable, the landlord or his representative might, on ten days' notice to the tenant, re-enter and re-possess the premises. The tenant being two months in arrears in rent, the landlord notified him to quit the demised premises, and upon the failure of the tenant to do so the landlord took off the belt that furnished the power and stopped the blast. On the filing of the bill an injunction was granted, and upon the defendant's moving to dissolve it the Chancellor wrote the opinion in question and held that the bill must be retained until the hearing. The Chancellor said:

“The complainants appear not to have observed strictly the provision of the lease as to payments of the rent \* \* \*. The bill alleges that the rent has, from the commencement of the term, been paid at irregular intervals, sometimes once a month and sometimes once in two months; that the defendant never strictly enforced the covenant for payment of the rent according to the terms of the lease, and that the last payment was made some time in May last, and was in full to the first of that month. It further states that since that payment the defendant has never either demanded or requested payment of the rent. *The defendant, by his answer, admits that some times the payment went over to the following month, or was paid by promissory note, but alleges that he remonstrated, at different times, with the complainants against such delay, and claimed that they had forfeited their lease.* \* \* \* If the defendant, by his acquiescence, induced the complainants to believe that strict

observance of their covenant to pay their rent was not required by him, it is inequitable in him, under the circumstances, to seek to enforce the forfeiture. *Besides, full compensation can be made to the defendant for the failure of which he complains, and under such circumstances equity will relieve.*" Citing Story's Eq. Jr. Par. 1314, 1315. Taylor's Ld. Ten. Par. 495, *Atkins v. Chilson*, 11 Mete. 112.

Justice Scudder in delivering the opinion of the Court of Errors and Appeals in *Grigg v. Landis*, 21 N. J. Eq. 494, quoted the following with approval:

"The result of all the cases on this subject seems to be that slight circumstances are sufficient in a court of equity to prevent a party from taking the benefit of such stipulation, and that whenever a party had done any act inconsistent with the supposition that he continues to hold his opponent strictly to his part of the agreement, he is taken to have waived it altogether." Citing: *Hipwell v. Knight*, 1 You. & Coll. Eq. Ex. 401, *Seton v. Slade*, 7 Ves. 265 and notes, 3 Lead. Cas. in Eq. 49.

The Court set forth in that case (*Grigg v. Landis*) that the complainant might reasonably have believed that the defendant acquiesced in the delay for he had been indulgent in other cases. "He had not been exact in holding the parties to compliance at the very day. \* \* \* In a case similar to the facts (*Harris v. Troupe*, 8 Paige 428) it was said that it was inequitable after the vendor had waived the forfeiture from time to time, by receiving portions of the purchase money long after the same was due and payable, to suddenly stop short and insist upon a forfeiture without any previous intimation that he intended to do it."

In an annotation in 16 A. L. R. at 443 under the heading "Acquiescence of the Lessor in irregular payments," the following is found:

"When a landlord, by a course of dealing in accepting over-due rent, has put a tenant off his guard, a forfeiture of the lease for a delayed payment of rent can not be enforced, unless notice has been given to the tenant calling on him for a compliance with the strict terms of the lease; and equity will relieve from such a forfeiture."

Numerous cases are cited in said note. So in *Horton v. N. Y. &c. R. R. Co.*, 12 Abb. N. C. (N. Y.) 30, affirmed 102 N. Y. 697, it was said:

"By the proof given upon the trial, it was made to appear that indulgence was extended to the lessees in the payment of the rent reserved by the lease. And while this did not strictly relieve them of the obligations to be performed and covenanted it still constituted an excuse for the lessees to pay the rent at the time when it matured.

\* \* \* and it was upon the belief that this delay would be permitted, without prejudice to the tenant's right afterwards to pay, that the omissions to pay at the day were made. This was a very natural result from what was shown to have transpired and, after the tenants had been in this manner lulled into negligence, it would be a fraud upon them to permit the lessors to insist upon the forfeiture."

"Equity will always relieve in a case of this nature against a forfeiture and will not permit a landlord to entrap his tenant by establishing a certain course of dealing, and then, without notice, suddenly enter up a judgment and eject the tenant." *Times Co. v. Lubrecht*, 15 Phila. Pa. (235).

That our Court of Chancery has been averse to enforcing such forfeitures and has sought to avoid them when they seemed to work injustice and inequity, is illustrated in the following cases:

Vice-Chancellor Bergen wrote the opinion in *Fleming v. Fleming Hotel Co.*, 69 N. J. Eq. 715. In that case the lease made to the corporation provided that if any rent should be due and unpaid the lease should become void and the lessor might re-enter. The tenant being decreed insolvent, a receiver was appointed. At the time of his appointment rent in the sum of \$2,435.00 was in arrear. The landlord filed a petition in the receivership proceedings, alleging a breach of the covenant for the payment of rent, and praying an order requiring the receiver to surrender the property to him. The landlord's application was denied, Vice-Chancellor Bergen saying in his opinion:

“It is well settled that the clause of re-entry is mainly inserted for the landlord's security, and will not be enforced when the lessee, upon proper demand, satisfies the rent due and compensates the landlord for any damages he may have sustained because of a breach of the covenant, and a court of equity would protect a defendant where the breach results from the neglect to pay money, the interest upon which can readily be calculated and the landlord thereby compensated for the inconvenience sustained because of the payment withheld.”

In *Fulton v. Greacen*, 36 N. J. Eq. 216, the deed authorized the grantors to enter on complainant's lands and void a grant of the right to use certain water in case of the non-payment of the water rent. There having been a default in the payment of the water rent the grantor claimed that the complainant's right to the water was thereby forfeited and that he, the grantor, was thereby justified in cutting off or diverting the water from complainant's mill. The bill was filed to enjoin the grantor from so doing, and upon

the return of the order to show cause, an injunction was allowed. Vice-Chancellor Van Fleet said in the course of his opinion:

“A default such as by the literal terms of the grant effect its forfeiture, is admitted. Equity does not favor forfeitures; on the contrary, one of its earliest and most salutary inventions was to provide a remedy against harsh injustice. If the case is not marked by any countervailing equities, it is now the common practice for courts of equity to give relief against a right to re-enter for non-payment of rent, on payment of the rent in arrear. They do so on the theory that the clause of forfeiture is simply intended as a penalty to secure the payment of the rent, and if the lessor gets his rent, with interest and costs, he gets all he can, in justice, ask, and should not, therefore, be permitted to void the lease.” *Keer on Inj.* 83; *Thropp v. Field*, 11 C. E. Gr. 82.

In *Bergman v. Fortescue*, 74 N. J. Eq. 266 at 269, citing *Fulton v. Greacen*, *supra*, and *Fleming v. Fleming Hotel Co.*, *supra*, Vice-Chancellor Leaming said:

“The right of forfeiture for failure to promptly pay rent is treated as a penalty for the landlord’s security, and is properly relieved against if the landlord gets the rent with interest and costs.”

In explaining the rule the above mentioned annotation in 16 A. L. R. 437, says:

“Forfeitures, in equity, are regarded with extreme disfavor, and, where compensation can be made for non-performance, a court of equity will ordinarily give the relief against forfeiture. This is on the principle that court of equity is a court of conscience, and will permit nothing to be done within its jurisdiction which is unconscionable, and that a person having a legal right shall not be permitted to avail himself of it for the purposes of injustice and oppression.”

In *Baldwin v. Van Vorst*, 10 N. J. Eq. 577 (which involved a forfeiture of a bond for non-payment of interest) Chancellor Williams, speaking for the Court of Errors and Appeals, treats at length of "the well established jurisdiction of a court of equity to grant relief in cases of forfeiture and penalties for breach of covenants and conditions," and in the course of the opinion (as dictum) says (p. 585):

"There is a class of cases in reference to leases where the court has interposed to prevent a forfeiture where a right of entry is stipulated in the lease in case of the non-payment of the rent at the regular days of payment. In those cases the Court interferes on the ground, that the right of entry is intended as a mere security for the payment of rent, and that when the rent is paid the end is obtained." Citing *Story's Eq. N. S.* 1315; *Wehman v. Colcraft*, 10 Ves. Jr. 69; *Sanders v. Pope*, 12 Ves. 284; *Bracebridge v. Buckley*, 2 Prior's Ex. R. 216.

It was said also in *Commercial Trust Co. v. Wertheim Coal Co.*, 88 N. J. Eq. 143 at bot. 152. "Equity will relieve against forfeiture where compensation can be made."

Note in 16 A. L. R. 437 citing and quoting from a long list of authorities, says: "That a court of equity has inherent power to relieve the tenant from a forfeiture of his estate, because of the failure to pay rent at the time required by the terms of his lease, is unquestioned."

Taylor's Landlord and Tenant par. 494 *et seq.* lays down and expounds the same rule, as does also *Story's Eq. Jur. Pars.* 1314-1315. In *Blake & Co. v. Smidth*, 119 Atl. Rep. (N. J. Ch.) 306, Vice-Chancellor Ingersoll on final hearing enjoined an ejectment suit which had been instituted by the landlord against a tenant for non-payment of rent. The lease contained "the usual

clause of right of re-entry, or to proceed by action for the recovery of possession in default of payment of rent.”

And we particularly call the Court's attention to that part of Vice-Chancellor Pitney's opinion in *Baltimore & N. Y. R. R. v. Bouvier*, 70 N. J. Eq. 158; which begins at the bottom of page 180 and runs to the top of page 183, and from which Vice-Chancellor Ingersoll quotes in his opinion in *Blake & Co. v. Smidth, supra*.

Notwithstanding that complainant may have a defense at law, our court of equity should intervene upon the following grounds:

1. Because the equitable defenses hereinabove stated are open to complainant in this court to defeat the forfeiture, whereas they would not be available to complainant at law, that is, the relief here is greater and broader than at law.
2. Because the relief in this court is more complete and final than at law.
3. Because it is the special province of a court of equity in such cases as this, to relieve against forfeitures.

Vice-Chancellor Berry held on application for preliminary restraint in this case: “The jurisdiction of the Court of Chancery to prevent unjust forfeiture in matters of this kind cannot be questioned and it is not necessary to cite any authorities on this point. Their number is legion. While it is quite possible that there may be a defense to the suit at law under a proper construction of sub-section N of Section 5 of the lease, the remedy in equity is undoubtedly more complete.”

In *Windholz & Son v. Burke*, 98 N. J. Eq. 471 the lease gave the landlord the right to terminate

it if the tenant should breach his covenant not to make any alterations in the demised premises without the written consent of the landlord. The tenant having made alterations the landlord claimed that they were made without consent and made written demand upon the tenant for possession of the premises. Said demand being refused, the landlord instituted proceedings in the District Court to dispossess the tenant under Chapter 260 of the laws of 1920 which is the same act under which the defendant in the present case has proceeded in the District Court. The tenant thereupon filed his bill to restrain the prosecution of the proceedings at law. On motion for preliminary injunction Vice-Chancellor Backes said:

“The defendant denies, in his affidavit, previous knowledge of, consent to or acquiescence in, the alterations first mentioned, but the proof in support of the bill leads strongly to the belief that he knew the alterations were being made and that he took rent with notice. As to the alterations made to conform to the health laws he says he had and has now knowledge. On the issue of fact and proofs of the complainant prevail, and it is entitled to the protection of this court, unless it has, as the defendant contends, a complete and adequate defense at law.

The causes for action to dispossess are two-fold for a breach of the covenant and for destroying the premises (laws of 1920, chapter 260), and in either aspect the right to recovery rests upon a forfeiture, to which a waiver would, undoubtedly, be a good defense at law (*North v. Jersey Knitting Mills*, 98 N. J. Law 157), and as to the alterations necessarily made to conform to the state health laws it could be pleaded that the covenant was not inclusive and was subordinate to the laws of the state, and that the penalty of forfeiture did not apply. The complain-

ant could also, it would seem, succeed in overthrowing a judgment, on a review by certiorari, for want of jurisdiction in the district court to oust for breach of covenant (*Smith v. Sinclair*, 59 N. J. Law 84), and it could succeed, no doubt, in nullifying the proceedings for insufficiency of the complaint in stating the causes for action. *Gray v. Reynolds*, 67 N. J. Law 169. The nature of the alterations are not specified, nor is it stated in what respect the complainant wantonly destroyed and damaged the premises, nor is it alleged that a right of re-entry was reserved in the lease in the event of such destruction, as required by the act of 1920. The constitutionality of the act, for want of proper title, might, also, be successfully assailed, and there may be other ground of which the complainant could avail itself and defeat the action at law, but it is not driven to such expediencies. Equity relieves against the forfeiture. 1 Pom. Eq. Jr. (4th Ed.) 857; *Thropp v. Field*, 26 N. J. Eq. 82; *Levy v. Blackmore*, 67 Atl. Rep. 1022; *Commercial Trust Co. v. Wertheim Coal Co.*, 88 N. J. Eq. 143. Furthermore, if the district court has jurisdiction and erroneously should refuse to entertain or uphold the defense of waiver, or any other valid defense, its judgment would be final, the complainant's possession would be lost to it, and its only remedy would be a suit for damages for unlawful ouster. *McGann v. LaBrecque Co.*, 91 N. J. Eq. 307. The proceedings are summary; there is no appeal on the merits, and, on certiorari, the only reviewable question is, had the court below jurisdiction. Cases in 4 Park. Dig. 7917. The relief the complainant presently stands in need of is the protection of its possession, not damages, and while the law may grant compensating damages for the injury now threatened, equity prevents the infliction of the injury altogether. It is obvious that the defense at law is not complete and adequate. *Equity will not refuse to interpose when the remedy is more nearly complete and perfect in equity than at law.*

*Hanwood v. Jarvis & Schafer*, 27 N. J. Eq. 247; *Commercial Casualty Ins. Co. v. Southern Co.*, 100 N. J. Eq. 92.

There will be an injunction.”

In *Lincoln Furniture Co. v. Bornstein*, 100 N. J. Eq. 78 at bot. 80, Vice-Chancellor Backes says that although there may be a defense available at law, equity may intervene, and he repeats that he had said in that regard in *Windholz v. Burke*, 98 N. J. Eq. 471. In the Lincoln case, *supra*, the tenant breached a covenant not to assign and the landlord gave notice of termination because of the breach and began dispossession proceedings in the District Court. The tenant filed his bill to enjoin the suit upon the ground that the landlord had waived the breach. There was an injunction *pendente lite*. On final hearing the Court overruled defendant's objection that the Court had not jurisdiction, but dismissed the bill on the proofs.

**As to the cases cited and points argued in appellant's brief.**

In the case of *Bonfils et al. v. Ledoux*, 266 Fed. Rep. 507, cited by defendant, even when possession was demanded of the tenant no tender or offer to pay the rent due was made, and it was held that under all the circumstances of that case, the rent, which was past due and for non-payment of which the default was declared, was wilfully withheld, and for that reason relief from the forfeiture was denied. In our present case the rent was tendered immediately upon receipt by the tenant of the very first word from the landlord concerning it. So also in *Crawford v. Texas Imp. Co.*, *supra*, cited by defendant, the unpaid rent on account of which the forfeiture was declared, was found to have been wilfully

withheld, and relief from the forfeiture was therefore denied. A reading of the case discloses, however, a state of facts in no way analogous to the facts of the present case.

The exhaustive annotation found in *Vol. 16 of American Law Repts. (Annotated)*, at pages 437 to 450, deals with the subject of "Power of equity to relieve against forfeiture of lease for non-payment of rent." The first twenty columns of the annotation cite scores of cases in which the power has been exercised, and then in part No. 2 of the article are set forth cases in which such relief has been refused, classified under the headings (a) wilful default, and (b) failure of lessee to tender amount due.

The gist of the cases therein cited under the heading of "Wilful Default," is summed up in the following quotation:

"Appellant cites numerous authorities to the effect that courts of equity do not favor forfeitures, and refers to cases where the courts have relieved against forfeitures in lease contracts where it has been a wilful failure to pay rent. The correctness of these authorities is unquestioned. But in order to justify the application of this doctrine in favor of a lessee who has wilfully and persistently defaulted in the payment of his rents, there should be some strong counterbalancing equity in his favor." *Crawford v. Texas Improvement Co.* (Tex. Civ. App.) 196 S. W. 195.

In the case *sub judice* (1) no wilful and persistent default has been proved, and (2) there are strong equities in complainant's favor.

The tenant's rent was paid in full up to and including December, 1928. There had been delays in payment, but we submit that there is nothing to show that they were wilful, or that the rent was ever intentionally and designedly

withheld. And, furthermore, it is clearly established that (notwithstanding the landlord's present protestations to the contrary) the landlord by his course of conduct and by his conversations with complainant, had induced the latter to believe that strict compliance was not required.

Nothing but the Janaury rent is now involved and surely as to that it does not appear that it was wilfully or intentionally withheld. If the landlord had demanded it he would have got it. The tenant was under no obligation to take it to the landlord. The tenant was on January 2nd, ready, willing and able to pay it and would have taken it to the landlord if the landlord had requested him to do so, or had taken any steps to bring the matter to his attention.

And therein lies the special and counter-balancing equity in complainant's favor, viz., that the course of dealings between the parties had been such that it was inequitable and unjust for the landlord to suddenly stop short and declare a forfeiture without notice or warning of his intention so to do. Under the circumstances as proved, he is in equity estopped from so doing.

We do not insist that by the landlord's leniency and indulgence the tenant had acquired a right to continued indulgence. We say merely that the landlord should not be permitted to spring a trap on the tenant.

Let us suppose that the tenant had mailed a rent check to the landlord promptly on the first business day of each month, and that when the check mailed on January 2nd was received by the landlord on January 3rd, it was returned to the tenant with a notice declaring a forfeiture upon the ground that the rent was due on the 2nd and

not on the 3rd. All the authorities are agreed that a court of equity will relieve against a forfeiture in such case. The present case differs only in the fact that the tenant had been delivering the rent later in the month and sometimes in two or more instalments, but that difference in no way alters the equity in the case or calls for the application of any different rule.

In *Cashin & Co. v. Alamac Hotel Co.*, 131 Atl. Rep. 117, cited by defendant, the rights and equities of the parties to a mortgage had been settled by the final decree of foreclosure, and the receiver of the mortgagor urged that it was inequitable and unconscionable not to give the Alamac Hotel Co. additional time before selling the property. The Chancellor said "the trouble with this claim is that it does not rise to the level of a right." In our present case complainant's claim does rise to the level of a right and in the cases above cited this court has repeatedly recognized and enforced such claim as a right.

In *McGann v. LaBrecque Co.*, 91 N. J. Eq. 307, an entirely different situation was presented to the Court from that which is here presented. A judgment for possession in favor of the landlord had actually been entered before the bill was filed. The bill sought to enjoin enforcement of the judgment which had been entered to dispossess the tenant after the end of the term. No equitable right was involved. The correctness of the judgment for possession was not disputed. The Vice-Chancellor had based his jurisdiction wholly upon the inadequacy of the remedy at law, and the Court of Errors and Appeals reversed him saying: "The Vice-Chancellor attempts to extend his jurisdiction to cases where there is no equitable right involved because he fears the verdict of a jury may be too small."

*Pershing v. Feinberg*, 52 Atl. Rep. 22, cited by defendant is a Pennsylvania case. The question presented was "whether the defendant (in an action of ejectment at law) had established any equitable ground for relief against the forfeiture." The Court said:

"Courts will relieve against forfeiture when the injured party has been misled, or an undue advantage has been taken of his reliance on a waiver of strict performance."

The tenant had made a deduction from the instalment of rent which was due, the Court held that he had not been misled and that the landlord had not induced him to believe that he might make the deduction.

In *Warne v. Wagenor*, 51 Atl. Rep. 107, cited by defendant, the lease in question was of a mine that provided among other things for the weighing by the tenant of the ores extracted. The landlord sent the tenant a notice in which he said that he would treat the tenant as a trespasser, first because of non-payment of rent and secondly "because the weighing had not been ascertained in a just and fair manner." The landlord had instituted no proceedings and had taken no steps to recover possession of the premises. Nothing had happened but the giving of said notice in which the landlord said that he would treat the tenant as a trespasser. The tenant filed a bill to restrain a forfeiture but alleged in it no facts or circumstances which might entitle him to the decree prayed for. In dismissing the bill the Vice-Chancellor said:

"But if after all there be a secret intention to secure the possession of this mine without violence, and thereby deprive the complainants of all their rights and the business which has been established, and an unmistakable demonstration should be made to that end, then will be the time to ask for

equitable aid, provided irreparable mischief is likely to follow."

*Heil v. Borough of Carteret*, decided April 15, 1929. Vol. 7, No. 17 of the N. J. Adv. Rep. & Weekly Law Rev. at page 603, cited by defendant, has no applicability whatever to the case *sub judice*. There was a bill filed by grantor praying that this court declare a forfeiture of his grantee's estate because of a condition contained in the deed alleged to have been broken, and praying for a decree directing the grantee to reconvey the premises to the complainant. Vice-Chancellor Berry held that the grantor's remedy was by an ejectment at law and not by a bill in chancery. In the course of his opinion he said: "As a general proposition equity will neither relieve against nor enforce a forfeiture, leaving the parties to their remedy at law." That proposition is unquestionably applicable to such a case as was then before him which involved the naked question of enforcing or not enforcing a forfeiture provided for in the deed, without any other equities whatsoever being involved. Certainly he did not mean, as defendant's counsel interprets him to have meant, that no equities can arise which will induce this court to relieve against a forfeiture.

Nor has the case of *Ocean Grove Ass'n v. Sanders*, 68 N. J. L. 631, cited by defendant, any applicability to this case. It was an action of ejectment at law instituted by the landlord. The lease provided among other things "that if the lessee shall persistently neglect or refuse to pay, it shall be lawful for the lessor to enter and hold possession, and this lease shall thereupon be wholly at an end and the estate hereby granted shall cease and determine." The Court found the fact to be that the lessee persistently neglected and refused to pay. No question of equita-

ble relief on equitable grounds, such as are involved in this case, and in *Thropp v. Field*, 26 N. J. Eq. 82, and in the other cases relied on by complainant herein was involved.

The *Harld Holding Company* case, 101 N. J. Eq. 94, is not in point for the reasons mentioned in the opinion of the court below.

### SUMMARY.

The propositions upon which complainant relies are:

1. That the re-entry clause in the lease requires any default to continue for a period of thirty days before the landlord might have the right to re-enter; and that such condition does not exist in this case.

2. That in no event could defendant declare a forfeiture for non-payment of any installment of rent without having first made a demand for it; and that the January, 1929 rent, for non-payment of which the forfeiture is attempted to be declared, was not demanded prior to the serving of the notice of termination.

3. That prior to the serving of the notice of termination defendant had not held the complainant to a strict compliance with his covenant that the rent should be paid on the first business day of each month, and by his long continued course of conduct defendant had put complainant off his guard and had induced complainant to believe that strict compliance was not required; and that therefore, it was inequitable for defendant to suddenly stop short, and without any prior notice or warning to complainant, to suddenly spring the trap and declare a forfeiture because the January, 1929 rent had not

been paid on the very first business day of the month.

4. That on the admitted and undisputed facts of this case equity will relieve against the forfeiture.

It is respectfully submitted that the decree appealed from should be affirmed.

LUM, TAMBLYN & COLYER,  
Solicitors for and of Counsel with  
Complainant-Respondent.

CHESTER W. FAIRLIE,  
Of Counsel.

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