INDEX

SUMMONS.

The State of New Jersey to Abra-
(SEAL) ham Ginsburg: YOU ARE SUMMONED to answer the annexed complaint of Ben Birkenfeld in an action at law in the Essex County Circuit Court. AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of Essex County, at Newark, N. J., within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, NELSON Y. DUNGAN, Judge of the Essex County Circuit Court, at Newark, this 10th day of July, nineteen hundred and twenty-eight.

JOHN H. SCOTT,
Clerk.

HARRY T. DAVIMOS,
Attorney.

COMPLAINT.

Essex County Circuit Court

BEN BIRKENFELD, *Plaintiff,*	*Action at Law.*
vs.	
ABRAHAM GINSBURG, *Defendant.*	*Complaint.*

The plaintiff, having an office in the City of Newark, County of Essex and State of New Jersey, says:

FIRST COUNT.

1. On February 14, 1928, the defendant employed the plaintiff as a real estate agent for the leasing of property. That attached hereto is a copy of the said agreement of leasing.

2. That the said plaintiff complied with all the terms of the said agreement and became entitled to a commission due thereunder in the sum of fifteen hundred and forty-five dollars ($1,545). Demand has been made for the payment of the same, of the defendant, but the defendant has refused to pay same.

SECOND COUNT.

1. The said defendant, Abraham Ginsburg, employed Kessler & Kessler as attorneys to handle the legal matter concerned in said contract of lease set forth in count one and agreed to pay for said services the sum of one thousand

dollars ($1,000). Said claim has been assigned to plaintiff. The said Kessler & Kessler as aatorneys for defendant, became entitled to said fee by reason of full compliance with the term of their contract and by reason of said contract with the defendant, plaintiff claims the sum of one thousand dollars. Demand has been made for the payment of said sum, and which was refused. Plaintiff demands on the second count the sum of one thousand dollars ($1,000).

Judgment will be claimed on both counts for the sum of twenty-five hundred and forty-five dollars ($2,545), together with interest and costs of suit.

Dated July 9, 1928.

HARRY T. DAVIMOS,
Attorney for Plaintiff.

February 14, 1928.

I hereby agree to pay Ben Birkenfeld, Real Estate Broker, a commission of 2½% on the total rental for the entire term of the lease, for leasing property located on Fourth avenue between Fifteenth and Sixteenth street, East Orange, New Jersey, to the Warner-Quinlan Co. (Miliage Gas).

Said commission payable in full on the signing of the lease and the granting of the permit.

A. GINSBURG.

ANSWER.

Filed August 2, 1928.

ESSEX COUNTY CIRCUIT COURT.

BEN BIRKENFELD, *Plaintiff,*		*Action at Law.*
vs.		
ABRAHAM GINSBURG, *Defendant.*		*Answer.*

The defendant, Abraham Ginsburg, of the Town of Nutley, County of Essex and State of New Jersey, says that:

FIRST COUNT.

1. Defendant denies paragraphs one and two of the first count, and further denies that there is any money due and owing from him to plaintiff.

SECOND COUNT.

1. Defendant denies paragraph one of the second count, and further denies that there is any money due and owing from him to plaintiff or Kessler & Kessler, attorneys.

SEPARATE DEFENSE TO SECOND COUNT.

The claim of Kessler & Kessler, attorneys, for professional services rendered against the defendant, which the plaintiff alleges has been assigned to the plaintiff, was never made known to the defendant, and the plaintiff or Kessler &

Answer.

Kessler, attorneys, did not deliver to defendant personally or otherwise, a copy of their bill of such fees, charges and disbursements.

MARDER & OKIN,
Attorneys for Defendant.

NOTICE OF MOTION TO DISMISS ANSWER.

Filed August 13, 1928.

ESSEX COUNTY CIRCUIT COURT.

BEN BIRKENFELD, *Plaintiff,* *vs.* ABRAHAM GINSBURG, *Defendant.*	*Action at Law.* *Notice of Motion to Dismiss Answer.*

To Marder & Okin, attorneys for defendant, 810 Broad street, Newark, N. J.

SIRS:

TAKE NOTICE, that I shall move for dismissal of your answer filed in this matter, and for entry of summary judgment, before Hon. William A. Smith, at 10 o'clock in the forenoon on Monday, August 13, 1928, at the Court House, Newark, N. J., based on the attached affidavits, on the grounds:

1. That the facts are contrary to the statements of the defense.

Dated August 3, 1928.

HARRY T. DAVIMOS,
Attorney for Plaintiff.

Affidavit of Benjamin Birkenfeld.

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

BENJAMIN BIRKENFELD, being duly sworn on his oath, deposes and says that he is the plaintiff herein; that he was employed by a written agreement a copy of which is attached hereto, for the leasing of the property at the special request of the defendant.

Upon signing of the lease and granting the permit, the plaintiff became entitled to his commission of 2½% of the total rental for the procuring of the lease, to wit, in the sum of fifteen hundred and forty-five dollars; that the said lease was duly signed as therein provided and thereafter the permit was granted on or about April 27, 1928.

That thereafter this deponent demanded payment of his commission from the defendant, and the defendant repeatedly promised to make payment and said in each instance he was embarrassed because he was expecting installment payments on certain buildings in the course of construction. From and after the 27th day of April, 1928, and the time suit was started, deponent repeatedly saw Abraham Ginsburg, and solicited payment of his account, and in each instance it was admitted that the money was due, and he had been repeatedly promising to make payment of his account.

Deponent has insisted upon collecting the moneys due him long past due. At the conference with Mr. Davimos, Mr. Ginsburg said if his terms were not acceptable, he would go to some lawyer's office and file an answer to get delay in his own way.

Deponent further says that when deponent was engaged as agent in negotiating the lease

upon which said suit is based, the defendant requested that deponent hire counsel for defendant to procure the permit and perform all the legal requirements in connection therewith.

Deponent at defendant's request engaged the services of Kessler & Kessler, attorneys of this State, for which services defendant agreed to pay. That the fees of the said Kessler & Kessler were agreed upon to be chargeable on the results of the procurement of the permit; that the said Kessler & Kessler attended upon the procuring of the said permit to the knowledge of deponent and performed all the duties in connection therewith, representing Ginsburg in every matter in connection therewith. At the close of their services, said firm of Kessler & Kessler requested that the defendant, Abraham Ginsburg, pay one thousand dollars ($1,000) for their services. The defendant then upon receiving notice of the charge of one thousand dollars ($1,000) for the services of Kessler & Kessler, spoke to deponent and complained he thought one thousand dollars was more than the services were worth. Deponent then suggested to Ginsburg to return to Kessler & Kessler's office to negotiate settlement of their account.

Defendant then informed deponent, he had negotiated with Kessler & Kessler directly with the result that they were willing if the account were paid at once to accept seven hundred and fifty dollars ($750) for their services. This deponent learned directly from the defendant, Ginsburg. The sum was agreeable to Ginsburg, as he said to deponent.

Repeatedly deponent had informed Ginsburg that Kessler & Kessler were insisting upon getting their money and they would start suit

unless he made payment, and in each instance defendant, Ginsburg, said he would make payment and fixed a time, from time to time to make such payment, all of which defendant failed to do.

The claim of Kessler & Kessler was duly assigned to deponent for valuable consideration.

Defendant offered by way of settlement, to pay $750 in cash and balance in notes, which was refused.

BENJAMIN BIRKENFELD.

Sworn to and subscribed before
me this 3rd day of August,
1928.

RUTH C. ROBINSON,
A Notary Public of New Jersey.

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

NATHANIEL KESSLER, being duly sworn, on his oath deposes and says that he is a member of the firm of Kessler & Kessler, attorneys at law of the State of New Jersey:

That some time in February, 1928, deponent was employed by Abraham Ginsburg to represent the said Abraham Ginsburg in procuring a permit for a gasoline station on property in East Orange, on Fourth avenue, which property has been leased by Ginsburg to the Warner-Quinlan Co. That plans were prepared which deponent presented to the proper authorities in East Orange for the purpose of procuring the permit.

That deponent performed all the legal services in connection therewith and attended regu-

larly upon the Commission sitting, and followed all the necessary requirements until said permit was successfully obtained.

No fee had been agreed upon as to what the charge was to be for the services, but it was understood it was to be worked on a contingent basis. At the conclusion of the work, to wit, on or about April 28, 1928, when the permit was obtained, then deponent requested payment of one thousand dollars ($1,000) from Ginsburg for his services.

That subsequently Ginsburg appeared at his office and discussed the matter with deponent and asked that his bill be cut down, whereupon deponent agreed if payment were made at once, they would be willing to accept seven hundred and fifty dollars ($750) in cash. Although repeatedly requested to pay same, and although often promised by the said defendant, said defendant, Ginsburg, has failed to pay anything for his said debt to deponent. Repeatedly letters and telephone messages were sent to defendant without reply, and attached hereto are copies of the letters addressed to the said defendant, Ginsburg, requesting payment of the account.

Said deponent has assigned the claim of Kessler & Kessler to Benjamin Birkenfeld for a valuable consideration.

NAT. KESSLER.

Sworn to and subscribed before
me this 3rd day of August,
1928.

LOUISE B. DENNIS,
Notary Public of N. J.

Affidavit of Harry T. Davimos.

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

HARRY T. DAVIMOS, being duly sworn, on his oath deposes and says that he is the attorney for the plaintiff in this matter. On Friday, July 27, 1928, at 4 P. M., the defendant, Abraham Ginsburg, appeared at deponent's office and there was present the plaintiff. That the defendant offered in settlement of his claim notes and cash in the sum of $750, admitting his debt and stating he was sorry he was delayed in paying it, but he meant to pay it right along, but in view of certain buildings operations, he was getting through, he was short of funds and that was the only way he could pay it, and if we did not accept this method of payment, he would go to some lawyer, file an answer and prevent us from getting a judgment. Deponent told him to come back on Monday to see whether it would be acceptable as plaintiff at this conference counted on his money. He came back the Monday following, and again returned on August 2nd, to see if the account could be paid by note and $750 in cash. Failing to find deponent in his office, defendant's answer and denial was interposed.

Defendant, Abraham Ginsburg, in the presence of plaintiff and deponent admitted both his debt to the attorneys who represented him in this matter and to the plaintiff for his services and the fulfillment of the contract upon which the claim for commission is based.

HARRY T. DAVIMOS.

Sworn to and subscribed before
me this 3rd day of August,
1928.

RUTH C. ROBINSON,
A Notary Public of New Jersey.

Affidavit of Harry T. Davimos.

I hereby agree to pay Ben Birkenfeld, Real Estate Broker, a commission of 2½% on the total rental for the entire term of the lease, for leasing property located on Fourth avenue between Fifteenth and Sixteenth street, East Orange, New Jersey, to the Warner-Quinlan Co. (Miliage Gas). Said commission payable in full on the signing of the lease and the granting of the permit.

A. GINSBURG.

May 12, 1928.

Mr. A. Ginsberg,
635 Franklin Ave.,
Nutley, N. J.

Dear Mr. Ginsberg:

This is just a reminder that your fee was to be paid on May 12th. Kindly give this matter your attention, and oblige,

Yours very truly,
KESSLER & KESSLER.

9/10

May 18, 1928.

Mr. A. Ginsberg,
635 Franklin Ave.,
Nutley, N. J.

My dear Mr. Ginsberg:

As yet I have not heard from you in reference to my recent letter and several telephone calls requesting a check.

Kindly give this matter your immediate attention.

Yours very truly,
KESSLER & KESSLER.

3/9

Affidavit of Harry T. Davimos.

May 24, 1928.

Mr. A. Ginsberg,
635 Franklin Ave.,
Nutley, N. J.

My dear Mr. Ginsberg:

We have repeatedly called you. We expect our clients to keep their promises, as we keep our promises to them.

Yours very truly,
KESSLER & KESSLER.

3/9

June 2, 1928.

Mr. A. Ginsberg,
635 Franklin Ave.,
Nutley, N. J.

My dear Mr. Ginsberg:

If I had treated your case the way you treated our fee, it would be very evident what your feelings in the matter would be.

You promised to pay ten days ago. There is no reason why we should not receive a check immediately and I shall expect a check by return mail.

Yours very truly,
KESSLER & KESSLER.

3/9

Affidavit of Harry T. Davimos.

July 7, 1928.

Mr. A. Ginsberg,
635 Franklin Ave.,
Nutley, N. J.

My dear Mr. Ginsberg:

We have made numerous calls, asking you to call us back, but have not heard from you.

Unless we hear from you Monday, July 9th, we intend to institute suit against you without further delay.

Yours very truly,
KESSLER & KESSLER.

3/9

Service of the within notice is hereby acknowledged this 3rd day of August, 1928.

MARDER & OKIN,
Attorneys for Defendant.

NOTICE OF MOTION TO AMEND THE COMPLAINT AND TO DISMISS ANSWER.

Filed August 27, 1928.

ESSEX COUNTY CIRCUIT COURT.

BEN BIRKENFELD, *Plaintiff,* vs. ABRAHAM GINSBURG, *Defendant.*	*Action at Law.* *Notice of Motion to Amend the Complaint and to Dismiss Answer.*

To Marder & Okin, attorneys for defendant, 810 Broad street, Newark, N. J.

SIRS:

TAKE NOTICE, that I shall move to amend my complaint, by adding paragraph 1a to paragraph 1 in the first count, before Hon. William A. Smith, at 10 o'clock in the forenoon on Monday, August 27, 1928, at the Court House, Newark, N. J., and at the same time move for dismissal of your answer filed in this matter, and for entry of summary judgment on affidavits heretofore filed and new affidavits hereto attached.

Dated August 14, 1928.

HARRY T. DAVIMOS,
Attorney for Plaintiff.

ESSEX COUNTY CIRCUIT COURT.

BEN BIRKENFELD, *Plaintiff,* vs. ABRAHAM GINSBURG, *Defendant.*	*Action at Law.* *Amended Complaint.*

The plaintiff, having an office in the City of Newark, County of Essex and State of New Jersey, says:

FIRST COUNT.

1. On February 14, 1928, the defendant employed the plaintiff as a real estate agent for the leasing of property. That attached hereto is a copy of the said agreement of employment.

1a. Said agreement for commission was performed by the plaintiff, by procuring a lessee the Miliage Gas Corporation, which corporation is a subsidiary of the Warner-Quinlan Co. That the said lease between the defendant and the Miliage Gas Corporation was approved in substitution of the one of the Warner-Quinlan Co., by the defendant thereto and accepted by the defendant as a full performance by the plaintiff of his employment, as agent under the terms of the attached commission agreement.

2. That the said plaintiff complied with all the terms of the said agreement and became entitled to a commission due thereunder in the sum of fifteen hundred and forty-five dollars ($1,545). Demand has been made for the payment of the

same, of the defendant, but the defendant has refused to pay the same.

SECOND COUNT.

1. The said defendant, Abraham Ginsburg, employed Kessler & Kessler as attorneys to handle the legal matter concerned in said contract of lease set forth in count one and agreed to pay for said services the sum of one thousand dollars ($1,000). Said claim has been assigned to the plaintiff. The said Kessler & Kessler as attorneys for defendant, became entitled to said fee by reason of full compliance with the term of their contract and by reason of said contract with the defendant, plaintiff claims the sum of one thousand dollars. Demand has been made for the payment of said sum, and which was refused. Plaintiff demands on the second count the sum of one thousand dollars ($1,000).

Judgment will be claimed on both counts for the sum of twenty-five hundred and forty-five dollars ($2,545), together with interest and costs of suit.

Dated August 14, 1928.

HARRY T. DAVIMOS,
Attorney for Plaintiff.

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

BENJAMIN BIRKENFELD, of full age, says: he was the agent in procuring the lessee for the defendant, A. Ginsburg, on premises located on Fourth avenue, East Orange, in fulfillment of the terms of a contract as agent and as set forth in the

complaint; that the original draft of lease as prepared by Joseph E. Cohn, attorney at law for Ginsburg, made the Warner-Quinlan Co. lessee; that to avoid long distance discussion on the lease, deponent drove to the New York office with defendant, Ginsburg, his attorney Joseph E. Cohn; the terms were discussed with the officers of the Warner-Quinlan Company and it was suggested that the lessee be changed to the Mileage Gas Corporation owned by Warner-Quinlan Company, as this was the company in whose name the leases of the Warner-Quinlan Company are taken. Mr. Ginsburg assented to the change, and his attorney, Joseph E. Cohn, accordingly changed the names of the lessee; which assent to such change was made with the consent of Ginsburg and at his final direction, and accordingly the said leases in compliance of deponent's contract was completed.

BENJAMIN BIRKENFELD.

Sworn to and subscribed before
me this 14th day of August,
1928.

THEODORE EHRENKRANTZ,
Notary Public of New Jersey.

Affidavit of W. W. McFarland.

Filed August 27, 1928.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.*

W. W. McFARLAND, of full age, being duly sworn, says: that he is the President of the Warner-Quinlan Co., and an officer of the Mileage Gas Corporation, which latter company holds the lease on property on Fourth avenue, East Orange, from A. Ginsburg, Benjamin Birkenfeld being the agent in procuring said lease. The original draft as submitted at our office in New York City by Joseph E. Cohn, attorney for Ginsburg, in the presence of Benjamin Birkenfeld, A. Ginsburg, deponent, and Joseph E. Cohn, was between Warner-Quinlan Co. and Ginsburg and deponent then stated that all leases were with their Mileage Gas Corporation, which substitution was then satisfactory to Ginsburg and the substitution was made accordingly.

W. W. McFARLAND.

Sworn to and subscribed before
me this 15th day of August,
1928.

N. J. PLUNKETT,
Notary Public, Kings County.
Kings Co. Clks. No. 405, Reg. No. 9258.
N. Y. Co. Clks. No. 551, Reg. No. 9011-A.
Commission Expires March 30, 1929.

Seal Attached.

Affidavit of Benjamin Birkenfeld.

Filed August 27, 1928.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.*

GEORGE FRANKEL, being an officer of the Warner-Quinlan Co., was present when the A. Ginsburg lease for property on Fourth avenue, East Orange, was considered in the presence of Benjamin Birkenfeld, agent, in procuring lease, Joseph E. Cohn, Ginsburg's attorney, and W. W. McFarland. The original draft made the lessee, Warner-Quinlan Co., but the Mileage Gas Corp. was suggested as a substitution, which suggestion was adopted by Ginsburg and a redrafted lease submitted and signed.

GEORGE FRANKEL.

Sworn to and subscribed before
me this 15th day of August,
1928.

N. J. PLUNKETT,
Notary Public, Kings County.
Kings Co. Clks. No. 405, Reg. No. 9258.
N. Y. Co. Clks. No. 551, Reg. No. 9011-A.
Commission Expires March 30, 1929.

Seal Attached.

Filed August 27, 1928.

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

Benjamin Birkenfeld, of full age, being duly sworn upon his oath, deposes and says: that he denies

1. That the Mileage Gas Corporation was substituted for the Warner-Quinlan Co., on con-

dition that the deponent was to postpone his commission as the lease progressed;

2. That deponent to collect his commisiion in full at once, was to furnish a bond guaranteeing the payment of rent. And

3. Deponent says, that the lessee was agreed upon directly in the presence of Joseph E. Cohn, attorney-at-law for Ginsburg, without any reference whatsoever as to the commission; that the said Joseph E. Cohn has admitted the debt is due deponent as of date of signing of lease; any facts or information or change was always fully within the knowledge and presence and with the consent of both Ginsburg and his attorney Cohn. Absolutely nothing was said about commission or method of payment, when Mileage Gas Corporation was substituted for the Warner-Quinlan Co.

Deponent attaches his letters wherein the time was fixed and kept in the office of Warner-Quinlan Co. in New York, wherein Joseph E. Cohn, Ginsburg and deponent attended, at which conference the change was made to make the lessee the Mileage Gas Corporation owned by Warner-Quinlan Co. It then took deponent until February 14, 1928, that is from January 24, to get his contract for commission. Due to the identity of the Warner-Quinlan Co. with Mileage Gas Corporation, deponent framed his commission agreement in the form set forth; the lease was actually signed March 6, 1928.

BENJAMIN BIRKENFELD.

Affidavit of Harry T. Davimos.

Sworn to and subscribed before me this 24th day of August, 1928.

THEODORE EHRENKRANTZ,
A Notary Public of New Jersey.

Filed August 27, 1928.

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

Harry T. Davimos, of full age, being duly sworn, says in addition to his previous deposition: that defendant Ginsburg ignored deponents letter that suit would be started as herein, that after suit was started Ginsburg got after Birkenfeld to make an appointment with deponent to settle his case; that the appointment was made and kept as stated before, and an offer of $750.00 cash and notes for balance tendered by defendant without solicitation or promise of any kind; absolutely nothing was said about a bond or postponement of commission, but Ginsburg definitely stated that if his proposition wasn't accepted he would get delay by hiring a lawyer to file an answer of some kind.

HARRY T. DAVIMOS.

Sworn to before me and subscribeded this 24th day of August, 1928.

THEODORE EHRENKRANTZ,
A Notary Public of New Jersey.

Affidavit of Abraham Ginsburg.

AFFIDAVITS ON BEHALF OF DEFENDANT.

Filed August 13, 1928.

ESSEX COUNTY CIRCUIT COURT.

BEN BIRKENFELD, *Plaintiff,* *vs.* ABRAHAM GINSBURG, *Defendant.*	*Action at Law.* *Affidavit on Behalf of Defendant.*

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

Abraham Ginsburg, of full age, being duly sworn up his oath, deposes and says:

I am the defendant in the above-entitled cause and I admit that I employed Ben Birkenfeld to secure the Warner-Quinlan Co. as a tenant for my property on Fourth avenue, between Fifteenth and Sixteenth streets, East Orange, New Jersey, and I further state that said Ben Birkenfeld never earned a commission from me in connection with said premises and never procured for me said Warner-Quinlan Co. as a tenant for said premises and never leased said premises to said Warner-Quinlan Co. I never acknowledged any indebetdness in connection with the leasing of said premises to anyone whatsoever.

I never retained Messrs. Kessler & Kessler, attorneys at law of this State, in connection with said premises or the procuring of a permit for said premises and any services that they may have performed were not performed for

me or at my request, but were performed for some other person, and I never admitted that I owed Kessler & Kessler any money in connection with said premises, or the procuring of a permit in connection with same.

I did endeavor to settle this case without prejudice and with that in view negotiated with Mr. Davimos, attorney for the plaintiff, and offered him as much as seven hundred and fifty ($750.00) without admitting, however, any liability on my part, but we could not get together and the negotiation fell through.

I told Mr. Davimos that if my settlement was not agreeable to him that, of course, I would defend any action that he might bring.

ABRAHAM GINSBURG.

Subscribed and sworn to before me this 13th day of August, 1928.

EDNA L. CHAMBERLAIN,
Notary Public of New Jersey.

Affidavit of Abraham Ginsburg.

ESSEX COUNTY CIRCUIT COURT.

Filed August 27, 1928.

BEN BIRKENFELD, *Plaintiff,* *vs.* ABRAHAM GINSBURG, *Defendant.*	*Action at Law.* *Affidavit.*

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

Abraham Ginsburg, of full age, being duly sworn on his oath, deposes and says that:

I have read the affidavit of Ben Birkenfeld, wherein he states that I assented to the change of the name inserted in the lease in question, from Warner-Quinlan Co. to Mileage Gas Corporation. This is true but before the execution of the lease I told Birkenfeld that the Mileage Gas Corporation was not as responsible a lessee as the Warner-Quinlan Co., that there were no commissions payable to him under my original agreement with him (Birkenfeld) that I would only pay a reasonable commission, said commission not to be paid in advance but only when Mileage Gas Corporation took possession of the premises leased and erected thereon a gasoline station and paid rents thereunder; I also informed Mr. Birkenfeld, the plaintiff, that the commissions would only be paid as the rents were paid so that said commissions would have to run over a period of fifteen years payable in yearly installments at the end of each current year of said lease as rents thereunder were paid;

Affidavit of Abraham Ginsburg.

I also at that time stated to Birkenfeld that if I were given a surety bond for the payment of rent under said lease, I would pay Birkenfeld his commissions in full. Birkenfeld consented to all this and said he would either furnish a surety bond or receive his commissions as and when the rents were paid.

No rents have been paid under said lease to date and no gasoline station has as yet been erected on the premises mentioned in said lease, and no surety bond has been furnished me for the rents under said lease.

(Signed) ABRAHAM GINSBURG.

Subscribed and sworn to before me at Newark, N. J., this 24th day of August, 1928.

(Signed) EDNA L. CHAMBERLAIN,
Notary Public of New Jersey.

Affidavit of Abraham Ginsburg.

Filed August 27, 1928.

ESSEX COUNTY CIRCUIT COURT.

BEN BIRKENFELD, *Plaintiff,* vs. ABRAHAM GINSBURG, *Defendant.*	*Action at Law.* *Affidavit.*

ABRAHAM GINSBURG, of full age, being duly sworn on his oath, deposes and says:

I have read the affidavit of Ben Birkenfeld sworn to on the 24th day of August, 1928. I refer particularly to the third paragraph wherein Ben Birkenfeld states that Joseph E. Cohn has admitted the debt was due to him as of the date of the signing of the lease. Any admission made by Joseph E. Cohn was without authority given by me. Mr. Cohn, insofar as I can ascertain, knew nothing about any substituted arrangement which I had with Mr. Birkenfeld, in connection with the commissions in question, Mr. Birkenfeld and I having discussed the commission subject at my office. Mr. Joseph Cohn personally told me that he knew nothing and said nothing to anybody about my commission arrangement with Mr. Birkenfeld. I have also read the affidavit of Harry T. Davimos, attorney of the plaintiff in this cause, wherein he states that I offered seven hundred and fifty ($750) dollars in cash and notes to the defendant as settlement. This is true but I stated at the time that any offer I made to Mr. Davimos or his client was made

without prejudice to my right to defend a suit in case a settlement did not go through.

I never stated that if my proposition of settlement was not accepted that I would get delay by hiring a lawyer to file an answer of some kind.

In connection with the claim for legal services with Messrs. Kessler & Kessler, as I stated in my prior affidavit, I never retained them to perform any services for me and such services were never performed for me, but for Mr. Birkenfeld. However, when I was asked to pay by Messrs. Kessler & Kessler, I finally consented to pay something for their legal services, and offered to give them two hundred ($200) dollars, which they refused.

It is true that the original draft of the lease was between myself and the Warner-Quinlan Co., and these were submitted at the office of the Warner-Quinlan Co. in New York City, I being present. Then we left the Warner-Quinlan office, and some time afterwards, the lease was signed with the Mileage Gas Corporation.

(Signed) ABRAHAM GINSBURG.

Sworn and subscribed to before
me this 27th day of August,
1928.

(Signed) EDNA L. CHAMBERLAIN,
Notary Public of New Jersey.

ORDER STRIKING OUT ANSWER AND FOR ENTRY OF SUMMARY JUDGMENT.

Filed August 29, 1928.

ESSEX COUNTY CIRCUIT COURT.

BEN BIRKENFELD, *Plaintiff,* *vs.* ABRAHAM GINSBURG, *Defendant.*	*Order Striking out Answer of Defendant and for Entry of Summary Judgment.*

This matter being opened to the Court by Harry T. Davimos, attorney for the plaintiff, and in the presence of Aaron Marder, attorney for the defendant, and after reading and filing affidavits herein and argument heard on August 13, 1928, and it appearing that the relief asked, namely, to dismiss the answer, be granted upon the plaintiff amending the complaint, and the matter being heard and continued until August 27, 1928, for that purpose, and it further appearing that the complaint has been amended as filed herein, and that the attorney for the defendant appeared on the said 27th day of August, 1928, in open court and in the presence of Harry T. Davimos, attorney for the plaintiff, with further affidavits and argument to the amended complaint, and it appearing that the further answering affidavits are without merit and that the defendant has failed to show such facts as entitle him to defend,

Order Striking Out Answer, etc.

It is on this 28th day of August, 1928, ORDERED, that the defense be struck out and final judgment be entered for plaintiff for the sum of twenty-five hundred and forty-five ($2,545) dollars together with interest and costs of suit.

WM. A. SMITH,
Judge of the Essex County Circuit Court.

NOTICE AND GROUNDS OF APPEAL.

Filed September 27, 1928.

ESSEX COUNTY CIRCUIT COURT.

BEN BIRKENFELD, *Plaintiff,* vs. ABRAHAM GINSBURG, *Defendant.*	*Action at Law.* *Notice and Grounds of Appeal.*

To Harry T. Davimos, Esq., attorney for plaintiff:

SIR:

PLEASE TAKE NOTICE, that Abraham Ginsburg, the defendant in the above-entitled cause, appeals to New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. Because the Circuit Court erred in striking out the answer of the defendant and giving the plaintiff summary judgment.

2. Because summary judgment herein illegally deprives this defendant of a trial by jury.

3. Because the affidavits submitted by the defendant present a good and valid defense.

4. Because the affidavits submitted by defendant controvert the alleged facts set up in plaintiff's affidavits.

5. Because the complaint as amended does not allege delivery to the defendant of a copy

of the bill of the fees, charges and disbursements of Messrs. Kessler & Kessler.

6. Because the affidavits submitted by defendant show that plaintiff was not entitled to any commissions.

7. Because the affidavits submitted by defendant show that plaintiff was not entitled to any commission when the suit was instituted.

8. Because the pleadings and affidavits show that plaintiff was not entitled to any commissions.

9. Because the pleadings and affidavits show that plaintiff was not entitled to any commissions when the suit was instituted.

10. Because the affidavits submitted by defendant show that Messrs. Kessler & Kessler had earned no fees from the defendant.

11. Because there is no proof of the value of the alleged services of Messrs. Kessler & Kessler.

12. Because the affidavits submitted on behalf of plaintiff fail to state the belief of plaintiff that there is no defense to the action.

13. Because the affidavits submitted on behalf of the plaintiff fail to state the belief of any other person that there is no defense to the action.

Respectfully yours,

MARDER AND OKIN,
Attorneys for Defendant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

BEN BIRKENFELD, *Plaintiff-Appellee,* *vs.* ABRAHAM GINSBURG, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Essex County Circuit Court.*

BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

This is an appeal from a summary judgment entered in the Essex County Circuit Court (p. 29).

Statement of Facts.

The complaint contains two counts: The first alleging the earning of commissions in the sum of $1,545.00 and the second alleging an assigned claim of Messrs. Kessler & Kessler, lawyers, in the City of Newark, for professional services at an agreed price of $1,000.00 (pp. 2 and 3).

The answer (p. 4) denied the first and second counts of the complaint.

Upon plaintiff's motion to strike out the answer, the court below suggested an amendment to the complaint (see order on p. 29) and the material amendment is to the first count (p. 16). The original complaint had attached to it an agreement wherein the defendant agreed to pay commissions to plaintiff for the leasing of the premises in question to the *Warner-Quinlan Co.* The amended complaint alleged in its first count that the agreement was performed by the procuring as a lessee the *Miliage Gas Corporation,* which

corporation is a subsidiary of the Warner-Quinlan Co. and that the Miliage Gas Corporation was approved in substitution of the Warner-Quinlan Co. by the defendant and *accepted* by him as a full performance of said commission agreement.

Defendant makes no point of the fact that he was given no opportunity to file an answer to the amended complaint (see Order on page 29) and defendant will assume for the purpose of this appeal that an answer was filed by him denying the amendments to the complaint.

POINT I.

(1) Plaintiff's affidavits must establish a good cause of action; (2) Defendant's affidavits must show that he has a probable (though not necessarily good) defense; (3) Plaintiff's affidavits must establish a cause of action as set forth in the complaint.

Supreme Court Rules 80 and 81, upon which the application for summary judgment was based, read as follows:

> "80. When an answer is filed in an action brought to recover a debt or liquidated demand arising—
>
> (a) Upon contract express or implied, sealed or not sealed; or,
>
> (b) Upon a judgment for a stated sum; or
>
> (c) Upon a statute;
>
> the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend.
>
> 81. The motion to strike out shall be made upon affidavit of the plaintiff or that of any

other person cognizant of the facts, *verifying the cause of action,* and stating the amount claimed and his belief that there is no defense to the action." (Italics ours.)

Propositions 1 and 2 in this heading are set forth in *Meyers* v. *Nickelsburg Bros. Co.,* 37 N. J. Law Journal, 36, wherein the opinion of Judge Adams reads partly as follows:

"In order to apply these rules intelligently it is necessary, first, to inquire as to their intent. Under what circumstances and to what extent may trial by jury be supplanted by the more expeditious process of trial by affidavit? One of the briefs submitted on behalf of the plaintiff deals largely with decisions of the English courts construing and applying rules which much resemble ours. The gist of these decisions is stated to be that unless the defendant shows by affidavit that he has probably (though not necessarily good) defense, the motion should be granted and the plaintiff permitted to take judgment. The English judges have said that what the defendant must show is that he has a bona fide defense, one which he may be able to establish, a plausible ground of defense, something fairly arguable and of a substantial character. *On the other hand, what a plaintiff who verifies his cause of action must show in order to entitle him to summary judgment is that he has a clear case against the defendant.*" (Italics ours.)

The third proposition in this heading is established in *Smith* v. *Hopping,* 88 N. J. Law, 195, the opinion of Mr. Justice Garrison for this Court reading partly as follows:

"Upon motion to strike out the answer the only question was whether it was false or frivolous, *i. e.,* untrue in fact or not responsive to the complaint. The plaintiff averred in his complaint as the basis of his cause of action, that he had sold the property of the defendant to Charles A. Terrill.

If the fact thus pleaded was untrue, the other averments of the complaint were without significance. The answer to this essential averment of the complaint was that it was not true that the plaintiff had sold the defendant's property to Charles A. Terrill.

* * * * * * * *

What was disclosed by the affidavits was that shortly after the defendant had agreed to pay the plaintiff a commission on the sale of his property, the plaintiff introduced him to a man named Walker, who stated that he was considering defendant's property as a site for a hotel, the erection of which was under consideration by parties interested in a corporation not yet formed for whom the purchase was contemplated. The price demanded by the defendant, viz.: $45,000, being satisfactory to Walker, he suggested that pending the formation of the corporation that was to purchase the property, an agreement to sell should be made to a straw man, who would hold it until the company was formed and then assign it to the real purchasers. In execution of this arrangement such an agreement was drawn up and signed, the name of the 'straw man' being Charles A. Terrill. It was the understanding of all parties that Terrill was a mere conduit, without financial ability or interest in the transaction. The plaintiff took no part in this transaction, although he was cognizant of the facts.

When, therefore, the plaintiff averred as a fact that he had sold the defendant's property to Charles A. Terrill and the defendant answered that it was not true, if either pleading was at fault it was the plaintiff's and not the defendant's, and if either was untrue it was the complaint and not the answer; for if the complaint was in any sense true it was only so because of a legal conclusion drawn by the pleader from undisclosed facts, which is bad pleading that will not be imputed to a complaint that apparently makes a direct averment of a matter of fact. It is only by

condoning the plaintiff's error in pleading, and then condemning the defendant for properly treating it as good, that the answer can be stricken from the record. Such a course is forbidden by the fundamental principle of estoppel, for the plaintiff by the presumed compliance of his complaint with the rules of correct pleading induced an answer that was both true and responsive, and hence cannot be permitted to strike it out on the ground that the complaint did not in reality comply with the rules of correct pleading. In such a case the first fault is with the plaintiff's pleading; if he is dissatisfied with the issue he has thus tendered, his remedy is not to strike out the answer but to amend his complaint.

The same result is required by the fundamental rule that a judgment is the determination of law upon the matters contained in the record, which is not the case if a judgment for one cause of action be rendered upon a complaint that sets up a different cause of action. Such a judgment would be like decreeing a divorce upon ex parte affidavits showing desertion when the petition charged the adultery of the defendant.

In the present cause the defendant's answer, which was unexceptionable under the rules of correct pleading, was struck out and a summary judgment entered against him upon a state of facts which, if it existed at all in the mind of the plaintiff, was in nowise disclosed by his pleading. Such a judgment is not a determination of law upon the matters contained in the record but upon matters entirely de hors the record. The fundamental error was in striking out the defendant's answer on the strength of the new state of facts developed upon the hearing of the motion, which should have led not to the striking out of the answer but to a grant of permission to the plaintiff to amend his complaint if he desired to obtain the judgment of the law upon such new state of facts. As long as the present averment of the com-

plaint stands, the answer cannot be struck out as irresponsive or untrue whatever may be the merits of the new cause of action disclosed by the affidavits, which presenting, as they do, questions of law both nice and difficult, and involving matters of fact that may require for their settlement the verdict of a jury, cannot properly be made the basis of a judgment until the record has been so amended as to present them or at least to admit of their presentation."

POINT II.

Plaintiff's affidavits do not establish a cause of action on the first count; plaintiff's affidavits do not sufficiently verify the complaint.

It is patent that proof by plaintiff of procuring the Miliage Gas Corporation as lessee does not entitle plaintiff to the commissions under the agreement in question, which only entitled plaintiff to commission for leasing to the Warner-Quinlan Co., the sellers of Miliage Gas, miliage gas being a product of the Warner-Quinlan Co. and a trade name for said product. It is further submitted that the addition of the words "Miliage Gas," in parenthesis, to the words "Warner-Quinlan Co." in the agreement in question (p. 3) is merely descriptive of the kind of gas the Warner-Quinlan Co. produces and/or sells and does not cause the leasing to the Miliage Gas Corporation to be an alternative to the earning of commissions under said agreement.

Nor do the affidavits submitted on behalf of the plaintiff (pp. 17 to 21 inclusive) state, as alleged in the amended complaint, that the defendant *accepted the substitution as a full performance by plaintiff of his agreement.* It is submitted that proving that the defendant was satisfied to accept the Miliage Gas Corporation as a tenant in place

of the Warner-Quinlan Co. does not prove that he was satisfied or agreed to pay commissions on an agreement which called for the payment of commissions upon leasing to the Warner-Quinlan Co., nor does it indicate or show a waiver by defendant of leasing to the Warner-Quinlan Co. as a condition precedent to the maturing of his obligations to pay commissions under said agreement.

It will also be noticed that the plaintiff's second group of affidavits submitted when the application was argued on the adjourned date on August 27, 1928, distinctly vary and depart from plaintiff's affidavits submitted when the motion was first argued, on August 13, 1928. The first group of affidavits (pp. 7 to 12, inclusive) attempt to verify the first count before amendment thereto and state that upon the signing of the lease in question the plaintiff became entitled to his commissions, the inference being that the lease was signed with the Warner-Quinlan Co.; on the other hand, the second group of affidavits (pp. 17 to 22 inclusive) state that the original lease was drawn for signature by the Warner-Quinlan Co., as lessee, that the terms were discussed with the officers of the Warner-Quinlan Co., and it was suggested that the lessee be changed to the Miliage Gas Corporation which was owned by the Warner-Quinlan Co. and that the defendant assented to this change. Surely this conflict between the two groups of affidavits submitted by and on behalf of the plaintiff is not such a verification of plaintiff's cause of action as to entitle plaintiff to a summary judgment.

POINT III.

Plaintiff's affidavits show a different cause of action, if any, than that set forth in the second count of the complaint.

The second count of the complaint as originally filed (p. 2) and as amended, reads exactly alike and in so far as pertinent provides as follows:

> "The said defendant, Abraham Ginsburg, employed Kessler & Kessler as attorneys to handle the legal matter concerned in said contract of lease set forth in count one and *agreed to pay for said services* the sum of one thousand dollars ($1,000). Said claim has been assigned to plaintiff. *The said Kessler & Kessler as attorneys for defendant, became entitled to said fee by reason of full compliance with the term of their contract and by reason of said contract with the defendant, plaintiff claims the sum of one thousand dollars.* (Italics ours.)

Plaintiff attempts to substantiate this allegation in the complaint, which alleges an express agreement to pay an agreed sum of $1,000.00 for specific services, by the affidavit of Nathanial Kessler (pp. 9 and 10) which reads in so far as pertinent as follows:

> "That deponent performed all the legal services in connection therewith and attended regularly upon the Commission sitting, and followed all the necessary requirements until said permit was successfully obtained.
>
> *No fee had been agreed upon as to what the charge was to be for the services, but it was understood it was to be worked on a contingent basis. At the conclusion of the work, to wit, on or about April 28, 1928, when the permit was obtained, then deponent requested payment of one thousand dollars ($1,000) from Ginsburg for his services.*" (Italics ours.)

It is submitted that Mr. Kessler's affidavit attempts to prove a claim to compensation upon reasonable value and not upon express contract and falls directly within the inhibition laid down in the ruling in the *Smith* v. *Hopping* case, above cited and quoted from; that the affidavit is a distinct variation and departure from the facts alleged in the complaint.

POINT IV.

There is no proof of the value of services alleged to have been rendered by Messrs. Kessler & Kessler.

The affidavit of Mr. Nathaniel Kessler above mentioned contains absolutely no proof of the value of the alleged services rendered by Messrs. Kessler & Kessler, nor do any of the affidavits submitted on behalf of the plaintiff contain any such proof. Said affidavits do contain statements alleging admission by the defendant of his indebtedness to Messrs. Kessler & Kessler because of the alleged services rendered but this is denied in defendant's affidavits which state that he had attempted to settle without admitting liability (see affidavit of defendant, pp. 23 and 24). There was, it is submitted no sufficient verification of the second count.

POINT V.

The affidavits submitted on behalf of the defendant sufficiently controvert the allegations in the first count of the complaint and show a probable and bona fide defense and entitle him to a trial by jury.

Defendant's affidavits (pp. 23-28) contain a full and complete denial of the allegations and

statements contained in the original and amended complaint and all the pertinent statements in the plaintiff's affidavits in support thereof. It is true that defendant's affidavits admit the hiring of the agent but that is all that they do admit. They deny the leasing to the Warner-Quinlan Co. and this is also borne out by plaintiff's affidavits. They deny admissions of liability and state instead that settlements without prejudice were proposed.

Furthermore the defendant's affidavits tell a complete story of the negotiations and transactions, particularly the affidavit on pp. 25 and 26, and if accepted as true (and it is submitted that for the purposes of the application for summary judgment the affidavits must be accepted as true), show that no commissions were to be payable to plaintiff until the Miliage Gas Corporation began to pay rent and then only reasonable commissions and show also that no admission of liability was made but that offers of settlement were made without prejudice.

It is further submitted that the variation in and conflict between the two groups of affidavits submitted by the plaintiff, above pointed out, entitle defendant to have plaintiff's story passed on by a jury.

POINT VI.

The affidavits submitted on behalf of the defendant sufficiently controvert the allegations in the second count of the complaint and show a proper and bona fide defense and entitle him to a trial by jury.

Defendant's affidavits contain a full and complete denial of the allegations and statements

contained in the original and amended complaint and the affidavits in support thereof.

Defendant's affidavits deny the hiring of Messrs. Kessler & Kessler; they deny the admissions of liability and state instead that settlements without prejudice were proposed.

It is respectfully submitted that on an application for summary judgment, defendant's affidavits should be taken as true, and hence said affidavits show a proper and bona fide defense.

The fact that the commission agreement itself provided that commissions were payable only upon the granting of the permit, raises a strong inference that the agent himself engaged Messrs. Kessler & Kessler for the procuring of the permit so that he could earn his commissions, and such an inference surely sufficiently supports defendant's denial so as to entitle him to a jury trial on the question of his liability.

POINT VII.

The affidavits submitted on behalf of plaintiff fail to show that the plaintiff, or any other person, has stated his belief that there is no defense to the action, and hence there should have been no summary judgment.

Careful examination of the affidavits submitted on behalf of the plaintiff fail to show or indicate any such statement.

In *Great American Indemnity Company* v. *Gronowicz,* 6 Miscellaneous, 821, the opinion by Justice Katzenbach reads partly as follows:

> "These defenses are all met by the affidavits submitted. They are either sham or frivolous. The difficulty, however, with striking out the answer at this time, and entering

summary judgment, is that the plaintiff elected to file a reply reserving therein the right to strike out the answer on the ground that it was sham and frivolous." * * *

"This court can, if in its opinion justice is defeated by the application of a rule, act contrary to the rule. Rule 30, however, is based upon and is the same as section 16 of the Practice Act of 1912 and is therefore statutory. In my opinion the plaintiff having elected not to address a motion to the answer, and having filed a reply with the reservation mentioned, must be held to the election.

Rule 81 of the Supreme Court, which is section 58 of the Practice Act of 1912, provides as follows:

"The motion to strike out, shall be made upon affidavit of the plaintiff or that of any other person cognizant of the facts, verifying the cause of action, and *stating* the amount claimed and his *belief that there is no defense to the action.*"

An examination of the affidavits submitted by the plaintiff fails to show that the plaintiff, by an officer or authorized agent, has stated its belief that there is no defense to the action. This is necessary.

For these reasons the motion will be denied. (Italics ours.)

In conclusion it is respectfully submitted that the judgment of the court below should be set aside and for nothing holden.

MARDER & OKIN,
Attorneys for Defendant-Appellant.

AARON MARDER,
Of Counsel with Defendant-Appellant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

BEN BIRKENFELD, *Plaintiff-Appellee,* *vs.* ABRAHAM GINSBURG, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Essex County Circuit Court.*

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE.

The plaintiff filed his complaint against the defendant on Two Counts, the first for Fifteen Hundred and Forty-five Dollars ($1545) pursuant to a written commission agreement signed by the defendant and set forth on (page 12, State of the Case).

The Second Count for legal services which the defendant had agreed to pay Kessler & Kessler as attorneys, on a contract of employment.

Each count sets forth a separate and distinct cause of action. The defendant denies generally, by his answer, both debts. The plaintiff then moved for a summary judgment. This was entered as appears by the order (p. 29, State of the Case).

Rule 80 of the Supreme Court rules (Practice Act 1912, paragraph 15) sets forth that a summary judgment may be entered and an answer struck out and judgment final entered upon motion and affidavits when it appears that the proofs do not show facts as may be deemed by the Judge hearing the motion, sufficient to entitle the defendant to answer, if the claim is

(A) Upon a debt on expressed or implied contract, sealed or not sealed.

Count One is based upon an expressed employment for a liquidated sum of Fifteen Hundred and Forty-five Dollars ($1545) commission due under a lease negotiated by the plaintiff for the defendant.

Count Two is for a compensation of One thousand dollars ($1,000) under a contract of employment assigned to the plaintiff and against the defendant and which debt the defendant admitted. Thus both counts are expressly within Rule 80 of the rules of the Court.

POINT 1.

The defendant says the lower court erred because the contract of employment to pay a commission recites Warner-Quinlan Company (Mileage Gas). The trial court made clear the ambiguity, if any, by directing the pleadings to be amended in such form that it was clear that the Mileage Gas was intended to mean Mileage Gas Corporation, owned entirely by the Warner-Quinlan Company, and by proof that the defendant consented that the lease with the Mileage Gas Corporation had earned a commission for plaintiff. See Amended complaint (p. 16, State of the Case).

As a matter of fact the contract for commission was intended to cover a lease with either company (Warner-Quinlan Company or Mileage Gas Corp.). The amendment only supplied the word "Corp." to the language of the commission agreement.

POINT 2.

The defendant states the trial court erred in entering a summary judgment because the affidavits of the plaintiff do not state his belief that there is no defense to the action, relying upon "*Great American Indemnity Company* v. *Gronowicz,* 142 Atlantic, page 897. Justice Katzenbach had before him a consideration of the order of pleadings and that alone was sufficient to decide that particular case. The recital of Section 58, therefore, of the Practice Act of 1912 was unnecessary for the decision in that case.

Nevertheless, Rule 5 of the Practice Act 1905 (Rule 218 Rules of the Supreme Court) states "That the rules shall be considered as general rules for the government of the Court and the conducting of causes, and as the design of them is to facilitate business and advance justice, it may be relaxed or dispensed with by the Court, in any case where it shall be manifest to the Court that a strict adherence to them will work surprise or injustice."

Further, under Rule 27 of the Practice Act of 1912, it says "No judgment shall be reversed or new trial granted on the ground of mis-direction or improper admission or exclusion of evidence, nor for error as a matter of pleading or procedure." Thus it must appear that the error complained of injuriously affected the substantial rights of the party in order to obtain a reversal.

It appears by the affidavit of the plaintiff Ben Birkenfeld (p. 9, l. 2, of the State of the Case) that a substantial compliance of Rule 58 exists, for therein defendant says he would make payment, and fixed a time for doing so, and finally refused. Again (p. 10, l. 23, State of the Case) in the affidavit of Mr. Kessler, it appears that

the defendant promised to make payment and refused. Again in the affidavit of Harry T. Davimos, it appears (p. 11, l. 14, State of the Case) that the defendant in the presence of plaintiff, and with deponent, openly admitted his debt and said he would pay Seven Hundred and Fifty Dollars ($750) in cash, and the balance in notes, and if not accepted, he would file an answer and prevent collection of the same. In his own affidavits, he repeatedly admits the debt, but denies his willingness to pay (p. 24, l. 14, State of the Case), the defendant says "I was willing to pay $750 and never admitted any part of the debt," and then again in his own affidavit (p. 27, l. 36, State of the Case) he again says he was willing to pay $750 in cash and notes in payment of his entire account. It is submitted these various statements in the affidavits are the equivalent of a charge verifying the cause of action, and that the defendant had no defense to the same.

POINT 3.

It is said by the defendant that a Jury question was presented by the pleadings and the affidavits. The defendant in writing made himself liable for the commission under Count 1. By his own agreement and admissions of debt, he was liable under Count 2. Disregarding the affidavits of the plaintiff for the time being, it is quite clear from the defendant's own position before the trial court, that he sets forth a complete admission of debt on both counts. His first affidavit (p. 23, State of the Case, l. 32) "I never acknowledged any indebtedness in connection with the leasing of said premises to anyone whatsoever. I never retained Kessler & Kessler as attorneys in connection with the leasing of the premises. I never admitted that I owed Kessler &

Kessler any money in connection with the premises or the procuring of a permit for said permises." The same defendant, through a series of perjuries, recognized by the trial court, in each succeeding affidavit fixed the debt upon himself. In his affidavit (p. 25, State of the Case) he says "I assented to the change of the name from Warner Quinlan Co., to Mileage Gas Corporation. This is true."

Further in his first affidavit (p. 24, State of the Case) the defendant says "I offered Mr. Davimos as much as Seven Hundred and Fifty Dollars ($750), without admitting liability on my part."

In his affidavit (p. 27, State of the Case) the defendant says "I have read the affidavit of Harry T. Davimos, attorney, wherein he states I offered $750 in cash and notes to the defendant as settlement. This is true."

In the first affidavit (p. 23, State of the Case) there is a denial of the employment of Kessler & Kessler. Later, the defendant says he consented to pay for legal services, the sum of Two Hundred Dollars ($200). In the same affidavit, he acknowledges his entire debt, and offered to pay $750 in cash and the balance in notes.

It nowheres appears that anyone induced the defendant to make these offers. No one induced him to make these statements without prejudice. He came of his own accord into the office of the attorney of the plaintiff, two days before the time for answering expired. Then he made his offer as he says by his own affidavit, of $750 in cash and the balance in notes, in liquidation of both claims as set forth in the complaint, and when this was refused he said he would hire a lawyer to cause delay.

The trial court was justified in believing the defendant's admission of full debt, under oath. The defendant by a series of perjuries attempted to evade a summary judgment by suggesting various methods of paying his debt.

The defendant failed to call the trial court's attention to any technical omissions in the affidavits. He is thus barred from raising these points on appeal. The rules of this court were adopted and designed for the general conduct of causes of action, to facilitate business and advance justice.

Respectfully submitted,

HARRY T. DAVIMOS,
Attorney for Plaintiff-Appellee.