

No 31

## New Jersey Court of Errors and Appeals

*Between*

LINCOLN FURNITURE Co., a  
corporation,

*Complainant-Appellant,*

*and*

RACHEL BORNSTEIN, NEWTON  
A. BORNSTEIN and ALFRED  
FRIED,

*Defendants-Appellees.*

*On Appeal  
from  
Chancery.*

BACKES,  
V.-C.

*Decree for  
Defendants.  
Complain-  
ant's Appeal.*

### BRIEF FOR DEFENDANTS-RESPONDENTS ON APPEAL.

(Italics, &c., except where otherwise noted,  
ours.)

#### Statement of the Case.

The Bill (p. 7), was filed by complainant, the occupant of premises No. 47 Market street, Newark, to enjoin defendants, Bornsteins, from prosecuting a suit in dispossession in the Second District Court of the City of Newark against one Carl Worman. The latter leased the premises from defendants Bornstein by lease dated December 8, 1919 (lease printed p. 127). The basis of the action brought by the landlords against the tenant in the District Court was an alleged violation of a covenant contained in the lease as follows:

“The party of the second part does further promise and agree that he will not re-let or under-let the said premises or any part thereof nor assign this lease, without the written consent of the party of the first part,

their heirs or assigns, under penalty of forfeiture and damages" (p. 130).

The fact of assignment was admitted by complainant. The formal assignment is printed (p. 199) and bears date February 29, 1924. It is claimed by complainant that the actual assignment was made on December 15, 1919, and that the assignment of February 29, 1924, is confirmatory of the prior assignment and it is so stated in the formal assignment. Pending the litigation defendant Fried succeeded to the rights of the landlords and addition to the bill by way of supplement was filed (p. 36). While the addition by way of supplement (p. 36) alleges that the rights of Fried are inferior to those of the original landlords by reason of his acceptance of rent pending litigation, that point was abandoned because all rents were accepted under the terms of an order of the Court and without prejudice. I concede, and have never contended the contrary, as counsel for appellant states at p. 35 of his brief, that Fried has no greater rights than the original landlords. They stand in the same position.

The basis upon which the injunctive relief was asked was that the landlords had waived the violation of the provisions of the lease. It is not contended that there was any written consent to the assignment or formal waiver; nor is it contended that there is any *direct* proof in the case of knowledge of the assignment on the part of the landlords. Waiver is sought to be spelled out by the acceptance of rent by the landlords with knowledge of the breach of the covenant, which knowledge it is sought to *infer* by the existence of certain facts and circumstances.

The issue tendered was one of fact and was resolved by the Vice-Chancellor against the

complainant (Opinion, p. 39); final decree was entered (p. 47) from which this appeal was taken. (Petition of Appeal, p. 2.)

### THE LAW.

A consideration of the brief of counsel with appellant indicates that underlying his contention is the idea that notice of such facts as would put a reasonable man upon inquiry is equivalent to knowledge in a case of waiver, and counsel cites (p. 31 of his brief, &c). *Pomeroy on Equity Jurisprudence*, 4th Edition, Vol. 2, page 1104; *Hodge's Executors v. Amerman*, 40 N. J. Eq. p. 99; *Lacombe v. Hedley*, 91 N. J. Eq. 63; *Davenport v. Prentice*, 126 App. Div. 451, at p. 459-460.

Pomeroy, in Sec. 5, of his 4th Edition, Vol. 2, page 1100, entitled "Concerning Notice" is speaking of notice as affecting priorities of equities, and what he says on constructive notice has no reference whatever to waiver. For the purpose of determining priorities of equities equity has developed a theory of constructive notice which, in the language of Pomeroy, at p. 1104 "is somewhat artificial and even technical."

But the doctrine of waiver has no reference to notice. It is the relinquishment of a *known* right. It is a branch of contract law not of equity.

While *actual* notice of a right makes the right a *known* right, the doctrine of constructive notice cannot make the right a "*known*" right as a matter of fact. The facts and circumstances may be sufficient for the Court to find, as a fact, that the person charged to have waived *knew* the right, but that is a matter of fact. *Actual knowl-*

*edge* must be found, or the doctrine of waiver cannot be applied.

*Hodges Executors v. Amerman*, 40 N. J. Eq. p. 99, is a typical case where the doctrine of constructive notice was applied to determine priorities of equities. The question there was as to the validity of an unregistered deed as against a subsequent judgment creditor where the grantee was in possession and the question was whether the subsequent judgment creditor, by reason of the possession of the grantee, was charged with knowledge of his prior right and it was held that he was.

*LaCombe v. Hedley*, 91 N. J. Eq. 63, was a similar case, and I have no doubt but that *Davenport v. Prentice*, 126 Appel. Div. 451, was also a similar case, and that it has no application to waiver, for if it had, counsel would have so stated in his brief.

The law is settled, and no case is cited by counsel to the contrary, nor do I know of any case, that has applied the doctrine of constructive notice to waiver, and particularly with reference to waiver of a right under a lease, such as is here involved, that there must be actual knowledge as distinguished from knowledge in law based upon constructive notice.

16 R. C. L., title "Landlord and Tenant" Sec. 655, p. 1135, states:

"To constitute a waiver, the lessor at the time of the receipt of rent must have had knowledge of the existence of the cause of the forfeiture. Thus forfeiture for a breach of a condition not to assign is not waived by acceptance of rent from the assignee unless the landlord *has knowledge* of the assignment.

## Sec. 656:

“Acceptance of rent from an assignee of the term is as effective to constitute a waiver as acceptance from the lessor himself, and when an assignment without the consent of the landlord works a forfeiture still such forfeiture is waived by the landlord, *with knowledge of the facts*, accepting rent from the assignee although when receiving it he protests against effect being given to his act. On the other hand, the fact that a lessor accepts rent from one who in fact was an assignee of the term, he having no knowledge of the assignment which gave rise to his right to declare a forfeiture, will not constitute a waiver. And it has been held that the mere fact that the rent is paid by a corporation claiming to be the successor of the corporation lessee by consolidation is not notice to the lessor that there has been an assignment so as to render the acceptance a waiver of the forfeiture caused thereby, as the lessor is justified *in the absence of actual notice of the assignment* in relying on the presumption that the possession is as a subtenant or otherwise and not in violation of the provision in the lease, *and is not required to inquire as to the nature of the holding.*”

35 C. J., title “Landlord and Tenant,” p. 1080, Sec. 255, in stating the rule that there may be a waiver by the acceptance of rent, proceeds:

“But the acceptance must have been with *full knowledge* on the part of the landlord of the fact of the breach and all of the circumstances thereof.

And 35 C. J., title “Landlord and Tenant,” p. 1077, Sec. 252, states:

“There can be no waiver unless the lessor *has knowledge* of the facts upon which the right to forfeiture arises, and the burden rests upon the party asserting the waiver to adduce some evidence of such knowledge.”

The statement in Note 56, in 35 C. J., p. 1078:

“Actual knowledge is unnecessary where a cause of forfeiture is such that the lessor should have known it.” *Harvey v. Oswald*, or Eliz 553, 78 Reprint, 798.”

is a mistake as reference to the case cited will indicate. In that case, Popham, after stating that acceptance of rent without knowledge would not bar the entry, said:

“But if the condition be of such a nature that the performance or non-performance thereof lies in the consuance, as well of the lessor as of the lessee, it is otherwise.”

The case does not justify the statement of the note in *Corpus Juris*.

And in *German-American Sav. Bank v. Golmer*, 155 Cal. 683, 691, 102 Pac. 932, 24 L. R. A. N. S. p. 1066 the Court said:

“It is admitted that to have this effect (waiver) the acceptance of the rent must have been with knowledge of the assignment. *It is not enough that the party might upon inquiry discover the fact. There must be actual knowledge of the fact.* And unless the evidence is sufficient to warrant the inference that there was such knowledge, there is no consent or waiver. As was said in *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714, a waiver is the relinquishment of a *known* right. The rule that such knowledge is essential to make the acceptance of rent a waiver is elementary, and has been applied by this Court.”

And the Virginia Court said, in *Wilson v. Carpenter*, 91 Va. 183, 50 A. S. R. p. 824, at p. 831:

“No man can be bound by a waiver of his rights, *unless such waiver is distinctly made, with full knowledge* of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them, must *plainly* appear.

And see also *Hotchkiss v. Middlekauf*, Virginia Supreme Court of Appeals, 43 A. S. R. p. 806, at p. 809; *Jones on Landlord & Tenant*, Sec. 4 and 5; *Tiffany*, Col. 1, Sec. 152, subdiv. H, p. 935; *Underhill, Landlord & Tenant*, Vol. 2, Sec. 630, p. 1058.

In *Decker v. Hartshorne*, 60 N. J. L. 548, which will be hereafter adverted to, this Court said:

“So, too, although it appears from the proofs that, after possession of the premises had been delivered by the defendant to the Type Founders Company, the latter paid rent to the plaintiffs, yet such payment was made by the company in the name of Louis Pelouze & Company, the name previously used by the defendant; and there is no evidence to warrant the conclusion that, when this payment was made to and accepted by the plaintiffs, they had any knowledge that ‘Louis Pelouze and Company’ was no longer Henry L. Hartshorne, the defendant, but had become the American Type Founders Company. But even if the fact had been otherwise—if the plaintiffs had known that the rent was paid by the Type Founders Company and had accepted it with that knowledge—the result would have been the same so far as this case is concerned.”

The cases cited by counsel at p. 23, &c., of his brief have no application.

*Levy v. Blackmore*, 67 Atl. 1022, is authority only for the proposition that the acceptance of rent *after knowledge of forfeiture* is a waiver. No one contends the contrary. There was no question in that case but that the landlord *knew* of the situation.

*Fulton v. Greacen*, 36 Eq. 216, has no application. That was a case where the forfeiture was based upon the failure to pay water rents promptly. It was a forfeiture against which

equity would relieve, even if there was no equity involved except only the right of equity to relieve against forfeitures. The landlord in that case, when he accepted the rent, had full knowledge of what had occurred.

*Commercial Trust Co. v. L. Weartheim Coal & Coke Co., et als.*, 88 N. J. E. 143, referred to at p. 27 of counsel's brief, is a similar case.

It is not argued in this case that equity has any power to relieve against this forfeiture except upon the doctrine of waiver. The law is clear that, where there is a breach of a covenant not to assign, no relief can be given in equity under the general jurisdiction of equity to relieve against forfeitures. The case is not within Sec. 449 Pomeroy on Equity Jurisprudence, Vol. 2, p. 853. It *is* within Sec. 454.

Cases having peculiar reference to the situation at bar will be considered in the argument.

In the light of the law, as firmly settled that the burden is upon the tenant to prove waiver by the landlord, after *actual* knowledge of his rights as distinct from any constructive knowledge. I will consider the

#### FACTS.

Before doing so I submit that the conclusion to which counsel has arrived in his brief is based upon the idea that constructive notice of the facts on the part of the landlords is sufficient.

I concede that the provision against assignment without written consent may be waived by conduct, although Ashhurst, *J.*, said in *Roe v. Harrison*, 2 Term. Reports 429:

"Another objection taken was, that the lessor gave license to the tenants to let part of the premises, namely, the stables, and that the license destroyed the whole condi-

tion. But this is not such a license to a lien as falls within the terms of the proviso; the express words are '*License or consent in writing*'; whereas this was only a license by parol; therefore this was not a legal license according to the terms of the covenant.'

The purpose of providing for a *written* consent is to avoid the uncertainties of parol evidence. That purpose is frustrated and the written instrument becomes but a scrap of paper when it is sought to avoid the effect of a provision for a written consent by such evidence as has been introduced in this case.

Most cases of waiver are cases in which some person is obliged to do a particular thing and performance of that thing, by the person obliged to do it, is waived. The class of cases with which we are now dealing goes one step farther. What the parties in effect did in this case was to provide that there *should be no waiver except in writing*. The effect of extending the doctrine of waiver to the permitting of a waiver by parol of a stipulation that there should be no waiver, except in writing, is to prevent parties contracting that there should be no waiver except in writing. And I see no reason, upon principle, why, if parties desire so to contract, they should not be left free to do so.

Whatever the technical rule may be, the effect of permitting relief in a case of this kind is to destroy the written engagements of the parties and to substitute uncertain evidence for certain, as contracted for by the parties and under such circumstances it is submitted the proofs must at least be clear.

It is first contended that, at the very time this lease was made and this provision against assignment inserted in it, the lessor knew that an

assignment was to be made to a corporation, in other words, that the provision against assignment in the written lease was, from the beginning, inoperative and that it had no place therein and I suppose, under the rule in *Dumphor's* case, 4 Coke 120, it was open to the corporation to assign the lease without written consent at any time, the provision against assignment, having been once waived, no longer being in force. In effect the contention of complainant is that the lease, as originally made, was to the corporation, without a covenant against assignment. The corporation is inserted in the lease as a party, instead of the individual, although the lease was required to be in writing under the provisions of the statute of frauds.

This attempt falls within the principle of *Schenck v. Spring Lake Improvement Company*, 47 N. J. Eq. 44; *Bowers v. Gluckman*, 68 N. J. L. 146; *Stengel v. Sergeant*, 74 N. J. Eq. at p. 28; *Le Grand Company v. Richman*, 82 N. J. Eq. 481. The principal of *Schenck v. Spring Lake* has been approved in *Davison v. Green*, 83 N. J. Eq. 596; *McClung Drug Company v. City Realty and Investment Company*, 91 N. J. Eq. 216 and *Clement v. Young McShea Amusement Company*, 70 N. J. Eq. 677.

The story told by the New York lawyer, Zodikow, is so improbable as that it would be almost impossible to believe it even if not denied, as it is. He says that at the time negotiations were opened with Mr. Myers to get the option for this lease he told Mr. Myers (p. 51) that:

“Mr. Worman was in the wholesale furniture business in the City of New York that I represented a client who was about to invest approximately fifteen thousand dol-

lars in this business, that we intended to organize and form a corporation for the purpose of conducting this business—retail furniture business—that Mr. Worman could not afford to run a retail furniture business in his own name in the City of Newark \* \* \* and I told him at that time that we intended to form a corporation.”

He says that before the lease was signed he, (p. 52):

“again took up the question of the corporation *conducting* this business in Newark here *with respect to the covenant against assignment without the landlord’s consent in writing.*”

And (p. 52):

“And I discussed the question of the covenant against assignment with the landlords and the attorney, and I again told them at that time that a Mr. Stern, who I represented, was going to invest approximately fifteen thousand dollars in this business, that the business was going to be *conducted through* a corporation, and that I did not want any question to arise at any time with respect to the corporation *conducting* the business in these premises. \* \* \* BUT I wanted them to understand that a corporation was going *to run* this business—that the corporation would be their tenant. \* \* \* I then stated that in order that there shall be at no time any ambiguity in this question—I stated that I would pay the first month’s rent with the corporation’s check under this lease. I stated to them at that time that under the laws of New York that where the landlord will accept the rent under those circumstances that there could never be any question raised with respect to the covenant against assignment and we did, by my advice and instruction, pay the first month’s rent under the lease in evidence here, to the landlord, by the corporate check.”

He says (p. 55) that he asked for a consent in writing in the language of the covenant and that the reply of Mr. Myers was "You are dealing with us. There won't be any trouble. All we are looking for is a good tenant."

He says that the reason why Mr. Myers would not give them a paper was because (p. 55):

"He was afraid if he gave me any such paper that it might affect Mr. Worman's personal liability under the instrument."

Although he discussed with Mr. Myers the law of New York there was no discussion of the law of New Jersey where the subject matter of the lease was (p. 55) and (p. 55):

"Q Did you tell Mr. Myers and the Bornsteins that you intended to assign that lease to the corporation? A We didn't tell him—we told him that the corporation would be the tenant, that the corporation would take the lease over."

And (p. 56):

"A I told him that the corporation was going to *conduct* the business; that the corporation was going to take over the lease, yes. \* \* \* I told them that the corporation was going to conduct the business on the premises \* \* \* A We discussed that the corporation would conduct the business."

It is significant that he tries to relate what was said (pp. 56 and 57) and, when pressed to tell *all* that he said, he omits to say that he told them that the lease was to be assigned or that the corporation was going to take over the lease. He first says (p. 56) that one of the things stated was:

"I told them that the corporation was going to *conduct* the business on the premises."

And then,

“Then you told them in so many words—interrupted.”

He was then asked to remember as clearly as he could, as to what, in effect, was said and, when he tried to remember, the furthest he goes is that he said:

“The corporation *would conduct* the business.”

He admits (p. 57) that there was some talk at the time of the lease being taken by a corporation, and “*they did not want a corporation.*” Again on page 58 he says:

“I told them that we intended to organize a corporation *to conduct the business* on the premises and there has no one to deal with at that time except Worman personally, not a corporation—it wasn’t in existence at the time.”

And so, at the time the option was talked about, he told them (pp. 58 and 59) that Worman did not desire to conduct business *in his own name*. He denies, however, that the expression “trade name” was used, although one of the reasons given by Worman for not “conducting” the business in his own name was that he was in business in New York and it would not be advisable for him to do so.

The story of this witness is highly improbable. He concedes that the landlords would not let to a corporation, and that the covenant against assignment was discussed and that they *would not give him a written consent*. And yet he contends that there was a discussion of the law of New York with respect to the acceptance of a check of the corporation and he places Mr. Myers in the position of acquiescing in that which would have the effect of not only permitting the corporation to take an assignment of

the lease but which would, under the rule in Dumphor's case, obliterate the provision against assignment. He can give no logical reason for not getting a consent in accordance with the terms of the covenant. It will be observed that, except in those cases where he happens to remember the distinction between "the corporation *conducting* the business" and the "lease being assigned to the corporation," he always speaks of telling Mr. Myers that the corporation *was going to "conduct"* the business and he expressly says (p. 55):

"Q Did you tell Mr. Myers and the Bornsteins that you intended to assign that lease to the corporation? A We didn't tell him—we told him that the corporation would be the tenant, that the corporation would take the lease over. Q Did you tell them that you were going to assign that lease to the corporation, or did you tell him that the corporation was going to run the business? A I told him that the corporation was going to conduct the business; that the corporation was going to take over the lease, yes. Q Then you told them in so many words—interrupted. A Or in substance."

And then follows the testimony, to which I have already referred, in which he purports to repeat *all* that was said and he says nothing about the lease being assigned to the corporation nor does he say anything about the corporation taking over the lease. All he speaks about is that the corporation was going "*to conduct*" the business—quite a different thing. And on page 59:

"That was the reason I told them for forming the corporation *to conduct* the business."

I do not believe that there was any formal assignment of this lease made until the execution

of Exhibit 11, which was on the 29th of February, 1924 (p. 199). The paper of February 29, 1924, which is the assignment, was executed because a Mr. Bloch was buying a majority of the stock of the corporation and his attorneys wanted to have a record of the assignment (p. 199). The assignment purports to be confirmatory of an assignment made on the 15th day of December, 1919. Worman says (p. 61) that when the corporation was organized, he assigned the lease to the corporation, but (p. 61):

The Court: *Is there a formal assignment?*

Mr. Bilder: *No.* There is not a formal assignment. There is an offer in writing and acceptance by the corporation (see Exhibit C. 6).

And page 64:

The Court: *Now, was there an actual assignment of the lease? Did you afterwards execute an assignment of the lease? Witness: I do not remember.* The Court: *You do not remember that? A Witness: You mean did I issue a new lease to the company? The Court: No. Did you make a formal assignment of that lease after these resolutions? Witness: I would have to look that up.* The Court: *Accepting your offer. Witness: I don't know.* The Court: *You do not remember that, eh? A Witness: I do not think so.*

When the assignment is shown to him he says (p. 78):

“Q May I ask why this assignment, Exhibit C. 11, was not executed until the 29th day of February, 1924? Mr. Bilder: I was going to put the attorney on the stand to explain that. The Court: Do you know why? Witness: *No, I do not.* Q You don't know why it was? The Court: It is dated you say? Mr. Lane: February 29, 1924. Mr. Bilder: Before the suit was instituted, the time Mr. Bloch purchased. Q

Do you know? A I do not. You don't know. It was about the time you sold your entire interest in this company, wasn't it? A Yes, sir. Q Isn't it your recollection that this was signed as part of the transaction by which you sold your interest in this company to Mr. Bloch? A Correct. The Court: To perfect the record and to bring on this cause. Mr. Lane: A little bit more than that. The Court: It had the effect of bringing on this case. Mr. Lane: It is highly significant in our cause. We say we had no knowledge of the assignment until that date."

It is clear, I submit, from this testimony that there was no assignment of this lease until February 28, 1924. Assuming, as the New York lawyer says, that there was some talk with Mr. Myers with respect to a corporation being involved in the business, which is denied, it is clear that the talk was only with respect to the corporation "conducting" a business. It is likewise clear, taking the testimony of the New York lawyer as a whole, that an assignment of lease to the corporation was never suggested. I submit that there was no such talk as he says about waiver being accomplished by the acceptance of the rent check. It may well be that this was *in the mind* of the New York lawyer and it may well be that, in view of the fact that the landlords refused to make a lease to a corporation, they attempted to deceive Mr. Myers. It was upon the New York lawyer's advice and instruction that the first month's rent under the lease was paid by the corporate check (p. 53). He had in mind the law of New York. Reading his testimony (pp. 51 and 52), it is clear that he never said anything to Mr. Myers about an *assignment* to the corporation. Under the advice and instruction of the New York lawyer the first month's rent was paid by corporate check and,

undoubtedly, the New York lawyer thought that, by the acceptance by the landlords of that check, the possession of the corporation was made solid but apparently they did not depend wholly upon this for, when the business was turned over to the corporation, *the lease was not assigned*. It was not until February 29, 1924, that a formal assignment was made and then it was made because Worman intended to sell out his entire interest and the purchaser required it. They undoubtedly thought, at this time, that it was a safe thing to do. Before February 29, 1924, they were in the position of being able always to contend that there had not in fact been an assignment of the lease and they would have relied upon those cases which told that it is only a formal assignment which violates a provision against assignment. *Herschorn v. St. Mary's Young Men's Assn.*, 49 N. S. 260, 25 Dom. L. R. 102.

I do not say that the equitable assignment which was created by the sale by Worman of all the assets in the business, etc., would not breach the lease. What I do urge is that no formal assignment was made in order that the point might be made, if the possession by the corporation of the premises were questioned, that there had been no breach of the covenant against assignment because there had not been an assignment of the lease and it would have been contended with great vigor that the corporation was only "conducting the business."

Having manipulated the situation so that such a claim might be made, complainant now seeks to charge defendants with notice of an assignment *at the inception of the lease*, although they kept themselves in the position where they could deny the assignment if they had so desired.

The only corroborating witness of the New York lawyer is Worman. He says that when the corporation was organized he had 75% of the stock and Fred J. Stearn had 25% (p. 60). He finally sold out to Mr. Bloch (p. 68). This was when the assignment, heretofore referred to, was made. He tells of the first occasion he negotiated about the lease in Mr. Myers' office (p. 75), and says:

“I said, ‘I am not worried about it, *but being I am running this business under the Lincoln Furniture Company now, why not have the lease transferred?*’ ”

On page 89, in reciting the conversation which took place at the time the lease was originally talked over, he says:

“They said that I can do anything I want to; I can incorporate, which I told them I am going to do, and that I shouldn't worry about the incorporation of the corporation at all, that they will accept *my* checks, that they will accept the Lincoln Furniture Company's check, it will be just as good, as long as I am on it.”

He tells of a conversation he had with Dr. Bornstein prior to making some alterations and (p. 69):

“I told him *I* am about to make some extensive alterations and he said ‘go ahead,’ so I went ahead. Of course he did mention at that time in case he shouldn't like the alterations I am doing and after *my* lease expired—I mean after the company's lease expired, that I might have to put the same front in there, and I agreed to that.

Q Did you make the alterations to the premises? A I did.”

He also testifies to a conversation with Dr. Bornstein (p. 76) as to having said to him:

“‘Dr. Bornstein, don't you think that we ought to have this lease changed into the

Lincoln Furniture Company?' He says, 'No, the Lincoln Furniture Company probably isn't as good as you. You pay your rent, and I am satisfied with that and why change it?' And I said, 'All right.'"

And see his testimony (p. 88) to the same effect:

"Q How did you come to ask him that at that time, six months later, as I understand? A No other reason, as long as we were running the Lincoln Furniture Company, Inc., business, I thought it would be better to have it that way."

All of these conversations are denied by Dr. Bornstein and it is not reasonable to suppose that they took place. The credit to be given Worman's testimony is indicated by his examination (p. 70). In speaking of a conversation which he had, six or seven months after the business was bought, he says he said to Bornstein:

"I will talk it over with Mr. Fred Stern, one of the officers of the company, and let you know."

And then followed:

"The Court: Did you say 'one of the officers of the company'?"

Witness: Yes, sir.

The Court: Did you say to him 'one of the officers of the Company'?"

Witness: Yes, sir.

Q Did you tell him what officer it was?

A I don't remember that."

This conversation was back in 1919 and yet the witness remembers the phrase "one of the officers of the company." In view of the uncertainty of the rest of the testimony, it is apparent that this is a deliberate invention.

He would have the court believe that when Mr. Myers and Dr. Bornstein went over to New York and met him at the Furniture Exchange on April 21, 1924, and there served him with the notice, which he denies having received, there was nothing said about the assignment; that Myers and Bornstein were apparently there for the purpose of purchasing furniture (p. 40):

“Q Did Dr. Bornstein say anything as to why he had brought his lawyer there to purchase furniture? A The furniture might have been for Mr. Myers for all I know. He didn't say that he wanted the furniture for himself.”

He says it was just a casual conversation (p. 79). And see his testimony (pp. 80 and 81). There was no talk about the lease. He said (p. 70) that they “mentioned something about selling the building, I believe—I really did not pay much attention. That is about all.” And on p. 71:

“A Whether I wouldn't be interested in buying the building and I again told them that I personally am not, but I will talk it over with Mr. Stern, and nothing came of it.

Q Did you tell them what interest Mr. Stern had? A Yes, sir; I mentioned that many a time.”

On p. 81 he says that the interest of Mr. Stern was not discussed. The reason why he, on p. 81, says that the interest of Mr. Stern was not discussed is apparent from p. 82, for it appears that at that time in April, 1924, Stern had no interest in the corporation. Realizing this Worman tries to shift the date (p. 82). He denies that he ever saw a copy of the notice to quit which Mr. Myers says was served on him in New York, although the 20th paragraph of the bill of complaint states that the “affidavit filed by plaintiffs in said action in accordance with the provisions

of said law, show that the said proceeding is based upon the allegation that the above mentioned lease was terminated on or about April 21st, A. D. 1924, by means of a notice and demand served by said plaintiffs on the said defendant, Carl Worman, which notice and demand was as follows" and then follows the notice:

Worman admits that Dr. Bornstein and Mr. Myers came over to see him in New York on the 21st day of April, 1924, meeting him at the Furniture Exchange. First he says that they discussed the sale of the property and that he told them that he would have to discuss the matter with Mr. Stern but, when it appears that Stern was not interested in the company at that time, he says that the conversation was only casual and, for all he knows, they came over there to purchase furniture, he does not remember what was said. The notice of April 21, 1924, was not served on him, although first he says he does not remember. Can a witness who testifies in this way be believed with respect to anything?

Charles M. Myers, who represented the landlords, testifies (p. 97) that: prior to the making of the lease, a corporation had been discussed; Worman stated that he was in the wholesale furniture business in New York and did not want to conduct the business under his name. And (p. 98):

"I told Mr. Worman in the presence of Dr. Bornstein and his brother that no consent would be given to the making of a lease to a corporation because of the unfortunate experiences that the Bornsteins had had with two previous corporations who had had leases on the property, and he then said that he would like to use *a trade name*. I

told him—because I was doing most of the talking for the Bornsteins—that there would be no objection to his using *a trade name* in view of his statement that he didn't want to conduct it under the name of Carl Worman."

He denies any talk with the New York lawyer as to the rent being paid by a corporation or as to the law in New York (p. 98). He says that, at the time the corporation was discussed (p. 64):

"I told him if he intended to form a corporation *the lease would not be made.*"

The court desired to know what the objection to the formation of a corporation was (p. 99). It is immaterial what the objection was. The fact is that they refused to make a lease to a corporation. He denies the statements of Worman that Worman saw him later and talked about getting the lease assigned to the corporation and that he replied "Why worry" and he states (p. 100):

"*I didn't know the corporation was formed until I investigated myself in Trenton in the month of April, 1924.*"

He says that on April 21, 1924, he went over to New York with Dr. Bornstein to see Worman. They saw him at the Furniture Exchange, and (p. 101):

"A Well, as I just said, we told him what we had heard. He said 'Yes' it was true that he had sold most of his interest in the business to Mr. Harry Bloch, and that he was retaining some of the stock he had, and during the course of the conversation he told us of the fact that it was incorporated. *At that time I asked him whether any assignment of the lease had ever been made and he said no to that, and threw it back at Dr. Bornstein that the Lincoln Furniture Company's name was always on the window and the doc-*

tor must have seen it, and I then served him with that notice which is attached to the District Court proceedings and copy of which is in the bill of complaint.”

And p. 101:

“Q *What was said about the assignment of the lease at the time? Did he say he had assigned it or what?* A *He said he had not. No assignment of the lease had been made. He said that Mr. Bloch’s lawyers had advised Mr. Bloch that no assignment was necessary.*”

He refreshes his recollection as to the date by reference to his diary (p. 102). He tells in detail how it was that he became suspicious that there *had* been an assignment (pp. 102 and 103) and he says that what set them supposing that there *might* be an assignment was (p. 104):

“A *By transferring his business which I took it must carry with it the lease to Mr. Bloch I thought I had a right to assume if Mr. Bloch, who I understood was engaged in large furniture enterprises, would not buy the business unless he had control of the lease.*”

At the time this notice was drawn he *did not*, in fact, *know* that there had been an assignment (p. 109). The notice was given on a chance (p. 111). There is nothing unusual in that. When he talked to Worman on the 21st day of April, Worman denied that the lease had been assigned. After having heard that the business had been transferred Mr. Myers examined the records in Trenton around April 17, 1924, for the purpose of ascertaining whether the Lincoln Furniture Company was incorporated and this was the first he knew that the business was incorporated (p. 107).

Bornstein corroborates Mr. Myers (p. 112). He denies any conversation with Worman during the

course of which Worman wanted to have the lease transferred to the corporation and denies that he knew, until April 21, 1924, or thereabouts, that a corporation was actually involved in the transaction and denies that he knew that there was any assignment of the lease (p. 113). He corroborates Mr. Myers with respect to what took place in New York on the 21st day of April (pp. 114, 115). He denies that at that time there was any discussion whatever as to purchasing furniture (p. 115). He corroborates Mr. Myers that the talk at the time the lease was given was that Worman was not going to trade under his own name but would use a *trade name* or something of that kind (pp. 116, 117).

Philip Bornstein corroborates Mr. Myers (p. 123) as to what took place at the time the lease was originally talked about and says that they refused to have anything to do with a corporation but stated that they would have no objection to his using a trade name. And he denies that anything was said about the checks for rent being paid by the corporation, etc. He denies that he knew that the business was being operated by the corporation and denies that he knew that there was an assignment of the lease.

With respect to what took place at the time of the original giving of the lease there is testimony of the New York lawyer and Worman on the one side and the two Bornsteins and Mr. Myers on the other, in irreconcilable conflict but it is hard to believe that the story told by the New York lawyer and Worman can accurately indicate what took place for it puts both Mr. Myers and the New York lawyer in impossible positions—Mr. Myers—because it would appear that, although he insisted upon a clause in the lease against assignment without written con-

sent, nevertheless he immediately consented to that clause being obliterated—the New York lawyer—because, although he realized that he should get a written consent, he permitted his client's rights to rest upon parol evidence. No two lawyers ever acted as the New York lawyer says he and Mr. Myers acted. I can readily conceive, however, that, if one could not get what one wanted, to wit, a lease to a corporation, he might advise his clients to incorporate and then use checks of the corporation for the payment of the rent in the hope that the acceptance of the checks would be considered as a waiver of the provision against assignment, protecting himself still further, however, by not making an actual assignment to the corporation until such a lapse of time as that he thought, by reason of the continuous possession by the corporation, it was safe to make the formal assignment. In view of the fact that we have no formal assignment here in writing until February, 1924, it is clear that the whole purpose of Worman and his counsel was to deceive Mr. Myers and the Bornsteins.

Counsel says (p. 15 of his brief):

“It being admitted that the matter of a corporation being organized to occupy the premises and run the business was discussed by the parties at the time of the making of the lease for the very logical reason given by Worman, if, in fact, at that time, any serious objection to the corporation presented itself, would it not have been a very simple matter for a lawyer of Mr. Myers' long experience to have safeguarded the interest of the landlords by providing for an assignment to the corporation but retaining Worman's responsibility nevertheless.”

I agree with this. The very fact that it was *not* done in this way indicates that there was an absolute refusal on the part of Bornstein and Mr.

Myers to make a lease to a corporation otherwise, if Worman had desired to be protected, the method pointed out by counsel for safeguarding the interests of both the landlords and the tenant would have been adopted.

That it was not adopted is a clear indication that for some reason (and whether it was good or bad is immaterial) the Bornsteins and Mr. Myers refused to deal with a corporation.

Counsel's statement on p. 15 of his brief that "if a corporation had then been in existence, it (the lease) would have been made with the corporation" is gratuitous for there is nothing in the testimony of *any* of the witnesses to that effect. All the testimony is to the exact contrary.

Counsel also states (p. 15):

" \* \* \* Is it reasonable to believe that Worman, after having invested a very substantial sum for the purchase of the business and lease of the Crown Company would have taken the very dangerous course, within a few days after the making of the lease, and before it was to begin, of organizing the corporation, assigning the lease in direct violation of the covenant against assignment, and tendering the very first check in payment of rent by a corporate check signed by two officers, putting it immediately within the power of the landlords to declare a forfeiture."

The difficulty with this is that *there is no proof of any probative value that there was an assignment of the lease when the corporation was organized.* Worman does not remember any such assignment. When the matter first came up counsel apparently did not think there had been. As a matter of fact, as indicated above, there was no formal assignment made

until February, 1924, and this course of procedure was deliberate.

An important matter, bearing directly upon the probabilities, is the fact that this business was conducted for a time under the *trade-name* of the Lincoln Furniture Company. In the first place the resolution by which the business was taken over by the corporation recites (p. 62):

“Whereas Carl Worman has offered to sell to this company the business now owned and conducted by him *under the name of the Lincoln Furniture Company* on premises, etc.”

Worman is examined on page 84:

“Q Then will you tell me why it is that in the minutes the resolution reads ‘whereas Carl Worman has offered to sell to this company the business now owned and conducted by him *under the name of the Lincoln Furniture Company* (interrupted). A Well, Carl Worman purchased the Crown Furniture Company and made a corporation, so Carl Worman never owned any part of that business. \* \* \* Q When did you take over the assets of the Crown Furniture Company with respect to the time that you incorporated the Lincoln Furniture Company? A When did I take over the assets of the Lincoln Furniture Company? Q When did you take over the assets of the Crown Furniture Company with respect to the time that you incorporated the Lincoln Furniture Company? A The Lincoln Furniture Company was formed after I purchased the Crown Furniture Company, *I believe a week may have elapsed.* Q And during that time that week elapsed you were conducting business at that place with the Crown assets, weren’t you? A With the Crown assets, yes, sir. Q Yes, and you were conducting business for that week before the incorporation of the Lincoln Furniture Company as a corporation *under the name*

of the *Lincoln*, weren't you? A Yes, sir.  
 Q And then you incorporated the company after a week and you sold your business or transferred your business which you were then conducting as the Lincoln Furniture Company to the corporation, didn't you? A I did. \* \* \* The Court: Under what name did you conduct the business you did at that time? Witness: *Lincoln Furniture Company, immediately until we got the incorporation papers back from Albany.*"

So that it is a fact that, immediately after the making of the lease, business was commenced by Worman and he conducted it under the *trade name* of the *Lincoln Furniture Company*. It was then *changed* to a corporation but there was nothing to indicate to the landlords that there had been any change from an individual conducting a business under a trade name to a corporation. The name was the same. Much is made of the fact that the name of Worman did not appear in the advertisements but the name of the Lincoln Furniture Company *did* and it was under *that* name *that* Worman conducted the business *as* an individual.

Much is made of the fact that the landlords accepted corporate checks. If we remember that the testimony is, from Mr. Myers and Bornstein, that Worman had told them that he intended *to conduct the business* under a trade-name and that he did in fact conduct business under a trade name, there is nothing unusual in checks being received bearing the name of the Lincoln Furniture Company, but it is said that, because these checks were signed by a president and secretary, there was notice that a corporation was conducting the business. As Bornstein says, the landlords paid no attention to the signatures on the checks (p. 118). They were interested in

the amounts. The checks went through the bank in regular course. It was not until there were rumors on the street to the effect that Worman had disposed of his business that any suspicion was aroused. Dr. Bornstein never noticed the name of Stern on the checks until they were presented to him *in court* (p. 121). Both Dr. Bornstein and his brother say that they did not know that the business was being conducted by a corporation. They deny that the form of the checks made them suspicious. As matter of fact, they paid no attention whatever to them and it is not unusual that they should pay no attention whatever to them in view of the fact that Worman had told them that he was going to conduct business under a trade name. And it is not unusual for business men, without having a corporation to conduct their businesses under a system by which checks are signed by others as president or secretary or what not—Partnerships have done it and individuals trading alone have likewise.

Is it possible to believe that all the testimony of Mr. Myers, as to his examining the records in Trenton for the purpose of ascertaining whether there was a corporation or not, is just a recitation of a stage play? Was his visit to New York on the 21st day of April and his inquiry to Worman all a stage picture? Is his testimony that Worman denied that there was an assignment, even on April 21st, 1924, untrue? If Bornstein knew that this business was being conducted by a corporation, it is impossible to believe but that Mr. Myers did also. And the court must find that Mr. Myers and Dr. Bornstein deliberately conspired to make it appear that they did not know and went through all the

actions that they did in order to have it appear that they did not know?

And so with the letters which passed between the parties. They were signed by, and addressed to, the Lincoln Furniture Company. But that was the trade-name under which Worman did business *before the formation of the corporation*. The name on the advertisements, the name on the building, etc., was not only the name of the corporation but also the trade-name under which Worman had in fact traded. The fact is that Bornstein and Mr. Myers had no suspicion either that a corporation was operating the business or that there had been an assignment of the lease until the rumor was abroad that Worman had disposed of the business. That started a train of investigation.

When counsel for complainant (p. 22) of the brief says:

“The corporation was openly, frankly and prominently presented as the tenant. Not a scintilla of evidence was produced which shows that the effect was made to mislead the landlords, or to place them, against their will, in the position of having waived the clause against assignment. The conduct of the tenant in every respect from the very beginning was open, frank and above board.”

we submit he is not supported by the testimony.

The irresistible conclusion from the testimony is that, knowing that the Bornsteins would not consent to a corporation as their tenant, Worman and those with him deliberately refrained, when the corporation was originally incorporated and the business taken over, from having the lease actually assigned. They deliberately had corporate checks sent to the landlord (on the advice and instruction of their attorney) so that it

might be claimed that the landlords, by accepting checks, had recognized the corporation as a tenant. The testimony of the lawyer indicates that *that* thing was in his mind and he tells an impossible story of having imparted that information to Mr. Myers. When directly asked on the 21st day of April, 1924, whether there had been an assignment of the lease or not, Worman said that there had not been. This is not open or frank conduct. If Worman had intended to openly and frankly hold out the corporation as a tenant, it would have been quite easy for him to have done so by sending a written notice to the landlord, when the corporation was incorporated and took over the business, to the effect that the corporation was now the tenant. There would have been no question then of notice. Why was this not done? It is significant that *all the dealings* with the landlords was by Worman. It was Worman who went to inquire about the alterations and he said (p. 69):

“I told him *I* am about to make some extensive alterations \* \* \* I mean after the company’s lease expired.”

And (p. 75):

“I am not worried about it, but being I *am running this business under the Lincoln Furniture Company now*, why not have the lease transferred?”

This statement is highly significant. And he *had* been running the business *under* the name of the Lincoln Furniture Company.

A very different situation would have been created if he had started to run the business under the name “Worman” and then changed to the “Lincoln Furniture Company.” Apparently, to deceive the landlords, he told them he was going to run it under a trade name and did

so in fact and then changed to a corporation, and then he seeks to bind the landlords by reason of the acceptance by the landlords of checks signed by the trade name and seeks to hold them by reason of the fact *only* that there are the words "president" and "secretary," on the checks, to knowledge of the fact that the corporation was not only running the business, *but had an assignment of the lease*. No question could have arisen if either—first, he had insisted upon getting from the landlords a consent to the assignment of this lease to the corporation, or—second, when the corporation was formed he had sent formal written notice to the landlord of that fact. Neither was done.

But suppose the landlords did know or suppose they are held to be bound to know, by reason of the acceptance of checks, that the corporation was *conducting* the business, does that show that they knew that there had been an *assignment of this lease*?

The corporation might have been "conducting" the business in this store without having an assignment of the lease and, although the business was "conducted" by the corporation, there would be no breach of the covenant. Worman himself says that he told Bornstein that *he* was conducting the business *under the Lincoln Furniture Company* (p. 75).

In order that this covenant should be breached there must have been more than a mere "conducting" the business by the corporation. There must have been an actual assignment. What evidence is there that the landlords knew, or were bound to know, that there had been in fact an assignment of the lease, in view particularly of the fact that no assignment is pro-

duced except one dated February 29, 1924, whereas the business has been conducted by the corporation since 1919? Are the landlords bound by knowledge of what is in the corporate records—particularly in view of the fact that in February, 1924, Worman denied that there had been an assignment?

Against the positive denials of the two Bornsteins and of Mr. Myers, appellant is attempting to impute knowledge to them which would have the effect of obliterating the clause against assignment. And it would have been *so* easy for the tenant, if he had been frank, to place the situation so that there could be no question about it. In this state of the proofs we submit that the appellant has not sustained the burden of proving the waiver relied upon.

The case of *German-American Savings Bank v. Gollmer*, 155 Cal. 683, 102 Pac. 932, 24 L. R. A. (N. S.), p. 1066, is somewhat similar to that at bar. The court said:

“The evidence is practically without conflict as to all material facts. On or about January 10, 1906, the Union Bank of Savings and plaintiff merged and consolidated their interest, since which time the business of both corporations has been conducted as one institution under the name of plaintiff, and in the demised premises. The directors of the Union Bank of Savings were included in the enlarged list of directors of plaintiff, and Mr. Bartlett, the president of Union Bank of Savings, has at all times since the consolidation, been the president of plaintiff corporation. A general assignment of all the property of the Union Bank of Savings was given to plaintiff, which assignment was never recorded, and as to which no notice appears to have been given to anybody. No specific assignment of the lease was ever executed. The Union Bank of Savings appar-

ently still maintains its corporate organization and also maintains its office in the demised premises. No consent that the lease should be assigned was ever requested or given. *No notice that there had been any assignment of the lease was ever given to either of the defendants by the Union Bank of Savings or by plaintiff.* To the contrary, both these corporations appear to have studiously endeavored to conceal the fact, if there was one. A written notice of the exercise of the option given on April 20, 1907, over one year after the change, was primarily given by the Union Bank of Savings, as lessee, by its president and secretary, and was joined in by plaintiff with the statement that it was so joined because said lessee and the German-American Savings Bank, a California corporation, did on or about the 10th day of January, 1906, merge and consolidate their interests, since which time the business of both said corporations has been and now is being conducted as one institution, under the name of the German-American Savings Bank, and, for the purpose of so conducting the said business, is now and has been since the date of said consolidation, occupying the premises described in said lease. There was no intimation of an assignment of the lease in this notice, or of the succession of plaintiff to any rights therein. Even in its complaint in this action filed September 7, 1907, plaintiff carefully refrained from specifically alleging any assignment, alleging simply that it 'is the successor in interest of the Union Bank of Savings.' The notices to the public were all simply to the effect that there had been a consolidation, and that the business thereafter would be conducted under the name of plaintiff. There might be a consolidation of the banking business of the two corporations and occupancy of the demised premises by plaintiff without any assignment of the lease. *Under the terms of the lease the Union Bank of Savings had the right, without any con-*

sent of the lessor, to permit the occupancy of the demised premises for banking purposes by plaintiff. Everything that was shown to have come to the knowledge of the defendant was entirely consistent with the theory that the occupancy of the demised premises by plaintiff was an occupancy under a mere license or sub-lease, and not under an assignment, and there is in the evidence no basis for any inference that either of the defendants had knowledge that there had been an assignment of the lease. The fact that from July 1, 1906, the monthly receipts for rent, at the request of someone in the office of the two corporations, were made in the name of plaintiff, shows no such knowledge. This indicated to defendants no more than some arrangement between the corporations under which the plaintiff, was to pay the rent, and was not notice of an assignment of the lease. Nor was the mere claim of the plaintiff asserted in its complaint in this action filed September 7, 1907, that it 'is the successor in interest of the Union Bank of Savings' notice of the fact of any assignment.

The only ground urged for a conclusion that defendants have consented to an assignment of the lease, or waived a breach of the condition against assignment, is the fact that they have accepted rents accruing since the assignment. *It is admitted that, to have this effect, the acceptance of the rent must have been with knowledge of the assignment. It is not enough that a party might upon inquiry have discovered the fact. There must be actual knowledge of the fact.* And, unless the evidence is sufficient to warrant the inference that there was such knowledge, there is no consent or waiver. As was said in *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714, a waiver is the relinquishment of a known right. The rule that such knowledge is essential to make the acceptance of rent a waiver is elementary, and has been applied by this court. See *Taylor*,

Land. & T., Sec. 497; Jones, Land. & T., Sec. 497. *Silva v. Campbell*, 84 Cal. 420, 23 Pac. 316; *McGlynn v. Moore*, 26 Cal. 394. As there is nothing to show that either of the defendants had any knowledge of any assignment of the lease at the time of the acceptance of rents, there could be no consent or waiver by reason of such acceptance."

In *Drmmond v. Fisher*, 16 N. Y. Sup. 868, it was held that proof of occupation of demised premises by a new firm of Fisher & Co., and that the rent was paid by checks of Fisher & Co., in the absence of proof that the landlords had knowledge of the formation of the new firm was not evidence of his assent to an assignment to them by Fisher, the original lessee, who had previously paid rent by checks in the same form.

An excerpt from the language of the court is:

"Had the appellants come into possession of the premises as assignees of Fisher, and either Mrs. Beekman or her grantee, the respondent in this proceeding, *knowingly* received rent from them, then we are of the opinion that we could have assumed there was an assignment, and that it was with the landlord's consent, although no written consent was shown."

In *Emery v. Hill*, 39 Atl. 266, the facts are so strikingly similar to those in the case at bar as to warrant copious quotations from the opinion.

"In the defendants' lease to James R. Hill & Co., it was stipulated that the lessees should 'not lease or under-let said premises, or any portion thereof, or assign this lease or any interest therein, without the written consent of the lessors. This is a valid stipulation, *inserted* for the benefit of the lessors. The lessees' ability and willingness to pay the rent promptly and their careful use of the premises, including the reasonable preservation of the building from reckless and careless injury, and from destruction and

fire, furnish some of the apparent reasons for this provision in the lease. *Roe v. Sales*, 1 Maule & S. 297. While the lessors were willing to make Hill & Co. their tenants, they were not willing to allow Hill & Co. to substitute others as their tenants by an assignment of the lease, made without their approval. *The practical dissolution of the partnership, the substitution of the corporation in its place, and the occupancy of the leased premises by the corporation as the successors of the partnership, amounted to an assignment of the lease.* The form of the assignment is unimportant. *Boston C. & M. R. Co. v. Boston & L. R. Co.*, 65 N. H. 393, 451-457, 23 Atl. 529. *If, instead of adopting a corporate form of doing business, they had admitted new members into the firm, and transferred to the new partnership their interest in the lease, the transaction would have been an assignment of 'the lease' or 'interest therein.'* *Varley v. Coppard*, L. R. 7 C. P. 505. The retention by the plaintiffs of a nominal interest in the firm would not enable them to violate the contract with impunity, or to deprive the defendants of their right to enforce it. 'A lessee of one hundred acres, on condition that he shall not assign, can no more convey one acre, without breaking the condition, than he can ninety-nine or one hundred acres. His grant of ninety-nine and ninety-nine hundredths of an acre is no more a breach than his grant of one hundredths of an acre.' *Boston, C. & M. P. Co. v. Boston & L. R. Co.*, 65 N. H. 452, 23 Atl. 529. If the plaintiffs could assign a hundredths part of their interest as lessees, they could assign ninety-nine hundredths of it. It is one of those cases in which no line can be drawn between a great and small violation of the contract. If the case of *Roosevelt v. Hopkins*, 33 N. Y. 81, holds that, although it is stipulated in the lease that the lessees shall not sub-let or assign the premises, they may assign anything less

than the whole premises, it is not in accordance with the settled law of the state.”

\* \* \* \*

“It is claimed that the defendants have so recognized the corporation as its tenant under the lease that they have waived their right to notice of extension from the partnership. If the receipt of rent from the corporation by the defendants, recognizing them as tenants, would be a waiver, there has been no such recognition. After the formation of the corporation, the rent was paid by checks signed by the corporation; but the defendants took special care not to recognize the corporation as their tenant, and plainly repudiated the relation of landlord and tenant, as to the corporation, by giving receipts for the rent to the unincorporated partnership. There has been no waiver, and the lease has not been extended. Case discharged.”

No receipts were given in the case at bar. The landlords did not attempt to protect themselves but this was because they had no knowledge that the corporation had succeeded to the lease by assignment and it is *knowledge* which is necessary, not facts sufficient to put one upon inquiry.

The case of *Walker v. Wadley*, 52 S. E. 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. The language of the court is as follows:

“Acceptance by the leasor of rent accruing after the breach of a covenant, with knowledge thereof, amounts to a waiver of a forfeiture resulting from that particular breach. Taylor’s Land. & Ten., Sec. 499. And, where rent is payable annually, the acceptance of the same with knowledge by the lessor that there has been a breach of covenant during the previous year and before the

accrual of the rent which is tendered, it is regarded as a waiver of that breach of the covenant. But, where the lessor is ignorant of an assignment of the lease for the full term of the tenancy, acceptance of the rent with knowledge limited to inferences drawn from the facts which gave no information as to the existence of a written assignment of the lease for the full term, will not extend the waiver to the full period of the term covered by the lease assigned. When the rent for 1902 was tendered, the admitted facts justify the inference that the lessor knew that the covenant against sub-letting had been violated during the years 1900, 1901 and 1902. For the violation of the covenant during these years, her acceptance of the rent with knowledge of such violation was a waiver of the forfeiture for such breaches. 'When, however, there is a continuing cause of forfeiture, the landlord will not be precluded from taking advantage of it by receiving rent which accrued after the breach was originally committed.' Taylor's Land & Ten., Sec. 500. Thus, when the lessee's administratrix continued to allow Daniel Sons & Palmer to remain in possession of the land and operate the farm under the assignment of the lease by the heirs of her intestate, there was a continuing breach, and the acceptance of rent by the lessor only waived the right to forfeit the lease for such breaches as occurred prior to the accrual of the rent, of which she had knowledge. Then the lessor notified the administratrix of Wadley, in March, 1903, that she claimed a forfeiture because of the violation of the covenant against assignment or sub-letting, then, after the expiration of the time stipulated in the contract, the lease became forfeited, by reason of the violation of that covenant, and the lessor could sue for possession. This she did in a few days, and under the admitted facts she was entitled to maintain her action from that time. It was, therefore, erroneous for the court, upon the

agreed statement of facts, to render judgment for the defendants.”

In *Roe v. Harrison*, 2 Term Reports, 428, Ashhurst, *J.*, said:

“Another objection taken was, that the lessor gave license to the tenant to let part of the premises, namely, the stables, and that the license destroyed the whole condition. But this is not such a license to alien as falls within the terms of the provision; the express words are ‘license or consent in writing’; whereas this was only a license by parol; therefore this was not a legal license according to the terms of the covenant. This objection then does not hold, for though the law insisted on the defendant’s counsel may be right, yet the facts of this case do not apply to it. It was, lastly, contended, that the forfeiture was waived by the acceptance of rent; there is no doubt that such a forfeiture as the present may be waived by a subsequent acceptance of rent; but that only holds in cases where the party, at the time of receiving the rent, is *cognizant of the fact of the forfeiture*; now here it does not appear that the lessor was cognizant of the forfeiture. The giving of the receipt by the landlord for rent, subsequent to the time of the forfeiture is indeed an acknowledgment of the tenancy, but that is only where he *knows* the act of forfeiture at the time.”

Buller, *J.*, concurs in the following language:

“With respect to the lessor’s consent to let part of the premises, which, it is contended, waives the forfeiture of the whole; this case does not come within the authorities which have been cited, because here was no legal consent to let any part of the premises. Besides, the lessor does not recover in this case for the forfeiture in letting the stable, but for a subsequent forfeiture in letting the whole. Then as to the waiver of the forfeiture, or as a confirmation of the been established in many cases that accept-

ance of rent shall not operate as a waiver of the forfeiture, or as a confirmation of the tenancy, unless the landlord *has notice* that a forfeiture was incurred at the time. But here it is not found that the lessor had notice of the forfeiture at the time of receiving the rent."

In *Decker v. Hartshorne*, 60 N. J. L. 548, this court said:

"In *Thomas v. Cooke*, the person who was put in possession of the demised premises by the lessee was afterward accepted as tenant by the lessor; in the present case that element is wanting. There is nothing in the letter written by the agent of the plaintiffs on November 29th which can be construed into an acceptance of the Type Founders Company as tenant. On the contrary, it clearly appears from it that the agent still considered the defendant to be the tenant of his principals, notwithstanding the change in the possession of the demised premises. So, too, although it appears from the proofs that, after possession of the premises had been delivered by the defendant to the Type Founders Company, the latter paid rent to the plaintiffs, yet such payment was made by the company in the name of Louis Pelouze & Company, the name previously used by the defendant; and there is no evidence to warrant the conclusion that, when this payment was made to and accepted by the plaintiffs, they had any knowledge that 'Louis Pelouze & Company' was no longer Henry L. Hartshorne the defendant, but had become American Type Founders Company. But even if the fact had been otherwise—if the plaintiffs had known that the rent was paid by the Type Founders Company and had accepted it with that knowledge—the result would have been the same so far as this case is concerned. The mere receipt of rent by the landlord from an under-lessee does not evidence his assent to the abandonment of

the premises by the original lessee, and is no proof of his acceptance of such underlessee as tenant. *Bacon v. Brown*, 9 Conn. 334; Taylor, Land. & T., Sec. 512; *Copeland v. Watts*, 1 Stark. 76."

I know of no case where the mere acceptance of a corporate check has been held sufficient to impute knowledge to a landlord that a corporation was in control of the business conducted in a place where the lease has been given to an individual. In the case at bar, appellant must go further than that. It must contend that the fact that the check was a corporate check imputed knowledge to the landlords, when they accepted it, that there had been an *actual assignment of this lease*. Actual knowledge as distinguished from constructive knowledge is required. The only probative value of the acceptance of the check is as a piece of evidence to assist the court in determining whether *in fact* the landlords had knowledge. I submit that, in this case, the acceptance of checks under the circumstances is not so persuasive as to induce the court to disbelieve the statements under oath of the two landlords that they, in fact, had no knowledge or to induce the court to believe that Mr. Myers and the landlords deliberately set the stage which it appears they did, if they in fact had knowledge.

Space is devoted by counsel to a consideration of the motives influencing the Bornsteins to take the position that they now do. Their motive is quite immaterial. The right to terminate the lease was at the *option of the landlords*.

Provisions against assignments without consent are not disfavored by the law of this state. They are to be *reasonably* construed. This Court, in *West Shore Railroad v. Wenner*, 70 N.

J. L. 233 at p. 238, expressly disapproved *Riggs v. Pursell*, 68 N. Y. 193, which rested upon the theory that a covenant against assignment must be strictly construed and that only an actual legal assignment is violative thereof. There was also involved the question of waiver by acceptance of rent. This Court said:

“The next question arising is whether the plaintiffs, by accepting rent from the executors of the lessee, in February, 1901, waived the forfeiture.”

“At that time the plaintiffs were informed that the lessee had mortgaged his interest, but they had no knowledge that default had been made in payment of the debt, and the sale to Wenner had not yet taken place. It is this sale, consummating the charge imposed on the estate by the lessee, which we consider as the violation of the covenant and the legal cause of forfeiture. The receipt of rent could, of course, not be a waiver of a forfeiture thereafter occurring.”

This quotation indicates that *knowledge* of the cause of forfeiture is required before there can be a waiver. Knowledge that there *might be* an existing cause of forfeiture is *not enough*. In the Wenner case it was held knowledge of the existence of a mortgage which might result in forfeiture, was not enough.

So here. As far as appellant can possibly go is to say that the landlord had knowledge that a corporation was *conducting* the business. But is that knowledge that the lease had in fact been assigned to the corporation, in the face of the *denial* by Worman in April, 1924, that there had been an assignment and in the face of the fact that no assignment is produced actually dated earlier than February, 1924?

It is respectfully submitted that the decree  
below should be affirmed.

Respectfully submitted,

MERRITT LANE,  
Of Counsel with Respondents.

## New Jersey Court of Errors and Appeals

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Between LINCOLN FURNITURE CO., a Corporation, <i>Complainant-Appellant,</i> and RACHEL BORNSTEIN, NEW- TON A. BORNSTEIN and ALFRED FRIED, <i>Defendants-Appellees.</i>	}	
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### REPLY BRIEF FOR COMPLAINANT-APPELLANT

There are several statements contained in the brief of counsel for the defendants-appellees which we think should be called to the attention of the Court.

On page 2 of the brief, defendants' counsel states that "The issue tendered was one of fact. \* \* \*"  
 It is respectfully submitted that the question at issue is not only one of fact, but of law. It is a question of law as to whether or not the occupation of the store in carrying on the business of the corporation would of itself amount to an assignment of the lease and a forfeiture. The learned Vice-Chancellor found, as a matter of law, that such occupation would amount to an assignment of the lease and a forfeiture (p. 45, line 22). It is also a question of law as to whether the display of corporate activities being sufficient to put them on notice as found by the learned Vice-Chancellor, was not,

therefore, sufficient to put them on inquiry. This feature of the case is treated in the main brief beginning at page 31. Page 7 of the brief states:

“*Levy v. Blackmore*, 67 Atl. 1022, is authority only for the proposition that the acceptance of rent *after knowledge of forfeiture* is a waiver. No one contends the contrary. There was no question in that case but that the landlord *knew* of the situation.”

This obviously is an admission that the complainant is entitled to a decree, provided that it be shown that the defendant “knew of the situation,” to wit: that the covenant against assigning, subletting or underletting the lease had been broken. It seems to us that by this admission defendant is precluded from discussing any other question or aspect of the case. Nevertheless he proceeds in the remainder of his brief to discuss the very question of law which he concedes to be established by the case of *Levy v. Blackmore*, cited by complainant in the main brief. Again on page 8 of his brief counsel for the defendant says:

“I concede that the provision against assignment without written consent may be waived by conduct, \* \* \*”

However, he attempts to attack and disparage the very principle which he has frankly recognized and conceded. On pages 9 and 10 of his brief counsel attempts to distract from the real inquiry by arguing that complainant’s legal contention is “in effect” that the lease was originally made with complainant and not with complainant’s assignor, because of the fact that complainant alleges that defendants knew when the lease was made that the complainant intended

to form a corporation and to transfer the lease to that corporation. Having attempted to thus construe complainant's legal position, defendants' counsel proceeds to demolish the supposititious legal position by citing cases which involve the rule that where a contract is within the statute of frauds no one can be shown to be a party thereto whose name is not mentioned in the written contract. The material for his argument is furnished by his misconstruction of the purpose of complainant's testimony showing that defendant had knowledge of complainant's intention to form a corporation to take over the business and the lease. The obvious and manifest purpose of this testimony was not to show that the complainant was not an original party to the lease, but rather that when defendants repeatedly received and accepted complainant's corporate checks for rent defendant had actual knowledge of the real situation and not merely such notice as the checks themselves constituted. However, it is respectfully submitted that the checks alone would have been sufficient to create a waiver.

Counsel on page 10 of his brief says, that the testimony of Mr. Zodikow was so improbable as that it would be almost impossible to believe it. It is respectfully submitted that the testimony is entirely probable and in its essential particulars is corroborated by the defendant's witnesses. Both of the Bornsteins and Mr. Myers admit that at the time negotiations were in progress with respect to the lease that the organization of a corporation was discussed and that they were informed that Worman was engaged in the wholesale furniture business in New York, and could not carry on a retail furniture

business in his name. See pages 97, 98, 112 and 123. There seems also to be corroboration by Mr. Myers of the testimony of Mr. Zodikow concerning the conversation with respect to the effect under the law of New York of the acceptance of the corporation's checks for rent; for instance, upon being informed by the Court and the Court having asked Mr. Myers what objection he had to the forming of a corporation so long as they had Worman as the lessee, Myers answered at page 99, line 22,

“That the lessee might—I didn't want to enter into any litigation. He might claim that the taking of the rent from some other person might absolve him from responsibility and liability.”

During the course of the oral argument counsel for the defendants stated that the Bornsteins did not want to make a lease with a corporation because of unfortunate experiences they had had with two previous corporations and that they refused to have Worman assign the lease to complainant because it would free Worman from liability on the lease. This is not the law of New Jersey. See the cases of *Hunt vs. Gardner*, 39 N. J. L. 530, and *Creveling vs. De Hart*, 54 N. J. L. 338, in which the New Jersey Supreme Court holds that a plea setting up that a lessee had assigned his lease and that lessor had received rent from the assignee and had accepted him as tenant does not show a bar to an action of covenant for rent on the lease, against the original tenant.

Counsel's argument on pages 11, 12, 13, 14 and 15 concerning Mr. Zodikow's testimony as to whether or not he stated to Myers that the lease

would be assigned or that the corporation would conduct the business and counsel's frequent references throughout the brief to the effect that the corporation was only to conduct the business are futile attempts to build up a sound argument. It would seem sufficient to say that on cross-examination Mr. Zodikow testified (p. 56) that he told Myers and the Bornsteins,

"that the corporation was going to conduct the business, that the corporation was going to take over the lease. Yes."

He also told them that the business in Newark was to be conducted by the corporation and that the corporation would become the tenant and take this lease over (p. 57). It is submitted that it is unfair for counsel to say (p. 54 of his brief) that

"I do not believe that there was any formal assignment of this lease made until the execution of Exhibit 11, which was on the 29th day of February, 1927."

He brands as perjury the testimony of Mr. Zodikow (p. 92), to the effect that a formal assignment was drawn up and executed at the time that the corporation was formed and that at the time Mr. Bloch bought part of Mr. Worman's interest this assignment could not be found and that the assignment of February, 1924, was executed in confirmation thereof. There is no testimony to the contrary, and moreover, the fact that the assignment of February, 1924, was confirmatory of a prior one is borne out by a reference to the minutes of the first meeting of the stockholders and directors of the corporation, which clearly provide for an assignment of the lease

to the corporation (pp. 62, 63, 64). The conclusion of counsel, therefore, at page 16 of his brief,

“It is clear from this testimony that there was no assignment of this lease until February 28, 1924,”

is unwarranted and is not substantiated by any of the facts in the case. Much of the argument of counsel throughout his brief is predicated upon the theory that the assignment of the lease was not made, as has been testified by the witnesses, and as corroborated by the documentary evidence and, as the conclusion upon which this argument is based is shown to be unwarranted and unsubstantiated by the evidence, therefore, the argument itself is without foundation in fact.

On page 23 of his brief counsel says that the notice, referring to the notice to terminate the lease, was given on a chance. I suppose he means it was given on a chance that they could break the lease. Because at that time, four years after the term of the lease had begun, the property had enormously increased in value, and the notice was given in an effort to break the lease in order that a more profitable one might be made. The landlords were looking for a loophole to void the lease. They served the notice on a chance. Although counsel for the defendants says that motive for breaking the lease is unimportant, it is respectfully submitted that motive is important, because it is perfectly clear that if the property had not increased in value it would have been a matter of indifference to the landlords who the tenant was so long as the rent was being paid.

Counsel, on page 27 of his brief, says, an impor-

tant matter is the fact that this business was conducted for a time under the trade name of "The Lincoln Furniture Co." As a matter of fact, there is no proof that it was so conducted. The corporation was organized and actually went into possession of the premises prior to the time when the lease was to begin. The sequence of events is as follows: The lease was dated December 8, 1919; the certificate of incorporation was filed December 11, 1919; the charter was granted December 12, 1919; the organization meeting of the corporation was held December 15, 1919; but the term of the lease did not begin until January 1, 1920. It seems, therefore, that the premises were occupied solely by the corporation from the beginning of the lease. It is probable that in the interval the store was being made ready and the business prepared for the opening, which was to occur on January 1, 1920.

There is no proof to substantiate the statement by counsel that immediately after making the lease business was commenced by Worman and conducted by him under the trade name and that it was afterwards changed to a corporation. Counsel on page 29 of his brief says that "it was not until there were rumors on the street to the effect that Worman had disposed of his business that any suspicion arose as to the change of ownership."

In view of the facts in this case, as shown in our main brief, we do not think that this statement is justified.

Also on page 29 of his brief counsel states:

"And it is not unusual for business men without having a corporation to conduct their businesses under a system by which checks

are signed by others as President, or Secretary or whatnot—Partnerships have done it and individuals trading alone have likewise.”

It is submitted that this statement is ridiculous. Although it may not be unusual, counsel does not cite any instances or cases where checks have been signed by president and secretary for an individual trading alone. We do not believe that any such situations exist.

Counsel states on page 31 to the effect that, “apparently to deceive the landlords, he” (Worman) “told them he was going to run it under a trade name and did do in fact and then changed to a corporation. \* \* \*”

The testimony of every witness in the case, including the Bornsteins and Myers, is to the contrary. All of the witnesses agree that Worman stated that he could not conduct this business under his own name because he was engaged in the wholesale furniture business and had customers in Newark, and he could not, therefore, be identified with a retail furniture business in that city. On page 32 of his brief counsel says that the corporation might have conducted “the business in this store without having an assignment of the lease \* \* \* There would be no breach of covenant.”

In view of the fact that the covenant in question prohibited not only assignments of the lease, but underletting and reletting of the premises, it is respectfully submitted that this contention of counsel is without merit. Occupation of the store and carrying on the business of the corporation would of itself amount to an assignment of the lease and a forfeiture. The learned Vice-Chancellor at page

45 of his opinion so held and we respectfully submit that this is the law.

The case of *German American Sav. Bank v. Gollmer*, 155 Cal. 683, 102 Pac. 932, cited and copiously quoted by counsel for the defendant on pages 6, 33, 34, 35 and 36 of his brief, and which is apparently greatly relied upon by him, was decided by a divided Court, the dissenting opinion reading as follows:

“BEATTY, C. J.—I dissent from the order denying a rehearing. There was in my opinion abundant evidence to sustain the findings that the defendants consented to the assignment of the lease, not in express terms, but by a course of conduct which warrants the inference of consent.”

We respectfully refer to 35 C. J., page 991, where the following statement may be found, supported by numerous authorities:

“Where one other than the lessee is found in possession of the leased premises, a presumption arises that he holds under an assignment of the lease, more particularly where he is shown to be in under the tenant, or is paying rent, or has occupied for the whole residue of the term.”

This is corroborated in *Mann v. Munch Brewery*, 225 N. Y. 189, where the Court said as follows (p. 193):

“Payment of rent by the defendant to the plaintiff when the defendant has been let into possession by the original lessee is *prima facie* evidence of the assignment of the whole term. (*Bedford v. Terhune*, 30 N. Y. 453, 459.)”

Also, in *Fischer v. Ginzburg*, 191 App. Div. 418, there is the following statement (p. 423):

“It is argued that inasmuch as it was unnecessary to record the sublease to Ortlieb, which was only for two years, and, therefore, did not constitute a conveyance within the Recording Act (Real Prop. Law, Par. 290, 291), the record thereof was not constructive notice thereof to the plaintiffs. (*Washburn v. Burnham*, 63 N. Y. 132.) Although the plaintiffs were not bound to search the records for such a sublease, it does not appear that they did not and it is not improbable that they did have notice of the record of the lease. If they obtained knowledge or notice in any form or from any source and then accepted the rent, they thereby waived the breach. I am also of opinion that a *prima facie* defense is presented by the tenant on the theory that the lease consisted of the two duplicates (*Martin v. Martin*, 1 Misc. Rep. 181; 1 McAdam Landl. & Ten., 4th ed. 147), and that the plaintiffs were chargeable with constructive if not actual notice that the premises were exclusively occupied by subtenants of the defendant and thereby were put upon inquiry with respect to the authority of the tenant so to sublet, and if they had inquired of him they would have discovered that the clause in question had been stricken out of the tenant's duplicate and that the tenant was free to sublet.”

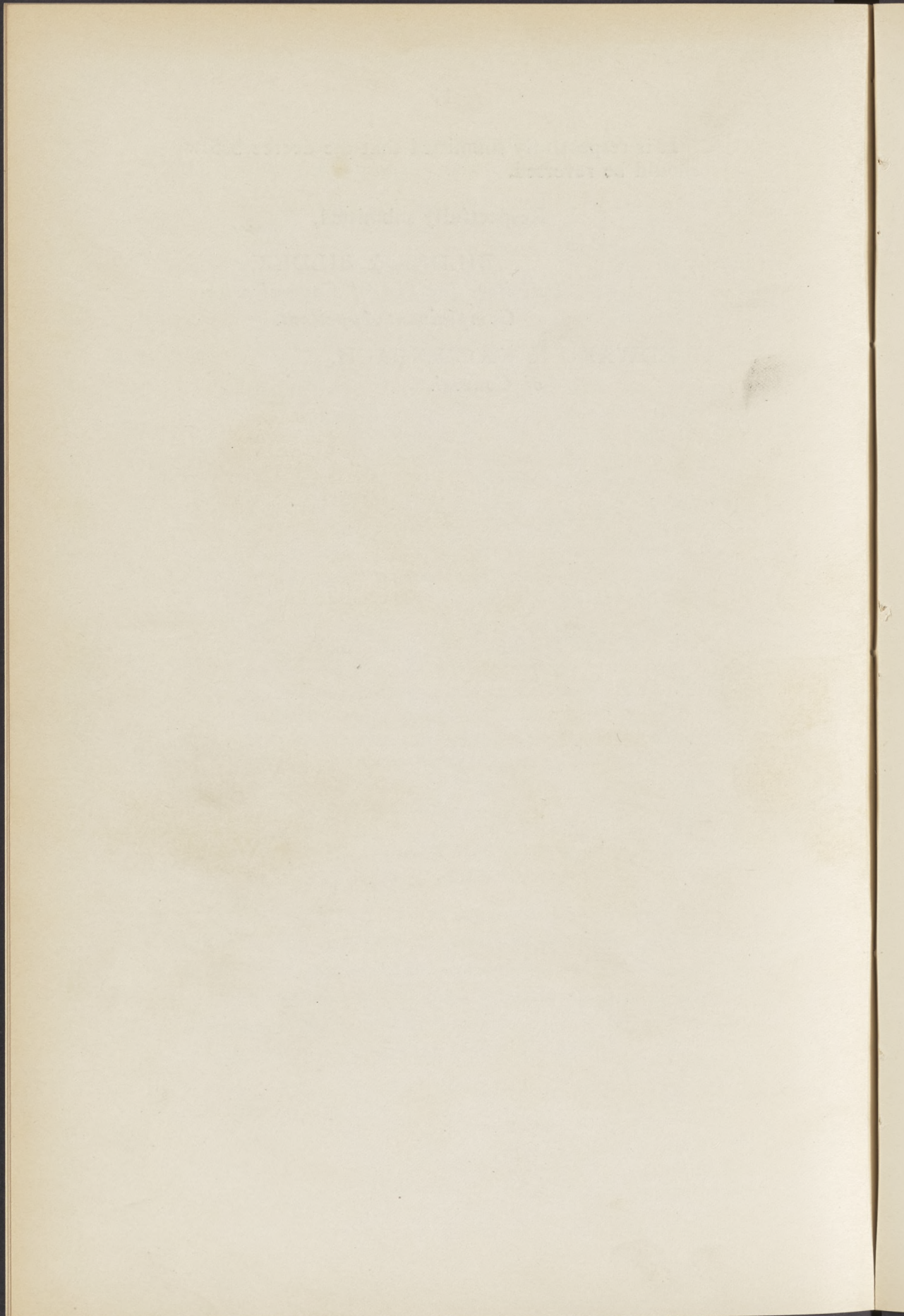
It will serve no useful purpose to continue to argue in opposition to any more of the points made in the brief of counsel for the defendants, since most of them assume that the lease was not assigned until February, 1924, which assumption, as has been shown, is not substantiated by any proof.

It is respectfully submitted that the decree below  
should be reversed.

Respectfully submitted,

BILDER & BILDER,  
*Solicitors for and of Counsel with  
Complainant-Appellant.*

EDWARD L. KATZENBACH,  
*of Counsel.*



## New Jersey Court of Errors and Appeals

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<p>Between</p> <p style="text-align: center;">LINCOLN FURNITURE CO.,</p> <p style="text-align: center;"><i>Complainant-Appellant,</i></p> <p style="text-align: center;">and</p> <p>RACHEL BORNSTEIN, NEWTON A. BORN- STEIN AND ALFRED FRIED,</p> <p style="text-align: center;"><i>Defendants-Appellees.</i></p>	}	<p>On Appeal</p> <p>From Chancery</p>
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### BRIEF FOR COMPLAINANT-APPELLANT

The complainant-appellant, a corporation organized under and by virtue of the laws of the State of New Jersey December 12, 1919, filed a Bill in Chancery (Case, p. 7) on July 15, 1924, to enjoin the defendants, Rachel Bornstein and Newton A. Bornstein, from proceeding with an action instituted by them in the Second District Court of the City of Newark, New Jersey, to recover possession of the premises known as 47 Market Street, Newark, owned by the defendants and occupied by the complainant. The said action was instituted upon the alleged ground that the landlords had terminated a lease dated December 8, 1919, by which said premises were leased by the defendants to one Carl Worman, the assignor of the complainant, upon the

ground of a "breach and violation of a covenant and agreement contained in said lease of the aforementioned premises, that you would not re-let or underlet the premises or any part thereof nor assign the lease without our written consent under penalty of forfeiture."

The bill alleged the incorporation of the complainant as aforesaid; that on or about December 8, 1919, Phillip Bornstein and Newton A. Bornstein, the latter being one of the defendants, leased the said premises to Worman; the said lease contained a provision whereby Worman agreed that he would not assign the lease without the written consent of the defendants; that at the time of making the lease the said Worman occupied the premises and therein conducted a furniture and carpet business; that on December 15, 1919, said Worman sold his said business to complainant and assigned and transferred the aforesaid lease to the complainant; that at all times since December 15, 1919, the complainant has occupied the said premises and has continuously carried on in the said premises the business of selling furniture; that its name has at all times since December 15, 1919, been conspicuously displayed upon the premises; that the rent payable under the terms of said lease was always paid by means of the complainant's checks; that subsequent to the making of the lease the said Phillip Bornstein transferred his interest in the property in question to his wife, Rachel Bornstein, one of the defendants; that there was an exchange of correspondence between complainant and the defendants, said letters being annexed to the complaint; that the complainant with the consent of the defendants made extensive alterations to the premises; that the defendants refused to

accept rent from the complainant for the months of April, May, June and July, 1924. The bill further recites the institution of proceedings in the Second District Court of Newark above mentioned and alleges that since the complainant is not a party to said proceedings no defense could be interposed by it to said action; that if in said action a judgment be entered in favor of the plaintiffs and an appropriate writ be issued out of said court on said judgment complainant could be removed from its possession or occupancy of the premises and its business seriously damaged, if not wholly destroyed; that the defendants at no time between the 15th day of December, 1919, and April 4, 1924, objected to complainant's occupancy of the premises, the assignment of the lease and the payment of the rent by the complainant, although the said defendants knew or had knowledge of said facts.

The bill prayed a decree adjudging that the complainant is the lawful assignee of the aforesaid lease and that complainant is in lawful occupancy of the premises and the bill further prayed that an injunction restraining the defendants from proceeding with the said action in the Second District Court of the City of Newark, and from instituting any other action or proceeding at law or in equity for the purpose of attacking plaintiff's right to the possession and occupancy of the said premises; and enjoining the defendants from declaring a forfeiture of said lease because of the said assignment from Worman to the complainant.

The defendants were ordered to show cause on the 29th day of July, 1924, why an injunction should not issue in accordance with the prayer of the bill of complaint. Upon the return day said order was

made absolute and the defendants were restrained until final hearing from proceeding with the suit in the Second District Court of the City of Newark and from instituting any other suit or proceeding at law or equity in any court for the purpose of contesting the complainant's right to the possession and occupancy of the premises in question.

Thereafter the premises were transferred by warranty deed from Rachel Bornstein and Phillip Bornstein, her husband, and Newton A. Bornstein and Margaret Bornstein, his wife, to Albert Fried, a relative of the grantors who was made a party defendant by an addition by way of supplement to the bill (Case, pp. 33, 36). The premises were conveyed subject to the rights, if any, of the Lincoln Furniture Co. with full knowledge on the part of said Fried of this litigation. (See stipulation between counsel admitting additional testimony. Case, p. 38.)

After final hearing the learned Vice Chancellor advised a decree dismissing complainant's bill. From this decree complainant appeals.

### **SUMMARY OF FACTS.**

The premises in question is the store known as 47 Market Street, Newark, N. J., located in the district in which are located a great number of merchants who sell furniture at retail on the installment plan (pp. 62, 68, 69).

Prior to December 8, 1919, the date of the making of the lease in question, the premises were leased to and occupied by the Crown Company, a corporation also engaged in the retail furniture business, under a written lease to run for three years from May 1, 1918, at a rental of \$6100. per year; said lease con-

taining an option for renewal for a further period of three years at the same rental (pp. 50, 51, 200).

Carl Worman, who had been extensively engaged in selling furniture at wholesale in New York City, desiring to embark in the retail furniture business in Newark, negotiated with Messrs. Riker & Riker, attorneys representing the Crown Company, for the purchase of its business, including its lease, but before completing the negotiation, attended with Mr. Herman Zodikow, a member of the New York Bar, a meeting at the office of Charles M. Myers, the attorney for the landlords, and there met the landlords (pp. 51, 75) (Newton A. Bornstein and Phillip Bornstein). As a result, on December 1, 1919, an option was given to Worman for a new lease of the premises upon the surrender of the lease held by the Crown Company, the new lease to be for a period of ten years beginning January 1, 1920, at a rental of \$8,000. per year, containing a provision for an additional term of five years for a sum that would net the landlords, the lessors,  $5\frac{1}{2}$  per cent. of the appraised value of the property at a rental of not less than \$10,000. per year (pp. 51, 52, 127).

Having completed the negotiations for the purchase of the Crown Company assets, including its lease, Worman surrendered that lease to the Bornsteins and entered into the lease in question, which, although dated December 8, 1919, was not to begin until January 1, 1920. (Exhibit C-1, p. 127.)

Before the term of the lease began a corporation was organized under the laws of the State of New Jersey named "Lincoln Furniture Co.," the complainant in this cause. A certificate of incorporation was signed by Carl Worman, Julius Worman, Fred

J. Stern and Samuel Goldstein. It provided for a capital of \$125,000., divided into shares of common stock of the par value of \$100. each. It also provided that the corporation's principal place of business was at No. 47 Market Street, Newark, N. J., the premises in question; and that one of the declared objects of the corporation was that of carrying on the furniture business (Ex. C-3, 135); the certificate was filed in the clerk's office of Essex County December 11, 1919, and recorded in the office of Secretary of State December 12, 1919, on which date the charter of the corporation was issued (p. 138).

At the organization meeting of the corporation, held December 15, 1919, all of the incorporators were elected directors, and resolutions were duly passed purchasing the business from Worman which he had acquired from the Crown Company. The lease in question was sold to the complainant as part of the assets of Worman's business (pp. 62, 63, 64).

On December 15, 1919, the first meeting of the directors was also held, at which time Carl Worman was elected President, Fred J. Stern was elected Vice-President, and Samuel Goldstein was elected Treasurer (p. 63). Mr. Goldstein also later acted as Manager. The directors also passed resolutions providing for the purchase of the said business and lease from Worman pursuant to a written offer of sale made by Worman to the corporation and dated the same day (pp. 63, 64). Mr. Zodikow testified that a formal assignment of the lease was executed to the corporation on December 15, 1919 (p. 92). It was also testified that on February 29, 1924, before any litigation had been started Worman sold a

substantial part of his stockholdings to Harry Bloch. It was then discovered that the formal instrument of assignment of the lease had been lost or mislaid and a new instrument of assignment confirmatory of a previous assignment and effective as of December 15, 1919, was executed by Worman (p. 92).

Large signs, upon which the corporate name appeared and running across the entire width of the building, were immediately placed upon the building and the corporate name was painted upon the front store windows. The corporation immediately upon the completion of its organization went into possession of the premises. It should be borne in mind that this was before January 1, 1920, the date when the lease began (pp. 63-66). On January 5, 1920, the first month's rent under the lease was paid by a check signed "Lincoln Furniture Co., Carl Worman, President, S. Goldstein, Treasurer." (Exhibit C-2, page 134. The check is dated in 1919, evidently in error.) This check was accepted by the landlords. For a continuous period of four years and three months until April, 1924, the rent was paid by corporate checks, every one of which was signed by an officer or by officers of the company, and every check was accepted by the landlords. (Exhibits C-4, C-5, pp. 140, 192.)

On May 22, 1922, the landlords addressed a letter to the Lincoln Furniture Co. (Exhibit C-7, p. 193), requesting that the corporation anticipate the rent for June, 1922, in order to enable the landlords to meet taxes maturing June 1, 1922.

In response, on May 26, 1922, a letter signed "Lincoln Furniture Co.," addressed to the landlords (Exhibit C-8, p. 194), enclosing a corporate check

for the June rent, was sent to and accepted by the landlords.

Three additional letters, all signed by the "Lincoln Furniture Co." and dated, respectively, July 8, 1922; August 5, 1922, and October 4, 1922 (Exhibit C-9, p. 194), were addressed to the landlords and received by them.

December 24, 1922, a letter was sent to the landlords and received by them signed "Lincoln Furniture Co.," enclosing a bill for repairs. This letter was returned to the company by the landlords with a notation in the handwriting of the landlords. (Exhibit C-9, p. 196.)

"Kindly read your lease, page 4, paragraph 3, 'and the said party of the second part further agrees that he will make any and all repairs to said premises during the term of this lease'."

On January 11, 1924, the landlords wrote to the Lincoln Furniture Co. requesting that checks for rent be sent to a new address. (Exhibit C-9, p. 197.)

On March 1, 1924, the Lincoln Furniture Co. wrote the landlords at the new address, enclosing check for rent for March, 1924.

On April 3, 1924, a check for rent for the month of April, which had been sent in the usual way to the landlords by the Lincoln Furniture Co., was returned by the landlords with a letter dictated by Charles M. Myers (p. 105), the attorney for the landlords, which letter is as follows (p. 198):

"April 3, 1924.

Lincoln Furniture Company,  
47 Market Street,  
Newark, N. J.

Gentlemen:

We are in receipt of a check dated April 1, 1924, for \$666.66 signed Lincoln Furniture Company, by J. W. Frankel Manager and Louis Rivello, book-keeper, which check we are herewith returning, as we do not recognize the Lincoln Furniture Company as our tenants.

The lease which we hold contains a provision that the lessee shall not re-let or assign the lease without our written consent, which has not been asked for or given,

Yours very truly,  
(signed) Rachel & N. A. Bornstein  
By N. A. Bornstein."

Shortly thereafter the aforesaid proceeding was instituted in the Second District Court of the City of Newark by the landlords to recover possession of the premises for the reason that there had been a breach and violation of the covenant and agreement contained in the lease relating to an assignment thereof without written consent.

## ARGUMENT

### Point I

**Equity has jurisdiction to and will relieve against forfeiture where the forfeiture has been acquiesced in or waived by a lessor.**

In the suit instituted by the landlords in the Second District Court of the City of Newark Carl Worman was the only defendant. The complainant is not a party to the summary proceeding instituted in that Court and therefore cannot interpose any

defense and cannot be heard to assert its rights, although a warrant of removal against Worman, its assignor, will dispossess the complainant. *Brahn v. Jersey City Forge Co.*, 38 N. J. L. 74; *Township of Union v. Bayliss*, 40 N. J. L., 60. In this situation the complainant's only relief at law would be an action for damages and such an action would not conserve or restore the possession of the premises to the complainant. What the complainant needs in this situation, in order that its rights may be fully protected, is that the suit instituted by the landlords aforesaid may be stayed until opportunity is given to the complainant to be heard. Equity has inherent jurisdiction to thus aid the complainant and to relieve against forfeiture in the case of the waiver of breach of covenant. *Pomeroy, Equity Jurisprudence*, Section 454.

"Section 454. Equity will not, under ordinary circumstances, relieve against a forfeiture arising from the breach of other covenants contained in a lease, on the ground that no exact compensation can be made. Among these covenants for a breach of which no relief can ordinarily be given is that to repair generally, or to make specific repairs, or to lay out a certain sum of money in repairs or erections within a specified time; the covenant to insure; the covenant not to assign without license; and in other covenants of a special nature. It should be observed, however, that in all cases of this class relief may be given when the breach was the result of fraud, mistake, accident, surprise, and the like, or was acquiesced in or waived by the lessor."

This point is fully discussed in the case of *Windholz v. Burke*, 98 N. J. Eq. 471, wherein the Court at page 473 says:

“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. La Brecque Co.*, 97 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.”

### Point II.

**The landlords have waived their right to and will be estopped in equity from declaring a forfeiture of the lease upon the ground that the covenant against assignment has been violated.**

Equity does not favor forfeitures and where a forfeiture is once waived the court will not assist in the enforcement thereof. *Fulton v. Greacen*, 36 N. J. Eq. 216; *Realty Improvement Company v. Montgomery*, 95 N. J. Eq. 367.

A mere statement of the undisputed facts in the case supported by the written documents in evidence is sufficient to cause a reversal of the decree advised by the learned Vice Chancellor to the end that a decree may be entered in favor of the complainant. The written documents, the mute witnesses, whose testimony cannot be colored or distorted, prove a course of conduct on the part of the defendants which brands the story presented by the defendants to the court for consideration as wholly improbable.

The defendants attempt to explain away the effect of this unimpeachable documentary evidence by asserting that they believed the name "Lincoln Furniture Co." was used by Carl Worman as a trade name solely, and that in fact they did not know that the premises had for over four years been occupied by a corporation. Does the testimony give credence to this astonishing defense

Herman Zodikow, an attorney who has practiced in New York for more than fifteen years, represented Worman at the time of the making of the lease and assisted in negotiating the purchase by Worman of the Crown Company's business. In a discussion with the landlords at the office of their attorney, Charles M. Myers, about December 1, 1919, and before the lease was made, Zodikow told Myers and the landlords that Worman was in the wholesale furniture business and that he, Zodikow, represented a client (Mr. Stern) who was about to invest approximately \$15,000 in the business and that it was intended to organize a corporation to conduct the retail furniture business in Newark; that Worman could not afford to run the retail furniture business in his own name in Newark be-

cause he did an extensive business throughout the State of New Jersey with retail furniture dealers (pp. 50, 51). Zodikow further testified that Myers for the landlords replied "It would be all right as long as they had a responsible party on the lease. It did not make any difference to them" (p. 52, l. 10). At that time the corporation had not been organized (p. 52). Zodikow also testified that when the lease was prepared and the discussion ensued as to the clause against assignment he again told the landlords and Myers that Mr. Stern was going to invest about \$15,000. in the business; that the business was going to be conducted through a corporation and that he did not want any question to arise at any time with respect to the corporation conducting business on the premises. He testified further that it was again stated by Myers that they saw no objection to it as long as Worman remained personally liable under the lease (p. 53).

Zodikow's testimony is corroborated by that of Worman, who has no interest whatsoever in the result of this litigation, having disposed of his stockholdings to Harry Bloch, 75 per cent. thereof about March, 1924, and the balance about a year later (pp. 76 and 93). It should be noted that in this respect the learned Vice Chancellor is in error when he says on page 40, line 32, that "Worman sold his interest in the company in February or March, 1924, to one Bloch and quit the business," the fact being that Worman at the time stated by the Vice Chancellor had only sold 75 per cent. of his holdings in the corporation and that remaining part of his holdings were held by him until almost a year after the suit in the district court was started.

Worman testified that he explained to the landlords at the office of Mr. Myers that it was not wise for him and that he did not intend to run the business under the name "Carl Worman," because it being a retail business such a course of action would hurt his wholesale business and that he intended to form a corporation (p. 75).

Dr. Bornstein and his brother Phillip and Mr. Myers all admit that the organization of a corporation was discussed when negotiations were pending for the lease and that Worman told them that he was engaged in the wholesale business in New York and did not want to conduct the business under the name "Carl Worman" (pp. 97, 112, 123). Mr. Myers insists, however, that he stated that no consent would be given to the making of a lease to a corporation "because of the unfortunate experiences that the Bornsteins had had with two previous corporations who had leases on the property" (p. 98, l. 15). He insists that he stated at that time that if Worman intended to form a corporation a lease would not be made (p. 99). The questions propounded by the Court and the answers of the witnesses on that point are illuminating (p. 99, l. 12):

"COURT:—What objection did you have to the forming of a corporation as long as you had Worman as the lessee?

Witness:—I didn't want that any question could arise.

COURT:—What question could arise?

Witness:—At that time I thought some question might arise.

COURT:—What did you think could arise, he having been bound as your tenant?

Witness:—That the lessee might claim I didn't want to enter into any litigation. He might claim that the taking of rent from some other person might absolve him from responsibility and liability."

It being admitted that the matter of the organization of a corporation to occupy the premises and run the business was discussed by the parties at the time of the making of the lease for the very logical reason given by Worman, if in fact at that time any serious objection to the corporation presented itself, would it not have been a very simple matter for a lawyer of Mr. Myers' long experience to have safeguarded the interests of the landlords by providing for an assignment to the corporation, but retaining Worman's responsibility on the lease nevertheless? It is respectfully submitted that the evidence indicates that an immediate increase in the rental from \$6100. per annum to \$8000. per annum, over a period of about four and a half years, during which the Crown Company's lease could still run, was the inducement moving the landlords to make the lease, and that if a corporation had been then in existence the lease would have been made with the corporation.

If, as is contended by the defendants, there had been a positive refusal on the part of the landlords to permit a corporation to be the tenant is it reasonable to believe that Worman, after having invested a very substantial sum for the purchase of the business and lease of the Crown Company, would have taken the very dangerous course within a few days after the making of the lease and before it was to begin, of organizing the corporation, assigning the lease in direct violation of the covenant against as-

signment and tendering the very first rent payment by means of a corporate check signed by two officers and thus immediately put the landlords in a position where they could declare a forfeiture? It is respectfully submitted that such a course of conduct on the part of Worman would not have been undertaken unless there had been a complete understanding between the parties that a corporation was to be organized which was to take over the business, occupy the premises and be the tenant, and it is further submitted that if the landlords were irrevocably opposed to having the corporation as a tenant they would not have accepted the first corporate check that was tendered to them in payment of the rent and all the succeeding checks for over a period of four years, and we must conclude that whether the tenant was an individual or a corporation was a matter of indifference to the landlords and that all they were principally interested in was the immediate substantial increase in rent. That the landlords were indifferent as to whether they had an individual tenant or a corporate tenant is the conclusion reached by the Vice Chancellor. (See p. 45, l. 9.)

“However, it appears that they were indifferent while Worman was connected with the store and did not concern themselves whether he, as lessee, was conducting the business personally under a trade name or through a corporation.”

At the time the lease was made the increased rental provided for in the lease made the landlords a good return on their investment. They were indifferent, therefore, at that time who the tenant was so long as the rent was paid, and *it was not until*

*more than four years later when, as everyone knows, and as Mr. Bornstein himself admitted, the value of the property had enhanced and its rental value had increased* (pp. 119 and 120), that they began looking for some means of creating a forfeiture of the lease. In the meantime the Lincoln Furniture Co. had built up its business from approximately \$65,000. per annum to over \$150,000. per annum and had made substantial repairs and improvements to the property costing from \$4,500. to \$5,000. with the express approval of the landlords (pp. 68, 69 and 70); repairs and improvements which the corporation thought the landlord should pay, and which the landlord refused to pay, returning to the corporation the letter from the corporation (Exhibit C, page 196), with a notation in the handwriting of the landlord, stating "Kindly read *your* lease, etc."

Having heard in some roundabout way that Worman had sold his stock interest in the corporation to Mr. Bloch and having received a check for the April rent signed by a bookkeeper and the manager, instead of officers of the corporation, as had been the custom for over four years, this incident was seized upon as an excuse for an attempt to declare a forfeiture of the lease, as shown by the letter of April 3d, 1924, referred to on page 7 of this brief. Mr. Myers' testimony concerning the writing of that letter is illustrative of their search for a reason which might be used by them in an effort to break the lease. In cross-examination concerning the writing of this letter and the reason for it Myers says that he dictated it and addressed it to the Lincoln Furniture Co. because he assumed that the

Lincoln Furniture Co. probably did not know that the lease contained a clause against assignment. Mr. Myers testified as follows (p. 105, l. 37, to p. 106, l. 32):

“Q. Who did you think the Lincoln Furniture Company was on that day, April 3d? You hadn’t yet examined—

A. I thought Carl Worman was the Lincoln Furniture Company.

Q. You thought Carl Worman was the Lincoln Furniture Company. You hadn’t yet examined the records and found there was a corporation?

A. No, not on the 3d of April.

Q. You didn’t know there was a corporation?

A. No.

Q. The letter is addressed to whom?

A. Lincoln Furniture Company, and the reason for addressing it to the Lincoln Furniture Company was—

The Court: Answer the question, please.

Q. And when you addressed this letter to the Lincoln Furniture Company and referred to a provision of the lease against assignment, it was to call their attention to the fact that they had no right to possession, isn’t that so?

A. Yes, sir; and had no right to give a check—

Q. But you knew at that time, didn’t you, that the Lincoln Furniture Company, a corporation, was in possession?

A. Only so far as it indicates in the letter that the check was signed by the president and treasurer.

Q. Does the letter say it was signed by the president and treasurer?

A. Well, it was signed differently than Mr. Bornstein had told me the checks had been in the habit of being signed.

Q. How had you been told the checks were?

A. Carl Worman."

Of course, this testimony is wholly inconsistent and is not supported by the facts, as has been shown. All of the checks which the landlords received had been signed in the corporate name, many of them by two officers; some of them by Carl Worman alone as President, and several of them by Fred J. Stern alone as Treasurer. But not a single check of an individual was tendered for any of the rest during the entire period of the occupancy. As a matter of fact there was less reason to reject the check which the landlords did reject than any of the previous checks, because the check that was rejected was signed by a manager and a bookkeeper, which indicated to a less extent a corporate existence than the other checks which were signed by an officer or officers, but the defendants, to find some reason for breaking the lease at that particular time, seized upon this mere change in the signatures as an expedient. And this in spite of the fact that Dr. Bornstein testifies on page 118 that after the first several months he merely glanced at the checks and then placed them in the bank; that he was only interested in the amount of the checks and whether they were good or not.

Mr. Myers testified that he did not know that a corporation had been organized until April 17, 1924, when he examined the records in the Secretary of State's Office in Trenton (p. 112). He claims to have served a notice on Mr. Worman terminating the lease on April 21, 1924, alleging as a reason for the termination that the clause against assignment

had been violated. When the notice was served he testified that he had a conversation with Mr. Worman about the assignment, yet not once in that conversation did he disclose to Worman that he knew that a corporation had been organized by Worman in December, 1919, to take over the business.

It is submitted that the following facts conclusively prove that the landlords had knowledge that the corporation was their tenant, since it was in possession of the premises and was paying the rent therefor.

1. Prior to January 1, 1920, which was the date on which the lease was to begin, the corporation had been completely organized and had taken possession of the premises, and in payment of the first month's rent tendered a corporate check signed by two officers of the corporation. (Ex. C-4, p. 140.)

2. The rent for the succeeding eleven months was paid by checks similarly signed and Dr. Bernstein admits having seen the checks during the first several months (p. 118).

3. Such checks as were signed by Mr. Worman alone, after Mr. Goldstein had been discharged as manager, were signed by him as President. (Ex. C-5, p. 151.)

4. Several checks were signed by Mr. Stern as Treasurer without Worman's signature at all, which testimony refutes the testimony given by Dr. Bornstein that he first suspected that an assignment had taken place when Mr. Worman's signature did not appear on the checks (p. 113).

5. All of the correspondence between the parties was in the name of the corporation. Such letters as were sent to the landlords were signed by the corporation and such as were sent by the landlords were addressed to the corporation. (Exs. C-7-8-9.)

6. No evidence was introduced showing that Worman was ever held out during the term of the lease as the owner of the business and there is no evidence of any transaction between the landlords and Worman as an individual.

7. The corporate name was conspicuously displayed on various parts of the building. Advertisements bearing the corporate name appeared in the newspapers at least twice a week (p. 77). The wagons which made deliveries had the corporate name painted upon them (p. 66), and the corporate name appeared on the stationery which passed from the corporation to the landlords.

8. Dr. Bornstein and Mr. Fried tried to sell the building to Mr. Worman before Worman had sold his interest to Mr. Bloch. Mr. Worman testified that on these occasions he advised Dr. Bornstein and Mr. Fried that they would have to consult Mr. Stern, who was a large stockholder and officer of the corporation (pp. 71-73). This is not denied, and even after this knowledge, the landlords received rent checks signed by the corporation, per its officers.

9. Dr. Bornstein and his brother Phillip are intelligent and well educated men, one of

them being a dentist by profession, and the other one a real estate man. Their familiarity with corporate organizations, customs and forms is clearly evidenced by their testimony upon this subject (pp. 116, 117 and 124), most of which was conducted by the Court. The last question by the Court and the answer thereto are very pertinent (p. 177, l. 38):

“Q. You saw the President and Secretary on the check. Didn't that suggest itself to you that it was a corporation?”

A. I never gave it any thought.”

It is submitted that this really explains the situation. It was not until over four years after the making of the lease and not until the property became very valuable, and it was, therefore, very desirable to break the lease, that any thought was given to the question as to who was occupying the premises.

All of the aforementioned facts conclusively prove that the landlords knew that a corporation was the tenant. The corporation was openly, frankly and prominently presented as the tenant. Not a scintilla of evidence was produced which shows that any effort was made to mislead the landlords or to place them against their will in the position of having waived the clause against assignment. The conduct of the tenant in every respect from the very beginning was open, frank and above board.

If, under these circumstances, the landlords are to be permitted, after the long lapse of time during which the corporation occupied the premises, after the corporation has spent a substantial sum of money in improvements and in building up the business,

to declare a forfeiture of the lease because of an assignment which took place December 15, 1919, irreparable damage will be inflicted upon the corporation because,

(a) It would lose an admittedly valuable lease which still has a considerable period to run.

(b) It would lose a valuable good will in the loss of possession of the premises in the heart of the retail furniture district.

(c) It would lose a large sum of money representing installment accounts receivable because, as has been testified by Mr. Bloch, the accounts receivable would depreciate at least 50 cents on the dollar.

(d) The corporation would lose approximately \$5000. expended by it in making extensive improvements to the premises, the improvements having been made by the corporation with the knowledge and approval of the landlords.

The law applicable to these facts is entirely settled, and the decisions are entirely in harmony.

In the case of *Levy v. Blackmore*, 67 Ttl. 1022, Blackmore, the defendant, made a written lease to Levy, the complainant, for certain rooms on the third floor of the building No. 60 Academy Street, Newark, New Jersey, for one year. The lease contained this covenant:

“And the said party of the second part do hereby promise and agree that I will not relet or under-let the whole or any part of said premises, nor assign this lease, nor use or

permit any part thereof to be used for any other purpose than enameling and painting jewelry, without the written consent of the party of the first part \* \* \* under penalty of forfeiture and damages."

The complainant entered into possession of the premises and used them, as he claimed, as a workshop for "enameling and painting jewelry." The defendant claimed that he was doing something more than that he was in addition polishing and gilding jewelry, and for that purpose used machines which annoyed other tenants. The landlord appears to have complained of the noise made by the operation of the tenant's machinery soon after the tenant had moved in, but he took no steps to obviate the difficulty until a few days before the bill was filed, when he disconnected a gas pipe which furnished gas to heat an oven, and so brought the business of the tenant to a standstill. The bill sought to restrain the landlord from doing anything which interfered with the operation of the machinery necessary to conduct the tenant's business. The landlord sought to justify his action by claiming that the tenant was using the premises for other purposes than that for which the lease specifically provided they should be used. He also filed a cross-bill, in which he alleged that such conduct on the part of the tenant broke the lease and prayed that it be set aside and for nothing holden.

Vice-Chancellor Howell says at page 1023:

"But, even conceding the position of the landlord, and conceding that the tenant did violate the covenant, and conceding, still further, that the violation operated as a forfeiture, and that due notice was given thereof, and everything done by the landlord to con-

serve what he thought were his rights, *it still appears that the landlord has accepted the rent from the beginning of the lease down to the present time.* This operates as a waiver of any forfeiture which may have been incurred during that period because it sufficiently appears that the rent was accepted after the landlord had knowledge of the facts which he now claims operate as a forfeiture. *Conger v. Duryee*, 90 N. Y. 394; *Taylor on L. & T. Section 497*; *Thropp v. Field*, 26 N. J. Eq. 83."

The Vice-Chancellor thereupon granted the injunction and dismissed the cross-bill.

In the case of *Fulton v. Greacen*, 36 Eq. 216, the defendant claimed that a condition in a deed which authorized his grantors to enter upon complainant's lands and avoid a grant of a right to use certain water in case of the non-payment of the water rent, had been broken, and all of complainant's claim or right thereby forfeited, and that therefore he was justified in cutting off or diverting the water from the complainant's mill.

The complainant claimed, among other things, that even if there might have been a forfeiture for want of prompt payment of the water rent, that the defendant or his grantors had waived that forfeiture by accepting such rent afterwards.

Vice-Chancellor Van Fleet, speaking for the Court of Chancery, says, at page 222:

"But the complainant does not ask to be relieved, on equitable terms, from a forfeiture. He stands on higher ground. He insists that the lessor has, by his own act, extinguished any right of forfeiture which may at

one time have existed. The fact is substantially undisputed that the lessor accepted rent, accrued subsequent to the forfeiture. The complainant swears to it, and there is nothing on the part of the defendant which can be regarded as an effectual denial.

The acceptance by the lessor of rent accrued subsequent to the forfeiture, *with notice of the breach*, on which the right of forfeiture rests, has, from a very early date, been held to be a waiver of extinguishment of the right of forfeiture. *March v. Curteys*, Cro. Eliz. 528 *Harvie v. Oswel*, Id. 572.

The reasons for the rule were very forcibly stated by Lord Mansfield in *Goodright v. Davids*, Cowp. 803. He said: 'Upon the breach of the condition, the landlord had a right to re-enter. He had full notice of the breach and does not take advantage of it, but accepts rent subsequently accrued. That shows he meant the lease should continue. Cases of forfeiture are not favored by the law, and where the forfeiture is once waived, the court will not assist it.' It has even been held that an absolute, unqualified demand of rent, accrued subsequent to the forfeiture, amounts to an extinguishment of the forfeiture. Baron Parke so declared in *Nash v. Birch*, 1 M. & W. 402, and Baron Bramwell said the same thing in *Croft v. Lumley*, 6 H. of L. Cas. 672; and in *Dendy v. Nichols*, 4 C. B. (N. S.) 376, it was held that bringing an action for rent, accrued subsequent to the forfeiture, was a waiver of the right of re-entry. Where the lease, in plain terms, provided that it shall be void, or become void, if the lessee fails to pay rent, or keep any other covenant, a breach does not render it *ipso facto void*, but merely gives the lessor a right to avoid it, which he may avail himself of or not, as he may choose

to elect. A breach, in such case, renders the lease voidable, but not void, and if the lessor, with notice of the breach, afterwards accepts rent, which accrued subsequent to the breach, the law understands his acceptance as a decisive and final election not to avoid the lease, but that it shall be continued. *Arnsby v. Woodward*, 6 Barn. & Cress, 519; *Bowser v. Colby*, 1 Hare 109; *Gatehouse v. Rees*, 4 Bing. N. C. 384."

*Commercial Trust Co. v. L. Weartheim Coal & Coke Co. et al.*, 88 N. J. Eq. 143.

"I am in accord with the complainant's views in this regard. In the first place, the default under the lease for the non-payment of tax for 1913 was effective January 19, 1914, and no action to enforce a forfeiture was taken by the railroad company until September 17, 1914, at which time the receivers of this court were in possession of the property. This delay is, in effect, a waiver of the default in equity, where forfeitures are not regarded with favor. *Crigg v. Landin*, N. J. Eq. 494. Some definite action must be taken to claim a forfeiture, and it is well settled that, if such action is taken after a lapse of time, this constitutes a waiver of the right to declare a forfeiture. 24 Cyc. 1364. It has been held that the lessor may waive the forfeiture by neglecting to assert his right within a reasonable time after the default. 24 Cyc. 1364.

If, with knowledge of an assignment, the lessor accepts from the assignee payment of the accruing rents, it is deemed conclusive evidence of a consent to the assignment or waiver of the necessity for a prior consent. *Cohen v. Todd*, 130 Minn. 237; *Katz v. Miller*, 148 Wisc. 63.

By accepting rent from the assignee and otherwise recognizing him as tenant the lessor waives the statutory requirement of written assent to an assignment. *B. Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530, 67 S. W. 967.

The law with respect to waiver of a breach of restriction is well summarized in 24 Cyc. 970.

"The lessor may waive a breach of the restriction against assignment or subletting, whether imposed by statute or by the terms of the lease, in which event the case stands as if no restriction had been imposed or as if the lessor had given his consent to the assignment or underletting.

If the lessor, with notice of a breach of the restriction against assigning, permits the assignee to remain in possession and accepts subsequently accruing rents from him, the breach is waived.

The right to take advantage of the lessee's breach of restriction may be lost by lapse of time and by estoppel, *in pais*. (24 Cyc. 971.)"

*Inconsistent acts in general.* (24 Cyc. 1360.)

"Any act of the lessor done with knowledge of a cause of forfeiture by the lessee, affirming the existence of the lease and recognizing the lessee as his tenant, is a waiver of such forfeiture.

And inasmuch as forfeitures are not favored, slight acts will be construed as a waiver of the forfeiture."

*And at page 1361.*

"A waiver may be inferred from the acquiescence inducing the tenant to incur expense in connection with the demised premises."

The ruling of the Vice-Chancellor was evidently based upon the proposition that "to constitute a forfeiture the lessor at the time of the receipt of rent must have had knowledge of the existence of the cause of forfeiture. Thus forfeiture for a breach of a condition not to assign is not waived by acceptance of rent from the assignee unless the landlord has knowledge of this assignment." To support this proposition the opinion cites certain cases. It is submitted that the cases therein cited are clearly distinguishable from the instant case.

In the case cited by the Vice-Chancellor, *German Am. Savings Bank v. Gollmer*, 155 Calf. 683, the lease in question permitted a subletting of the premises in question without any consent of the lessor and prohibited merely an assignment of the lease. There was simply a consolidation and merger of one corporation with another, both corporations using exactly the same name and there being no outward indication of any sort that a merger or change had taken place. The payment of rent in that case by the lessee's assignee was not an indication that there had been an assignment.

The second case cited, *Drummond v. Fischer*, 18 N. Y. Supp, 868, is also distinguishable from the case at bar. In that case the assignee did business under exactly the same name as the lessee, viz., Fischer & Company, and the checks for rent given by the lessee's assignee were exactly in the same form as the checks for rent previously given by the lessee. Hence, the checks would not furnish to the landlord any indication of the presence of a new tenant and a consequent breach of the lease.

In the instant case, however, if Worman had been the tenant the rent would have been paid with his individual check, but, as previously shown, the rent for over four years was paid in every instance by corporate check of the complainant.

The case of *Emery v. Hill*, 39 Atl. 266, is also distinguishable from the instance case in that the landlords in that case took special care to not recognize the assignee as their tenant by giving all receipts for rent in the name of the original lessee.

In the case of *West Shore Railroad Co. v. Wenner*, 70 N. J. L. 233, the lessee mortgaged his leasehold interest without the knowledge or consent of the lessor. This mortgage was foreclosed. The Court held that it was the sale under the foreclosure proceeding which constituted the violation of the covenant and the legal cause of forfeiture, there being under the New Jersey theory of mortgages, no conveyance by the lessee of his leasehold interest by virtue of the mortgage; and the Court therefore held that the mere acceptance of rent by the lessor after the mortgage was made, but before the sale, was not a waiver of a forfeiture for violation under the covenant not to assign.

The case of *Deckert v. Hartshorn*, 60 N. J. L. 548, also cited by the Court, was an action at law for rent. The defense was that defendant ceased to be a tenant prior to the accrual of the rent sued for. The defendant showed that its business at the premises in question had been turned over to a new owner and that the new owner had been paying rent to the plaintiff for some time. The only rule of law established by that case is as follows:

“The mere receipt of rent by a landlord from an underlessee is no proof of his acceptance of such underlessee as a tenant.”

The Vice-Chancellor in his opinion (p. 45, l. 33) holds:

“The display of corporate activities was no doubt sufficient to put them on notice, but such notice is not knowledge and they were under no legal duty to inquire into and be informed of the facts, and it is inferable that, had they inquired of the interested parties,

they would not have been told the truth.”

It is contended on the part of the complainant that the foregoing facts in the possession of the lessors gave them knowledge that the premises had been assigned in December, 1919, to the corporation. But assuming that the lessors only had notice of the occupancy of the premises by the complainant corporation and consequently had notice of the forfeiture of which they complained, as the Vice-Chancellor asserts, it is respectfully urged that notice, in view of all the circumstances in this case, amounts to knowledge or at least has the same effect as knowledge with respect to the lessors' rights to claim the forfeiture of the lease. (See Pomeroy on Equity Jurisprudence, 4th Edition, Vol. 2, page 1104 at line 10):

“ \* \* \* While the doctrines of equity on the subject” (Notice and Knowledge) “do not assume that notice *is* knowledge, nor even that it is necessarily followed by knowledge, they still often impute to it the very same consequences which would flow from actual knowledge acquired by the party.”

(See Pomeroy on Equity Jurisprudence, 4th Edition, Vol. 2, pages 1109 and 1110):

“Within the meaning of the rules, notice may, I think, be correctly defined as the *information concerning a fact* actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent *in its legal effects* to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge. It should be most carefully observed that the notice thus defined is not knowledge, nor does it assume that knowledge necessarily results. On the other hand, the information which constitutes the notice may be so full and minute as to produce complete knowledge. Although an actual knowledge is not necessarily assumed to result, yet in many instances, as will be seen, the party is not permitted to show this fact, but the same consequences follow with respect to his rights and interests as though he had obtained real knowledge.”

(See also page 2094 of the same volume above):

“When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby

reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity."

The possession of the premises by the corporation was visible, open and notorious over a period of more than four years and was amply sufficient to put the lessors on inquiry. This being so, if the lessors failed to inquire, the notice of the corporation's possession of the premises, which it is admitted they possessed, amounted to knowledge or at least the same consequences will result from such notice as if they, the lessors, had actual knowledge. This view is shown in *Hodge's Executors v. Amerman*, 40 N. J. Eq. 99, in which the Court said on page 104:

"But it is not necessary, in order to establish the fact of notice in such cases, to show that the person to be affected by the notice knew of the possession of the other. If the possession of the other is of the character required by the law—if his possession has the notoriety, certainty and exclusiveness which the law says shall constitute notice—then notice is a legal deduction from the fact of possession, and all persons dealing with the title to the land in his possession are chargeable with notice of his possession whether they have actual knowledge of his possession or not. The reason of the rule is this: That it is the duty of a person, who proposes to deal respecting the title to a particular tract of land, to ascertain, in advance, who is in possession of it, and by what right he claims to hold it, and if he neglects this duty it is only just that he should be charged with the knowledge that he would have obtained had he performed it."

The same view is also expressed in the case of *La Combe v. Hedley*, 91 N. J. Eq. 63, in which the Court said on page 65:

“ \* \* \* and it is entirely settled, both in this state and elsewhere, that possession of land, if open, notorious and unequivocal, constitutes notice of the right, or claim of right, under which the party in possession occupies it; and this notice is effective, not only as to those who have actual knowledge of the occupation, but as to all the world. It is the duty of an intending purchaser of land which is in the possession of a person other than the intending grantor to inquire of the occupant and ascertain the rights under which he holds; and if he does not make such inquiry, he is chargeable with notice of such facts as the inquiry, if it had been in fact made, would have revealed.”

And in *Davenport v. Prentice*, 126 App. Div. 451, at page 459-460, Judge Jenks said:

“ ‘Knowledge’ may mean that gained by information or intelligence. (Webster’s Dict., Worcester’s Dict., Cent. Dict., Imperial Dict., Stormonth’s Dict.) ‘Knowledge is information and information knowledge,’ and it is ‘not confined to what we have personally observed.’ (2 Bouv. L. Dict. (Rawle’s Rev.) 94, citing authorities. See, too, *Iron Silver Mining Co. v. Reynolds*, 124 U. S. 384; *Lambert v. People*, 76 N. Y. 220, 227, 228.) To one’s knowledge means ‘so far as one is informed.’ (Cent. Dict.) Knowledge and belief is nothing more than a firm belief. (Anderson L. Dict.) We must take the word in its common acceptation, its plain, common, ordinary meaning. (*Utley v. Hill*, 155 Mo. 232; 49 L. R. A. 323.)”

That portion of the Vice-Chancellor's opinion which contains expressions of doubt as to whether a formal assignment of the lease was executed seems to be entirely irrelevant to the main issue of the case, for he previously stated at page 45, line 22, that

“Occupation of the store and carrying on the business of the corporation would of itself amount to an assignment of the lease and a forfeiture.”

But, even if it were necessary to prove a formal assignment, it is respectfully submitted that there is no evidence that a formal assignment was not executed at the time of the incorporation and that the assignment of February 29, 1924, was only confirmatory. If, in February, 1924, it was intended to manufacture evidence, it would have been just as easy for the parties concerned to have executed an assignment purporting to be an original assignment, dating it in December, 1919. If this procedure had been followed no one would have been in a position to question the genuineness of such an assignment.

THE DEFENDANT ALBERT FRIED  
HAS NO GREATER RIGHTS THAN  
THE DEFENDANTS RACHEL BORN-  
STEIN AND NEWTON A. BORN-  
STEIN.

Albert Fried purchased the premises from the defendants, Newton A. Bornstein and Rachel Bornstein. The deed of conveyance is dated July 25, 1924, and was recorded August 22, 1924, which was after the bill in this case had been filed. The stipulation admitting additional evidence (p. 38) provides:

"That said premises were conveyed to the said Albert Fried as aforesaid, subject to the rights, if any, of the complainant, with full knowledge on the part of the said Albert Fried of the litigation pending in the Court, concerning the premises described in said deed."

The defendant, Fried, having accepted the conveyance subject to the rights of the complainant, he cannot now claim that he stands in any better position with respect to the premises in question than his grantors, and they having waived their rights under the covenant against assignment, he cannot assert any right for violation of that covenant.

It is respectfully submitted that the lessors, having waived their right to declare a forfeiture of the lease upon the ground that the covenant against assignment has been violated, the decree advised by the Vice-Chancellor should be reversed to the end that a decree may be entered granting the relief prayed for in the bill of complaint.

Respectfully submitted,

**BILDER & BILDER,**  
*Solicitors for and of Counsel with*  
*Complainant-Appellant.*

**EDWARD L. KATZENBACH,**  
*of Counsel.*

