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Notice of Appeal to the New Jersey Court of Errors and Appeals.

Filed May 2, 1930.

New Jersey Supreme Court.

JEANETTE HEMMINDINGER, Plaintiff-Respondent, vs LOUIS GITTER and BENJAMIN GITTER, Defendants-Appellants.	In Tort. On Appeal from District Court. Notice of Appeal and Grounds.

To HARRY KAPLAN, ESQ., Attorney of Plaintiff-Respondent, or to whom it may concern:

Sir:

Please Take Notice that the defendants in the above entitled cause appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole judgment entered in this cause on the following ground, to wit:

1. Because the Supreme Court erred in affirming the judgment of the Second District Court of the City of Newark instead of reversing said judgment.

Respectfully yours,

AARON LEVINSTONE,
Attorney of Defendants.

ARTHUR R. LEWIS,
Of Counsel.

Notice of Appeal to the New Jersey Court of Errors and Appeals.

Service of a copy of the within notice of appeal and grounds is acknowledged this 30th day of April, 1930.

HARRY KAPLAN,
Attorney of Plaintiff.

Summons.

DISTRICT COURT SUMMONS.

Essex County, } ss.
The State of New Jersey. }

(Seal)

To any Constable in said County or to the Sergeant-at-Arms of The Second District Court. SUMMON Louis Gitter and Benjamin Gitter to appear before the Second District Court of the City of Newark, to be held in the City Hall, Broad Street (between Green and Franklin Streets), in the said City, on the thirtieth day of November, Nineteen Hundred and Twenty-seven, at ten o'clock in the forenoon to answer unto Jeanette Hemmindinger in an action on contract to the damage of the plaintiff five hundred dollars. hereof fail not.

Witness, LOUIS R. FREUND, ESQ., Judge of said Court at Newark, aforesaid, the seventeenth day of November, in the year One Thousand Nine Hundred and Twenty-seven.

JAMES E. GARRIGAN,
Clerk.

Summons.

SECOND DISTRICT COURT
of Newark, N. J.

Summons and State of Demand

On Contract

79219

Jeanette Hemmindinger,

vs.

Louis Gitter and Benjamin Gitter.

Demand	$500.00
Costs	2.50
Mileage	
Attorney Fee	25.00

Returnable November 30, 1927.

Israel B. Greene, 60 Park Pl. Newark.
Attorney for Plaintiff.

I served the within summons and state of demand November 18, 1927, on the defendant B. Gitter by reading it to him and giving him a copy thereof.

LOUIS RAPPAPORT,
Sergeant-at-Arms.
Constable.

The said defendant
not being found, I served the within summons and state of demand November 18, 1927, by leaving a copy thereof at his residence with a member of his family above the age of fourteen years, informing him of its contents.

Louis Rappaport,
Sergeant-at-Arms,
Constable.

State of Demand.

SECOND DISTRICT COURT

OF THE CITY OF NEWARK.

JEANETTE HEMMINDINGER, Plaintiff, vs LOUIS GITTER and BENJAMIN GITTER, Defendants.	In Tort. State of Demand.

The plaintiff demands of the defendant the sum of five hundred dollars ($500.00) for that whereas

1. On or about the 28th day of May, 1925, the plaintiff leased to the defendants, Louis Gitter and Benjamin Gitter, a store at premises known as 29½ Springfield Avenue, Newark, New Jersey, for a term of one year commencing on the 1st day of August, 1925, at a rental of $1,020 per annum, payable in monthly instalments of $85 payable on the 1st day of each and every month.

2. At the end of the above-mentioned term, the defendants renewed said lease for a further period of one year, on the same terms, excepting that the rental was increased to $1,200.00 per annum, payable in equal monthly instalments of $100 per month.

3. On or about February 20, 1927, the defendants abandoned said premises without the consent of the plaintiff and left said premises in a dam-

aged condition and without the consent of the plaintiff wilfully and maliciously tore down the partitions, altered the store front so that it was unusable; tore out all the toilet facilities and plumbing and otherwise injured the premises.

4. Defendants have failed and refused to repair said store and replace it to its former condition.

5. Plaintiff has repaired said store and the reasonable cost of said repairs is $500.

Judgment will be claimed in the sum of five hundred dollars ($500).

(Sgd.) ISRAEL B. GREENE,
Attorney for Plaintiff.

Counterclaim.

Filed December 15, 1927.

SECOND DISTRICT COURT

OF THE CITY OF NEWARK.

JEANETTE HEMMINDINGER, Plaintiff,	
vs	In Tort.
LOUIS GITTER and BENJAMIN GITTER, Defendants.	Counterclaim.

By way of counterclaim, the defendants claim of the plaintiff the sum of one hundred ($100.00) dollars, with interest, which sum was given to the plaintiff as security on the lease set forth in the first paragraph of the plaintiff's state of demand, filed in this cause, and which sum has not been returned to the defendants, although they have often requested the plaintiff so to do.

AARON LEVINSTONE,
Attorney of Defendants.

Transcript of Clerk's Docket.

79219

JEANETTE HEMMINDINGER,
Plaintiff,

vs

LOUIS GITTER and BENJAMIN GITTER,
Defendants.

In Tort.
Demand $500.

ISRAEL B. GREENE, Plaintiff's Attorney.
AARON LEVINSTONE, Defendant's Attorney.

PLAINTIFF'S COSTS.

Summons	$ 2.50
Mileage	
Listing Fee	1.50
Witness Fee	
Order	
Attorney's Fee	12.50
Total Cost	16.50
Execution	
Statement	

15 Springfield Ave.
Summons issued November 17, 1927.
Returnable November 30, 1927.
Demand filed , 192

I served the within summons November 18, 1927, on the defendant B. Gitter by reading it to him and giving him a copy thereof.

LOUIS RAPPAPORT,
Sergeant-at-Arms or Constable.

Summons returned as follows:

The said defendant L. Gitter not being found, I served the within summons November 18, 1927, by leaving a copy thereof at his residence with a member of his family, above the age of fourteen years, who was informed of its contents.

LOUIS RAPPAPORT,
Sergeant-at-Arms, Constable.

1926

Dec. 15. Counterclaim filed and notice to produce filed.

Nov. 30 This cause was adjourned by the plaintiff to December 19th and from time to time thereafter until May 3, 1929.

1927

May 3 The plaintiff and defendant appeared and the cause was tried and determined at this time. Harold Levine, the defendant, Nathan O. Walters, Jacob Holle and George Lifer were sworn in behalf of the plaintiff.

The following witnesses were sworn in behalf of the defendant:

The defendant and Benjamin Gitter.

The plaintiff offered in evidence three leases and three bills.

The evidence being closed, the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of two hundred fifty dollars damages with costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of two hundred fifty dollars damages with costs.

1929

May 23 Notice of appeal and bond filed.

Certificate of Judge.

SECOND DISTRICT COURT

OF THE CITY OF NEWARK.

I, LOUIS R. FREUND, Judge of the Second District Court of the City of Newark, in the County of Essex, and State of New Jersey, do hereby certify that the aforesaid Court is a Court of Record, that James E. Garrigan, whose name is subscribed to the preceding transcript, is the Clerk of the Second District Court of the City of Newark, County of Essex and State of New Jersey, and that full faith and credit are due to his official acts.

Witness my hand at Newark, N. J., this twenty-third day of July, A. D., Nineteen Hundred Twenty-nine.

LOUIS R. FREUND,
Judge.

Certificate of Clerk.

SECOND DISTRICT COURT

OF THE CITY OF NEWARK.

I, JAMES E. GARRIGAN, Clerk of the Second District Court of the City of Newark, in the County of Essex and State of New Jersey, do hereby certify that the aforesaid Court is a court of record, that Honorable Louis R. Freund, whose name is subscribed to the preceding certificate is the Judge of the Second District Court of the City of Newark, in the County of Essex and State of New Jersey, and that the signature of said Judge is genuine.

In Testimony Whereof I have set my hand and affixed the seal of said court this twenty-third day of July, A. D. Ninetten Hundred Twenty-nine.

JAMES E. GARRIGAN,
Clerk.

Notice of Appeal.

Filed May 23, 1929.

SECOND DISTRICT COURT

OF THE CITY OF NEWARK.

JEANETTE HEMMINDINGER, Plaintiff, vs LOUIS GITTER and BENJAMIN GITTER, Defendants.	In Tort. Notice of Appeal.

To HARRY KAPLAN, ESQ., Attorney of Plaintiff.

Dear Sir:

Please Take Notice that the defendants hereby appeal to the New Jersey Supreme Court from the judgment rendered in the above cause.

Yours respectfully,

(Sgd.) AARON LEVINSTONE,
Attorney of Defendants.

Service of copy of the within notice of appeal is hereby acknowledged this 22nd day of May, 1929.

(Sgd.) HARRY KAPLAN,
Attorney for Plaintiff.

Agreed State of Case.

SECOND DISTRICT COURT

OF THE CITY OF NEWARK.

JEANETTE HEMMINDINGER, Plaintiff, vs LOUIS GITTER and BENJAMIN GITTER, Defendants.	In Tort. Agreed State of Case.

The parties hereto by their respective attorneys, submit the following as the state of the case for appeal.

This action was instituted in tort by the plaintiff-lessor against the defendants-lessees for damages sustained by the plaintiff by reason of the fact that the defendants made certain alterations on the leased premises contrary to the terms of their lease. Defendants counter-claimed for the sum of $100.00 deposited with the plaintiff as security for the faithful performance of the covenants and conditions contained in the lease.

The plaintiff introduced in evidence a lease between plaintiff and defendants for premises No. 29½ Springfield Avenue, Newark, New Jersey, for a period of one year commencing August 1, 1925, which lease was renewed at its termination for another year. This lease was marked Exhibit P-1. Plaintiff further introduced in evidence a lease dated February 23, 1927, between the defendants and one Chris Karafel for the same

premises for the unexpired term of the first lease. This lease was marked Exhibit P-2. The witness Harold Leveen, for the plaintiff, testified that at the time the defendants sublet said premises no alterations had been made by them, but that subsequently in March, 1927, the subtenant Chris Karafel altered the store front without the knowledge or permission of the plaintiff. Evidence was submitted as to the amount of the plaintiff's damages caused by the aforesaid alterations.

Motion for non-suit was denied.

The defendants testified that they had made no alterations on the premises, nor had they authorized their subtenant to do so. They further testified that they had deposited $100.00 with the plaintiff in accordance with the terms of their lease and that said $100.00 had never been returned.

The trial judge made the following findings:

1. The plaintiff has been damaged to the extent of $350.00.

2. The defendants are responsible for that damage.

3. Chris Karafel was the agent of the defendants and acted within the apparent scope of his authority in making alterations which caused the plaintiff's damages.

4. The suit by the plaintiff was properly sounded in tort.

5. Defendants are entitled to receive $100.00 on their counter-claim and that sum should be set off on the $350.00 damage sustained by the plaintiff.

6. Judgment is entered in favor of the plaintiff and against the defendant in the sum of $250.00, besides costs.

HARRY KAPLAN,

By MICHAEL G. ALENICK,
Attorney for Plaintiff.

AARON LEVINSTONE,
Attorney for Defendants.

Dated 14th day of June, 1929.

Abstract of Exhibit P-1.

LEASE dated May 28, 1925 by and between Jeanette H. Hemmindinger lessor and Louis Gitter and Benjamin Gitter, lessees for premises #29½ Springfield Avenue, Newark, New Jersey, for the term of one year beginning August 1, 1925 and terminating August 1, 1926.

This lease was renewed at its termination for another year.

The lease contains the following pertinent paragraphs:

> And the said party of the second part does hereby promise and agree that he will not re-let or under-let the whole or any part of the said premises, nor assign this lease nor use or permit any part thereof to be used for any other purposes than a shoe shine and hat cleaning parlor and a place for the sale of caps, without the written consent of the said party of the first part, her heirs, executors, administrators, assigns or attorneys, under the penalty of forfeiture and damages.
>
> And the said party of the second part does further agree to keep the premises in as good repair as the same shall be at the commencement of the term (wear and tear arising from a reasonable use of the same and damages by the elements excepted); at the expiration of the said term to yield up the peaceable possession thereof to the said party of the first part, her heirs, assigns, agents or attorneys.
>
> The lessee agrees that without the consent of the lessor in writing and without the written permit of the municipal authorities, they will not make any alterations upon the demised premises.

Abstract of Exhibit P-2.

Lease dated February 23, 1927 by and between Louis Gitter, lessor, and Chris Karafel, lessee, for premises #29½ Springfield Avenue, Newark, New Jersey, beginning March 1, 1927 and terminating July 31, 1927

The lease contains the following pertinent paragraphs:

> It is understood that whatever rights the lessor has in said premises as a tenant, expire on July 31, 1927 and that the owner of said premises is a certain Mrs. Hammendinger.
>
> It is understood that the plate glass insurance is to be paid by the lessee and that he is to return said premises in the same condition as it is at this time to the original owner, (reasonable wear and tear and damages by the elements excepted).
>
> It is also understood that the lessee cannot make any repairs or changes in said store unless he has the written consent of the present owner.

There was appended at the end of the lease, beneath the signature, the following which was not signed or executed:

> I, the present owner of said premises, have read the above lease between the lessor and lessee and hereby give my consent thereto. I also consent to the changing of the front of said store by removing the door from its present place to the front.
>
> (Not Signed)
> Owner.

Witnessed by:

Specification of Determinations.

NEW JERSEY SUPREME COURT.

JEANETTE HEMMINDINGER, Plaintiff-Respondent, vs LOUIS GITTER and BENJAMIN GITTER, Defendants-Appellants.	On Appeal from the District Court. Specification of Determinations.

The following is a specification of the determinations of the District Court with which appellants are dissatisfied in point of law.

1. The Court erred in finding contrary to the evidence and contrary to law that Chris Karafel, the subtenant, was the agent of the defendants.

2. The Court erred in finding contrary to the evidence and contrary to law that as such agent he acted within the apparent scope of his authority in making alterations which caused the plaintiff's damages.

3. The Court erred in finding contrary to law that the defendants were liable in a tort action for the damages sustained by the plaintiff.

AARON LEVINSTONE,
Attorney for Defendants-Appellants.

ARTHUR R. LEWIS,
Of Counsel.

Service of a copy of the within specification is hereby acknowledged on this 2nd day of August, 1929.

HARRY KAPLAN,
By MICHAEL G. ALENICK,
Attorney for Plaintiff-Respondent.

Opinion of Supreme Court.

Filed Dec. 13, 1929.

NEW JERSEY SUPREME COURT.

No. 435 October Term 1929.

Jeanette Hemmindinger, Plaintiff-Respondent, vs Louis Gitter, *et als.*, Defendants-Appellants.	On Appeal.

Submitted October Term 1929: Decided December 13th, 1929.

Before Justices Parker, Black and Bodine.

For the Plaintiff-Respondent Messrs. Harry Kaplan & Michael G. Alenick.

For the Defendants-Appellants Messrs. Aaron Levinstone & Arthur R. Lewis.

Per Curiam.

This suit was commenced in the Second District Court of the City of Newark to recover $500.00 damages caused by alterations to premises No. 29½ Springfield Avenue, Newark, N. J. The suit is by a plaintiff, the landlord against the defendants as tenants, under a written lease dated May 28th, 1925, which provides, that the defendants "will not re-let or under-let the whole or any part "of said premises, nor assign this lease" &c. * * * "and further agree to keep the premises in as good "repair as the same shall be at the commencement

"of the term wear and tear arising from a reason-
"able use of the same and damages by the elements
"excepted". The defendants sub-let the premises in violation of the terms of the lease to one Chris Karafel a sub-tenant, who did the damages by alterations to the premises sued for. The action is styled in tort. The case was tried by the Court without a jury resulting in a judgment for the plaintiff for $350.00; less $100.00 deposited as security on the lease set up in the counter claim. We think this judgment should be affirmed, but not on the ground, that Chris Karafel the sub-tenant was the agent of the defendants and acted within the apparent scope of his authority, because, there is authority for the position, that if the sub-lease contains the same restrictions as the original lease and this is violated by the sub-tenant; the first lessee is not liable on the covenant. But the first lessee is liable in contract, the injury grows out of the unlawful act by the first lessee in subletting the premises in violation of the terms of the lease, i. e. for a breach of the agreement not to sub-let. 36 Corp. Juris p. 93 Sec. 726 See 16 R. C. L. p. 879 Sec. 384, p. 882 Sec. 387. Under Section 68 of the District Court Act 2 Comp. Sts. of N. J. p. 1977; the practice of the Circuit Courts is to apply to the District Courts. Under this section the action can be changed to one in contract. Then, the judgment of the Second District Court of Newark will be affirmed, and it is therefore, affirmed with costs.

Rule of Affirmance and Remittitur.

NEW JERSEY SUPREME COURT.

No. 435 October Term 1929.

Jeanette Hemmindinger, Plaintiff-Respondent, vs Louis Gitter, *et als.*, Defendants-Appellants.	On Appeal. from Judgment of Second District Court of the City of Newark. Rule of Affirmance and Remittitur.

This cause having been duly argued at the October 1929 term by Harry Kaplan, attorney for and Michael G. Alenick, of counsel with plaintiff-respondent and Aaron Levinstone, attorney for and Arthur R. Lewis, of counsel with defendants-appellants, and the court having considered the same and finding no error in the final judgment of the Second District Court of the City of Newark,

It is thereupon Ordered and Adjudged that the judgment of the Second District Court of the City of Newark from which an appeal was taken to this Court, be and the same is hereby affirmed with costs; and that the record be remitted to the Second District Court of the City of Newark to be proceeded with in accordance with this judgment and practice in such case made and provided.

Entered Jan. 2, 1930.

On motion of
HARRY KAPLAN,
Attorney of Plaintiff-Respondent.

MICHAEL G. ALENICK,
Of Counsel.

Notice of Petition for Re-hearing-

Filed Jan. 23, 1930.

NEW JERSEY SUPREME COURT.

No. 435 October Term 1929.

Jeanette Hemmindinger, Plaintiff-Respondent, vs Louis Gitter, *et als.*, Defendants-Appellants.	On Appeal. Notice.

To Harry Kaplan, Esquire, Attorney for Plaintiff-Respondent.

Please Take Notice that the defendants-appellants are applying to the Honorable New Jersey Supreme Court for a re-hearing of the above entitled cause and that the attached petition and affidavit will be presented to the said court.

AARON LEVINSTONE,
Attorney for Defendants-Appellants.

Dated: January 21st, 1930.

Petition for Re-hearing.

NEW JERSEY SUPREME COURT.

No. 435 October Term 1929.

Jeanette Hemmindinger, Plaintiff-Respondent, vs Louis Gitter, *et als.*, Defendants-Appellants.	On Appeal. Petition for Re-hearing.

To the Honorable New Jersey Supreme Court.

The petition of Louis Gitter and Benjamin Gitter the defendants-appellants in the above-entitled action respectfully shows that:

1. The above-entitled action was submitted to the court on an appeal from a decision rendered in favor of the plaintiff in the Second District Court of the City of Newark.

2. The cause was submitted on briefs and came on to be heard as case No. 435 of the October term, 1929 before Justices Parker, Black and Bodine and in a Per Curiam opinion the judgment below was affirmed in the following language:

> "* * * The defendants sub-let the premises in violation of the terms of the lease to one Chris Karafel a sub-tenant, who did the damages by alterations to the premises sued for. The action is styled in tort. * * * We think this judgment should be affirmed, but not on the ground that Chris Karafel the sub-tenant was the agent of the defendant and

> acted within the apparent scope of his authority, * * * But the first lessee is liable in contract * * * under Section 68 of the District Court Act 2 Comp. Sts. of N. J. p. 1977; the practice of the Circuit Courts is to be applied to the District Courts. Under this section the action can be changed to one in contract. Then, the judgment of the Second District Court of Newark will be affirmed. and it is therefore, affirmed with costs."

3. The defendants-appellants stand aggrieved in that the plaintiff has on two previous occasions recovered judgment against the same defendants in contract actions arising out of the identical lease which is the subject of the present action. The second one of the above two suits was commenced on August 1st, 1927, immediately after the termination of the lease and the judgment was paid by these defendants (case No. 77331 of the Second District Court of the City of Newark).

4. At the trial of this cause, defendants raised objection to the style of this action in tort but the Judge decided that "the suit by the plaintiff was properly sounded in tort" (State of Case p. 12 lines 30-31).

5. Defendants feel that they have a good and sufficient defense to any contract action that the plaintiff may bring against them arising out of this lease.

6. The decision of the appellate court in which the judgment is affirmed by changing the action to one in contract deprives the defendants of an opportunity to assert a defense which was not available to them in defending a tort action.

7. Defendants-Appellants in preparation of the State of the Case, followed strictly Rule 141 of the Rules of the Supreme Court which reads:

> "The statement of the case shall include * * * and so much of the evidence taken and documents filed in the cause as shall be necessary to present the questions raised upon the appeal (Rule 81 Pr. Act. 1912)."

The sole question raised on the appeal was whether the plaintiff could recover against the defendants in a tort action on the theory that Karafel the sub-tenant was the agent of the defendants. Accordingly defendants presented only such facts as were necessary for the determination of this question which the appellate court answered in the negative.

Petitioners respectfully pray therefore, that the Honorable Court will grant them a re-hearing on their appeal to present the aforesaid facts.

Yours very respectfully,

AARON LEVINSTONE,
Attorney for Defendants-Appellants.

ARTHUR R. LEWIS,
Of Counsel.

Affidavit in Support of Petition for Re-hearing.

NEW JERSEY SUPREME COURT.

JEANETTE HEMMINDINGER, Plaintiff-Respondent, vs LOUIS GITTER, *et als.*, Defendants-Appellants.	On Appeal. Affidavit.

State of New Jersey, } ss.:
County of Essex, }

Samuel Weitzman of full age being duly sworn according to law upon his oath deposes and says:

1. I am an Attorney at Law of the State of New Jersey.

2. I tried the above case in the Second District Court, of the City of Newark, appearing for Aaron Levinstone, Esquire, the Attorney of Record for the defendants.

3. I have read the foregoing petition and the statements therein contained are true.

4. The records of the Second District Court show that prior to the present action the plaintiff herein recovered two judgments on contract against these defendants arising out of the identical lease which is the subject of the present action. The second one of these actions was commenced on August first, 1927, immediately after the termination of the lease and the judgment was paid by these defendants (case No. 77331 of the Second District Court of the City of Newark).

Affidavit in Support of Petition for Re-hearing.

5. At the trial I raised objection to the style of this action in tort, arguing that it was so styled to prevent the defendants from asserting a defense which they might have to a contract action, namely the defense of res-adjudicata because of the previous contract actions but the Judge decided that "the suit by the plaintiff was properly sounded in tort" (state of case p. 12 lines 30-31).

6. I prepared the Specification of Determinations and the State of the Case for the appeal and in accordance with rule 141 of the rules of the Supreme Court, I included in the State of the Case only such facts as I thought were necessary for the proper determination of the only question to be decided namely whether the plaintiff could recover against the defendants in a tort action.

7. I feel that the interests of the defendants has been jeopardized by reason of my failure to include all of the facts.

SAMUEL WEITZMAN.

Sworn to and subscribed before me
this 21st day of January, 1930.
Henry Goldberg,
An Attorney at Law
of New Jersey.

Petition for Re-argument Denied.

Filed Jan. 28, 1930.

NEW JERSEY SUPREME COURT.

No. 435 October Term 1929.

Jeanette Hemmindinger, Plaintiff-Respondent,	On Appeal
vs	
Louis Gitter, *et als.*, Defendants-Appellants.	Petition for Re-argument.

By the Court.

The application for a re-argument in this case is denied.

Dated January 28th, 1930.

New Jersey Court of Errors and Appeals

JEANETTE HEMMENDINGER, Plaintiff-Respondent, vs. LOUIS GITTER and BENJAMIN GITTER, Defendants-Appellants.	In Tort. On Appeal from New Jersey Supreme Court.

BRIEF OF DEFENDANTS-APPELLANTS.

Facts.

The defendants leased premises No. 29½ Springfield Avenue, Newark, N. J., from the plaintiff under a written lease. (Exhibit P-1, State of Case, p. 15.) This lease contained covenants against reletting under-letting or assigning the lease, and against making any alterations to the premises without the written consent of the lessor. On or about February 23, 1927 defendant sub-let the premises to one Chris Karafel, under a written sub-lease. (Exhibit P-2, State of Case, p. 16.) Subsequently, in March, 1927 Karafel made certain alterations on the premises without having obtained the written consent of the plaintiff and contrary to the terms of his sub-lease.

The present action was instituted as an action in tort in the Second District Court of the City of Newark to recover from the defendants the damages sustained by the plaintiff by reason of the alterations made by Karafel.

Argument.

Appellant's argument will be presented under four main headings.

POINT I.

Karafel, the sub-tenant, was not the agent of the defendants.

At the outset, it should be borne in mind that this action is one *in tort* (State of Case, p. 13, ll. 32-33). The witness Harold Leveen, for the plaintiff, testified that at the time the defendant sub-let said premises no alterations had been made by them, but that subsequently, in March, 1927, the sub-tenant, Chris Karafel, altered the store front without the knowledge or permission of the plaintiff (State of Case, p. 13, ll. 2-11). The defendants testified that they had made no alterations on the premises and had not authorized their sub-tenant to do so (State of Case, p. 13, ll. 15-17).

In order to hold the defendants liable in tort for the acts of Karafel, some relationship must have existed whereby defendants would be charged legally for Karafel's acts. The trial judge found that the relationship of principal and agent existed (State of Case, p. 13, ll. 28-29). There was no evidence or testimony tending to establish such a relationship other than the bare fact that defendants sub-let the premises to Karafel. Appellants contend that such a sub-letting establishes only the relationship of landlord and tenant with its incident privities of estate and of contract. Appellants, after diligent search, have been unable to find any authorities which hold that the mere es-

tablishment of the relationship of landlord and tenant in any wise establishes a relationship of principal and agent. The negative of this proposition seems to be so elementary that the text-books and other legal references do not even discuss the possibility of an agency arising from the mere relationship of landlord and tenant.

Appellants contend that Karafel, the sub-tenant, was not the agent of the defendants. Therefore, defendants are not liable in tort for damages arising from Karafel's acts. The Supreme Court agreed with the appellants in this contention. (State of Case, p. 19, ll. 14-16).

POINT II.

Karafel, the sub-tenant, if he were the agent of the defendants, acted beyond the scope of his authority.

Assuming that it is held that the trial judge did not err in finding that Karafel, the sub-tenant, was the agent of the defendants, then it must be established that said agent acted within the scope of his authority. *Hall* v *Passaic Water Co.*, 83 N. J. L. 771.

> "One who seeks to charge another with the act of an agent must prove that the agent acted within the scope of his authority, actual or apparent, or ratification of, acquiescence in, or acceptance of the benefit of the act, on the part of the employer."

Let us first determine what actual authority, if any, defendants conferred upon Karafel by the written sub-lease (Exhibit P-2, State of Case, p. 16). We find that the defendants sub-let the pre-

mises to Karafel; that he was expressly informed that the "owner of said premises is a certain Mrs. Hemmendinger" (Exhibit P-2, State of Case, p. 16, ll. 13-15); that he expressly covenanted to "return said premises in the same conditions as it is at this time to the original owner" (Exhibit P-2, State of Case, p. 16, ll. 16-20); and that he expressly covenanted not to "make any repairs or changes on said store unless he has the written consent of the present owner" (Exhibit P-2, State of Case, p. 16, ll. 21-24). There was added at the end of the sublease a paragraph for obtaining the written consent of the owner to the letting and also her consent to the making of the alterations complained of, which consent was never obtained (Exhibit P-2, State of Case, p. 16, ll. 29-37). It must be quite clear, therefore, that the defendants expressly denied to the sub-tenant, Karafel, the right or authority to make any alterations.

The trial judge found that Karafel acted within the apparent scope of his authority in making alterations which caused the planitiff's damages. (State of Case, p. 13, ll. 29-31.) Apparent authority has been defined as that authority which a principal knowingly permits the agent to assume, or holds the agent out to the public as having. *Law* v. *Stokes,* 32 N. J. L. 249; *Wiss* v. *Vogel,* 86 N. J. L. 618; *Heckel* v. *Cranford Golf Club,* 97 N. J. L. 538. In *Law* v. *Stokes,* 32 N. J. L. 249, Depue, *J.,* on pages 251-252, says:

> "For the acts of the agent, within the scope of the authority he holds the agent out as having or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such cases would be to enable him to commit fraud upon innocent persons."

In the instant case, there is no doubt as to what authority Karafel had. The plaintiff knew from the terms of her lease with defendants that neither the defendants nor anyone acting for them had the right or authority to make alterations. By what stretch of the imagination can it be said that the defendants held out Karafel to the plaintiff as having authority to make the alterations complained of? By what stretch of the imagination can it be said that the defendants knowingly permitted Karafel to assume such authority when, quite to the contrary, defendants had expressly denied to Karafel the right to make the alterations complained of without first obtaining the consent in writing of the plaintiff?

Appellants respectfully urge, in accordance with the cases cited above, that, assuming that Karafel was their agent, his acts, whereby the plaintiff was damaged, were entirely beyond the scope of his authority. The Supreme Court also agreed with appellants in this contention (State of Case, p. 19, ll. 14-17).

(OVER)

POINT III.

Defendants are not liable to the plaintiff in a tort action.

Appellants repeat that this action was instituted *in tort,* (State of Case, p. 13, ll. 33-34.) The judgment rendered must be based upon the legal principles governing tort actions. One of the primary principles is that, under ordinary circumstances, one person can not be held responsible for the acts or omissions of another.

Appellants contend that in order for the plaintiff to charge the defendants with liability for the acts of some third person, *in a tort action,* plaintiff must establish that some relationship existed between the defendants and that third person which would make the defendants legally responsible for that third person's acts. The only relationship that existed here between the defendants and Karafel was that of landlord and tenant. In *38 Cyc. 481,* we find:

> "It is generally true that a lessor is not responsible to third persons for injuries caused by the act or omissions of a lessee." citing the case of *Todd* v. *Collins,* 6 N. J. L. 127.

It is clear therefore that the mere relationship of landlord and tenant is not sufficient to make the landlord liable for the acts of his tenant. Accordingly, the defendants were not liable *in tort,* for the damages caused by the acts of their sub-tenant, Karafel.

POINT IV.

The Supreme Court erred in amending the action to one in contract.

Thus far it is clear that the Supreme Court upheld all of the points raised by the appellants in their appeal to that court, namely, that Karafel was not the agent of the defendants, that his acts were not within the scope of his authority, and that the defendant-appellants were not liable in a tort action, (State of Case, p. 19, ll. 14-21). Nevertheless the Supreme Court affirmed the judgment of the District Court by the simple and seemingly harmless expedient of changing the action to one in contract, (State of Case, p. 19, ll. 22, 28-35). Appellants contend that such action was unwarranted, highly unjust, and contrary to the well-established law of the State.

First let us consider some additional facts. At the trial defendants objected to the form of the action, arguing that the action was properly a contract action; that the plaintiffs had previously recovered a judgment against these defendants in a contract action arising out of the identical lease (Exhibit P-1, State of Case, p. 15); and that the present action was being masked as an action in tort to prevent the defendants from availing themselves of a valid defense, namely that of *res adjudicata,* (State of Case, p. 25, l. 29 to p. 26, l. 9). However the trial judge disagreed with the defendants and expressly ruled that "the suit by the plaintiff was properly founded in tort" (State of Case, p. 13, ll. 33-34). The case was then tried as an action in tort—the plaintiff attempting to prove, by introducing in evidence the lease between the

defendants and Karafel, that Karafel was the agent of the defendants (State of Case, p. 12, l. 38 to p. 13, l. 2). The defendants, being unable to avail themselves of the defense of *res adjudicata* and being called upon to interpose a defense only to an action in tort, testified that "they had made no alterations on the premises, nor had they authorized their sub-tenant to do so (State of Case, p. 13, ll. 15-17). Plaintiff and defendants met squarely on the only question in controversy, namely, were the defendants liable in a tort action? In *Kapherr* v. *Schmidt,* 98 N. J. L. 803, Minturn, *J.* speaking for the Court of Errors and Appeals, says on pages 804-805:

> "In such a situation, where parties without objection try and submit the question at issue upon a theory apparently satisfactory to themselves, and suffer the case to go to the jury upon the legal theory thus adopted, such course of proceedure becomes the law of the case and it is too late upon appeal for either party, for the first time, to question the legal propriety of the course pursued."

Despite the fact that at the trial, the defendants raised objection to the form of the action; despite the fact that the plaintiff deliberately chose over the defendants objection, to proceed with the action in tort; and despite the fact that thereafter the question at issue was submitted upon a theory satisfactory to both parties and decided on that theory and appealed on that theory, the Supreme Court, of its own accord, in order to affirm the judgment, amended the action to one in contract. The result is that the entire theory of the case, the entire law of the case, has been completely changed without affording the defendants-appellants an opportunity to de-

fend the action on the new theory, on the very theory upon which it was their original desire to try the case, on the very theory to which, in their honest opinion and judgment, they had a complete and meritorious defense; that of *res adjudicata.*

In *L. R. A. 1916 D on page 852* we find:

> "So, in a number of cases appellate courts have refused to permit amendments of the pleadings to conform to the proof, or to regard such amendments as made, where the proposed amendments changed substantially the nature of the claim or defense and introduced new issues which it did not clearly appear had been fully litigated".

In the case of *The State, Philip Weigel, Jr., Prosecutor* v. *The Hartman Steel Co.*, 41 N. J. L. 446, the plaintiff brought an action on an account stated and recoverd a judgment. On appeal, appellants urged that the proof did not substantiate an account stated but respondent contended that the judgment should be supported by viewing the state of demand as one counting for goods sold and delivered. Reed, *J.* held on page 454:

> "The cause, however, was tried below upon a different theory. The counsel for the defendant obviously shaped his client's cause in accordance with the demand as filed. No amendment was asked for at the time of the trial, and, under the circumstances, the court should not exercise its power to order an amendment here."

In *Excelsior Electric Co.* v. *William Sweet,* 59 N. J. L. 441 our Court of Errors and Appeals held in the second paragraph of the Syllabus:

> 2. "If, at the trial, the parties have con-

> fined their controversy to the issues raised by the pleadings, the pleadings should not, after verdict, be amended so as to present a different issue, * * *

In *Kent* v. *The Phenix Art Metal Co.*, 69 N. J. L. 532, an action was brought upon an express contract of employment and judgment entered for the defendant. Plaintiff appealed and urged that he was entitled to recover upon a quantum meruit basis. Pitney, *J.* held on page 540:

> "In short, the plaintiff brought the defendant into court to answer to a claim made upon an express contract, and upon that alone; that was the issue tried below. That issue was properly adjudicated, and, on familiar principles, we are prohibited from reversing the judgment upon the theory that if another issue had been presented and tried it might have resulted in favor of the plaintiff".

It is true that an appellate court may amend pleadings to support a judgment but the circumstances under which this power will be exercised have been strictly defined. In *Levenson Wrecking Company* v. *Gatti-McQuade Company,* 93 N. J. L. 184, our Court of Errors and Appeals by Justice Trenchard held on page 186:

> "Where as here, the real question in controversy has been fully and fairly tried, though not precisely pleaded; and the complaining party has not been surprised or injured, this court on appeal has the power to amend pleadings in order to support the judgment, and will, in such case, in the interest of justice, exercise the power".

Bearing in mind that at the trial the defendants objected to the style of the action and that the judge ruled that it was properly a tort action, it

becomes apparent immediately that the action of the Supreme Court in amending it to one in contract was not only surprising and injurious to the defendants-appellants but also contrary to the interest of justice. Appellants through no fault of their own, have been deprived of their day in court. They have been denied an opportunity to defend an action in contract which was never tried, not to say never "fully and fairly tried", though they have a meritorious defense to such an action. Is such action injurious to the defendants? Is such action "in the best interest of justice"? The answer is obvious. Should the judgment in this action be decided unfavorably to the respondent, she may still bring an action in contract. She will encounter no impediment. Then, the defendants-appellants would have their day in court and an opportunity to defend the action. To decide this appeal upon the theory on which it was tried and not upon a new and entirely different theory which works a hardship upon the defendants is the only and proper way to serve the interest of justice.

(OVER)

Conclusion.

The trial judge found that the plaintiff had been damaged to the extent of $350.00 (State of Case, p. 13, ll. 22-23); but that defendants were entitled to receive $100.00 on their counter-claim (State of Case, p. 13, ll. 35-36); and rendered a judgment in favor of the plaintiff for $250.00 (State of Case, p. 14, ll. 1-3). Appellants respectfully urge that inasmuch as no such relationship existed between the defendants and Karafel as would make the defendants liable in tort for acts committed by Karafel, the judgment should be reversed and a judgment entered in favor of the defendants on their counterclaim in the sum of $100.00.

Respectfully submitted,

AARON LEVINSTONE,
Attorney for Defendants-Appellants.

ARTHUR R. LEWIS,
Of Counsel.

E. W. Stillman, Pompton Plains, N. J., Tel. Pompton Lakes 500

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

New Jersey Court of Errors and Appeals

JEANETTE HEMMINDINGER, *Plaintiff-Respondent,* *vs.* LOUIS GITTER and BENJAMIN GITTER, *Defendants-Appellants.*	*On Appeal From New Jersey Supreme Court.*

BRIEF OF PLAINTIFF-RESPONDENT.

Facts.

The facts have been stipulated (C., pp. 12, 13, 14). Succinctly stated, plaintiff leased a store at 29½ Springfield avenue, Newark, New Jersey, to the defendants. The lease prohibited an assignment, or under-letting, and contained a covenant by the defendants not to make alterations without the written consent of the plaintiff, and the written permission of the municipal authorities. Defendants, contrary to the provisions of the lease, and without plaintiff's consent, under-let the store to one Karafel, who altered it and thereby caused money damage to the plaintiff.

The Issue.

The sole issue in this case is whether or not the defendants-appellants are answerable for the damages sustained by the plaintiff-respondent.

THE ARGUMENT.

Plaintiff-respondent contends that the learned District Court Judge, in deciding that the defendants-appellants were liable for the damages,

and the Supreme Court in affirming the judgment, decided the case correctly, and the decision should here likewise be affirmed.

These are the reasons:

POINT ONE.

An action in tort may be maintained against lessees even though the tort was not committed by them personally.

As a preliminary to the establishment of this point, it is necessary that the status of the actual tort-feasor be determined, and this necessarily involves a consideration of the lease between the plaintiff and defendants. *The lease contained a provision that the lessee would not* relet or under-let the whole or any part of the said premises, nor *assign* the lease, etc., etc., without the written consent of the landlord (C., p. 15, l. 16). In the face of this prohibition, the defendants saw fit to enter into an arrangement with one Chris. Karafel, whereby the defendants purported to lease the premises to him for the unexpired term of their lease. What was the effect of this so-called transfer or assignment or whatever one may choose to call it? So far as it concerned the plaintiff, it created, as between the defendants and Karafel, the relation of principal and agent. Why, will be seen presently.

When a lease is executed there springs into existence between the lessor and lessee a privity of estate and a privity of contract. See *Field* v. *Mills*, 33 N. J. L. 254. When the lease is legally assigned the privity of estate between the lessor and lessee vanishes and transfers itself to the assignee and lessor, but the privity of contract be-

tween the lessor and lessee nevertheless remains constant. See *M. Earlington Realty Co.* v. *Berkow,* 3 N. J. Misc. Rep. 444; citing *Hunt* v. *Gardner,* 39 N. J. L. 530; *Wallace* v. *Kennelly,* 47 N. J. L. 242. These rules of law are quite elementary and need no further elaboration by way of citation of authorities.

In the case at bar, the consent of the landlord to the assignment was not obtained, which made the attempted assignment abortive. It did not destroy the privities of estate and contract which existed between the lessor and lessee, but resulted in creating as between the lessees and Karafel, the man the defendants put in possession of the premises, the relation of principal and agent. Consequently all the incidents of principal and agent relationship flowed between them and the rule of agency which declares that a principal is answerable for all acts committed by his agent within the apparent scope of his authority would apply.

In this connection it is important tot observe that a principal is liable for torts committed by his agent. This proposition is supported by 21 R. C. L. 919, in the following language:

> "It is a well established rule of law that if one, not assuming to act for himself, does an act for or in the name of another upon an assumption of authority to act as the agent of the latter, even though without any precedent authority whatever, if the person in whose name the act was performed subsequently ratifies or adopts what has been done, the ratification relates back and supplies original authority to do the act. In such a case the principal is bound to the same extent as if the act had been done in the first instance by his previous authority; and this is true whether the act be detrimental to the principal or to his advantage,

> or *whether it sound in contract or tort.*" Citing *Gullick* v. *Grover*, 33 N. J. L. 463; and *Schlesinger* v. *Foust Products Company*, 78 L. 637; also 22 L. R. A. 364.

The Supreme Court in *Donsky* v. *Sedlak*, 4 N. J. Misc. Rep. 49, held that:

> "An undertenant does not put himself in privity of estate with the original lessor, nor is he liable to him for the performance of the covenants running with the land, such as the covenants to pay rent or keep premises in repair." Citing *Field* v. *Mills*, 33 N. J. L. 254.

Just how the law looks upon an assignment of a lease which contains a prohibition against assigning can be seen by a perusal of the case of *Lincoln Furniture Co.* v. *Bornstein*, 100 N. J. E. 78 decided by Vice-Chancellor Backes (affirmed by Court of Errors and Appeals, 101 E. 774). The syllabus states:

> "2. A forfeiture of a lease for breach of a covenant not to assign without the written consent of the lessor is not waived by accepting rent from the assignee unless the lessor knew that the lease had been assigned. Mere knowledge of facts which put the lessor on notice is not sufficient." Citing *West Shore R. R. Co.* v. *Wenner*, 70 N. J. L. 233, and other cases.

Be that as it may, the defendants cannot escape the fact that in attempting to assign their lease to Karafel they created as between themselves and Karafel the relationship of principal and agent and are bound to answer for the damage done by their agent. The foregoing authorities fortify that view.

POINT TWO.

Karafel was the agent of the defendants.

In Point 1 of defendant's brief, counsel endeavors to show that Karafel was not the agent of the defendants. This contention is groundless in the face of the express finding by the trial court that Karafel was the agent of the defendants (C., p. 13, ll. 28-29).

Moreover, while counsel contends that as between the defendants and Karafel there existed a landlord and tenant relationship, it is not borne out by the fact, nor was it such a relationship as the plaintiff was bound to, nor did recognize. Certainly, as between the plaintiff and Karafel no landlord and tenant relationship existed, nor any relationship whatever. Karafel might properly be regarded as a trespasser so far as the plaintiff was concerned. By what color of authority did he occupy the premises? He was in possession by virtue of an abortive sublease given him by the defendants. Before a landlord and tenant relationship can be created, it is requisite that the lessor should have the power and authority to make a sublease. Here no such authority existed in the defendants, hence no landlord and tenant relationship could arise. Obviously, since the sublease was inoperative, no landlord and tenant relationship could spring into being as between the defendants and Karafel. However, Karafel, by being put in possession of the premises by the defendants could only remain there as agent for them. The supposed landlord and tenant relationship as between the defendants and Karafel thus being eliminated, only one other relationship could possibly suggest itself to justify Karafel's use of the premises which had been leased by the defendants,

and which the defendants were prohibited from assigning or subletting, and that is of principal and agent, the defendants being the principal and Karafel their agent. And this is precisely what the Court found to be the fact. The law is clear that the finding of fact by a trial court will not be disturbed on appeal, if there is evidence to support it. *Resky* v. *Meyer*, 98 L. 168.

The finding being supported by the testimony and proofs, the appellants' case fails.

POINT THREE.

Karafel acted within the scope of his authority.

A complete answer to Point two of defendants' brief, which states that Karafel acted beyond the scope of his authority, is this: By putting Karafel in possession and complete control of the premises, and in a position where he could do the damage which he did, the defendants took upon themselves the responsibility for whatever acts Karafel performed. The alteration of a store cannot be said to be an act which is beyond the scope of apparent authority of a person in the exclusive use and occupation thereof.

The law is well-settled in this State and other jurisdictions that where a covenant in a lease prohibits alterations of premises and requires the lessee to restore the premises at the end of the term in the same condition as they were at the commencement, the lessee is responsible in damages to the lessor for failure to comply with that covenant, regardless of whether the damages to the premises was caused by the negligent act or default of the lessee, or any third person. So just as in the case at bar the plaintiff has a remedy against the defendants, so the

defendants have a remedy against Karafel who made an agreement with them which he failed to keep. The defendants here really have no meritorious defense to the plaintiff's case, although they may have a perfectly good cause of action against Karafel.

In 64 L. R. A. 660, the following proposition of law is pronounced:

> "Thus, lessees who had covenanted to yield up the premises in as good state and condition as they were in at the commencement of the term, reasonable use and wear thereof and damages by the elements excepted, were held liable to replace or pay for a large plate-glass which was cracked at the time they surrendered the property. Their liability was not affected by the fact that the crack in the glass was not caused by any cause or omission to their own; *it rested, on the ground that having to do all necessary repairs, they were therefore absolutely responsible for an omission to do so, no matter what caused the injury, aside from any fraud of the lessors.*" Citing *Cohen* v. *Hill*, 30 N. Y. Sup. 259.

In the case of *Regan* v. *Luthy*, 11 N. Y. Supp. 709, a lessee of a house from year to year removed therefrom before the expiration of the year, securely closing the premises, but within a few days, thereafter, the plumbing work was cut out and stolen by persons unknown. Held, that this, even through the act of strangers, constituted commissive waste for which the tenant was liable.

The damage suffered by the destruction of a leased building by the negligent acts of a third party was incidentally held recoverable against the lessee under a covenant that the buildings should revert to the lessors without damage, in *Cook* v. *Champlain Transportation Co.*, 1 Denio 91.

And a covenant in a lease to surrender the premises at the expiration of the term in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted, was held in *Parrot* v. *Barney*, 1 Sawy 423, Federal Case No. 10, 773, not to protect the lessee from liability for *waste* resulting from accidents occurring *without his fault*, through the wrongdoing of third parties.

Bearing in mind that a covenant in the lease between the parties to this action expressly prohibited the tenants from making any alterations without first obtaining the consent of the landlord in writing and mindful further that the tenants put a third person in possession of the demised premises in violation of the terms of the lease, the following cases take on added significance:

In the case of *Topf* v. *West Shore and Ontario Terminal Co.*, 46 N. J. L. 34 (Supreme Court), there was a *count in trespass* to which a demurrer was filed. The count alleged that the defendant knowingly permitted a third person to use the property of the defendant in a manner that was, *per se,* injurious and destructive to the adjacent land of the plaintiff. The averments showed that without the assent of defendant the alleged wrong could not have been perpetrated. The Court overuled the demurrer and in so doing referred to the case of *Del., Lack & West. R. R.* v. *Salmon*, 10 Vroom 299, in which Justice Depue, after stating that the injury was caused by the locomotive of another corporation which was permitted by the defendant to use its track, said:

> "The defendants' road was under their management and control. The track and road-bed were under their control and pos-

> session, and if they knowingly suffered and permitted another company to make it a place of danger they are responsible in damages."

From the foregoing citation of authorities it is manifest that the trial court was correct in holding the defendants answerable for the damage done by Karafel, the person they put in exclusive possession and control of the premises.

POINT FOUR.

Defendants are liable to the plaintiff in a tort action.

In his endeavor to show that the defendants are not liable to the plaintiff in a tort action, counsel for defendants starts off with a wrong premise, in that he states that "The only relationship that existed here between the defendants and Karafel was that of landlord and tenant." Such is not the fact (see Point 1 of this brief; also C., p. 13, l. 26).

Whether or not tort in such a case as this is the proper form of action, has been adjudicated in this State in a number of instances.

It is admitted that the store front was torn out and a different one was put in and other alterations were made to the demised store without the knowledge or consent of the landlord, the plaintiff, and in violation of the prohibition contained in the lease. This was a trespass.

> "*Direct injury to realty of another is trespass*, as is any wrongful interference with possession." * * * "The term 'trespass' in its broadest sense means any misfeasance, transgression or offense which damages another's person, health, reputation, or property, and as used in some statutes is equivalent to 'tort'." 38 Cyc. 994.

In the case of *Ten Eyck* v. *Runk*, 31 N. J. L. 428, trespass is thus defined:

> "It is obvious that in its widest scope the word 'trespass' signifies every injury to property. Its synonym in law Latin was *transgressio*, a term which, in its comprehensive signification, embraced every infraction of a legal right. In this sense it comprehended not only forcible wrongs, where the damages were direct and immediate, but also acts, the consequences of which made them tortious. Tomlin, in his law dictionary, in defining this word, uses this language, viz.: 'So also non-performance of promises and undertakings is a trespass upon which an action of trespass on the case is grounded; and, in general, any misfeasance or act of one man whereby another is injuriously treated or damnified, is a transgression, or trespass in the largest sense; for which an action will lie.' Tomlin's Law Dic., tit. *Trespass*. See also, 5 Bac. Ab. tit. *Trespass.*"

See also *Tichenor* v. *Hayes*, 41 N. J. L. 193, 198; and *Noice, Adm'x* v. *Browne*, 39 N. J. L. 569 where it has been held that *the word "trespass is synonymous with 'tort'."*

In a decision by the Court of last resort in the case of *Paterson E. R. Co.* v. *Rector, etc., Church Holy Communion*, 68 L. 399, it was held that a tort action would lie. The language in the syllabus of that case is as follows:

> **"A railroad company's** excavation disturbed the foundation of an adjacent building, and the company agreed to build a wall sufficient to make the building safe and to pay for repairs. The railroad company built a wall and paid for the repairs, taking a receipt stated to be in full settlement of all damage. Subsequently, the building sufferred further damage through a fault in a design of the wall. Held, *that the damage resulting from the failure of the railroad*

company to construct a sufficient wall was distinct from that occasioned by the original excavation, so that the receipt in full was not a defense to an action for the damage so resulting.''

Clearly, an action would lie against the railroad company for a breach of this agreement, *and it is not material what the form of the action might be*—whether in *tort or on contract.*

Touching upon the question of damages, *Braem* v. *Washington Piece Dye Works*, 100 L. 209, 127 A. 461, is authority for the proposition that:

> ''In an action by the lessor for breach of covenant in a lease to deliver up the premises in as good a state and condition as reasonable use thereof will permit, damages by the elements excepted, the measure of damages is the amount required to restore the premises to the condition they were in at the beginning of the lease; due allowance being made for reasonable use and wear and the operation of the elements.''

The case of *Todd* v. *Collins* in 6 L. 127 cited by defendants is not in point because in the case at bar no landlord and tenant relationship existed so far as Karafel was concerned.

Manifestly this suit in the District Court was correctly sounded in tort.

POINT FIVE.

The Supreme Court was correct in affirming the judgment of the District Court.

When this case was appealed from the District Court to the Supreme Court, it was submitted on a stipulation of facts (C., pp. 12-14). These indicate clearly that the action was instituted in tort and the defendants-appellants counterclaimed in tort (C., p. 6). The case was fully and

fairly tried and it is not pretended that the defense was in any respect limited or abridged. In fact, the trial court allowed the defendants the full amount of their counter-claim, viz., $100.00 and deducted that sum from the judgment of $350.00 which it awarded the plaintiff and entered a verdict only for the difference, to wit, $250.00. Could it have done anything fairer?

Evidently the Supreme Court felt that the decision at which the learned trial judge arrived was correct and consequently affirmed it. Although the Supreme Court did not go along with the trial court on the precise grounds upon which it based its findings, nevertheless substantial justice required an affirmance of the judgment. What the Supreme Court said (C., p. 19, ll. 14-26) was this:

> "We think this judgment should be affirmed, but not on the ground that Chris. Karafel the sub-tenant was the agent of the defendants and acted within the apparent scope of his authority, because, there is authority for the position, that if the sub-lease contains the same restrictions as the original lease and this is violated by the sub-tenant, the first lessee is not liable on the covenant. But the first lessee is liable in contract, the injury grows out of the unlawful act by the first lessee in subletting the premises in violation of the terms of the lease, *i. e.* for a breach of the agreement not to sub-let."

Then in its opinion the Supreme Court alluded to section 68 of the District Court Act, 2 C. S. 1977, which provides that the practice of the Circuit Courts is to apply to the District Courts and changed the action from one sounding in tort to one in contract and affirmed the judgment.

With this decision, defendants-appellants were disappointed and they made application to the

Supreme Court for a rehearing (C., p. 21), but this was denied (C., p. 27, l. 20). Hence this appeal.

Authorities are numerous on the proposition that an appellate court has the right and power in order to do justice to amend the pleadings to support the judgment.

American Popular Life Insurance Co. v. *Day*, 39 L. 89;

Blackford v. *Plainfield Gaslight Co.*, 43 L. 438;

Radstrake v. *Cumberland Insurance Co.*, 44 L. 294.

In *Ware* v. *Millville Fire Insurance Co.*, 45 L. 177 (Errors and Appeals), the syllabus reads as follows:

> Syl. 1. "If the real question in controversy between the parties to an action appears to have been fully and fairly tried and correctly settled, this court will not reverse for an objection which may be avoided by an amendment of the pleadings but will in such case exercise the power of amendment."

In that case the Court among other things stated:

> "If the result reached was otherwise correct, such an amendment should be made."

Willis v. *Shinn*, 42 L. 138, contains the following pronouncement:

> "* * * Under the liberal construction given to the statute authorizing amendments, it would be within the power of this court, if necessary to advance justice, to allow that to be done which should have been done below."

There are a host of cases which support the principle that amendments are allowable at any

stage of the procedings. Just to mention a few of them in addition to the foregoing:

Excelsior Electric Co. v. *Sweet*, 57 L. 224;
Finegan v. *Moore*, 46 L. 602;
Vunk v. *Raritan River R. Co.*, 56 L. 395;
Monmouth Park Ass'n v. *Warren*, 55 L. 598.

Even the case of *Levinson Wrecking Company* v. *Gatti-McQuade Company*, 93 L. 184 (Errors and Appeals), cited by the appellants, fortifies the action taken by the Supreme Court in the case at bar for it holds in the words of Justice Trenchard, page 185:

> "Where as here, the real question in controversy has been fully and fairly tried, though not precisely pleaded; and the complaining party has not been surprised or injured, this court on appeal has the power to amend pleadings in order to suport the judgment, and will, in such case, in the interest of justice exercise the power."

It seems as if in one breath, defendants-appellants, blow both hot and cold. They say they objected to the form of the action in tort and at the same time, they themselves filed a counterclaim in tort and were successful thereon. It strikes one that instead of supporting their contention, the case of *Kapherr* v. *Schmidt*, 98 L. 803, cited by them in their brief, is authority for the plaintiff-respondent.

The pleadings even as amended by the Supreme Court present no new issue, create no surprise, cause no hardship, and are in consonance with the dictates of plain justice, common sense and law.

Even if the Supreme Court took a little different course to arrive at the same result which the District Court reached, nevertheless in affirming the judgment of the District Court, the Supreme Court was right.

CONCLUSION.

On the whole case, it must be clear to the Court that this action which originally was sounded in tort and by the Supreme Court changed to contract, was properly maintainable against the defendants who were the lessees of the plaintiff's property and that in determining that the defendants were answerable for the plaintiff's damage, the trial court rendered a correct decision.

The judgment of the District Court as affirmed by the Supreme Court should here likewise be affirmed.

Respectfully submitted,

HARRY KAPLAN,
Attorney of Plaintiff-Respondent.

MICHAEL G. ALENICK,
Of Counsel on the Brief.