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Amended Complaint.

AMENDED COMPLAINT.

Filed March 23, 1921.

New Jersey Supreme Court

UNION COUNTY.

10

HERBERT S. NORTH, as Executor under
the Last Will and Testament of
Joseph W. North, deceased,

Plaintiff,

vs.

JERSEY KNITTING MILLS, a corporation,
Defendant.

Action at Law.

In Ejectment.

Amended

Complaint.

20

The plaintiff, Herbert S. North, as Executor under the Last Will and Testament of Joseph W. North, deceased, residing at Number 9 Vista avenue, in the City of Elizabeth, in the County of Union and State of New Jersey, says that:

1. On January 13, 1921, plaintiff owned and possessed a lot of land in the City of Elizabeth, in the County of Union and State of New Jersey, and more particularly described as follow:

FIRST TRACT: Known, numbered and designated on a Map of the New Manufacturing Town of Elizabeth Port, N. J. (now on file in the Register's office of the County of Essex), as Lot Number Fifty-six (56) on Block Number Seven (7) and which is described as follows:

30

BEGINNING at a point in the westerly line of Fulton Street, fifty feet Northerly from Sixth Street and at the Northeasterly corner of land recently conveyed by said party of the first part to said

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Amended Complaint.

10

North; running thence Westerly parallel with Sixth Street along the land of said North one hundred (100) feet to the middle line of the block between Fulton and Franklin Streets; thence Northerly along said middle line of the block and parallel with Fulton Street twenty-five (25) feet; thence Easterly and parallel with Sixth Street one hundred (100) feet to Fulton Street and thence Southerly along Fulton Street twenty-five (25) feet to the point or place of beginning.

Being the same premises conveyed to Joseph W. North by deed of Warren R. Dix and wife, dated May 8th, 1891, and recorded in Book 229 of Deeds for Union County, on pages 222, etc.

20

SECOND TRACT: Known, numbered and designated on a Map of the New Manufacturing Town of Elizabeth Port, N. J. (now on file in the Clerk's office of the County of Essex), as Lots Numbers Fifty-five (55), Fifty-seven (57) and Fifty-nine (59) on Block Number Seven (7), being each Twenty-five feet wide, front and rear, by one hundred feet deep, and which taken together are bounded and described as follows:

30

BEGINNING at the corner formed by the intersection of the Easterly line of Franklin Street with the Northerly line of Sixth Street, and running thence Northwesterly along Franklin Street seventy-five (75) feet to land conveyed by party of the first part to Gustav Boettke; thence Northeasterly along his land one hundred (100) feet to land heretofore conveyed to party of the second part; thence Southeasterly along his land seventy-five (75) feet to Sixth Street and thence Southwesterly along Sixth Street one hundred (100) feet to the point or place of beginning.

40

Amended Complaint.

Being the same premises conveyed to Joseph W. North by deed of Warren R. Dix and wife, dated June 14th, 1893, and recorded in Book 263 of Deeds for Union County, on pages 119, etc.

2. Defendant on that day wrongfully entered upon said land and dispossessed plaintiff and still keeps him out of possession, depriving him of the rents and profits. 10

3. Said rents and profits amount to the sum of \$3,000.00 a year.

4. Plaintiff's right to the possession of said lands accrued on the 14th day of January, 1921.

5. Plaintiff demands judgment for the possession of said premises and \$3,000.00 damages.

ABE J. DAVID,
Attorney of Plaintiff.

Consent is hereby given to filing and acknowledgment of service is hereby given of within amended complaint. 20

3/21/21.

KANTER & KANTER,
Attorneys of Plaintiff.

30

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*Amended Answer to Amended Complaint.***AMENDED ANSWER TO AMENDED COMPLAINT.**

Filed June 23, 1921.

10 The defendant, Jersey Knitting Mills, a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, answering the amended complaint herein, says that:

1. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the complaint and therefore neither admits nor denies the same, but leaves the plaintiff to make such proof thereof as may be proper.
2. It denies the allegations of paragraph 2.
3. It denies the allegations of paragraph 3.
4. It denies the allegations of paragraph 4.
- 20 5. It denies the allegations of paragraph 5.

FIRST SEPARATE DEFENSE.

6. On or about January 23, 1917, the plaintiff in this action entered into a lease with Joseph W. North & Son, Inc., a corporation of the State of New Jersey, a true copy of which lease is hereunto annexed and expressly made a part hereof, marked Exhibit A.

- 30 7. The premises described in paragraph 1 of the complaint in this cause are a portion of the premises mentioned in the said lease.

SECOND SEPARATE DEFENSE.

8. This defendant repeats the allegations of paragraph 6 above.

9. This defendant repeats the allegations of paragraph 7 above.

40 10. Subsequent to January 23, 1917, and prior to November 20, 1920, said Joseph W. North & Son, Inc., a cor-

Amended Answer to Amended Complaint.

poration, assigned the said lease to Royal Knitting Mills, a corporation of the State of New Jersey.

THIRD SEPARATE DEFENSE.

11. This defendant repeats the allegations of paragraph 6 above.

12. This defendant repeats the allegations of paragraph 7 above. 10

13. This defendant repeats the allegations of paragraph 10 above.

14. On or about November 30, 1920, said Royal Knitting Mills, a corporation of the State of New Jersey, was declared an insolvent corporation by the Court of Chancery of the State of New Jersey and thereupon Samuel Roessler was appointed the receiver of said Royal Knitting Mills, pursuant to "An Act Concerning Corporations (Revision of 1896)," and the several acts supplementary thereto and amendatory thereof. 20

15. On or about January 13, 1921, said Samuel Roessler, receiver as aforesaid, assigned, transferred and set over to Joseph Meltzer all the right, title and interest of the said receiver to the said lease.

FOURTH SEPARATE DEFENSE.

16. This defendant repeats the allegations of paragraph 6 above. 30

17. This defendant repeats the allegations of paragraph 7 above.

18. This defendant, at the time of the institution of this suit, maintained some of its property and chattels in several portions of the premises described in the lease referred to in paragraph 6 above, with the approval and consent of said Joseph W. North & Son, Inc., a corporation. 40

Amended Answer to Amended Complaint.

FIFTH SEPARATE DEFENSE.

19. This defendant repeats the allegations of paragraph 6 above.

20. This defendant repeats the allegations of paragraph 7 above.

10 21. This defendant repeats the allegations of paragraph 10 above.

22. This defendant repeats the allegations of paragraph 14 above.

23. This defendant repeats the allegations of paragraph 15 above.

20 24. This defendant, at the time of the institution of this suit, maintained some of its property and chattels in several portions of the premises described in the said lease, with the approval and consent of said Joseph Meltzer.

SIXTH SEPARATE DEFENSE.

25. This defendant repeats the allegations of paragraph 6 above.

26. This defendant repeats the allegations of paragraph 7 above.

30 27. The plaintiff has never elected to declare a forfeiture of the said lease for any cause or reason whatsoever.

28. The said lease has not been forfeited by reason of any cause or thing whatsoever.

SEVENTH SEPARATE DEFENSE.

29. This defendant repeats the allegations of paragraph 6 above.

30 30. This defendant repeats the allegations of paragraph 7 above.

Amended Answer to Amended Complaint.

31. This defendant repeats the allegations of paragraph 10 above.

32. This defendant repeats the allegations of paragraph 27 above.

33. This defendant repeats the allegations of paragraph 28 above.

10

EIGHTH SEPARATE DEFENSE.

34. This defendant repeats the allegations of paragraph 6 above.

35. This defendant repeats the allegations of paragraph 7 above.

36. This defendant repeats the allegations of paragraph 10 above.

37. This defendant repeats the allegations of paragraph 14 above.

20

38. This defendant repeats the allegations of paragraph 15 above.

39. This defendant repeats the allegations of paragraph 27 above.

40. This defendant repeats the allegations of paragraph 28 above.

NINTH SEPARATE DEFENSE.

41. This defendant repeats the allegations of paragraph 6 above.

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42. This defendant repeats the allegations of paragraph 7 above.

43. Prior to November 30, 1920, plaintiff waived his right, if any, to declare a forfeiture of said lease by reason of any alleged or actual breach of any of the covenants therein contained.

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Amended Answer to Amended Complaint.

TENTH SEPARATE DEFENSE.

44. This defendant repeats the allegations of paragraph 6 above.

45. This defendant repeats the allegations of paragraph 7 above.

10 46. This defendant repeats the allegations of paragraph 10 above.

47. This defendant repeats the allegations of paragraph 43 above.

ELEVENTH SEPARATE DEFENSE.

48. This defendant repeats the allegations of paragraph 6 above.

49. This defendant repeats the allegations of paragraph 7 above.

20 50. This defendant repeats the allegations of paragraph 10 above.

51. This defendant repeats the allegations of paragraph 14 above.

52. This defendant repeats the allegations of paragraph 15 above.

53. This defendant repeats the allegations of paragraph 43 above.

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TWELFTH SEPARATE DEFENSE.

54. This defendant repeats the allegations of paragraph 6 above.

55. This defendant repeats the allegations of paragraph 7 above.

56. Subsequent to November 30, 1920, and prior to the institution of this suit, the plaintiff waived his right, if any, to declare a forfeiture of said lease by reason of any alleged or actual breach of any of the covenants therein contained.

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Amended Answer to Amended Complaint.

THIRTEENTH SEPARATE DEFENSE.

57. This defendant repeats the allegations of paragraph 6 above.

58. This defendant repeats the allegations of paragraph 7 above.

59. This defendant repeats the allegations of paragraph 10 above. 10

60. This defendant repeats the allegations of paragraph 56 above.

FOURTEENTH SEPARATE DEFENSE.

61. This defendant repeats the allegations of paragraph 6 above.

62. This defendant repeats the allegations of paragraph 7 above.

63. This defendant repeats the allegations of paragraph 10 above. 20

64. This defendant repeats the allegations of paragraph 14 above.

65. This defendant repeats the allegations of paragraph 15 above.

66. This defendant repeats the allegations of paragraph 56 above.

FIFTEENTH SEPARATE DEFENSE.

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67. The plaintiff has no title and right to possession in the premises described in the complaint sufficient to maintain this action.

FIRST OBJECTION IN LAW TO THE COMPLAINT.

68. At or before the trial of this action this defendant will move to strike out the amended complaint herein on the ground that said amended complaint does not show a

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Amended Answer—Exhibit A.

cause of action in favor of the plaintiff and against this defendant.

KANTER & KANTER,
Attorneys of Defendant.

RALPH E. LUM,
Of Counsel with Defendant.

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EXHIBIT A.

THIS AGREEMENT between Herbert S. North as Executor under the last Will and Testament of Joseph W. North, deceased, as Landlord and Joseph W. North & Son, Inc., a Corporation organized and existing under the laws of the State of New Jersey, as Tenant. WITNESSETH: That
20 the said Landlord has let unto the said Tenant and the said Tenant has hired from said Landlord the premises formerly occupied by the firm of Joseph W. North and Son, fronting on Fulton, Sixth and Franklin Streets, in the City of Elizabeth, Union County, New Jersey, together with the buildings thereon erected, the machinery, shafting and other property therein contained, belonging to the said landlord for the term of five years from the date hereof, and to commence on the seventeenth day of
30 January, 1917, and to end on the seventeenth day of January, 1922, to be used and occupied for the manufacture and sale of knit underwear and other fabrics upon the conditions and covenants following:

1st. That the Tenant shall pay the rent of Fifteen Hundred Dollars per annum, payable in equal monthly installments of One Hundred and twenty-five dollars a month on the first days of each and every month during said term in advance. The rent for the month of January, 1917, having been computed and paid on the delivery hereof.

40

Amended Answer—Exhibit A.

2nd. That the Tenant shall take good care of the premises and make all necessary inside repairs thereto during the term of this lease, and shall also pay all water charges and rents assessed against said premises and at the end or other expiration of the term shall deliver up the demised premises in good order or condition, damages by the elements excepted.

10

3rd. That the Tenant shall promptly execute and comply with all rules, orders, ordinances and regulations of the City Government, and of any and all its Departments and Bureaus applicable to said premises, for the correction, prevention, and abatement of nuisances or other grievances, in, upon or connected with said premises during said term; and shall also promptly comply with and execute all rules, orders, and regulations of the New York Board of Fire Underwriters for the prevention of Fires, at its own cost and expense.

20

4th. That the Tenant shall not assign this Agreement, or underlet or underlease the premises, or any part thereof, or make any alterations on the premises, without the Landlord consent in writing; or occupy, or permit or suffer the same to be occupied for any business or purpose deemed disreputable or extra-hazardous on account of fire under the penalty of damages and forfeiture.

5th. That the Tenant shall, in case of fire, give immediate notice thereof to the Landlord, who shall thereupon cause the damage to be repaired forthwith; but if the premises be so damaged that the Landlord shall decide to rebuild, the term shall cease and the accrued rent be paid up to the time of the fire.

30

6th. That said Tenant agree that the said Landlord and Agents, and other representatives, shall have the right to enter into and upon said premises, or any part thereof, at all reasonable hours, for the purpose of examining the same, or making such repairs, or alterations therein as may be necessary for the safety and preservation thereof.

40

Amended Answer—Exhibit A.

7th. The Tenant also agrees to permit the Landlord or his Agents to show the premises to persons wishing to hire or purchase the same; and the Tenant further agree that on and after three months next preceding the expiration of the term thereby granted, the landlord or his Agents shall have the right to place notices on the front of said premises, or any part thereof, offering the premises "To Let" or "For Sale," and the Tenant hereby agree to permit the same to remain thereon without hindrance or molestation.

8th. That if the said premises, or any part thereof, shall become vacant during the said term, the Landlord or his representative may re-enter the same, either by force or otherwise without being liable to prosecution therefor; and re-let the said premises as the Agent of the said Tenant and receive the rent thereof, applying the same, first to the payment of such expenses as he may be put to in re-entering, and then to the payment of the rent due by these presents; the balance (if any) to be paid over to the Tenant who shall remain liable for any deficiency.

9th. That in case of any damage or injury occurring to the glass in the buildings on the said demised premises or damage and injury to the said premises of any kind whatsoever, said damage or injury being caused by the carelessness, negligence or improper conduct on the part of the said Tenant, its Agents or Employees, then the said Tenant shall cause the said damage or injury to be repaired as speedily as possible at its own cost and expense.

10th. That the Tenant shall neither encumber nor obstruct the sidewalks nor allow the same to be obstructed or encumbered in any manner, and will keep the sidewalks and gutters free from ice and snow.

12th. It is expressly agreed and understood by and between the parties to this agreement, that the landlord shall not be liable for any damage or injury by water,

Amended Answer—Exhibit A.

which may be sustained by the said Tenant or other person; or for any other damage or injury resulting from the carelessness, negligence, or improper conduct on the part of any other Tenant or Agents, or Employees, or by reason of the breakage, leakage, or obstruction of the water or soil pipes, or other leakage in or about the said building, the landlord, however, agrees to make all exterior repairs and keep the roof in order. 10

13. That if default be made in any of the covenants herein contained, then it shall be lawful for the said landlord to re-enter the said premises, and the same to have again, re-possess and enjoy. The said Tenant hereby expressly waive the service of any notice in writing of intention to re-enter.

The landlord agrees on the termination of this lease, all the covenants and conditions thereof on the part of the tenant having been fully kept and performed and the said tenant not being in default, to renew this lease for a further term of two years at the annual rent of Seventeen Hundred and Fifty Dollars a year payable in equal monthly payments in advance, provided the said tenant shall give notice in writing to the said landlord of its intention to renew the same at least three months before the expiration hereof, said renewal lease to be in the same form as this lease, except that it shall not contain this covenant of renewal. 20

It is further understood and agreed that the tenant shall have the option to purchase the demised premises at any time during the continuance of the term hereby demised, or of the renewal thereof hereinbefore provided for in case the same shall be so renewed, for the sum of Twenty-five thousand dollars, said purchase money to be paid in cash at the time of the delivery of the deed or at the election of the said tenant by the said tenant executing and delivering to the said landlord its bond for Fifteen thousand dollars payable in five years from the date there- 30

Amended Answer—Exhibit A.

10 of with interest at five percentum per annum, payable semi-annually, said bond to be secured by a purchase money mortgage covering said premises, the balance of Ten thousand dollars of said purchase money to be paid in cash on the delivery of the deed. The landlord further agrees if requested during the term of the original lease, to make such alterations in the storehouse as the tenant may require, such alterations, however, not to exceed in cost the sum of three hundred dollars.

And the said Landlord doth covenant that the said Tenant on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

20 And it is further understood and agreed, that the covenants and agreements herein contained are binding on the parties hereto and their legal representatives.

IN WITNESS WHEREOF, the landlord has hereunto set his hand and seal and the tenant has caused its corporate seal to be hereunto affixed and these presents to be signed by its proper officer this day of one thousand nine hundred and seventeen.

HERBERT S. NORTH, Exe. (L. S.)

JOSEPH W. NORTH & SON, INC.

By NATHAN SCHWARTZ, Pres.

30 Sealed and delivered in
the presence of

SAMUEL PHILLIPS SAVAGE.

Amended Answer—Exhibit A.

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

BE IT REMEMBERED, that on this 23rd day of January, in the year one thousand nine hundred and seventeen, before me a Master in Chancery of New Jersey, personally appeared Herbert S. North, who, I am satisfied, is the grantor in the within Instrument named, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed. 10

ABE J. DAVID,
Master in Chancery of New Jersey.

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

BE IT REMEMBERED, that on this 22nd day of January, in the year one thousand nine hundred and seventeen, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Samuel Phillips Savage, who being by me duly sworn, doth depose and make proof to my satisfaction, that he well knows the Common Seal of Joseph W. North & Son, Inc., the Grantor named in the foregoing Deed, that the seal thereto affixed is the proper Common Seal of the said Corporation, and that the same was so affixed thereto, and the said Deed signed and delivered by Nathan Schwartz who was at the date and execution thereof, President of said Corporation, as the voluntary act and deed of the said Corporation and by authority of said Corporation in the presence of said Deponent and that the said Deponent subscribed the same as witness to the execution thereof. 20 30

SAMUEL PHILLIPS SAVAGE.

Sworn and subscribed before me

January 22, 1917.

FRANK P. McDERMOTT,
A Master in Chancery of N. J.

*Replication to Amended Answer.***REPLICATION TO AMENDED ANSWER.**

Filed July 15, 1921.

REPLICATION TO THE FIRST SEPARATE DEFENSE.

- 10 1. Paragraph 6 is admitted.
2. As to paragraph 7, plaintiff alleges that the premises described in paragraph 1 of the complaint include all of the premises mentioned in the lease.

REPLICATION TO SECOND SEPARATE DEFENSE.

3. Paragraph 10 is admitted, and plaintiff alleges that the said Joseph W. North & Son, Incorporated, had no right to assign the said lease to the Royal Knitting Mills, under the terms of the lease, and by such assignment the
- 20 lease became and was forfeited.

REPLICATION TO THIRD SEPARATE DEFENSE.

4. Paragraph 14 is admitted.
5. Paragraph 15 is admitted and plaintiff alleges that the said Samuel Roessler, as such receiver, had no right, title and interest to the said lease which he could assign, transfer and set over to said Joseph Metzler.

30 REPLICATION TO FOURTH SEPARATE DEFENSE.

6. As to paragraph 18, the plaintiff reserves the right to move to strike out said paragraph at or before the time of the trial of the cause.

REPLICATION TO FIFTH SEPARATE DEFENSE.

7. As to paragraph 24, plaintiff reserves the right to move to strike out said paragraph at or before the time of the trial of the cause.

Replication to Amended Answer.

REPLICATION TO SIXTH SEPARATE DEFENSE.

8. Paragraph 27 is denied, and plaintiff reserves the right to move to strike out said paragraph at or before the time of the trial of the cause.

9. Paragraph 28 is denied, and plaintiff reserves the right to move to strike out said paragraph at or before the time of the trial of the cause. 10

REPLICATION TO NINTH SEPARATE DEFENSE.

10. Paragraph 43 is denied, and plaintiff reserves the right to move to strike out said paragraph at or before the time of the trial of the cause.

REPLICATION TO TWELFTH SEPARATE DEFENSE.

11. Paragraph 56 is denied, and plaintiff reserves the right to move to strike out said paragraph at or before the time of the trial of the cause. 20

REPLICATION TO FIFTEENTH SEPARATE DEFENSE.

12. Paragraph 67 is denied, and plaintiff reserves the right to move to strike out said paragraph at or before the time of the trial of the cause.

13. Plaintiff reserves the right to move to strike out amended answer on the ground that it does not allege facts which constitute a defense in this cause. 30

ABE J. DAVID,
Attorney of Plaintiff.

*Postea.***POSTEA.**

Filed February 11, 1922.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10

HERBERT S. NORTH, Executor,

*Plaintiff,**vs.*

JERSEY KNITTING MILLS, a corporation,

*Defendant.**In Ejectment.**Postea.*

20

This cause was tried before Honorable George S. Silzer, Circuit Judge, with a jury, at the Union Circuit of the New Jersey Supreme Court on the ninth and tenth days of February, 1922.

The jury found a verdict in favor of the plaintiff and against the defendant and determined that the plaintiff was entitled to the possession of the lands and premises mentioned and described in the summons and complaint and further found that the plaintiff was entitled to recover as mesne profits against the defendant for the use and detention of said premises the sum of \$2,378.13.

30

GEORGE S. SILZER,
J.

40

Judgment.

JUDGMENT.

NEW JERSEY SUPREME COURT.

HERBERT S. NORTH, as Executor under the Last Will and Testament of Joseph W. North, deceased, <i>Plaintiff,</i> <i>vs.</i> JERSEY KNITTING MILLS, a corporation, <i>Defendant.</i>	}	<i>Action at Law.</i> <i>(Ejectment.)</i> <i>On Postea.</i>	10
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This case having been tried at the Union Circuit before the Judge of said Court and a jury on the ninth and tenth days of February, 1922, and the jury having rendered a verdict in favor of the plaintiff and against the defendant that the plaintiff was entitled to the possession of the lands and premises mentioned and described in the summons and complaint and further found that the plaintiff was entitled to recover as mesne profits against the defendant for the use and detention of said premises the sum of twenty-three hundred and seventy-eight dollars and thirteen cents, as appears by the postea now here returned,

It is ORDERED that judgment be and hereby is entered in favor of plaintiff and against the defendant for the possession of the premises mentioned and described in the complaint, together with the sum of twenty-three hundred and seventy-eight dollars and thirteen cents as mesne profits, besides costs to be taxed *nisi*.

Entered February 11, 1922.

On motion of
 ABE J. DAVID,
Attorney.

A true copy,
 ENOCH L. JOHNSON,
Clerk.

Order.

ORDER.

Filed February 14, 1922.

NEW JERSEY SUPREME COURT.

10	HERBERT S. NORTH, as Executor under the Last Will and Testament of Joseph W. North, deceased, <i>Plaintiff-Respondent,</i> <i>vs.</i> JERSEY KNITTING MILLS, a corporation, <i>Defendant-Appellant.</i>	}	<i>On Appeal, etc.</i> <i>Order.</i>
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20 The above-named defendant-appellant having appealed from the judgment, after verdict, entered in the above-entitled cause, it is hereby on this thirteenth day of February, A. D. 1922, on motion of Messrs. Kanter & Kanter, attorneys of the aforesaid defendant-appellant, ORDERED that the sum in which the said defendant-appellant shall make recognizance to the plaintiff-respondent is Seven Thousand Dollars (\$7,000).

Let this rule be entered.

J. J. BERGEN,
Justice Supreme Court.

30 Entered February 14, 1922.

On motion of
 KANTER & KANTER,
Attorneys.

A true copy,
 ENOCH L. JOHNSON,
Clerk.

Notice of Appeal.

NOTICE OF APPEAL.

Filed February 14, 1922.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

HERBERT S. NORTH, as Executor under
the Last Will and Testament of
Joseph W. North, deceased,

Plaintiff-Respondent,

vs.

JERSEY KNITTING MILLS, a corporation,
Defendant-Appellant.

In Ejectment.

*Notice of
Appeal.*

10

To Abe J. David, Esq., attorney of plaintiff-respondent.

20

PLEASE TAKE NOTICE that the defendant, Jersey Knitting Mills, a corporation of the State of New Jersey, hereby appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Yours, etc.,

KANTER & KANTER,
Attorneys for Defendant-Appellant.

Newark, N. J., February 11, 1922.

30

Service of the within notice of appeal is hereby acknowledged this 13th day of February, 1922.

ABE J. DAVID,
Attorney for Plaintiff-Respondent.

40

*Grounds of Appeal.***GROUND OF APPEAL.**

Filed May 13, 1922.

New Jersey Court of Errors and Appeals

10

HERBERT S. NORTH, executor, etc., <i>Plaintiff-Respondent,</i> <i>vs.</i> JERSEY KNITTING MILLS, a corporation, <i>Defendant-Appellant.</i>	}	<i>On Appeal, etc.</i> <i>Grounds of Appeal.</i>
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To the above-named plaintiff-respondent or whom it may concern:

20

PLEASE TAKE NOTICE that the following are the grounds of appeal of the defendant-appellant in the above-entitled cause:

1. The Trial Court's action in allowing plaintiff to introduce Exhibit P. 1 into evidence.
2. The Trial Court's action in overruling the motion for a non-suit made by the defendant.
3. The Trial Court's action in failing, at the defendant's request, to make the following charge to the jury:
 30 "The jury is directed to return a verdict in favor of the defendant."
4. The Trial Court's action in failing, at the defendant's request, to make the following charge to the jury:
 "The plaintiff has not proved his right to possession of the premises, and you must therefore find a verdict in favor of the defendant."
5. The Trial Court's action in failing, at the defendant's request, to make the following charge to the jury:
 "It appears affirmatively that some party, other than the

40

Grounds of Appeal.

plaintiff, is entitled to possession of the premises, and you must therefore find a verdict in favor of the defendant."

6. The Trial Court's action in charging the jury as follows: "The plaintiff insists that there was another forfeiture, even if the first one was waived. After the first one was waived, if it was waived, and the receiver sold, which he had a right to do, if there was no forfeiture of the lease, then it came into the possession of Mr. Meltzer. When Mr. Meltzer took it he still had this lease. The question was whether Mr. Meltzer could assign this lease to somebody else and not break it * * *. So that the plaintiff in this case insists that there was a second breach by a sub-letting of these premises, or assignment of them by Mr. Meltzer to the Jersey Knitting Company."

7. The Trial Court's action in charging the jury as follows: "So that the plaintiff in this case insists that there was a second breach by a sub-letting of these premises, or assignment of them by Mr. Meltzer to the Jersey Knitting Company. It appears that the Jersey Knitting Company was in possession * * *. So the rule is this, that where one not the lessee of premises is found in possession thereof, the presumption is that he holds an assignment of the lease; and in the absence of explanation the presumption continues."

8. The Trial Court's action in charging the jury as follows: "Then the question is before you whether there is a breach of the lease, even if there is a waiver on the first part, and if there was, then the fact that suit was brought is a declaration of forfeiture."

9. The Trial Court's action in charging the jury as follows: "So then it comes to this: Was there a breach of this lease either in one or two of these particulars? If there was not, or if there was a waiver of it, then your verdict would be no cause for action, and the tenant would

Grounds of Appeal.

be entitled to remain in the premises. On the other hand, if there was an assignment of this lease and the breach of it in that way, and declaration of forfeiture by the landlord, and a demand for possession, and no waiver of that, then the landlord would be entitled to possession of his premises.”

10

Yours, etc.,

KANTER & KANTER,
Attorneys of Defendant-Appellant.

Service of the foregoing grounds of appeal is hereby acknowledged this twelfth day of May, A. D. 1922.

ABE J. DAVID,
Attorney of Plaintiff-Respondent.

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Filed May 5, 1922

COURT OF ERRORS

HERBERT S. NORTH, executor, etc.,
Plaintiff-Respondent, *On Appeal, etc.* 10

JERSEY KNITTING MILLS, a corporation,
Defendant-Appellant. } *Stipulation.*

1. It is hereby agreed and stipulated by and between the parties to the above-stated cause, acting by their attorneys herein, that the following portions of the stenographer's transcript and of the evidence taken at the trial of this cause shall be omitted from the state of the case to be printed in this cause: Testimony of Mr. Elwood W. Phares; testimony of Mr. Robert L. Paterson; testimony of Mr. David Meltzer; testimony of Mr. Julius Finkel; Exhibit D. 5 and Exhibit D. 6. It is stipulated that the foregoing testimony, agreed to be omitted from the printed state of the case, is not material for the argument on the grounds of appeal to be urged by the appellant.

2. It is also stipulated by and between the parties that on this appeal, the Court of Errors and Appeals shall deem that the verdict for the damages is supported by the evidence offered in this cause for use and occupation of the premises described in the complaint for the period from January 13, 1921, through and including February 10, 1922.

Stipulation.

3. This stipulation shall be printed in the state of the case on appeal in lieu of the testimony and exhibits omitted, as stipulated in paragraph one above.

Newark, N. J., May 5, 1922.

ABE J. DAVID,
Attorney of Plaintiff-Respondent.

KANTER & KANTER,
Attorneys of Defendant-Appellant.

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Opening.

New Jersey Supreme Court

UNION COUNTY CIRCUIT.

JANUARY TERM, 1922.

HERBERT S. NORTH, as executor, etc.

vs.

JERSEY KNITTING MILLS, a corporation.

10

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before Hon. George S. Silzer, Circuit Court Judge, and a jury, at the Union County Court House in the City of Elizabeth, New Jersey, on the ninth day of February, A. D. 1922, at 2:55 P. M.

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Appearances:

Abe J. David, Esq., attorney for the plaintiff.

Messrs. Kanter & Kanter, attorneys for the defendant.

A jury being empanelled and found satisfactory, they were sworn.

Mr. David opens the case for the plaintiff.

Mr. Kanter opens the case for the defendant.

The Court. I understand Mr. Herbert North made a lease in 1917 to Joseph North & Company, Inc. That thereafter that lease was assigned to the Royal Knitting Mills. Then the Royal Knitting Mills went into the hands of a receiver, became bankrupt.

30

Mr. Kanter. No, sir. A Chancery receiver.

The Court. A Chancery receiver. Then the receiver in Chancery sold the lease to Mr. Meltzer. Now, you claim, Judge David, that there was no authority to make the sale of that lease to Mr. Meltzer, and Mr. Meltzer gained

40

Opening.

no rights by the purchase of that lease. Is that what you say?

Mr. David. We go back further than that and say that North & Son, Inc., even had no right to assign the lease, under a clause in the lease which says it shall not be assignable, and if they do, it becomes void.

10 *The Court.* Was the option to declare it void ever exercised.

Mr. David. We insist it was.

The Court. Now, then, on the receivership, why do you say that the receiver had no right to sell the lease, because it had already been declared void?

Mr. David. Yes, sir.

The Court. So that you say that there being no power to assign the lease, that it was void in the hands of the receiver, and the receiver could not sell a void lease?

20 *Mr. David.* Yes, sir.

The Court. Therefore you are entitled to your property?

Mr. David. Yes, sir. We go farther than that and say that if the receiver had any right to sell the lease, if they prove a waiver of that clause, and the receiver had a right to sell it, after Meltzer bought it he had no right to assign it to the present defendant, whom we say he has attempted to assign the lease to.

30 *The Court.* You say that you are not there under any lease from Mr. Meltzer?

Mr. Kanter. That is correct, sir.

The Court. You are simply there because he does not object to your being there?

Mr. Kanter. As licensee only.

The Court. What are you as licensee?

Mr. Kanter. There with his permission.

The Court. With his permission?

Opening.

Mr. Kanter. Yes, sir.

The Court. What right is that as against the landlord? If he has no title, what right has he to allow you in there?

Mr. Kanter. Meltzer has the title.

The Court. Do you in your pleadings plead that Mr. Meltzer is possessed of sufficient title in these premises that you may gather that right from him? 10

Mr. Kanter. May I state my position?

The Court. Answer the question, so that we can make some headway.

Mr. Kanter. Sufficient title as against the present plaintiff to entitle him to possession. Don't claim title to the fee.

The Court. In other words, you go back to the right that Mr. Meltzer has?

Mr. Kanter. Yes, sir.

The Court. Now we have it straightened out. 20

Mr. Kanter. Furthermore—

The Court. Never mind any furthermore. That clarifies it.

Mr. Kanter. May I state it so it will clarify the trial and shorten this issue considerably? Judge David has opened the subject to the jury of forfeitures, and so forth, and in his bill of particulars, upon which his title is founded, on which he claims as a basis of this action, there is not a word said about forfeiture. 30

The Court. What does it say?

Mr. Kanter. The bill of particulars is this:

The Court. What is it you ask him in your bill of particulars?

Mr. Kanter. I ask him to give me a bill of particulars of his claim of title to this property.

The Court. Is that the way it is stated? Have you your notice? Read it. It is not usually stated that way, that is the reason I ask you to read it. 40

Opening.

Mr. Kanter. Here it is, your Honor: "Please take notice that the defendant in this case demands a bill of particulars of the plaintiff's claim or title to the premises mentioned and set forth in said plaintiff's complaint."

The Court. He sets out the lease.

10 *Mr. Kanter.* No, sir. He sets out merely two deeds and a will.

The Court. He says he is the owner of the property.

Mr. Kanter. Yes.

The Court. That is his title, isn't it? If the Meltzer lease is void then that is his title.

Mr. Kanter. I think this is true, that under the decisions the plaintiff is prohibited from showing any other title than that which is set forth—

20 *The Court.* He does not have to set up any other. He says, my title is my ownership of the property; you haven't anything which deprives me of my ownership and possession.

Mr. Kanter. I say that he is now asserting a different title.

The Court. What is inconsistent with that? He says that you haven't anything which deprives him of the title which he has, namely, the ownership and the right to possession. You say on your part yes, we have; we are in under a valid lease by Mr. Meltzer.

30 *Mr. Kanter.* Yes, sir.

The Court. That is not inconsistent.

Mr. Kanter. He goes further and says, yes, you have a lease.

The Court. No. He says, I own the property and there is nothing against my property. That is what he says.

Mr. David. We might shorten the case still further. They set up that they have a lease, that is, that Meltzer now has a lease, and that they are under Meltzer.

40 *The Court.* There must be that, or nothing.

Opening.

Mr. David. Yes, sir. I now say that the title we set up in our bill of particulars has nothing further to do with the case. That the lease is the basis on which this suit now starts.

The Court. That is their defense. If there is nothing outstanding against your title you are entitled to possession. If they are right, that there is an outstanding lease 10
in the hands of Mr. Meltzer, under which they are holding, then they are entitled to possession.

Mr. David. Yes, sir.

The Court. That brings me back to this: You say you are holding under Mr. Metzler?

Mr. Kanter. Yes, sir. With this additional fact: We deny absolutely the title of the executor. And the decisions in this State are quite clear that the recovery of the plaintiff is based not upon the weakness of the defendant's 20
title, but upon the strength of his own.

The Court. That is true in an ejectment case, of course. What you are after in this case is not the rent alone, but you want the possession?

Mr. David. Possession, and the rent. My other reply to the last observation of counsel is that they may not deny their landlord's title, and they set up that Meltzer holds under this lease.

I offer in evidence lease Herbert S. North, as executor under the last will and testament of Joseph W. North, deceased, as landlord, and Joseph W. North & Son, Incorporated, a corporation, bearing date 17th day of January, 1917, for the premises. 30

The Court. Premises described in this suit?

Mr. David. Described in the bill of complaint.

Mr. Kanter. I object to the introduction of the muniment of title on the ground that that muniment of title is neither referred to nor set up in the bill of particulars.

The Court. Objection overruled. 40

Mr. Kanter. Prays exception.

Herbert S. North, direct.

The Court. Exception allowed.

(Lease entered in evidence and marked Exhibit P. 1.)

HERBERT S. NORTH, the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. David.

10

Q You are the plaintiff in this suit, Mr. North? A I am.

Q Where do you live? A I live in Elizabeth, New Jersey.

Q You are the executor of your father's estate? A Yes, sir; I am.

20

Mr. Kanter. If the Court will permit me at this time to object to the last question; Judge David was standing in front of me and I hardly got his question. The question was, are you the executor of your father's estate. The best evidence of the fact that he is the executor is the will and the proof of his appointment, and not his statement.

The Court. Do you want us to go to the trouble of bringing the Surrogate up from downstairs?

Mr. Kanter. For this reason, that it will appear affirmatively.

30

Mr. David. I have a probate copy of the will and I have arranged with the Surrogate to be up here as soon as we send for him. It is such an apparent thing that I thought counsel would not put us to that trouble.

The Court. There cannot be much doubt about it, if it is so. It seems to me a farce to go through this—

Mr. Kanter. I do not want to be captious about this thing.

The Court. Yes, but you are.

40

Mr. Kanter. I may appear to be.

Herbert S. North, direct.

The Court. There certainly cannot be any question that this man is executor, in your mind?

Mr. Kanter. I think he is executor.

The Court. Is there any sense of going through the farce of having the Surrogate come up here and bring the will here and prove it?

10

Mr. Kanter. Yes, sir.

The Court. Why?

Mr. Kanter. Because the will will establish that he has no title to maintain this suit.

The Court. The will will establish it?

Mr. Kanter. Yes, sir.

The Court. How does the will establish it?

Mr. Kanter. The contents of the will show that.

The Court. Show what?

20

Mr. Kanter. That he has no title to maintain this action.

The Court. How does the will state that?

Mr. Kanter. I suppose the will will be offered in due time. It shows that the legal title is not in this executor at all.

The Court. What does it show? You know what the will is. You say it does show that he has no title. The will certainly does not say I hereby declare that my executor has no title to this property.

30

Mr. Kanter. Of course not.

The Court. What is it that you are pointing out?

Mr. Kanter. It divides this property into two equal shares, to two children. There is no devise of this property to the executor.

The Court. There is a direct devise to two children.

40

Herbert S. North, direct.

10 *Mr. David.* It is absolutely immaterial in the case. The lease which has gone in evidence, and on which they base Mr. Meltzer's right to possession, is between Herbert S. North as executor under the last will and testament of Joseph W. North, deceased, as landlord, and Joseph W. North & Son, Incorporated, as lessee.

The Court. You don't need the will?

Mr. David. Don't need the will.

Q In the month of February, 1921, and each month after that, did you receive a communication from the Jersey Knitting Mills, the defendant in this case, enclosing a check for rent? A I did, up until January 1, 1922. I haven't received such a communication so far.

By the Court.

20 Q You received the rent each month up to January 1, 1922? A Yes, sir.

By Mr. David.

Q What did you do with that rent? A I returned the checks together with the voucher over to my attorney, Judge David, for return.

Q And are there the letters that you received with the rent? A They are; yes, sir.

30

Mr. David. I am about to offer eight of these letters in evidence. Is there any objection?

I offer in evidence the eight letters just testified to by the witness.

(Eight letters entered in evidence as one exhibit and marked Exhibit P. 2.)

Mr. David. I desire to offer in evidence letter from myself as attorney for the plaintiff under date of March 2, 1921, to the Jersey Knitting Mills, which reads as follows:

40

Herbert S. North, direct.

Mr. Kanter. I object to Judge David reading the letter into the record. The letter will speak for itself. It can go in as an exhibit, if he wants it.

The Court. I will overrule the reading. Do you offer the letter?

Mr. David. I offer the letter in evidence.

(Letter entered in evidence and marked Exhibit P. 3.) 10

Mr. David. I offer in evidence letter from myself as attorney for the plaintiff, to the Jersey Knitting Mills, under date of April 6, 1921.

(Letter entered in evidence and marked Exhibit P. 4.)

Mr. David. I offer in evidence letter from myself as attorney for the plaintiff, to Messrs. Kanter & Kanter, attorneys of the defendant, under date of December 1, 1921. 20

(Letter entered in evidence and marked Exhibit P. 5.)

Q On January 5, 1921, who was your attorney, with reference to the subject matter in this suit? A Yourself, Judge David.

Q When were you last at the plant at the corner of Sixth and Franklin streets? A I haven't been there, as far as I can recollect, in probably three years.

Q How big is the lot on which the buildings are situated? A The lot extends from Fulton street through to Franklin street. It is seventy-five feet deep on Fulton street, seventy-five feet deep on Franklin street, and the full length of the block between on Sixth street. It is two hundred by seventy-five. 30

Q How much of the plot do the buildings cover? A The buildings cover nearly all of the plot, with the exception of the lot at the corner of Sixth and Franklin streets, about fifty feet square, and a yard in the rear on 40

Herbert S. North, direct.

Fulton street, about twenty-five feet wide, and about sixty feet long.

Q How many buildings are there? A There are two buildings.

Q What are the dimensions of the buildings? A The frame building is one hundred and fifty feet long by forty-two or forty-four feet wide, two stories high. The warehouse, situated on Franklin street, is one hundred by thirty-two or thirty-four.

Q And how many stories? A One story.

Q How many square feet of floor space do the buildings contain? A Approximately sixteen thousand square feet.

Q At the time you rented the buildings under this lease what equipment did they contain?

Mr. Kanter. I object to the question on the ground that it is immaterial.

Mr. David. It is material on the question of rental value, which I must establish.

The Court. I will allow the question. Did the equipment go with the building?

Mr. David. Equipment that was in the building at the time it was leased, is my question.

A The building was fully equipped with power plant, boiler, all the line shafting that was necessary to run a business similar to what I was operating at the time I leased to the Joseph W. North & Son, Incorporated.

Q When did you first learn, Mr. North, that the lessee Joseph W. North & Son, Incorporated, was no longer in occupancy of the building? A When I returned from Europe early in September.

Q What year, Mr. North? A Three years ago last September. That would be 1918, or 1919.

Q Whom did you learn was in occupancy of the building? A I learned that a concern bearing the name of the Royal Knitting Mills was in occupancy of the building at that time.

Herbert S. North, direct.

Q What did you do when you got that information? A I immediately notified you, as my attorney, to take the matter up and verify the report that I had heard.

By the Court.

Q When was that?

Mr. David. September, 1919.

10

By Mr. Kanter.

Q You said 1918, didn't you? A 1919 is when I returned from Europe.

Mr. David. I demand the production of a letter from Joseph W. North & Son to myself, under date of October 25, 1919.

Mr. Kanter. We haven't any such letter.

Mr. David. I desire to offer in evidence copy of a letter sent by me as attorney for Mr. North to Joseph W. North & Son, under date of October 25, 1919. 20

Mr. Kanter. I object.

The Court. To whom?

Mr. David. To Joseph W. North & Son, the original lessee, and under whom they claim.

The Court. Who are you asking to produce it?

Mr. David. The defendant, having served notice to produce. 30

Mr. Kanter. Judge David did serve notice to produce, and we say we had no such letter in our possession.

The Court. That is your answer to the demand for production?

Mr. Kanter. Yes, sir.

Mr. David. I now offer in evidence a copy of that letter. 40

Herbert S. North, direct.

Mr. Kanter. I object to the introduction of the copy on the ground that the best evidence is the production of the original, under subpoena, to the person who has it.

The Court. Why isn't that so?

10

Mr. David. For two reasons: One reason is that the attorney for Joseph W. North & Son, and to whom the subsequent letters that I propose to introduce were written, is also the attorney of record for the defendant in this case.

20

The Court. That does not follow that he has possession of this letter. Before you can introduce a copy you must show that you either called on the party, if he is a party to the suit, to produce the original, and if he is not a party to the suit you must make efforts to get it from those who have it.

Mr. David. The other answer is this: The assets, belongings of Joseph W. North & Son were turned over to the Royal Knitting Mills; the assets of the Royal Knitting Mills were sold by the receiver and purchased by Mr. Meltzer, who took possession of them, and under whom the defendant now claims.

30

The Court. - I know, but this is purely a question of evidence, Judge. The rule is you must produce the original. If you cannot get the original then you are entitled to produce the copy, but before you can do that you must show that you have made effort. If the other side hasn't them, you can show they had them. After you call upon them to produce you can use your copy. But if you don't show they had them in their possession, or did have, then you must go after somebody who did.

40

Mr. David. I will make all the proof that is necessary. I will withdraw the witness for the moment.

Joseph Meltzer, direct.

JOSEPH MELTZER, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Dayid.

Q Where do you live, Mr. Meltzer? A Jersey City, New Jersey.

10

Q You are the person who purchased the assets of the Royal Knitting Mills at the receiver's sale? A I am not. I didn't purchase the assets. I purchased part of the assets. I didn't purchase the entire assets.

Q Who did? A I don't know.

Q What part did you purchase?

Mr. Kanter. I object to the question on the ground it is immaterial.

The Court. Question allowed.

20

A Certain of the machinery.

Q Is that all, only the machinery? A That is all. That is all that I can recall this moment, the machinery, that is all I was interested in. Might have gotten a broken chair with it.

Q Then you purchased nothing else at all? A The machinery, and the lease, of course.

Q You did purchase the lease? A I did.

Q And your first name is Joseph? A Yes, sir.

30

Q What office do you hold in the defendant company?

Mr. Kanter. I object to the question on the ground it is immaterial.

The Court. I will allow that.

A I am president and treasurer.

Q And your brother is assistant treasurer? A Yes, sir.

Q And is the man who signed these eight letters? A Yes, sir.

40

Joseph Meltzer, direct.

Q Which have been offered in evidence by the plaintiff and marked Exhibit P. 2?

The Court. Speaking now about the Jersey Knitting Company, the ones who are in possession?

Mr. David. Yes, sir.

Mr. Kanter. Yes, sir.

10

Q When did you take possession of the machines? A Shortly after I purchased them from the receiver.

Q When was that? A If I remember correctly, towards the end of January, 1921, last year.

Q And when did you go in physical possession of the business, the plant itself? A At the same time.

Q Was the desk in the office at the time? A There is no desk there.

20 Q Was the desk in the office at the time? A I said there was no desk there.

Q There was no desk? A No.

Q At the time of the sale? A At the time of the sale I believe there was.

Q What became of the desk?

Mr. Kanter. I object to the question. This witness is not called upon to explain what happened to a sale by a receiver of assets of an insolvent corporation.

30

The Court. I will allow the question.

A I presume it was sold to somebody else.

Q Do you know what became of the papers that were in the desk? A How would I know that?

By the Court.

Q Do you? A I don't.

By Mr. David.

40

Q Do you know to whom they were sold? A I don't.

Joseph Meltzer, direct.

Q Did you make a search in the office for the letters in the letter file of Joseph W. North & Son Company at the time? A I did not.

Q Are they down there now? A I don't know.

Q Could you look tonight? A I could not.

Q Why? A I have other matters to attend to.

Q Is there any objection to my looking?

10

Mr. Kanter. I might say, for the benefit of Judge David, there is no objection.

Q You know that Joseph W. North & Son are wound up in receivership, don't you?

Mr. Kanter. I object to the question on the ground that this witness is not competent to state what happened to Joseph W. North as being wound up in receivership. The Knitting Mills it appears was the company that was wound up.

20

The Court. How is that relevant? This is in relation to the letter?

Mr. David. Yes. I will go as far as I can to try to get the letter and show what became of it.

Mr. Kanter. May I renew my objection? I just want your Honor to get in mind the fact that Joseph W. North & Son was the original lessee which sold out its assets apparently to Royal Knitting Mills, as far as I know. Royal Knitting Mills was sold by the receiver, and this witness is now called upon to describe what happened to the letter files, or letters, or other property of Joseph W. North & Son.

30

The Court. The Judge is trying to find out whether they came into his possession.

(Question repeated by stenographer.)

A I do not.

Q Is this your signature on this letter I show you? A It is.

40

Joseph Meltzer, direct.

Q And was that letter sent by you as treasurer of the defendant company, to Mr. North, the plaintiff? A It is.

Q You mean it was? A It was.

Mr. David. I offer in evidence letter of the Jersey Knitting Mills, by J. Meltzer, Treasurer, to the plaintiff, under date of January 31st, 1921.

10

Mr. Kanter. No objection.

Mr. David. And the envelope attached.

(Letter and envelope attached entered in evidence and marked Exhibit P. 6.)

Mr. David. I demand production of letter, Samuel Roessler, receiver, to myself, dated December 2nd, 1920.

Mr. Kanter. We have no such letter in our possession, nor have we had it.

20

Mr. David. Also letter to Ralph E. Lum, Esq., attorney, from myself, dated December 9th, 1919.

Mr. Kanter. You want me to produce all the letters in your notice?

30

Mr. David. Yes. I will read the demand. Letter to Ralph E. Lum, attorney, dated January 26th, 1921, from myself as attorney. Letter to Ralph E. Lum, attorney, from myself, attorney, dated February 2nd, 1921. Letter to Ralph E. Lum, attorney, from myself, attorney, dated January 5th, 1921. Letter to Jersey Knitting Mills, from myself, attorney, dated February 2nd, 1921.

Mr. Kanter. I will respond to that in the morning. Judge David, I understand, does not want to put them in at one time. I have some of the letters Judge David refers to.

The Court. And some you haven't?

Mr. Kanter. Yes.

Mr. David. Cross examine.

Mr. Kanter. No questions.

40

Abe J. David, direct.

Mr. David. I would like to call out of turn Mr. Phares.

* * * * *

Mr. David. I desire to read into the record the tenth paragraph of the second defense of the answer, as follows: "Subsequent to January 23rd, 1917, and prior to November 20th, 1920, said Joseph W. North & Son, Incorporated, a corporation, assigned the said lease to Royal Knitting Mills, a corporation of the State of New Jersey." 10

Also the fourteenth paragraph of the third defense: "On or about November 30th, 1920, said Royal Knitting Mills, a corporation of the State of New Jersey, was declared an insolvent corporation by the Court of Chancery of the State of New Jersey, and thereupon Samuel Roessler was appointed the receiver of said Royal Knitting Mills, pursuant to an act concerning corporations, revision 1896, and the several acts supplementary thereto and amendatory thereof." 20

Paragraph fifteen: "On or about January 13th, 1921, said Samuel Roessler, receiver as aforesaid, assigned, transferred and set over to Joseph Meltzer all the right, title and interest of the said receiver to said lease."

Mr. David. That is all. I will be sworn. 30

ABE J. DAVID, being duly sworn according to law, on his oath saith:

I am the attorney of the plaintiff and have been for five years and upwards. I attended in person the sale of the assets of the Royal Knitting Mills, under a receivership in bankruptcy, on the fifth of January, 1921, at which sale Joseph Meltzer purchased the lease, among other chattels of the Royal Knitting Mills then in the hands of a receiver. At said sale, and before the receiver at 40

Abe J. David, direct.

tempted to sell, I read the following notice, in the presence of Mr. Meltzer: "Notice is hereby given on behalf of the landlord, Herbert S. North, executor, etc., that the lease heretofore made between him and Joseph W. North & Son, Inc., has been and is forfeited under the clause in the lease disallowing an assignment of it, or any under-
 10 letting of the premises without the consent of the landlord in writing. And the landlord claims immediate right to possession of the premises. Notice is also given that all shafting, hangers, pulleys, cross plates, engines, electric dynamo, known as lot number 46, and all fixtures are part of and belong to the realty, or the property of the landlord and cannot be sold." I thereupon handed a copy of this notice to Samuel Roessler, the receiver, and he in turn gave public notice that anyone that purchased the lease after this notice did so at his peril.

20 *Mr. Kanter.* Do you offer the notice?

Mr. David. I offer the copy of the notice.

The Court. It will be admitted.

(Copy of the notice entered in evidence and marked Exhibit P. 7.)

By the Court.

Q The North Company assigned to the Royal Knitting Company on November, 1920, but the first check that you
 30 got was on February following, 1921, from the Royal Knitting? A Yes. Your Honor will observe that Meltzer purported to purchase the lease in January, 1921.

Q 1921? A Yes. And the following month the Jersey Knitting Mills sent the first month's rent, which was returned.

Q The Jersey Knitting Mills? A Yes, sir.

Q I thought you said the Royal? A No. The Royal Knitting Mills attempted to take an assignment from the North Company. Royal Knitting Mills were in the hands of the receiver. Meltzer bought from the receiver, and
 40 turned over to the Jersey Knitting Mills.

Abe J. David, cross.

Cross examination by Mr. Kanter.

Q Judge David, when you read that notice you knew that Joseph W. North & Son had assigned this lease to the Royal Knitting Mills? A I knew they had attempted to.

Q And it was your impression that it was in fact assigned? A Yes, I understood that they had attempted to assign to the Royal Knitting Mills. 10

Q And it was because of the fact of the assignment by Joseph W. North & Son to the Royal Knitting Mills that you read the notice that you have just read into the record? A No. It was because the lease, in my opinion, had become void under the clauses in the lease.

Q Because of the particular clause against assignment by Joseph W. North to the Royal? A That is right.

Q And so you reported the fact to your client, Mr. North, executor? A Reported what fact?

Q The fact that the lease was void? A I so advised him some days before. 20

Q And at the sale you read the notice that you have just read, is that correct? A Yes, sir.

Q So on January 5, 1921, Mr. North was in full possession of the fact that there was either an actual assignment, or an attempted assignment by Joseph W. North & Son to the Royal Knitting Mills? A That is right.

Q And he was in possession of the fact when this suit was brought that the receiver of the Royal Knitting Mills had assigned to Joseph Meltzer? A Had attempted to. 30

Q Had in fact done so? A No. My opinion that I gave to Mr. North was that the receiver was waiting word from you as to the name of the corporation which would take the lease that Mr. Meltzer purported to buy with it.

Q Well, on February 1, 1921, Mr. North received a check for \$125, didn't he? A The check that I returned to you.

Q He received that on February first? A Well, I don't recall the date that he got it. I know he got it during February, he gave it to me, and I returned it to you. 40

Abe J. David, cross.

Q When did you get it from him, in February? A I believe I did.

Q When did you get the March check from him? A I believe I got the checks each month, the same months that Mr. North got them.

10 Q And the last batch of checks accompanying your letter to me, letter dated December 1st, 1921, when did you get those checks? A Each month, some time during the month, Mr. North would leave the check with me, and I waited until a number of them accumulated, after the first few which were returned, and then shipped the whole number back to you.

Q The checks accompanying your letter of December 1st, 1921, for several months? A Yes; they were in my office I should say for four or five months, I guess, some of them. One was in just a day.

20 Q I show you seven checks dated respectively from May 1st, 1921, through and including November 1st, 1921, and ask you whether you had those in your office during that time? A The May check I had from some time in May; the June check I had from some time in June; the July check from some time in July; and the August check from some time in August; the September check from some time in September; the October check from some time in October; the November check from some time in November.

30 Q And you returned these checks on December 1st, 1921? A Yes, sir. The prior checks had already been returned.

Q I understand that. You instituted this action on—

The Court. The only question this witness was asked, the only thing he is called for is to prove the notice to the receiver. That is all. How is this cross examination?

Mr. Kanter. Perhaps you are right.

The Court. Perhaps I am.

40 *Mr. Kanter.* I will say your Honor is right.

Abe J. David, cross.

Q Now, Judge David, after you gave notice to the receiver, did you make any attempt to appeal to the Court of Chancery for a declaration that the lease is void, or did you make any attempt against the sale by the receiver because of the fact that the lease had been declared void by Mr. North, executor, prior to the sale? A I read that notice and announced that the lease was void, and the notice of sale provided only for sale of right, title and interest of it. 10

Q You knew that at that sale the right, title and interest of the receiver to that lease was to be sold? A Yes, sir.

Q And you knew that Mr. North, executor, claimed that the lease had then been forfeited? A Yes, sir.

Q Because of the assignment by North Company to Royal? A Yes, sir.

Q Did you, before the sale, in any way apprise the Court of Chancery of the fact that the lease had been forfeited? A Yes, sir. 20

Q How? A I notified the receiver.

Q Did you attempt to prevent the receiver from selling the lease? A Yes, sir.

Q How? A Appeared in person at the sale and told him there was no lease.

Q Did you attempt to do so by formal action in the Court of Chancery? A I filed no papers in the Court of Chancery. 30

The Court. This lease from the receiver, does it assign the lease, or does it assign such right, title and interest as the receiver has?

A The notice of sale provides the sale of right, title, and interest.

Mr. Kanter. I object to Judge David quoting what the notice of sale provided for, because I think you are mistaken, Judge David.

A Produce the notice. 40

Herbert S. North, direct—cross.

Mr. Kanter. I am not obliged to produce the notice.

A Well, I am not mistaken.

Q You knew that the sale was to be confirmed by the Chancellor?

10

The Court. Can't we find out what the assignment of the lease was, whether it was an assignment of the lease, or an assignment of the right, title and interest of the receiver?

Mr. Kanter. It assigns, pursuant to an order—shall I read it to your Honor?

The Court. Just the part whether he assigns the lease, or assigns such title as he has.

Mr. Kanter. "I assign the right, title and interest, if any, which I as receiver had in a certain lease made and entered, and so forth."

20

Adjourned until tomorrow, Friday, February 10th, 1922, at 9:30 A. M.

SECOND DAY.

February 10, 1922.

Appearances as before stated.

30

HERBERT S. NORTH, recalled.

Direct examination by Mr. David.

Q During the past year what sign, if any, was there on the outside of this building? A Jersey Knitting Mills.

Mr. David. Cross examine.

Cross examination by Mr. Kanter.

Q How old is that building, Mr. North? A The original building was erected in 1891. That makes it
40 thirty-one years this August.

Herbert S. North, cross.

Q And the other building? A The other building was erected about fifteen years ago.

Q What is the condition of the floors in that building?
A I can't say what condition they are in at present.

Q You haven't been in there for over a year, have you? A Yes, sir; I have.

Q Beg pardon? A I have.

10

Q Within the past year? A Yes, sir; I have.

Q Excepting yesterday with me? A That is all.

Q When were you in there before? A I think about a year and a half ago, or two years.

Q Within the last year you haven't been there? A I haven't been there within the last year, except yesterday.

Q And what its condition was in February, 1921, you are not able to state? A I am not able to state. Not as far as the interior is concerned.

Q When you left the building how many toilets were there? A Four.

20

Q Four toilets? A Yes, sir.

Q How many spigots for water were there? A There were five hand spigots.

Q Mr. North, you said yesterday that when you returned from Europe you discovered some fact with reference to who was in the building in 1918. I have forgotten what date you said that you returned from Europe. A September, 1919.

Q September, 1919? A Yes, sir.

30

Q Can you fix the date a little more closely? A I think I returned on September 8th.

Q And when you went down to the property you found a concern known as the Royal Knitting Mills in charge? A No, sir; I did not.

Q When did you discover that the Royal Knitting Mills was there? A I understood when I got down to the bank, who were receiving the rentals, the bank of which I am vice-president, they were receiving rentals while I was away, Mr. Green, the assistant cashier, told

40

Herbert S. North, cross.

me that the checks now bore the name of the Royal Knitting Mills, and asked me if I was aware of the fact. I didn't know whether that had reference to the present tenants in there, or whether they were coming from someone else that was paying the rentals.

10 Q When did you leave for Europe in 1919? A I left May 30th, 1919.

Q And you were vice-president of this bank? A Vice-president of the Elizabeth Trust Company.

Q You are in the brick business, I understand, in New York, is that correct? A The brick business in New Jersey.

Q Your office is in New York? A Yes, sir.

Q When you left for Europe in May, 1919, you left directions that the checks for the rent be sent to your bank? A Yes, sir.

20 Q And delivered to the bank? A Yes, sir.

Q And when you returned in September, 1919, the checks had come in? A I believe they had, yes.

Q Of the Royal Knitting Mills? A I can't say how many checks of the Royal Knitting Mills had come in.

Q Several checks? A I can't say.

Q More than one? A I can't tell you that.

Q At least one? A At least one.

Q And had been deposited? A I believe it had.

Q To your account? A I believe so.

30 Q And never returned to the Royal Knitting Mills?
A Evidently not, excepting as a cancelled voucher.

Q And from that time on, from September, 1919, on until November, 1920, from whom did you receive the rent? A I believe the rentals came in with the name of the Royal Knitting Mills on the end of the check.

Q That included a period right up to the time that the Royal Knitting Mills went into the hands of a Chancery receiver? A I think it did; yes, sir.

Q You also collected from the Chancery receiver a portion of the rent thereafter to become due—that became

Herbert S. North, cross.

due to you after the receivership had occurred? A Through the tenancy of the receiver; yes, sir.

Q You say through the tenancy of the receiver? A When the receiver occupied the premises.

Q You make a distinction then between getting money for use and occupancy, and money that you receive as rent, don't you? A I make a distinction between the money that I got from rent and occupancy from the tenant of the building; yes, sir. 10

Q You understood that you were being paid by the receiver, not for rent that was due you from the Royal Knitting Mills, but you were being paid for the occupancy of the receiver, is that correct? A For the occupancy of the receiver, that is the way I understood it.

Q You understand the distinction, of course? A I can't say that I do understand that thoroughly; no, sir; I do not. 20

Q Well, you understand it well enough to make the distinction? A I should think so.

Q And when did you first discover that the lease that you as executor had given to Joseph W. North & Son, Inc., had been transferred to the Royal Knitting Mills? A Some time in November, 1920.

Q And you communicated that fact, I presume, to your counsel? A You communicated it to me, and I communicated it to Judge David. 30

Q Was it in November, 1920? A I believe it was; yes, sir.

Q Then you knew that if you had any rights to declare the lease forfeited, you had your right in November, 1920? A I believe so.

Q Since November, 1920, you have been receiving a check every month, commencing with February, 1921, down to and including December, 1921, from the Jersey Knitting Mills, for one hundred and twenty-five dollars? A That is what I testified to yesterday. 40

Herbert S. North, cross.

By the Court.

Q Are those the ones you returned? A Those are the ones that we returned; yes, sir.

By Mr. Kanter.

Q How long did you keep those checks before returning
10 them? A I kept them about two hours, I imagine, and I turned them over to Judge David.

Q And he kept them for several months, didn't he? A I believe he did; yes, sir.

Q Why? A Through some controversy, or some communication, or letter writing between he and other attorneys.

Q Through some letter writing? A I believe so, yes.

Q You understood that letters were passing between Judge David and the attorney for the mills? A Yes, sir.

20 Q Between Judge David and the attorneys for the Jersey Knitting Mills, after you had returned the checks, which held up the return of the checks? A I don't know as that is correct.

Q That is your idea of it? A I don't really know what Judge David had in mind in holding the checks. It was for some legal controversy.

Q You entrusted the matter to him as to whether he was to hold them or return them? A Absolutely.

30 Q And you were willing to rely upon his discretion and judgment in the matter? A Positively.

Q He was your agent unqualifiedly, to act as he thought best? A Yes.

Q And whether he held them or returned them you are willing to stand by that action? A That is what I employed Judge David for.

Q You knew in November, 1920, that the Royal Knitting Mills had gone into the hands of a Chancery receiver? A Yes, sir.

Herbert S. North, cross.

Q You knew in January, 1921, that the Royal Knitting Mills had been put in the hands of a bankruptcy receiver?

A No; I didn't say that I did know that.

Q When did you learn that fact, sir? A I don't know as I ever learned that fact.

Q Never learned that fact? A I knew they were in the hands of a receiver, but I didn't know there had been any change in the receivership. 10

Q Was there any rent due to you at the time that the Royal Knitting Mills went out of business? A I think not.

Q You think not? A I think not.

Q Did you ever demand any rent from the Royal Knitting Mills, or from the receiver, after November, 1920?

A I am not in possession of that fact. I can't say.

Q You are not in possession of that fact? A No, sir; I don't know.

Q Don't you know, as a matter of fact, whether there was rent due you in November, 1920? A I don't think—November, 1920, I don't think there was. 20

Q You don't think there was? A Not from the Royal Knitting Mills, I don't think so.

Q Who was the rent due to you from? A I don't know as there was any rent due.

Q There was no rent due to you from anybody? A I don't know as there was.

Q Do you state that as a fact, sir? A No, sir; I do not. 30

Q You think there was? A I can't say.

Q Are you doubtful on the question? A I am absolutely doubtful on the question.

Mr. David. Why don't you bring out the facts?

Mr. Kanter. Judge David, you try your case in your way, and I will try mine in my way.

Q Is it not a fact, Mr. North, that the Royal Knitting Mills owed you rent for the months of October and No- 40

Herbert S. North, cross.

venber, when they went into the hands of a Chancery receiver? A I couldn't say.

Q Did they or did they not? A I couldn't say.

The Court. He said he could not say.

Q I show you a paper that appears to contain your signature. Is that your signature? A Yes, sir; that is.

10

Mr. Kanter. I ask it be marked for identification.)

(Paper marked D. 1 for identification.)

Q You swore to this paper before a clerk in the office of Judge David on February 18th, 1921? A Evidently.

Q At that time you knew whether there was rent due you from the Royal Knitting Mills? A I must have known it at that time; yes, sir.

20

Q And if you claimed rent in 1921 from the Royal Knitting Mills, rent was due you at that time? A It certainly was.

Q Can you tell now how much was due you? A I cannot; no, sir.

Q I show you this paper. Will you read it over, Mr. North? Have you read it? A Yes, sir.

30

Q Having refreshed your memory, Mr. North, by the reading of the paper which has been marked D. 1 for identification, will you state whether or not rent was due you from the Royal Knitting Mills for the months of October and November? A I considered that rent was due—

Q I didn't ask you what you considered.

The Court. Let him answer it.

A I considered that was due from the receiver. Not from the Royal Knitting Mills.

Mr. Kanter. I move that the answer be stricken out.

(Question repeated by stenographer.)

40

Herbert S. North, cross.

A By reading that paper I cannot determine.

Q In this paper, Mr. North, you swore that the Royal Knitting Mills, a corporation, against whom a petition for adjudication in bankruptcy has been filed, was at and before the filing of said petition, and still is indebted to said deponent in the sum of \$321.12; that said debt exists upon rent due for the premises occupied by said Royal Knitting Mills for the months of October, November and December, 1920, and January, 1921, at the rate of one hundred and twenty-five dollars a month, making a total of five hundred dollars; is that statement true, or is it untrue? A The paper speaks for itself; yes, sir. 10

Q I ask you whether the statement which you made in this paper is true or untrue? A It certainly is. I wouldn't take an oath unless it was true.

Q Is it true? A It is.

Q Then rent was due you for October and November? A Evidently. 20

Q And at the time you made this statement, this claim for rent, you knew that the Royal Knitting Mills had assigned—that Joseph W. North & Son had assigned the lease to the Royal Knitting Mills? A I think the wording of that document—

Q I don't ask you about the wording, sir. A I did not; no, sir.

Q You didn't know it? A I did not.

Q Well, Mr. North, three minutes ago you said that in November, 1920, I told you that the Joseph W. North & Son had assigned the lease to the Royal Knitting Mills? A November, 1920; yes, sir. That is correct. What is the date of that paper. 30

Q You knew that fact, didn't you? A Will you tell me the date of that paper?

Q February 18th, 1921. A Yes, sir; absolutely.

Q When you collected \$178.88 from the receiver of the Royal Knitting Mills, that represented occupation for how long a time? A That was a partial payment. 40

Herbert S. North, cross.

Q For what period? A For the period stated in the paper.

Q Well, I will show you the paper again and ask you to state it to the Court and the jury? A October, November and December, 1920, and January, 1921.

10 Q So that payment of \$178.88 you received on account of the rent due you for October, November and December and January, is that right? A For the rent of occupancy of the Royal Knitting Mills; yes, sir.

Q You received it in payment on account? A On account of the rental for those months.

Q The receiver would pay you only that amount on account, is that correct? A I believe so.

Q And you accepted that amount of money? A I believe so.

20 Q And you subsequently filed this proof of claim for \$321.12, being the balance due for rent for that period? A Yes, sir. And I received that check also.

Q You made that claim after you knew the fact that the Joseph W. North had assigned the lease to the Royal Knitting Mills? A Yes, sir.

30 Q Mr. North, in your complaint Mr. David describes the premises as being, the only premises sued for in the complaint is a tract 75x100, at the corner of Sixth and Fulton streets, and 25x100—the first tract at the corner of Fulton and Sixth streets Judge David describes as 75x 100 feet, is that seventy-five feet on Fulton street? A The depth of the lots.

Q Is that seventy-five feet on Fulton street? A Yes. Seventy-five feet on Franklin street. That is the depth of the lot.

Q First referring to the property at Fulton and Sixth, is it a seventy-five foot frontage on Fulton street? A Yes, sir.

40 Q And runs back one hundred feet on Sixth street? A That is right.

Herbert S. North, re-direct.

Q The building itself is bigger than one hundred feet?

A Yes, sir; it is.

Q The other tract is 75x100 at the corner of Franklin and Sixth street? A That is right.

Q And part of that is not occupied by this defendant?

A Yes; fifty feet of it is.

Q Fifty feet of it is? A To the vacant lot.

Q And twenty-five is not. Fifty feet is not? A Fifty feet is not occupied. Twenty-five is. The building is one hundred and fifty feet long.

Q Well, now, considering the property at Franklin and Sixth streets, sir, there is a vacant lot? A I can't tell you the size of that vacant lot.

Q Approximately, sir? A Some place between twenty-five and fifty feet. I can't tell you.

Q You don't know? A No, I don't know.

Re-direct examination by Mr. David.

Q The premises, possession for which is sought, is the same premises that formerly was occupied by Joseph W. North & Son? A Incorporated; yes, sir.

Q And also by Joseph W. North & Son before it was incorporated? A Yes, sir.

Q That is yourself and your father? A Yes, sir.

Q And all of that property is not covered by the buildings? A It is not.

Q How much is not? A There is a corner plot on the corner of Franklin and Sixth streets, possibly twenty-five feet square. There is a rear yard that has a shed on it for storage purposes, about 25x75.

Q Those two portions of this plot that have no buildings on, were they included in the part that was occupied by Joseph W. North & Son? A Yes, they were.

Q Now, Mr. North, when you got back from Europe and found that checks had been deposited in the name of the Royal Knitting Mills, what, if anything, did you do?

A I immediately notified you, in connection with it.

Herbert S. North, re-cross.

Q And when did you first learn that there was an assignment claimed? A In November a year following.

Q At that time did you make a memorandum of the information that you had gotten? A Yes, sir; immediately.

Q Was it made in the presence of Mr. Kanter? A
10 The memorandum was not; no, sir.

Q Do you need the memorandum to refresh your memory? A No, sir.

Q Or do you remember? A I can remember that.

Mr. David. I now ask the production of a letter by Samuel Roessler, dated December 2nd, 1920.

Mr. Kanter. We have no such letter in our possession.

Mr. David. Weren't you the attorney for the receiver?
20

Mr. Kanter. No.

Mr. David. You have the proof of claim, and other letters.

Mr. Kanter. The Referee in Bankruptcy was good enough to give that to me, but I am not the attorney for the receiver.

Mr. David. That is all.

Re-cross examination by Mr. Kanter.

30 Q I show you ten checks and ask you whether these are the checks that you received from the Jersey Knitting Mills?

The Court. Judge David has already testified to those.

Mr. Kanter. Yes; I think he has. I would like to have them marked for identification.

(Ten checks marked D. 2 for identification.)

Mr. David. Plaintiff rests.

Motion for a Non-suit.

MOTION FOR NON-SUIT.

Mr. Kanter. I desire to make a motion for a non-suit. I move for a non-suit in this case on the following legal grounds, which I shall elaborate in the course of the argument:

1. It appears that the plaintiff does not prove any legal title to support this action. 10

2. It affirmatively appears that whatever right of possession there is, whatever legal title there is, is in a person other than the plaintiff.

3. That the plaintiff has not done any act to declare a forfeiture, and has not re-entered the premises in pursuance of the forfeiture, or attempted a re-entry in pursuance of an alleged forfeiture.

4. That the plaintiff's own testimony shows a complete waiver of the forfeiture. 20

5. That there is no proof in this case of the executor's power to institute this action with respect to this real estate, and no proof of his power as executor. 20

6. That the title asserted in the bill of particulars and the complaint is not proved by the plaintiff.

7. And on the last ground, with your Honor's permission, I would like to produce to your Honor a copy—the original demand for the bill of particulars, and the bill of particulars served, which I will ask the stenographer to mark in evidence. 30

The Court. You are going to offer your case then, are you?

Mr. Kanter. No.

The Court. How can you offer anything in evidence until your side comes?

Mr. Kanter. I offer this to your Honor as a formal record of this Court. 40

Motion for a Non-suit.

The Court. You must offer this in evidence. I cannot recognize anything that is not in evidence.

Mr. Kanter. This is a part of the record.

Mr. David. No. His Honor has the record.

Mr. Kanter. This is part of the record, it is part of the pleadings between counsel.

10

The Court. I cannot consider it until it is in evidence. I will deny the motion and allow you an exception.

Mr. Kanter. I offer in evidence the paper which has heretofore been marked D. 1 for identification. That is the proof of claim before the Referee in Bankruptcy.

(Paper heretofore marked D. 1 for identification entered in evidence and marked Exhibit D. 1.)

20

Mr. Kanter. I offer in evidence the ten checks which have been marked D. 2.

(Ten checks heretofore marked D. 2 for identification entered in evidence and marked Exhibit D. 2.)

Mr. Kanter. I offer in evidence the demand for the bill of particulars.

(Demand for bill of particulars entered in evidence and marked Exhibit D. 3.)

30

Mr. Kanter. And the bill of particulars served in response to the demand.

The Court. All together.

(Bill of particulars entered in evidence and marked Exhibit D. 4.)

* * * * *

Mr. Kanter. I would like to put in an additional plea of *puis darrein* continuance, with the Court's permission, and would like to read:

40

1. The defendant repeats the allegations of paragraphs six and seven of the amended answer.

Charge to Jury.

2. Subsequent to the institution of this suit, and prior to the trial thereof, the plaintiff waived his right, if any, to declare a forfeiture of said lease, by reason of any alleged or actual breach of the covenants therein contained.

The Court. Do you object to these, Judge?

Mr. David. No.

10

The Court. They will be made then.

Mr. Kanter sums up the case for the defendant.

Mr. David sums up the case for the plaintiff.

CHARGE TO JURY.

Charge to the jury by Hon. George S. Silzer, Circuit Court Judge, as follows: 20

Gentlemen of the Jury:

Mr. North, executor, the plaintiff in this suit, on January 17th, 1917, made a lease, in which it was provided, among other things, as follows:

"Fourth Clause: That the tenant shall not assign this agreement, or under-let or under-lease the premises, or any part thereof, or make any alterations on the premises, without the landlord's consent in writing, or to occupy, or permit or suffer the same to be occupied by any business or parties deemed disreputable or extra hazardous on account of fire, under penalty of damages and forfeiture." 30

It also contained another clause, the thirteenth: "If default be made in any of the covenants herein contained, then it shall be lawful for the landlord to re-enter the premises and the same to have again, reposseess and enjoy, and the tenant hereby expressly waives the service of any notice in writing of intention to re-enter." 40

Charge to Jury.

10 This lease, of course, was one which bound both parties. When people enter into agreements they bind both sides. The landlord had to live up to his end of it, and the tenant had to live up to his end of it. The plaintiff insists that the tenant did not keep these covenants; the covenants say there shall be no assigning and no sub-
 10 letting. It appears on the 20th of November the tenant did assign this to the Royal Knitting Company, and ten days later the Royal Knitting Company went in the hands of a receiver, and on January 13th the receiver sold to Mr. Meltzer the right, title and interest which he had in this lease, if any. Mr. Meltzer bought it, and since that time the Jersey Knitting Mills have been in possession, or are in possession now, and were at the time of bringing this suit.

20 The plaintiff claims that this lease has been broken and that there was a forfeiture of it; that the clause here prevents any assignment of it, and that there was a breach of that by the assignment of the lease to the Royal Knitting Company, and that as soon as it was ascertained by the landlord, that the landlord declared a forfeiture of it, asked that the property be turned over to him, and that this was not done and that therefore, having declared a forfeiture, and there having been a breach, he is entitled to possession of his property.

30 The defendants say that the plaintiff waived his rights, that he accepted rent from the receiver of the Royal Knitting Company for the months of October, November, December and January and that, therefore, having received rents from the receiver, that he did not consider the breach as one of which he would take advantage. In other words, that he waived the breach of the lease and did not ask for the forfeiture. The plaintiff answers that by saying that the notice declaring the forfeiture and insisting on possession of the property was given before the receiver sold the lease, and that was in January, and that it was not until February that Mr. North put in his

Charge to Jury.

claim for the occupation of the premises by the parties who had gone in under this breach of the lease. Their insistent is that they had a right to collect from the men who were unlawfully in there, during the time they were there, and and at the same time say, we declare this a forfeiture, but that does not give you the right to stay there for nothing. So that is your first issue, was there a breach when this lease was assigned to the Knitting Company? Was there a declaration of forfeiture? Was there a demand that the property should be returned? If there was, and there was nothing else, then the plaintiff would be entitled to recover. On the other hand, if the plaintiff waived that, then that ends his right to recover on that particular feature of the case. 10

The plaintiff insists that there was another forfeiture, even if the first one was waived. After the first one was waived, if it was waived, and the receiver sold, which he had a right to do, if there was no forfeiture of the lease, then it came into the possession of Mr. Meltzer. When Mr. Meltzer took it he still had this lease. The question was whether Mr. Meltzer could assign this lease to somebody else and not break it. Our Court of Chancery has declared the law in this way: "If a lessor consents to a subletting, the lease is, of course, valid, though the lease expressly forbids all subletting, but the consent of a lessor to one subletting, or the waiver of one breach of the covenant against the subletting is no defense to a breach of a covenant by another and subsequent and distinct sublease." 20 30

So that the plaintiff in this case insists that there was a second breach by a subletting of these premises, or assignment of them by Mr. Meltzer to the Jersey Knitting Company. It appears that the Jersey Knitting Company was in possession. I do not recall that the defendant has put anybody on the stand to explain in what way they came into possession. Was there any evidence on the part of the defendant?

Mr. David. No. 40

Charge to Jury.

Mr. Kanter. No.

The Court. So the rule is this, that where one not the lessee of premises is found in possession thereof, the presumption is that he holds an assignment of the lease; and in the absence of explanation the presumption continues. So that there is evidence before you then that the present
 10 holders have an assignment of the lease, at least, that is the presumption until it is overcome. Then the question is before you whether there is a breach of the lease, even if there is a waiver on the first part, and if there was, then the fact that suit was brought is a declaration of forfeiture. I understand that the matter was before Justice Bergen in the Supreme Court and he so declared. That would be so anyway, whether there has been a particular declaration on the subject or not. The fact is that when a man starts suit and wants possession, that
 20 is a very fair declaration that he is insisting that there was a breach and that he wants the place.

So then it comes to this: Was there a breach of this lease either in one or two of these particulars? If there was not, or if there was a waiver of it, then your verdict would be no cause for action, and the tenant would be entitled to remain in the premises. On the other hand, if there was an assignment of this lease and the breach of it in that way, and declaration of forfeiture by the landlord, and a demand for possession, and no waiver of that,
 30 then the landlord would be entitled to possession of his premises, and in that event your verdict would be in a double form; first, for possession of the premises, that will be the first finding; and then second, for the mesne profits, as they are called in the law, reasonable value for the use and occupation during the period during which they have been unlawfully held. There the parties again differ, the plaintiff insisting that from the evidence that has been produced here by his experts that a fair and reasonable rental value of those premises during the time
 40 they have been occupied, from January 14th, 1921, that

Charge to Jury.

is the date, is two hundred and fifty dollars a month. On the other hand, the defendant, through his expert, Mr. Finkel, and after a statement of the condition of the premises, insists that the fair rental value is only one hundred and twenty-five dollars a month. So you gentlemen will have to take that testimony, if you come to the question of damages, and weigh it and determine what in your judgment is the fair and reasonable rental value during the period that it has been so occupied, namely, from January 14, 1921, unto date. 10

Mr. Kanter. The suit is from February 5, 1921. I think the testimony is that Mr. Meltzer got it January 25th.

The Court. The declaration is: "Plaintiff's right to the possession of the lands accrued on the 14th of January, 1921." That is the day I understand that he made demand for possession under the notice to the receiver. 20

Mr. Kanter. If Judge David wants to rest on that, I am satisfied.

The Court. Yes.

The Court. I have several requests to charge. One, two and three I decline to charge.

4. "Unless, prior to the institution of this suit, the plaintiff demanded possession of the premises, you must find a verdict for the defendant." I so charge you.

5. "Plaintiff, by accepting rent from the Royal Knitting Mills, or by accepting rent from the receiver of the Royal Knitting Mills, or by demanding balance of rent from the Royal Knitting Mills, waived any right that he may have had to declare a forfeiture, and in such event you must find in favor of the defendant." If that is the situation, that there was an acceptance of rent, and these other facts set forth, then that request is correct and I so charge it. 30

6. "The fact that the receiver of the Royal Knitting Mills assigned this lease to Mr. Meltzer gives plaintiff no 40

Charge to Jury.

ground for declaring a forfeiture." That is so. A receiver has a right to assign a lease and that does not make a forfeiture, because that is done by operation of law and not in violation of the terms.

7. "If you find that plaintiff held checks of the Jersey Knitting Mills for an unreasonable length of time, that constitutes a waiver of forfeiture, and you will then find in favor of the defendant." That is true, unless you find there are circumstances which satisfy you that there was no waiver. What I am referring to is that Mr. North stated that there was some correspondence between the two attorneys, and that that was the reason for holding the checks. So if there was some reason, or some correspondence which was contrary to the conclusion that there was a waiver by holding them, then, of course, simply holding them would not be a waiver.

8. "If the plaintiff has done any act which is inconsistent with an intention to enforce a forfeiture, such acts are a waiver of the forfeiture and you must find in defendant's favor." I so charge you.

9. "The defendant is not obliged to prove its right of possession. Plaintiff's action is defeated when he fails to show right to possession in himself, at the time of the institution of the suit, or if it should appear that such right of possession is in the J. W. North Co., Royal Knitting Mills, its receiver, or Mr. Meltzer, or in any other person." I so charge you.

10 I decline to charge.

11. "If you should find it necessary to consider the question of damages, you have the right to consider the value of the property, its condition, its attractiveness as a factory because of the fire insurance rate or burglary insurance, and what is the reasonable return for such property to an owner." I charge you in connection with that you have a right to consider all those things. You have a right to consider all the elements which go to make

Exceptions to Charge.

up the question of what is the reasonable rental value of a place of this kind.

12. I decline to charge.

The Court. I will allow counsel an exception to those which I have declined to charge.

The Court. So take the case and determine whether there has been a breach of this lease, whether they elected 10 to stand on the breach, whether they asked for possession of the premises, and if they did, then the plaintiff would be entitled to recover the possession and mesne profits.

If there is no such thing, or if there was a waiver, then the plaintiff would not be entitled to recover.

You may retire.

Mr. Kanter. I except to the Court's statement that there is a presumption in this case that there was an assignment of the lease. 20

The Court. Exception will be allowed.

Mr. Kanter. I except to the Court's charging that there was a right to recover upon the first forfeiture, by reason of the alleged assignment from Jersey to Royal—

The Court. Gentlemen. I wish that you would indicate, when you bring in your verdict, if you find for the defendant, of course, then it is no cause for action. If you find for the plaintiff I wish you would indicate to the Court whether you find that it was the first assignment 30 to the Royal Knitting Company was the breach, or whether the subsequent one was the breach that you rely on, if you find for the plaintiff.

Mr. Kanter. (Continuing.) If that forfeiture has not been waived.

The Court. I will allow an exception.

Mr. Kanter. I also except to the Court's charge that if there is no right to recover by reason of the first forfeiture, there may be a right to recover by reason of a 40

Exceptions to Charge.

forfeiture occurring because of Meltzer's alleged assignment to Jersey Knitting Mills.

The Court. Exception allowed.

10 *Mr. Kanter.* Also I except to the Court's charge that there is testimony in the case that there was correspondence between the attorneys for the plaintiff and the defendant in reference to the checks which were returned December 1, 1921.

20 *Mr. Kanter.* I object to the conduct on the occasion of the reception of the verdict on the ground that the jury first came in and found in favor of the plaintiff and said they assessed the damages in favor of the plaintiff and against the defendant the sum of \$185 from January 14, 1921, to date, without having found a lump verdict. I think the Court's action in returning them to find another verdict is improper.

The Court. I will allow you an exception.

Mr. Kanter. Will your Honor grant me a rule to show cause?

The Court. No, I do not think I will.

Mr. Kanter. I think that the question of fact is debatable. I think, as a matter of fact—

The Court. You did not put in any defense at all.

30 *Mr. Kanter.* Let me put this in, that the jury in announcing its verdict said they found in favor of the plaintiff on the ground that there was an assignment of the lease from Meltzer to Jersey. And I think that as a matter of law that fact is not determinable.

The Court. You can determine that on a writ of error.

Mr. Kanter. It involves a question of—

40 *The Court.* I am not inclined to grant a rule at all because I think, from what I saw of the case, it is merely an effort to delay the ends of justice. But you are entitled, of course, to review on the law. If the Court is

Defendant's Requests to Charge.

wrong on the law, it ought to be corrected, and you can get that on a writ of error. But I do not think I will allow any rule to show cause.

Mr. Kanter. Will your Honor consider that my application has been made and not declined, at the present time?

The Court. I will decline it now. I will not waste any more time on it. No use. Procrastination will not help it any. 10

DEFENDANT'S REQUESTS TO CHARGE.

(1)

"The jury is directed to return a verdict in favor of the defendant."

(2)

"The plaintiff has not proved his right to possession of the premises, and you must therefore find a verdict in favor of the defendant." 20

(3)

"It appears affirmatively that some party, other than the plaintiff, is entitled to possession of the premises, and you must therefore find a verdict in favor of the defendant." 30

(4)

"Unless, prior to the institution of this suit, the plaintiff demanded possession of the premises, you must find a verdict for the defendant."

(5)

"Plaintiff, by accepting rent from the Royal Knitting Mills, or by accepting rent from the receiver of the Royal Knitting Mills, or by demanding balance of rent from the Royal Knitting Mills, waived any rights that he may have 40

Defendant's Requests to Charge.

had to declare a forfeiture, and in such event you must find in favor of the defendant."

(6)

10 "The fact that the receiver of the Royal Knitting Mills assigned this lease to Mr. Meltzer gives plaintiff no ground for declaring a forfeiture."

(7)

"If you find that plaintiff held checks of the Jersey Knitting Mills for an unreasonable length of time, that constitutes a waiver of forfeiture, and you will then find in favor of the defendant."

(8)

20 "If the plaintiff has done any act which is inconsistent with an intention to enforce a forfeiture, such acts are a waiver of the forfeiture and you must find in defendant's favor."

(9)

30 "The defendant is not obliged to prove its right of possession. Plaintiff's action is defeated when he fails to show right to possession in himself, at the time of the institution of the suit, or if it should appear that such right of possession is in the J. W. North Co., Royal Knitting Mills, its receiver, or Mr. Meltzer, or in any other person."

(10)

"If you should find that the right of possession is in the plaintiff, you will give him nominal damages only, 6c."

(11)

40 "If you should find it necessary to consider the question of damages, you have the right to consider the value of the property, its condition, its attractiveness as a factory because of the fire insurance rate or burglary insur-

Exhibit P. 1.

ance, and what is the reasonable return for such property to an owner."

(12)

"In considering values, you have the right to consider the tax assessment and the fact that plaintiff has himself placed lower valuations than that which he now claims." 10

EXHIBIT P. 1.

THIS AGREEMENT between Herbert S. North as Executor under the last Will and Testament of Joseph W. North, deceased, as Landlord and Joseph W. North & Son, Inc., a Corporation organized and existing under the laws of the State of New Jersey as Tenant. WITNESSETH:—That the said Landlord has let unto the said Tenant and the said Tenant has hired from said Landlord the premises formerly occupied by the firm of Joseph W. North and Son fronting on Fulton, Sixth and Franklin Streets in the City of Elizabeth, Union County, New Jersey, together with the buildings thereon erected, the machinery, shafting and other property therein contained, belonging to the said landlord for the term of five years from the date hereof, and to commence on the seventeenth day of January, 1917, and to end on the seventeenth day of January, 1922, to be used and occupied for the manufacture and sale of knit underwear and other fabrics upon the conditions and covenants following: 20

1st. That the Tenant shall pay the rent of Fifteen hundred dollars per annum, payable in equal monthly installments of One Hundred and twenty five dollars a month on the first days of each and every month during said term in advance. The rent for the month of January, 1917, having been computed and paid on the delivery hereof. 30

Exhibit P. 1.

2nd. That the Tenant shall take good care of the premises and make all necessary inside repairs thereto during the term of this lease, and shall also pay all water charges and rents assessed against said premises and at the end or other expiration of the term shall deliver up the demised premises in good order or condition, damages
10 by the elements excepted.

3d. That the Tenant shall promptly execute and comply with all rules, orders, ordinances and regulations of the City Government, and of any and all its Departments and Bureaus applicable to said premises, for the correction, prevention, and abatement of nuisances or other grievances, in, upon or connected with said premises during said term; and shall also promptly comply with and execute all rules, orders, and regulations of the New York Board of Fire Underwriters for the prevention of Fires, at its own cost and expense.

20 4th. That the Tenant shall not assign this Agreement, or underlet or underlease the premises, or any part thereof, or make any alterations on the premises, without the Landlord consent in writing; or occupy, or permit or suffer the same to be occupied for any business or purpose deemed disreputable or extra-hazardous on account of fire under the penalty of damages and forfeiture.

30 5th. That the Tenant shall, in case of fire, give immediate notice thereof to the Landlord, who shall thereupon cause the damage to be repaired forthwith; but if the premises be so damaged that the Landlord shall decide to rebuild, the term shall cease and the accrued rent be paid up to the time of the fire.

40 6th. That said Tenant agree that the said Landlord and Agents, and other representatives, shall have the right to enter into and upon said premises, or any part thereof, at all reasonable hours, for the purpose of examining the same, or making such repairs, or alterations therein as may be necessary for the safety and preservation thereof.

Exhibit P. 1.

7th. The Tenant also agree to permit the Landlord or his Agents to show the premises to persons wishing to hire or purchase the same; and the Tenant further agree that on and after three months next preceding the expiration of the term thereby granted, the Landlord or his Agents shall have the right to place notices on the front of said premises, or any part thereof, offering the premises "to Let" or "For Sale," and the Tenant hereby agree to permit the same to remain thereon without hindrance or molestation. 10

8th. That if the said premises, or any part thereof, shall become vacant during the said term, the Landlord or his representatives may re-enter the same, either by force or otherwise, without being liable to prosecution therefor; and re-let the said premises as the Agent of the said Tenant and receive the rent thereof, applying the same, first to the payment of such expenses as he may be put to in re-entering, and then to the payment of the rent due by these presents; the balance (if any) to be paid over to the Tenant who shall remain liable for any deficiency. 20

9th. That in case of any damage or injury occurring to the glass in the buildings on the said demised premises or damage and injury to the said premises of any kind whatsoever, said damage or injury being caused by the carelessness, negligence or improper conduct on the part of the said Tenant, its Agents or Employees, then the said Tenant shall cause the said damage or injury to be repaired as speedily as possible at its own cost and expense. 30

10th. That the Tenant shall neither encumber nor obstruct the sidewalks nor allow the same to be obstructed or encumbered in any manner, and will keep the sidewalks and gutters free from ice and snow.

12th. It is expressly agreed and understood by and between the parties to this agreement, that the Landlord shall not be liable for any damage or injury by water, 40

Exhibit P. 1.

which may be sustained by the said tenant or other person; or for any other damage or injury resulting from the carelessness, negligence, or improper conduct on the part of any other Tenant or Agents, or Employees, or by reason of the breakage, leakage, or obstruction of the water or soil pipes, or other leakage in or about the said building, the landlord, however, agrees to make all exterior repairs and keep the roof in order.

10 13th. That if default be made in any of the covenants herein contained, then it shall be lawful for the said Landlord to re-enter the said premises, and the same to have again, re-possess and enjoy. The said Tenant hereby expressly *wave* the service of any notice in writing of intention to re-enter.

20 The landlord agrees on the termination of this lease, all the covenants and conditions thereof on the part of the tenant having been fully kept and performed and the said tenant not being in default, to renew this lease for a further term of two years at the annual rent of Seventeen Hundred and fifty dollars a year payable in equal monthly payments in advance, provided the said tenant shall give notice in writing to the said landlord of its intention to renew the same at least three months before the expiration hereof, said renewal lease to be in the same form as this lease, except that it shall not contain this covenant of renewal.

30 It is further understood and agreed that the tenant shall have the option to purchase the demised premises at any time during the continuance of the term hereby demised, or of the renewal thereof hereinbefore provided for in case the same shall be so renewed, for the sum of Twenty five thousand dollars, said purchase money to be paid in cash at the time of the delivery of the deed or at the election of the said tenant by the said tenant executing and delivering to the said landlord its bond for Fifteen thousand dollars payable in five years from the date thereof with interest at five per centum per annum, pay-

40

Exhibit P. 1.

able semi-annually, said bond to be secured by a purchase money mortgage covering said premises, the balance of Ten thousand dollars of said purchase money to be paid in cash on the delivery of the deed. The landlord further agrees if requested during the term of the original lease, to make such alterations in the storehouse as the tenant may require, such alterations however not to exceed in cost the sum of three hundred dollars. 10

And the said Landlord doth covenant that the said Tenant on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the terms aforesaid.

And it is further understood and agreed, that the covenants and agreements herein contained are binding on the parties hereto and their legal representatives.

IN WITNESS WHEREOF, The Landlord has hereunto set his hand and seal and the tenant has caused its corporate seal to be hereunto affixed and these present to be signed, by its proper officer this day of one thousand nine hundred and seventeen. 20

HERBERT S. NORTH, Exe. (L. S.)
JOSEPH W. NORTH & SON, Inc.

By NATHAN SCHWARTZ, Pres.

Sealed and delivered in the presence of 30

SAMUEL PHILLIPS SAVAGE.

Exhibit P. 1.

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

BE IT REMEMBERED, that on this 23rd day of January in the year one thousand nine hundred and seventeen, before me, a Master in Chancery of New Jersey, personally appeared HERBERT S. NORTH who, I am satisfied, is the grant-
10 or in the within instrument named, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

ABE J. DAVID,
Master in Chancery of New Jersey.

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

BE IT REMEMBERED, that on this 22d day of January in the year one thousand nine hundred and seventeen, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared SAMUEL PHILLIPS SAVAGE, who being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the Common Seal of Joseph W. North & Son, Inc., the Grantor named in the foregoing Deed, that the seal thereto affixed is the proper
30 Common Seal of the said Corporation, and that the same was so affixed thereto, and the said Deed signed and delivered by Nathan Schwartz, who was at the date and execution thereof, President of said Corporation, as the voluntary act and deed of the said Corporation and by authority of said Corporation in the presence of said De-

Exhibit P. 2.

ponent and that the said Deponent subscribed the same as witness to the execution thereof.

SAMUEL PHILLIPS SAVAGE.

Sworn and subscribed before me
January 22, 1917.

FRANK P. McDERMOTT,
A Master in Chancery of N. J.

10

EXHIBIT P. 2.

Phone Elizabeth 758

JERSEY KNITTING MILLS
Manufacturers of
Silk and Worsted Knit Cloths
Sixth, Fulton and Franklin Streets

20

Elizabeth, N. J., Aug. 1, 1921.

HERBERT S. NORTH, Exr.,
Estate Jos. W. North,
Elizabeth, N. J.

Enclosed herewith please find check for \$125 to cover rent for the month of August, 1921.

Very truly yours,

30

JERSEY KNITTING MILLS,
David Meltzer.

40

Exhibit P. 2.

Letterhead of Jersey Knitting Mills.

Elizabeth, N. J., Sept. 1. 1921.

HERBERT S. NORTH,
Elizabeth, N. J.

Dear Sir,

10 Enclosed please find our check for \$125.00 in payment
of rent for the month of September, 1921.

Very truly yours,

JERSEY KNITTING MILLS,
David Meltzer.

Letterhead of Jersey Knitting Mills.

Elizabeth, N. J. Oct., 1, 1921.

20 HERBERT S. NORTH, EX., ESTATE J. W. NORTH,
Elizabeth, N. J.

Dear Sir,

Enclosed please find our check for \$125.00 in payment
for rent for the month of October.

Very truly yours,

JERSEY KNITTING MILLS,
David Meltzer.

30

Letterhead of Jersey Knitting Mills.

Elizabeth, N. J., Nov. 1, 1921.

HERBERT S. NORTH,
Elizabeth, N. J.

Dear Sir,

Enclosed herewith please find our check for \$125.00 in
payment of rent for the month of November, 1921.

Very truly yours,

JERSEY KNITTING MILLS,
David Meltzer.

40

Exhibit P. 2.

Letterhead of Jersey Knitting Mills.

Elizabeth, N. J. July 1, 1921.

HERBERT S. NORTH, EXR.,
Estate Jos. W. North,
Elizabeth, N. J.

Dear Sir:

10

Enclosed herewith please find check for \$125.00 to cover
rent for month of July, 1921.

Very truly yours,

JERSEY KNITTING MILLS,
David Meltzer.

Letterhead of Jersey Knitting Mills.

Elizabeth, N. J., May 2, 1921.

20

HERBERT S. NORTH,
Elizabeth, N. J.

Dear Sir,

Enclosed please find our check for \$125.00 in payment
of rent for the month of May, 1921.

Very truly yours,

JERSEY KNITTING MILLS,
David Meltzer.

30

40

Exhibit P. 2.

Letterhead of Jersey Knitting Mills.

Elizabeth, N. J., April 1, 1921.

HERBERT S. NORTH,
Elizabeth, N. J.

Dear Sir,

10 Enclosed please find our check for \$125.00 in payment
of rent for the month of April, 1921.

Very truly yours,

JERSEY KNITTING MILLS,
David Meltzer.

Letterhead of Jersey Knitting Mills.

Elizabeth, N. J., Feb. 28, 1921.

20 HERBERT S. NORTH,
Elizabeth, N. J.

Dear Sir,

Enclosed please find our check for \$125.00 in payment
of rent for the month of March, 1921.

JERSEY KNITTING MILLS,
Per David Meltzer, (Asst. Treasurer.)

30

40

Exhibits P. 3—P. 4.

EXHIBIT P. 3.

(Letterhead of Abe J. David.)

March 2, 1921.

Jersey Knitting Mills,
6th & Fulton Sts.,
City.

10

Gentlemen:

I am returning you herewith your check of February 28th to Herbert S. North, Executor, etc., for \$125 intended for rent for the month of March, owing to the pending litigation.

Very truly yours,

A. J. DAVID,

S.

20

EXHIBIT P. 4.

(Letterhead of Abe J. David.)

April 6, 1921.

Jersey Knitting Mills,
6th & Fulton Sts.,
City.

30

Gentlemen:

I am returning you herewith your check of April 1st to Herbert S. North, Executor, for \$125.00, for the same reason that I have returned prior checks.

Very truly yours,

A. J. DAVID,

S.

40

Exhibit P. 5.

EXHIBIT P. 5.

(Letterhead of Abe J. David.)

Dec. 1, 1921.

Messrs. Kanter & Kanter,
747 Broad St., Newark, N. J.

10

In re: North v. Jersey Knitting Mills.

Gentlemen:

About the time that the ejectment suit was started, the checks for rent which were sent by your client were returned by me with the advice that rent would not be accepted pending the litigation. Since then your client has been forwarding check each month which Mr. North has left at the office here.

20 Mr. North does not desire to change his position pending this litigation, and I am therefore returning seven checks for \$125 each for the months of May to November inclusive.

I hope to be able to dispose of this case at the coming term and trust that you will arrange to try it.

Very truly yours,

A. J. DAVID.

30

40

Exhibit P. 6.

EXHIBIT P. 6.

(Envelope addressed to Herbert S. North, Esq., c/o Elizabeth Trust Company, 715 Elizabeth Avenue, Elizabeth, N. J. Stamped on face "Registered, No. 309634" Return receipt requested. "28889". Postage stamps for 12¢ attached and cancelled.)

10

Enclosure:

JERSEY KNITTING MILLS
Manufacturers of
Silk and Worsted Knit Cloths
Sixth, Fulton and Franklin Streets
Phone Elizabeth 758

Elizabeth, N. J., January 31, 1921.

Herbert S. North, Esq.,
c/o Elizabeth Trust Company,
715 Elizabeth Avenue,
Elizabeth, N. J.

20

Dear Mr. North:

You will find enclosed herewith check of Jersey Knitting Mills for \$125 made to your order as executor of the estate of Joseph W. North, deceased, in payment of February rent of premises at Fulton, Sixth and Franklin Streets, Elizabeth, N. J., under lease commencing with January 17, 1917.

30

The writer desired to meet you personally and called at your banking office for that purpose but did not have the pleasure of making your acquaintance. The writer trusts that this pleasure will be afforded him in the very near future and that our future relations will be most cordial.

Yours very truly,

JERSEY KNITTING MILLS,

By

J. Meltzer,

Treasurer.

JM:MS

40

Exhibits P. 7—D. 1.

EXHIBIT P. 7.

10 NOTICE is hereby given on behalf of the landlord, Herbert S. North, Executor, etc., that the Lease heretofore made between him and Joseph W. North & Son, Inc., has been and is forfeited under the clause in the Lease dis-allowing an assignment of it or any under-letting of the premises without the consent of the landlord in writing, and the landlord claims immediate right to possession of the premises.

NOTICE is also given that all shafting, hangers, pulleys, cross belts, engines, electric dynamo known as lot #46 and all fixtures are part of and belonging to the realty or the property of the landlord and cannot be sold.

Dated January 5th, 1921.

20

EXHIBIT D. 1.

IN THE DISTRICT COURT OF THE
UNITED STATES,
FOR THE DISTRICT OF

30 In the matter of
ROYAL KNITTING MILLS,
Bankrupt. } *In Bankruptcy.*

UNITED STATES OF AMERICA, }
DISTRICT OF NEW JERSEY. } ss.

40 At Elizabeth, in said District of New Jersey, on the Eighteenth day of February, A. D. 1921, came Herbert S. North of No. 9 Vista Avenue, Elizabeth, in the County of Union, State of New Jersey, in said District of New Jersey, and made oath, and says that the said Royal Knit-

Exhibits P. 7—D. 1.

ting Mills, the corporation—whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly and truly indebted to said deponent in the sum of three hundred and twenty-one and 12/100 dollars; that the said debt exists upon rent due for the premises occupied by said Royal Knitting Mills for the months of October, November and December, 1920, and January, 1921, at the rate of \$125.00 a month, total \$500.00 of which a statement is hereto annexed; that the consideration of said debt is as follows: There has been paid on account of the said claim for rent the sum of one hundred and seventy-eight dollars and eighty-eight (178.88) by the receivers of the Royal Knitting Mills, and that no note has been received for the said debt nor any judgment rendered thereon except as aforesaid; that no part of said debt has been paid, that there are no set-offs or counter-claims to the same, that deponent has not, nor has any person by his order or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

HERBERT S. NORTH.

Subscribed and sworn to before
me this day of
February, A. D., 1921.

MABEL SEIBERT GROFF,
Notary Public of New Jersey.

A true copy.

ATWOOD L. DE COSTER,
Referee in Bankruptcy.

Exhibit D. 2.

EXHIBIT D. 2.

55-100

THE ELIZABETHPORT BANKING COMPANY

Elizabeth, N. J., Feb. 1, 1921. No. A107.

Pay to the order of *Herbert S. North, Exr. of*

10 Estate Jos. W. North \$125 00/100
One Hundred Twenty Five 00/100 Dollars

JERSEY KNITTING MILLS,

By David Meltzer by J. Meltzer

Asst. Treasurer Treasurer

55-100

Elizabeth, N. J., *Feby* 28, 1921. No. 133.

THE ELIZABETHPORT BANKING COMPANY

20 Pay to the order of *Herbert S. North, Exr. of*

Estate Jos. W. North \$125 00/100

One Hundred Twenty Five 00/100 Dollars

JERSEY KNITTING MILLS,

By *Nathan Schwartz* By *David Meltzer*

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1981-1982	1981-1982
1982-1983	1982-1983
1983-1984	1983-1984
1984-1985	1984-1985
1985-1986	1985-1986
1986-1987	1986-1987
1987-1988	1987-1988
1988-1989	1988-1989
1989-1990	1989-1990
1990-1991	1990-1991
1991-1992	1991-1992
1992-1993	1992-1993
1993-1994	1993-1994
1994-1995	1994-1995
1995-1996	1995-1996
1996-1997	1996-1997
1997-1998	1997-1998
1998-1999	1998-1999
1999-2000	19

JERSEY KNITTING MILLS

Mfg. Knitted Clothes

6th, Fulton and Franklin Sts.

30 Elizabeth, N. J.

Exhibit D. 2.

55-100

Elizabeth, N. J., *April 1, 1921.* No. 171.

THE ELIZABETHPORT BANKING COMPANY

Pay to the order of *Herbert S. North, Exr.**Estate Jos. W. North* \$125 00/100*One Hundred Twenty Five 00/100* Dollars

10

JERSEY KNITTING MILLS,

By *Nathan Schwartz* By *David Meltzer*

Pres. Asst. Treas.

JERSEY KNITTING MILLS

Mfg. Knitted Clothes

6th, Fulton and Franklin Sts.

Elizabeth, N. J.

55-100

Elizabeth, N. J., *May 2, 1921,* No. 216. 20

THE ELIZABETHPORT BANKING COMPANY

Pay to the order of *Herbert S. North, Exr. of**Estate Jos. W. North* \$125 00/100*One Hundred Twenty Five 00/100* Dollars

JERSEY KNITTING MILLS,

By *Nathan Schwartz* By *David Meltzer*

Pres. Treasurer.

Asst. Treas.

Secretary 30

JERSEY KNITTING MILLS

Mfg. Knitted Clothes

6th, Fulton and Franklin Sts.

Elizabeth, N. J.

Exhibit D. 2.

55-100

Elizabeth, N. J., *June 1, 1921.* No. 268.

THE ELIZABETHPORT BANKING COMPANY

Pay to the order of *Herbert S. North, Exr. of*

Estate Jos. W. North \$125 00/100

One Hundred Twenty Five 00/100 Dollars

10

JERSEY KNITTING MILLS,

By *Nathan Schwartz* By *David Meltzer*

Pres.

Treasurer.

Asst. Treas.

Secretary

JERSEY KNITTING MILLS

Mfg. Knitted Clothes

6th, Fulton and Franklin Sts.

Elizabeth, N. J.

20

55-100

Elizabeth, N. J., *July 1, 1921.* No. 315.

THE ELIZABETHPORT BANKING COMPANY

Pay to the order of *Herbert S. North, Exr.*

Estate Jos. W. North \$125 00/100

One Hundred Twenty Five 00/100 Dollars

JERSEY KNITTING MILLS,

By *Nathan Schwartz* By *David Meltzer*

Pres.

Treasurer.

Asst. Treas.

Secretary

30

JERSEY KNITTING MILLS

Mfg. Knitted Clothes

6th, Fulton and Franklin Sts.

Elizabeth, N. J.

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Exhibit D. 2.

55-100

Elizabeth, N. J., *Aug. 1, 1921.* No. 351.

THE ELIZABETHPORT BANKING COMPANY

Pay to the order of *Herbert S. North, Exr.**Estate Jos. W. North* \$125 00/100*One Hundred Twenty Five 00/100*

Dollars

10

JERSEY KNITTING MILLS,

By *Nathan Schwartz* By *David Meltzer*

Secretary

Pres.

Treasurer.

Asst. Treas.

JERSEY KNITTING MILLS

Mfg. Knitted Clothes

6th, Fulton and Franklin Sts.

Elizabeth, N. J.

20

55-100

Elizabeth, N. J., *Sept. 1, 1921.* No. 383.

THE ELIZABETHPORT BANKING COMPANY

Pay to the order of *Herbert S. North, Exr.**Estate Jos. W. North* \$125 00/100*One Hundred Twenty Five 00/100*

Dollars

JERSEY KNITTING MILLS,

By *Nathan Schwartz* By *David Meltzer*

Pres.

Treasurer.

30

Asst. Treas.

Secretary

JERSEY KNITTING MILLS

Mfg. Knitted Clothes

6th, Fulton and Franklin Sts.

Elizabeth, N. J.

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Exhibit D. 2.

55-100

Elizabeth, N. J., Oct. 1, 1921. No. 412.

THE ELIZABETHPORT BANKING COMPANY

Pay to the order of *Herbert S. North, Exr.*

Estate Jos. W. North \$125 00/100

One Hundred Twenty Five 00/100 Dollars

10

JERSEY KNITTING MILLS,

By *J. Meltzer* By *David Meltzer*

Pres.—Vice-Pres. Treasurer.

Asst. Treas.

Secretary.

JERSEY KNITTING MILLS

Mfg. Knitted Clothes

6th, Fulton and Franklin Sts.

Elizabeth, N. J.

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55-100

Elizabeth, N. J., Nov. 1, 1921. No. 439.

THE ELIZABETHPORT BANKING COMPANY

Pay to the order of *Herbert S. North, Exr.*

Estate Jos. W. North \$125 00/100

One Hundred Twenty Five 00/100 Dollars

JERSEY KNITTING MILLS,

By *J. Meltzer* By *David Meltzer*

Pres.—Vice-Pres. Treasurer.

Asst. Treas.

Secretary.

30

JERSEY KNITTING MILLS

Mfg. Knitted Clothes

6th, Fulton and Franklin Sts.

Elizabeth, N. J.

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NEW JERSEY SUPREME COURT.

UNION COUNTY.

Plaintiff,

U.S.

JERSEY KNITTING MILLS, a corporation,
Defendant.

Action at Law.

Demand for Bill of Particulars.

To the above-named plaintiff and his attorney, Abe J. David, Esq.

PLEASE TAKE NOTICE that the defendant in this cause demands a bill of particulars of the plaintiff's claim or title to the premises mentioned and set out in said plaintiff's complaint.

Newark, N. J., April 4, 1921.

KANTER & KANTER,
Attorneys of Defendant.

Service of the foregoing demand for bill of particulars is hereby acknowledged this 5th day of April, A. D. 1921.

A. J. DAVID,
Attorney of Plaintiff.

*Exhibit D. 4.***EXHIBIT D. 4.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10 HERBERT S. NORTH, as Executor under the Last Will and Testament of Joseph W. North, deceased, <i>Plaintiff,</i>	<i>vs.</i>	JERSEY KNITTING MILLS, a corporation, <i>Defendant.</i>	<i>Action at Law. In Ejectment. Amended Bill of Particulars of the Plaintiff.</i>
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20 The following is a Bill of Particulars of the claim or title of the plaintiff to the premises mentioned in the plaintiff's complaint, the same being an abstract of such documentary evidence of title as the plaintiff intends to give in evidence on the trial of the above-stated cause, namely:

1. Warranty deed made and executed by Warren R. Dix and wife, to Joseph W. North, bearing date May 8th, 1891, and recorded in the office of the Register of the County of Union in Book 229 of Deeds for said County, on pages 222, &c.

30 2. Warranty deed made and executed by Warren R. Dix and wife, to Joseph W. North bearing date June 14th, 1893, and recorded in the office of the Register of the County of Union in Book 263 of Deeds for said County, on pages 119, &c.

3. Will of Joseph W. North, deceased, bearing date August 4th, 1910, probated in the office of the Surrogate of Union County, in Book A-2 of Wills, page 384, and the letters testamentary issued thereon.

Yours, &c.,

A. J. DAVID,

Atty. of Pltff.

Exhibit D. 4.

WARRANTY DEED.

THIS INDENTURE, MADE the Eighth day of May, in the year of our Lord One Thousand Eight Hundred and Ninety One, BETWEEN Warren R. Dix and Elizabeth Le-Roy Dix, his wife, of the City of Elizabeth, in the County of Union and State of New Jersey, of the first part, AND Joseph W. North of the City of Rahway, in the County of Union and State of New Jersey, of the second part, WITNESSETH, that the said party of the first part, for and in consideration of the sum of Three Hundred and fifty dollars lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release enfeoff, convey and confirm to the said party of the second part, and to his heirs and assigns forever, ALL that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Elizabeth, in the County of Union and State of New Jersey, which is known, numbered and designated on a Map of the New Manufacturing Town of Elizabeth Port, N. J. (now on file in the Register's Office of the County of Essex) as lot number fifty-six (56) on Block Number seven (7) and which is described as follows: Beginning at a point in the westerly line of Fulton Street, fifty feet Northerly from Sixth Street and at the North Easterly corner of lands recently conveyed by said party of the first part to said North, running thence Westerly parallel with Sixth Street, along the land of said North one hundred feet (100 ft.) to the middle line of the block between Fulton and Franklin Streets, thence Northerly along said middle line of the block and parallel with Fulton Street

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Exhibit D. 4.

twenty-five (25 ft.), thence Easterly and parallel with Sixth Street one hundred feet (100 ft.) to Fulton Street and thence Southerly along Fulton Street twenty-five (25 ft.) to the point or place of Beginning. And being part of the same premises conveyed to said Warren R. Dix by George M. Stiles, Sheriff by deed dated October 9th, 1886, and Recorded in Book 185 of Deeds for Union County, page 125, &c. Subject to the taxes of 1891.

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TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in any-wise appertaining thereto.

Also all the estate, right, title, interest, property, claim and demand whatsoever of the said party of the first part of, in and to the same, and of, in and to every part and parcel thereof.

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TO HAVE AND TO HOLD all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

30

AND the said Warren R. Dix doth for himself, his heirs, executors and administrators, covenant and grant to and with the said party of the second part, his heirs and assigns, that he the said Warren R. Dix is the true, lawful and rightful owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging, and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged altered or defeated in any way whatsoever. Except as aforesaid.

Exhibit D. 4.

AND ALSO that the said party of the first part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid.

AND ALSO that he, said Warren R. Dix and his heirs will WARRANT, secure and forever defend the said land and premises unto the said Joseph W. North, his heirs and assigns forever against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever. Except as aforesaid.

10

IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

WARREN R. DIX. (SEAL)
ELIZABETH LEROY DIX. (SEAL)

20

Signed, sealed and delivered
in the presence of

T. D. HODGES.

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

BE IT REMEMBERED, that on this Eighth day of May, in the year of our Lord One Thousand Eight Hundred and Ninety One, before me a Master in Chancery within and for said State, personally appeared Warren R. Dix and Elizabeth LeRoy Dix, his wife, who, I am satisfied, are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed; and the said Elizabeth LeRoy Dix being by me privately examined, separate and apart from her husband, acknowledged that she

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Exhibit D. 4.

signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

T. D. HODJES,
M. C. C.

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DEED

Warren R. Dix and wife
To
Joseph W. North.

Dated May 8th, 1891.

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Received in the Clerk's Office of the County of Union, N. J. on the 9th day of May, A. D. 1891, at 10:45 o'clock in the forenoon, and recorded in Book 229 of Deeds for said County, on pages 222, &c.

John L. Crowell,
Clerk.

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Exhibit D. 4.

WARRANTY DEED.

THIS INDENTURE, MADE the Fourteenth day of June, in the year of our Lord One Thousand, Eight Hundred and Ninety Three, BETWEEN Warren R. Dix and Elizabeth LeRoy Dix, his wife, of the City of Elizabeth, in the County of Union and State of New Jersey, of the first part, AND Joseph W. North, of the City of Rahway, in the County of Union and State of New Jersey, of the second part, WITNESSETH, that the said party of the first part, for and in consideration of Fourteen Hundred Dollars (\$1400) lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to his heirs and assigns forever, ALL those three lots, tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the City of Elizabeth, in the County of Union and State of New Jersey, which are known, numbered and designated on a Map of the New Manufacturing Town of Elizabeth Port, N. J. (now on file in the Clerk's Office of the County of Essex) as lots numbered fifty-five (55), fifty-seven (57) and fifty-nine (59) on block number seven (7), being each twenty five feet wide, front and rear, by one hundred feet deep, and which taken together are bounded and described as follows: Beginning at the corner formed by the intersection of the Easterly line of Franklin Street with the Northerly line of Sixth Street and running thence North Westerly along Franklin Street seventy-five (75) feet to land conveyed by party of the first part to Gustav Boettke, thence North Easterly along his land one hundred feet (100 ft.) to land heretofore

Exhibit D. 4.

conveyed to party of the second part, thence South Easterly along his land seventy-five feet to Sixth Street and thence South Westerly along Sixth street one hundred feet (100 ft.) to the point or place of beginning. Subject to taxes for the year 1893.

10 TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in any-wise appertaining thereto.

ALSO all the estate, right, title, interest, property, claim and demand whatsoever of the said party of the first part of, in and to the same, and of, in and to every part and parcel thereof,

20 TO HAVE AND TO HOLD all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

30 AND the said Warren R. Dix does for himself, his heirs, executors and administrators, covenant and grant to and with the said party of the second part, his heirs and assigns, that he the said Warren R. Dix is the true, lawful and rightful owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging, and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged altered or defeated in any way whatsoever. Except as aforesaid.

40 AND ALSO that the said party of the first part now has good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid.

Exhibit D. 4.

AND ALSO that he, said Warren R. Dix, will WARRANT, secure and forever defend the said land and premises unto the said Joseph W. North, his heirs and assigns forever against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever. Except as aforesaid.

10

IN WITNESS WHEREOF, the said party of the first part has hereunto set their hands and seals the day and year first above written.

WARREN R. DIX. (SEAL)

ELIZABETH LEROY DIX. (SEAL)

Signed, sealed and delivered
in the presence of

N. C. J. ENGLISH.

20

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

BE IT REMEMBERED, that on this Fourteenth day of June in the year of our Lord One Thousand Eight Hundred and Ninety Three, before me, a Master in Chancery of New Jersey, personally appeared Warren R. Dix and Elizabeth LeRoy Dix, his wife, who, I am satisfied, are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed; and the said Elizabeth LeRoy Dix being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

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N. C. J. ENGLISH,

M. C. C. of N. J.

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Exhibit D. 4.

DEED

Warren R. Dix and wife

To

Joseph W. North.

10

Dated June 14th, 1893.

Received in the Clerk's Office of the County of Union on the 14th day of June A. D. 1893, at 10:30 o'clock in the forenoon, and recorded in Book 263 of Deeds for said County, on pages 119, &c.

J. W. Brown,
Clerk.

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WILL OF JOSEPH W. NORTH, DECEASED.

Be it Known that I, Joseph W. North now residing in the City of Rahway and doing business in the City of Elizabeth, New Jersey, being in my usual good health make this as my Last Will and Testament as follows:

First. I direct that all my just debts and funeral expenses be paid.

30 Second. I give and bequeath to my son Herbert Sayre North, his heirs and assigns forever, my house and Lot known as 112 Commerce Street, Rahway, New Jersey, together with the household furniture and furnishings pertaining to the same. Except those which may hereafter be otherwise bequeathed.

Third. I give and bequeath to my daughter Emma North Alioth her heirs and assigns forever, my house and Lot known as 143 Bryant Street, Rahway, New Jersey.

Fourth. I give and bequeath to my Daughter in Law Carrie W. North, Widow of my deceased son Joseph North

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Exhibit D. 4.

the annual income at the rate of four per cent (4%) per annum of the sum of Ten Thousand Dollars (\$10,000) the Interest to be paid to her, in equal quarterly payments, by my Trustees as long as she remains the Widow of my son Joseph North. If she should again marry, this annual payment and Legacy to her shall immediately cease. If she should remain a Widow this annuity and Legacy shall be paid to her for the term of her natural Life. I desire that the Interest on the said Ten Thousand Dollars to be paid to her as specified in the above clause *shall not be* paid to her while she is receiving compensation for her services in any occupation *whatsoever* in the event of her receiving compensation for her services the said Interest shall revert and be equally divided between my son Herbert Sayre North and my Daughter Emma North Alioth. I empower my executors and Trustees to continue invested in my manufacturing business the sum of Ten Thousand Dollars of which Carrie W. North is to receive the aforesaid income. If the manufacturing business should fail or loss of the aforesaid principal while continued in that business, my Executors and Trustees shall incur no personal liabilities thereof.

Fifth. All the rest and Residue of my Estate, both personal and real, wheresoever or whatsoever the same may be, I direct shall be divided into two equal parts, one share I give and bequeath to my son Herbert Sayre North, his heirs and assigns forever. The remaining share I give and bequeath and devise to my son Herbert Sayre North. To Have hold manage and invest the same for the following use and purpose—viz.—to pay my Daughter Emma North Alioth all the Net Income thence arising for and during the term of her natural life, said payments to be made quarterly at the decease of my said Daughter Emma North Alioth, In case she should leave children her surviving then in such case to pay the net income thence arising to the children of the said Emma North Alioth. In Equal shares during their respective lives until

Exhibit D. 4.

the youngest child of the said Emma North Alioth attains the age of Twenty-one years, at which time that portion of my estate that is held in Trust for them is to be divided "Equally" among her children "per stirps" share and share alike. It is my will however and I direct that if the Income arising from that portion of my Estate which I direct shall be held for the benefit of my daughter for Life shall not be sufficient for her Reasonable necessities and well being then it is my wish and I direct that she shall from time to time have the Right and appropriate such portion of the Principal of my Estate as may be held by my Trustees for her benefit for Life as may be necessary to relieve her from want or suffering, and suitably provide for her well being and I direct my Trustees or said Executors shall pay her from time to time such sums as in their judgment and discretion may be appropriate for carrying into effect the provision of my will.

Sixth. It is my will and I direct that my son Herbert Sayre North as Executor and Trustee may continue the Manufacturing business carried on by us at the factory at 6th and Fulton Streets, Elizabeth, New Jersey, if it is by him considered desirable and profitable for my Estate, for it to be done and in so doing he shall not be held responsible for any loss that may occur to my Estate therefrom.

Further, I direct that whereas my Daughter Emma North Alioth will have an interest in the property invested in the manufacturing business carried on as aforesaid that my son shall each year draw out of the business Ten per cent (10%) of the Principal held by him in said business for her benefit until all of the Principal held for her benefit has been drawn out and shall pay her individually Twenty-five per cent (25%) of the annual profits of the business which may be carried on and shall each year as the principal so held for her benefit in the aforesaid business be decreased pay to her her proportionately less per cent of the Profits and shall also pay to her Individually at

Exhibit D. 4.

least four per cent (4%) or more as the conditions of the business shall warrant per annum. Interest on her balance of the Principal remaining unpaid, in the said property and business carried on at said factory, until the Principal of the Fund held for her benefit shall under this direction have been paid. It is my will that all the moneys withdrawn from said principal—shall be invested 10
in First Mortgages or some good Railroad Bonds for the benefit of my said Daughter. Whenever and as soon as the principal of the fund held for my Daughter's benefit in said Manufacturing business has been paid and satisfied, as provided for in my Will, I direct the Manufacturing business aforesaid so far as my Estate is concerned, be closed up.

Seventh. It is my will and I so direct that the money accruing from the "Royalties" of the Patent Fleece Underwear paid to me by the several parties who are licensed 20
to make the same. The money so received shall be divided equally between my son Herbert Sayre North and my Daughter Emma North Alioth, share and share alike. The money so accruing shall be paid every month in cash and to continue until the expiration of the Patent.

Eighth. I hereby name and appoint my son Herbert Sayre North———under this will and I direct that they shall not be required to give any bonds, in order to act as Executors and I give and empower and authorize them 30
as Executors and Trustees, to sell convey any Real Estate, or Interest therein I may die seized and to give good and sufficient deeds therefor.

In Witness Whereof I have hereto set my hand this 4th day of August in the year of our Lord, 1910.

JOSEPH W. NORTH.

Exhibit D. 4.

Signed and acknowledged *that the* said Joseph W. North as being his last Will and Testament, in the presence of us, both being present at the same time set our names as witnesses.

JOSEPH T. MEAD.
BENJAMIN C. MEAD.

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Service of the within bill of particulars is hereby acknowledged this 12th day of April, A. D. 1921.

KANTER & KANTER,
Attorneys of Defendant.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

Herbert S. North, Executor, etc.,
Plaintiff-Respondent,

VS.

On Appeal, etc.

Jersey Knitting Mills, a corporation,
Defendent-Appellant.

BRIEF OF THE PLAINTIFF-
RESPONDENT.

This is an action in ejectment,- judgment being in favor of the plaintiff for possession and for mesne profits in the sum of \$2,378.13, being the rental value of the property from the time the defendant took possession until the time of trial, payment of rent having been refused by the landlord (plaintiff) during that interval.

Under the Stipulation in the State of Case, the verdict for damage is supported by the evidence offered in the cause for use and occupation of the premises. Case, page 25.

Believing that the present practice of the Court is to dispose of matters in litigation at and as of the time the facts in each case are presented to the Court, Counsel for the palintiff- respondent deems it proper to make part of this brief, an agreement made between the parties after the judgment appealed from was entered, dated April 27th, 1922, under the terms of which the defendant- appellant vacated the premises in question. The question therfor before the Court is purely an academic one, and the question of whether the judgment for possession was correct or not, is really not material or important. Whether the judgment should have been for use and occupation amounting to \$2,378.13, or for the amount of rent reserved in the lease, is the only question that can now affect the defendant- appellant.

NEW YORK COUNTY OF NEW YORK

IN SENATE, JANUARY 1, 1904.

REPORT OF THE

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COMMISSIONERS OF THE LAND OFFICE, IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE, MAY 1, 1903.

THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE COMMISSIONERS OF THE LAND OFFICE, IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE, MAY 1, 1903. THE REPORT IS HEREBY SUBMITTED TO THE SENATE FOR ITS CONSIDERATION.

THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE COMMISSIONERS OF THE LAND OFFICE, IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE, MAY 1, 1903. THE REPORT IS HEREBY SUBMITTED TO THE SENATE FOR ITS CONSIDERATION.

The various matters objected to with reference to the admission of evidence under the Bill of Particulars, I believe are over-come by the well established rule of law,- that a tenant may not deny the title of the landlord.

The defendant-respondent in the answer filed in the cause sets up the original lease. The lease itself was offered in evidence and establishes ownership of the plaintiff. Occupation under the lease was claimed by the defendant, and occupation after default in the lease was claimed by the plaintiff.

A brief reference to the history of the tenancy show plainly the question of fact decided by the jury in favor of the plaintiff to the effect that there was no waiver of the default in the clause of the lease, whereby it became void after an attempt to sub-let or assign.

The original lease set up in the answer and printed in full, Case, page 10, commenced January 17th, 1917, to run for five (5) years and was between the plaintiff and Joseph W. North & Son, Inc., a corporation. This lease contained a clause that the tenant shall not assign or under-let, under penalty of forfeiture, Case, page 11, and a further clause, that in default of any of the covenants, it would be lawful for the landlord to re-enter, and waived the service of notice of intention to re-enter. Case, page 13.

Between January 23rd, 1917 and November 20th, 1920, the lessee, Joseph W. North & Son, Inc., a corporation, assigned this lease without consent of the landlord, to the Royal Knitting Mills, Case, page 25. This assignment was a default of the covenant in the lease against assignment.

About November 20th, 1920, the Royal Knitting Mills went in the hands of a Receiver, and on January 13th, 1921, the Receiver sold and assigned the right, title and interest, if any, of the Royal Knitting Mills in the lease, to Joseph Meltzer.

At this sale, notice was given in the presence of Meltzer, that the landlord claimed a default in the lease, and that the lease was void. Case, pages, 43 and 44.

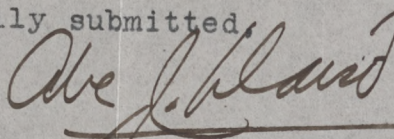
After the attempted purchase of the lease by Meltzer, payment of rent from Meltzer and from the defendant who claimed under him, was refused, and no rent was accepted from that time until the trial of the cause. Case, pages 45 and 46.

No default by reason of the assignment by the Receiver to Meltzer is claimed, but default is claimed in the assignment,- (a) of the lease from the original lessee, Joseph W. North & Son, Inc., a corporation, to Royal Knitting Mills,- and (b) from Joseph Meltzer to the defendant.

Although it is claimed that there was no assignment of the lease from Meltzer to the defendant, the jury had a right under the fact to find that there was an attempted assignment because of the proof (a) that the defendant was in occupancy of the entire premises, (b) had its sign out showing it was in possession and (c) because of its repeated attempts to pay the rent.

I respectfully submit,-(a) under the proofs in the cause the verdict of the jury was proper, and (b) because of the agreement subsequently made between the plaintiff and the defendant, the question of the right of possession at the present time is eliminated, and the appeal should be dismissed.

Respectfully submitted,



Attorney for the plaintiff-
respondent.

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Agreement made this twenty-seventh day of April, A.D. 1922, by and between Jersey Knitting Mills, a corporation of the State of New Jersey, party of the first part, Herbert S. North, party of the second part, Herbert S. North, executor of the Last will and testament of Joseph W. North, deceased, part of the third part, and Joseph Meltzer, party of the fourth part, in consideration of the premises and covenants hereafter made, WITNESSETH:-

1. The party of the first part hereby covenants and agrees that it will on or before May 10, 1922 remove from the premises fronting on Sixth Street, extending from Fulton to Franklin Streets, in the City of Elizabeth, County of Union and State of New Jersey, and from every part and parcel thereof. In removing from said premises, however, Jersey shall not be obliged to remove any chattels therefrom, but it is agreed between the parties hereto that any chattels (excepting those specified in paragraph 4 herein) not removed from said premises on or before May 10, 1922 shall be deemed abandoned.

2. The party of the first part does hereby surrender to the party of the third part whatever right, title and interest it may have in and to a certain lease made between Herbert S. North as executor under the last will and testament of Joseph W. North, deceased, as landlord, and Joseph W. North & Sons, Inc., a corporation of the State of New Jersey, as tenant, executed on or about January 23, 1917 in respect to the premises described in paragraph 1 herein, including all rights thereunder and the option to purchase the demised premises, provided that no right to possession of the said premises shall accrue to the party of the third part by reason hereof until May 11, 1922. It is distinctly agreed by and between all the parties hereto that this surrender shall not

be construed as an admission against the party of the first part, that the said party of the third part is entitled to the surrender of the aforesaid lease or the leasehold term therein created.

3. The party of the fourth part does hereby surrender to the party of the third part whatever right, title and interest he, the said party of the fourth part, may have in and to a certain lease made between Herbert S. North as executor under the last will and testament of Joseph W. North, deceased, as landlord, and Joseph W. North & Son, Inc., a corporation of the State of New Jersey, as tenant, executed on or about January 23, 1917 in respect to the premises described in paragraph 1 herein, and all rights thereunder, including the option to purchase the demised premises, provided that no right to possession of the said premises shall accrue to the party of the third part by reason hereof until May 11, 1922. It is distinctly agreed by and between all the parties hereto that this surrender shall not be construed as an admission against the party of the fourth part, that the said party of the third part is entitled to the surrender of the aforesaid lease or the leasehold term therein created.

4. The party of the first part has assigned, sold, transferred and set over, and be these presents does hereby assign, sell, transfer and set over the gas engine, starter, pump, clutch, and all shafting (which may belong to it), all of which chattels are now contained in the premises described in paragraph 1 herein, to the party of the second part, his personal representatives and assigns. The party of the first part does hereby covenant that it will warrant and defend the sale of the goods, wares and chattels herein made against all lawful claims and demands whatsoever, excepting the lien or claim

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, under the act of March 3, 1879, entitled "An Act to provide for the better management of the public lands, and for other purposes."

The names of the persons appointed to the various positions are as follows:

Secretary of the Interior: William B. Ewing

Assistant Secretary: John W. Foster

Chief of the Bureau of Land Management: John W. Foster

Chief of the Bureau of Reclamation: John W. Foster

Chief of the Bureau of Indian Affairs: John W. Foster

Chief of the Bureau of Geographical Names: John W. Foster

Chief of the Bureau of the Census: John W. Foster

Chief of the Bureau of the Coast and Geodetic Survey: John W. Foster

Chief of the Bureau of the Fish and Game Service: John W. Foster

Chief of the Bureau of the Forest Service: John W. Foster

Chief of the Bureau of the Mineral Lands: John W. Foster

Chief of the Bureau of the National Park Service: John W. Foster

Chief of the Bureau of the Public Lands: John W. Foster

Chief of the Bureau of the Survey of the Coast: John W. Foster

Chief of the Bureau of the Survey of the Interior: John W. Foster

Chief of the Bureau of the Survey of the Marine: John W. Foster

Chief of the Bureau of the Survey of the Terrestrial: John W. Foster

Chief of the Bureau of the Survey of the Water: John W. Foster

Chief of the Bureau of the Survey of the Air: John W. Foster

Chief of the Bureau of the Survey of the Earth: John W. Foster

Chief of the Bureau of the Survey of the Sky: John W. Foster

Chief of the Bureau of the Survey of the Sea: John W. Foster

Chief of the Bureau of the Survey of the Land: John W. Foster

Chief of the Bureau of the Survey of the Fire: John W. Foster

Chief of the Bureau of the Survey of the Wind: John W. Foster

Chief of the Bureau of the Survey of the Sun: John W. Foster

Chief of the Bureau of the Survey of the Moon: John W. Foster

Chief of the Bureau of the Survey of the Stars: John W. Foster

Chief of the Bureau of the Survey of the Planets: John W. Foster

Chief of the Bureau of the Survey of the Comets: John W. Foster

Chief of the Bureau of the Survey of the Meteors: John W. Foster

Chief of the Bureau of the Survey of the Universe: John W. Foster

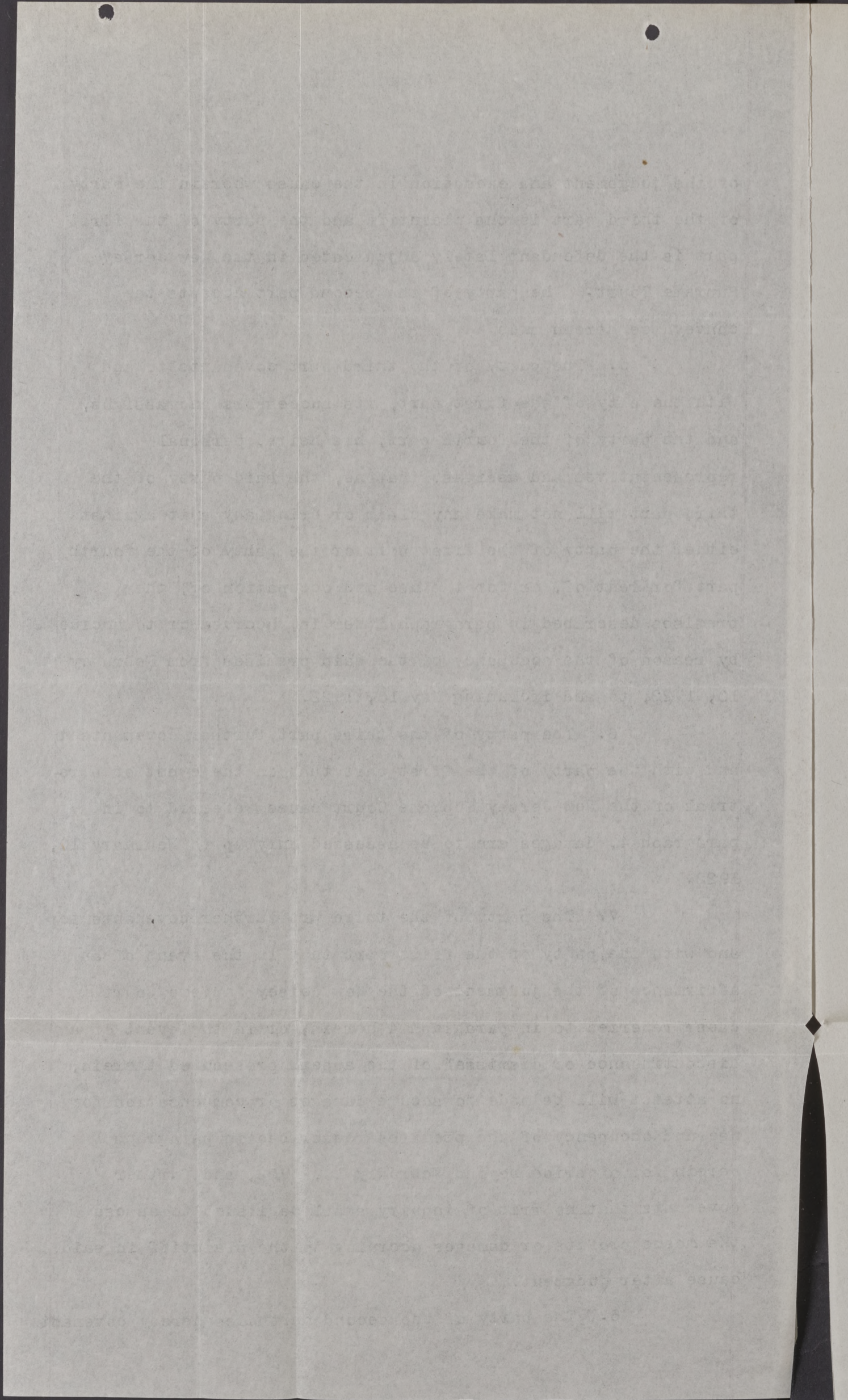
of the judgement and execution in the cause wherein the party of the third part is the plaintiff and the party of the first part is the defendant lately adjudicated in the New Jersey Supreme Court. The party of the second part accepts the conveyance herein made.

5. The party of the third part covenants to and with the party of the first part, its successors and assigns, and the party of the fourth part, his heirs, personal representatives and assigns, that he, the said party of the third part will not make any claim or bring any suit against either the party of the first part or the party of the fourth part for rent of, or for the use and occupation of, the premises described in paragraph 1 herein, accrued or to accrue by reason of the occupancy of the said premises from February 10, 1922, to and including May 10, 1922.

6. The party of the third part further covenants to and with the party of the first part that in the event of a retrial of the New Jersey Supreme Court cause referred to in paragraph 4, damages are to be assessed only up to February 10, 1922.

7. The party of the third part further covenants to and with the party of the first part that in the event of an affirmance of the judgment of the New Jersey Supreme Court cause referred to in paragraph 4 herein, or in the event of a discontinuance or dismissal of the appeal prosecuted therein, no attempt will be made to secure damages or compensation for use and occupancy of the premises described in paragraph 1 herein for a period beyond February 10, 1922, and further covenants that no writ of inquiry shall be issued to assess the mesne profits or damages accruing to the plaintiff in said cause after judgment.

8. The party of the second part does hereby covenant



to and with the party of the first part that he, the said party of the second part, will, at his own cost and expense, defend any action or proceeding that may hereafter be instituted against the party of the first part by any of the devisees or heirs at law of the late Joseph W. North, deceased, the object of which action, in whole or in part, shall be the enforcement or collection of the rents of, or damages for the use and occupation of, the premises described in paragraph 1 herein, and in the event of the institution of any such action, he, the party of the second part will pay any judgment recovered therein immediately upon its rendition.

9. The party of the second part does hereby covenant to and with the party of the fourth part that he, the said party of the second part, will, at his own cost and expense, defend any action or proceeding that may hereafter be instituted against the party of the fourth part by any of the devisees or heirs at law of the late Joseph W. North, deceased, the object of which action, in whole or in part, shall be the enforcement or collection of the rents of, or damages for the use and occupation of, the premises described in paragraph 1 herein, and in the event of the institution of any such action, he the party of the second part will pay any judgment recovered therein immediately upon its rendition.

10. The party of the second part hereby guarantees the performance of the covenants entered into hereby by the party of the third part.

11. The party of the fourth part hereby guarantees the performance of the covenants entered into herein by the party of the first part.

12. This contract shall be binding upon, and be applicable to and for the benefit of, the heirs, personal

representatives, assigns, and successors of the parties hereto respectively,

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

Attest as to Jersey Knittings
Mills,

David Meltzer,
Assistant-Treasurer.

Jersey Knitting Mills,

by, J. Meltzer,
President. (L.S.)

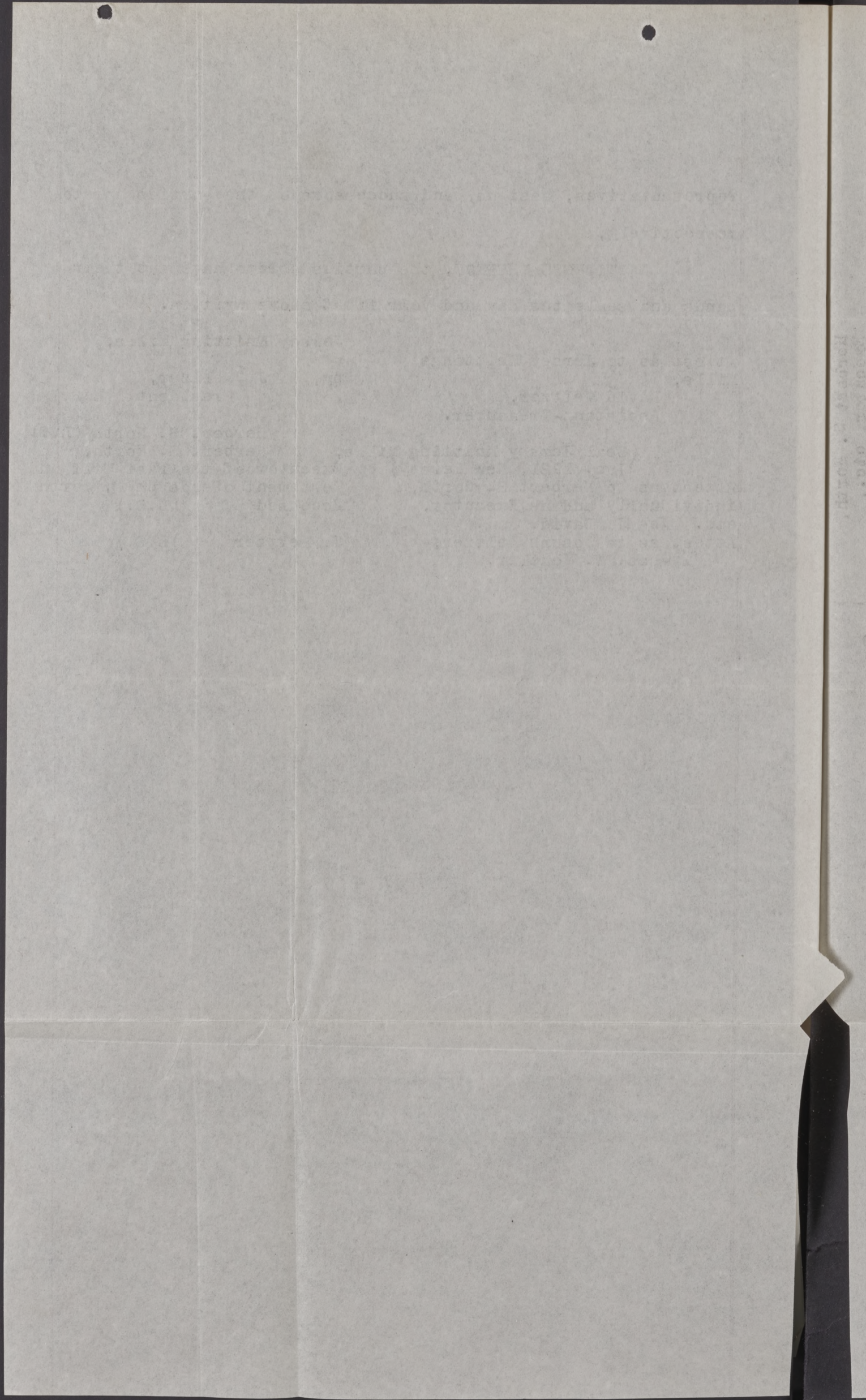
(Seal Jersey Knitting Mills,
Inc. 1921, New Jersey)

Attest as to Herbert S. North,
individually and as Executor,
etc. Abe J. David.

Attest as to Joseph Meltzer,
Chas. W. Ventler.

Herbert S. North (L.S)
Herbert S. North,
Executor of the last Will and
Testament of Joseph W. North
deceased (L.S.)

J. Meltzer)L.S.)



73 MAY 1928

Respondent:
J. J. J. J.
J. J. J. J.

THE CHURCH
BIBLE ON THE KILLING

Defendant: J. J. J. J.
J. J. J. J.
J. J. J. J.

Plaintiff: J. J. J. J.
J. J. J. J.
J. J. J. J.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Herbert S. North,
Executor, etc.,
Plaintiff-Respondent,

v.

Jersey Knitting Mills,
a corporation,
Defendant-Appellant.

BRIEF OF THE PLAINTIFF-
RESPONDENT.

ABE J. David,
Atty. for the
Plaintiff-
Respondent.

On Appeal, etc.

72 JUN.T.1922

*Filed after the Oral Argument
by leave of Court.*

New Jersey Court of Errors and Appeals

HERBERT S. NORTH, executor, etc.,
Plaintiff-Respondent,

vs.

JERSEY KNITTING MILLS, a corporation,
Defendant-Appellant.

On Appeal, etc.

APPELLANT'S BRIEF.

Kanter & Kanter, attorneys of defendant-appellant.
Elias A. Kanter, of counsel with defendant-appellant.

Formal Record of the Case.

This was an action of ejectment instituted by the plaintiff-respondent, as executor, in the New Jersey Supreme Court, referred to the Union County Circuit for trial and trial had before Hon. George S. Silzer, *C. C. J.*, with a jury. It resulted in a judgment in favor of the plaintiff for possession of the premises and \$2,378.13 damages. This appeal is prosecuted from said judgment, on nine specific, definite and concrete grounds of appeal, the first relating to the admission of evidence, the second to the Court's failure to render judgment of non-suit, the third to the Court's failure to direct a verdict in defendant's favor, and the last six to erroneous charges and omissions to make duly requested charges to the jury.

POINT I.

The Trial Court erred in allowing plaintiff to introduce Exhibit P. 1 into evidence.

1. This Court will observe that the foregoing error is alleged as the first ground of appeal (State of Case, p. 22, l. 25).

2. In reading plaintiff's amended complaint, this Court will notice that the claim of title there asserted is general, being confined merely to the statement that "on January 13th, 1921, plaintiff owned and possessed (the property in question)," and that "defendant on that day wrongfully entered upon said land and dispossessed plaintiff" (State of Case, p. 1, l. 25, and p. 3, ll. 8-10).

3. To ascertain what legal title plaintiff actually relied on, the defendant-appellant served a demand for a bill of particulars (State of Case, p. 91), and plaintiff furnished a bill of particulars (State of Case, pp. 92-104). This bill of particulars shows that the plaintiff relied on the following muniments of title, and no others, the language of the answer to the bill of particulars being "the following is a bill of particulars of the claim or title of the plaintiff to the premises * * *, the same being an abstract of such documentary evidence of title as the plaintiff intends to give in evidence on the trial * * *, namely," (State of Case, p. 92, ll. 18-40) and then follows an enumeration of three papers.

A. A deed to Joseph W. North, dated May 8, 1891 (State of Case, pp. 93-96).

B. Another deed to Joseph W. North, dated June 14, 1893 (State of Case, pp. 97-100).

C. The will of Joseph W. North, dated August 4, 1910, and the letters testamentary issued thereon (State of Case, pp. 100-104).

Copies of the deeds and the will are annexed to the bill of particulars, but the record of probate and the letters testamentary are not annexed.

4. The statute defining the office of a bill of particulars in actions of ejectment is Section 26 of our "Act concerning electment," reading as follows:

"26. Contents of bill. That the bill of particulars shall include an abstract of such documentary evidence of title as the party may intend to give in evidence on the trial; and if any such doc-

uments may by law be recorded, it shall also state where they are recorded, or if not recorded then it shall include copies of such thereof as are in the possession of the party, with the name or names of the subscribing witness or witnesses, if any." 2 C. S., p. 2059, Sec. 26.

5. Speaking generally of this statute, Justice Pitney, in our Supreme Court, said:

"In order to apprise each party, before trial, of his adversary's claim of title, provision is made in sections 25, 26 and 27 for the delivery of a bill of particulars to either party demanding same." *Mt. Pleasant Cemetery Co. v. Erie R. Co.*, 74 N. J. L. 100; at p. 103; 65 A. 193, 194.

6. In a consideration of this statute, our Supreme Court early settled the law in this state that *where, the plaintiff, in an action of ejectment, specifies in a bill of particulars the title upon which he means to rely, he is precluded by the delivery of such bill of particulars from setting up any other title, for in Graham v. Whitley, it is said:*

"The language of the act is very broad, it requires the party, on demand, to furnish a bill of particulars of his claim or title, which shall include an abstract of such documentary evidences of title as the party may intend to give in evidence on the trial, and *requires that in all cases the evidence of title shall be confined to the matters contained in the bill of particulars*, and if the bill of particulars had specified that the party claimed by devise, it would seem that the act would prevent his showing title by descent." *Graham v. Whitley*, 26 N. J. L. 254, 261.

7. To the same effect is the late case of *Parrot v. Nugent*, decided by this Court, opinion by Justice Black, the headnote there correctly expressing one of the points decided and reading:

"The office of a bill of particulars of the party's claim or title to the premises, in an action of ejectment, confines the evidence of title to the matters therein contained." *Parrot v. Nugent*, 91 N. J. L. 302; 102 A. 899.

8. Respondent's counsel will perhaps refer to the case of *Miller v. Mead*, 39 N. J. L. 538, where the Supreme Court points out that papers introduced by the plaintiff in *rebuttal of defendant's title* are not required to be set up in the plaintiff's bill of particulars. In the case at bar, however, the paper was not offered, or introduced, in evidence in rebuttal; it was offered and allowed into evidence, before the defendant offered any evidence at all, and strictly as part of the plaintiff's main case (State of Case, p. 31, l. 29, objection noted and exception taken on p. 31, ll. 36-42, allowed into evidence, p. 32, l. 5). The ruling in *Miller v. Mead* is not applicable because Exhibit P. 1 is an instrument which is neither referred to or annexed to the bill of particulars furnished by the plaintiff, yet allowed into evidence on plaintiff's main case.

9. That the Trial Court was misled by plaintiff's counsel as to the function of a bill of particulars, and that it did not duly appreciate the fact that the plaintiff was required to prove the title set up in plaintiff's bill or particulars seems clear from the colloquy between the Court and counsel on page 30 of the State of the Case and the statement of plaintiff's counsel on page 31.

"Mr. Kanter. I think this is true, that under the decisions the plaintiff is prohibited from showing any other title than that which is set forth—"

"The Court. He does not have to set up any other. He says, my title is my ownership of the property; you haven't anything which deprives me of my ownership and possession."

"Mr. Kanter. I say he is now asserting a different title."

"The Court. What is inconsistent with that?
* * * "(State of Case, p. 30, ll. 16-25).

"Mr. David. Yes, sir. I now say that the title we set up in our bill of particulars has nothing further to do with the case. That the lease is the basis on which this suit now starts." (State of Case, p. 31, ll. 1-5).

10. And with this, plaintiff was permitted to introduce in evidence on his main case, the lease and then to attempt to show a forfeiture of the title of the lessee, clearly quite another title than that set up in the bill of particulars, namely deeds, a will and probate of the will.

11. It is, therefore, respectfully submitted that the action of the Trial Court, in permitting this instrument to go into evidence, was manifest error.

12. Counsel for the defense will undoubtedly urge that a tenant cannot deny his landlord's title. That statement is undoubtedly true as a general proposition. That, however, was not the question before the Court. The question before the Court was whether the lease given by North, Exr., to North, Inc., was admissible; that was a question entirely distinct and independent of whether the defendant, had the lease been its sole justification, could have denied the landlord's title on the defendant's main case. But the issue, as presented by the pleadings, showed that defendant did not rely merely on the lease; there was also a denial of the plaintiff's claim generally, quite independently of the defense of justification of the lease, and it became, therefore, incumbent upon plaintiff to prove his main case by proper, legal evidence, competent under the bill of particulars. This he failed to do. That the plea of defendant—denial of plaintiff's right to possession on January 13th, 1921—was a proper one is shown by the case of *Howell v. Ashmore*, 22 N. J. L. 261, where the Court in setting aside a judgment for the plaintiff in an action for ejectment, and in a consideration of this question, says:

“The true meaning of this is, that a tenant shall not deny his title under which he entered, or set up a title in another, in contravention of the one he has admitted. *But a tenant may always show that his landlord's title has expired at the time of suit brought, * * * or that he has sold his interest in the premises, * * * or that it is aliened from him by judgment and operation of law, * * **

This is no denial of the landlord's original right. There is nothing in such a defence incompatible with the tenant's implied admission in accepting the lease."

Howell v. Ashmore, 22 N. J. L. 261, 265.

Therefore, the admission of this lease as sole evidence of plaintiff's title (as it indeed proved to be such sole evidence) was error, because it was not evidence of that fact and because it was incompetent under the plaintiff's bill of particulars.

POINT II.

The Trial Court erred in overruling the motion for a non-suit.

1. Six grounds for the granting of this motion were urged before the Trial Court (State of Case, p. 59, ll. 1-32), which motion was overruled and exception allowed (State of Case, p. 60, ll. 10-12). These grounds will be argued in the order in which they appear in the original motion.

2. The first ground why the non-suit should have been granted was that it appeared affirmatively that the plaintiff had not proved any legal title in support of his action. This involves, of course, an examination of the evidence introduced by the plaintiff, and briefly summarized, that evidence consists of the following:

A. Exhibit P. 1, which is a lease, for the premises in question, from Herbert S. North, executor, as the landlord, to Joseph W. North & Son, Inc., a corporation, as the tenant, for a period from January 17th, 1917, to January 17th, 1922, with the option of an additional term of two years, that is to January 17th, 1924.

B. The testimony of Herbert S. North, substantially:

1. From February 1, 1921, to January 1, 1922, I received the rent from Jersey Knitting Mills, accompanied by eight letters marked Exhibit P. 2. (In this connection, the Court will observe that plaintiff's claim is that the unlawful entry

occurred January 13th, 1921, and that the trial opened February 9th, 1922.)

2. I turned these letters and checks over to my attorney.

3. On September 8th, 1919, on my return from Europe, I found that more than one check for rent, made by the Royal Knitting Mills, had been deposited to my account, which I never returned (State of Case, p. 49, ll. 35-40, and p. 50, ll. 1-31).

4. From September, 1919, to November, 1920, I received the rent from the Royal Knitting Mills, and that included a period of time right up to the time that the Royal Knitting Mills went into the hands of a Chancery receiver (State of Case, p. 50, ll. 32-38).

5. I also collected rent from the Chancery receiver, for a portion of the rent that became due after the receivership occurred (State of Case, p. 50, ll. 38-40).

6. I make a *distinction* between money received for *use and occupancy* and money received as *rent* (State of Case, p. 51, l. 10).

7. In November, 1920, I discovered that the lease given to Joseph North & Son, Inc., had been transferred to Royal Knitting Mills (State of Case, p. 51, ll. 22-30).

8. *In November, 1920*, I knew that, if I had a right to declare the lease forfeited, I had that right then (State of Case, p. 51, ll. 33-35).

9. *On February 18th, 1921*, I signed and swore to paper marked D. 1 for identification (State of Case, p. 54, l. 15). (This is a proof of claim in bankruptcy, and is printed at page 84.)

10. In that proof of claim, I swore that "the Royal Knitting Mills, a corporation, against whom a petition * * * was filed, is indebted to said deponent in the sum of \$321.12, that said debt exists upon *rent* due for the premises occupied by the said *Royal Knitting Mills* for the months of *October, November and December, 1920, and January, 1921, at the rate of one hundred and twenty-five dollars a month * * **," and the statement contained there is true (State of Case, p. 55, ll. 1-20).

11. I collected the \$500 (State of Case, p. 56, ll. 1-20).

12. *I made this claim* (referring to D. 1) *after I knew of the assignment to Royal* (State of Case, p. 56, ll. 20-25).

C. The testimony of Joseph Meltzer, substantially:

1. I purchased some of the assets and the lease of the Royal Knitting Mills at the receiver's sale (State of Case, p. 39, ll. 10-30).

2. I took physical possession of the plant in the latter part of January, 1921 (State of Case, p. 40, l. 15).

D. The testimony of Abe J. David, substantially:

1. On January 5th, 1921, at the receiver's sale of the Royal Knitting Mills, I read a notice that the lease had been forfeited because of a clause therein disallowing an assignment or subletting without the landlord's consent (State of Case, bottom p. 43, top p. 44).

2. On January 5th, 1921, Mr. North was in full possession of the fact that there was either an actual assignment or an attempted assignment of this lease by North, Inc., to Royal (State of Case, p. 45, ll. 25-30).

3. Summarizing the testimony above given, which is all the material testimony, the following facts appeared at the close of plaintiff's case:

A. Herbert S. North, Executor, had leased the property to Joseph W. North & Son, Inc., a corporation.

B. In September, 1919, plaintiff had received checks for the rent from Royal Knitting Mills, which he did not return, and continued to receive such rent from the Royal Knitting Mills down to November, 1920, when the Royal Knitting Mills went into the hands of a Chancery receiver.

C. On January 5th, 1921, notice was read at the receiver's sale that the lease had been forfeited because of the assignment, without the landlord's consent, of the lease by Joseph W. North & Son, Inc., to the Royal Knitting Mills.

D. On February 18th, 1921, the plaintiff made proof of claim for *rent* due from the *Royal Knitting Mills* for the months of October, November and December, 1920, and January, 1921, and subsequently collected the rent from the receiver of the Royal Knitting Mills.

4. This state of fact *indicates* first, that the right of possession is in Joseph W. North & Son, Inc., or second, that such right is in Royal Knitting Mills, or third, that such right is in the receiver of the Royal Knitting Mills, or fourth, that such right is in Joseph Meltzer, the purchaser from the receiver, or fifth, that such right is in Jersey Knitting Mills, the defendant, or sixth, that such right is in the plaintiff *provided* that on January 5th, 1921, he, the plaintiff, had the right to declare a forfeiture, and had not done anything which amounts to a waiver of that right. It seems to the pleader, that this question (in whom is there title to this lease?) can best be approached by considering the last question first, viz., did Herbert S. North, Executor, have the right to declare a forfeiture of the lease, and secondly had he waived it?

5. The clause upon which the plaintiff relies are the 4th and 13th paragraphs of the lease, reading as follows:

"4th. That the tenant shall not assign this Agreement, or underlet or underlease the premises, or any part thereof, or make any alterations on the premises without the Landlord's consent in writing; or occupy, or permit or suffer the same to be occupied for any business or purpose deemed disreputable or extra-hazardous on account of fire under penalty of damages and forfeiture" (State of Case, p. 72, ll. 20-28).

"13th. That if default be made in any of the covenants herein contained, then it shall be lawful for the said Landlord to re-enter the said premises, and the same to have again, repossess and enjoy
* * * ,"

6. The 13th paragraph adds nothing to the 4th, because it is a familiar proposition of law that a breach of a con-

tract, *e. g.*, a lease, in its independent covenants does not justify a termination of the contract, unless the forfeiture is clearly expressed; the 13th paragraph does not clearly express and unequivocally give the right of forfeiture, and unless it is clearly given, such right will not be enforced. As Dr. Williston says:

“Therefore, construction of a contract which would lead to a forfeiture will not be favored” (Williston’s Contracts, Vol. 2, p. 1202, Section 620, point 5 and cases there cited).

And the same learned authority again says:

“Because the enforcement of conditions frequently leads to forfeitures and penalties courts have always been indisposed to construe contracts as conditional, unless the language is too clear to be mistaken” (Williston’s Contracts, Vol. 2, pp. 1579-1580, Section 827, point 46 and cases there cited).

We, therefore, submit that in view of the language of the thirteenth paragraph, in the light of the authorities to which we have referred, the thirteenth paragraph does not give the right to declare a forfeiture for tenant’s breach of the covenant contained in the fourth paragraph. See also *Clifford v. Androscoggin*, Me. ; 112 Atl. 669.

7. Counsel for respondent will undoubtedly contend that the fourth paragraph, standing independently, justifies a forfeiture if the tenant (North, Inc.) assigned the lease or sublet the premises without the landlord’s written consent; we, however, assert that a proper construction of the fourth paragraph prevents that result. It will be noticed that a semicolon separates two portions of that paragraph. The first portion states—no assignment, subletting, underletting, or alterations shall be made, without the landlord’s written assent; here then, are four distinct things interdicted without the landlord’s written assent. The last portion of the fourth paragraph states—no occupancy shall be permitted for a disreputable or extra-hazardous business, under penalty of damages and

forfeiture; here then are two *other* distinct things interdicted under penalty of forfeiture. The lease itself distinguishes between the first four and the last two; the lease does not say that you, the tenant, must not do either of these six things, under penalty of forfeiture; the lease says that you must not do either of these first four things without my written permission; and then says that you must not do either of these last two things under penalty of forfeiture. We do not believe that this is a strict construction of the fourth paragraph; we believe that it is the proper, grammatical construction. If, however, it be a strict construction, we urge that it is such a strict construction that must be applied, in view of the authorities referred to in the preceding (6th) paragraph of this brief.

8. We therefore submit that no right to forfeiture exists, because of North, Inc.'s assignment to Royal, and that the right to possession continues with the original tenant and its assignees.

9. That the landlord cannot recover in an action of ejectment where it appears that plaintiff had not proved title in himself (as must be the case if there was no right to forfeiture) is a proposition that has been firmly established in the jurisprudence of our state. See

Jennings v. Burnham, 56 N. J. L. 289; 28 Atl. 1048;

Boylan v. Meeker, 28 N. J. L. 274;

Hoyt v. Buckenmyer, N. J. L. ; 114 Atl. 311;

City Trust Co. v. Cohen, N. J. L. ; 112 Atl. 852.

Nugent v. Lindsley, N. J. L. ; 116 Atl. 790.

10. But if this Court should still be of the opinion that our argument, in paragraphs 5, 6 and 7, for the proposition that no right to declare a forfeiture because of assignment without written consent exists, is not tenable, we

claim *most earnestly* that the right to declare a forfeiture was waived, because with knowledge of the assignment and subsequent to it (see paragraphs 2 and 3 under this point), the plaintiff made claim for *rent*, accruing after the assignment, and collected the *rent*. The late Vice-Chancellor Howell, in an able opinion, in case of *Levy v. Blackmore*, 67 Atl. 1022 (not officially reported) pointed out and decided that *a landlord by accepting rents after having knowledge of all the facts waives any forfeiture arising therefrom*. This Court, too, in the case of *Griggs v. Landis*, says:

“Circumstances inconsistent with an intention to enforce a strict compliance * * * will be construed as a waiver of the breach * * *.” *Griggs v. Landis*, 21 N. J. E. 494.

See also:

Rosenberg v. Taft, Vt. ; 111 Atl. 583;

Thropp v. Field, 26 N. J. E. 82;

Taylor's Landlord & Tenant, Sec. 497.

Quite recently, too, an able and learned judge of our state, Vice-Chancellor Lewis, in a well-considered opinion, decided that:

“The tender of a bill for rent reserved under the lease * * * and the acceptance by the railroad company * * * was a waiver of any defaults under the lease which existed prior to that date * * *.” *Commercial Trust Co. v. Wertheim Coal, etc., Co.*, 88 N. J. E. 151, 102 Atl. 448, 452.

Tiffany, who is considered a very excellent authority, says:

“Not only may a condition be dispensed with by express license—but the right to take advantage of the breach may be waived after the occurrence of the breach, either expressly or by implication.

“Any act on the part of the grantor or lessor, after knowledge of the breach, which unequivocally recognizes the interest of the grantee or lessee as still existing, is sufficient to show a waiver. Accordingly, a breach of condition by a lessee is waived by the lessor if, after knowing of the breach,

he accepts from the lessee or his assignee rent which accrued after the date of the breach; and a protest on his part at the time of its receipt that it is not to affect his right to enforce the condition will have no effect * * *. The institution of a distress proceeding for rent accruing either before or after the breach waives the breach, since such a proceeding presupposes the relation of landlord and tenant at the time of its institution." Tiffany's Modern Law of Real Property, pp. 177-179.

11. *Summarizing the foregoing, being the first reason for urging the motion for non-suit*, the motion should have been granted because it affirmatively appeared that the right to possession of the premises in question was vested in a person other than the plaintiff.

12. Our second ground for urging the motion of non-suit was that the plaintiff had not exercised his right to re-enter, if the thirteenth paragraph of the lease (*supra*, paragraph five of this brief, under this point) is to be relied on. In this connection, one of the latest expressions on this subject is the case of *Clifford v. Androscoggin*, where it was held:

"The common law rule that an *estate upon condition* does not *ipso facto* terminate upon its breach, but *can be determined only by entry* by one authorized to take advantage of the condition, *applies to a lease with a condition subsequent*, giving the landlord a right to re-enter and terminate the estate *on breach of covenant against assignment* without previous written permission." *Clifford v. Androscoggin*, Me. ; 112 Atl. 669.

13. Our fourth ground of non-suit was that the plaintiff's own testimony shows a complete waiver of any forfeiture. This point was discussed above, and we therefore, call the Court's attention to paragraphs 2, 3 and 10, under this point, Point II, as indicative of the testimony showing a waiver of the forfeiture and the law applicable to such facts.

14. Our fifth ground of non-suit was that there was no proof in the plaintiff's case of the executor's power to institute this action with respect to this real estate, and secondly, that there was no proof of his power as executor. An executor, as such, has no power over real estate. As was said by the late Vice-Chancellor Emery, in *Nelson v. Nelson*, 36 Atl. 280 (not officially reported), *an executor has only such power over real estate as is given to him by the will*. To the same effect, see Kocher's Probate Law, Vol. I, p. 424, and cases there cited. Furthermore, in the case at bar, the Court will look in vain for any legal evidence showing the appointment and qualification of the plaintiff as the executor of the will wherein he claims to be nominated. And the record of plaintiff's case is devoid of proof of the will, either by production and proof of the original or by the production of a certified copy thereof. In other words, there was an entire absence of legal proof showing either plaintiff's appointment in a will or plaintiff's appointment by a court of competent jurisdiction.

15. Our last ground for urging the motion for non-suit was that plaintiff failed to prove the title asserted by his complaint and by his bill of particulars. In our consideration of Point I of this brief, we have already pointed out what documents the plaintiff's bill of particulars referred to, and have also indicated the cases showing the necessity of showing the title so asserted in the bill of particulars. *The Court will not find the slightest scintilla of evidence of the deeds, the will or the record of probate* (all referred to in the *bill of particulars*), and because of this failure of proof, the motion for non-suit should have been granted. See *U. S. Fidelity, etc., Co. v. Donnelly*, 68 N. J. L. 654, 54 Atl. 547. Counsel for respondent may argue that this proof was supplied by the defendant, but it should be borne in mind that what was offered when Exhibit D. 4 went into evidence was *not* the deeds or the will, but was merely the bill of particulars, the plaintiff's statements used as an admission against his

interest under the authority of *Parrot v. Nugent*, 91 N. J. L. 302, 102 Atl. 899. In other words, the failure of proof was never supplied; the deeds or will were offered by neither side.

16. By reason of the statements made in the foregoing fifteen paragraphs, the motion for a non-suit should have been granted and its overruling was error.

POINT III.

The Trial Court erred in failing to direct a verdict for defendant.

1. The only testimony offered in behalf of the defendant was documentary in character, and consisted of the following:

A. Proof of claim against Royal Knitting Mills, made by Herbert S. North, dated February 18th, 1921, for rent from October, 1920, through and inclusive, January, 1921, printed at page 84, State of Case.

B. Ten checks of Jersey Knitting Mills from February 1, 1921, through and inclusive, November, 1921, printed at pages 86-90, State of Case.

C. Defendant's demand that plaintiff furnish bill of particulars, State of Case, p. 91.

D. Plaintiff's bill of particulars, State of Case, pp. 92-104.

This testimony and that offered by the plaintiff, already pointed out under Point II of this brief, was all the testimony in the case, and justified the request for a direction of a verdict.

2. Such direction was proper because as already stated, under Point II of this brief, it already appeared from the plaintiff's case that he had failed to prove any legal title, and had proved that the right of possession was certainly not in him. But with the introduction of the plaintiff's bill of particulars, it further appeared that even if the defendant had no title, the title was vested not in this

executor-plaintiff, but in two other individuals, Herbert S. North and Emma North Alioth.

3. In *Parrot v. Nugent*, 91 N. J. L. 302, 102 Atl. 899, this Court, speaking by Justice Black, in addition to holding that the office of a bill of particulars in an action of ejectment confines the evidence of title to the matters contained therein, also holds that *when offered in evidence, such bill of particulars is an admission against the party delivering it of what such party claims, but it cannot be taken as proof of the facts stated therein*. With this idea in mind, Exhibit D. 4, plaintiff's bill of particulars was offered in evidence by the defendant, and that contains a will, the salient provisions of which, insofar as the question in issue here is concerned, are as follows:

- First. Payment of funeral expenses.
- Second. Gift of property not here involved.
- Third. Gift of property not here involved.
- Fourth. Gift of property not here involved.
- Fifth. "All the rest and residue of my Estate, both personal and real, wheresoever and whatsoever the same may be, I direct shall be divided into two equal parts, one share I give and bequeath to my son Herbert Sayre North, his heirs and assigns forever. The remaining share I give and bequeath and devise to my son Herbert Sayre North. To have hold manage and invest the same for the following use and purpose," (then follows a life estate of the income to the testator's daughter, and to her children until they are of age) "at which time that portion of my estate that is held in trust for them is to be divided 'Equally' among her children 'per stripes' share and share alike * * *."
- Sixth. Provisions not here involved.
- Seventh. Provisions not here involved.

Eighth. "I hereby name and appoint my son Herbert Sayre North ——— under this will and I direct that they shall not be required to give any bonds, in order to act as Executors and I give and empower and authorize them as Executors and Trustees, to sell, convey any Real Estate, or Interest therein I may die seized and to give good and sufficient deed therefor."

Dated, August 4th, 1910.

State of Case, pp. 100-104.

There having been no specific devise of the property mentioned in the complaint, the plaintiff in this case, takes title to that property, by virtue of the fifth clause, the residuary clause, or exercises power over this property by virtue of the eighth clause of the will. The residuary realty is divided into two parts, by the fifth clause of the will, and the devise of one part is to Herbert S. North as an individual and strictly for his own benefit, and the devise of the other part is to Herbert S. North as trustee for certain specific purposes. In other words, taking the most liberal construction, Herbert S. North and Herbert S. North, Trustee, in law two distinct and separate persons, are tenants in common of all the testator's realty of which he died seized. (Parenthetically, it may be suggested, that with the issue arising in a court of law, as distinguished from a court of equity, the legal title of the residuary realty must have descended to Herbert S. North personally, if the courts of law will not recognize the trust.) It is not now argued whether the remainderman, the children of Mrs. Alioth are or are not the holders of the legal title of the one-half interest, or who in the absence of such children, are the holders of the legal title. But as said before, taking a situation most favorable to plaintiff and most unfavorable toward the defendant, *the title to this residuary property, by virtue of the terms of the fifth clause of the will itself is in either Herbert S. North and Herbert S. North, Trustee, as tenants in*

common, or it is, as parenthetically pointed out, in *Herbert S. North* individually.

4. Counsel for respondent will, however, say, as he is indeed bound to say to support this judgment that either, first, the title has been devised to the executor, or second, that the eighth clause of the will offers sufficient authority for the institution of this action. *Nowhere in the will is there a devise of this property to the executor.* Therefore, it must be considered what is the effect of the words "I give and empower and authorize them as Executors and Trustees, to sell convey any Real Estate, or Interest therein I may die seized and to give good and sufficient deeds therefor." This Court will observe that there was here no *direction*, but merely a *power*. The title has *not* been changed by the grant of power, and *until the property is sold in pursuance of the power* (if indeed the power is broad enough) *the title remains where it has been cast by the will—which is*, as indicated in paragraph three of this point—*not in Herbert S. North, Executor.* Furthermore, the grant of the power was not to North, Executor, but to *Executor and Trustee*.

5. We believe the foregoing argument to be supported by the authorities in this state. A provision similar to the one here existing was considered in the case of *Cook v. Cook*, 20 N. J. E. 375; where Chancellor Zabriskie says:

"In this case, the executor was *not directed* or required to sell, except so far as a sale was necessary for the purpose of paying debts and the legacies directed to be paid. As to the rest it was a *mere power* which he could exercise or not, at his discretion, and, therefore, *the land must be considered to have retained its character as land until the actual sale.*" *Cook v. Cook*, 20 N. J. E. 375, 377.

Citing the *Cook* case, Chancellor Runyon in *Romaine v. Hendrickson*, in considering a similar provision said:

"The power of sale is not one that is to be exercised on the happenings of a certain event, or at a given time but is wholly discretionary, not only as to the time of sale, but as to whether the sale shall

ever be made. It may never be exercised. It is a power and not a trust. The land was *not devised to the executors, and in the meantime, until the sale, the title is in the heirs, and they have power to transfer their interest in it * * **" (*Romaine v. Hendrickson*, 24 N. J. E. 231, 237.)

In respect to a devise of realty to certain beneficiaries (as in the case at bar) and the power given to an executor to sell, Vice-Chancellor Grey, in the first paragraph of his opinion in *Hatt v. Rich*, said:

"This was the devolution of the title. All of these devises were subject to the power of sale given to the executors. * * * There is no direction to sell, but there is the fullest authority to do so. In such cases the land retains its character as land until it is actually sold. * * * *Meanwhile, by the testator's residuary devise, the title to the lands vested in his children, subject to be divested by the execution of the power by the executors*" (*Hatt v. Rich*, 59 N. J. E. 492; 45 Atl. 969).

See also *Scheiner v. Scheiner*, 116 Atl. 683.

6. We believe that from the foregoing that it is apparent that, at the close of the entire case, the *undisputed* evidence, on the authority of *City Trust Co. v. Cohen*, N. J. L. 112, Atl. 852 (holding that the plaintiff, in an action of ejectment must recover on the strength of his own title, and not because of the weakness of defendant's title), warranted the direction of a verdict for the defendant, because:

First, the plaintiff, North, Executor, had not proved a right to possession in himself as such executor.

Second, it appeared affirmatively, and undisputably, that others than the plaintiff were entitled to possession, it being immaterial in this action whether such persons are North individually, North and North trustee, as tenants in common, or the unknown remainderman of the North, Sr., estate.

POINT IV.

The Court erred in failing to charge the jury that "The plaintiff has not proved his right to possession of the premises, and you must therefore find a verdict in favor of the defendant."

1. What we have said under Point II and Point III is our justification for the materiality and propriety of this request to charge. The Trial Court denied this request (State of Case, p. 65, l. 25, and p. 69, ll. 20-23) and exception was allowed (p. 67, l. 7).

POINT V.

The Court erred in failing to charge the jury that "It appears affirmatively that some party, other than the plaintiff, is entitled to possession of the premises, and you must therefore find a verdict in favor of the defendant."

1. What we have said under Point II and Point III is our justification for the materiality and propriety of this request to charge. The Trial Court denied this request (State of Case, p. 65, l. 25, and p. 69, ll. 25-30), and exception was allowed (State of Case, p. 67, l. 7).

POINT VI.

The Court erroneously charged the jury.

1. Four of the appellant's grounds of appeal, based on the Court's erroneous charges to the jury, are numbered 6-9 consecutively and are printed on pages 23-24 of the State of the Case. The erroneous matter set up in ground of appeal #6 will be found in the Court's charge at p. 63, ll. 18-35; the erroneous matter set up in ground of appeal #7 will be found in the Court's charge at p. 63, ll. 35-40, and p. 64, ll. 1-10; the erroneous matter set up in ground of appeal #8 will be found in the Court's charge, p. 64,

ll. 10-15; the erroneous matter set up in ground of appeal #9 will be found in the Court's charge at p. 64, ll. 22-31.

2. A reading of the charges, above refererd to, will sufficiently indicate to this Court that they embrace the following underlying idea and proposition, *the defendant was found in possession of the premises, and the presumption therefore exists in this case that it holds an assignment of the lease, and in the absence of explanation this presumption continues, and further that the jury has the right to consider the possession of the defendant as evidence of an assignment or sub-letting made in breach of the lease.*

3. This charge injected a theory into the case *that the plaintiff might still recover possession* (even if his original claim failed) *on a different claim to title than that set up in the bill of particulars.* For the reasons set up in Point I in this brief, this charge was erroneous and harmful.

4. *This charge was contrary to the record admissions* in this case. The fifth separate defense (State of Case, p. 6, ll. 1-20) in substance states:

A. On January 13th, 1917, North, Exr., made a lease from the premises in question, to North, Inc.

B. The premises described in the complaint are a portion of the premises described in the lease.

C. Prior to November 20th, 1920, North, Inc., assigned said lease to Royal Knitting Mills, a corporation of N. J.

D. On November 30th, 1920, Royal Knitting Mills was, by the Court of Chancery of New Jersey, adjudged an insolvent corporation pursuant to the Corporation Act, and Samuel Roessler was pursuant thereto appointed as its receiver.

E. On January 13th, 1921, said Chancery Receiver assigned all his title in said lease to Joseph Meltzer.

F. "The defendant, at the time of the institution of this suit, maintained some of its property and chattels in several portions of the premises described

in said lease, with the approval and consent of said Joseph Meltzer."

The allegations of this defense are not denied in any portion of the ~~answer~~ ^{reply} and are therefore constructively admitted; the plaintiff merely reserved the right, in his replication (State of Case, p. 16, ll. 35-40), to strike out the defense, but never made such motion. In the face of this record admission, it was highly prejudicial to the defendant to have the Court mislead the jury by the non-existent presumption of an assignment from Meltzer to the defendant, Jersey Knitting Mills. In this manner, the Trial Court raised an issue which was not in the pleadings. And since without assumption, of either fact or law, there was no basis for the Trial Court going into the question of whether such assignment (or subletting) by Meltzer was justification for a forfeiture. Of course, in this connection, we desire to repeat what we have said in paragraphs 5-8 under Point II, that an assignment or subletting does not justify a forfeiture.

5. These requests were also erroneous because the case was not tried on the theory that the lease was forfeited because Meltzer assigned the lease to Jersey, but was tried (and improperly also as we have heretofore contended) on the sole question whether the lease had been forfeited by North, Inc.'s, assignment to Royal.

Conclusion.

The result of this case, as we see it, was not merely the injustice resulting from the Trial Court's submission to the jury of an issue which was not in the pleadings and had not been tried (whether there was an assignment by the lease from Meltzer to Jersey) and the consequent inability of the defendant to meet this issue, since it was raised for the first time in the Court's charge (and not in the pleadings) an analogous situation to that presented in *Goodyear Tire & Rubber Co. v. Kruvant*, 115 Atl. 304 (decision by Justice Parker), but the result also is, as

seems plain from the uncontradicted evidence in this case, that the plaintiff had undoubtedly waived any grounds for declaring a forfeiture, and that the judgment is not *res adjudicata* against the persons actually holding the title. All the questions raised here were raised by appropriate exceptions, motion for non-suit, request for direction, requests to charge and exceptions to the Trial Court's charge, and in view of the manifest, prejudicial error, we urge the reversal of the judgment.

Respectfully submitted,

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