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COMPLAINANT'S EXHIBITS.

DEFENDANT'S EXHIBITS.

Notice of Appeal.

(Filed March 1, 1929.)

In Chancery of New Jersey

Between

ORANGE MOTORS, INC., a Corporation,
Complainant,

and

JOHN J. MEYER,
Defendant.

66–620
On Bill, etc.
Notice of Appeal.

The complainant, Orange Motors, Inc., a corporation of New Jersey, hereby appeals from the Final Decree made in the above entitled cause by the Chancellor, upon the advice of Honorable Alonzo Church, Vice-Chancellor, on November 27th, 1928, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated February 28, 1929.

CHARLES HOOD,
Solicitor for and of Counsel
with Complainant.

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

CHARLES HOOD,
Of Counsel with Complainant.

Petition of Appeal.

(Filed March 20, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

ORANGE MOTORS, INC., a corporation of New Jersey,
Complainant-Appellant,

v.

JOHN J. MEYER,
Defendant-Respondent.

On Appeal from the Court of Chancery.

Petition of Appeal.

TO THE HONORABLE THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES, OF THE STATE OF NEW JERSEY:

The petition of Orange Motors, Inc., a corporation of New Jersey, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of his Honor, Alonzo Church, Vice-Chancellor, bearing date November 27th, 1928, in a certain cause in said Court of Chancery wherein the said Orange Motors, Inc., a corporation of New Jersey, was complainant and the said John J. Meyer was defendant, in this respect, to wit: that the said final decree adjudged that the complainant was not entitled to the relief prayed for in its bill of complaint and ordered that the bill of complaint be dismissed with costs and a counsel fee of $250.00.

And petitioner appeals from the whole and every part of said final decree of the Chancellor which decrees as aforesaid; upon the ground that the same is erroneous, contrary to law, and contrary to the facts established at the hearing, in that:

(a) The Court should have found that the defendant John J. Meyer, did consent to the assignment of the lease from Joseph O. Dye, Hanford A. Dye, and Charles F. Schnepp, to the Orange Hudson Co., the corporate name of which was later changed to Orange Motors, Inc., the complainant, because the pleadings and proof show that on or about April 7, 1923, the defendant, John J. Meyer, did acknowledge receipt of a notice of the exercise of the option of renewal of the lease in question, which lease contained the option to purchase the demised premises, and which notice was signed by Joseph O. Dye, Hanford A. Dye, Charles F. Schnepp and Orange Hudson Co., and that the said John J. Meyer did consent in writing to the renewal of said lease.

(b) It having been admitted in the pleadings that the defendant, John J. Meyer, had consented to the assignment of the lease from Gabrowitz and Schlenger, the original lessees, to Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp; and it having been admitted by the pleadings and proof that the defendant, John J. Meyer, had received written notice of the renewal of the lease for the term of renewal provided in said lease, which lease contained an option of purchase and which notice of renewal was signed by Joseph O. Dye, Hanford A. Dye, Charles F. Schnepp and Orange

Hudson Co., which latter corporate name was changed to Orange Motors, Inc., and

It appearing from the proof that the defendant had accepted monthly checks from the complainant for more than four years after such notice of renewal, and that a sign with complainant's corporate name extended across the entire width of the building (about 50 feet), the Court should have found that the defendant had knowledge of the assignment of the lease with the option of purchase to the complainant, and that such knowledge constituted a ratification of the assignment of the lease and a waiver of the provision of forfeiture contained in the lease as to assignment without the written consent of the landlord, John J. Meyer.

(c) The Court should have found that the condition against assignment of the lease without the written consent of the landlord that was contained in the lease was a single condition, was discharged, terminated and extinguished, because the said defendant, John J. Meyer, had consented in writing to the assignment of the lease, and the option to purchase, from Max Gabrowitz and Alex Schlenger the original lessees, to Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp, and that the said defendant, John J. Meyer, by said written consent, had thereby surrendered his right to exercise further control over any subsequent assignments of said lease and option to purchase and could not thereafter prohibit any further assignments of the said lease and option to purchase.

(d) The Court should have granted the prayer in the said bill of complaint and should have ordered the defendant, John J. Meyer, to execute a warranty deed to the complainant, Orange Mo-

tors, Inc., a corporation of New Jersey, for the conveyance of the premises described in the bill of complaint.

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

CHARLES HOOD,
Solicitor for and of Counsel with
Complainant-Appellant.

Answer to Petition of Appeal.

(Filed March 23, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

ORANGE MOTORS, INC., a corporation of New Jersey,
Complainant-Appellant,

v.

JOHN J. MEYER,
Defendant-Respondent.

On Appeal from the Court of Chancery.

Answer.

The answer of the above-named John J. Meyer, respondent to the petition of appeal of the above-named appellant.

This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that a final decree was on November 27, 1928, made and directed in the Court

of Chancery in this cause for the purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced; and this respondent is advised and believes that the said decree is agreeable to equity and he prays that the same may be affirmed with costs to be adjudged to this respondent.

STEIN,, MCGLYNN & HANNOCH,
Solicitors and of counsel with Respondent.

MERRITT LANE,
Of Counsel.

Bill of Complaint.

(Filed January 11, 1928.)

IN CHANCERY OF NEW JERSEY.

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

The complainant, Orange Motors Inc., a corporation of New Jersey, having its principal place of business in the City of East Orange, County of Essex and State of New Jersey, respectfully shows and alleges that:

(1) On April 13, 1920, Max Gabrowitz and Alex Schlenger duly entered into a written agreement of lease with John J. Meyer, the defendant herein, whereby the said John J. Meyer leased to Max Gabrowitz and Alex Schlenger for the term of three years from May 1, 1920 and ending May 1, 1923, and upon a stipulated rent therein set forth, certain lands and premises in the City of Orange, County of Essex and State of New Jersey and be-

ing described in said lease as #494 Main Street, East Orange, New Jersey.

(2) The said premises are more particularly described as follow:

> BEGINNING at a point on the northerly line of Main Street at the southeast corner of the building occupied as an Automobile Garage distant about 192.28 feet from the corner formed by the intersection of said northerly line of Main Street with the westerly line of Ashland Avenue; running thence along said Northerly line of Main Street, North 34° 30′ west 50.50 feet; thence north 49° 30′ east 294.82 feet to the line of land of the late Samuel J. Blair; thence along said Blair's line south 36° 57′ east 77 feet more or less to a line drawn along the pilasters on the garage upon the property adjoining on the east, thence along said last mentioned line South 55° 31′ west 120.43 feet; thence south 34° 30′ east 1.50 feet to a line with the easterly face of the garage now on the premises, thence south 55° 31′ west along said mentioned line 175.32 feet to the point and place of beginning.

(3) In and by the aforesaid lease, the said John J. Meyer, agreed to and with Alex Schlenger and Max Gabrowitz, lessees, that the said lessees should have the privilege of renewing the said lease for a term of five (5) years from May 1, 1923, at a stated yearly rental.

(4) By the further terms of this lease, it was agreed by the parties thereto that the lessees, their heirs and assigns should have the option to pur-

chase the said premises, during the term of said demise or renewal thereof, for the sum of Fifty-five thousand ($55,000.00) Dollars, said conveyance to be made by Deed of Warranty, free from all encumbrances.

(5) On the 25th day of February, 1922, the said Alex Schlenger and Max Gabrowitz duly assigned all their right, title and interest in the said lease to Joe O. Dye and Handford A. Dye and Charles F. Schnepp, to which assignment the said John J. Meyer consented.

(6) On or about the 28th day of February, 1923, the said Joseph (Joe) O. Dye, Handford A. Dye and Charles F. Schnepp, associated themselves into and formed a corporation known as the "Orange Hudson Co.," a corporation of New Jersey.

(7) On the 28th day of March, 1923, the said Joseph (Joe) O. Dye, Handford A. Dye and Charles F. Schnepp by written agreement, duly assigned all their right, title and interest in and to the said lease, the renewal thereof and the option to purchase the said premises, to the Orange Hudson Co., a corporation aforesaid for a valuable consideration.

(8) On or about the 7th day of April, 1923, the said Joseph (Joe) O. Dye, Handford A. Dye and Charles F. Schnepp and the Orange Hudson Co., a corporation, notified the said John J. Meyer by written notice, that they did exercise the option of renewal of the lease as provided in same and set forth heretofore.

(9) On or about April 7, 1923, the said John J. Meyer did acknowledge receipt of the said notice and did consent to the renewal of the said lease, pursuant to the terms thereof.

(10) On or about the 15th day of January, 1924, the Certificate of Incorporation of Orange Hudson Company was amended in accordance with Sec. 27 of the General Corporation Act, so that the name of the corporation be "Orange Motors, Inc."

(11) On or about June 6, 1927, and on numerous occasions thereafter, and during the renewal term of the lease and before the expiration thereof, the complainant notified the said John J. Meyer that it exercised the option to purchase the premises as contained in the lease according to the terms contained therein and demanded the execution of a Warranty Deed of conveyance for the premises in question.

(12) The said John J. Meyer has refused to execute and deliver to complainant a warranty deed of conveyance for the premises in question, and although often requested so to do, still refuses.

(13) Complainant is ready, willing and able to perform the contract on its part and tenders itself ready and willing and able to pay the full amount of said purchase price upon the delivery to it of a duly executed warranty deed of conveyance for the lands and premises hereinbefore described.

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That John J. Meyer, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That the defendant, John J. Meyer, may be decreed specifically to perform the said agreement hereinbefore set forth by executing a warranty deed of conveyance executed by the defendant.

Answer.

3. That a writ of subpoena may issue, commanding the said defendant to answer this bill of complaint and to abide by such decree as this court may make in the premises.

CHARLES HOOD,
Solicitor for and of
Counsel with Complainant.

Answer.

(Filed March 17, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

ORANGE MOTORS, INC., a corporation of New Jersey,
Complainant,

and

JOHN J. MEYER,
Defendant.

On Bill, etc. Answer of Defendant, John J. Meyer.

Defendant, John J. Meyer, residing in the Town of West Orange, County of Essex and State of New Jersey, answering the bill of complaint filed herein, says that:

1. He admits the facts alleged in paragraph No. 1 of the bill of complaint.

2. He admits the facts alleged in paragraph 2 of the bill of complaint but denies that that description is contained in the lease referred to in the bill of complaint.

3. He admits the facts alleged in paragraph No. 3 of the bill of complaint.

4. He admits the facts alleged in paragraph No. 4 of the bill of complaint.

5. He admits the facts alleged in paragraph No. 5 of the bill of complaint.

6. He has no knowledge or information sufficient to form a belief with regard to the facts alleged in paragraph No. 6 of the bill of complaint and therefore denies the same.

7. He has no knowledge or information sufficient to form a belief with regard to the facts alleged in paragraph No. 7 of the bill of complaint and therefore denies the same.

8. He admits that on or about April 7th, 1923, Joseph O. Dye, Handford A. Dye and Charles F. Schnepp notified him by written notice that they did exercise the option of renewal of the lease as provided for in said lease, and admits that said notice of renewal had thereon the name of Orange Hudson Company, a corporation, and denies that he had any contractual relations with the Orange Hudson Company, and denies that the Orange Hudson Company had any right to participate in the notice of renewal, or that he was bound thereby.

9. He admits that on or about April 7th, 1923, he did acknowledge receipt of what purported to be a notice of renewal and he consented to the renewal of said lease to the said Joseph O. Dye, Handford A. Dye and Charles F. Schnepp.

10. He has no knowledge or information sufficient to form a belief with regard to the facts

alleged in paragraph No. 10 of the bill of complaint and therefore denies the same.

11. He admits that on or about June 6th, 1927, and on occasions thereafter, and during the renewal term of the lease of the said Joseph O. Dye, Handford A. Dye and Charles F. Schnepp, the complainant notified him that it desired to exercise an option to purchase the premises as described in the lease dated April 13th, 1920, but defendant denies that the Orange Motors, Inc. had any right to exercise the option to purchase the premises as contained in said lease.

12. This defendant admits that he has refused to execute and deliver to complainant a Warranty Deed of conveyance for the premises in question.

FIRST AND SEPARATE DEFENSE.

This defendant further answering the bill of complaint filed herein, says that

1. The lease mentioned and described in the bill of complaint contains the following clause:

> "This lease is upon the following conditions and covenants, all and every of which the said party of the second part agrees to perform and keep. That they will pay the rent at the times aforesaid and will not let, sell, underlet or assign the premises or any part thereof, * * * without the written consent of the party of the first part, themselves, their heirs, assigns, agents or attorneys."

2. This defendant further alleges that he at no time consented to an assignment of said lease from Joseph O. Dye, Handford A. Dye and Charles F.

Schnepp to either the Orange Hudson Company or the Orange Motors, Inc.

3. This defendant further alleges and charges that he is under no obligation to convey the premises described in said lease to the complainant herein, because, if the said Joseph O. Dye, Handford A. Dye and Charles F. Schnepp assigned said lease, together with said option to purchase to the said Orange Hudson Company whose name was later changed to the complainant Orange Motors, Inc., defendant did not consent to the same and never recognized the Orange Hudson Company or the Orange Motors, Inc. as being the owner of said option to purchase, or entitled to exercise the same.

STEIN, MCGLYNN & HANNOCH,
Solicitors of Defendant,
John J. Meyer.

Replication.

IN CHANCERY OF NEW JERSEY.

Between

ORANGE MOTORS, INC., a corporation of New Jersey,
Complainant,

and

JOHN J. MEYER,
Defendant.

On Bill, etc.
Replication.

The complainant joins issue on the answer of the Defendant.

CHARLES HOOD,
Solicitor for and of Counsel
with Complainant.

Conclusions.

(Filed November 27, 1928.)

CHURCH, V. C.:

The bill seems to be drawn on the theory that there was a specific assignment. Now, that proof fell down, and, as Mr. Lane said this morning in calling my attention to the pleadings, the fifth clause, the assignment to buy, and so on, was consented to by Mr. Meyer, but in the eighth clause he just simply says that they exercised the option of renewal, and so forth; and in the seventh clause there is no suggestion in there that Mr. Meyer ever consented to the assignment, and that disposes of that.

Now, the only question left is whether or not there had been a ratification. I fail to see where there has been a ratification. All the testimony I have listened to since luncheon seems to indicate that Mr. Meyer did everything he could to indicate that he was not going to recognize anybody but these three individuals.

It is very easy for us all to understand that if he is dealing with three responsible individuals he has a much better chance to get his money than if he is dealing with a corporation, the assets of which are perhaps doubtful or certainly intangible.

As for the signs, they mean nothing. You might put a sign on the building, "The Welfare Company" and there might not be any such company at all and I think we all know that there are witnesses of that kind, "Jones, Brown and Smith are partners; they formed a company."

No, I don't think that I am at all justified in enforcing a decree of specific performance.

I will dismiss the bill.

Final Decree.

(Filed November 27, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

ORANGE MOTORS, INC., a corporation,
Complainant,

and

JOHN J. MEYER,
Defendant.

On Bill, etc.
Final Decree.

This cause coming on to be heard before the Chancellor upon bill, answer, replication and proofs in the presence of Charles Hood, counsel of complainant, and Edward R. McGlynn, of the firm of Stein, McGlynn & Hannoch, and Merritt Lane, of counsel for the defendant, and the pleadings and proof having been read and argument of counsel heard and considered and the Chancellor being of the opinion that the complainant was not entitled to the relief prayed for in its bill of complaint,

It is thereupon, on this 27th day of November, 1928, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey,

ORDERED, ADJUDGED AND DECREED that the bill of complaint in the above entitled matter be dismissed with costs and that the sum of $250.00 be allowed and paid to the solicitors of the defendant for counsel fees, the same being included in the

taxed bill of costs to be collected with the other items of said bill.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V. C.

IN CHANCERY OF NEW JERSEY.

Between

ORANGE MOTORS, INC., a corporation,
Complainant,

and

JOHN J. MEYER,
Defendant.

November 21, 1928.

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, Alonzo Church, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Charles Hood, for complainant; Messrs. Stein, McGlynn & Hannoch (by Mr. McGlynn) and Merritt Lane, for defendant.

Mr. Hood: We offer in evidence certified copy of the deed to John J. Meyer.

Mr. Lane: No objection.

Mr. Hood: Vesting the title in Mr. Meyer.

The Court: All right; let it be received.

(Certified copy marked Exhibit C-1.)

Mr. Hood: We offer in evidence a certified copy of a lease made by J. J. Meyer and wife to Max Gabrowitz and Alex Schlenger, which lease was recorded on the 26th day of March, 1923, in Book W-67 of Deeds for Essex County on page 359. I call your Honor's attention to this clause in the lease, "that they will pay the rent at the times aforesaid and will not let, sell, underlet or assign the premises or any part thereof, and they will not use them, or permit any part thereof to be used, for any other business or purpose than a public garage, nor for any business or purpose extra hazardous, without the written consent of the party of the first part, themselves, their heirs, assigns, agents or attorneys."

And on the same instrument was endorsed under date of February 24, 1922, "I hereby assign the within lease to Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp for the sum of $400," signed "John J. Meyer," who was the owner of the property and the landlord, which is further appended here, hereby assign the within lease to Hanford A. Dye, Joseph O. Dye, Charles F. Schnepp the parties who assigned it to the two defendants. We offer that in evidence.

(Certified copy of lease marked Exhibit C-2.)

Mr. Hood: We offer in evidence the certificate of incorporation of the Orange Hudson Co., certified copy.

Mr. Lane: What is the date of it?

Mr. Hood: It was received in the Clerk's office on the 5th day of March, 1923, and recorded in Book 81 of incorporated business companies for the

said county and it has the certificate by the Secretary of State under the sixth day of March, 1923.

The Court: All right.

(Certified copy of certificate of incorporation marked Exhibit C-3.)

Mr. Hood: We offer certified copy, certified amendment of the certificate of incorporation, Orange Hudson Co. changing its name to Orange Motors Company. It is filed with the certificate of the Secretary of State under date of January 16, 1924.

The Court: Let it be marked.

(Certified copy of amendment of certificate of incorporation marked Exhibit C-4.)

Mr. Hood: I think there is no objection, Mr. Lane has said, for what they are worth, of offering in evidence certified vouchers, checks in payment of rent made to the order of J. J. Meyer and signed on the checks Orange Motors, Inc., signed H. H. Dye, secretary.

The Court: Well, is there any objection to that?

Mr. Lane: No objection as to the manner of proof, except they are immaterial and not competent proof, not probated proof of any facts in the case of any importance.

The Court: What do you offer them for, Mr. Hood?

Mr. Hood: I offer them because I propose to prove in the first place, that they will be material in proving knowledge of the assignment on the part of the two Dyes and Schnepp to Orange Hudson Co., and for the further reason, as I understand your Honor's decision in a recent case, the Reid case, from which I take it that they also estab-

lished ratification of that assignment so that I think they are competent on either ground.

The Court: I will admit them for what they are worth. Just say how many checks.

Mr. Hood: May I say they are for the years 1924, 1925, 1926, 1927 and one—and four checks the first four months of 1928.

(Bunch of checks marked Exhibit C-5.)

JOSEPH O. DYE, sworn for complainant.

Direct examination by Mr. Hood:

Q. Mr. Dye, where do you live? A. In Glen Ridge, New Jersey.

Q. And are you the gentleman who appears as one of the assignees in a lease from Schlenger to Meyer? A. Yes, sir.

Q. From Schlenger to the two Dyes and Schnepp? A. Yes, sir.

Q. And are you one of the gentlemen who appears as one of the incorporators of the Orange Hudson Company? A. I am, yes, sir.

Q. And its successors, the Orange Motors Co., you are still an officer of that company? A. Yes, sir.

Q. Do you know Mr. Meyer, John J. Meyer, personally? A. I do, yes, sir.

Q. Subsequent to the assignment of the lease by Schlenger and Gabrowitz, were you and your son and Mr. Schnepp—did you come in contact with Mr. Meyer? A. We did, yes, sir.

Q. To what extent? A. Pardon?

Q. To what extent—how frequently? A. He was present during a conversation that was had with reference to the assignment and quite a discus-

sion with respect to back rent which was owed by Mr. Schlenger and Mr. Gabrowitz.

Q. Was that at the time that you took over the lease and the business from Schlenger and Gabrowitz? A. Yes, sir.

Q. Now, subsequent to that did you come in contact with Mr. Meyer? A. Very frequently.

Q. Where? A. At the garage.

Q. As I recall it, your Orange Hudson Company was organized in February, 1923? A. Yes, sir.

Q. And you took over the business from Schlenger and Gabrowitz—in 1922—and you took over the business from Schlenger and Gabrowitz in February, 1922? A. Yes, sir.

Q. Now, I want to direct your attention to that period of time, about when the Orange Hudson Company was organized and started to function. Did you at that time, approximately at that time, come in contact with Mr. Meyer? A. Yes, sir.

Q. Was your contact with Mr. Meyer at the garage during the preceding period of time casual or was it prearranged? A. It was casual, prior to that time.

Q. How frequently would you see Mr. Meyer? A. Why, it was my practice to visit the garage almost every Saturday afternoon.

Q. Yes? A. And I would see him down there, oh, I would say on an average of twice a month.

Q. Now, at about the time of the organization of the corporation or shortly thereafter, did you have any conversation with Mr. Meyer in reference to the lease of the premises, about the time of the organization of your Orange Hudson Co.? A. Yes, sir; yes, sir.

Q. What brought that about? A. Simply that we wished to have him know of the change and to have his consent.

Q. Well, how did you call that—your meetings to his notice? A. To his notice?

Q. Yes. A. I don't recall whether—I telephoned him frequently, I think a couple of times, about that matter and I think later I wrote him a letter about it.

Q. Well— A. That we have—now, I guess possibly I simply asked him to call at the garage, that I wanted to discuss the matter with him. I think that probably is the fact in this case.

Q. That was when, when was that? A. That was at the time immediately after we had concluded that we would organize a corporation, conduct the business under the name of the corporation.

Q. Now, as a result of that conversation did Mr. Meyer call at the garage? A. He did, yes, sir.

Q. Do you recall whether anyone was present at that time, at the time of his visit? A. Well, they were present about the garage. There was no one, I think, present to hear our conversation; the men were busy; my son and Mr. Schnepp were there, but they were busy; I don't think they listened to our conversation.

Q. What conversation did you have with Mr. Meyer?

Mr. McGlynn: Will you fix the date?

Mr. Hood: Yes. He said on or about the time of the organization of the Orange Hudson Company.

Mr. Lane: I object to this whole line of testimony upon the ground that you cannot show in a written lease as against a decision of the lease requiring—(interrupted).

Mr. Hood: I will withdraw that question.

Q. As a result of the conversation that you had, did Mr. Meyer do anything?

Mr. Lane: I object to that because he is characterizing it as a result of the conversation.

Mr. Hood: I will ask counsel to produce in accordance with our notice, which has been acknowledged, copy of a consent and assignment from the two Dyes and Schnepp to the Orange Hudson Co. of the lease.

Mr. McGlynn: There was never such a lease; therefore we could not produce it.

The Court: What?

Mr. McGlynn: There never was one; therefore we could not produce it.

Mr. Hood: We maintain that there was and we maintain that we have been unable to find it and that we have a right to establish by secondary proof its execution and its contents, provided we establish that we have made due and diligent effort to find the copy.

The Court: I suppose the first thing to do is to prove there was such a paper.

Mr. Hood: Precisely. That is why I asked the witness whether as a result of that conversation, what act, if any, did Mr. Meyer perform, did he execute any paper.

The Court: All right; he may answer it.

Mr. Lane: I still object to it, to the "as the result of the conversation" part of it, what Mr. Meyer might do as a result of the conversation or whether it was the result of a conversation, Mr. Meyer did anything.

Mr. Hood: I will reframe the question.

Q. On the occasion that you have referred to, about the time of the organization of the Orange Motors Co., when Mr. Meyer came to the garage in response to your telephone call, did Mr. Meyer execute a paper? A. He did; yes, sir.

Q. Where is that paper? A. I don't know.

Q. Do you know what was done with it, of your own knowledge? What did you do, if anything? A. We put it in the safe in the office.

Q. Was there a copy of that paper? A. Beg pardon?

Q. Was there a copy of that paper given to Mr. Meyer? A. There was, yes, sir.

Q. Do you recall to whom you handed the paper that you kept? A. I gave it to the bookkeeper.

Q. What is his name? A. I don't know who was the bookkeeper at that time. There was several changes. We had a lady or two, bookkeepers, and two or three gentlemen. I don't recall who was bookkeeper at that time.

The Court: You mean to say, you gave the paper to your bookkeeper?

The Witness: What?

The Court: Whose bookkeeper was it?

The Witness: The garage bookkeeper.

The Court: That is your bookkeeper?

The Witness: Our bookkeeper, yes, sir.

The Court: All right.

The Witness: To be filed.

Q. Have you caused search to be made for it? A. I didn't get your question.

Q. Have you caused search to be made for this paper that you gave to the bookkeeper to be filed? A. I have caused numerous very thorough searches to be made.

Q. Have you thus far been able to find it? A. Been wholly unable to find it.

Q. Do you recall what the paper that Mr. Meyer signed at that time stated?

Mr. Lane: I ask to cross examine on the loss of the paper.

The Court: All right.

Cross examination by Mr. Lane:

Q. When did you last see the paper? A. When did I last see the paper?

Q. That was the question. A. I can't give you the date. I saw it several times after it was executed.

Q. Well, can you give me approximately the date that you last saw it? A. Well, it has probably been a year since I saw that paper, and I could not recall the date.

Q. Well, in connection with what did you see it? How did you come to see it then? A. Well, there was a gentleman called at the garage several times, talking about wanting to buy it, wanting to buy the property, and my son and I got out the lease and this assignment for the purpose of having it to show to him in case he asked for it.

Q. When was that? You have identified the occasion. Now, when was it? A. Well, that was,—that occurred shortly after the change in name to Orange Motors some time in 1923, I would say, or 1924.

Q. And that was the last you saw the paper? A. That was the last I saw it.

Q. Now, that paper was then with the lease? A. With the lease, yes, sir.

Q. And where was it put, at that time? A. It was returned to the safe.

Q. With the lease? A. With the lease.

Q. And what other papers? A. Well, there were many other papers in the safe.

Q. I know there were. A. A large number of notes.

Q. Yes, but weren't these papers kept together? A. They were, yes.

Q. Yes. Well, now, I am talking about the papers that were kept together. What other papers were in that package? A. They were, yes, sir.

Q. Well, what papers were they? A. There was the original lease and this assignment.

Q. Well, what assignment are you referring to? A. The consent to the assignment of the lease from the partnership to the corporation.

Q. Well, that is the consent to an assignment, as you call it. A. Consent to our assigning the lease, yes.

Q. Well, what other papers? A. Well, I think that is all.

Q. Well, where was the assignment? A. The assignment was—that was the assignment, the paper that I speak of that Mr. Meyer signed.

Q. That is not an assignment, that is a consent to an assignment, quite a different thing. Where was the assignment? Was the assignment there? A. Well, I may not use the proper legal terms for those things.

Q. Were there two papers, three papers or four papers? A. There was one paper—one assignment.

Q. There was a lease, wasn't there? A. The assignment, the original assignment.

Q. There was a lease, wasn't there? A. There was.

Q. What other papers now—this consent, and what else? A. An assignment of the lease.

Q. To whom? A. An option.

Q. From whom to whom? A. From the partnership to the corporation.

Q. Where is that assignment? A. That is the paper I have been trying to tell you about—mislaid, lost somewhere—where I don't know.

Q. You have said now that there were three papers, the lease, the assignment from the partnership to the corporation, and the consent to the—(interrupted) A. No, no; I didn't say that.

Q. Well, there was just the lease and the consent to the assignment? A. There is a lease and a separate assignment on a separate sheet of paper from the lease.

Q. Where is that? A. That is the paper I am telling you I don't know where it is.

Q. Then I do not understand your testimony at all. I thought you had called the paper a consent to an assignment. A. Well, I suppose that is the same thing.

Q. Well, it is not the same thing. The assignment from the partnership to the corporation is what I refer to. Where is that? A. I would hardly think he could make the assignment without consenting to it.

Q. Well, some people do. Where is that assignment, actual assignment from the partnership to the corporation? A. That is the paper I am telling you that has been lost.

Q. Then there is no separate consent. It was all in the same paper.

Q. It was all in the same paper? A. Yes, sir.

Q. Now, what date was this? A. The date was very late in February or early in March of 1923.

Q. When did you first discover that there was—that you had lost this paper? A. If I recall correctly, it was when we concluded to serve notice on Mr. Meyer of our desire to exercise the option to purchase.

Q. Well, about when was that? A. That was about 1927, along in May or June.

Q. Did you tell your counsel that you had lost this assignment or this paper? A. Do we tell counsel?

Q. Yes. A. We had no occasion to tell counsel.

Q. Well, when did you tell your counsel that you did not have this paper? A. When we found it necessary to bring this action.

Q. Well, when was that? A. Well, that was—I couldn't tell you the exact date when we came to that conclusion, but we arrived at that conclusion after failure to reach Mr. Meyer by letter, with notice of our desire to exercise the option to purchase. That perhaps was in June or July of 1927.

Q. Did you have the assignment when you first saw Mr. Hood, or the paper, rather? A. No, we didn't have it at that time. That is, we didn't see it, didn't look for it.

Q. Oh, you did not look for it then? A. No.

Q. Well, where was the lease, the original lease kept? A. It was kept in the safe.

Q. You found that there? A. Yes, but that was kept there until—it is a little difficult to remember dates so far back—well, it was some time prior to our conclusion that we would exercise the option to purchase that we went to—or, at that time we looked for these papers; we found the original lease and because of our inability to find the assignment, we took the original lease and put it in my safety box at the bank for fear it would also be lost.

Q. And there were no other papers with the original lease at the time you went to look for the original lease? A. No.

Q. In connection with this transaction? A. No.

Q. Did you have copies there of notices which you had served on Mr. Meyer? A. No. I think the only thing that we had there was the letter we addressed to Mr. Meyer, telling him that we would postpone the date of exercising our option from 1923 until some time later. I think there was a letter of that kind in the correspondence, maybe.

Q. Have you that letter? A. No, I have not the letter.

Q. Where is it? A. Mislaid that letter to Mr. Meyer.

Q. Got a copy of it? Have you a copy of it? A. I think there is a copy in the papers.

Q. Now, you knew as early as June, 1927, that Mr. McGlynn, who represented Mr. Meyer, had asked Mr. Hood for a copy of the assignment, didn't you? A. Well, I didn't get that question; a little too long. I did know that Mr. McGlynn had asked Mr. Hood for a copy of the assignment, yes, sir.

Q. And you knew that he asked for it several times, or twice, at least, in the month of July, 1927, didn't you? A. No, sir; I don't know anything about that.

Q. Well, you know he asked more than once? A. No.

Q. Did you tell your counsel that there had been a written assignment but that you had lost it? A. I did, yes.

Q. When he talked to you about the request of Mr. McGlynn for a copy of it? A. Yes, sir.

Q. Do you know, or have you any knowledge

what reply Mr. Hood, your counsel, made to Mr. McGlynn? I show you a letter of July 5, 1927, from Mr. Hood to Mr. McGlynn. I ask you to look it over and ask you to tell whether you knew before that letter was sent what the purport of the reply was to be. A. Well, I don't find anything in this that you are talking about.

Q. Well, the letter from Mr. McGlynn to—which made the request for the copy of the assignment was in June, the latter part of June and the only letter which we have got is the letter of July 5th which is in reply to that letter of ours. Now, you don't see anything in that letter about any assignment to your company, nor do you see anything in that letter about any paper being lost, nor do you see anything in that letter as to any written consent of Mr. Meyer, do you? A. Well—(witness looks at paper long time).

Q. You do not, do you? A. Now, just what is your question?

Q. Whether you see anything in that letter that says anything about the written assignment of the lease to your company or a written consent to Mr. Meyer, whether in your possession or lost. A. Well, the letter speaks for itself.

Q. Well, you had a talk with your counsel about this case before the date of that letter, didn't you? A. Over the telephone, yes, sir.

Q. Well, you told your counsel all about these written papers and that they had been lost, didn't you? A. I don't recall about that.

Q. Well, you talked about what right your corporation had, didn't you? Do you mean to say you didn't talk about the instrument, the assignment, the fact that they were lost? A. If I recall the facts, Mr. Hood asked me, told me that Mr.

McGlynn had asked him for—had written him that Mr. Meyer had lost his copy of this assignment or he didn't have it, or something of the kind.

Q. Now, do you mean that? A. And asked me if I had a copy of it.

Q. Do you mean that? Do you mean that Mr. Meyer (Mr. Hood) told you that Mr. McGlynn had written him that Mr. Meyer had lost his copy of the assignment? A. That is my recollection about it, yes; and Mr. Hood stated that they wanted us to furnish them with our copy of the assignment and I told him we were unable to find it.

Q. Yes? A. And that Mr. McGlynn—well, I asked him why Mr. Meyer did not furnish his copy and he said Mr. McGlynn said he did not have it.

Q. He told you that Mr. McGlynn had written him that they had no knowledge of that assignment or the consent, so-called, didn't he? A. I don't think so.

Q. You don't think so? A. No. I am sure not. I am sure that what Mr. Hood told me was that Mr. McGlynn said that Mr. Meyer was unable to find his copy.

Q. And you told Mr. Hood at that time that your papers were lost? A. I did, yes,—well, that we had been unable to find ours. We had not, perhaps, made as thorough a search at that time, I know, as we made afterwards. We afterwards went through all the files. My son, I think, and the bookkeeper both went through the files individually. My son has more recently gone through all of my personal files of some eight or ten years looking for that.

Q. So that on the 7th of April, 1923, there was an assignment of this lease to the corporation; is

that right? A. I don't remember the exact date. There was an assignment of the lease, yes.

Q. Well, can you tell me when that was made? Was it made upon the date of the incorporation of the—(interrupted) A. Well—

Q. —about the date of the incorporation, which was in 1922? A. About the date of the corporation, yes; of the completion of the corporation.

Q. And as soon as the company was incorporated it took over the business and the lease; is that right? A. Yes, sir.

Q. Will you tell me why when you signed your notice April 7, 1923, to Mr. Meyer, you had the individual sign the notice of renewal? A. Well, I don't know why that was, no. I was—just out of excessive caution, perhaps.

Q. On whose advise was that done, anybody's, or just your own idea of having the individuals sign after this lease had been assigned? A. I think maybe that paper relates to the—

Q. Renewal? A. —renewal after the expiration of the first three years.

Q. Yes. That is exactly what it relates to. A. Yes.

Q. And according to your statement the corporation had the lease now, or had the individuals to sign asking for the renewal or giving notice of the renewal. A. Well, I don't know that I can state any reason. I think Mr. Hood drew that paper and that was why, perhaps.

Q. And that was at the advice of counsel; is that right? A. Well, I don't think he gave me any advice. I simply asked him to draw up a form and he drew it up for me.

Q. At that time there was a written assignment

which had not as yet been lost to the corporation? A. No; not this corporation.

Q. Well, the same corporation with the name changed; isn't that right? A. Yes, sir.

Q. Yes. So at that time when you had this notice signed, it was signed by the individuals as well as by the corporation. There was a written assignment of the interest of the individuals to the corporation, which had not yet been lost and Mr. Hood drew it; is that right? A. Oh, yes, Mr. Hood did know it.

Q. And can you tell me why the individuals went on this note? A. Just wait a minute until I see if I can connect up the story. The assignment of the lease to the Orange Hudson Company took place only a short time prior to the expiration of the first three years of that lease and option contract. It was necessary for us after that to notify Mr. Meyer that we exercised the option to renew the lease and option to purchase and this paper is the one that was issued on that occasion.

Q. I know that, and that paper is dated April 7th, and that is a couple of months, at least, after the organization of this corporation and after this corporation took over the business. My question was why, if there was a written assignment and the rights were held by the corporation and Mr. Meyer knew it and had consented to it, did you make the individuals parties to this notice of renewal and can you give me any reason for it? A. Well, I have no reason for it.

Q. No. Did this corporation keep a minute book; did it keep minute books, the corporation? A. Oh, yes.

Q. Are the minute books in court? A. I don't know.

Q. Well, where are they? A. Probably are—Mr. Hood may have them.

Mr. Hood: I have them, Mr. Lane.

Q. Anything in those minute books with respect to the assignment of the lease? A. I didn't get that question.

Q. Is there anything in those minute books with respect to the assignment of this lease? A. I don't recall that there is. I haven't them before me.

I can't remember everything that is in those minute books. There is a resolution on the part of the Board of Directors, in all probability that we do renew the lease.

Q. I am not talking about renew. I am talking about the assignment from the individuals of the corporation. A. Why, I wouldn't think so.

Q. What? A. I wouldn't think so.

Q. You wouldn't think so. Is there anything in writing anywhere which refers to this assignment or this consent, anything at all in writing? A. I believe I know of nothing except the copy which you had in your hand a minute ago or some such document.

Q. Well, I will tell you now that that copy was the notice to the individuals renewing the lease and there is nothing in it of any assignment at all. Is there anything else in writing of any kind that you know of now while you are on the stand that refers to this assignment or this consent, alleged assignment and consent, note, memoranda, anything? Do you know of anything now while you are on the stand? A. I have not been through those papers for some time and I know of nothing.

Q. You know of nothing and you prepared for this case and you knew the importance of this

assignment and consent, didn't you? A. No, we did not regard the—Oh, the renewal, you mean? The renewal of the lease and the option, yes, we knew of its importance.

Q. Now is there in existence, whether it was executed in 1923 or at any other time, is there now in existence any formal assignment of this lease from anybody else to the corporation, that you know of? A. Oh, yes.

Q. When was that made? A. Oh, yes, that was done at the time the corporation was formed.

Q. I thought that was the thing that was lost. A. Oh, not at all.

Q. Then we have been talking at cross purposes for the last hour. You have testified time over and again that the assignment and the consent were all on one paper and the assignment and the consent was lost. Now, do you want to change your testimony as to that? A. You are talking about Mr. Meyer's assignment one time and about the assignment to the individuals of the corporation at another time, not specifying which you are talking about.

Q. How long have you been in business? A. A long time, sir.

Q. How long? A. Well, I have been in business for about fifty-five years.

Q. Actively conducting business in the city of New York? A. Very, very actively.

Q. Very active. A. Yes, sir.

Q. Do you know the difference between an assignment and the consent to an assignment? A. I do, yes.

Q. Well, in every one of my questions I have made that distinction and you have distinctly stated that the assignment and the consent to the

assignment was on one paper— were on one paper and that they were lost. Now, do you want to change it? A. Well, you didn't ask me if there was an assignment of the individuals to the corporation.

The Court: Just answer the question.

The Witness: You are trying to cover two subjects in one question. I cannot answer them that way.

Mr. Lane: Will you repeat the question?

(Question read as follows: "Well, in every one of my questions I have made that distinction and you have distinctly stated that the assignment and the consent to the assignment was on one paper—were on one paper and that they were lost. Now, do you want to change it?")

The Witness: The consent of the assignment from the firm to the corporation was on one paper; the assignment, as you may call it, Mr. Meyer's assignment of the—or consent to the assignment from the firm to the corporation was on another piece of paper.

Q. Now, do you remember that first question: Where were those papers, all together in this safe? Were they? A. They—no, they were not all together. The corporation papers were in the corporation file. Only the lease and the assignment of Mr. Meyer was in the safe.

The Court: How many papers were there in the safe relating to this matter?

The Witness: Beg pardon, —Judge?

The Court: How many papers were there in the safe that relate to this matter?

The Witness: Only the lease and the assignment of it. The other papers I kept at home.

The Court: Where was the consent to the assignment?

The Witness: That was in the safe with the other papers.

The Court: Then were there three papers in the safe or two relating to this matter?

The Witness: There were three papers, Judge.

The Court: All right.

The Witness: Finally.

Q. That was the assignment, or, rather, the lease? A. That was the lease.

Q. The assignment— A. The assignment—

Q. —and the consent to the assignment? A. — and the renewal.

Q. And the consent to the assignment? A. Oh, no; that was all on one paper.

The Court: Well—

The Witness: The consent to the assignment of the partnership to the corporation is a different thing from Mr. Meyers' assignment.

Q. Well, did Mr. Meyer execute two papers? A. No, no.

Q. Only one? A. The assignment on the lease, and then later the assignment from the partnership to the corporation. Those were two. Those are the only ones we are talking about.

Q. Now, were both of those consents to assignment in the safe? A. They were, yes, sir.

Q. And where was the consent of Mr. Meyer to the assignment from Gabrowitz to Dye and others? A. That is on that paper right there.

Q. All right. That is one assignment. A. That is one.

Q. One consent to assignment endorsed on the lease itself? A. Yes.

Q. Then there was a separate paper written or signed by Mr. Meyer, consenting to an assignment from Dye to the corporation; is that right? A. Yes, sir.

Q. And that was in the safe? A. Yes, sir.

Q. And that is the paper that was lost? A. That is one of the papers that was lost, yes, sir.

Q. Well, what other paper was lost? A. The assignment when—now, let me see about this now—the renewal—the assignment—the renewal of the last five year term of the lease that was in the paper—in the safe.

Q. That is the consent of Mr.— A. Meyer.

Q. —Meyer to renewal of the five year term, that was there, and that is lost? A. Yes, sir.

Q. What other papers were there there and lost? A. That was all.

Q. And the assignment to the corporation was not there? A. Yes, it was.

Q. Now, please think. The assignment by the individuals, Dye and others to the corporation— A. Oh, no.

Q. —was it there or wasn't it? A. No, that was not in the safe.

Q. That was not? A. That was kept with my papers at home.

Q. And was that lost? A. No, sir.

Q. And why was that particular paper kept at home and the others kept in the safe? A. Well,

we got—I don't know except that I kept that with the minutes of the meetings of the stockholders and board of directors.

Q. Well, why didn't you keep the consent to it in the same minutes or with the same minutes? A. Oh, I don't know that there was any particular reason, we just—(interrupted).

Q. Why did you have a separate paper executed by Mr. Meyer consenting to this assignment? A. Out of excessive caution, I suppose.

Q. Why not have it endorsed right on the lease? You had the lease before you, didn't you, where it had been endorsed before? A. Well, the lease was pretty well covered up.

Q. Is that the only reason why you did not have it put on the lease? A. I don't know that we thought anything about that; we thought an assignment on a separate sheet of paper would be just as good.

Q. Who drew it? A. I don't recall that; I don't recall whether Mr. Hood drew that or whether I drew it myself.

Q. Typewritten. A. I can't answer that.

Q. Typewritten? A. Yes; it was typewritten.

Q. Who drew the assignment? A. Well, what assignment are you talking about?

Q. The assignment from the individuals to the corporation now, the paper that was not lost. A. Mr. Hood did that.

Q. But you cannot tell whether you drew the consent or whether Mr. Hood did? A. What consent are you talking about now?

Q. The consent of Mr. Meyer to the assignment from the individuals to the corporation. A. Well, I think Mr. Hood did that because it was our practice to have him do all those things, but I wouldn't be able to swear positively to that.

Mr. Lane: I think that is all the cross examination on that subject.

Of course, I object to the offer of secondary evidence, or, rather, offer of the evidence, upon the ground—of a lost instrument, upon the ground that a proper foundation has not been laid for such a proof in this kind of a case. Your Honor will remember the terms of the lease which require a written consent. I put this case in the same class as if a writing had been required by the Statute of Frauds. Now, the proof to establish a lost instrument in that kind of a case must be to the point of demonstration, else the statute is futile. And I also think that under the pleadings in this cause this consent cannot be established as a lost instrument, either. There is no prayer for it in the bill, no reference to it in the bill.

Mr. Hood: May it please the Court, I think before your Honor rules, that I may have the opportunity of a redirect examination on counsel's cross in order to clear up some things that I think Mr. Dye is confused about.

Redirect examination by Mr. Hood:

Q. Now, Mr. Dye—(interrupted).

The Court: Now, just be careful not to lead him at all. I don't want you to ask him any leading questions.

Mr. Hood: No.

Q. Mr. Dye, I show you this paper dated the 28th day of March, 1923. Just look at the signatures,

please. Just look at the signatures, please, Mr. Dye. Will you please look at the signatures? A. Yes, sir.

Q. Now, in answer to Mr. Lane's question, you spoke of an assignment from the individuals to the corporation and a consent to an assignment signed by Mr. Meyer and from the individuals to the Orange Hudson Co. and also to an assignment. Now, does that paper that I have given you in any way clear up your mind as to just what you meant in your testimony with reference to those three papers? What is that? A. This is the paper I referred to as an assignment by the partnership to the corporation.

Q. Now, your attention has been called by Mr. Lane to this paper which he referred to as having the names of the three individuals and which I offer in evidence. It was called for by counsel and admitted in their answer. Correct, Mr. McGlynn?

The Court: All right.

Mr. Hood: Which not only has the names of the individuals but also the name of the corporation, the Orange Hudson Company, signed by the president and secretary and which they acknowledged Mr. Meyer received.

The Court: All right. Let it be marked.

(Paper marked Exhibit C-6.)

Q. Now, that paper, if you will please look at that and see whether that clears up in your mind what you referred to as the consent to an assignment and ask—by Mr. Meyer—and the assignment. A. Yes; this is the paper I referred to as being Mr. Meyer's consent to the assignment of this lease to the Orange Motors Co. under the renewal.

The Court: Now, let me see it.

The Witness: The renewal of the lease and option.

The Court: This, you say, is the consent by Mr. Meyer to the transfer of the lease from the individuals to the corporation?

The Witness: No, sir.

The Court: Well, what is it?

The Witness: That paper was issued when the first three-year term of the lease expired and we were asking Mr. Meyer's consent to the renewal.

The Court: All right. I see.

The Witness: For a five-year additional period, both the lease and the option; it was a paper signed at that time.

The Court: All right.

Recross examination by Mr. Lane:

Q. Was there another consent by Mr. Meyer which has been lost? A. No, sir.

Q. There are no papers lost.

The Court: I do not—(the Court shakes his head negatively).

Q. Is that the paper that you have in mind as the consent of Mr. Meyer to the assignment of the lease? A. The signed copy of that paper was lost, yes.

Q. Oh, so that is the paper you had in mind, a signed copy of that paper is the paper you had in mind as Meyer's consent to the assignment of the lease which has been lost; is that right? A. That is one of them.

The Court: Well—

Q. That is one of them. Is there another paper, another assignment of Mr. Meyer to the assignment of the lease—another consent of Mr. Meyer to the assignment of the lease? A. Yes, sir.

Q. Well, then, why in the world did you say, "No, sir" a few moments ago? A. I did not.

Q. You did not? A. No.

Q. Why in the world a few moments ago did you say that that was the paper, the original of which was lost and which you considered to be the consent of Meyer to the assignment? Or didn't you say that a few minutes ago? A. I said that the original of this paper was lost, yes.

Q. Yes. Well, is there any other paper lost? A. Yes, sir.

Q. And you have no copy of it? A. I have no copy of it.

Q. But you have a copy of the lost paper. A. Yes.

Q. How did you happen to have a copy of one lost paper and not the copy of the other? A. Well, that is very easily explained.

Q. Well, explain it. A. I made an extra copy of this paper for Mr. Meyer, yes, and Mr. Meyer did not ask for a copy and so I did not give it to him.

Q. You did not give Mr. Meyer a copy? A. Not of this paper.

Q. But he asked for a copy of the other, so you gave that copy to him? A. Yes.

Q. And you say both those papers were drawn by Mr. Hood? A. I think so. I see no reason for believing it otherwise.

Q. I can't either. Did you find out whether Mr. Hood had any copies of them in his file? A. I didn't ask him to look for a copy of the other one.

Q. No. I am talking about a copy of the very

one and the important one and the last one. Did you ask him if he had a copy of that in his file? A. I never asked him for a copy of the first one because I considered this to be a final paper, although he had never signed a previous one.

Q. So this renewal, this paper that you have here, which is signed by Mr. Meyer, Exhibit C-6, of April 7, 1923, you considered that as the final one? A. Yes, I considered that was—we did not need any other—he signed that.

Q. How soon after the first consent was signed, was this one, Exhibit C-6, signed? A. Well, the first one was signed at the time of the organization of the Orange Hudson Company which was in February or March—February, I think, 1923. This one was a little later, the first three-year term of the lease expiring in May, the 1st of May, 1923.

Q. I understand you to say that you considered this the final and binding one, Exhibit C-6, although the first one was not signed? A. It occurred to me that would be the case.

Q. I make no mistake with respect to that? A. Well, I may have made a mistake.

Q. That is the way it appeared to you? A. That was my idea of it.

Q. The fact is that you asked Mr. Meyer to consent to the assignment of this lease and he would not do it, isn't it? A. Oh, no.

Q. Nothing of that kind occurred? A. Yes, there was something of that kind.

Q. Well, now, what was there of that kind that was said? A. Mr. Meyer and I met at the office of the garage. I told Mr. Meyer that we were ready to exercise our option to renew this lease and option for a period—the remaining period of five years. Mr. Meyer said he didn't want to renew

the option to purchase if he could avoid it and I said to him, "Do you want us to bring a suit in order to test the question as to whether you have a right to decline?" And he said, "No, I do not. I prefer, though, to consult my attorney." He asked me for our copy of the lease, saying he did not have his with him, and a paper that I wished to have him sign in order that he might confer with his attorney. I gave them to him. He went out and came back in less than an hour and said, "Well, my attorney says I cannot avoid assigning—renewing this lease and option for the other final period of five years and I am ready to sign." He sat down and signed it.

Q. Now, don't you know—(interrupted) A. He got up and immediately left.

Q. Don't you know that that document, Exhibit C-6, does not say a word about the option to purchase at all?

The Court: Yes, it does.

The Witness: He never signed any document for me of that kind.

The Court: The copy I saw does.

Mr. Lane: Your Honor is right.

Q. Have you given us practically all the conversation between you and Mr. Meyer? A. Well, all of it that referred to this signing.

Q. Yes. A. We had some other talks.

Q. When he said he did not want to renew the option to purchase, did you say that he had already consented to the assignment of the lease to the corporation? A. No. I asked him if he wanted us to bring a suit to require him to do so.

Q. To require him to do what, to consent to the assignment of the corporation? A. Oh, no.

Q. Well, was anything said about the assignment of the consent that he had already signed, consenting to an assignment of the corporation? A. I don't think that was referred to, no.

Q. Was anything said between you as to why the individuals signed this paper and asking for a renewal? A. I don't think so, no.

The Court: The renewal is the individual, not the corporation.

Mr. Lane: The renewal contains the names of the individuals and then there is added to it the names of the Orange Hudson Co.

Mr. Hood: By the present treasurer and the acknowledgment.

The Court: The renewal is to the individual, not to the corporation.

Mr. Hood: The renewal was consented to to the individual.

The Court: Yes.

Mr. Hood: Now, that is the original, original.

Mr. McGlynn: That is the original assignment, yes.

Q. Now, do I understand that before Mr. Meyer signed the consent to the assignment he took this paper away and showed it to his lawyer? A. Yes, he—(interrupted).

Q. Yes. That is two papers he took away, the same circumstances, and showed it to his lawyer and came back and signed it; is that right? A. He took the lease and a copy of the paper which you have in your hand.

Q. That is Exhibit C-6? A. The original.

Q. Yes. And he did the same thing when he

was asked to sign the consent to the assignment from the individuals to the corporation? A. Oh, no, he did not, no.

Q. I thought you said he did. A. Oh, no.

Q. What did he do then, just sign without—(interrupted). A. Yes; he signed without question.

Q. (Continuing.)—without showing that paper to his lawyer at all? A. Yes, sir.

Q. Although that was—(interrupted). A. Well, I don't know. He may have shown it to his lawyer.

Q. All right. Then he took it away with him before he signed it? A. Well, no.

Q. Well, how could he show it to his lawyer? A. He may have shown it to his lawyer after he signed it.

Q. I say, before. A. He did not, to my knowledge.

Q. Just signed it? A. Yes, sir.

Q. Raised no objection to it at all? A. No.

Q. That is the lost paper; is that right? A. That is the lost paper, yes; that is one of them.

Q. Well, it is the only lost paper of which you have not got even a copy. A. Yes.

Mr. Lane: That is all.

Redirect examination by Mr. Hood:

Q. Mr. Dye, about this consent that you say Mr. Meyer signed, consenting to the assignment of the lease from the individuals to the Orange Hudson Co., can you describe that, the appearance of that paper, so far as the stationery, and so forth, what was it? A. The assignment from one corporation—

Q. The consent that you speak of signed by Mr. Meyer at your garage on Saturday afternoon where

you say that he consented to the assigning by you and your son, Mr. Schnepp, to the Orange Hudson Co., can you describe that, its physical appearance? A. Yes. It was a typewritten paper on, I think, an ordinary letterhead.

Q. Yes. Whose letterhead? A. It may have been on a short piece of legal cap, I am not definite about that, but it was not a long, full length legal cap paper.

Q. And you are uncertain as to whether you drew that or whether I drew it? A. I am, yes. It was a simple matter.

Mr. McGlynn: I object to any testimony as to its contents now.

Mr. Hood: That is all about that.

Mr. McGlynn: In the absence of Mr. Lane, I renew his objection to the proof by secondary evidence, in view of the reasons set forth by him, one being the evidence on secondary proof wipes out consent, and, second, I do not think there has been sufficient proof which clearly demonstrates to your Honor beyond a question of doubt that there was such a paper.

The Court: Have you any further testimony to take with regard to this paper?

Mr. Hood: Not as to that paper, no, sir. I have further testimony from witnesses, but not as to those papers.

The Court: I mean, have you any further testimony from any other witness as to this paper?

Mr. Hood: Yes, I have three corroborative witnesses.

The Court: Well, then, I will hear the

witnesses about the paper before I decide about the paper. You can withdraw this man and then we will hear the witnesses about the existence of the paper.

Mr. Hood: Mr. Dye.

The Court: I will take a recess for about five minutes.

CHARLES H. SCHNEPP, sworn for complainant.

Direct examination by Mr. Hood:

Q. Where do you reside now, Mr. Schnepp? A. In Connecticut.

Q. Were you a member of the—were you one of the officers and stockholders of the Orange Hudson Co.? A. Yes, sir.

Q. And are you the individual designated as one of the firm of Mr. Hanford A. Dye, Mr. Joseph O. Dye and yourself in the business taken over from Schlenger and Gabrowitz, together with a lease, the assignment of which was consented to by Mr. Meyer? A. Yes.

Q. Do you recall about when the Orange and Hudson Company was organized? A. The corporation, you mean?

Q. Yes. A. I believe it was in February, 1923, or thereabouts.

Q. Did you know Mr. Meyer personally? A. Quite well.

Q. Did you have occasion to see him in the place of business? A. Quite frequently, yes.

Q. Do you know anything as to a consent to an assignment of a lease from the three individuals, the two Dyes and yourself, to the Orange Hudson

Co.—I don't want the contents—do you know anything about the existence of such a paper? A. Yes, sir.

Q. I want to show you this paper that is marked Exhibit C-6 and ask you whether that is the paper you refer to as the consent of the assignment from the three individuals to the Orange Hudson Co.? Look at it, please. A. No; this is not the paper.

Q. The paper that you refer to, who was that signed by? A. Will you please repeat that question now to clear that in my mind?

Q. (Question read as follows: "Do you know anything as to a consent to an assignment of a lease from the three individuals, the two Dyes and yourself, to the Orange Hudson Co.—I don't want the contents—do you know anything about the existence of such a paper?") A. Yes, that is right.

Q. (Question read as follows: "I want to show you this paper, marked Exhibit C-6 and ask you whether that is the paper that you referred to as the consent of the assignment from the three individuals to the Orange Hudson Co.? Look at it, please.") A. The answer was "No."

Q. Who signed the paper which you call the consent of assignment from the three individuals to the Orange Hudson Co.? A. Mr. Meyer, John J. Meyer.

Q. Was there any signature on it? A. Not that I remember.

Q. Where did you see this paper? A. I saw it on a show case in the office. I walked in the office. I was working in the garage and young Mr. Dye said, "Here is Mr. Meyer's signature to this consent," and I glanced at the paper and laid it down on the counter again.

Q. Were you an officer of the corporation at the time? A. I was, yes.

Q. What position did you hold? A. I believe that I was vice-president.

Q. Did you see it at any subsequent time after the time you have referred to laying on the desk in the office? A. No, I did not.

The Court: Did you read it?

The Witness: I glanced through it and Mr. Dye told me of its contents.

The Court: But you did not read it yourself, did you?

The Witness: Not in detail, no.

The Court: Well.

Q. Can you describe its physical appearance? A. So far as I recall it, it was a simple sheet of white paper without any letterhead on it, and if I remember correctly there was no ruled lines on it; it was a plain piece of paper typewritten and Mr. Meyer's signature at the bottom.

Q. Do you recall how many lines approximately, to what extent it was covered with typewriting? A. Not clearly, but my impression is that the typewriting on it may have been about six inches of double spacing, perhaps that long (indicating with hands) oh, about six inches of double spacing.

Cross examination by Mr. Lane:

Q. How did you come to see it? A. I beg pardon?

Q. How did you come to see it there at that time? A. I walked into the office and young Mr. Dye was there and he consulted me on everything we did and naturally he showed me the paper.

Q. Did you casually walk in? A. I had occasion

to go in there frequently to get supplies to know the ways to record transactions of business.

Q. What was your part of the business? A. My part of the business was the same as his, we ran—we managed the business.

Q. Were you on the outside more than on the inside? A. Not necessarily, no.

Q. What day was this? A. I can't recall the day.

Q. What month? A. Well, I presume that was—(Interrupted.)

Q. I don't want any presumption, I want to know. A. I can't recall definitely when it was.

Q. You cannot tell definitely when it was? A. Not definitely, no.

Q. Can you tell me the year? A. I can tell you the year; it was in 1923, in the spring of 1923.

Q. And you don't know Mr. Meyer's signature, do you? A. I couldn't—no, I do not.

Q. Have you ever seen the original of the paper, Exhibit C-6, the one that Mr. Hood showed you? A. Yes, sir.

Q. Where did you see that? A. Probably in the office of the company.

Q. Well, where? Where? We don't want any probabilities, we want you to be as definite as you were to the lost paper. A. I can't be definite.

Q. Well, be as definite as you were to the other paper that you lost. A. Will you please repeat the question?

Q. Be as definite as you were with respect to seeing the paper which was lost. A. I will have to ask you to clarify that a little, please, to make it clear, what you would like me to be exact about.

Q. I want to know how and under what conditions and circumstances you saw the original of

Exhibit C-6. A. I saw that paper in the office—(witness pauses about half a minute).

Q. Does it take you two minutes to answer that question? A. Yes, sir.

Q. Go ahead, then, and take your time. A. It seems to me I saw that paper in the office—(interrupted).

Q. I don't want "it seems to me." A. That is the best I can tell you. I am not so very clear about it.

Q. Then why are you so clear with respect to the lost paper and not so clear with this one? A. You will have to answer that. I can't.

Q. No. You are the person whose mind I am trying to probe. You know why you are clear in one case and not in the other. A. I cannot answer the question.

Q. You cannot answer the question after taking thirty seconds to determine, and you never saw this paper, which has been lost again? A. No.

Q. Did you see the original of C-6 again? A. No.

Q. Except the one time you did see it which you do not remember? A. No.

Mr. Lane: That is all.

The Court: That is all. What is the name of this man?

Mr. McGlynn: Schnepp.

Redirect examination by Mr. Hood:

Q. One minute. When did you leave the company? A. Very shortly after the occasion of which I speak.

Q. Do you remember when that was? A. Yes. It was in April of 1923.

Mr. Hood: April, 1923.

The Court: That is all. sir.

WILLIAM PAUL JAEGER, sworn for complainant.

Direct examination by Mr. Hood:

Q. Where do you live, Mr. Jaeger? A. West Orange.

Q. And were you connected with the Orange Hudson Co., or the Orange Motors Co.? A. Yes, sir.

Q. Orange Motors Co.? A. Yes, sir.

Q. From when to when? A. From May, 1923, to May, 1928.

Mr. McGlynn: What was that last date?
The Court: May, 1928.

Q. And what was your work? A. Bookkeeping.

Q. Bookkeeper. Do you know anything—or, have you at any time seen a paper which has been discussed as a consent to an assignment of a lease from the three individuals, the two Dyes and Mr. Schnepp, to the Orange Hudson Co.? A. Well, I don't—the only paper I have in mind, there was no one's signature on, only Mr. Meyer's; I don't know about any individuals Orange Hudson.

Q. Is this paper, C-6—do you know whether this is a copy of the paper that you say you saw? A. No, no.

Q. Where did you see the paper with Mr. Meyer's signature? A. In the safe, in the pigeon hole.

Q. When did you see such a paper? A. Oh, I couldn't say exactly. I imagine it was a few months after I started there.

Q. What is that? A. A few months, four months, maybe five months, I don't know.

Q. After when? A. After I started to work.

Q. That was May, 1923. What other papers

were there in the pigeon holes? A. Well, there were notes; there was insurance papers and there was some kind of a book, form of a lease, I don't know whether there was anything in it or not, and bills of sales. Well, not in that one pigeon hole, but all scattered through the safe was bills of sale, micrometers, books.

Q. Did you see the paper that you refer to as being signed by Mr. Meyer more than once? A. Well, I might have seen it two or three times in fingering through the papers until such time, I sort those papers out that do not interest me and I put them back by themselves and I never bothered with them.

Q. Do you know whether the papers that you put up by themselves, as you say, and did not bother with, whether that paper signed by Mr. Meyer was one of them? A. No doubt it was.

Q. Do you know whether it was? A. Well, I never ran across it in my regular papers, anyway. I only had insurance papers I sorted out and kept the insurance papers as the insurance policies lapsed, in other pigeon holes.

Q. Have you ever made search for that paper? A. About a year and half ago.

Q. And to what extent did you search? A. Went all through the safe—I did myself, all through the safe and I couldn't see nothing.

Q. And did you find it? A. No.

Q. And did you read the paper? A. I read the paper when I first saw it. It was about a lease and an option.

Q. Can you describe the physical appearance of the paper? A. Well, I don't know what kind of a paper it was, nothing more than the meaning I got out of it was that Mr. Meyer—(interrupted).

Q. No, no. The looks of it, the appearance. A. Oh. Just a piece of plain, white paper, typewritten. It was not a letterhead. Just a plain piece of white paper about the size of a letterhead.

Q. And it was signed by whom? A. By Mr. Meyer.

Q. Now, did you know Mr. Meyer? A. Yes, sir.

Q. Come in there frequently? A. Yes, sir.

Q. Do you recall what that paper said? A. Oh, not word for word. The meaning I could get out of that paper—(interrupted).

Mr. Lane: I object, if the Court please, on the same ground I objected to it before.

The Court: What are the grounds?

Mr. Lane: On the ground, first, that no proper foundation has been laid for the introduction of this kind of testimony, and upon the ground, secondly, that this witness does not purport to give the contents of the paper. He says that "I—" (interrupted).

The Court: I thought we were confining our testimony as nearly as possible to whether or not the paper ever existed, but, of course, we have the effort to identify it, or this testimony won't be of any value.

Mr. Lane: For the purpose of attempting to identify the paper, I have no objection. I object to probating proof, that is all.

The Court: That is another matter. He must give us some idea of what he thinks the paper he saw was about.

Q. Do you recall what that paper said? A. The meaning I got out of that was that Mr. Meyer was agreeing to lease the property at 494 Main Street, East Orange, with an option to purchase. I did

notice that part in it because there was a figure set up in the books for a lease and an option to purchase. I looked at that paper and thought I might get some information on it, not that it concerned me, but it was more being nosey, I suppose, but there were no figures on it and I let it pass out of my mind.

Q. I didn't quite get what you said about on the books, there were no figures.

The Court: Read the answer.

(Answer read as follows: "The meaning I got out of that was that Mr. Meyer was agreeing to lease the property at 494 Main Street, East Orange, with an option to purchase. I did notice that part in it because there was a figure set up in the books for a lease and option to purchase. I looked at that paper and thought I might get some information on it, not that it concerned me, but it was more being nosey, I suppose, but there were no figures on it, and I let it pass out of my mind.")

Q. When you say "were on the books"—were on what books? A. On the general books, general ledger.

Q. On the general ledger? A. (Witness nods yes.)

Q. And were they there when you became connected with the company? A. The books were all set up when I came there.

Cross examination by Mr. Lane:

Q. Did you read the other papers that you found? A. I probably did read some of the papers.

Q. I don't want any probabilities, I want your best recollection. I don't want you to guess at what you did. A. I went through some of the papers and passed on.

Q. What did you do? A. That had something about lease and option to purchase and that was a figure that was on the books there that I never knew anything about, that is I didn't know the detail of it.

Q. There were other papers there that said something about the lease and option to purchase, weren't there? A. Well, I don't know. There were legal papers there, but I don't know what they were.

Q. Well, the lease and option to purchase was right there itself, wasn't it? A. I don't remember seeing that.

Q. You don't remember seeing a lease and option to purchase? A. Well, I saw a little lease card there.

Q. Yes, that is what I am talking about? A. Like a little book form.

Q. You saw it was the lease at the time? A. Yes.

Q. Did you read it? A. That lease there?

Q. Yes. A. I don't remember reading that one in particular.

Q. Well. But the option to purchase you would expect to find in the lease, wouldn't you? A. Well, I don't remember reading that.

Q. You were asked for some information with respect to the option to purchase, because you wanted some figures to set up on the books, you wanted to verify some figures. A. I didn't pursue it.

Q. I want to know why you initiated it. A. It was not really our issue.

Q. I know, but I want to know why you started it. A. I just happened to be looking through the papers and come across that.

Q. What were you looking through the papers for? A. Sorting out papers and looking for notes, or something at the time. I don't remember what prompted me to look through it.

Q. Can't you remember what it was that induced you to start to sort those papers at that particular time? A. Well, I probably was sorting out notes or something that was of current use.

Q. I don't want any probabilities again. Do you know what it was? A. Well, I just went through the papers.

Q. And when you saw—by the way, was this paper folded up? A. It was folded.

Q. It was folded? A. Yes.

Q. Well, then, to see what was in it you had to open it, didn't you? A. I did.

Q. And you didn't have any—before you opened it, what did you think it was? A. Why, I saw John Meyer's signature on there.

Q. That was when you opened it. The signature was on the inside. You couldn't see it before you opened it, could you? A. No. I probably opened other papers, too.

Q. Did you open the lease? A. I don't know.

Q. You don't remember whether you opened the lease or not? A. I don't remember that, no.

Q. What induced you to open this particular paper? A. Oh, I saw John Meyer's name on it. I thought it was a personal paper, it looked like a letter. I looked at it and it said something about lease with option to purchase and I looked to see whether there were any figures on it and there were no figures on it so I closed it up.

Q. Why did you look to see whether there were any figures on it? A. I thought maybe there was something to bear out the figures that were on the books, not that it meant anything to me.

Q. Now, not having found any figures on that that would bear on the book, why didn't you look at the lease and option to purchase which would contain the figures? A. It was not necessary.

Q. Why not? A. Those figures were all set up on the books.

Q. Then why were you looking at the first one for that purpose? A. Just come to my mind. I might have found something that was there.

Q. Then didn't it come to your mind immediately that here was the lease right alongside of it that would give all the figures, how much you would have to pay for the property and all that? A. Well, I started there on a small scale, anyway. I wasn't very exact.

Q. You just happened— A. Just happened—

Q. —to open it. Can you tell me any other papers that you opened? A. Standard Oil contract and things of that sort.

Q. What? A. Standard Oil contract.

Q. I mean with reference to this lease. A. Why, I don't remember.

Q. The only paper that you remember opening is this important lost paper; is that right? A. No, I remember other papers that I opened, that I thought—I thought it was a personal letter and I read it, I read that one; the others I did not read.

The Court: Do you know Mr. Meyer's signature?

The Witness: Yes, sir.

Q. How do you know his signature? A. Well, I have seen it.

Q. Where? A. Endorsement on his checks.

Q. Is that the only place you have seen it? A. Well, I— (witness pauses).

Q. Is that the only place you have seen it? A. Outside of on that one sheet of paper.

Q. Well, that one sheet of paper couldn't tell you it was Meyer's signature, could it? A. No.

Q. How many signatures did you see of Mr. Meyer's before you saw this paper? A. I don't recall.

Q. You didn't see any of them before then, did you? A. I don't think so.

Q. Then you didn't know Mr. Meyer's signature when you looked at the paper, did you? A. Well, I didn't know whether it was a forgery or not.

Q. Well, you didn't know it was Mr. Meyer's signature. A. Do you mean was I accustomed to his signature before that?

Q. Yes. A. No, I don't think I was.

Q. Now, didn't you see Mr. Meyer's signature on the lease, when you looked over it, right on the outside of it? A. I don't remember that.

Q. You don't remember that? A. Not that signature.

Q. You had this lease in your hand. A. Probably.

Q. And Meyer's signature is right on the outside, so that if you turned it over you could not help but see it, could you? A. I don't remember. No.

Q. But you remember seeing his signature on the lost instrument, that is right, isn't it? A. I never seen the signature on the lost instrument.

Q. Did you see the original of which Exhibit C-6 is a copy? A. No, I didn't see that, I don't

think so, I don't think I did. I might have looked at it, but I don't remember seeing it.

Q. Have you ever seen that paper? A. I don't remember seeing that one.

Q. Don't you remember whether that paper was among the others? A. I couldn't swear to that.

Q. Mr. Meyer's signature was on that paper, too. A. Well, I—(interrupted).

Q. Do you remember seeing the signature on that? A. No, sir.

Q. When did the fact that you saw this lost instrument in this safe come back to your knowledge after it had slept for four or five years? A. Well, about a year and a half ago Mr. Dye come in and asked me if I—he termed something in a legal sense—had seen something of Mr. Meyer's, and I told him that I—the only thing I remember seeing was a letter with Mr. Meyer's signature on it, saying something about an option. He said, "That is the one," so I started to look for it and I couldn't locate it.

Q. So, casually having seen this signature and casually having read this letter in 1923 and never having thought of it again, in 1927, when Mr. Dye suggests that there is some paper of Meyer's signed by Meyer's in existence, which had been lost, you suddenly remember having seen it; is that right? A. I remember seeing that paper with his signature on it.

Q. But you had not thought of it in the meantime, had you? A. Well, I might have run across it once or twice.

Q. Well, do you know? A. I can't swear how many times I run across that paper.

Q. And you put that paper back with the other

papers in the pigeon hole of the safe? A. Some of them up in the corner, up in the left-hand corner.

Q. Did you ever disturb those papers after that? A. I—I—I don't think I had much occasion to disturb them.

Q. I didn't ask you that. I asked you whether you did. Now, please remember— A. I don't remember.

Q. Then, will you tell me why you remember having disturbed that so specifically—or, remember so specifically having disturbed them back in 1923 and cannot remember whether you disturbed them after that? A. You ask me the question?

Q. I am asking you the question as to why you remember one incident so vividly and can't remember anything else about it. A. I probably wouldn't go up to the pigeon hole unless there was something I couldn't find in the other pigeon holes, I might have went up in that corner.

Q. But you were not looking for anything in a pigeon hole when you looked in 1923. A. Not anything in particular.

Q. No. A. Went up—I might have looked for a notice.

Q. Can't you tell me whether after 1923 and before 1927 you went to that pigeon hole again without intending to look for anything and disturbed these papers? A. Well, I probably went through there in 1923, probably a few times, maybe later on; I never went through there unless there was something there I could not find and I went—(interrupted).

Q. I don't want probabilities. I want to know whether you can remember going to that safe at any other time between 1923 and 1927 and dis-

turbing these papers? A. No, I can't say that I—(interrupted).

Q. You can't say you did and you can't say you did not; is that right? A. I cannot say I disturbed those papers. I might have fingered through them.

Q. You don't remember. Your mind is a perfect blank on it, isn't it? A. Well, so many papers inside.

Q. Yes, of course there are. And you have been to that safe so many times. A. There are.

Q. Yes, there are. Now, will you tell me how you can so definitely remember what you did back in 1923 and what you saw there then? A. Well, there was a lot of papers there when I first came there and a lot of that stuff stayed there until such time as I familiarized myself with some of the papers and sorted them out.

Mr. Lane: I think that is all.
The Court: That is all.
Mr. Hood: That is all.

HANFORD A. DYE, sworn for complainant.

Direct examination by Mr. Hood:

Q. Mr. Dye, where do you live? A. Glen Ridge.

Q. Mr. Joseph Dye is your father? A. Yes, sir.

Q. And you were one of the members of the firm of Dye, Dye & Schnepp who took over the business from Schlenger and Gabrowitz? A. I was.

Q. And you are the Mr. Hanford Dye who is one of the incorporators and officers of the Orange Motors Company? A. I am.

Q. Now, I direct your attention to a paper that has been called a consent to an assignment of a

lease from the three individuals, the two Mr. Dyes, and Mr. Schnepp to the Orange Hudson Co. Do you recall seeing such a paper? A. Yes, sir.

Q. I show you Exhibit C-6 and ask you whether this is the paper you saw—whether this is the paper that you saw as set forth in my previous question and your answer. A. No, sir; that is not that particular paper.

Q. Where did you see the paper that has been discussed as the consent of the assignment from the three members of the firm the Orange Hudson Co.? A. I saw it in our safe on several occasions.

Q. What was your part of the work in that company? A. Well, I was the secretary and treasurer of the company and one of the managers of the business.

Q. Did you, as such, have access to the safe? A. Yes, sir.

Q. Do you recall where it first was when you saw it? A. My recollection is that it was in one of the pigeon holes in the upper left-hand corner of the safe.

Q. Do you remember when that was? A. Well, I would place it in the spring of 1923, March or April, long in there, the first time.

Q. Do you recall how often after that time you saw it? A. Not definitely.

Q. Any time? A. Not definitely, no.

Q. Do you remember when you saw it last? A. Not definitely on that, no.

Q. Approximately? A. Well, I would place it within a year after it was signed, I saw it probably a year later, I might have seen it again.

Q. Can you describe its appearance? A. A plain white sheet of typewritten—short typewritten paragraph, Mr. Meyer's signature below.

Q. Did you read the paper? A. Yes, sir.

Q. What was it? What did it say? A. Well, it was Mr. Meyer's consent to the transfer of the lease with the option from the three individuals to the corporation, the Orange Hudson Co.

Q. How many signatures were on it? A. Just one signature.

Q. Whose? A. Mr. Meyer's.

Q. Have you made search for it? A. Yes, sir.

Q. How long ago? A. Well, we started the search three or four years ago and continued it right almost to the present, going over the papers that seemed less and less likelihood that it might be with. I have just been through my father's papers, for instance.

Q. And you have not found it? A. No, sir.

Cross examination by Mr. Lane:

Q. Did you see the original of Exhibit C-6? A. Yes, sir.

Q. Where did you see that? A. That was also in the safe.

Q. Is that where you saw it? A. Yes, I saw it in going through the papers in the safe.

Q. Did you see it there at the same place or was it at the same place at which this lost paper was? A. I believe that it was, yes, sir.

Q. Do you know? I don't want your belief. A. To the best of my belief it was in the same place, yes.

Q. You are positive that the lost paper was there, aren't you? A. Yes, sir.

Q. That is no belief, is it? A. No, that is not a belief.

Q. That is a positive knowledge on your part? A. Yes, sir.

Q. Now, will you be as positive with respect to Exhibit C-6? A. Well, I am just as positive about seeing it, but as to where I saw it—I mean, if it was with the others in exactly the same pigeon hole—

Q. Will you tell me why you are so positive with respect to where you saw the lost paper, and not so positive as to where you saw the original of Exhibit C-6? A. I am just as positive about the location of the two papers. They were both in pigeon holes nearby or perhaps together, but as I understood your question it was as to whether the two papers were right together. I wouldn't swear to that, but—(interrupted)—

Q. When did you last see the original of Exhibit C-6? A. Well, that was also perhaps a year after the signing of this lost paper.

Q. Eh? A. That was also perhaps a year after the—I saw the—after the signing of this lost paper.

Q. Well, how did you come—and then what did you find? A. What did I find where?

Q. Did you find they were lost or what? A. Yes, we found that the papers were lost.

Q. That is about a year and a half after you first saw them in 1923? A. Something like that.

Q. So that from about a year and a half after 1923 you realized that both of these papers were lost. A. Yes, sir.

Q. And set no investigation in effect to find out how they happened to get out of that safe? A. No; I don't think there was any investigation. We still hoped to locate them through—with some of our papers. There were some of the papers transferred about a bit—I mean, from the house to the garage and to the safe deposit box, and so on, and

we still hoped to locate these papers, in fact, hoped right up to the present time to find them.

Q. You found the lease where it had been left, didn't you? A. Yes, sir; the lease was there.

Q. Did you find any other papers in connection with the lease with the lease? A. Eh—well, I think you would have to make that definite as to what time.

Q. When you discovered that they were lost. A. When we first discovered that they were lost?

Q. Yes. A. I think at that time the lease was found in the safe with no other paper relating to it.

Q. Where did you have a copy of Exhibit C-6? A. That was at home, I think.

Q. Well, do you know? A. I wouldn't want to say positively, no.

Q. I want you to be as certain as to this Exhibit C-6 as you are to the other, if you can be, and, if you cannot be, I want to know the reason why you cannot be. A. Well, I can be on any important detail.

Q. Well, Exhibit C-6 is an important paper; it is a copy of the original of which you discovered to be lost. Now, where did you find that? A. The—

The Court: Where did you find the copy of Exhibit C-6?

The Witness: The copy was found at home among some of the papers that we had at home.

Q. Now, you are certain of it? A. I feel certain of that.

Q. What makes you so certain when you were uncertain a moment ago? A. Well, I think I can

say I have been certain all along on that. Of course, if—(interrupted)—

Q. Then why didn't you tell me so without hesitation when I asked you? A. Perhaps the reason is that I have reviewed many times certain of these things that I considered very important and this lost paper I considered that very important and I have turned it over in my mind to make definite on these points, but this Exhibit C-6 I did not perhaps attach the same importance to and therefore I did nothing about it.

Q. Have you any explanation as to how it is that the covers of these papers in connection with this transaction have been lost except the two original bearing Mr. Meyer's signature? A. I might have a certain theory.

Q. Have they been stolen, would you say? A. There is a possibility.

Q. And is that your theory? A. That is my theory. I—That is a possibility. I will put it that way.

Q. There is not any other explanation as to how these two papers bearing the signature of Mr. Meyer should disappear from that safe and not any of the other papers, is there, barring theft? A. Yes, sir, I think it would be possible.

Q. Probable that these two important papers bearing his signature should be the only ones—(interrupted)— A. Even probable, yes, sir.

Q. Even probable. Did you know Mr. Meyer's signature? A. Yes, sir.

Q. When did you first see his signature? A. Well, in 1922.

Q. Where? A. Well, I saw it for one place—

Q. Yes. A. —on the back of the lease with the option to purchase.

Q. Yes. Anywhere else? A. Endorsement of checks.

Q. How many checks did you see endorsed by him before 1923? A. I couldn't say how many.

Q. Did you compare the signatures that you saw on this paper with any signatures—(interrupted)— A. No; I never made an actual comparison.

Q. So that all you can say is what, with respect to his signature? A. I can say I believe I know his signature when I see it.

Q. What is your business? A. I am not employed at present.

Q. What was your business at that time? A. Manager of—one of the managers of the garage.

Q. What was your duty? What were your duties? A. Well, everything in connection with the managing and sometimes even the operation of the garage and sales agency later. I have done everything.

Q. How old are you? A. Forty-one.

Q. What has been your business for the past forty-one years, the nature of the business? A. Well, I have been an industrial engineer. I have been a telephone engineer, various work with two or three corporations along engineering lines.

Q. Have you had any work of a clerical nature which required you to know signatures or to compare signatures or to be familiar with signatures? A. Yes.

Q. When? A. Well, mostly, it is true, after 1922.

Q. I am not interested in anything that occurred after 1922. A. I answered your question, anyway.

Q. I want before 1922 and 1923. A. Not so much at that time.

Q. Well, what; what particular thing? A. Well, for one thing that I happen to think of, when I

was with the telephone company I was instrumental in getting a great many right of way permits signed up.

Q. Yes? A. I was out on that duty of getting the signatures of property owners for permission to put poles and lines up and such.

Q. You got the signatures? A. Yes, sir.

Q. You think that qualifies you as a handwriting expert? A. Not necessarily.

Q. No, I shouldn't think so. What is it that you did, what kind of work of a clerical nature that would give you any experience in comparing handwriting, prior to 1922 and 1923? A. I cannot claim any great experience along that line.

Q. Well, can you claim any, any, any? A. None, except that I have always felt I could recognize a signature or compare a signature. That would only seem to be an easy job.

Q. Who was it discovered that these papers were missing? A. Well, I believe I was the one that reported to my father that we had been unable to locate the papers at the garage and we wanted to search further among the papers at home and in the bank and various places.

Q. How did you come to make any inquiry? What initiated it? A. I think my father asked for the papers.

Q. What did he say to you? Did he ask you? A. Yes; I think he asked me to locate the papers bearing on this case.

Q. Well, what else did he say at that time? A. I can't remember anything else that he said.

Q. Why were you trying to locate the papers at that time? Did he say anything about that? A. We were contemplating exercising our option

to purchase the building and wanted to get the papers together to have everything in readiness.

Q. Had you been talking to counsel before that? A. No, I had not.

Q. Do you know whether your father had been? A. Well, no, I couldn't—I don't know.

Q. And you say that that was as early as a year and a half after 1923? A. My best recollection, yes, sir.

Q. When was the first time that you had seen this consent to an assignment signed by Mr. Meyer? A. I believe very soon, if not on the same day that he signed it.

Q. Well, where did you see it then? A. In the safe.

Q. How did you come to see it in the safe then? A. I think, if I re—(interrupted).

Q. Well, now— A. My father told me that it had been signed and I wanted to see it, that was all.

Q. Did you see the original of Exhibit C-6 at the same time? A. No, sir, not at that same time.

Q. When did you see the original of Exhibit C-6? A. Just after that was signed.

Q. How did you come to see that?

Mr. Lane: Withdraw that.

Q. Where? A. Well, in the office. I wouldn't say whether I went to the safe and got it out, but in the office at any rate.

Q. Well, where in the office? Won't you be as certain with respect to that as you are to the lost paper? A. I am just as certain about seeing that paper as I am any of the details about seeing the other paper.

Q. Then, tell me where you saw it, because you

have told me where you saw the other, definitely. A. Well, your question is not definite, because I don't understand whether you mean the first time or subsequent times. I saw those papers many times.

Q. I said the first time with respect to both and my question was quite clear: When was it that you first saw Exhibit C-6, you said shortly—(interrupted). A. Well—

Q. —you said shortly after it was executed and I asked you where, then you said you knew it was in the office but you could not tell where. Now, can you tell me where? A. Also in the safe, to the best of my recollection.

Q. Are you certain about it being in the safe that you saw that? A. Yes; I think I can say I am certain, if not at that time, as slightly subsequent times I saw it in the safe.

Q. I want you to be—I have reference to the first time. I want to know whether you are certain you saw that in the safe. A. I don't think I would want to swear to a certainty now.

Q. Then why were you so certain about seeing the original of the lost consent in the safe the first time? A. I don't believe I am any more certain in the one instance than I am in the other. As I say, I have seen them many times in there.

Q. Then, why didn't you tell me you were certain with respect to the lost consent? A. I did not understand your question to apply to the exact first time that I saw that paper.

Q. And your explanation is—you heard my question, didn't you? A. Yes, sir.

Q. And your explanation is that the reason why you answered as you did with respect to the certainty with respect to the lost consent was that

you did not understand my questions to refer to the first time, is that your answer? A. (Witness pauses.)

Q. Is it? A. Well, yes, I think it is.

Q. That is your answer. Do you remember any date that was on this paper? A. No, sir; I don't remember the date on it.

Q. Do you remember whether there was any date on it? A. Yes, sir; it was dated.

Q. But you cannot remember what the date was? A. No, sir.

Q. Did you ever see a copy of it? A. No, sir; I have never seen a copy of it.

Q. And you discovered the loss of the original—of Exhibit C-6 and of the lost consent at the same time; that is right, isn't it? In other words, there never was a time when you thought you had lost the one paper and had the other? A. I think at the same time, yes.

Q. And there never was a time when you thought you had one paper—

Mr. Lane: I will withdraw that.

Q. There never was a time when you actually did have the original of Exhibit C-6 when you knew that you had lost the other paper; that is so, isn't it? A. Will you repeat that?

Q. (Question read as follows: "There never was a time when you actually did have the original of Exhibit C-6 when you knew that you had lost the other paper; that is so, isn't it?") A. I believe that that is so, yes.

The Court: Is that all?

Mr. Lane: That is all.

The Court: Now, is that all the proof as to the fact that the paper is lost?

Mr. Hood: That is all the proof as to the paper that was lost.

(Discussion.)

The Court: In order to allow the contents of an instrument alleged to have been lost to be introduced in evidence, as I recollect the cases, it is necessary to prove the existence of the lost instrument almost to point of demonstration. Now, we have here as witnesses, who say they saw such a paper, four men, all of whom are interested in the matter of the consent to this lease. Now, surely, Mr. Joseph Dye in his testimony was so conflicting and confusing that I cannot possibly say that his testimony proves to me to the point of demonstration that there ever was such a paper. Mr. Schnepp finally says that he does not know Mr. Meyer's signature and did not read the paper that he was told was this consent; and I might say here that I noticed that Mr. Schnepp said that after Dye showed him this paper lying on the counter and told him it was the consent; and Hanford in his testimony says that he first saw the paper in the safe. Now, there seems to be a discrepancy. And, as for this young Jaeger, his testimony is entirely too hazy to impress me very seriously. He doesn't know Mr. Meyer's signature and I believe that his testimony very strongly points to the fact that these witnesses have confused their alleged lost paper with Exhibit C-6. I think that is the paper to which they refer and that is the paper that actually was lost and that is the paper a copy of

which we have. I do not doubt their absolute sincerety, but I do not think that the testimony as to the existence of this so-called consent has been so proved under the cases that I am entitled to accept secondary evidence as to its contents.

Therefore, I will deny the motion, if that is what I am to do, or sustain the objection, whichever it is, and it seems to me, therefore, that this bill must fail, because the lease says it can only be transferred with a written consent, and, no written consent having been established, I do not see how the bill can lie.

(Argument and discussion.)

Mr. Hood: Of course, we would like an opportunity to complete our proof.

The Court: I will allow you to put in the rest of your testimony.

NOON RECESS.

HANFORD DYE, recalled.

Examined by Mr. Hood:

Q. Mr. Dye, can you tell me—did you know the name of the garage that you took over from Schlenger and Gabrowitz before you went into possession? A. Yes, sir.

Q. Did you know that? A. Yes, sir.

Q. By whom was it conducted? A. Conducted at that time by Schlenger.

Q. Did you know it prior to the time that Schlenger and Gabrowitz were in it? A. No, sir; I did not.

Q. Can you tell me anything at all as to whether there were any signs on your garage? A. You mean, after we took it?

Q. Yes. A. Yes, sir; we had signs on it at all times.

Q. Well, what signs did you have on it? Describe their general extent. A. Well, I presume you mean after?

Q. After the organization of the Orange Hudson Co. A. After the organization of the Orange Hudson Company we had a large sign, approximately twenty feet long, black and gold sign.

Q. What was on it? A. "Orange Hudson Company, 494"; the street number was on it.

Q. That was about twenty feet long? A. Yes, sir.

Q. And what part of the building was that on? A. It was right in the center of the building above the driveway.

Q. What part, the rear? A. No; on the front of the building.

Q. On the front of the building. Were there any other signs on the garage? A. Yes, sir; there was a sign on the door, the doorway leading into the office, the east side of it.

Q. On the glass was painted? A. On the glass, yes.

Q. What was the purport of that sign? A. "Orange Hudson Co. Office."

Q. And after the company changed its name was anything done to those signs? A. The signs were changed to correspond to the new name.

Q. What was that? A. "Orange Motors, Inc." "Orange Motors Incorporated."

Q. Both the twenty foot sign, you say—A. Yes, sir.

Q. —and the signs on the windows? A. Yes, sir.

Q. What about the stationery of the company?

Mr. McGlynn: I object to the stationery unless they can show Mr. Meyer had—(interrupted).

Mr. Hood: All right; you may cross examine.

Mr. McGlynn: No questions.

The Court: That is all, sir.

Mr. Hood: Mr. Joseph Dye.

Oh, yes, let me ask Mr. Hanford Dye one question more.

Q. Mr. Dye, in your connection with the company as general manager, did you also perform any of the mechanical work? A. Occasionally.

Q. Yes. Did you see Mr. Meyer at your place of business? A. Yes, sir; he was in there frequently.

Q. And when you say "frequently" what do you mean by that, to what extent? A. Well, an average of twice a month or better.

Q. For how long a period of time after you took charge, the three of you or your company, during what period of time? A. Well, that would apply for perhaps a couple of years. After that he didn't come around quite so much.

Q. During the period of his visit was the name of Orange Hudson Company and Orange Motors, Inc. on the front of the building? A. Yes.

Q. And on the doors that you have testified? A. Yes, sir.

Mr. Hood: Now, Mr. Joseph Dye.

JOSEPH DYE, recalled.

The Witness: If you will speak a little clearer to me; my hearing is not very keen. It is difficult for me to hear it all the time.

Examined by Mr. Hood:

Q. Mr. Dye, prior to the organization of the Orange Hudson Co.—I am not referring to the matter of any consent, which has been disposed of—had you any conversation with Mr. Meyer as to the business that you were conducting?

The Court: You had better get up here.

Mr. McGlynn: I cannot quite see the relevancy of the question.

The Court: Well, wait, we will find out.

Q. Did you hear my question? A. Yes, I heard your question. Yes, I had a conversation with Mr. Meyer during the time we were organizing the Hudson, Orange Hudson Corporation.

Q. Where was that conversation held? A. At his home.

Q. Where was his home? A. On Prospect Avenue in West Orange, up on the mountain.

Q. Can you tell me approximately when that was, was it prior or during the course of the formation of the Orange Hudson Co? A. It was during the course of the formation of the corporation.

Q. What was the conversation? A. Well, I wanted to inform—(interrupted).

Mr. McGlynn: Your Honor, I don't want the conclusions when he asked for the conversation.

Q. What was the conversation? A. I said to Mr. Meyer that we were taking an agency for the

Hudson-Essex car and we were incorporating the business and that we would like to have him join with us in the same scheme, that is, sell cars for Newark and West Orange.

Q. What did he reply to that? A. Well, he replied that he was going away, going to Florida, I believe, and would not be able to do anything of that kind at that time and he might see us about it when he returned.

Q. Do you know what business Mr. Meyer had been in prior to his disposing of the garage and the business of Schlenger and Gabrowitz? A. Yes; he had operated the garage and the plant at 494 Main Street, East Orange.

Q. Did that also include a sales agency when he conducted it, or just a repair shop? A. He sold cars, they sold the White car there.

Q. Do you recall any further conversation at any time subsequent thereto with Mr. Meyer? I am not referring to the matter of the consent. A. Well, I refer to one conversation we had—I recall one conversation we had with reference to Mr. Spangler closing up our windows and the driveway alongside of the garage.

Q. Yes. What was that conversation and where was it held? A. That was in the garage.

Q. Do you remember when that was? A. Well, I think that was—that was quite some time after the organization of the Orange Motors Corporation.

Q. What did Mr. Meyer say and what did you say at that conversation? A. Well, I called his attention to the closing up of these windows, the shutting out our light, making it necessary for us to spend quite a little money in order to comply with the city ordinances and asked him to enjoin

Mr. Spangler from going ahead with this, called his attention to the fact that the deed to this property contained a clause with reference to all the easements that went with the conveyance of the property and that we were interested in those easements and that we wanted Mr. Spangler prevented from closing up the alley way and closing up our windows.

Q. And what did Mr. Meyer say to that? A. Well, he said that he would consult his attorney about it and in a later conversation I asked him what he had done and he said he had consulted his attorney and the attorney advised him not to enjoin Mr. Spangler from completing this work, but to bring an action for damages after he had completed it.

Q. Did you make any reply to it? A. I did.

Q. What was your reply? A. I said to him that if he brought an action for damages that he must bring that action in the name of our corporation, our company, that we were the interested parties; it was our intention to exercise our option to buy the premises in due time and that we would be the injured parties.

Q. How often were you in the habit of going to the garage? A. I generally went down on Saturday afternoon. I usually went home from the city by way of Orange, take my Saturday lunch with my son and spend a portion of the afternoon at the garage.

Q. On any of these occasions, your visits on Saturday, did you see Mr. Meyer there? A. Oh, yes; he was there several times, numerous times.

Q. And what can you tell me as to the signs on the building? A. Well, I can tell you a good deal.

I thought for one thing that my son spent to much money on signs.

Q. Well, what were they? A. And we talked about them—Well, there were signs, there was a gold letter sign on the office window and a large black wooden sign with gold letters running almost the full width of the building, which is fifty feet.

The Court: What was the name on the sign?

Q. What name was on the long sign? A. "Orange Hudson Co"—"Orange Hudson, Inc." rather.

Q. Was that sign ever changed? A. Oh, yes.

Q. What was on that long sign, then? A. "Orange Motors, Inc."

Q. Mr. Dye, I am going to show you some envelopes addressed to Mr. John J. Meyer, two of them in pen and ink. Whose handwriting is this one? Who addressed it? A. I would say that is my son's handwriting. It looks bad enough to be his.

Q. And this other one, do you recognize that handwriting? A. Yes; I would say that is the same.

Q. And the third is typewritten? A. Yes.

Q. Now, on this one that I first showed you, there is a registry stamp?

Mr. McGlynn: If the Court please, I cannot see the relevancy of this proof. There is no question in our case that they sent us a written notice to exercise the option. It doesn't make any difference. We got one. There is no question about it.

(Discussion.)

The Witness: Those envelopes were not opened.

The Court: What is that?

The Witness: They were returned.

Q. They were returned? A. They were returned unopened.

Mr. Hood: I would like to have them marked for identification, if I may.

(Envelopes marked C-7, 8, 9, for Identification.)

Q. Now, after having returned to you the envelope which has the registry stamp of the Postal Department on it with the number "7125 return receipt requested"—after receiving that back, do you recall forwarding a check to Mr. Meyer with a notation on it? A. Yes, sir.

Q. Was that check forwarded to Mr. Meyer by you? A. Yes, sir, as a company, I think I did not do it personally.

Q. How did it come back to you? Who brought it back to you?

Mr. McGlynn: I cannot see the relevancy of this proof, may it please the Court.

A. The postman.

The Court: I cannot, either.

Mr. Hood: Simply, if your Honor will permit me, I want to prove that check which came back had a certain notation on it.

The Court: All right.

Mr. Hood: And for the purpose of showing knowledge on the part of Mr. Meyer.

The Court: All right.

Mr. McGlynn: Where is the check?

Mr. Hood: Have you that check?

Mr. McGlynn: He never cashed it. I don't see how he can—I don't see why you waste so much time about it.

The Court: Of course, if he did not accept the check, it would be a self-serving declaration.

The Witness: The check may be in one of these unopened envelopes.

Q. I show you this check number 4676 on the Savings Investment & Trust Company dated June the 6th, 1927; is that the check with reference to which you are testifying came back to you? A. Yes, sir; yes, sir.

Q. Who brought that check back to you? A. A young man. I don't—

Mr. McGlynn: What is that?

Mr. Hood: A young man.

Q. Do you recall a Mr. Donner? A. Mr. Donner, that is the gentlemen.

Q. Who was Mr. Donner? A. Well, I don't know that, except—(interrupted).

Mr. McGlynn: I don't see why we should be bound by somebody's action when even Mr. Dye does not know who he was.

The Court: As long as this check was not accepted and cashed, I cannot see this evidence at all. It is a self-serving declaration it seems to me.

Mr. Hood: It is my purpose, may it please the Court, to prove the admissibility of this check, because it was received and turned over to counsel, Mr. McGlynn, with a letter I have in connection with it, and I think

by reason of that fact, the reason for its return, that it is competent to prove knowledge.

Mr. McGlynn: It is after the controversy started, may it please the Court.

The Court: Absolutely unevidential, in my opinion.

(Discussion.)

Mr. Hood: Your Honor rules against me.

The Court: No. I will allow it in over Mr. McGlynn's objection. Let Mr. McGlynn's objection be noted on the record.

Mr. McGlynn: A further objection; it is my letter. I do not see why my client should be bound by what I say.

The Court: All right; let that go in.

Q. Is this check, number 4676, June 6, 1927, the check that you had forwarded and was enclosed in this letter of Mr. McGlynn dated July 9, 1927? A. Yes, sir.

Q. And I show you an envelope sent by special delivery, registered mail, with a card of Stein, McGlynn & Hannoch in the left hand corner and post marked June 10, 1927. Can you tell me from your recollection whether that was the envelope in which that check was returned?

Mr. McGlynn: I will say yes, Mr. Hood, to save time; it is my letter, my envelope and the check was enclosed in it.

Mr. Hood: We offer those three in evidence.

The Court: I will receive them, if it is admitted that the check was not cashed, was not accepted. That is admitted, isn't it?

Mr. Hood: It is admitted.

The Court: Yes. Very well; what does it say on the back of it.

Mr. Hood: Let me have it and I will read it to the Vice-Chancellor.

The Court: Read it into the record.

Mr. Hood: The check says, "Mr. J. J. Meyer. We give you this formal notice that we exercise our option to purchase the premises at 494 Main Street, East Orange, New Jersey, in accord with our lease contract with you and demand deed in accord therewith, twenty days from date hereof, June the 6th, 1927, Orange Motors, Inc. H. H. Dye, Secretary & Treasurer."

The Court: All right; let that be read into the record.

Mr. Hood: Shall I read the letter into the record?

The Court: No; I don't think it is necessary, but that proves, if it proves anything at all, that the contention of Mr. Dye was at that time denied and resisted by Mr. Meyer. That is all that proves, if anything.

Mr. Hood: You may cross examine.

Cross examination by Mr. McGlynn:

Q. Mr. Dye—

Mr. McGlynn: No questions.

The Court: That is all, sir.

Mr. Hood: Mr. McGlynn consents that this letter of May the 25th, 1927, be offered in evidence.

(Letter of May 25, 1927, read.)

May 25, 1927

Mr. J. J. Meyer,
Prospect Avenue,
West Orange, N. J.

Dear Sir:

This is to advise you that Orange Motors, Inc. formerly the Orange Hudson Company, is now ready to exercise its option to purchase the premises at 494 Main Street, East Orange, N. J. in accordance with the terms provided in the lease granted by you under which we have been occupying the premises for the past several years.

Will you please promptly advise when you will be prepared to deliver the deed and oblige,

Yours very truly,

J. O. DYE,
General Adjuster

Mr. Hood: We rest.
Mr. McGlynn: Mr. Hanlon.

FRANK J. HANLON, sworn for defendant.

Direct examination by Mr. McGlynn:

Q. Mr. Hanlon, you are connected with the Standard Oil Company? A. Yes, sir.

Q What capacity? A. District Manager of West Orange.

Q. And have been for how long? A. Well, I have been at West Orange for nineteen years, but I have been connected with the company for thirty-five years.

Q. I see. And under your jurisdiction was this property at 494 Main Street, East Orange—did it come under your district? A. Yes, it does.

Q. Have you produced here under subpoena served on you certain papers? A. Yes; I have produced those.

Q. Yes. Now, I understand that your company has installed on these premises certain tanks for oil and gasoline? A. We had tanks installed for gasoline and it is customary—

Mr. Hood: I object.

A. (Continuing)—when we install tanks—

Mr. Hood: I object to the custom.

The Court: Just the facts.

Q. In connection with the installation of your tanks, did you present a written agreement to the first tenant, Gabrowitz and Schlenger, with regard to the removal of those tanks, and so forth? A. No, no, not to the removal.

Q. This agreement— A. Well, that is for the signing of the—

Q. Yes. For the installation of it. A. Yes, we did.

Q. And did you request the then tenant to secure the consent of the landlord to that agreement? A. Yes, we did. The landlord's signature is on it.

Mr. Hood: I object. I don't see how that is binding on the complainant.

Mr. McGlynn: We will connect it up very shortly.

The Court: I will allow it.

Q. You say the landlord, Mr. Meyer, did consent

to that? A. We sent to the owner the agreement made with Schlenger.

Q. And Gabrowitz? A. And Gabrowitz.

Q. Now, did you also prepare one for Dye and Schnepp? A. Yes, we did.

Q. I show you that paper and ask you if you requested the consent of the landlord to that agreement and did you get this? A. Yes, we did. We did and he signed it.

Q. And he signed it. Now, did somebody bring to your attention the fact that there was a change in the agency thereafter from Dye and Schnepp? A. Yes, he did.

Q. And did you request the then tenant, the Orange Hudson Company, to get the consent of Mr. Meyer to that same agreement? A. Yes.

Q. And did they obtain that consent? A. No. Meyer refused to sign it.

Cross examination by Mr. Hood:

Q. Did you present the request—did you present that request personally? A. No, the—one of our salesmen presented it.

Q. So what you know about it is what the salesman told you? A. Yes; there is a letter attached to this agreement dated June the 23rd, 1923. If you will allow me, I would like to make a little explanation in connection with our agreement. It does not pertain to the case, I do not think, Judge.

The Court: Well, then, do not.

Q. Let me see that. A. There is a letter here.

Q. Did you continue to deliver oil there? A. Yes.

Q. And for how long thereafter, after you say Mr. Meyer did not consent? A. Oh, we delivered it up until just very recently.

Q. And who paid you? A. Well, while it was under the Orange Hudson, I presume Mr. Dye paid for it.

Q. Well, no, do you recall whose check it was? A. Oh, no. I wouldn't know that.

Q. And when it was under the name "Orange Motors, Inc." do you recall whose check you received? A. No. You see, they had (interrupted)—

Q. You have answered the question. A. Yes.

Q. But you do know the place was operated for a time under Orange Hudson Co.? A. Yes, I do.

Q. And you do know it was operated under the name Orange Motors, Inc. A. Yes, I do.

Examined by Mr. McGlynn:

Q. And Mr. Meyer would not consent to the arrangement of either the Orange Motors or Orange Hudson Co? A. No, he would not sign the agreement.

Examined by Mr. Hood:

Q. But you say this agreement was presented to Mr. Meyer? A. For his signature.

Q. For his signature. A. Yes.

Q. And the agreement is made out to the Orange Hudson Co.? A. Yes.

Q. And the subsequent agreement is made out to Orange Motors, Inc.? A. Yes, sir. We presented them, as you know, for the property signature.

Q. Yes. And that Mr. Meyer did not sign. Did you take them to Mr. Meyer? A. No, I can't say

whether I took them or whether one of my salesmen took them.

Q. Then all you know of Mr. Meyer's position or contention in the matter is what you were told? A. Exactly.

Q. By your salesman? A. Yes, sir.

Q. I see.

Mr. Hood: I move that is incompetent and should be stricken out.

The Witness: There is a letter there (interrupted)—

The Court: Wait a minute.

Witness: Excuse me.

The Court: I will receive these things in evidence and then the contract will speak for itself.

(Papers marked Exhibit D-1.)

Mr. McGlynn: Agreement of December 22, 1920.

The Witness: Gabrowitz and Schlenger.

Mr. McGlynn: The next is March 1st, 1922, Dye and Schnepp.

(Paper marked Exhibit D-2.)

Mr. McGlynn: January 30, 1924, Orange Motors, May 3, 1923, Orange Hudson Co.

(Two papers marked Exhibit D-3 and D-4.)

EDWARD R. McGLYNN, sworn.

The Witness: On June 22nd, 1927, I wrote to Mr. Charles Hood a letter with respect to this case. May I have the original, Mr. Hood, or can I read from the carbon?

Mr. Hood: Yes, you can read it; it is all right.

The Witness: "My dear Mr. Hood: I have a note from my client, Mr. Meyer, and I am wondering if it would be too much for me to ask you for a copy of the lease containing the option under which you sent me your recent notice, also the assignment by the various lessees? It is difficult for me to understand my client's letter, but I gather that I should see or have a copy of the lease so that I can intelligently answer his questions."

On July 5th I received a letter from Mr. Hood in which he says, "I find that the lease on property occupied by the Orange Motors, Inc. was made by J. J. Meyer and Harriet K. Meyer, his wife, to Max Gabrowitz and Alex Schlenger and was recorded on March 26th, 1923, in Book W-67 of Deeds for Essex County on Pages 359-360, and in this recorded lease, the option to purchase is set forth.

Schlenger and Gabrowitz assigned this lease to Joe O. Dye, Hanford A. Dye and Charles F. Schnepp on February 24, 1922, and John J. Meyer joined in the assignment.

Joseph O. Dye, Charles F. Schnepp and Hanford A. Dye organized a corporation on the fifth day of March, 1923, known as Orange Hudson Co. and on or about the 31st day of December, 1923, Orange Hudson Co. changed its corporate name to Orange Motors, Inc., which succeeded Orange Hudson Co.

The original lease was dated May 1st, 1920 and terminated on May 1st, 1923, and contained the privilege of renewal for a term of five years from May 1st, 1923.

Prior to May 1st, 1923, the Gabrowitz and Schlenger had sold out to the Orange Hudson Co., and on April 7th, 1923, Orange Hudson Co., in writing, notified Mr. Meyer that they exercised the right to the renewal of the lease, and has accepted the rent.

I trust that upon your examination of the document that you will be in a position to advise Mr. Meyer that we are within our rights in asking him for a conveyance of the premises as provided in the option."

I replied on July 8th: "I have read carefully your letter of July 5th and have also looked at the recorded lease at the Court House, and I wish you would inform me whether there is any other assignment of the lease in existence other than the one from Schlenger and Gabrowitz to Joe O. Dye, Hanford A. Dye and Charles F. Schnepp.

I do not seem to find among my client's papers, nor at the Court House, any assignment to the Orange Hudson Company or to the Orange Motors, Inc., either of the above named corporations. I would appreciate it if you would let me have a copy of the assignment and I think I will then be in a position to properly advise my client as to what action he is to take. I will also be able to tell you his decision."

On July 12th I again wrote Mr. Hood: "I was wondering if you had advised your client to pay the July rent, as I have not heard from the agent. If not, will you see that the rent is paid? I am still waiting to hear from you in reply to my last letter."

On July 13th I wrote Mr. Hood again: "I beg to acknowledge receipt of your letter of July 12th enclosing copy of the notice with regard to renewal of lease in the above matter.

I notice that the notice in addition to being signed by the three individuals to whom the lease was assigned by Gabrowitz and Schlenger, was also signed by the Orange Hudson Company. I understand the Orange Motors, Inc. is the same corporation, formerly known as the Orange Hudson Company, but I would like to have a copy of the assignment from the three individuals to either the Orange Hudson Company or the Orange Motors, Inc., or, if there is no assignment, if the lease was taken by some form of corporation minutes or resolution, please let me have copy of same."

I received Mr. Hood's letter dated July 13th, "Attention: Mr. McGlynn. In re: Orange Motors. I am in receipt of your letter and will comply with your request promptly."

There has been no more correspondence except in regard to the filing of the bill, and so forth.

The Court: Well, is it a fact that there was no assignment from these three individuals to either one of these corporations?

The Witness: I have never seen one until today, when Mr. Hood placed in evidence a paper which purports to be, from my examination of it,—of course, I don't know how your Honor would look at it—I would call it a bill of sale from the three indi-

viduals to this newly organized corporation. There is no assignment of a lease that I have seen yet. I don't know the Exhibit number of that. Mr. Hood can tell us.

Mr. Hood: The exhibit number has not been marked.

Mr. McGlynn: I would like to have it marked.

(Paper marked Exhibit C-10.)

JOHN J. MEYER, sworn for defendant.

Direct examination by Mr. McGlynn:

Q. Mr. Meyer, you are the defendant in this case. A. Yes, sir.

Q. And the owner of the property at 494 Main Street, East Orange? A. Yes, sir.

Q. Did you at any time consent to an assignment of the lease covering your property from Hanford Dye, Joseph Dye and Charles Schnepp to anyone, either individually or a corporation? A. Yes; the lease was transferred from Gabrowitz and Schlenger.

Q. Well, that is that. A. To Dye, Schnepp and Dye.

Q. Now after that consent that you made— A. Yes.

Q. —from Gabrowitz and Schlenger to the two Mr. Dyes and Schnepp, did you ever consent to any assignment after that? A. No.

Q. Did either one of the Mr. Dyes ever request of you to consent to an assignment of the lease? A. Yes, Mr. Dye, Sr. did.

Q. What did you tell them? A. I told them no.

Q. And did you thereafter have any knowledge that there had been any transfer of this lease? A. No, sir.

Q. You consented, of course, to a renewal of the lease from 1923 for five years, as provided in the lease. A. Yes, sir.

Q. And at the request of Mr. Dye. A. Mr. Dye wrote me a letter that they were going to continue with the lease for the other five years.

Q. Outside of that did you consent to any assignment or transfer or any change in the interest— A. None whatsoever.

Q. —of that property? Did you have any knowledge that any business was being conducted in that property by any corporation? A. No.

Q. You, of course, saw the signs on the front of the building. A. Yes, sir.

Q. And you, of course, saw these checks which came to you in payment of the rent. A. Yes, sir.

Q. Outside of seeing that name or seeing the name on the checks, did you have any other knowledge with regard to the actual fact of the corporation? A. No.

The Court: Now, there have been some contracts introduced in evidence here for a gasoline station.

The Witness: Yes.

The Court: Now, you consented to two, didn't you?

The Witness: Well, only from Gabrowitz and Schlenger.

The Court: Now, there was one presented from who?

Mr. Hood: Orange Hudson Co.

The Court: Orange Hudson Co. Inc., and

another from the Orange Motors, Inc. Did you sign them?

The Witness: No, sir.

The Court: Why?

The Witness: Why, I did not acknowledge them as my tenants.

The Court: I see. And those things were presented to you?

The Witness: Well, they wasn't presented to me. Mr. Hanlon only asked me that he had these here for me to sign.

The Court: And you said you would not sign them?

The Witness: Positively no.

Cross examination by Mr. Hood:

Q. And you did know that the Orange Hudson Company and the Orange Motors, Inc. were the two Dyes and Mr. (interrupted)— A. No, I did not.

Q. You saw them around there. A. Not particularly, no.

Q. You saw them around there. A. Oh, I seen them. Of course, I knew Mr. Dye was my tenant.

Q. You went into the place frequently. A. Not frequently, no.

Q. You had your cars repaired there. A. Well, I did, yes.

Q. And you were billed by the Orange Hudson Co., or the Orange Motors, Inc., weren't you? A. Well, I don't remember that whether I (interrupted)—

Q. You don't remember that, but you saw this one sign on the front of the building, the large sign covering the front of the building, "Orange

Motors, Inc." and "Orange Hudson Co."? A. I didn't look at that.

Q. (Continuing.) In black and gold letters? A. You see signs all over.

Q. But you did look at the agreement which Mr. Hanlon gave you to sign as to the consent of the Standard Oil to permit their tanks to remain, which were made out to Orange Motors, Inc., and Orange Hudson, Inc.? A. I didn't look at the agreement, no. He asked me to transfer them and I said no.

Q. Transfer them to whom? A. Well, I didn't ask that. I says (interrupted)—

Q. You mean to tell this Court that you simply said you would not consent to signing, that you would not sign them without looking for a reason why you should not consent to it? A. Well, he did ask me to sign over to another company. He says, "We want to transfer this to another company" and I said—

Q. Well—

Mr. McGlynn: Wait a minute. Let him answer.

The Witness: I said, "No, I will sign no more," that I had signed too much already.

Q. You saw the contract? A. No, I didn't see the—

Q. You knew the company that was operating was the Orange Hudson Company and Orange Motors, Inc.? A. No.

Q. You saw the signs, didn't you? A. Well, the signs may be true, yes.

Q. You saw the checks, fifty-one of them, with the name, Orange Motors, Inc. on them. A. Yes.

Q. Signed by the secretary and treasurer. A. Yes.

Q. And didn't you associate these checks with a great big sign on the front of the garage? A. Not necessarily.

Q. Not necessarily. Did you or did you not? A. Well, I didn't look at them.

Q. Yes or no? A. As my tenants.

Q. Didn't you associate the name with the sign that ran across the front of the bulding, these checks of Orange Motors, Inc., which corresponded to the name across the front of the building on the big sign? Didn't you associate these checks with that sign? A. Well, that didn't—I—that didn't make any difference to me. All I cared for the checks, I wanted my money from the tenant and I didn't care as long as I got the money.

Q. I asked you whether you associated the name of these checks with the name on the front of the building. A. I never gave that a thought.

Q. You never gave that a thought? A. No, sir.

Q. Did you see the sign on the front of the building? A. I suppose I did. I didn't take—there were so many signs put on there, after I got out of the building (interrupted)—

Mr. Hood: That is all.

The Court: That is all.

CHURCH, V. C.:

The bill seems to be drawn on the theory that there was a specific assignment. Now that proof fell down, and as Mr. Lane said this morning in calling my attention to the pleadings, the fifth clause, the assignment to buy, and so on, was consented to by Mr. Meyer, but in the eighth clause he just simply says that they exercised the option of renewal, and so forth; and in the seventh clause

there is no suggestion in there that Mr. Meyer ever consented to the assignment, and that disposes of that.

Now, the only question left is whether or not there had been a ratification. I fail to see where there has been a ratification. All the testimony I have listened to since luncheon seems to indicate that Mr. Meyer did everything he could to indicate that he was not going to recognize anybody but these three individuals.

It is very easy for us all to understand that if he is dealing with three responsible individuals he has a much better chance to get his money than if he is dealing with a corporation, the assets of which are perhaps doubtful or certainly intangible.

As for the signs, they mean nothing. You might put a sign on the building, "The Welfare Company" and there might not be any such company at all and I think we all know that there are witnesses of that kind, "Jones, Brown and Smith are partners; they formed a company."

No, I don't think that I am at all justified in enforcing a decree of specific performance.

I will dismiss the bill.

Exhibit C-1.

DEED

A. FRANK SPANGLER *et ux*
TO
JOHN J. MEYER.

THIS INDENTURE, made the Fifteenth day of September, in the year of Our Lord One Thousand Nine Hundred and Sixteen, Between A. Frank Spangler and Laura B. Spangler, his wife, of the City of East Orange, in the County of Essex and State of New Jersey, of the first part; And John J. Meyer, of the City of East Orange, in the County of Essex and State of New Jersey, of the second part: Witnesseth, that the said party of the first party, for and in consideration of the sum of One Dollar, and other valuable consideration, 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 certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of East Orange, in the County of Essex and State of New Jersey:

(Describes premises in question)

Recorded September 15th, 1916 in Book B-58 of Deeds for Essex County, N. J., pages 118-120.

Exhibit C-2.

LEASE

J. J. MEYER, *et ux*
AND
MAX GABROWITZ *et al*

THIS INDENTURE OF LEASE, made this Thirteenth day of April in the year One Thousand Nine Hundred Twenty BETWEEN J. J. Meyer & Harriet K. Meyer (his wife) of the City of West Orange, in the County of Essex and State of New Jersey party of the First Part: AND Max Gabrowitz & Alex Schlenger of the City of Newark in the County of Essex and State of New Jersey party of the Second Part; WITNESSETH, That the said party of the First Part, have agreed to let, and hereby do demise and let, and the said party of the Second Part have agreed to take, and hereby do take——. Known as No. 494 Main Street, in East Orange, New Jersey, for the term of three years commencing the first day of May 1920 and ending the first day of May 1923, at 10 o'clock in the forenoon of that day, at the yearly rent of Five thousand two hundred Dollars, to be paid in equal monthly payments of Four hundred thirty-three dollars and thirty-four cents ($433.34) payable on the first day of each month. THIS LEASE is upon the following conditions and covenants, all and every of which the said party of the Second Part agree to perform and keep. That they will pay the rent at the times aforesaid, and will not let, sell, under-let or assign the premises, or any part thereof, and they will not use them, nor permit any part thereof to be used, for any other business or purpose than a Public Garage nor for any business or purpose extra-hazardous, without the written consent of the party of the First Part, themselves, their heirs, assigns, agents or attorneys.

AND will permit the said party of the First part or their agent to enter the said premises at reasonable hours in the day time, to examine or to make such repairs and alterations therein as shall be necessary for the preservation thereof; the party
10a of the First Part not being bounden, however, to make any repairs unless it be elsewhere in this Lease expressly so agreed and will permit the said party of the First Part to exhibit the premises after—to persons, and to put and maintain notices "To Let" or "For Sale" on the walls thereof; and if the premises, or any part thereof, shall become vacant or deserted during the said term, will permit the party of the First Part, or their agent to re-enter without being liable to any prosecution
20a thereof, and re-let the same and receive and apply the rent, first, to the payment of the expense of re-entering and then to the payment of the rent due by these presents; and will preserve the said premises and quit and surrender them at the expiration of said term in as good condition as reasonable use and wear thereof will permit, damages by the elements excepted. AND it is agreed that upon the breach of any of said covenants or conditions, the party of the Second Part shall forfeit
30a said term, and the party of the First Part may, at their option, re-enter and recover immediate possession of said premises, and shall also have an action for all damages arising from such breach. AND the said party of the Second Part doth further agree to pay all the water rates assessed upon said property during said term as additional rent, payment to be made promptly when said water rents fall due and before any penalties or interest are
40a chargeable thereon, and if the party of the Second Part fails herein, the party of the First Part may pay the same and recover the same on demand or evict the said party of the Second Part as in other cases of non-payment of rent. This lease in accordance with a certain contract between parties hereto. Party of the second part to have the

privilege of renewal for a term of five (5) years from May 1st, 1923 at the yearly rental of Five Thousand four hundred dollars ($5400.)

It is expressly agreed by the parties hereto that the parties of the second part their heirs and assigns shall have the option to purchase the premises herein demised during the term of said demise, or renewal thereof as herein provided, for the sum of Fifty Five Thousand ($55,000.) Dollars, and the parties of the first part hereby agree in the event that the parties of the second part exercising said option to purchase said premises, being the parcel of land having a frontage of fifty feet and a depth of approximately two hundred and ninety feet that they said parties of first part will convey said premises by deed of warranty free from all encumbrances. In the event that the building upon said premises shall be damaged or destroyed by fire at any time before said premises are conveyed by said parties of first part to parties of second part, and the parties of second part, their heirs or assigns shall have availed themselves of said option to purchase, then and in that event the monies collected on the policies of insurance shall be credited upon the purchase price hereinabove mentioned.

10b

20b

30b

In Witness Whereof, the parties hereto have set their hands in duplicate, the day and year first above written.

J. J. Meyer Seal

Alex Schlenger Seal
his
Max X Gabrowitz Seal
mark

40b

Signed, Sealed and Delivered
in the presence of
Charles Hood as to
Max Gabrowitz and
Alex Schlenger

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

BE IT REMEMBERED, That on this thirteenth day of April, Nineteen Hundred and Twenty, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Max Gabrowitz & Alex Schlenger, who, I am satisfied are the lessees of the within lease named, 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.

CHARLES HOOD,
Master in Chancery of New Jersey.

February 24, 1922.

I hereby assign the within Lease to Joe. O. Dye, Hanford A. Dye and Charles F. Schnepp, for the sum of Four Hundred ($400.) Dollars.

JOHN J. MEYER

We hereby assign the within Lease to Joe O. Dye, Hanford A. Dye and Charles F. Schnepp.

Witness.
CHARLES HOOD

ALEX SCHLENGER
his
MAX X GABROWITZ
mark
Witness as to Mark Charles Hood.

Received in the Office March 26th, A. D. 1923 at 3:11 P. M. No. 53

Exhibit C-3.

Certificate of Incorporation of Orange Hudson Co., dated Feb. 28, 1923, received in the Clerk's Office of the County of Essex March 5, 1923, and recorded in Book 81 of Incorporation of Business Co.'s and filed in the office of the Secretary of State on the 6th day of March, 1923.

Exhibit C-4.

Certificate of Amendment of Orange Hudson Co., filed and recorded in the office of the Secretary of State on January 16, 1924, changing the name of Orange Hudson Co. to Orange Motors, Inc.

Exhibit C-5.

Exhibit No. 5 consists of 50 checks made by Orange Motors, Inc., to the order of John J. Meyer in payment of the monthly rent, each check being for $450 and each bearing successive monthly dates and all of which are of the same tenor as the following and are endorsed by John J. Meyer or J. J. Meyer:

Orange Motors, Inc.
494 Main Street

No. 1515

East Orange, N. J. Feb. 4, 1924

Pay to the
order of
J. J. Meyer $450.xx
Four Hundred Fifty .....Dollars

H. A. Dye
Secretary & Treasurer

To Savings Investment & Trust Company
of East Orange
East Orange, N. J.

Endorsed: J. J. Meyer

The remaining 50 rent checks are dated as follows:

March	26, 1924,	$450.	Apr.	10, 1926,	$450.
April	1, 1924,	450.	May	10, 1926,	450.
April	5, 1924,	450.	June	22, 1926,	450.
June	2, 1924,	450.	July	15, 1926,	450.
July	7, 1924,	450.	Aug.	2, 1926,	450.
Aug.	12, 1924,	450.	Sept.	, 1926,	450.
Sept.	8, 1924,	450.	Oct.	4, 1926,	450.
Oct.	6, 1924,	450.	Nov.	8, 1926,	450.
Nov.	14, 1924,	450.	Nov.	30, 1926,	450.
Dec.	3, 1924,	450.	Jan.	4, 1927,	450.
Jan.	5, 1925,	450.	Jan.	31, 1927,	450.
Feb.	10, 1925,	450.	Feb.	28, 1927,	450.
Mar.	10, 1925,	450.	Apr.	1, 1927,	450.
April	6, 1925,	450.	May	3, 1927,	450.
May	15, 1925,	450.	June	15, 1927,	450.
June	1, 1925,	450.	July	6, 1927,	450.
July	1, 1925,	450.	Aug.	6, 1927,	450.
Aug.	1, 1925,	450.	Aug.	29, 1927,	450.
Sept.	2, 1925,	450.	Sept.	28, 1927,	450.
Oct.	1, 1925,	450.	Oct.	26, 1927,	450.
Nov.	10, 1925,	450.	Nov.	29, 1927,	450.
Nov.	30, 1925,	450.	Jan.	3, 1928,	450.
Jan.	4, 1926,	450.	Feb.	3, 1928,	450.
Feb.	10, 1926,	450.	Mar.	1, 1928,	450.
Mar.	9, 1926,	450.	Apr.	1, 1928,	450.

Exhibit C-6.

(Duplicate)

To JOHN J. MEYER.

Dear Sir:—

This is to notify you that we hereby exercise our right to the option of renewal of lease on premises described in lease made by John J. Meyer to Max Gabrowitz and Alex Schlenger, which lease was assigned to us on February 24th 1922, by John J. Meyer, Alex Schlenger and Max Gabrowitz, the said lease, with the assignments endorsed thereon,

having been recorded in the office of the Register of Essex County on March 26th 1923. The terms of the renewal are set forth in the aforesaid lease, with provision of the right to purchase said premises.

(Signed) J. O. DYE L. S.
(Signed) H. A. DYE, L. S.
(Signed) CHAS. F. SCHNEPP, L. S.

WITNESS:

.....

ORANGE HUDSON CO.
(Signed) By: J. O. DYE,
President

Attest: H. A. DYE,
Secretary

Dated April 7th 1923.

I hereby acknowledge receipt of the above notice wherein Joseph O. Dye, Charles F. Schnepp, and Hanford A. Dye and Orange Hudson Co. have exercised an option of renewal contained in said lease, and hereby consent to the renewal of said lease, pursuant to the terms thereof.

(Signed) J. J. MEYER

Exhibit C-7.

(Envelope)

ORANGE MOTORS INC.
OAKLAND
Sales and Service
494 Main Street East Orange, N. J.

20c. canceled postage stamp
(Cancellation stamp illegible)

Mr. J. J. Meyer,
Propect Avenue,
West Orange,
N. J.

Stamped on face:

52078
Registered
No. 7125
Return Receipt Requested
Returned to Writer
From Orange, N. J.

Stamped and crossed out:

30449

Written on face:

Traveling
No add
Rural

Exhibits.

Exhibit C-8.

(Envelope)

ORANGE MOTORS INC.
OAKLAND
Sales and Service
494 Main Street East Orange, N. J.

2c canceled postage stamp

Cancellation stamp:

East Orange N. J.
May 31 1927 11 PM

Mr. John J. Meyer
Prospect Ave.,
West Orange, N. J.

Stamped on face:

Returned to Writer
From Orange, N. J.
Moved, Left no address.

Written on face:

Rem
Add unknown
Rural

Exhibit C-9.

(Envelope)

Registered Mail
Return Receipt Demanded
This letter to bear Registration No. F6223

J. O. Dye Care
GREAT AMERICAN
INSURANCE COMPANY
New York
Incorporated—1872
Home Office, One Liberty Street
New York City, N. Y.

20c. canceled postage stamp

Cancellation stamp:

Wall Street Station N. Y.

Mr. J. J. Meyer,
Propect Avenue,
West Orange, N. J.

Stamped on face:

30300

Written on face:

J J Meyer
on a trip

Exhibit C-10.

THIS AGREEMENT, made this twenty-eighth day of March, 1923, by and between JOSEPH O. DYE, CHARLES F. SCHNEPP and HANFORD A. DYE, partners, trading under the firm name of MAIN GARAGE, of the City of East Orange (hereinafter called the "Vendors"), of the first part, and ORANGE HUDSON CO., a Corporation organized under the laws of the State of New Jersey (hereinafter called the "Company") of the second part:

WHEREAS, the vendors for some time past have been carrying on the business of automobile repairing and garage under the name or style of "MAIN GARAGE" in the City of East Orange, and are the joint proprietors of such business and of the property hereinafter described; and

WHEREAS, the Company has been duly organized with an authorized capital stock of twenty five hundred (2,500) shares of stock without any nominal or par value, of which there have been issued thus far to Joseph O. Dye 470 shares, Hanford A. Dye 29 shares and Charles F. Schnepp 1 share; and

WHEREAS, under the above stated date, to wit, the twenty-eighth day of March, the Board of Directors had a meeting and by resolution determined and fixed the value of the respective shares of stock so issued at Fifty Dollars per share; and

WHEREAS, the Directors of the Company have ascertained, adjudged and declared that the property hereinafter described is of the fair value of Twenty Five Thousand Dollars ($25,000) including the lease of said premises, with the right of renewal thereunder, together with the option to pur-

chase the premises, and that the purchase thereof by the Company is necessary to enable it to carry out its objects, as set forth in its Certificate of Incorporation;

NOW THEREFORE, THIS AGREEMENT WITNESSETH:

I. That the vendors have sold and the company has purchased:

First. The good will of the aforesaid business and the lease of the premises where the same is carried on.

Second. All moneys, bills, notes and negotiable instruments and securities for money, book and other debts and choses in action, and all contracts and agreements to which the vendors are entitled in relation to the said business; all books of account, papers and documents relating to such business; all merchandise, stock in trade, materials, supplies, machinery, tools, designs, patterns, fixtures, office furniture and all other property and effects of every nature and description owned and used by the vendors in relation to the said business, and wheresoever situated.

II. In part consideration of such sale, the company hereby agrees to undertake, pay, satisfy and discharge all the lawful debts and liabilities of the vendors in relation to the said business, and to indemnify the vendors and their several heirs, executors, administrators, estates and effects against all actions, claims and demands in respect thereof.

III. As the balance of the consideration for the said sale, the company hereby agrees to issue to the vendors, as hereinafter specified, certificates of

full paid stock of the company to the aggregate amount of five hundred (500) shares.

IV. Such shares of stock shall be allotted as follows: To Joseph O. Dye, 470 shares, Hanford A. Dye, 29 shares and Charles F. Schnepp 1 share.

V. Said shares of stock shall be deemed to be and are hereby declared to be full paid shares and not liable to any further call, and the holders of such stocks shall not be liable to any further payment thereon.

VI. The delivery of certificates for such shares to the above named parties and their respective receipts for the same, shall be a full discharge of each of the parties hereto to the extent thereof. It is understood and agreed that the shares subscribed by the incorporators, as evidenced by the certificate of incorporation, are intended as the shares provided for in the preceding paragraph.

VII. The vendors jointly and severally covenant and agree with the company that they are the lawful owners of the property hereby agreed to be sold; that the same is free from all incumbrances; that they have good right to sell the same, and that they will warrant and defend the same against the lawful claims and demands of all persons.

VIII. The vendors further jointly and severally covenant and agree that they will, from time to time, at the request and cost of the company, execute and do all such further instruments, assurances and things as shall reasonably be required by the company to vest in it the property hereby agreed to be sold, and to give to it the full benefit of this agreement.

IX. Such sale shall take effect on the second day of April, 1923, whereupon possession of the tangible property above mentioned shall be delivered to the company, and on or after which day certificates of stock shall be issued as hereinabove provided.

IN WITNESS WHEREOF, the vendors have hereunto set their hands and seals and the company has caused this instrument to be signed in its behalf by its President, and its corporate seal to be hereunto affixed and attested by its Secretary, the day and year first above written.

J. O. DYE (Seal)
H. A. DYE (Seal)
C. F. SCHNEPP (Seal)

ORANGE HUDSON CO.
BY: J. O. DYE
President

(Seal)

J. M. CONWAY
Delivered in the
presence of:
Signed, Sealed and

[SEAL
ORANGE HUDSON CO
1923
NEW JERSEY
INCORPORATED]

ATTEST:

H. A. DYE
Secretary.

Schedule.

Machinery, tools, parts, as per detailed inventory on file in the office of MAIN GARAGE, and which is to be taken and deemed as part hereof, as the same appears under date of March 28th, 1923; also wrecking car and other shop equipment, tires, accessories, leasehold, option of renewal and option of purchase of premises $25,000.00

J. O. DYE.
H. A. DYE.
C. F. SCHNEPP.

Witness:

N. H. GEREHINS.

Exhibit D-1.

550 Tank	Change in name
T-59 pump	Was
2 T-57	Main Garage, Inc.

MEMORANDUM OF AGREEMENT

AGREEMENT, made this third day of May, 1923, between STANDARD OIL COMPANY OF NEW JERSEY, a Delaware corporation, party of the first part, and Orange Hudson Company of the city of East Orange in the County of Essex and State of New Jersey, party of the second part.

WHEREAS, the party of the second part is now purchasing petroleum products from the party of the first part and has requested the party of the first part to install equipment on the premises situ-

ated at 494 Main Street in the city of East Orange in the County of Essex and State of New Jersey for the better storage and handling of petroleum products so purchased; and

WHEREAS, in compliance with said request, the party of the first part is about to place upon the said premises of the party of the second part One Underground Gasoline Storage Tank & One Gilbert & Barker Self-Measuring Pump, Complete for storage and handling of Gasoline only. Two Portable Tanks with Self-Measuring Pumps for Gasoline.

Terms of Contract omitted by Consent of Counsel.

IN WITNESS WHEREOF, the said parties have caused these presents to be duly executed the day and year first above written.

STANDARD OIL COMPANY OF NEW JERSEY.
By F. J. HANLON,
District Manager.

ORANGE HUDSON CO., INC.,
H. A. DYE, Secy. & Treas.

.....
Address

Witness:

C. E. HERMEY.

Witness:

FRED M. BERRY.

The undersigned, being the owner of the above mentioned premises occupied by the party of the second part to the above agreement, hereby consents to the placing of the equipment therein mentioned on such premises and agrees with the party

of the first part that the title thereto shall remain in such party of the first part during the time such equipment shall remain upon the said premises under the terms of this agreement, any renewal or assignment thereof or under the terms of any other agreement with the party of the second part or with any other parties, and that it may remove said equipment from such premises whenever it desires to do so.

.....

.....

Address

Witness:

.....

For Property Owners Signature see Agreement on File #8724.

Exhibit D-2.

550 Tank
T-99 Pump
2 T-57

Change in proprietor, was
Alexander Schlenger &
Max Gabrowitz

MEMORANDUM OF AGREEMENT

AGREEMENT, made this first day of March 1922, between STANDARD OIL COMPANY OF NEW JERSEY, a Delaware corporation, party of the first part, and The Main Garage (Dye & Schnepp) of the city of East Orange in the County of Essex and State of New Jersey party of the second part.

WHEREAS, the party of the second part is now purchasing petroleum products from the party of the first part and has requested the party of the first part to install equipment on the premises sit-

uated at 494 Main Street in the city of East Orange in the County of Essex and State of New Jersey for the better storage and handling of petroleum products so purchased; and

WHEREAS, in compliance with said request, the party of the first part is about to place upon the said premises of the party of the second part One Underground Gasoline Storage Tank and one Gilbert & Barker Self-measuring Pump Complete for storage and handling of Gasoline only. Two Portable Tanks with Self-measuring Pumps for storage and handling of Gasoline only.

Terms of Contract omitted by Consent of Counsel.

IN WITNESS WHEREOF, the said parties have caused these presents to be duly executed the day and year first above written.

STANDARD OIL COMPANY OF NEW JERSEY

By

S. B. FARNUM
Asst. District Manager
THE MAIN GARAGE

DYE & SCHNEPP
Per H. A. DYE
Address

Witness:

R. B. M. TAYLOR

Witness:

FRANK J. HANLON

The undersigned, being the owner of the above mentioned premises occupied by the party of the

second part to the above agreement, hereby consents to the placing of the equipment therein mentioned on such premises and agrees with the party of the first part that the title thereto shall remain in such party of the first part during the time such equipment shall remain upon the said premises under the terms of this agreement, any renewal or assignment thereof or under the terms of any other agreement with the party of the second part or with any other parties, and that it may remove said equipment from such premises whenever it desires to do so.

J. J. MEYER
Address Prospect Avenue
West Orange, N. J.

Witness:

FRANK J. HANLON

Exhibit D-3.

550 Tank
T-99 Pump

MEMORANDUM OF AGREEMENT

AGREEMENT, made this twenty-second day of December 1920, between STANDARD OIL COMPANY OF NEW JERSEY, a Delaware corporation, party of the first part, and Main Garage (Max Gabrowitz & Alexander Schlenger) of the city of East Orange in the County of Essex and State of New Jersey party of the second part.

WHEREAS, the party of the second part is now purchasing petroleum products from the party of the first part and has requested the party of the first part to install equipment on the premises sit-

uated at 494 Main Street in the city of East Orange in the County of Essex and State of New Jersey for the better storage and handing of petroleum products so purchased; and

WHEREAS, in compliance with said request, the party of the first part is about to place upon the said premises of the party of the second part One Underground Gasoline Storage Tank and One Gilbert & Barker Self-measuring Pump Complete for storage and handling of Gasoline only.

Terms of Contract omitted by Consent of Counsel.

IN WITNESS WHEREOF, the said parties have caused these presents to be duly executed the day and year first above written.

STANDARD OIL COMPANY OF NEW JERSEY

By

J. A. VAN WYNEN
District Manager

MAIN GARAGE

MAX GABROWITZ
ALEX SCHLENGER Mgr.

.....
Address

Witness:

W. HERMEY

Witness:

FRANK J. HANLON

The undersigned, being the owner of the above mentioned premises occupied by the party of the second part to the above agreement, hereby con-

sents to the placing of the equipment therein mentioned on such premises and agrees with the party of the first part that the title thereto shall remain in such party of the first part during the time such equipment shall remain upon the said premises under the terms of this agreement, any renewal or assignment thereof or under the terms of any other agreement with the party of the second part or with any other parties, and that it may remove said equipment from such premises whenever it desires to do so.

J. J. MEYER
Address Pleasant Valley Way
West Orange, N. J.

Witness:

FRANK J. HANLON

Exhibit D-4.

555 Tank
T-99 Pump
2 T-57

If a Replacement Specify Equipment to be Returned.....
If Change of Owner or Location Specify Former Owner or Location x

Change in name
Was Orange Hudson Co.
Same Props,
Same Address.

MEMORANDUM OF AGREEMENT

AGREEMENT, made this Thirtieth day of January 1924, between STANDARD OIL COMPANY OF NEW JERSEY, a Delaware corporation, party of the first part,

and Orange Motors, Inc. of the city of East Orange in the County of Essex and State of New Jersey party of the second part.

WHEREAS, the party of the second part is now purchasing petroleum products from the party of the first part and has requested the party of the first part to install equipment on the premises situated at 494 Main Street in the city of East Orange in the County of Essex and State of New Jersey for the better storage and handling of petroleum products so purchased; and

WHEREAS, in compliance with said request, the party of the first part is about to place upon the said premises of the party of the second part One Underground Gasoline Storage Tank and One Gilbert & Barker Self-Measuring Pump, Complete for storage and handling of Gasoline only. Two Portable Storage Tanks for storage and handling of Gasoline only.

Terms of Contract omitted by Consent of Counsel.

IN WITNESS WHEREOF, the said parties have caused these presents to be duly executed the day and year first above written.

STANDARD OIL COMPANY OF NEW JERSEY

By

F. J. HANLON
District Manager

ORANGE MOTORS, INC.
H. A. DYE, Sec'y.

.....

Address

Witness:

J. F. McGREEVY

Witness:

F. M. BERRY

The undersigned, being the owner of the above mentioned premises occupied by the party of the second part to the above agreement, hereby consents to the placing of the equipment therein mentioned on such premises and agrees with the party of the first part that the title thereto shall remain in such party of the first part during the time such equipment shall remain upon the said premises under the terms of this agreement, any renewal or assignment thereof or under the terms of any other agreement with the party of the second part or with any other parties, and that it may remove said equipment from such premises whenever it desires to do so.

.....

.....

Address

Witness:

.....

New Jersey Court of Errors and Appeals

Between

ORANGE MOTORS, INC., a corporation of New Jersey,
Complainant-Appellant,

and

JOHN J. MEYER,
Defendant-Respondent.

On Appeal from the Court of Chancery.

Brief for Complainant-Appellant.

History of the Case.

On April 13, 1920, John J. Meyer, the defendant-respondent, executed a lease with Alex Schlenger and Max Gabrowitz at a stipulated rent for the term of three years beginning May 1, 1920, and terminating May 1, 1923, of the garage building located at No. 494 Main Street, East Orange, New Jersey. This lease contained an option of renewal for a term of five years from May 1, 1923, at an annual rental therein contained, and also contained an option of purchase of said premises for the sum of $55,000.00, in cash, free from all encumbrances. The lease also contained the following provision: "That the party of the second part (lessees) will not let, sell, under-let or assign the premises or any part thereof * * * without the written consent of the party of the first part (lessors), themselves, their heirs, assigns, agents

or attorneys." And also the following covenant: "And it is agreed that upon the breach of any of said covenants or conditions, the party of the second part shall forfeit said term, and the party of the first part may, at their option, re-enter and recover immediate possession of said premises and shall also have an action for all damages arising from such breach." Less than two years thereafter on February 25, 1922, and before the expiration of the original term of the lease, the lessees, Schlenger and Gabrowitz, sold out their business to Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp and executed an assignment of said lease to them, to which assignment the said John J. Meyer, the defendant-respondent, consented in writing. On February 28, 1923, and before the expiration of the original term of the lease, the aforesaid Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp, the assignees under the lease by virtue of the assignment consented to by John J. Meyer, the defendant-respondent, organized a corporation known as the Orange Hudson Co. and continued in possession of the demised premises to the expiration of the original term of the lease, May 1, 1923. However, on April 7, 1923, three weeks before the expiration of the original term of the lease, the assignees of the lease, the two Dyes and Schnepp, who became the assignees of the lease under the written consent of John J. Meyer, the defendant-respondent, organized a corporation under the name of Orange Hudson Co., and a few days after the organization of the corporation notified John J. Meyer, the defendant-respondent, in writing, that they exercised the option of renewal of the lease. This notice was signed by Orange Hudson Co., the two Dyes and Schnepp, and the receipt of this notice by John J. Meyer, the de-

fendant-respondent, was acknowledged by him and consent to the renewal of the lease given by him in writing. At the time of the organization of the Orange Hudson Co., the two Dyes and Schnepp who had become the assignees of the original lease by the written consent of John J. Meyer, the defendant-respondent, executed an agreement with Orange Hudson Co. wherein they sold to the Orange Hudson Co. all the personal property contained in the garage and also the good-will of the business and the lease of the premises.

Beginning May 1, 1923, Orange Hudson Co. continued in possession of the demised premises under the renewal term of the lease and for about nine months thereafter John J. Meyer, the defendant-respondent, accepted checks each month from the Orange Hudson Co. in payment of the rent. The Orange Hudson Co. then changed its corporate name to Orange Motors, Inc., and the company, under this new name continued in possession of the premises until the expiration of the renewal term of the lease, to wit, May 1, 1928, paying the rent monthly to the said John J. Meyer, the defendant-respondent, by checks upon which the name of Orange Motors, Inc. was printed and the signature of Hanford A. Dye as Secretary and Treasurer appeared. In short, Orange Hudson Co. were tenants of the defendant-respondent, under the original lease from February 23rd, 1923, to January 16, 1924, when the corporate name of the company was changed to Orange Motors, Inc., and as such continued as tenants to the end of the renewal period, to wit, January 16, 1924, to May 1st, 1928.

Before the expiration of the renewal term of the lease and at divers times prior to its expiration, Orange Motors, Inc., in writing, notified John J.

Meyer, the defendant-respondent, that it desired to avail itself of the option of purchase of the premises, requested the delivery of deed for the same and advised the said John J. Meyer, the defendant-respondent, that it was ready to pay the consideration price in cash for the property at a specified time, which deed the said John J. Meyer, the defendant-respondent, refused to deliver. The refusal of the said John J. Meyer, the defendant-respondent, to deliver a deed for the premises as provided in the option of purchase contained in the lease impelled the complainant-appellant to file a bill for specific performance in the Court of Chancery and upon final hearing before the Honorable ALONZO CHURCH, Vice-Chancellor, the bill of complaint was dismissed. From this finding this appeal is taken.

The points involved in this appeal are:

POINT I.

The Court should have found that the defendant John J. Meyer did consent to the assignment of the lease from Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp to the Orange Hudson Co., the corporate name of which was later changed to Orange Motors, Inc, the complainant, because the pleadings and proof show that on or about April 7, 1923, the defendant, John J. Meyer, did acknowledge receipt of a notice of the exercise of the option of renewal of the lease in question, which lease contained the option to purchase the demised premises and which notice was signed by Joseph O. Dye, Hanford A. Dye, Charles F. Schnepp and Orange Hudson Co.; and that the said John J. Meyer did consent in writing to the renewal of said lease.

POINT II.

It appearing from the proof that the defendant had accepted monthly checks from the complainant for more than four years after such notice of renewal and that a sign with complainant's corporate name extended across the entire width of the building (about 50 feet), the Court should have found that the defendant had knowledge of the assignment of the lease with the option of purchase to the complainant, and that such knowledge constituted a ratification of the assignment of the lease and a waiver of the provision of forfeiture contained in the lease as to assignment without the written consent of the landlord, John J. Meyer.

POINT III.

The Court should have found that the condition against assignment of the lease without the written consent of the landlord that was contained in the lease was a single condition, was discharged, terminated and extinguished because the defendant, John J. Meyer, had consented in writing to the assignment of the lease and the option to purchase from Max Gabrowitz and Alex Schlenger, the original lessees, to Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp and that the said defendant, John J. Meyer, by said written consent has thereby surrendered his right to exercise further control of said lease and option to purchase and could not thereafter prohibit any further assignments of the said lease and option to purchase.

Consideration of the respective grounds of appeal will now be taken up in detail:

POINT I.

The Court should have found that the defendant John J. Meyer did consent to the assignment of the lease from Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp to the Orange Hudson Co., the corporate name of which was later changed to Orange Motors, Inc., the complainant, because the pleadings and proof show that on or about April 7, 1923, the defendant, John J. Meyer, did acknowledge receipt of a notice of the exercise of the option of renewal of the lease in question, which lease contained the option to purchase the demised premises and which notice was signed by Joseph O. Dye, Hanford A. Dye, Charles F. Schnepp and Orange Hudson Co.; and that the said John J. Meyer did consent in writing to the renewal of said lease.

The written notice of the renewal of the option for a term of five years, as provided in the lease, the receipt of which was acknowledged in writing by John J. Meyer, the defendant-respondent, and wherein the said John J. Meyer also consented to such renewal was signed not only by the two Dyes and Schnepp, but also by the Orange Hudson Co., and was in no way misleading (see Exhibit C-6, State of Case, p. 104). It clearly indicated that Orange Hudson Co., which corporate name embodied the name of a well-known automobile, was concerned or involved in the occupancy of the premises. The names of the two Dyes and of Schnepp indicated their association with the new corporation. It was notice to Meyer, the landlord, that a tenant other than the original tenant was concerned in exercising the renewal of the option for a further term of years. The landlord could

not close his eyes to the fact that the notice of renewal contained a name other than the name or names of the tenant with whom he had had the prior relationship of landlord and tenant. It must necessarily have aroused some suspicion in his mind of the existence of an interest in the renewal of the lease by a new party. It suggested to the landlord that the new party in the transaction, the body corporate, was made up of those who had been his tenants under the original assignment of the lease from Schlenger and Gabrowitz, and to which the landlord had consented.

Undoubtedly the relationship between the landlord and the two Dyes and Schnepp, the tenants, had been so satisfactory that it was immaterial to the landlord whether the three individuals continued in their individual identity or had associated themselves into a body corporate. Meyer shows his indifference in the following testimony:

> "Q. Didn't you associate the name with sign that ran across the front of the building, these checks of Orange Motors, Inc., which corresponded to the name across the front of the building on the big sign? Didn't you associate these checks with that sign? A. Well, that didn't—I—that didn't make any difference to me. All I cared for the checks, I wanted my money from the tenant and I didn't care as long as I got the money" (see State of Case, p. 98, lines 11-22).

Under the corporate name of Orange Hudson Co., the business continued to be carried on by the same individuals. The rent was paid monthly, and nine months after the notice of the renewal of option, the corporation changed its corporate name from Orange Hudson Co. to Orange Motors, Inc. (see Exhibit C-4, State of Case, p. 103). Thereafter, and until May, 1928, a period of four years

and two months, the landlord received monthly checks for the rent, upon which checks was printed the corporate name "Orange Motors, Inc." and the checks bore the signature of the secretary and treasurer of the company (see Exhibit C-5, State of Case, p. 103). So that each month, for a period in excess of four years, it was brought home to the landlord the fact of the existence of the Orange Motors, Inc., not only by the checks of the corporation, but by extensive signs covering the front of the leased premises which Meyer, the landlord, admits existed as he quite frequently, during that period, visited the premises in question (see State of Case, p. 97, lines 36-41; see State of Case, p. 98, lines 11-22).

It is submitted that the landlord, having accepted such notice of renewal and consenting thereto, and having accepted the monthly rent for a long period of time, and not having availed himself of the forfeiture clause in the lease (see State of Case, p. 101a, lines 27a-33a), and having neglected or having failed to institute suit to dispossess the tenant by reason of the forfeiture clause in the lease, waived his rights under the forfeiture clause and is estopped from challenging the right of the original assignee to assign the lease to the Orange Hudson Co., which the latter did by virtue of an agreement (Exhibit C-10, p. 110, lines 13-14-15).

POINT II.

It appearing from the proof that the defendant had accepted monthly checks from the complainant for more than four years after such notice of renewal and that a sign with complainant's corporate name extended across the entire width of the building (about 50 feet), the Court should have found that the defendant had knowledge of the assignment

of the lease with the option of purchase to the complainant, and that such knowledge constituted a ratification of the assignment of the lease and a waiver of the provision of forfeiture contained in the lease as to assignment without the written consent of the landlord, John J. Meyer.

Fifty checks, covering a period of four years and two months subsequent to the date of the alleged breach, namely, the assignment by Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp to the Orange Hudson Co., to wit, March 28, 1923, each and every check being made by the Orange Motors, Inc., were accepted and endorsed by John J. Meyer or J. J. Meyer (see Exhibit C-5, State of Case, p. 103). Such acceptance by the landlord constituted a waiver of the breach of condition of non-assignment.

See:

Levy v. *Blackmore*, 67 Atl. Rept. 1022;
Commercial Trust Co. v. *Wertheim Coal Co.*, 88 N. J. E. 143;
Garbarine v. *Read*, 95 N. J. E. 495;
Brower v. *Brd. of Commrs. Asbury Park*, 6 N. J. Adv. Repts. p. 1253 (1928);
Lincoln Furniture Co. v. *Bornstein*, 100 N. J. E. 78, affirmed in 5 N. J. Adv. Repts. 501.

In the *Lincoln Furniture Co.* case above cited, the learned Vice-Chancellor on page 81 said: "To maintain the bill (the bill in this case was filed by the tenant in danger of being ousted by the landlord to restrain the dispossess proceedings instituted by the landlord for the breach of covenant), the complainant must satisfactorily establish that the defendant with knowledge of the assignment, accepted the rent from the assignee"; and on page

83 near the bottom of the page the learned Vice-Chancellor said: "The display of corporate activities was no doubt sufficient to put them (landlords) on notice, but such notice is not knowledge and they were under no legal duty to inquire into and be informed of the facts, and it is inferable that had they inquired of the interested parties they would not have been told the truth."

Apparently two things prompted the learned Court in finding that Bornstein, the defendant in the case, *supra,* had no knowledge of the assignment and they were: First, the fact that Bornstein immediately instituted dispossess proceedings against the tenant in possession, when he learned that the checks in payment of the rent were being signed by a party other than the one from whom he was accustomed to receive the rent; secondly, that if Bornstein had made inquiry as to who controlled the demised premises, they would not have told him the truth.

These two facts do not appear in the case at issue. Had Meyer been interested in who his tenants were in the premises in question, and if he would have inquired, he would have undoubtedly been told that the Orange Motors, Inc., was in possession by virtue of an assignment from the two Dyes and Schnepp. The complainant did not hide the fact that it was rightfully in possession. Its name occupied conspicuous places on its checks, on a large sign in the front of the building, on their office doors and on all of their stationery. The defendant was fully aware of the fact as to who his tenants were. He admits that he saw the large sign hanging in the front of the building with the same name on it that appeared on the checks he received in payment of his rent (see State of Case, p. 97, lines 36-41):

"Q. You saw the signs, didn't you? A. Well, the signs may be true, yes.

"Q. You saw the checks, fifty-one of them, with the name Orange Motors, Inc., on them? A. Yes.

"Q. Signed by the Secretary and Treasurer? A. Yes."

The defendant Meyer knew that his original tenants or their assignees were no longer in control of the demised premises for he acknowledged receipt of a notice of renewal which was signed not only by the two Dyes and Schnepp, but also by Orange Hudson Co. (see Exhibit C-6, State of Case, p. 104).

A further fact which shows that Meyer knew of the presence of the complainant in the demised premises was his refusal to sign the agreements between the Standard Oil Company and the tenant, Orange Hudson Company, (see Exhibit D-1, State of Case, p. 113), and the Orange Motors, Inc. (see Exhibit D-4, State of Case, p. 119). These contracts were dated May 3, 1923, and January 30, 1924, almost five years before the expiration of the renewal term of the lease which Meyer had consented to. Yet, notwithstanding the fact that the covenant not to assign the lease without the consent of the owner, which was entered into between the defendant and Max Gabrowitz and Alex Schlenger (see Exhibit C-2, State of Case, p. 101), was broken, the defendant continued to accept the rent with knowledge of said breach of condition and thereby waived the aforesaid breach.

Still a further fact which shows that the defendant-respondent had knowledge of the assignment of the lease from the two Dyes and Schnepp to the Orange Hudson Co., whose name was later changed to the Orange Motors, Inc., was the discussion between the landlord and Joe O. Dye as

to proceedings to be instituted by the landlord in relation to an easement for light and air which existed and which was being cut off by reason of the erection of a wall on the adjoining property and the necessity of preserving that easement as its destruction would considerably affect the demised premises. It was then that Joseph O. Dye, president of the Orange Motors, Inc., informed Meyer that if an action for damages were brought against the adjoining land-owner, it would have to be instituted in the corporate name because the corporation was an interested party to the proceedings, inasmuch as it was their intention to exercise the option to purchase the premises in due time and that the corporation would ultimately be the injured party (see State of Case, p. 79, lines 22-40, p. 80, lines 1-30).

The aforementioned facts, namely, the checks drawn by the Orange Motors, Inc. for a period of fifty months and endorsed by the defendant-respondent; the sign across the entire front of the leased premises, having on it "Orange Motors, Inc." which sign Meyer admits he saw; the acknowledgment by Meyer of receipt of a notice of renewal signed by the Dyes, Schnepp and also Orange Hudson Co.; the refusal of Meyer to sign the agreements between the Standard Oil Co. and his tenant, the Orange Motors, Inc.; the discussion between Meyer and Joseph O. Dye pertaining to the suit against the adjoining land-owner; are not merely facts and circumstances from which tacit knowledge of the assignment is or can be imputed as a matter of law, but are such facts and circumstances which rightfully and unequivocally indicate actual knowledge on the part of the defendant-respondent of the assignment from the Dyes and Schnepp to the Orange Hudson Co.

The rule laid down in *Levy* v. *Blackmore*, 67 Atl. Rep. 1022, clearly enunciates the law applicable in cases where the landlord accepts rent after a breach of covenant. The Court said "But even conceding the position of the landlord, and conceding that the tenant did violate the covenant, and conceding still further that the violation operated as a forfeiture and that due notice was given thereof and everything done by the landlord to conserve what he thought were his rights, it still appears that the landlord has accepted the rent from the beginning of the lease down to the present time. This operates as a waiver of any forfeiture which may have been incurred during that period."

The defendant's knowledge of the assignment and his continued apparent indifference as to who occupied the premises, which indifference and knowledge lasted throughout the entire term of the lease cannot be set up now by him in an effort to defeat the complainant's right to specific performance. On the contrary the defendant by his failure to act after his discovery of the breach, is now estopped from setting up his true intentions as against the complainant.

See:

Bridgewater v. *Ocean City Ass'n*, 85 N. J. E. 379; affirmed in 88 N. J. E. 351;
Trout v. *Lucas*, 54 N. J. E. 361;
Sumner v. *Seaton*, 47 N. J. E. 103;
Crandall v. *Graham*, 93 N. J. E. 675.

POINT III.

The Court should have found that the condition against assignment of the lease without the written consent of the landlord that was contained in the lease was a single condition, was discharged, terminated and extinguished because the defendant, John J. Meyer, had consented in writing to the assignment of the lease and the option to purchase from Max Gabrowitz and Alex Schlenger, the original lessees, to Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp and that the said defendant, John J. Meyer, by said written consent has thereby surrendered his right to exercise further control over any subsequent assignments of said lease and option to purchase and could not thereafter prohibit any further assignments of the said lease and option to purchase.

The facts are undisputed. We have a lease containing a covenant against assignment without the consent of the landlord (see Exhibit C-2, State of Case, p. 101). There is an assignment by the tenant of the entire remaining term to a third party with the consent of the landlord (see Exhibit C-2, State of Case, p. 102, lines 21-34). What is the legal effect of such assignment and consent?

The question as to effect to be given a consent by a lessor to an assignment by his lessee on the right to make subsequent assignments first arose in England in 1578. *Dumpor's Case* (1578) 4 Coke, 119b, 76 Eng. Reprint, 1110, 1 *Smith, Lead. Cas.* 11th ed. 32.

In that case it was held that a condition in a lease that the lessee or his assigns should not alien without the special license of the lessors was determined by an alienation by license, so that no subsequent alienation was a breach of the condition. The ground of that decision was stated to be that, the lessors having licensed the lessee to alien, "they

should never defeat, by force of the said proviso, the term which is absolutely aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent; so, if the lessors dispense with one alienation, they thereby dispense with all alienations after; for, inasmuch as by force of the lessor's license, and of the lessee's assignment, the estate and interest of Tubbe (the first assignee) was absolute, it is not possible that his assignee, who has his estate and interest, shall be subject to the first condition."

Though it is no longer the law of England, having been repealed by 22 and 23 Vict. chap. 35 para. 1-3, the doctrine of *Dumpor's Case* has been recognized in the United States, where it is generally held that, where there is a condition in a lease against the assignment of the term without the consent of the lessor, and such consent is given without any restrictions as to future assignments, the condition is waived altogether, and the assignee may reassign the term without the consent of the lessor:

Chipman v. *Emeric* (1855), 5 Cal. 49, 63 Am. Dec. 80;

German-American Sav. Bank v. *Gollmer* (1909), 155 Cal. 683, 24 L. R. A. (N. S.) 1066, 102 Pac. 932;

Reid v. *John F. Weissner Brewing Co.* (1898), 88 Md. 234, 40 Atl. 877;

Pennock v. *Lyons* (1875), 118 Mass. 92;

Siefke v. *Koch* (1866), 31 How. Pr. (N. Y.) 383;

Heeter v. *Eckstein* (1874), 50 How. Pr. (N. Y.) 445;

Murray v. *Harway* (1874), 56 N. Y. 337;

Conger v. *Duryee* (1882), 80 N. Y. Rep. 594;

Fischer v. *Ginzburg* (1920), 191 App. Div. 418; 181 N. Y. Supp. 516;
Easley Coal Co. v. *Brush Creek Coal Co.* (1922), 91 W. Va. 291, 112 S. E. 512;
Aste v. *Putnam's Hotel Co.*, 141 N. E. (Mass.) 666.

Also see:

McGlynn v. *Moore* (1864), 25 Cal. 384;
Gannett v. *Albree* (1869), 103 Mass. 372;
Storms v. *Manhattan R. Co.* (1902), 77 App. Div. 94, 79 N. Y. Supp. 60, affirmed in (1904) 178 N. Y. 493, 66 L. R. A. 94, 71 N. E. 3;
Lynde v. *Hough* (1857), 27 Barb. (N. Y.) 415.

In *Easley Coal Co.* v. *Brush Creek Coal Co.* (1922), 91 W. Va. 291, 112 S. E. 512, it was said, referring to *Dumpor's Case,* that "It seems to be recognized as unimpeachable common law in all jurisdictions, and applied, in the absence of statutory repeal or modification thereof, when the condition and the terms and provisions of the assignment and consent are such as make it applicable, citing:

Dakin v. *Williams* (1837), 17 Wend. (N. Y.) 447;
Wertheimer v. *Hosmer* (1890), 83 Mich. 56, 47 N. W. 47;
Randol v. *Tatum* (1893), 98 Cal. 390, 33 Pac. 433;
Taylor, Land & T., Para. 410; 501;
McAdam, Land & T., Para. 241, 24 Cyc. 963, 16 R. C. L., p. 838, 18 *Am & Eng. Enc. Law,* 662 (e). There is an express recognition of it as law in *McKildow* v. *Darracott* (1856), 13 Gratt. (Va.) 278;
Daugherty v. *Matthews,* 35 Mo. 520.

However much there might be an inclination to dissent from it as an original proposition, if any at all, it is so well fortified in precedents and judicial opinion that its genuineness cannot be judicially denied nor its consequences avoided. Being a part of the common law, it is made effective here by the Constitution, and, there being no repugnance between it and the Constitutional provision, it must continue the law of the state until altered or repealed by the legislature."

Similarly, in *Reid* v. *John F. Weissner Brewing Co.* (1898), 88 Md. 234, 40 Atl. 877, it was held that an assignment by the lessee, with the consent of the lessor, without the superaddition of a restriction on subsequent assignments, waived forever the condition requiring the consent of the lessor. The Court said: "This principle was announced as early as the reign of Elizabeth, in Dumpor's Case (1578) 4 Coke, 1196 B, 76 Eng. Reprint 1110. While Sir James Mansfield observed the profession had always wondered at Dumpor's Case, still he held, in Doe *ex dem.* Boscawen *v.* Bliss (1813), 4 Taunt. 736, 128 Eng. Reprint 520, that the decision had 'been law so many centuries that it could not be reversed. Later decisions have carried the doctrine even farther than as applied in Dumpor's Case, or particularly as to one particular person subject to the performance of the covenants in the original lease, still the condition is gone in both instances, and the assignee may assign without license. Brummel *v.* MacPherson (1807), 14 Ves. Jr. 173, 33 Eng. Reprint 487; Taylor Land & T., Para. 410. The restriction having been waived by the lessor as to the assignment made by Miller, the lessee, the brewing company was not bound by that restrictive covenant, and consequently no assent on the part of the

lessor to the assignment by the brewing company to Jones was necessary; and such assent not being necessary, the assignment made without it was perfectly valid.' "

The rule was stated in *German-American Sav. Bank* v. *Gollmer* (1909), 135 Cal. 683, 24 L. R. A. (N. S.) 1066, 102 Pac. 902, as follows: "The assignee of a leasehold estate takes it subject to all the obligations imposed by the lease, except that, where there is a condition against assignment without consent (which is necessarily single in its nature), such condition is wholly discharged by the consent or waiver."

In *Fischer* v. *Ginzburg* (1920), 191 App. Div. 418; 181 N. Y. Sup. 516, it was held that a covenant against assignments is wholly discharged where a forfeiture arising from an assignment without consent is waived by the lessor.

In *Murray* v. *Harway,* 56 N. Y. 337, it was held that, where a lease contained a covenant that the lessee should not transfer or assign the same without the written consent of the lessors, followed by a provision for re-entry for breach of such covenant; and the lessors had waived the forfeiture arising from an assignment without their consent, the assignee had a good right to assign the lease again, the condition against assignment, once having been dispensed with, being dispensed with forever.

In *Pennock* v. *Lyons,* 118 Mass. 92, it was held that, where a lease contained a condition forbidding any assignment thereof without the consent of the lessors, and their consent had been obtained to an assignment, the assent of the lessors to a subsequent assignment was not necessary, because the condition in the lease which required it had been dispensed with by their consent to the first assignment, citing *Dumpor's Case.*

The rule laid down in *Dumpor's Case* has never been expressly or impliedly overruled in any of our New Jersey Courts. In *West Shore R. R. Co.* v. *Wenner*, 70 N. J. L. 233, (Ct. of Er. & Ap.), a case that dealt with sub-letting, DIXON, J., at page 240, after citing *Dumpor's Case*, ruled that *Dumpor's Case* did not apply to the case in question for here, a sub-letting was involved, whereas *Dumpor's Case* relates only to assignments of leases.

In *Miller, et al.* v. *Newton-Humphreville Co.*, 116 Atl. 325, Vice-Chancellor FOSTER ruled that as to sub-letting *Dumpor's* Case did not apply.

Thus we see that in our sister states, *Dumpor's Case* is still the law with reference to assignments of leases, and that *Dumpor's Case* has not been abrogated by any legislative enactments or judicial decisions in the State of New Jersey. We therefore conclude, that if the lessee assigns with the license of the lessor, the covenant against assigning is discharged and a subsequent assignment by the assignee is not a breach.

Therefore, for the above mentioned reasons, namely, that the defendant consented to the assignment of the lease from the original tenants to the Orange Hudson Co. due to the fact that defendant acknowledged receipt of and consented to the exercise of the option of renewal of the lease, by the Orange Hudson Co.; that the defendant with knowledge of the breach accepted the rent that accrued after such breach and thereby ratified the assignment of the lease and a waiver of the provisions of forfeiture contained in the lease as to assignment of the lease without the written consent of the landlord; that the condition against assignment was a single condition discharged, terminated and extinguished by the

consent of the landlord to the assignment of the lease and option to purchase from the original lessees to Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp; the Court should have granted the prayer in the said bill of complaint and should have ordered the defendant, John J. Meyer, to execute a warranty deed to the complainant, Orange Motors, Inc., a corporation of New Jersey, for the conveyance of the premises described in the bill of complaint.

Respectfully submitted,

CHARLES HOOD,
Solicitor for and of Counsel with
Complainant-Appellant.

New Jersey Court of Errors and Appeals

ORANGE MOTORS, INC., Complainant-Appellant, *and* JOHN J. MEYER, Defendant-Respondent.	No. 86 May Term 1929 On Briefs. On Appeal from Decree Denying Specific Performance. Sat below: Church, V.C.

(Italics, etc., ours except where otherwise noted.)

BRIEF FOR RESPONDENT.

Preliminary.

Appellant has stated the case as if no question of fact were involved, whereas, we submit, there is such confusion in the testimony offered by appellant as that it is not at all clear that appellant has title to the option to purchase, which the bill was filed to specifically enforce, and shows a deliberate attempt, by false testimony, to induce the Court to believe that, not only was there an assignment of the lease containing the option, together with the option, to appellant, but that there was a written consent of respondent to such assignment. Appellant argues under its Points 1 and 2, not only that respondent consented to the assignment of the lease to appellant, but also that he was charged with knowledge of such assignment by reason of his acceptance of checks of appellant for the rental, although it appears that, on June 22, 1927, counsel for respondent wrote counsel for appellant asking for a copy of the assignment of the lease, to which letter he received

a reply on July 5th, which not only did not enclose a copy of such assignment, but referred to the organization of the Orange Hudson Co. and its change of corporate name to Orange Motors, Inc., in such a way as to indicate that *there was no assignment,* to which letter counsel for respondent replied, on July 8th, specifically asking counsel for appellant to inform him whether any assignment to appellant was in existence, and, again, on July 12th, asking for a reply to his letter of July 8th, to which he received a reply, and he again wrote on July 13th, 1927, asking for a copy of such assignment, or, in the absence of such assignment, a copy of any minutes or resolution of the corporation referring thereto, to which he received a reply on July 13th, stating that his request would be complied with promptly, but it never was complied with. The bill was filed January 11th, 1928, and the agreement, Exhibit C-10 (p. 109), which is supposed to be the assignment, was produced at the trial during the examination of Joseph O. Dey, after he had stated that there was no such assignment (p. 39), under such circumstances as to cast great doubt upon it, to say the best.

The relief of specific performance is not a matter *ex debito justitiae;* the application is addressed to the extraordinary jurisdiction of a court of equity to be exercised according to its discretion; it will be granted only in cases where it is strictly equitable to make a decree; the relief rests, not upon what the Court must do, but, rather, in view of the circumstances, upon what it ought to do.

Brown v. *Brown,* 33 N. J. E. 650, at p. 655;

Blake v. *Flatley,* 44 N. J. E. 228, at p. 231;

Pyatt v. *Lyon,* 51 N. J. E. 308, at p. 314;

Ten Eyck v. *Manning,* 52 N. J. E. 47, at p. 49;
Brisbane v. *Sullivan,* 86 N. J. E. 411, and many other cases.

Before specific performance is granted the proof must be clear as to the right of complainant and there must not be any attempt to create a right by manufactured evidence.

In this case it does *not* clearly appear that any assignment ever was made to appellant and, if no such assignment was made, appellant was without right to exercise the option.

But the lease, which contained the option, provided that—"and will not let, sell, under-let or assign the premises, or any part thereof, and they will not use them, nor permit any part thereof to be used, * * * without the written consent of the party of the first part, *themselves, their heirs, assigns, agents or attorneys.*"

To meet this provision, appellant first attempted to prove that respondent had, in fact, consented, in writing, to the assignment and that the *paper was lost.* We are not as charitable as was the Vice-Chancellor in dealing with the testimony upon the existence of that paper when he said, on p. 74, that there was no such paper but that—"I do not doubt their (the witnesses') absolute sincerity, but I do not think that the testimony as to the existence of this so-called consent has been so proved under the cases that I am entitled to accept secondary evidence as to its contents."

On the contrary, we will argue that the testimony of these witnesses was false and we will point to many circumstances, aside from the testimony itself, to indicate its falseness and that it was designedly manufactured because of appellant's belief (and whether it was right or wrong is

of no consequence) that it was necessary to show the *written* consent of respondent.

Having failed to prove that written consent it now, under its Point III, relies upon the rule in *Dumpor's Case* (1578), 4 Coke, 119 b, 76 English Reprint 1110, which was followed, although discredited, in England until obliterated by statute and which has never been approved by this Court. We submit that a rule of which Sir James Manfield observed in 1813 in *Doe ex dem Boscawen* v. *Bliss,* 4 Taunt 736, 129 Eng. Reprint 520, that the profession had always wondered at it should not receive the consideration of this Court, with a view to a determination as to whether it should be determined to be the law of this State, except in a case where it is absolutely necessary that there should be such consideration, and we submit that the decree below was right wholly irrespective of any application of the rule in Dumpor's case.

The Facts and Argument Thereon.

The lease, which contained the option to purchase, was made April 13, 1920, by respondent and his wife to two individuals, Gabrowitz and Schlenger (Ex. C-2, p. 101); the premises were to be used exclusively for a public garage; on or about February 24th, 1922, Schlenger and Gabrowitz assigned the lease to Joseph O. Dey, Hanford A. Dey and Charles F. Schnepp, and on that date respondent executed an endorsement upon the lease reading as follows: "I hereby assign the within lease to Joe O. Dye, Hanford A. Dye and Charles F. Schnepp, for the sum of Four hundred ($400) dollars. (Signed) John J. Meyer" (p. 102).

The three assignees took over the business which had been operated by Schlenger and Gabrowitz

under the name of the Main Garage (see the agreement of December 22, 1920, between the Standard Oil Company of New Jersey and Main Garage [Max Gabrowitz and Alex Schlenger] Ex. D-3, pp. 117, 118). On March 6, 1923, the three assignees incorporated the Orange Hudson Co. and on January 16, 1924, the name of that company was changed to "Orange Motors, Inc." (pp. 102, 103).

The lease was for a term of three years ending May 1, 1923. On April 7, 1923, a notice of which Exhibit C-6, p. 104, is a duplicate, was served on respondent and he signed the acknowledgment of receipt, etc. (p. 105).

It will be noted that this notice of an election to exercise the option to renew the lease is first signed by the three individuals to whom the lease was assigned by the original lessees, Gabrowitz and Schlenger, on February 24, 1922. There is also attached the signature of the Orange Hudson Co., but in what capacity it signs does not appear. It is argued now that respondent should be charged with notice of the supposed assignment from the three individuals, Joseph O. Dey, Hanford A. Dey and Charles F. Schnepp, purporting to be dated March 28, 1923, Ex. C-10, p. 109, but the recitation in the notice is (p. 104)—"which lease was assigned *to us* on February 24th, 1922, by John J. Meyer, Alex Schlenger and Max Gabrowitz, *the said lease, with the assignments endorsed thereon, having been recorded in the Office of the Register of Essex County on March 26th, 1923.*"

Here is no notice that the lease had been assigned by the three individuals to the Orange Hudson Co. It is not now contended that the lease was assigned to the three individuals *and* the Orange Hudson Co. by the assignment of February 24th, 1922. On the contrary, that assignment, as was known to the lessees, was to the three individuals

(p. 102) and Orange Hudson Co. did not come into existence until March 6, 1923 (p. 102).

The statement is contained in the notice that "the said lease, *with the assignments endorsed thereon,* having been recorded in the office of the Register of Essex County on March 26th, 1923."

This is a clear assertion that whatever assignments there were of the lease *were endorsed on it and appeared of record.* No such assignment, as is indicated by Ex. C-10, p. 109, is endorsed upon the lease. The only assignment endorsed on it is that of February 24, 1922, to the individuals (p. 102).

Not only did this notice not convey any information to respondent that the lease had been assigned to the Orange Hudson Co., as now contended, but that the lessees should have, on April 7th, 1923, served a notice in the form of Ex. C-6, means either one of two things—(a) there was no such assignment as that indicated by Ex. C-10 (p. 109) which, according to its date, was executed but ten days before the service of the notice, the contents of which are inconsistent with its existence, or (b) the lessees desired to conceal from respondent the fact that there had been an assignment to the Orange Hudson Co. because they thought that an assignment, without his consent, which he had not given, would void the lease, and they desired to place themselves in such a position as that they could always claim, if respondent attempted to void the lease, that, as matter of fact, there had been no assignment, the law being that unless there be a legal assignment, there is no breach of the covenant of the lease.

On May 25, 1927, a letter was sent to respondent (p. 86) advising him "that Orange Motors, Inc., formerly the Orange Hudson Company, is now ready to exercise its option to purchase the

premises at 494 Main Street, East Orange, N. J., in accordance with the terms provided in the lease granted by you under which we have been occupying the premises for the past several years." That letter is signed "J. O. Dye", "General Adjuster".

It will be observed that, although on April 7, 1923, Ex. C-6, the notice of election to renew, was signed by the three individuals *and* then by Orange Hudson Co. (in what capacity does not appear), which was after full title to the lease had vested in the Orange Hudson Co., if the agreement of March 28, 1923, ever had any existence, and was carried out (Ex. C-10, p. 109), the notice of election to exercise the option to purchase was given only by the Orange Motors, Inc., formerly Orange Hudson Co.

On June 6th, 1927, Orange Motors, Inc., sent a check to respondent for the rent and endorsed on the check was the following:

> "Mr. J. J. Meyer. We give you this formal notice that we exercise our option to purchase the premises at 494 Main Street, East Orange, New Jersey, in accord with our lease contract with you and demand deed in accord therewith, twenty days from date hereof, June the 6th, 1927, Orange Motors, Inc., H. H. Dye, Secretary & Treasurer" (pp. 84, 85).

This is the election to exercise the option to purchase and the demand for a deed referred to in the Bill of Complaint, paragraph 11, p. 9.

That check was received by respondent and returned through his counsel, Stein, McGlynn and Hannoch to appellant without being cashed (pp. 84, 85).

It was thereafter that counsel for respondent attempted to get a copy of any assignment by the three individuals to Orange Motors, Inc., formerly

Orange Hudson Co. Not only was no copy of such an assignment sent to counsel for respondent but the replies of counsel for appellant are inconsistent with the existence of such an assignment (p. 91).

In the letter of June 22nd, 1927, counsel for respondent had asked counsel for appellant for a copy of the assignments. In reply counsel for appellant wrote the letter of July 5th which refers to the assignment of February 24, 1922, to the organization of the corporation known as the Orange Hudson Co. and the change of the corporate name to Orange Motors, Inc., and states that *Gabrowitz* and *Schlenger* prior to May 1, 1923, *sold to Orange Hudson Co.* and that the Orange Hudson Co. notified respondent that "they exercised the right to the renewal of the lease".

Gabrowitz and Schlenger did *not* sell to the Orange Hudson Co. On the contrary, they sold to the three individuals, Joseph O. Dye, Hanford A. Dye, and Charles F. Schnepp on February 24, 1922 (see assignment of lease, p. 102). But the agreement of March 28, 1923 (Ex. C-10), purports to be one by which Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp sold to Orange Hudson Co. This assignment is not referred to in the letter of counsel for appellant of July 5th, 1927. Why not? Either it had no existence at the time or its existence was concealed, the purpose of the letter of July 5th, 1927, being to convey the impression that, from the time Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp went into the business, i. e., February 24, 1922, it was the Orange Hudson Co. which was operating the business, or, in other words, that the individuals were trading *under the name of the Orange Hudson Co.* before the incorporation, for the corporation was not actually formed until March 6, 1923, and only

by assuming that they were trading *under the name of the Orange Hudson Co.* can the statement in the letter of counsel for appellant of July 5th, 1927, that Gabrowitz and Schlenger sold to the Orange Hudson Co. be justified.

Counsel for respondent was not satisfied with this letter and, on July 8th, replied asking counsel for appellant to inform him "whether there is any other assignment of the lease in existence other than the one from Schlenger and Gabrowitz to Joe O. Dye, Hanford A. Dye and Charles F. Schnepp". He states that he does not find among his client's papers, nor at the Court House, any assignment to the Orange Hudson Company or to the Orange Motors, Inc. He asks for a copy of any such assignment if it is in existence.

On July 12th he repeated his request, not having received a reply (p. 92).

Apparently, on July 12th, counsel for appellant sent to counsel for respondent a copy of the notice, Ex. C-6, p. 104, *i. e.*, the notice of the exercise of the privilege of renewal, for, on July 13th, counsel for respondent wrote counsel for appellant acknowledging receipt of a copy of such a notice and stating that he observed that it was signed not only by the three individuals, to whom the lease was assigned by Gabrowitz and Schlenger, but also by the Orange Hudson Company and "I understand the Orange Motors, Inc., is the same corporation, formerly known as the Orange Hudson Company, but I would like to have a copy of the assignment from the three individuals to either the Orange Hudson Company or the Orange Motors, Inc., or, if there is no assignment, if the lease was taken by some form of corporation minutes or resolution, please let me have copy of same."

To this counsel for appellant replied on July 13th that he would "comply with your request promptly."

The request was never complied with, and on January 11, 1928, six or seven months later, the bill for specific performance was filed (p. 6). It specifically charged (paragraph 5) the making of the assignment of the lease by Schlenger and Gabrowitz to the Dyes and Schnepp, and "to which assignment said John J. Meyer (respondent) consented."

It alleged, paragraph 7, that on the 28th day of March, 1923, the Dyes and Schnepp "by written agreement, duly assigned all their right, title and interest in and to the said lease, the renewal thereof and the option to purchase the said premises, to the Orange Hudson Co., a corporation aforesaid for a valuable consideration", but it failed to allege that the respondent consented to *this* assignment. The agreement which is referred to must be Exhibit C-10, p. 109.

The first witness called by appellant was Joseph O. Dye (p. 19), who was the president of appellant and appeared to have charge of the transaction, and appellant immediately started out to attempt to prove that respondent not only had notice of the assignment from the three individuals to Orange Hudson Co. but actually signed a consent in writing, which had been lost (pp. 19, 20). The witness states that about the time of the organization of the Orange Hudson Co. he had a conversation with respondent:

> "Q. What brought that about? A. Simply that we wished to have him know of the change and to have his consent. * * * That we have—now, I guess possibly I simply asked him to call at the garage, that I wanted to discuss the matter with him. I think that probably is the fact in this case" (p. 21).

No one heard the conversation. Respondent executed the paper (pp. 22, 23).

Counsel for appellant called for the production by respondent of "a copy of a consent and assignment from the two Dyes and Schnepp to the Orange Hudson Co. of the lease."

The reply being that no such document existed, appellant set out to prove that it had, and the original, which had been in the possession of appellant, had been lost (p. 23). The witness said that it had been put in a safe and that search had been made and it could not be located (p. 24).

On cross-examination (p. 24) the witness said that: he had seen the paper several times after its execution; on one occasion a gentleman called talking about buying the property and "my son and I got out the lease and this assignment *for the purpose of having it to show to him in case he asked for it*"; that occasion was shortly after the change in name to Orange Motors, Inc., in 1923 or 1924, and was the last occasion upon which he saw the paper (p. 24); it was then *with the lease* and returned to the safe; the papers were kept together; "there was the original lease *and this assignment.*"

The witness was then cross-examined as to how many papers there were in the package. He says that the assignment he had theretofore referred to was the "consent to our assigning the lease". His attention is then directed to the fact that there must have been an assignment to which a consent was given, and (p. 25):

> "Q. There was a lease, wasn't there? A. There was.
>
> Q. What other papers now—this consent and what else? A. *An assignment of the lease.*
>
> Q. To whom? A. From the partnership to the corporation.
>
> Q. Where is that assignment? A. *That is the paper I have been trying to tell you about —mislaid, lost somewhere I don't know.*"

He then denies (p. 26) that there were three papers, "the lease, the assignment from the partnership to the corporation and the consent to the assignment", and insists "there is a lease and a separate assignment on a separate sheet of paper from the lease", and he repeats *"that is the paper I am telling you I don't know where it is"*.

He is pressed (p. 26) and asked the whereabouts of the "actual assignment from the partnership to the corporation", and he replies, "That is the paper I am telling you *that has been lost"*, and he then says (p. 26):

> "Q. Then there is no separate consent? A. *It was all in the same paper.*
>
> Q. *It was all in the same paper?* A. *Yes, sir.*
>
> Q. Now, what date was this? A. The date was very late in February or early in March of 1923."

He says that he first discovered the loss when they concluded to serve notice on respondent of the desire to exercise the option to purchase in May or June, 1927, but that they did not have occasion to tell counsel until they found it necessary to bring the action, and he says that he did not have the paper when he first saw Mr. Hood, and:

> "A. No, we didn't have it at that time. That is, we didn't see it, didn't look for it.
>
> Q. Oh, you did not look for it then? A. No" (p. 27).

He says that the lease was kept in the safe and that, "Well, it was some time prior to our conclusion that we would exercise the option to purchase that we went to—or, at that time, we looked for these papers; we found the original lease and because of our inability *to find the assignment,*

we took the original lease and put it in my safety box at the bank for fear it would also be lost'' (p. 27).

He says that: there were other papers with the original lease at the time he went to look for that lease in connection with this transaction (p. 28):

> ''A. No. I think the only thing that we had there was the letter we addressed to Mr. Meyer, telling him that we would postpone the date of exercising, our option from 1923 until some time later. I think there was a letter of that kind in the correspondence, *may be.*
>
> Q. Have you that letter? A. No, I have not the letter.
>
> Q. Where is it? A. *Mislaid that letter to Mr. Meyer.''*

He states that as early as June, 1927, he knew that Mr. McGlynn, who represented respondent, had asked counsel for appellant for a copy of the assignment, and he says that he told his counsel that ''there had been a *written assignment''* but that *''he had lost it''* (p. 28).

If he had told counsel for appellant at that time that there had been an assignment of the lease, but that *it had been lost,* it is inconceivable that counsel for appellant would have written counsel for respondent as he did on July 5th, 1927 (p. 93). The attention of the witness is directed to these letters which do not mention the assignment and the contents of which are inconsistent with the existence of such an assignment, and he has no legitimate explanation (pp. 29, 30). On page 32 he states that counsel for appellant knew of the written assignment. He says (pp. 30, 31) that there was a written assignment of the lease to the corporation prior to April 7th, 1923, but cannot explain, if that were true, why, not only

the corporation, but the individuals signed the notice of the exercise of the option to renew the lease of April 7th, 1923 (Ex. C-6). He has no answer except out of "excessive caution" (p. 31), but was it also "excessive caution" which induced them to refer specifically, in the notice of April 7th, 1923, to an assignment of Gabrowitz and Schlenger of February 24th, 1922, to which respondent consented, and not to refer to the now claimed assignment of March 28th, 1923, Ex. 6-10, which appellant attempted to prove respondent consented to, in writing, the writing having been lost? The assignment and the consent certainly were not lost on April 7th, 1923, if they ever had any existence. We repeat the assignment did not have existence on that date, although it purports to be dated March 28th, 1923, Ex. C-10, p. 109, or they deliberately refrained from referring to it because *respondent had not consented to it* and for fear, if he was notified of it, he would claim a violation of the provision of the lease against assignment.

The witness says that the company has minute books and that the minute books were in court (pp. 32, 33). But they were not produced, and:

> "Q. Is there anything in those minute books with respect to the assignment of this lease? A. I don't recall that there is. I haven't them before me. I can't remember everything that is in those minute books. There is a resolution on the part of the Board of Directors, in all probability that we do renew the lease.
>
> Q. I am not talking about renew. I am talking about the assignment from the individuals of the corporation? A. Why, I wouldn't think so."

He is then asked (p. 33) whether there is anything in writing anywhere which refers to this assignment—

> "* * * anything at all in writing?"

and his reply was—

> "A. I believe I know of nothing except the copy which you had in your hand a minute ago or some such document."

This document was Exhibit C-6, p. 104, and does not refer either to the assignment or to the consent.

He repeats that, although he prepared for the case, he knows of nothing in writing either as to the assignment or as to the consent (p. 34).

Almost immediately after making this answer (p. 34) he says that there *is* in existence a formal assignment of the lease from the individuals to the corporation. His attention is directed to the fact that he had been examined for some considerable time and had stated time over and again that the assignment and the consent of respondent were *all on one paper* (p. 34) and that the assignment *and* the consent had been lost, and he finally says that the examining counsel had not specified what he was talking about. He has been in business for upwards of fifty-five years actively conducting business in New York, and knows the difference between an assignment and a consent to an assignment.

He changes his testimony (p. 35) and says that the assignment and the consent were *not* on the same paper, and that they were *not* all together, in the safe (p. 35), and that—

> "only the lease and the assignment of Mr. Meyer was in the safe.";

that the other papers were kept at home (p. 36). He then says that there were three papers in the safe, the lease, the assignment and the consent. It is almost impossible to comprehend his testimony on pp. 35, 36, 37, 38. At one time he says that there were but two papers in the safe, the lease and "the assignment of Mr. Meyer" (p. 35); then he says there were three, the lease, the assignment and the consent (p. 36); then he says that the assignment and the consent were "all on one paper" (p. 36). Then (p. 36)—

> "Q. Well, did Mr. Meyer execute two papers? A. No, no.
>
> Q. Only one? A. The assignment on the lease, and then later the assignment from the partnership to the corporation. Those were two. Those are the only ones we are talking about."

Then he says that both these consents were in the safe, one endorsed on the lease and the other a separate document, and that this consent to the assignment was *only one of the papers that were lost* and immediately after:

> "Q. What other papers were there there and lost? A. That was all."

And then, p. 37—

> "Q. And the assignment to the corporation was not there? A. *Yes, it was.*
>
> Q. Now, please think. The assignment by the individuals, Dye and others to the corporation— A. *Oh, no.*"

He can give no reason why the assignment was kept in a different place from the lease (p. 38) nor can he give any reason why respondent was asked to execute a separate paper and consent to the assignment "out of excessive caution, I sup-

pose", and then he says that it was not endorsed upon the lease because the lease was pretty well covered up and the next moment that endorsement upon the lease was never thought of. He does not know who drew this paper and (p. 38):

> "Q. Who drew it? A. I don't recall that: I don't recall whether Mr. Hood drew that or whether I drew it myself.
> Q. Typewritten? A. I can't answer that.
> Q. Typewritten? A. Yes; it was typewritten."

He finally says that counsel for appellant drew the assignment from the individuals to the corporation, which would be the document Ex. C-10, p. 10.

Immediately upon re-direct examination Ex. C-10 (p. 109) is presented to him by counsel for appellant, which is the first time there appeared either in the case or prior thereto a paper writing purporting to be an assignment from the individuals to the corporation and he says that that is the paper referred to "as an assignment" by the partnership to the corporation (p. 40) and then Exhibit C-6 (p. 104) is shown to him which is the notice of April 7, 1923, of the exercise of the option to renew and:

> "Q. Now, that paper, if you will please look at that and see whether that clears up in your mind what you referred to as the consent to an assignment and ask—by Mr. Meyer —and the assignment? A. *Yes; this is the paper* I referred to as being Mr. Meyer's consent to the assignment of this lease to the Orange Motors Co. under the renewal."

Of course, it was nothing of the kind, and then this testimony appears (p. 41):

"Q. Was there another consent by Mr. Meyer which has been lost? A. *No, sir.*
Q. There are no papers lost?

The Court: I do not— (the Court shakes his head negatively).

Q. Is that the paper that you have in mind as the consent of Mr. Meyer to the assignment of the lease? A. *The signed copy of that paper was lost, yes.*
Q. Oh, so that is the paper you had in mind, a signed copy of that paper is the paper you had in mind as Meyer's consent to the assignment of the lease which has been lost; is that right? A. *That is one of them.*

The Court: Well——

Q. That is one of them. *Is there another paper, another assignment of Mr. Meyer to the assignment of the lease, another consent of Mr. Meyer to the assignment of the lease?* A. *Yes, sir.*
Q. Well, then, why in the world did you say, 'No, sir,' a few moment ago? A. I did not.
Q. You did not? A. No.
Q. Why in the world a few moments ago did you say that that was the paper, the original of which was lost and which you considered to be the consent of Meyer to the assignment? Or didn't you say that a few minutes ago? A. I said that the original of this paper was lost, yes."

He then says that there was *another paper lost* of which he has no copy. He explains his possession of a copy of *this* lost paper (Ex. C-6, p. 104) by the fact that he "made an extra copy of this paper for Mr. Meyer and Mr. Meyer did not ask for a copy of it so I did not give it to him". He says respondent asked for a copy of the other lost paper and he had given him such a copy (p. 42). He then proceeds, p. 43, to negative what

he had said on p. 41, to the effect that Ex. C-6 was what he had in mind as the consent of respondent to the assignment of the lease from the individuals to the corporation by again asserting that there was *another consent* signed by respondent, "at the time of the organization of the Orange Hudson Co., which was in February or March, February I think, 1923", and that that is lost.

That there was no such consent is indicated by his testimony on p. 44. He says that respondent did not want to renew the option to purchase if he could avoid it, at the time of the service of the notice Exhibit C-6, p. 104, and that he had said to respondent—"Do you want us to bring a suit in order to test the question as to whether you have a right to decline?", etc.

Now, if his testimony is to be believed, a few days before April 7th, 1923 (it could have been but a few days for the corporation was not incorporated until March 6th, 1923), respondent had executed a consent to the assignment of the lease from the individuals to the corporation, and yet in this discussion he did not direct respondent's attention to the fact that he had already executed a consent to the assignment.

Although respondent took away a copy of Ex. C-6 to show to his lawyer before he would sign it, he signed the consent to the assignment from the individuals to the corporation "without question" and——

> "Q. That is the lost paper; is that right? A. That is the lost paper, yes; that is one of them."
>
> Q. Well, it is the only lost paper of which you have not got even a copy? A. Yes.

On re-direct examination he describes the appearance of the consent to the assignment from

the individuals to the corporation, which is lost, and——

> "A. It was a typewritten paper on, I think, an ordinary letterhead. * * * It may have been on a short piece of legal cap, I am not definite about that, but it was not a long, full length legal cap paper."

A moment before he had said (p. 38) first that he could not say that it was typewritten and then that it was. He repeats (p. 47) that he is uncertain as to whether he drew the paper or whether it was drawn by counsel for appellant.

Three witnesses are called to corroborate him and to prove the existence of this lost paper.

Schnepp, who is one of the individuals who formed the corporation, says that he saw the consent on a show case in the office (p. 49). His testimony is:

> "Q. Who signed the paper which you call the consent of assignment from the three individuals to the Orange Hudson Co.? A. Mr. Meyer, John J. Meyer.
>
> Q. Was there any signature on it? A. Not that I remember.
>
> Q. Where did you see this paper? A. I saw it on a show case in the office. I walked in the office—I was working in the garage and young Mr. Dye said, 'Here is Mr. Meyer's signature to this consent', and I glanced at the paper and laid it down on the counter again."

He denies that it was the same paper as Exhibit C-6 (p. 49).

He says that he does not know respondent's signature. He has seen the original of Exhibit C-6 (notice of exercise of option to renew the lease of April 7, 1923) "probably in the office of the company". He cannot be definite, and, p. 51:

"Q. Be as definite as you were with respect to seeing the paper which was lost. A. I will have to ask you to clarify that a little, please, to make it clear, what you would like me to be exact about.

Q. I want to know how and under what conditions and circumstances you saw the original of Exhibit C-6. A. I saw that paper in the office—(witness pauses about half a minute).

Q. Does it take you two minutes to answer that question? A. Yes, sir.

Q. Go ahead, then, and take your time. A. It seems to me I saw that paper in the office—(interrupted).

Q. I don't want 'it seems to me.' A. That is the best I can tell you. I am not so very clear about it.

Q. Then why are you so clear with respect to the lost paper and not so clear with this one? A. You will have to answer that. I can't.

Q. No. You are the person whose mind I am trying to probe. You know why you are clear in one case and not in the other? A. I cannot answer the question.

Q. You cannot answer the question after taking thirty seconds to determine, and you never saw this paper, which has been lost again? A. No."

Jaeger, who was connected with Orange Motors, Inc., from May 1923 to May 1928 as bookkeeper, says that he saw a paper "which has been discussed as a consent to an assignment of a lease from the three individuals, the two Dyes and Mr. Schnepp, to the Orange Hudson Co." in the safe, in the pigeon hole, he imagines a few months after he started work; "might have seen it two or three times in fingering through the papers"; he made a search for the paper about a year and a half ago but could not find it; he read the paper when he first saw it; "it was about a lease and an option";

it was "just a piece of plain, white paper, typewritten; it was not a letterhead, just a plain piece of white paper about the size of a letterhead", signed by respondent and, p. 55:

> "Q. Do you recall what that paper said? A. Oh, not word for word. The meaning I could get out of that paper (interrupted).
>
> * * * * * *
>
> Q. Do you recall what that paper said? A. The meaning I got out of that was that Mr. Meyer was agreeing to lease the property at 494 Main Street, East Orange, with an option to purchase. I did notice that part of it because there was a figure set up in the books for a lease and option to purchase. I looked at that paper and thought I might get some information on it, not that it concerned me, but I was more being nosey, I suppose, but there were no figures on it and I let it pass out of my mind."

This is not a very accurate description of a consent to an assignment of a lease.

He is shown Exhibit C-6 (p. 53) and says that that is not the paper.

On cross-examination he is wholly indefinite as to what the other papers were; indefinite as to why he opened this paper and read it; indefinite as to whether he opened and read any other paper; does not know the signature of respondent; does not know how many times he ran across the paper; does not know why he remembers some things and not others. We submit that his cross-examination, from pp. 58 to 63, indicates clearly that he is deliberately fabricating.

Hanford A. Dye, one of the individuals who transferred the business to the corporation, says that he saw the consent to the assignment from the individuals to the croporation signed by respondent "in our safe on several occasions". He

is secretary and treasurer of the company and one of the managers of the business, and he recalls that "it was in one of the pigeon holes in the upper left-hand corner of the safe" at a time when he says, "I would place it in the spring of 1923, March or April, long in there, the first time". He does not recall how long after that he saw it again and is not definite as to when he saw it last and he places it "within a year after it was signed; * * * I might have seen it again".

He describes it as a short typewritten paragraph with respondent's signature below, and he says that he read the paper and that it was, "Well, it was Mr. Meyer's consent to the transfer of the lease with the option from the three individuals to the corporation, the Orange Hudson Co.", and he denies that it was Exhibit C-6.

On cross-examination he says he has seen the original of Exhibit C-6 and believes that it was in the same place as was the lost paper.

Upon this testimony the Court (p. 74) declined to permit secondary evidence to be adduced as to the contents of this supposed lost consent of respondent to the assignment by the individuals to the corporation, and in passing said that he thought the paper, to which the witnesses referred, and which is the paper that actually was lost, was the original of Exhibit C-6, p. 104, and also that he did not doubt the sincerity of the witnesses (p. 75). It may be that it was the original of Exhibit C-6, which was lost, but the witnesses denied that this was the paper they were talking about, and we submit that the testimony can bear but one construction and that is that these witnesses deliberately attempted to induce the Court to believe that there had been a consent which had been lost when, in fact, they knew there never had been any such instrument.

There then was a recess, and after recess appellant, having failed to prove a written consent by respondent to the assignment of the lease from the individuals to the corporation, then set about attempting to prove constructive waiver of the provision of the lease against assignment and, for that purpose, introduced evidence from Hanford A. Dye (pp. 75, 76) that, upon the organization of the Orange Hudson Co., a large sign, twenty feet long, was placed upon the building, reading "Orange Hudson Company 494" (p. 76), and that there also was a sign at the door reading "Orange Hudson Co.", and that these signs were changed to correspond to the new name when the name of the corporation was changed, and that respondent visited the garage (p. 77).

Joseph O. Dye (p. 78) testified that, prior to or during the course of the formation of the Orange Hudson Company, he had a conversation with respondent in which he told respondent that they were taking the agency of the Hudson Essex cars and were incorporating the business and that they would like him to join the scheme "that is sell cars for Newark and West Orange," and that respondent's reply was that he was going away to Florida and would not be able to do anything of that kind at that time and he might see them about it when he returned, and that, at some later date after the organization of the Orange Motors Inc., a neighbor was closing up the windows on the driveway alongside of the garage and he, Joseph O. Dye, had a conversation with respondent as to this (p. 79) and told respondent that he wanted to keep the neighbor from closing up the alleyway and the windows and that respondent replied that he would consult his attorney about it and that, in a later conversation, respondent told Joseph O. Dye that his attorney had advised him not to pre-

vent the neighbor from completing the work but to bring an action for damages after he had completed it and that Dye had stated to respondent that, if he brought an action for damages, he must bring it in the name of the corporation, that "we were the interested parties, it was our intention to exercise our option to buy the premises in due time and that we would be the injured parties."

Appellant then offered in evidence the envelopes Exhibits C-7, C-8 and C-9 (pp. 107, 106, 108), which were returned undelivered (p. 82), and which, of course, are evidential of nothing. It then offered the check of June 6, 1927, upon which there was the endorsement of a formal notice of the exercise of the option (pp. 83, 84, 85), which check was returned by respondent. These were all after the controversy started (p. 84).

An agreement made March 1, 1922, between the Standard Oil Company of New Jersey and the Main Garage (Dye & Schnepp) for the installation of underground gasoline storage tank, etc., upon which there was endorsed by respondent a memorandum of an agreement that the equipment should remain upon the premises under the terms of the agreement, any renewal or assignment thereof, etc. (Ex. D-2, p. 115) and an agreement made the 30th day of January, 1924 between the Standard Oil Company of New Jersey and Orange Motors, Inc. to the same effect (Ex. D-4, p. 119) were offered. Hanlon, who is District Manager for West Orange for the Standard Oil Company of New Jersey (p. 86) says one of the salesmen presented the latter agreement, or one like it, to respondent and respondent refused to sign it (p. 89).

The evidence of Hanlon as to any presentation of this proposed agreement to respondent, should have been stricken out, for it was pure hearsay (p. 90).

Respondent (p. 95) states that it is true that one of the Dyes asked him to consent to an assignment of the lease and that he declined to do so (p. 94), and he says that he thereafter had no knowledge that there had been any transfer of the lease (p. 95).

Checks given by appellant in payment of rent for the years 1924, 1925, 1926, 1927 and four checks for the first four months of 1928 (p. 18), which checks bore the printed name of "Orange Motors, Inc." and the signature of H. A. Dye, secretary and treasurer (pp. 103, 104), had been offered in evidence (p. 18).

Respondent says that he was asked by the Standard Oil Company to consent to the agreement of May 3, 1923, between the Standard Oil Company and Orange Hudson Company (Ex. D-1, p. 113) and that he refused (p. 96). He did not see the agreement, but, upon being told that it was a transfer to the Orange Hudson Co., he declined to agree because he would not acknowledge them "as my tenants".

Appellant concedes that respondent declined to consent to the agreement of May 3, 1923 (Ex. D-1, p. 113), which indicated a change to Hudson Orange Company, and yet appellant, by four witnesses, attempted to prove that, but a few weeks before, respondent had "*without question*" consented to the assignment of the lease from the individuals to the corporation.

Respondent says that, of course, he saw the signatures on the checks, but that he did not consider that they indicated that there was any assignment of the lease to Orange Motors, Inc.; that it did not make any difference to him whose checks were sent to him; all that he was interested in on that branch of the matter was the receipt of his moneys; he had already taken the position that he

would not consent to the assignment; had declined to consent to the change of the contract of the Standard Oil Company to Orange Motors, Inc. (Ex. D-1, p. 113). He had no reason to suppose that, in the face of that declaration, appellant would deliberately assign the lease and thus, as all supposed, breach it.

Upon this record appellant asked the Court below to decree specific performance of the option to purchase and the court declined to do so (see Conclusions, p. 14).

Before arguing the three points made by appellant we submit:

POINT I.

There was not sufficient evidence of title to the option to purchase in Orange Motors, Inc., to warrant the Court under the circumstances of this case in granting a decree.

We have already cited the cases which hold that the remedy of specific performance is not *ex debitio justitiae* but rests in discretion. It should not be granted except in a clear case. Good faith is always required from a complainant in a suit in equity *but the utmost good faith* is required in a case of specific performance.

Orange Motors, Inc., is the sole complainant. It and it alone, on May 25, 1927, attempted to exercise the option to purchase (p. 86).

When the option to renew was exercised by the notice, Ex. C-6 (p. 104), the three individuals signed it, and underneath their signatures there was also that of Orange Hudson Co., but that notice of April 7, 1923, recited the lease and "which lease was assigned *to us* on February 24,

1922, by John J. Meyer, Alex Schlenger and Max Gabrowitz, the said lease, with the assignments endorsed thereon, having been recorded in the office of the Register of Essex County on March 26th, 1923".

In what capacity Orange Hudson Co. signed does not appear. The lease was *not* assigned to the individuals *and* Orange Hudson Co. on February 24, 1922, for the corporation was not incorporated until a year later. The lease *was* recorded *on March 26, 1923,* but, although it contained the assignment of February 24, 1922, from Gabrowitz and Schlenger to the three individuals, *it did not contain any assignment to the corporation.*

The option to purchase created an interest in land and any assignment thereof, under section 2 of the statute of frauds, 2 C. S. of N. J., p. 2610, required a writing.

The title of appellant is said to rest upon Ex. C-10 (p. 109) which purports to be an agreement made March 28, 1923, between the three individuals trading under the name of Main Garage and Orange Hudson Co., which afterwards changed its name to Orange Motors, Inc. (p. 109). The conditions under which that document was produced and the surrounding circumstances throw great doubt upon its authenticity.

We have fully considered the facts and will not repeat them. We suggest that it is very strange that, if this document was in existence on April 7, 1923, and was considered as having the effect of an assignment of the right of the individuals to the option to purchase to appellant, it was not referred to in Ex. C-6, the notice of April 7, 1923, eleven days after its execution (p. 104) in which notice the parties purport to set up their chain of title to the option for they expressly refer to

the assignment of February 24, 1922, from Gabrowitz and Schlenger to the two Dyes and Schnepp, and refer to the fact that the lease "with the assignments endorsed thereon" was recorded on March 26, 1923. No such assignment as indicated by Ex. C-10 (p. 109) of March 28, 1923, was recorded. Why, if this document was in existence, was it not referred to in Ex. C-6 (p. 104)?

If this document was in existence in July, 1927, it is strange that, when counsel for respondent communicated with counsel for appellant and directed his attention to the fact that counsel for respondent could not locate any record of any such assignment and specifically asked if there was such an assignment and for a copy of it, if it existed, or for a copy of the corporation minutes or resolutions referring to it (pp. 92, 93), he got no reply even that such an assignment existed, much less a copy of it. On the contrary, the letter of July 5th, 1927, from counsel for appellant to counsel for respondent (pp. 91, 92) would indicate that no such assignment did exist.

Upon whether this so-called assignment existed or not, the testimony of Joseph O. Dye, which has heretofore been referred to in detail is of the utmost importance. He equivocates and contradicts himself to such an extent as that no reliance whatever can be put upon his testimony. He says at one stage that this supposed lost written consent of respondent to the assignment from the individuals to the corporation was upon the same paper as the assignment in which event, of course, *both* would be lost, and yet, finally, Exhibit C-10 (p. 109) is produced; he later contradicts himself and says that there were two separate papers, p. 15 of this brief.

The authenticity of this supposed assignment cannot be rested upon the testimony of this wit-

ness, Joseph O. Dye, particularly in view of the fact that, if it is authentic, further proof was in the possession of appellant.

If the transaction indicated by Ex. C-10, p. 109, actually took place, there must have been some record of it in the minutes of the corporation. There could not have been a purchase of the assets, including the lease and the option to purchase, by the corporation from the individuals and the issuance of stock therefor without some reference in the minutes of the company, if the company had minutes.

Joseph O. Dye testified not only that the company had minutes but that the minutes were in Court (pp. 32, 33). The minutes were not produced. Why not?

22 Corpus Juris, title "Evidence" sec. 24, p. 81, states the rule:

> "In the administration of justice it is often wise to place the burden of producing evidence on the party best able to sustain it, and ambiguity, concealment, or evasion react with peculiar force on a pleader who asserts a fact and fails to produce the evidence, which if his assertion were true, would be in his possession. Hence it is very generally held that where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or where for any reason the evidence to prove a fact is chiefly, if not entirely, within his control, the burden rests on him to produce the evidence, although he is obliged to go no further than necessity requires."

Corpus Juris also states, title "Evidence", p. 115, Sec. 55:

> "Where it is apparent that a party has the power to produce *evidence of a more explicit,*

direct and satisfactory character than that which he does introduce and relies on, it may be presumed that if the more satisfactory evidence had been given it would have been detrimental to him and would have laid open deficiencies in, and objections to, his case which the more obscure and uncertain evidence did not disclose."

Section 56:

"*Failure of a party to call an available witness* possessing peculiar knowledge concerning facts essential to a party's case, direct or rebutting, or to examine such witness as to the facts covered by his special knowledge, especially if the witness would naturally be favorable to the party's contention, relying instead upon the evidence of witnesses less familiar with the matter, gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of the party."

See

United States ex rel. Vajtauer v. *Comr. of Immigration,* 273 U. S. 102, 71 L. Ed. 561, p. 565;
United States Ex Rel Bilokumsky v. *Tod,* 263 U. S. 149, 150, 68 L. Ed. p. 22.

In *Runkel* v. *Burnham,* 53 U. S. 217, 38 L. Ed. 694, Mr. Justice Fuller, delivering the opinion of the Supreme Court of the United States, said (at p. 697):

"If the new power of attorney was sent, and revoked the one relied on here, Runkel or his attorney could have dispelled all doubt by offering it in evidence, or by testifying as to its contents, their silence must necessarily make against them on the question of revocation. Mansfield, J., in Roe *v.* Harvey, 4 Burr. 2487.

> *The doctrine that the production of weaker evidence, when stronger might have been produced, lays the producer open to the suspicion that the stronger evidence would have been to his prejudice was expressly adopted in the case of Clifton* v. *United States, 45 U. S. 4 How. 242.*''

In *Kirby* v. *Tallmadge,* 160 U. S. 379, 40 L. Ed. 463 at p. 465, Mr. Justice Brown, delivering the opinion for the Supreme Court of the United States, said:

> ''While he avers in his answer, and Miller admits, the payment of $3,000. in cash, defendants introduced no testimony whatever in support of their case, but relied solely upon their answers. As they had it in their power to explain the suspicious circumstances connected with the transaction, we regard their failure to do so as a proper subject of comment. 'All evidence', said Lord Mansfield in Blatch *v.* Archer, Cowp. 62, 65, 'is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted'. It would certainly have been much more satisfactory if the defendants, who must have been acquainted with all the facts and circumstances attending this somewhat singular transaction, had gone upon the stand and given their version of the facts. McDonough *v.* O'Niel, 113 Mass. 92; Com. *v.* Webster, 5 Cush. 295, 316, 52 Am. Dec. 711. It is said by Mr. Starkie, in his work on Evidence (Vol. I, p. 54): 'The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.' ''

In *Wratchford* vs. *Milburn,* May, 1929, 7 N. J. A. R. 751, this Court said:

> "The omission of a party to an action to testify to facts or to produce evidence in explanation, except where the evidence is not peculiarly within his power, or is merely cumulative, raises a presumption against his claims."

Instead of relying, for the authenticity of this document, upon the uncertain testimony of Joseph O. Dye, appellant might have produced much better proof, or at least corroborating proof and the circumstances surrounding the production of this document required that appellant produce all the proof within its power.

But even if the document were authentic and was executed upon the day of its date, March 28, 1923, the burden was upon appellant to go further because the document was not an effective assignment in and of itself.

While the agreement of March 28, 1923 assumes to recite resolutions of the Board of Directors of the company for the purchase from the individuals of their assets, including the lease and the option to purchase, for a consideration of 2,500 shares of stock, without any nominal or par value, of the corporation, and witnesses that the vendors (the individuals) have sold and the company has purchased, the good will of the business, the lease (there is omitted in the operative words of sale the right of renewal and the option to purchase) the agreement specifically provides, section IX— "Such sale shall take effect on the second day of April, 1923, whereupon possession of the tangible property above mentioned shall be delivered to

the company, and on or after which day certificates of stock shall be issued as hereinabove provided'' (p. 112).

The agreement was, therefore, not a present transfer but was only to take effect *in futuro,* to wit, on the 2nd day of April, 1923. Did it take effect? Was the stock issued? Was anything or nothing done? There is no proof.

That it *did not* take effect, at least so far as the option to purchase was concerned, seems to be indicated by the fact that, five days after it was supposed to take effect, the notice of the exercise of the option to renew, Ex. C-6, p. 104, was given, and in that notice, although the assignment of February 24, 1922 from Gabrowitz and Schlenger to the three individuals was specifically referred to, this supposed transfer from the three individuals to the corporation was wholly omitted.

Appellant, therefore, failed to prove that it had any title to the option to purchase.

If this assignment actually had been made so that title to the option to purchase and to the lease vested in the corporation on March 28, 1923, the fact was deliberately concealed from respondent, and appellant so conducted itself toward respondent, including the serving of the notice of April 7, 1923, as that it could, if it suited its purposes, allege that no assignment had been made such as to warrant respondent in terminating the lease, or, if its purpose were otherwise, to insist that such an assignment had been made as it now insists, or, in other words, it played fast and loose with respondent. In this case, it attempted to induce the Court to believe by false testimony that respondent had signed a paper consenting to the making of an assignment to the corporation.

This conduct does not commend itself to a court of equity in *any* case, and certainly not in a spe-

cific performance case. It alone is sufficient to bar relief.

Rynda Development Co. v. *Gluck,* 99 N. J. E. 788 and cases referred to on p. 799, affirmed 100 N. J. E. 554 (A specific performance case);
Clickner v. *Clickner,* 95 N. J. E. 479;
Newark Cleaning and Dyeing Co. v. *Gross,* 6 N. J. Advance Reports 598.

We will consider appellant's Points I and II under one head.

POINT II.

There was no proof of any consent of respondent to any assignment from the three individuals to the corporation nor was there any proof of a ratification of that assignment or of a waiver of the provision of forefeiture contained in the lease as to assignment without the written consent of respondent.

Under its Point I appellant states: "The court should have found that the defendant John J. Meyer did consent to the assignment of the lease from Joseph O. Dye, Hanford A. Dye and Charles F. Schnepp to the Orange Hudson Co." Appellant seems to have abandoned its claim, which it attempted to sustain by proof, that respondent signed a consent to this supposed assignment from the individuals to the corporation, which consent has been lost, and now asserts that, by the consent "to the renewal of said lease *pursuant to the terms thereof* on Exhibit C-6, p. 104, which was the notice dated April 7, 1923, signed by the three individuals and Orange Hudson Co. there was an express consent to the assignment from the individuals to the corporation" (p. 6).

That is not so for there is nothing in Exhibit C-6 which indicates that there has been any assignment from the individuals to the corporation nor is the consent of respondent that to any assignment. The consent of respondent is to the renewal to which the three individuals who signed the notice appeared to be entitled. At the best for appellant this can only be considered as an item of evidence under appellant's second point.

Upon the claim that respondent waived the provision of the lease as to an assignment without his consent, appellant is, we submit, concluded by *Lincoln Furniture Co.* v. *Borstein,* 100 N. J. E. 78, affirmed on the opinion below 5 N. J. Advance Reports 1501.

The facts in that case relied upon as evidence of waiver are strikingly similar to those relied upon in the case at bar. There was the receipt of corporate checks; signs indicating that the business was being carried on by a corporation; knowledge of such signs by the landlord; proof of supposed conversations in which the landlord had been told that a corporation had or was to take over the lease, etc. There, as here, the argument really was that the landlord was bound by constructive notice.

In referring to Exhibit C-6, p. 104, and the consent of respondent to the renewal of the lease, appellant says, p. 7:

> "It (the fact that the notice of renewal of April 7, 1923, contained names other than the name or names of the tenant with whom the landlord had had prior relationship of landlord and tenant) must necessarily have aroused *some suspicion* in his mind of the existence in the renewal of the lease by a new party."

It is settled law that in case of waiver, such as here involved, there must be *actual* notice as

distinguished from constructive notice or notice of such facts as would put a party upon inquiry.

Vice-Chancellor Backes, deciding *Lincoln Furniture Co.* v. *Borstein,* 100 N. J. E. 78, and which was affirmed on the opinion below, 5 N. J. Advance Reports 1501, said:

> "To maintain the bill the complainant must satisfactorily establish that the defendants, *with knowledge* of the assignment, accepted the rent from the assignee. * * * The display of corporate activities was no doubt sufficient to put them on notice, but *such notice is not knowledge,* and they were under no legal duty to inquire into and be informed of the facts, and it is inferable that had they inquired of the interested parties they would not have been told the truth. *It was their privilege to rely in confidence on Worman's covenant not to assign his lease,* and neither he nor the company, for obvious reasons, ventured to dispel their faith by a disclosure of the facts. * * * Waiver is the intentional relinquishment of a known right. 'To constitute a waiver the lessor at the time of the receipt of rent must have had knowledge of the existence of the cause of forfeiture. Thus, forfeiture for a breach of a condition not to assign is not waived by acceptance of rent from the assignee, unless the landlord has knowledge of the assignment.' 16 R. C. L. 1135; German-American Savings Bank *v.* Gollmer, 155 Cal. 683; 24 L. R. A. (N. S.) 1066; Drummond *v.* Fisher, 18 N. Y. Supp. 142; Emery *v.* Hill, 39 Atl. Rep. 266; West Shore Railroad Co. *v.* Werner, 70 N. J. Law 233; Decker *v.* Hartshorn, 60 N. J. Law 548."

And see also Pomeroy, sec. 5, 4th Ed., Vol. 2, p. 1100, in which the author says that "constructive notice has no reference whatever to waiver".

Also:

> 35 Corpus Juris, title "Landlord and Tenant", 1080, sec. 255, p. 1077, sec. 252;

Wilson v. *Carpenter,* 91 Va. 183, 50 A. S. R. p. 824 at p. 831;
Jones on Landlord & Tenant, secs. 4 and 5;
Tiffany, Vol. 1, sec. 152, subdiv. H, p. 935;
Underhill, Landlord and Tenant, Vol. 2, sec. 630, p. 1058.

The cases cited by appellant on p. 9 of its brief have no application, save only *Lincoln Furniture Co.* v. *Borstein,* 100 N. J. E. 78, affirmed 5 N. J. Advance Reports 1501, which is in favor of respondent.

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

Commercial Trust Co. v. *L. Weartheim Coal & Coke Co., et als.,* 88 N. J. E. 143, is a similar case.

Twice this court has said that the acceptance of rent and the performance of any other act by the landlord is not evidence of waiver of the provisions of such a clause in the lease as is here under discussion unless there be *actual* knowledge as distinguished from knowledge imputed upon the doctrine that proof of facts sufficient to put a person upon inquiry is equivalent in law to knowledge, of an actual violation of the covenant prior to the performance of the act.

Lincoln Furniture Co. v. *Borstein,* 100 N. J. E. 78, affirmed 5 N. J., Advance Reports 1501;
Decker v. *Hartshorn,* 60 N. J. L. 548.

It has been held that, to breach a covenant against assignment without the consent of the landlord, there must be *an actual legal assignment.* What would amount in equity to an assignment is not sufficient. Putting a third party in possession and permitting the business to be operated by that third party is not sufficient. Before there can be a waiver, therefore, there must be performance of acts amounting to ratification after knowledge of *a legal assignment.*

Had the Court below found upon the facts that there was such knowledge on the part of the respondent it would have been in error. It found the contrary (Conclusions, p. 14).

The conduct of appellant is like that of the tenant in *Lincoln Furniture Co.* v. *Bornstein,* 100 N. J. E. 78, affirmed 5 N. J. Ad. R. 1501.

On p. 84 of 100 N. J. E. Vice-Chancellor Backes said:

> "It is doubtful that a formal assignment of the lease was executed before the so-called confirmatory assignment of February 29th, 1924, which was given to clear the record for the sale of Worman's stock holdings in the company to Block. Zodikow's scheme, as he says he outlined to the defendants, was not to breach the covenant by assigning the lease to the company when formed, but to have the company take it over in possession and to effect a waiver by paying the first month's rent on January 1st, 1924, with the company's check. With this undisclosed plan in mind, and obviously sensible of the penalty of assigning the lease on the heels of the covenant not to assign, it does not seem plausible that the lessee or his attorney took the chance of discovery and the risk of forfeiture. The attorney's safer manipulation, which he undoubtely pursued, was to have the company carry on the business under Worman's management, neither re-let or under-let, nor

> assign the lease, and by *assuming an equivocal occupancy* they better ward off both charge and proof of forfeiture, and it would appear that not until it became expedient to Worman's sale was the so-called confirmatory assignment made."

So, here, appellant so manipulated the situation until during the trial of this case, Exhibit C-10, p. 109, was produced, as that respondent could not say that there had been such an assignment of this lease as to bring about the penalty for assigning without the consent of the landlord.

The matter has been fully argued on pp. 5, 6, 28 of this brief and we will not again refer to the facts.

POINT III.

The rule in Dumpor's case.

As a last resort appellant argues that, under the rule in Dumpor's case (1578), 4 Coke 119b, 76 Eng. Reprint 1110, 1 Smith Lead. Cases 11th Ed. 32, in view of the consent by the landlord to the assignment made by the original tenants, Gabrowitz and Schlenger, to the two Dyes and Schnepp, Ex. C-2, pp. 101, 102, on February 24, 1922, the provision against assignment without the consent of the landlord was not only excised from the lease but *excised* from the renewal for the consent of the landlord to the assignment of the two Dyes and to Schnepp was made one year prior to the expiration of the original term of the lease. The renewal started on May 1, 1923, and the option to purchase was exercised during the term of the *renewal.*

For the first time this Court is asked to determine whether the rule in Dumpor's case is to be considered the law in New Jersey.

To apply Dumpor's case to the facts in the case at bar it is not only necessary for this Court to determine that the rule as laid down by the English court in 1578 is the law in this State, but also that the rule, as *extended* by other cases as indicated by the Court of Appeals in *Reid* v. *Weissner Brewing Co.* (1898), 88 Md. 234, 40 Atl. 877, is to be considered as the law of this State.

The adherence of the English courts to the rule is as striking an illustration of the application of the doctrine of *stare decisis* as can be found. No rule was more criticized by the English courts than the rule in Dumpor's case, yet they followed it until it was obliterated by the 22nd and 23rd of Victoria, Chapter 35, and the 23rd and 24th of Victoria, Chapter 38.

Sir James Mansfield observed that the profession has always wondered at the case, although he held in *Doe* v. *Bliss,* 4 Taunt. 736, 128 Eng. Reprint 520, that the decision had been "the law so many centuries that it could not be reversed".

It is not necessary for this Court in this case to determine whether the rule in Dumpor's case as it was laid down in 1578 is the law of this State for in Dumpor's case the consent of the landlord was to assign the lease *"to any person or persons quibuscunque",* 76 English Reprint, p. 1112.

The consent to the assignment in the case at bar was not general but *particular.*

The consent of respondent signed on the 24th day of February, 1922, was to an assignment of the lease "to Joseph O. Dye, Hanford A. Dye and Charles H. Schnepp".

It is quite true that, as stated by appellant in its brief p. 17, in *Reid* v. *John F. Weissner Brewing Company,* 88 Md. 234, 40 Atl. 877, the Court, after referring to the fact that Sir James Mansfield observed in 1813 that the profession had al-

ways wondered at Dumpor's case said: "Later decisions have carried the doctrine even farther than as applied in Dumpor's case, for it is held that whether the license to assign be general, as in Dumpor's case, or particular as 'to one particular person, subject to the performance of the covenants in the original lease', still the condition is gone in both instances and the assignee may assign without license."

But the rule has not been so extended in this State.

It is conceded by the English authorities that the rule is contrary to common sense and it was only followed in England upon the doctrine of *stare decisis*. It is significant that, while Chief Justice Mansfield in *Doe ex dem Boscawen* v. *Bliss* (1813), 4 Taunt. 736, 128 Eng. Reprint 520, after stating that the profession had always wondered at the case but that it had been law so many centuries it could not be reversed, held (Gibbs, Justice concurring), that the rule did not embrace the case before the Court.

It was urged that where there was a covenant against under-letting a consent to one under-letting waived the right of re-entry for a subsequent under-letting.

The Court declined to make the application. Upon what reason it is not clear. Mansfield, C. J., simply said that the rule did not "however embrace the pending case". Gibbs, Justice, said: "This is a question whether the landlord by overlooking a former underletting, has waived the right of re-entry for a subsequent underletting. That is too strong a proposition * * * I suppose the defendant relies on Dumpor's case, and infers that this tolerance is tantamount to a license, but this is too strong a proposition."

And this Court in *Westshore Railroad* v. *Wenner*, 70 N. J. L. 233, while stating that Dump-

or's case was the law in England until changed by statute, carefully, it would seem, refraining from stating that it was the law in New Jersey, refused to apply it in a case of sub-letting.

Vice-Chancellor Foster in *Miller* v. *Newton Humphreville Co.,* 116 Atl. 325, likewise refused to apply it to a case of sub-letting, and he said:

> "From my consideration of the authorities cited in support of this rule I find that a distinction has almost uniformly been drawn by the courts in the application of this rule between an assignment of the lease and a subletting, and that the *unsatisfactory rule* of the Dumpor's case has been *limited* to assignments of the lease, and has not been extended to a subletting of the premises, regarding such subletting as a continuing condition of the lease, which is not extinguished by a single consent. Gear, L. & T., p. 285; Taylor, L. & T., par. 501. The true rule applicable to the present situation is stated in 18 A. & E. Ency. of Law at p. 681, as follows:
>
> 'If the lessor consents to a subletting the sublease is, of course, valid, though the lease expressly forbids all subletting, but the consent of the lessor to one subletting, or the waiver of one breach of the covenant against subletting, is no defense to a breach of the covenant by another and distinct sublease.' "

We are not informed by any of the cases as to the principle of the distinction, although Justice Dixon, speaking for this Court in *West Shore Railroad* v. *Wenner,* 70 N. J. L. 233, at p. 240, said that it had been settled "on sound reasoning". But he is not there speaking of a waiver of the covenant with respect to a subsequent subletting by reason of a consent to a prior subletting. He is referring to an obliteration of the covenant with respect to a subletting by reason of a consent to a prior assignment.

The true principle upon which the distinction has been made is, we submit, that the rule is so against reason as that, if it is to be applied at all, *it is to be applied to a situation where the facts are precisely the same as they were in Dumpor's case in 1578.* The rule should, upon reason, no more be extended to embrace cases where the prior consent is to an assignment to a particular person than it should be extended to cases of subletting. The real genesis of the rule in England was the theory that covenants against assignments without consent must be strictly construed, and the Court would look for any means by which it could avoid the right of the landlord to insist upon a forfeiture for breach of the condition.

The New York Court of Appeals acted upon this principle in *Riggs* v. *Purcell,* 66 N. Y. 193. The law in this State is not in accord with *Riggs* v. *Purcell* nor the cases following it. This Court, in *West Shore Railroad Company et al.* v. *Wenner,* 70 N. J. L. 233, at p. 238, expressly disapproved *Riggs* v. *Purcell.* In that case it was contended that a sale of a leasehold under foreclosure of a mortgage given by the lessee upon the lease was not a breach of a covenant not to assign. And so it had been held in *Riggs* v. *Purcell.* This Court held that it *was* a breach of such a covenant. It conceded that the mere mortgaging would not be a breach of the covenant for a mortgage is but security, but when the lease came to be sold in foreclosure proceedings, although the assignment was by operation of law in the sense that it was in the course of judicial proceedings, there then was a breach of the covenant against assignment. And this Court said, p. 237:

> "Thus the act and default of the lessee, operating directly upon the lease and the estate thereunder, resulted in the transfer of

> the same, and that result must be deemed to have been within the contemplation of the lessee when he executed the mortgage and failed to pay the debt."

The effect of this decision of this Court is that these covenants are to be *reasonably* construed.

The rule in Dumpor's case does not apply because, in the case at bar, the assignment was to a particular person.

In the case at bar the covenant against assignment without consent, by its express terms, binds not only the lessees but *"themselves, their heirs and assigns, agents or attorneys"*. If the intent of the parties was that, upon a consent to an assignment of the lease to a particular person, the covenant against assignment without consent should be obliterated, there was no purpose in making the covenant binding upon the *"assigns"* of the lessees, for, under the rule, by the assignment with consent the covenant would be obliterated. The genesis of the law is that parties may make such contracts as they please unless contrary to public policy. It is not, and never has been, argued that it is contrary to public policy that the covenant against assignment without consent should subsist after an assignment with consent. The test in this case, as in any case of construction of a contract, is as to the intent of the parties. The provision in the lease making the covenant binding, not only upon the lessees, but upon their *assigns,* is clearly inconsistent with any idea of the obliteration of the covenant after one assignment with consent. The parties have, therefore, contracted in such a way as to avoid the application of the rule in Dumpor's case, and this Court in *West Shore Railroad Company* v. *Wenner,* 70 N. J. L. p. 233, at p. 239, in getting at the meaning of the parties, laid particular stress upon

the presence in the lease of the words "his successors or assigns", and the reasoning of this Court at that page is applicable to the situation with which we are now dealing.

There is another reason why the rule in Dumpor's case does not apply in the instant case and that is that, while it may be that under Dumpor's case the consent of respondent of February 24, 1922, to the assignment of the lease by the original lessees to the two Dyes and Schnepp obliterated the covenant against assignment without consent *for the balance of the original term of the lease,* i. e., until May 1, 1923, it did *not* obliterate such covenant for the renewal term of the lease, and it was, as stated above, during the renewal, that the option to purchase was exercised.

In *North Chicago Street Railway Co.* v. *Le Grand Co.*, 95 Ill. App. 435, the Court said:

> "Although that decision (referring to Dumpor's case) was long adhered to in England, this was solely on account of the rule *stare decisis.* Eminent English judges, among them Sir James Mansfield, chief justice of the Common Pleas, and Lord Eldon, while following, disapproved it, and finally it was obliterated by 22 and 23 Victoria, Chap. 35 and 23 and 24 Victoria, chap. 38. *A decision regarded by the English bench and bar so unreasonable as to warrant resort to legislation to eliminate it from the body of English law, will hardly be followed in this State.*"

And the Court further said:

> "The decision in Dumpor's case has been severely criticised by Washburn in his work on real property, and his criticism has been cited by the Supreme Court with seeming approval. Kew *v.* Trainer, 150 Ill. 150.

And the Court further said:

> "If it be conceded that the decision in Dumpor's case is law, we do not think it

> applicable to the covenant for renewal in question. The case merely decided that the condition was gone *for the term.* In the present case the covenant is for renewal on the terms of the executed lease with the exception mentioned and a waiver of the condition during the term is not in the least inconsistent with the contract for renewal on the terms of the executed lease. The only estate, which in the present case the appellee could assign or sublet, was the term created by the original lease, and, consequently that estate was the only one in respect to which the license to assign or sublet could operate. The right to a renewal is not an estate. Sutherland *v.* Goodnow, 108 Ill. 528."

Applying this decision to the case at bar and assuming the application of the rule in Dumpor's case, by the consent to the assignment of February 24, 1922, respondent placed it in the power of the two Dyes and Schneep, who were the assignees, to, without his consent, assign the lease but such assignment could only, without his consent, affect the balance of the term and the right of appellant would cease on May 1, 1923.

And, here again, it is significant that the notice of the exercise of the option to renew, Ex. C-6, p. 104, dated April 7, 1923, is signed by the three individual assignees and no assignment to the corporation is recited in the body of the notice, although the notice purports to recite the chain of title.

If, in fact, therefore, there was an actual assignment to the corporation, either prior or subsequent to May 1, 1923, without the consent of respondent it conferred no rights upon appellant either to the renewal of the term or to the option to purchase which went with the *renewal* of the term.

Finally, upon this branch of the subject, we repeat that in Dumpor's case there was a consent to an assignment *to any person or persons;* the consent was general, whereas, in the case at bar, the consent was to particular persons and the rule in Dumpor's case, if it is to be determined to be the law in this State is, we submit, at this late day not to be extended.

If this Court holds, as we submit is the fact, that appellant has not proven such a title in itself to the option to purchase as would have warranted the Court of Chancery in granting specific performance, the discussion of the rule in Dumpor's case is academic as well as is the discussion with respect to whether respondent waived the provisions of the covenant.

It is respectfully submitted that the decree appealed from should be affirmed, with costs.

Respectfully submitted,

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