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REBUTTAL.

COMPLAINANT'S EXHIBITS.

DEFENDANT'S EXHIBITS.

Complaint.

(Filed Sept. 3, 1926.)

IN CHANCERY OF NEW JERSEY.

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

The complainant Thomas R. Cahill residing in the City of Jersey City, County of Hudson and State of New Jersey, says that:

1. On October 1st, 1923, Nellie Martynick, being indebted to him in the sum of $1,500, executed to him a chattel mortgage of that date, to secure the said sum and to be paid in monthly installments of $25 each on the first day of each and every month in advance besides interest at the rate of six per cent. per annum.

2. To secure payment of the said sum, the said chattel mortgage mortgaged and conveyed to the complainant all those two one-family frame buildings now situated and located upon a lot known and numbered as 28 West 19th Street, in the City of Bayonne, County of Hudson and State of New Jersey, said buildings being then the property of said Nellie Martynick and the said buildings being on leased lands.

3. Said mortgage provided that in case default shall be made in the payment of installments above mentioned, that the principal sum and accrued interest should become immediately due and payable at the option of the complainants.

4. That no payments whatsoever have been made on the principal or interest on complainant's mortgage and there is due the entire principal sum of $1,500 besides interest from October 1st, 1923, and the complainant has elected to demand the entire principal and accrued interest and notwithstanding such election being made known to the defendant repeatedly, she has declined to make any payments whatsoever.

5. The said chattel mortgage mentioned in Paragraph 1 was duly acknowledged and the certificate of acknowledgment endorsed thereon, was recorded in the office of the Register of the County of Hudson in Liber 446, page 68, &c., on October 2, 1923, and said mortgage was executed to secure the balance of the purchase price of the said two houses mentioned in said mortgage.

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

1. That Nellie Martynick, who is the defendant, may answer this bill of complaint without oath and each statement therein made.

2. That an account made be taken of the amount due on complainant's mortgage.

3. That the defendant may be decreed to pay complainant, the amount so found due with interest and costs by a short day, to be appointed by this Court, and that in default of said payment that she be debarred and foreclosed of all equity of redemption in said chattels.

4. That a decree may be made for the sale of the mortgaged chattels to raise and pay to the complainant, the amount found due on his mortgage with interest and costs.

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

6. That this Court give the complainant any further relief which may be just.

SECLOW & NESSANBAUM,
Solicitors and of Counsel with Complainant.

Answer and Counterclaim.

(Filed October 23, 1926.)

IN CHANCERY OF NEW JERSEY.

Between
THOMAS R. CAHILL,
Complainant,
and
NELLIE MARTYNICK,
Defendant.
} On Bill, &c.

The defendant Nellie Martynick answering the bill of complaint, says that:

1. Paragraph One is admitted.

2. Paragraph Two is admitted.

3. Paragraph Three is admitted.

4. She admits so much of Paragraph Four wherein it is stated that no payments have been made, but denies that there is due the entire principal sum of $1,500.00 besides interest, or any sum.

5. Paragraph Five is admitted.

6. Prior to the filing of the bill in this action,

the complainant authorized one, Philip H. Levy, a Constable of Hudson County, to foreclose the chattel mortgage in question, and in compliance with such authorization, the said Constable caused to be posted several chattel mortgage sale notices, a copy of which is attached hereto and marked, "Schedule D."

7. Immediately thereafter, Messrs. Feinberg & Feinberg, attorneys for the mortgagor, Nellie Martynick, the defendant herein communicated with Alexander Seclow, solicitor for the complainant, advising him that the chattel mortgage was no longer in existence and void because of a certain covenant and restriction in the said mortgage, and requested that the chattel mortgage sale be adjourned in order to enable the mortgagor sufficient time within which to prepare a bill in Chancery, to enjoin the mortgagee and the constable from proceeding with the said sale; which request was granted by the said solicitor.

8. Shortly thereafter the said Alexander Seclow agreed to abandon the said sale, and informed the said firm of Feinberg & Feinberg that he would institute an equitable foreclosure, so that the matters in difference may be submitted to this Honorable Court, and thereupon on April 6th, 1926, the following letter was sent to the said Alexander Seclow:

"April 6th, 1926.

Alexander Seclow, Esq.
Bergoff Building
Bayonne, N. J.

Re: *Martynick* v. *Cahill.*

Dear Sir:

Following up our telephone conversation

of yesterday relative to the above matter, I am writing you at this time to confirm the arrangement then made between us, to the effect that I am not to file the bill in Chancery, which I have already prepared, for an injunction and cancellation of the chattel mortgage, and that I shall wait until you institute an equitable foreclosure thereon. Just as soon as the papers are prepared, I will be glad to acknowledge service on behalf of Martynick.

Yours very truly,

JF' AZ JACOB FEINBERG."

9. On October 1st, 1923, the complainant, by a written memorandum of agreement, sold, assigned and transferred to the defendant, a certain indenture of assignment of lease, the property described therein being lot known as 28 West 19th Street, in the City of Bayonne, County of Hudson and State of New Jersey, as is more particularly set forth in the said memorandum, a copy of which is attached hereto and made part hereof and marked "Schedule A."

10. The consideration for the said transfer and assignment was $2,500.00, which the defendant paid to the said complainant as follows: $1,000.00 in cash upon the execution of said agreement, and the balance or $1,500.00, by the execution of a chattel mortgage upon the two buildings on the said premises, as is more particularly set forth in the said agreement.

11. In pursuance to the terms of said agreement, the defendant executed to the said complainant, a chattel mortgage in the sum of $1,500.00,

the terms of which are more particularly set forth in the copy thereof, which is attached hereto and made part hereof and marked "Schedule B."

12. It was understood and agreed between the said defendant and the complainant, that if the leasehold interest in and to the said premises is terminated through no fault of the defendant, then and in that event, the balance due on said mortgage shall cease, and that the debt existing between the defendant and the said complainant shall be considered cancelled.

13. That the said mortgage contained a covenant that the said chattel mortgage is made subject to the following restriction and condition, viz.:

> "It is understood, however, that if the leasehold interest which I now have in the said premises known and numbered as 28 West 19th Street, Bayonne, New Jersey, is terminated through no fault of mine, in that event the balance due on this mortgage shall cease, and the balance considered as paid in full. It being understood that I shall have possession of the said premises during the life of this mortgage."

14. Prior to and at the time of the making of the agreement mentioned in Paragraph Nine of this answer, the complainant represented to the defendant that he was lawfully in possession of said premises, by reason of an assignment which he held from one, Charles Wilder, and that the rental of the said premises was $25.00 per year in addition to taxes, which was paid to the Public Service Railway Company, the owner of said property, and solely through said representation, upon

which the defendant relied, the said defendant entered into and executed the said agreement.

15. Shortly after the defendant entered into possession of the said premises, she learned from the Public Service Railway Company, that she was not lawfully in possession; that the said Charles Wilder never had possession of the said premises, nor did he ever have a lease from the Public Service Railway Company, nor was he ever lawfully entitled to the possession of the same; that the assignment from the said Charles Wilder to the complainant was null and void and of no value whatever. She was also informed by the Public Service Railway Company that it did make a written lease on March 20th, 1916, with one, Adolph Zilewich, creating a monthly tenancy, which expressly provided that the tenant shall not assign or sublet or transfer said lease without the written consent of the Public Service Railway Company, and that thereafter it did recognize one, N. Galenter, as a tenant, but that this lease terminated on May 1st, 1923, and that from that date no rent was paid to the Public Service Railway Company, nor was there any tenant in possession, nor did it execute a new lease to any other person, except as hereinafter mentioned.

16. That upon learning that she was not lawfully in possession of said premises, and upon being threatened with ejectment or dispossession proceedings, the defendant through her husband, Mike Martynick, also known as Martin Martynick entered into a lease with the Public Service Railway Company, on or about March 6th, 1924, and which is dated May 1st, 1923, because she was obliged to pay rent from that date, the terms of which

lease are more particularly set forth in the copy attached hereto and made part hereof, and marked "Schedule C."

17. That under the terms of said lease, the defendant is obliged to pay $14.00 per month, and not $25.00 per annum as represented by the complainant, besides taxes assessed against the said premises by the City of Bayonne.

18. Immediately after the defendant entered into possession of said premises, and before she learned that her possession was not lawful and without color of title, she, through her husband, Mike Martynick, also known as Martin Martynick, entered into contracts for the improvement of the two frame dwellings on the said premises with a building contractor, electrician, with the Public Service Gas Company, with a plumber, with the City of Bayonne for the connection of a water line, and by reason of the extensive repairs and alterations, the two frame buildings, which were then worth no more than $600.00 and unfit for occupancy, were vastly improved and made up to date, and that in connection therewith the defendant expended $4,084.88.

19. That the defendant has applied to the complainant in a friendly manner to cancel the said mortgage in accordance with the understanding and agreement entered into between her and the said complainant, and in accordance with the covenant and condition contained in the said chattel mortgage, and more particularly set forth in Paragraph 13 of this answer, but the complainant has refused and still refuses so to do.

20. The actions of the complainant is contrary to the agreement made between the complainant

and the defendant, and contrary to the covenant contained in the chattel mortgage hereinbefore mentioned, and contrary to equity and good conscience.

By way of counterclaim, the defendant prays that the complainant be restrained and enjoined from assigning his interest in and to said chattel mortgage to any third party during the pendency of this suit, and that the said chattel mortgage be cancelled in accordance with the intentions of the said defendant and complainant, and according to the covenant and restriction contained in the chattel mortgage executed by and between the said parties.

FEINBERG & FEINBERG,
Solicitors for and of Counsel
with Defendant.

SCHEDULE A.

KNOW ALL MEN BY THESE PRESENTS, that Thomas R. Cahill, of the City of Jersey City, County of Hudson and State of New Jersey, herein known as the party of the first part, in consideration of Twenty-five hundred dollars ($2500.00) lawful money of the United States, to be paid to him as hereafter mentioned, has sold, assigned, transferred and set over, and by these presents does sell, assign, transfer and set over unto Nellie Martynick, of the City of Bayonne, County of Hudson and State of New Jersey, herein known as the party of the second part, a certain indenture of assignment of lease made by Charles Wilder to the party of the first part, the said Thomas R. Cahill, on August 2nd, 1921, and all the massuage described therein, being the lot known as 28 West

19th Street, in the City of Bayonne, County of Hudson and State of New Jersey, with the appurtenances, and also all the estate, right, title, term of years yet to come, claim and demand whatsoever, of, in, to or out of the same, to have and to hold the same unto the said party of the second part, her executors, administrators or assigns, for an indefinite period or perpetuity.

And the party of the first part for himself, his heirs and assigns, hereby covenants and agrees to and with the party of the second part, that the said premises are now free and clear of and from all other leases, judgments, executions, taxes, assessments and incumbrances whatsoever. It being understood that the party of the first part is to pay the taxes now due on the said premises, up to and including the date of these presents.

For and in consideration of the above and other good and lawful considerations, the party of the first part hereby acknowledges that he has bargained, sold, granted and conveyed and by these presents does bargain, sell, grant and convey unto the said party of the second part, her executors, administrators and assigns, all his right, title and interest in and to the two buildings now standing upon the said premises hereby mentioned, to have and to hold the same unto the said party of the second part, her executors, administrators and assigns forever.

And the party of the first part, for himself, his executors, administrators and assigns, covenants and agrees to and with the said party of the second part to warrant and defend the said described houses hereby sold unto the said party of the second part, her executors, administrators and assigns against all and any person or persons what-

soever, and that the same are free and clear of and from any incumbrance, mortgage, lease, judgment or lien of whatsoever kind or nature.

For and in consideration of the above, the party of the second part hereby agrees to pay the sum of twenty-five hundred dollars ($2500.00) as follows: the sum of One thousand dollars ($1000.00) upon the execution of this agreement, the receipt whereof is hereby acknowledged by the party of the first part, and the sum of Fifteen hundred dollars ($1500.00) by the execution of a chattel mortgage upon the said two buildings above referred to, payable in monthly installments of Twenty-five dollars ($25.00) together with interest at six per cent. on the first day of each and every month in advance.

In Witness Whereof, the parties hereto have hereunto set their hands and seals this first day of October, 1925.

Thomas R. Cahill (L. S.)
Nellie Martynick (L. S.)

Signed, sealed and delivered
in the presence of

Jacob Feinberg

SCHEDULE B.

To All to Whom These Presents Shall Come,

Know Ye That I, Nellie Martynick, of the City of Bayonne, County of Hudson and State of New Jersey, herein known as the party of the first part, for securing the payment of the money hereinafter mentioned, and in consideration of the sum of one dollar to me duly paid by Thomas R. Cahill, of the City of Jersey City, County of Hudson and

State of New Jersey, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant, bargain and sell unto the said party of the second part, his executors, administrators and assigns, all the goods and chattels mentioned in the schedule hereunto annexed and now in premises known and numbered as 28 West 19th Street, in the City of Bayonne, New Jersey.

To Have and to Hold, all and singular the goods and chattels above bargained and sold, or intended so to be, unto the said party of the second part, his executors, administrators and assigns forever. And I, the said party of the first part, for myself, my heirs, executors and administrators, all and singular the said goods and chattels, above bargained and sold, unto the said party of the second part, his executors and administrators and assigns, against me the said party of the first part, and against all and every person or persons whomsoever, shall and will warrant, and forever defend, Upon Condition, that if I, the said party of the first part shall and do well and truly pay unto the said party of the second part, his executors, administrators or assigns the sum of Fifteen hundred dollars ($1500.00) in equal monthly installments of $25.00 each, on the first day of each and every month in advance, together with interest at six per cent. per annum, then these presents shall be void. And I, the said party of the first part, for myself, my heirs, executors, administrators and assigns, do covenant and agree to and with the said party of the second part, his executors, administrators and assigns, that in case de-

fault shall be made in the payment of the said sum above mentioned, or in case the said party of the first part shall at any time before the said day of payment herein provided for, remove the said goods and chattels, or any of them, or permit or suffer any attachment or other process against property to be issued against her the said party of the first part, or permit or suffer any judgment to be entered against her then the said sum of money herein mentioned shall become instantly due and payable, and it shall and may be lawful for, and she the said party of the first part, does hereby authorize and empower the said party of the second part, his executors, administrators and assigns, with the aid and assistance of any person or persons, to enter said dwelling-house, store and other premises, and such other place or places as the said goods or chattels are or may be placed, and take and carry away the said goods or chattels, and to sell and dispose of the same for the best price they can obtain; and out of the money arising therefrom, to retain and pay the said sum above mentioned, and all charges touching the same, rendering the overplus (if any) unto the said party of the first part, or to her executors, administrators or assigns. And until default be made in the payment of said sum of money, the said party of the first part is to remain and continue in the quiet and peaceful possession of the said goods and chattels, and a full and free enjoyment of the same. And she, the said party of the first part for herself, her heirs, executors, administrators and assigns, does hereby covenant, promise and agree to and with the said party of the second part, his executors, administrators and assigns, to pay the said sum of money and interest

above mentioned at the time and times, and in the manner above mentioned.

It is understood however, that if the leasehold interest which I now have in the said premises known and numbered as 28 West 19th Street, Bayonne, New Jersey, is terminated through no fault of mine, in that event the balance due on this mortgage shall cease, and the balance considered as paid in full. It being understood that I shall have possession of the said premises during the life of this mortgage.

In Witness Whereof, I, the said party of the first part have hereunto set my hand and seal the first day of October, one thousand nine hundred and twenty-three.

Nellie Martynick.

Signed, sealed and delivered in the presence of

Jacob Feinberg.

SCHEDULE.

All those two one family frame buildings now situated at and located upon a lot known and numbered as 28 West 19th Street, in the City of Bayonne, County of Hudson and State of New Jersey.

State of New Jersey, County of Hudson, ss.:

Be It Remembered, That on this first day of October, in the year of our Lord One Thousand Nine hundred and twenty-three, before me, the subscriber, personally appeared Nellie Martynick, who, I am satisfied, is the grantor mentioned in

the foregoing chattel mortgage, to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

Jacob Feinberg,
Master in Chancery of N. J.

State of New Jersey, County of Hudson, ss.:

Thomas R. Cahill, of full age, being duly sworn on his oath, says that he is the holder of this mortgage. That the amount due and to grow due on said mortgage is the sum of $1,500.00 and no cents, together with interest on said sum at the rate of 6% per annum, payable monthly; that the consideration of said mortgage is as follows: said sum of $1,500.00 being the balance due on the purchase price of the two houses mentioned herein and also the assignment of my leasehold interest in and to the lot known and numbered as 28 West 19th Street, Bayonne, New Jersey.

Thomas R. Cahill.

Sworn and subscribed to before me this 1st day of October, 1923.

Jacob Feinberg,
Master in Chancery of N. J.

SCHEDULE C.

THIS INDENTURE, made this first day of May in the year of our Lord one thousand nine hundred and twenty-three, between Public Service Railway Company, a corporation of the State of

New Jersey, hereinafter called "Lessor," of the first part, and MICHAEL MARTYNICK, of the City of Bayonne, in the County of Hudson and State of New Jersey, hereinafter called "Lessee," of the second part.

WITNESSETH, that the said Lessor hath demised and let and by these presents doth demise and let unto the said Lessee Lot 14, Block 329 on the south side of West 19th Street, in the City of Bayonne, in the County of Hudson and State of New Jersey, for the term of two (2) months from the first day of May in the year of our Lord one thousand nine hundred and twenty-three (subject to termination as hereinafter expressed) at the rate of fourteen dollars ($14) per month payable in advance. In addition to said rent the said Lessee is to pay all taxes assessed against the improvements on said lot, and all water rents charged against the same.

It is understood and agreed by and between the parties hereto that until one party shall give to the other one (1) month's written notice as hereinafter expressed, this lease with all the terms and conditions hereof shall be deemed continued from the end hereof for the further period of two (2) months and so on for two (2) months at a time thereafter, but shall be deemed to be at an end on the first day of the month succeeding the giving of a one (1) month's notice in writing by either party to the other. Upon the giving of such notice, the first day of the month specified therein, which shall be at least one (1) month after the giving of such notice, shall be deemed and taken to be the end of the term hereof, the same as though it were expressly herein written.

This lot is demised and let unto the said Lessee in order that he may keep and maintain therein the house now erected thereon which is the property of the said Lessee, and which the said Lessee is entirely to remove from said premises at the termination of this lease, leaving the said lot in proper order and condition.

And it is understood and agreed that if any rent shall be due and unpaid or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said Lessor to re-enter the said demised premises and to remove all persons therefrom.

And the said Lessee doth hereby covenant to pay to the said Lessor the said rent as herein specified and that at the expiration of the said term the said Lessee will quit and surrender the said premises hereby demised in good order and condition.

And the said Lessor doth hereby covenant that the said Lessee on paying the said rent and performing the covenants herein contained shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

It is further distinctly understood and agreed by and between the parties hereto that the Lessee shall not re-let or under-let the whole or any part of the said premises, nor assign this lease without the written consent of the said Lessor.

IN WITNESS WHEREOF, the said Lessor hath caused these presents to be signed by its Vice-President, attested by its Assistant Secretary, and its corporate seal to be hereunto affixed, and the

said Lessee hath hereunto set his hand and seal; dated the day and year first above written.

PUBLIC SERVICE RAILWAY COMPANY,
By
Vice-President.

MIKE MARTYNICK

Attest:
CHARLES M. BUDER
Assistant Secretary.

Signed, sealed and delivered
in the presence of
F. W. SCHMIDT.

SCHEDULE D.

CHATTEL MORTGAGE SALE.

THOMAS R. CAHILL, Mortgagee, NELLIE MARTYNICK, Mortgageor.	Chattel Mortgage.

TAKE NOTICE, That on Monday, the 15th day of March, 1926, at 12 o'clock in the forenoon of that day at Number 28 West 19th Street, in Bayonne City, Hudson County, New Jersey, will be sold at Public Vendue, to the highest bidder, all rights, title and interest of the mortgagor in and to the following goods and chattels, to wit: All those two one-family frame houses now situated and located upon a lot known and numbered as 28 West 19th Street, in the City of Bayonne, County of Hudson and State of New Jersey, taken in as

the property of the above named mortgagor, Nellie Martynick, and to be sold for cash by me.

PHILIP H. LEVY,
Constable or Bailiff.

Dated—March 9th, 1926.

Replication and Answer to Counterclaim.

(Filed Oct. 25, 1926.)

IN CHANCERY OF NEW JERSEY.

Between THOMAS R. CAHILL, Complainant, and NELLIE MARTYNICK, Defendant.	On Bill, &c.

By way of replication to the answer of the defendant, this complainant joins issue thereon.

By way of answer to the counterclaim of the defendant, this complainant says that:

1. He denies the allegations of said counterclaim.

SECLOW & NESSANBAUM,
Solicitors of Complainant.

Motion Addressed to the Answer and Counterclaim.

At or before the hearing of this matter, the complainant will move to strike out the answer and counterclaim on the ground that such answer and counterclaim do not set up equitable defenses and counterclaims respectively.

SECLOW & NESSANBAUM,
Solicitors of Complainant.

Order of Reference.

(Filed Nov. 30, 1926.)

IN CHANCERY OF NEW JERSEY.

Between

THOMAS R. CAHILL,
Complainant,

and

NELLIE MARTYNICK,
Defendant.

} On Bill, &c.

This matter being opened to the Court by Seclow & Nessanbaum, of counsel with the complainant, and it appearing that the defendant Nellie Martynick has filed an answer to which a replication has been filed, and that Feinberg & Feinberg, Esqs., solicitors of the defendant, having consented to the entry of this order, it is thereupon on this 30th day of November, 1926,

ORDERED, that the said cause be referred to the Honorable John Griffin, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor and to report thereon to him and to advise what order or decree should be made thereon.

E. R. WALKER,
C.

We hereby consent to the entry of the foregoing order.

FEINBERG & FEINBERG,
Solicitors of Defendant.

A true copy.

THOMAS BARBER,
Clerk.

Order of Designation.

(Filed Dec. 7, 1926.)

IN CHANCERY OF NEW JERSEY.

Between

THOMAS R. CAHILL,
Complainant,

and

NELLIE MARTYNICK,
Defendant.

} On Bill, &c.

Upon application of Seclow & Nessanbaum, Esqs., solicitors of complainant, it is on this 6th day of December, 1926,

ORDERED, that Monday, March 14th, 1927, at ten o'clock in the forenoon, and the Chancery Chambers at 1 Exchange Place, Jersey City, N. J., are designated as the time and place for the hearing in the above entitled matter.

JOHN GRIFFIN,
V. C.

We hereby consent to the above order.

FEINBERG & FEINBERG,
Solicitors of Defendant.

Order of Designation.

(Filed Mar. 10, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

THOMAS R. CAHILL,
Complainant,

and

NELLIE MARTYNICK,
Defendant.

} On Bill, etc.

Upon application of Seclow & Nessanbaum, Esqs., solicitors of complainant, it is on this 10th day of March, 1927,

ORDERED that Monday, March 14th, 1927, at 10 o'clock in the forenoon, at the Chancery Chambers, 1 Exchange Place, Jersey City, N. J., are designated as the time and place for the hearing in the above entitled matter.

JNO. J. FALLON,
V. C.

We consent to the above order.

FEINBERG & FEINBERG,
Solicitors of Defendant.

Final Decree.

(Filed Mar. 21, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

THOMAS R. CAHILL,
Complainant,

and

NELLIE MARTYNICK,
Defendant.

} On Bill, etc.

This cause coming on to be heard in the presence of Alexander Seclow, of counsel with the complainant, and Jacob Feinberg, of counsel with the defendant, and the pleadings having been read and the testimony and proofs offered by the parties and the arguments of counsel having been heard and the said pleadings, proofs and arguments of counsel having been duly considered, and it appearing to the Court that the complainant is not entitled to the relief prayed for in his bill of complaint, and it further appearing to the Court that the defendant Nellie Martynick is entitled to the relief prayed for in her answer and counterclaim, and it appearing further that the said defendant Nellie Martynick is entitled to have the chattel mortgage held by the complainant and recorded in the Register's office of the County of Hudson in Liber 446, page 68, delivered up and surrendered for cancellation, it is on this 21st day of March, 1927, upon motion of Jacob Feinberg, of counsel with defendant,

ORDERED, ADJUDGED AND DECREED, that the complainant's bill be, and the same is hereby dismissed

Final Decree.

with costs to be taxed, and that the complainant Thomas R. Cahill, within ten days of the service of a certified copy of this decree upon him or his solicitor, deliver up and surrender for cancellation to the defendant Nellie Martynick, the said chattel mortgage dated October 1, 1923, made by Nellie Martynick to Thomas R. Cahill, recorded in the Register's office of the County of Hudson on October 2, 1923, in Liber 446, page 68 of Chattel Mortgages, and at the same time execute, acknowledge and deliver to the said Nellie Martynick a discharge and release of the said chattel mortgage; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the said complainant be and he is hereby restrained and enjoined from transferring, assigning, selling, pledging or in any manner alienating or conveying in any form whatsoever said chattel mortgage mentioned, and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the complainant pay the solicitor of the defendant a counsel fee of one hundred ($100.00) dollars, and the said counsel fee be added to the taxed bill of costs and that said defendant have execution therefor according to law and the rules and practice of this Court.

E. R. WALKER,
C.

Respectfully advised.
JNO. J. FALLON,
V. C.

I hereby consent to the foregoing decree as to form.

SECLOW & NESSANBAUM,
Solicitor of Complainant.

A true copy.
THOMAS BARBER,
Clerk.

Order of Re Reference.

(Filed February 25, 1927.)

IN CHANCERY OF NEW JERSEY.

THOMAS R. CAHILL, Complainant, and NELLIE MARTYNICK, Defendant.	On Bill, &c.

The above stated cause having been duly referred to the Honorable John Griffin, deceased, formerly one of the Vice-Chancellors of this Court and same remaining unheard.

It is thereupon on February 24, 1927, ordered that said cause be now referred to the Hon. John J. Fallon, one of the Vice-Chancellors and to report thereon to him and advise what order or decree be made therein and that such hearing be had at time and place already designated therefrom.

E. R. WALKER,
C.

Petition of Appeal.

(Filed May 24, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

THOMAS R. CAHILL,
Complainant,

and

NELLIE MARTYNICK,
Defendant.

On Appeal from the Court of Chancery.

To the Honorable, the Court of Errors and Appeals in the last resort in all causes:

The petition of Thomas R. Cahill, the appellant in the above stated cause, respectfully show that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 21st day of March, in the year one thousand nine hundred and twenty-seven, wherein the said Thomas R. Cahill is complainant and Nellie Martynick is defendant, in this respect to wit:

That the said decree adjudges that:

1. The complainant is not entitled to the relief prayed for in his bill of complaint.

2. That the defendant is entitled to the relief prayed for in her answer and counterclaim.

3. That the defendant is entitled to have the chattel mortgage held by the complainant and recorded in the Register's Office of the County of

Hudson in Liber 446, page 68, delivered up and surrendered for cancellation.

4. That the complainant's bill is dismissed with costs to be taxed and counsel fee.

5. That the complainant within ten days of service of a certified copy of the decree, deliver up and surrender for cancellation to the defendant the said chattel mortgage dated October 1st, 1923, made by Nellie Martynick to Thomas R. Cahill, recorded in the Register's Office of the County of Hudson on October 2nd, 1923, in Liber 446 of Chattel Mortgages, page 68, and at the same time execute, acknowledge and deliver to the said Nellie Martynick, a discharge and release to the said chattel mortgage.

6. That the complainant be restrained and enjoined from transferring, assigning, selling, pledging or in any manner of alienating or conveying in any form whatsoever the said chattel mortgage.

And your petitioner humbly appeals from that part of the decree of the Chancellor which decrees, as aforesaid, upon the ground that the same is erroneous for that,

1. The complainant is entitled to the relief prayed for in his bill of complaint.

2. The defendant is not entitled to the relief prayed for in her answer and counterclaim.

3. The defendant is not entitled to have the chattel mortgage held by the complainant and recorded in the Register's Office of the County of Hudson in Liber 446, page 68, delivered up and surrendered for cancellation.

4. That the defendant is not entitled to have

the complainant's bill dismissed with costs and counsel fee.

5. That the defendant is not entitled to have the chattel mortgage dated October 1st, 1923, made by Nellie Martynick to Thomas R. Cahill, recorded in the Register's office of the County of Hudson on October 2nd 1923, in Liber 446 of Chattel Mortgages, page 68, either discharged, released or cancelled.

6. That the defendant is not entitled to have the complainant restrained and enjoined from transferring, assigning, selling, pledging, or in any manner of alienating or conveying in any form whatsoever the said chattel mortgage.

7. That the chattel mortgage mentioned in the complaint was and is a good and subsisting mortgage and that because of the default of the defendant in the terms of payment of said mortgage, the complainant was entitled to have entered in his favor a decree according to the prayer of his bill.

8. That no leasehold or interest held by the defendant was terminated and that therefore the balance due on the mortgage should not be considered as paid in full.

9. That the defendant did not lose the right to possession of said premises, but from the date of the chattel mortgage to the date of the hearing, she retained possession thereof, and she therefore was obliged to pay the said chattel mortgage according to its terms.

10. That the decree requiring the chattel mortgage to be cancelled and holding that the said

chattel mortgage is inequitable and unjust as it creates a forfeiture.

11. That the most the defendant was entitled to offset against the chattel mortgage, was only such moneys as she expended in excess of the original rental.

12. That the decree so far as it literally construed the chattel mortgage as void, ineffective or paid and satisfied, is inequitable and unjust as imposing a penalty and forfeiture.

Your petitioner, therefore, prays that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden.

And that your petitioner may have such relief in the premises as to this Honorable Court may seem meet.

SECLOW & NESSANBAUM,
Solicitors of Appellant.

ALEXANDER SECLOW,
Of Counsel with Appellant.

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

ALEXANDER SECLOW,
Of Counsel with Appellant.

Notice of Appeal.

(Filed May 26, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

THOMAS R. CAHILL,
Complainant,

and

NELLIE MARTYNICK,
Defendant.

} On Bill, &c.

The complainant hereby appeals from the whole and every part of the final decree made in this Court in the above stated cause, which decree declares that the complainant is not entitled to the relief prayed for in his bill of complaint, and that the defendant is entitled to the relief prayed for in her answer and counterclaim, and which decree declares that the defendant is entitled to have the chattel mortgage held by the complainant and recorded in the Register's office of the County of Hudson in Liber 446, page 68, delivered up and surrendered for cancellation; and which further orders, adjudges and decrees that the complainant execute, acknowledge and deliver to the said defendant a discharge and release of the said chattel mortgage; and which further orders, adjudges and decrees that the complainant be restrained and enjoined from transferring, assigning, selling, pledging or in any manner of alienating or conveying in any form whatsoever said chattel mortgage; and which further orders, adjudges and decrees that the complainant's bill be dismissed with

costs to be taxes and a counsel fee and that execution issue therefor according to law.

To the Court of Errors and Appeals in the last resort in all causes.

Dated May 21st, 1927.

SECLOW & NESSANBAUM,
Solicitors of Complainant.

ALEXANDER SECLOW,
Of Counsel.

I conceive that there is a good cause for appeal in the above stated cause.

ALEXANDER SECLOW,
Of Counsel with Complainant.

Amended Notice of Appeal.

(Filed June 9, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

THOMAS R. CAHILL,
Complainant,

and

NELLIE MARTYNICK,
Defendant.

} On Bill &c.

The complainant hereby appeals from the whole and every part of the final decree made March 21st, 1927, in the above entitled cause, by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, as advised by Honorable John J. Fallon, one of the Vice-Chancellors, to the Court of Errors and Appeals in the last resort in

all causes, which decree declares that the complainant is not entitled to the relief prayed for in his bill of complaint, and that the defendant is entitled to the relief prayed for in her answer and counterclaim, and which decree declares that the defendant is entitled to have the chattel mortgage held by the complainant and recorded in the Register's Office of the County of Hudson in Liber 446, page 68, delivered up and surrendered for cancellation; and which further orders, adjudges and decrees that the complainant execute, acknowledge and deliver to the said defendant a discharge and release of the said chattel mortgage; and which further orders, adjudges and decrees that the complainant be restrained and enjoined from transferring, assigning, selling, pledging or in any manner of alienating or conveying in any form whatsoever said chattel mortgage; and which further orders, adjudges and decrees that the complainant's bill be dismissed with costs to be taxed and a counsel fee and that execution issue therefor according to law.

To the Court of Errors and Appeals in the Last Resort in All Causes.

Dated June 7th, 1927.

Seclow & Nessanbaum,
Solicitors of Complainant.

Alexander Seclow,
Of Counsel.

I conceive that there is a good cause for appeal in the above stated cause.

Alexander Seclow,
Of Counsel with Complainant.

Stenographer's Minutes.

IN CHANCERY OF NEW JERSEY.

Before—Hon. Jno. J. Fallon, Vice-Chancellor.

Between
Thomas R. Cahill,
Complainant,
and
Nellie Martynick,
Defendant.

On Bill, etc.
Final Hearing.

For the Complainant, Messrs. Seclow & Nessanbaum.
For the Defendant, Messrs. Feinberg & Feinberg.

Chancery Chambers, Jersey City, N. J.,
March 14, 1927.

Mr. Seclow: Your Honor, this is a suit to foreclose a chattel mortgage. At one time there was a railroad—what they called a "dummy railroad" that ran to Jersey City, and subsequently that railroad was discontinued, and the right-of-way was taken over, I think, by the Pennsylvania Railroad, and then the Public Service Corporation succeeded to the title to the right-of-way, and for a great many years the Public Service Corporation had been permitting people to build houses and put improvements up there, and merely requiring the payment of the taxes or a nominal rental, and this policy was altered, I think in May, 1924, when the Public Service Company set a price on the lots and charged a sum more nearly in conformance with

the interest rate, and also required the occupier of the lands to pay the taxes. Now, the complainant in this matter was the owner of a building erected on one of these so-called "dummy lots," and on October 1st, 1923, executed a bill of sale, which was the ordinary way that the rights of the owners of these buildings was transferred—he executed a bill of sale to the defendant Nelly Martynick in consideration of $2,500, receiving $1,000 in cash, and the balance was secured by a chattel mortgage, payable in monthly installments of $25.00 each and interest at 6%. This chattel mortgage was recorded, and nothing was ever paid thereon, because, the defendant says, the Public Service—

The Vice-Chancellor: I think I had better excuse your further explanation of the matter, because I have read both of the pleadings before I came out here.

Mr. Feinberg: I just want to say this—that when we went into possession, the reason we paid the $2,500 was because this Mrs. Martynick and her husband (who had formerly been in possession of the place) were told by Mr. Cahill that the rental would only be $25.00 a year for as long as we wanted to stay there, and that was the inducing cause for this transaction; so when we took the bill of sale from him we gave back a mortgage of $1,500—we paid $1,000 cash—but in that mortgage we inserted a clause that in the event that we lost possession through no fault of ours the mortgage would be considered paid. We will prove that we never had possession—never had any right of possession—and two months after my client was in there he was notified by the Public Service that unless they made an independent lease they would eject them from the premises; and we were obliged to make a lease, which was dated back in May, 1923, and were obliged to pay the rent, plus $39.00 a year interest. We will show, by proper proof, that the premises were not worth over four hundred dollars; and when we prove those facts we will ask your Honor that there be an order made discharging this chattel mortgage. We will also show your Honor that, even with the chattel mortgage as it stands now, those houses are real estate, and I do not know how a decree can be made on a chattel mortgage against real estate. As the mortgage is against these two frame buildings, no matter who owns the property, they are realty.

The Vice-Chancellor (to Mr. Seclow): This replication says that a motion shall be made before the hearing of the matter to strike out the answer and counterclaim; is that motion made? If it is, Rule 119 of the Rules of the Court requires you to submit the points which you wish to make, and also excerpt the portion of the pleading that you object to.

Mr. Seclow: No, sir; the motion will not be made.

The Vice-Chancellor: All right—you waive that motion?

Mr. Seclow: We waive the motion.

The Vice-Chancellor: What explanation have you to make other than what I see in the reply you file, to the allegations made by the other side, Mr. Seclow?

Mr. Seclow: First, we say the lease which we assigned to them is for no definite period—it was assigning whatever interest these people have; and I think it was a monthly lease.

The Vice-Chancellor: Well, do you say that you had a subsisting lease at that time?

Mr. Seclow: Well, we had what we think was a good lease, but it was only from month to month, anyway.

The Vice-Chancellor: Well, as I understand the pleadings in this suit, on the other side, you did not have a lease at that time at all, that the lease was originally made by the Public Service Corporation to some person whose name I do not recall, and that lease was for a short period of time—it was a monthly letting—and there was a clause in it prohibiting the transfer, and then it was, nevertheless, assigned or transferred to some individual whom the Public Service recognized and considered as the lessee thereafter, but that lease had also expired; and I understand, from the pleadings filed by the defendant, that your client, at the time he made this instrument, had no subsisting lease whatever, and none had been in force for a considerable period of time previously.

Mr. Seclow: Simply a monthly tenancy.

The Vice-Chancellor: Of course I am not foreclosing you at all, I am trying to seek information. What I had in mind was that if you assign an instrument purporting to be a lease, very likely the law will assume that you impliedly say to this other party, "I have a lease"; you cannot say, "We assign whatever we might have," because you ought to know whether you have anything.

Mr. Seclow: Well, of course, the circumstances were such that leases were being assigned which were given by the predecessor of the Public Service Railroad Company. Of course this is not in the case, and I do not think that we can prove that this was a subsisting lease; what we did assign was any right, title or interest which we had in that.

The Vice-Chancellor: What I am trying to find out is, do you claim that you had any right, title or interest in and to these premises at the time you signed this paper?

Mr. Seclow: No, we claim that we had a paper which we assigned to them. Their characterization of this in the pleadings will not enlarge or minimize it. We gave them this particular paper; they are bound by this paper which they took.

The Vice-Chancellor: But they go further—they say your client was not in possession of the premises at the time.

Mr. Seclow: We were in possession. The facts in the case will show that the Public Service created a new policy on a certain day, and they wanted monthly rentals. Hitherto they had been permitting people to stay in there from year to year upon payment of a yearly rental, and oftentimes not any rental. They were tenants from year to year, where they paid rent to the Public Service from year to year. May not those tenants assign whatever right, title and interest they had in it?

The Vice-Chancellor: Did your client ever pay any rent to the Public Service Company?

Mr. Seclow: No, he did not; his predecessors did.

The Vice-Chancellor: How long do you claim your client was in possession of these premises?

Mr. Seclow: In it for two years.

The Vice-Chancellor: And he was there, as recognized by the Public Service, with one other individual whose name I do not recall?

Mr. Seclow: Yes, I noticed that. No, we have

this lease from Charles Wilder to Thomas R. Cahill. Each man transfers to the present complainant all the right, title and interest, or right to have the lease, or any right that they may have in the premises known as No. 28 West Nineteenth Street, Bayonne, N. J., and of, in and to the building now standing upon said premises. The people did not know what they had there; they were simply tenants by sufferance or from year to year, one or the other.

The Vice-Chancellor: I know, but you claim, however, that you were there under a lease, not as a tenant by sufferance; you say you were there under a lease, and you assigned this lease to this defendant. I think you had better proceed. I just wanted to get your view.

Mr. Seclow: That is my view of it; and then, after all, there is fifteen hundred dollars due on this chattel mortgage, and this Court will not declare a forfeiture of that amount, but will admeasure the loss that these people have sustained.

The Vice-Chancellor: As I understand, that chattel mortgage contains a clause which specifically says that it is made on the consideration (that may not be the language) but that it was made upon the consideration that Cahill has that which he claims to have, and that which he is assigning, and that if they are deprived of the right of occupancy of these premises within a given time, then it says that the moneys due and payable thereunder shall be regarded as paid, or some language of that kind. (Reading the clause referred to.)

Mr. Seclow: They are still there.

The Vice-Chancellor: All right; I say it is conditioned upon him being deprived of the right of possession through no fault of his.

Mr. Seclow: I will offer in evidence Chattel Mortgage, dated October 1st, 1923, made by Nellie Martynick to Thomas R. Cahill, recorded in the Register's Office of the County of Hudson, on October 2nd, 1923, in Liber 446 of Mortgages, page 68.

(Admitted, without objection, and marked Exhibit C-1.)

THOMAS R. CAHILL, sworn.

Direct examination by Mr. Seclow:

Q. Have you ever received any portion of this $1,500?

Mr. Feinberg: We will admit that he did not.

A. No, I have not.

Q. Now, when you took possession of the buildings covered by that chattel mortgage did you receive any paper from your predecessor in title (showing the witness a paper)? A. I received this paper, signed, from Wilder.

Q. And did you afterwards assign this to your successor in title, Mrs. Martynick? A. Yes.

(The paper was thereupon offered in evidence, admitted without objection, and marked Exhibit C-2.)

Cross examination by Mr. Feinberg:

Q. Mr. Cahill, you sold two buildings and assigned your lease to Mrs. Martynick for $2,500; that is right, is it not? A. Yes.

Q. And this is the bill of sale that you signed, is that right? A. Yes, that is right.

(The paper is offered for identification and marked J. F-1.)

Q. You received a thousand dollars in cash? A. Yes.

Q. And were at my office when this transaction was closed? A. Yes.

Q. I drew the paper for you and for Mrs. Martynick? A. Yes.

Q. Do you remember telling Mrs. Martynick, when Mr. and Mrs. Martynick asked you, that the rent was twenty-five dollars a year? A. Yes, that is what I said it was; that is what I was told, although I didn't pay any because I never had any bill sent me; I supposed it could be paid any time later.

Q. And when they asked how long it was, you said "For years, that they never bothered you"? A. That is what I was told when I took that over

Q. And you received a thousand dollars in cash? A. Yes.

Q. And a mortgage was given for fifteen hundred dollars, is that right? A. Yes.

Q. Do you remember, Mr. Cahill, when the mortgage was being drawn, Mr. Martunick said, "Now, suppose they put me out, do I still have to pay you the money—

Mr. Seclow: I object to that.

The Vice-Chancellor: He is talking about the conversation; we will see where it leads to.

Q. —and you said, "You will never get put out; if they do put you out you don't have to pay me this mortgage"?

Mr. Seclow: I object to that.

The Vice-Chancellor: What is the objection?

Mr. Seclow: The objection is this—there

is no fraud here; it is embodied in the writing; how can they vary it by verbal statements made at that time. It culminated in a writing.

The Vice-Chancellor: What is the use of asking the question, when you seem to have it embodied in your paper? I will sustain the objection.

Mr. Feinberg: All right; I will withdraw the question.

By Mr. Seclow:

Q. When you spoke to them about the amount of the rent and the term of this lease, did you give them the source of your information?

The Vice-Chancellor: How is that material? You are objecting to the other party bringing in things that are not in the papers?

Mr. Seclow: All right.

Q. How long were you in possession of those buildings? A. Well, it was, I think, pretty near two years, I am not sure of the dates. They were tenants of mine for most all of that time, and paid me rent, and they came to me and wanted to buy the property.

Q. Oh, Mrs. Martynick was a tenant in that building? A. A tenant there for about a year, at least, and Mr. Martynick, too.

Q. And paid you rent? A. Yes; and I had done a great deal of repairing to the buildings, keeping them in shape.

Q. Did you pay taxes there? A. Well, I never had no tax bill sent, but I paid water rent, I think it was, and I think you have a receipt for that water rent that was paid.

By the Vice-Chancellor:

Q. Well, did you pay any rent or taxes, whatever, upon that property while you were in possession, other than the water rents? A. I think that was all, because I didn't know that there was any taxes except to the Public Service; and then I was told that you only had to pay those yearly.

Q. Well, this paper which was marked Exhibit C-2 appears or purports to be, rather, an assignment from one Charles Wilder to you of "all the right, title and interest of Wilder in and to all that certain lease, or right to have a lease, or any right that they may have to the premises known as 29 West Nineteenth Street, Bayonne, N. J., and of, in and to the buildings now standing on said premises"—now, did you see any such lease; did you ever have any such lease in your possession—a lease made to Wilder? A. I never seen any lease except this one that I had assigned to me by Wilder.

Q. Well, do you see any paper at all that Wilder claimed to be his, which purported to be a lease for these premises? A. No, I did not.

Q. Well, did you make any inquiry at all before you had concluded your dealings with Wilder, as to whether he had a lease? A. Galenti, a fellow that claimed what Wilder had a right there, he had a lease, I understand, with the Public Service.

Q. Well, what did you know about that, yourself? A. I didn't know anything about it, only what they told me.

Q. What who told you? A. What Wilder and this Galenti told me; they told me that was all I needed, was the assignment of that lease from Wilder, and then I had possession for two years, about.

Q. Well, if you went in there under a lease, didn't you know you should be expected to pay rent to someone? A. Well, I understood that there was just about twenty-five dollars to be paid every year.

Q. You understood that from Galenti, did you? A. Yes.

Q. You made no inquiry to find out? A. I never had any bills sent to me, and I never followed it up.

Q. You say you were in possession there about two years, were you? A. About, I think.

Q. Didn't it occur to you as strange that you should be in possession of premises for that period of time, such as that, and nobody seek payment of rent from you? A. Well, I thought it was like the taxes.

Q. But you didn't pay any taxes in that period, did you? A. Well, probably sometimes I would let it go for two or three years, and pay it.

Q. But you did not let this go for two or three years and pay it, on this property; I understood you to say you paid no taxes whatever on this property, but you think you did pay some water rents? A. I did pay water rents, and I repaired the buildings, and I never was disturbed.

Q. What was it you considered you had the right to sell to this woman Nellie Martynick? A. Well, I understood I owned the buildings; I had the right to the two buildings on there.

Q. What did you understand that from—from what source? A. From the assignment papers from Wilder.

Q. You mean from this paper which was marked Exhibit C-2—this paper here? A. Yes, your Honor.

Q. Now, in the purported assignment by you of

whatever rights you thought you had in and to this lease, which appears written on the back of Exhibit C-2, you say, "I hereby assign all my right, title and interest in and to the within assignment of lease for and in consideration of one dollar to Nellie Marytnick,"—now, did you receive one dollar, or why was that written? A. Well, I suppose that is a matter of form.

Q. But I understand the other side to say that you agreed, for $2,500, to sell to Nellie Martynick, and also to assign a lease which was upon the lands upon which the buildings were erected, is that right? A. Yes, sir, your Honor. I was never disturbed within those two years, and I collected rent there and fixed and repaired the buildings, and I was always able to pay those taxes, whatever they was; I understood they was only twenty-five dollars a year.

Q. I am trying to find out, if I can, what you sold to these people for $2,500—what you owned? A. I sold the buildings, the two houses, and whatever right I had in the ground.

Q. Well, why do you say you owned the two buildings—did you erect those buildings? A. I repaired them.

Q. Did you erect them? A. I did not erect them.

Q. Well, by what means did you acquire the ownership of those two buildings? A. Well, I understood that was the way it went along—that they signed a lease, and that the buildings did not belong to the Public Service.

Q. Then your understanding was that by force of Exhibit C-2, this paper here, you acquired the ownership of the buildings and a lease which you thought was upon the lands upon which the buildings were erected, is that right? A. Yes, your Honor.

By Mr. Seclow:

Q. I show you a paper dated November 23, 1923, can you tell us what that is? A. Yes, that is when I paid these water rents. I gave that money to Mrs. Martynick.

Q. That was after you made the bill of sale? A. Yes.

Mr. Seclow: I offer this paper in evidence.

The Vice-Chancellor: What are you referring to as the bill of sale—what exhibit?

Mr. Seclow: The bill of sale is not in evidence yet.

(The paper was admitted and marked Exhibit C-2.)

Mr. Seclow: May I read this receipt, Exhibit C-2?

The Vice-Chancellor: Yes.

Mr. Seclow (reading the same): That is signed "Mike Martynick." That was paid afterwards.

The Vice-Chancellor: "Mike Martynick"?

Mr. Seclow: That is the husband.

The Vice-Chancellor: What has that to do with the dealings with Nellie?

Mr. Seclow: Well, he acted as her agent.

The Vice-Chancellor: Well, that kind of agency will not be assumed in law.

Mr. Seclow: Well, I will call him.

Q. I show you a letter, dated February 8, 1924, from Feinberg & Feinberg, did you receive this? A. I did.

Mr. Seclow: Is there any objection, Mr. Feinberg, to the offer of this letter?

Mr. Feinberg: Yes, I object to it.

Mr. Seclow: I offer it in evidence. It is a letter from Feinberg & Feinberg, who, at the time, was representing Nellie Martynick, concerning the rental due to the Public Service.

The Vice-Chancellor: What relevancy has that to this matter?

Mr. Seclow: Why, they tell him—

The Vice-Chancellor: You cannot tell me what that tells him yet.

Mr. Seclow: It has this relevancy—it gives the entire situation with reference to the rent—that Mr. Feinberg had gotten information from the Public Service about the rent, acting for Mrs. Martynick.

The Vice-Chancellor: Yes, but as I understand the pleadings, there is no relation of landlord and tenant between the Public Service and the complainant here; and I do not know yet what relevancy this letter can have in this case, which you say was written by Feinberg & Feinberg, as attorney for the defendants, to the Public Service Corporation.

Mr. Seclow: Well, he asks for a certain amount of money, in payment of back rents due the Public Service.

The Vice-Chancellor: He asks who?

Mr. Seclow: He asks this man here—in settlement of this. Now he is coming in and asking for a forfeiture.

The Vice-Chancellor: I will receive it, subject to the objection.

(The paper was thereupon marked Exhibit C-3.)

MICHAEL MARTYNICK, sworn.

Direct examination by Mr. Seclow:

Q. I show you a paper marked Exhibit C-2—is that your signature? A. Yes, sir.

Q. What did you do with the money which you got from Mr. Cahill?

Mr. Feinberg: I object to that as irrelevant and immaterial.

The Vice-Chancellor: How do you consider it to be relevant; he is not a party to this suit?

Mr. Seclow: No, but I want to connect it up, and show that he used it for this property.

The Vice-Chancellor: I do not think I will receive it at this point.

Mr. Seclow: Here is a receipt in evidence by the man who received money to use for this property.

The Vice-Chancellor: You say that, but what right had he to receive it for the use of anybody?

Mr. Seclow: I am trying to show what he did with it.

Q. Who sent you down there to receive the money?

The Vice-Chancellor: Wait a moment; I am not concerned with what he did with the money he received, unless you show some connection of it with the defendant.

Q. Is Nellie Martynick your wife? A. Yes.

Q. She took the deed for this property? A. No, I took it myself, and she is in the property; she has got the property.

Q. She has got the property? A. Yes.

Q. Did she tell you to go see Mr. Cahill about the water bills? A. No, I go myself, because she don't know anything about it.

Q. She didn't understand it? A. No.

Q. Now, did you pay the water bill?

Mr. Feinberg: I object to that.

The Vice-Chancellor: Now I sustain the objection, because it appears, so far, that this man was acting of his own accord, and not in any ways on the authority of the defendant.

Q. All right. Did you tell your wife what you did with the money?

Mr. Feinberg: I object to that.

The Vice-Chancellor: What is your purpose, Mr. Seclow?

Mr. Seclow: Well, can agency be only shown in one way.

The Vice-Chancellor: I am not arguing with you, I am asking you what the purpose is?

Mr. Seclow: The purpose is to show that this man got the money to pay the water bills on this property.

The Vice-Chancellor: Suppose he did, how is that going to bind this woman: He might have done something officiously, as I might call it, how is that going to bind her?

Mr. Seclow: Well, she got the benefit of it.

The Vice-Chancellor: Well, suppose she did, how is that paper going to bind her? It cannot in any wise bind you.

Mr. Seclow: It will show that after they

had been treating with the Public Service Company and the question arose as to their right to stay in there—

The Vice-Chancellor: There is no proof here as to their right to stay in there.

Mr. Seclow: All right. The complainant rests.

Mr. Feinberg: I respectfully move for a dismissal.

The Vice-Chancellor: You had better be careful, because if you move now to dismiss you close your case. This is not a court of law, you know.

THE CASE FOR THE DEFENDANT.

FRED. P. SCHAHER, sworn.

Direct examination by Mr. Feinberg:

Q. Mr. Schafer, what is your occupation? A. I am Chief Clerk in the Real Estate Department of the Public Service Corporation.

Q. And, as such, have you access to the records of the Real Estate Department of the Public Service Corporation? A. I have .

Q. Have you made a thorough search of the premises, No. 28. West 19th Street, Bayonne, New Jersey? A. I have.

Q. Have you got the first lease made between the Public Service on that premises? A. I have.

Mr. Seclow: I object to that, as calling for a conclusion.

The Vice-Chancellor: He says he has; I don't know; maybe he has, and maybe he has not.

Mr. Seclow: Well, the point is this, your

Honor—"the first lease" would imply—well, if he asked him if he had a specific lease, that may not be objectionable.

The Vice-Chancellor: I think you had better ask that, Mr. Feinberg.

(Question withdrawn.)

Q. Are you in possession of a lease covering those premises, made by the Public Service to a man named Levandroski—or what is that name? A. Adolf Zilewicz.

Q. Your answer to that question is what? A. I have.

Q. When was that lease made? A. That lease was made around November, 1915, as I recall the date.

Q. Have you got the lease with you? A. I have the original lease with me.

Q. Well, let us have it? (The witness produces a paper, which he hands to examining counsel.)

Q. Is that a monthly lease?

The Vice-Chancellor: No, that is objectionable. The paper itself will state what it is.

Mr. Feinberg To Mr. Seclow): Have you any objection to the lease?

Mr. Seclow: No objection.

Mr. Feinberg: I offer it.

(Paper admitted and marked Exhibit D-1.)

The Vice-Chancellor (To Mr. Feinberg): I wish you would state on the record the particulars of the lease, the names of the parties and the date, and some of the essential elements.

Mr. Feinberg: The lease is dated March

20, 1916; made by the Public Service Railway Company to Adolph Zilewicz; the terms of the lease are for the term of one month from the 1st of November, 1915, with a monthly rent of $2.09 per month. And the lease specifically sets forth that the lessee agrees not to underlet the said premises except with permission of the said lessor in writing.

Q. From that date—1916—Mr. Schafer, did your company, the Public Service Railroad Company, or the Public Service Corporation, ever make another lease, a written lease, with anybody else on these premises? A. Yes, we did.

Q. With whom? A. With Mr. Martynick.

Q. And between the making of this lease and the making of the Martynick lease, which I will refer to a little later, did you ever make a lease with anybody else? A. We did not.

Q. Now, after this man Zilewicz made this lease, did you recognize any other tenant on those premises? A. We had a tenant by the name of Galenti there—Nathan Galenti, or N. Galenti, who paid two years rent, from May 1st, 1920 to May 1st, 1923.

Q. Did you terminate that tenancy? A. We served him with a notice in January, 1923, to vacate—

Mr. Seclow: I object, if your Honor please, on the ground that it is not binding on us.

The Vice-Chancellor: I guess that is so, Mr. Feinberg.

Mr. Feinberg: The complainant comes in here and claims he had a leasehold interest—

The Vice-Chancellor: Oh, why don't you prove your instruments; I think that is the quickest way out of it.

Mr. Feinberg: All right.

Q. Now, I show you a paper, and ask you what that is? A. This is the lease we made with Michael Marytnick.

Q. By "we" you mean the Public Service Railroad Company? A. The Public Service Railway Company.

Q. Do you know when that lease was made?

The Vice-Chancellor: Well, don't it bear date?

Mr. Feinberg: Yes, sir. I will offer this in evidence.

(Admitted, without objection, and marked Exhibit D-2.)

Mr. Feinberg: Exhibit D-2 is a lease which is dated May 1, 1923, between the Public Service Railway Company and Michael Martynick, for the term of two months from the First day of May, 1923, at the rate of fourteen dollars per month; and in addition to said rent, the lessee is to pay all taxes assessed against improvements on said lots, and all water rents. There is a stipulation which provides that the lease shall terminate upon the giving of one month's notice by either of the parties, and until this notice is given the lease continues for two months at a time; and also provides that this lot is demised and let unto the said lessee in order that he may keep and maintain thereon the house now erected thereon, which is the property of said lessee, and

which the said lessee is to entirely remove from said premises at the termination of this lease, leaving the said lot in proper order and condition; with the usual clause about the payment of the rent and quitting and surrendering the premises. The lease specifically provides that "it is further understood and agreed by and between the parties hereto, that the lessee shall not relet or underlet the whole or any part of the said premises, nor assign this lease, without the written consent of the said lessor."

Q. While this lease was dated May 1st, 1923, I will ask you do you recall when it was made, approximately? A. Our correspondence would indicate that it was executed either February 29th or March 1st, 1924.

Q. Around March, 1924? A. Yes.

Q. And why was it dated back to the 1st day of May? A. We had given Mr. Galenti notice to get out from May 1st—

Mr. Seclow: I object to that, if the Court please.

The Vice-Chancellor: I think the reasons for dating it back are immaterial in this case, as far as I can see.

Mr. Feinberg: All right; I withdraw that.

Q. Now, if Mr. Martynick or Mrs. Martynick had not made this lease, would they have been permitted to remain in possession?

Mr. Seclow: That is objected to.

The Vice-Chancellor: I sustain the objection.

Q. Until this lease was made, did the Public Service Company recognize Mr. Martynick as a tenant? A. It did not.

Q. And until this lease was made, when was the last rent the Public Service Company received for these premises? A. I cannot recall dates, but the rent was paid, if that is what you ask.

Q. Yes. Up to what date was the rent paid on these premises? A. Up to May 1st, 1923.

Q. After that you never received any rents from anybody until this lease was made? A. As I recall it, no.

Q. Did you ever make a complete search of this record? A. I did.

Q. Does your search disclose a tenant by the name of Charles Wilder? A. It does not.

Q. Does your search disclose a tenant by the name of Thomas R. Cahill?

Mr. Seclow: I object to that.

The Vice-Chancellor: The objection is sustained as to the last question.

Q. Did the Public Service Railway Company ever have any dealings with Thomas Cahill?

Mr. Seclow: That is objected to.

The Vice-Chancellor: Well, I do not mind considering your objections, but you know, under the rule of the court, that an objection made without stating some grounds for it is not a matter of much significance. I will sustain the objection at this time, but you had better bear that in mind, if you are going to keep on objecting.

Q. Was Mr. Martynick or Mrs. Martynick obliged

to pay the rent from May, 1923? A. Mr. Martynick was.

Q. From the date of that lease? A. From the date of that lease.

Q. As far as your records disclose, there were no assignments from this original lessee, that the Public Service Company consented to?

Mr. Seclow: I object to that.

The Vice-Chancellor: Objection sustained.

Mr. Feinberg: I would like to know the ground of the objection.

The Vice-Chancellor: Well, it is manifest to me that it is inadmissible, so I will sustain the objection; but counsel had better bear in mind that an objection without grounds stated is of no avail, and I called his attention to that before.

Cross examination by Mr. Seclow:

Q. Did it make any difference to you, while you were collecting this rent, who paid the rent?

Mr. Feinberg: I object to that, on the ground that it is immaterial, irrelevant and improper.

The Vice-Chancellor: Oh, yes; I sustain the objection.

Mr. Seclow: No further questions.

The Vice-Chancellor: Can counsel agree upon furnishing the Court, if necessary, with a copy of that paper, so that the original would not have to be left here—I mean the Public Service lease to Martynick?

Mr. Feinberg: Yes, sir.

The Vice-Chancellor: I do not want to

keep the records of the Public Service Company here if you can avoid it.

Mr. Feinberg: I will agree to strike off a copy of that here today and let you have it immediately.

The Vice-Chancellor: Do you want the original here for any reason?

Mr. Feinberg: No, sir.

The Vice-Chancellor: It had better remain here until the case is concluded; I didn't know that it would be concluded very shortly, or not.

Mr. Seclow: I think we can finish it very shortly.

JOHN LEVANDOWSKY, sworn.

Direct examination by Mr. Feinberg:

Q. What is your business? A. Carpenter and builder.

Q. And contractor? A. Well, I take contracts, generally.

Q. Did you do any repairing on the premises 28 West Nineteenth Street? A. I did.

Q. When you got there you saw the condition of the buildings?

The Vice-Chancellor: What is the materiality of that?

Mr. Seclow: I object, on the ground that it is immaterial.

Mr. Feinberg: I want to show that the two shacks were not worth more than four hundred dollars.

The Vice-Chancellor: Well, what does that indicate? I will sustain the objection,

because it does not seem to be material on the issues that I can see before me.

Mr. Feinberg: My point was to show (and I was going to show) that the Martynicks went into this transaction believing they had a lease for years.

The Vice-Chancellor: This contract indicates that payments were to be made monthly at $25, and at $300 a year, and it would take five years to pay that off. The mortgage bears date October 1, 1923. Now, the clause in that mortgage, to which you referred before, says that "it is understood, however, that if the leasehold interest which I now have in the said premises known as No. 28 West Nineteenth Street, is terminated through no fault of mine, and in that event, the balance due on this mortgage shall cease, and the balance considered as paid in full; it being understood that in the event of my losing the right of possession in said premises this mortgage shall be considered null and void." Now, it appears from the proofs thus far that this defendant has lost possession of these premises because there is somebody else in possession—in other words, her husband is in possession under a lease made by the Public Service Corporation. I just want to call your attention to that, to indicate that I do not consider the question of repairs of any significance.

Mr. Feinberg: That is all.

(No Cross Examination.

The Defendant Rests.

Mr. Seclow: On that last point, I want to

call your Honor's attention to the answer: The answer says that Martynick took the lease on behalf of his wife, and they are bound by that.

The Vice-Chancellor: Are they bound by that, without Martynick being considered in the matter?

Mr. Seclow: No, but it is the answer of Mrs. Martynick.

The Vice-Chancellor: How can she bind her husband?

Mr. Seclow: It is not a question of binding her husband; she says she sent him out to act as her agent, to get that lease—

The Vice-Chancellor: Suppose she says so, what have you got here to indicate that he coincides with that; her saying her husband was her agent don't make him her agent, as against him.

Mr. Seclow: No, the statements of the man who claims he is the agent are not binding, but the statements of the principal are always binding.

The Vice-Chancellor: Do you think that if she said that she sent her husband out to obtain a lease for her, and her husband went out and obtained a lease in his own name, that that can deprive him of his lease, without his being a party to the suit and having an opportunity to be heard?

Mr. Seclow: No; but she says she obtained the lease through her husband.

The Vice-Chancellor: But the proof here does not disclose that; the proofs here disclose that he has the lease, and there is nothing to indicate that he is not entitled to it.

Mr. Seclow: That is true; it simply proves he took it in his name, but it is hers.

The Vice-Chancellor: How did you prove that?

Mr. Seclow: It is in the pleading; we did not have to prove it if it is in the pleading (reading the portion of the pleading referred to).

The Vice-Chancellor: All I can say in answer to that is that the lease in evidence here indicates that it is to Mike Martynick. Now, the agency of the husband is not presumed in law.

Mr. Seclow: She admits it.

The Vice-Chancellor: She admits it, but she cannot make this man her agent against his will.

Mr. Seclow: It is not so much a matter of agency; she says he holds it in trust for her.

The Vice-Chancellor: But he is entitled to be heard on that question. He has a piece of property—how can she deprive him of his piece of property without his consent, or being heard. This lease is property. Now, merely because she says it is hers does not make it hers. He is entitled to be heard on that question. If you have anything else to offer, I am ready to hear it.

MRS. NELLIE MARTYNICK, sworn.

(Mr. John Levandowski was sworn as interpreter, by consent of counsel for both parties.)

Direct examination by Mr. Seclow:

Q. Do you remember when your husband went down to see Mr. Cahill about the payment of the water bills?

Mr. Feinberg: I object to that as irrelevant, immaterial and improper, and not proper rebuttal, to ask her that question.

The Vice-Chancellor: What have you to say to that?

Mr. Seclow: She is my witness.

The Vice-Chancellor: I know, but your case was concluded long ago; you say she is your witness, but you have closed your case as complainant; now you are calling her in rebuttal. I presume, aren't you?

Mr. Seclow: Well, it is rebuttal. Any inference that might arise there, I want to disclose.

The Vice-Chancellor: I will overrule the question.

Q. Who paid the thousand dollars to Mr. Cahill when this matter was closed on October 1st, 1923?

Mr. Feinberg: I object to that, also, on the same ground.

The Vice-Chancellor: How is that relevant? What is the purpose of this question? You had an opportunity of putting in your case, and you closed your case. I do not want to foreclose you, I want to see what you are leading to.

Mr. Seclow: Either she was acting as a dummy for Martynick, or he now is acting as a dummy for her.

The Vice-Chancellor: But you closed your case. Do you want to open your case again?

Mr. Seclow: No further questions.

The Vice-Chancellor: Anything else?

Mr. Seclow: That is our case.

The Vice-Chancellor: Do counsel want to be heard?

Mr. Feinberg: I am willing to submit it.

Mr. Seclow: Well, I want to be heard.

(Mr. Seclow then summed up for the complainant.)

FALLON, V.-C. (orally, after hearing counsel): The complaint in this matter indicates that on October 1st, 1923, Nellie Martynick, who is the defendant in this proceeding, made a chattel mortgage to the complainant to secure the payment of the sum of $1,500, the said sum to be paid in monthly installments of $25 each on the first day of each and every month, in advance, besides interest at the rate of six per cent. That mortgage was said to cover, by way of lien, two one-family frame buildings situate and located upon a lot known and numbered as 28 West Nineteenth Street, Bayonne, N. J.—said buildings, as recited in the complaint, being the property of Nellie Martynick, and the buildings being on leased lands. The complainant, by Paragraph 4, indicates that no payments were made on the principal or interest on the complainant's mortgage, and that the entire principal sum of $1,500, besides interest from October 1, 1923, became due and payable to

the complainant, and the complainant elected to demand the entire principal and accrued interest because of the defendant having neglected, or made default in, the payment of installments as they became due and payable under the terms of the mortgage. The complainant prays that an account be taken of the amount due on complainant's mortgage, and the defendant be decreed to pay the complainant the amount so found due, with interest, and that, in default thereof, shall be debarred and foreclosed of all equity of redemption in said chattels, and that a decree be made for the sale of the mortgaged chattels to raise and pay the complainant the amount so due.

The answer filed by the defendant admits the making of the so-called chattel mortgage for the sum of $1,500; she admits Paragraphs 1, 2 and 3 of the complaint; she admits Paragraph 5 of the complaint. She says that prior to the filing of the bill the complainant, through one Philip H. Levi, a constable of Hudson County, sought to foreclose the chattel mortgage in question by sale, under notices posted in various places, and that, because of a claim made upon the complainant's solicitor by Feinberg & Feinberg, solicitors of the defendant, that the chattel mortgage was no longer in existence and was void because of the covenant and restriction contained therein, the chattel mortgage sale should not be proceeded with, and that the complainant, through his solicitor, abandoned that proceeding, and then subsequently filed the bill of complaint in this cause.

There are certain paragraphs in the answer of the defendant which set out what the defendant claims to have been a representation made by the complainant with respect to the property covered

by the chattel mortgage, and with respect to a lease which the complainant claimed to have had and under which he held, relating to the premises No. 28 West Nineteenth Street, Bayonne. The reply to that answer does not specifically deny the several paragraphs of the answer, but contains merely a general replication. It is a well-known rule of pleading that material allegations contained in a bill of complaint which are not specifically denied are said to be admitted as true. Now, there are certain paragraphs of that answer (and I refer particularly to Paragraphs 12, 13, 14 and 15) which appear to the Court to be quite significant. Paragraph 12 says that it was understood and agreed between the defendant and complainant that if the leasehold interest in and to the premises is terminated through no fault of the defendant, then and in that event, the balance due on said mortgage shall cease, and that the debt existing between the defendant and complainant shall be considered cancelled. Paragraph 13 refers to the clause contained in the mortgage, part of which recites that the instrument was made upon a condition that she (the defendant) should have possession of the premises during the life of the mortgage. Now, it is apparent that the mortgage was intended to run for practically five years, and the payments thereunder were to be made monthly, of $25.00. Paragraph 14 refers to a representation made by the complainant that he had a right to the possession of the premises in question under an assignment from one Charles Wilder. Paragraph 15 alleges that she (the defendant) learned that the complainant was not lawfully in possession of the premises in question, and that Charles Wilder never had been in possession of the prem-

ises, nor did he ever have a lease from the Public Service Railway Company (which appears to be conceded was the owner of the lot in question), nor was Wilder ever lawfully entitled to the possession of the same; and that the assignment from Wilder to the complainant was null and void and of no value whatever.

Now, there was no lease offered in this case to indicate whether or not the complainant, or any of his predecessors in title or possession really had a lease with the Public Service Railway Company, which is said to be the owner of the property. The complainant, by a paper (which I believe is referred to as Exhibit C), undertook to assign what purports to be some rights under a lease said to have been assigned to him by Wilder. The testimony of the complainant indicates that he never saw a lease made to either Wilder or to anyone else, but he took it for granted because of some talk he had with some party he referred to as "Galenti" that what Galenti said as to his rights in the premises was true.

The defendant, in addition to the answer as filed, also sets out a counterclaim wherein it is asked that the complainant be restrained and enjoined from assigning his interest in and to the chattel mortgage in question to any third party during the pendency of the suit, and that the chattel mortgage be cancelled in accordance with the intentions of defendant and complainant, and in accordance with the covenant and restriction contained in the chattel mortgage executed between the parties. The answer to the counterclaim is merely a denial of the allegations therein. In the replication and answer to the counterclaim, as filed by the solicitor of the complainant, there is annexed notice of a motion addressed to the answer

and counterclaim, saying that at or before the hearing of the matter the complainant would move to strike out the answer and counterclaim on the ground that the answer and counterclaim do not set up equitable defenses and counterclaims respectively. At the commencement of the hearing counsel for the complainant expressly waived his right to apply to the Court for any relief under that notice, and, as the Court understands it, practically acquiesces that the allegations contained in the answer are well pleaded, because that, seemingly, is the effect of his declination to press his motion addressed to the pleadings; and, furthermore, as stated before, the rule thoroughly is that any material allegation set out in the pleadings which is not denied by the other party is to be regarded to be true, or to be effective pleading.

It appears to me in this matter that Cahill had nothing whatever to assign. This instrument referred to as a chattel mortgage here appears to the Court to be what ordinarily is known as a *nudem pactum*—it was something for which there was no consideration whatever. There was nothing before the Court to indicate that these buildings were to be regarded as chattels. Buildings situate upon lands ordinarily are considered as part of the land, or part of the real estate, as the Court understands the rule; and to make the buildings other than real estate there should be some proof before the Court to indicate that they are what they are claimed to be in the chattel mortgage—that is, chattels.

It appears by the proofs in this cause that this defendant, by some means, and without his fault, has been deprived of the right to the occupancy of these premises within the period of time for

which this chattel mortgage was to run; and it appears to the Court that that clause was inserted in that chattel mortgage with the view to protect the defendant against any dispossession from the premises, or from any deprivation of the rights in and to the lease which is referred to, and in and to the premises—the so-called chattels—that is, the buildings.

Another thing that appears somewhat significant to the Court in this matter, as a sort of an acquiescence in the defendant's insistment that the chattel mortgage was not subsisting but was void and should be so regarded, was the inaction of the complainant until the bill of complaint was filed in this cause, which appears to be October 23, 1926; whereas, the complainant indicates that the moneys due under the chattel mortgage, if due at all, were due in October, 1923. Of course, mere delay for that period of time is not in itself prejudicial to the complainant, but it has some significance in the Court's mind as to the relation of the parties here, and as to what they considered their respective rights to be.

Another thing that is significant somewhat, and that is in the Court's mind, is the fact that the complainant undertook to foreclose this chattel mortgage in what is generally called the "short method of procedure" by giving notice to the mortgagor and the posting of notices; and when the attorney for the defendant remonstrated with the complainant, claiming that the mortgage was no longer in existence and was null and void, the complainant abandoned that short method of mortgage foreclosure proceeding and said he would resort to redress in this Court by way of strict foreclosure.

The complainant in this case, in his testimony, clearly stated that he did not see any lease, and it was not manifest to the Court from his testimony that, as far as he knew, there may not have been at any time any lease in existence. He bought from someone what that someone claimed to be a leasehold interest in these premises. It appears from the testimony of the representative of the Public Service Corporation that whatever rights were to be exercised under the lease made by the Public Service Corporation to this Zilewicz (or however his name may be pronounced) expired in 1923. Then it appears also from the other proofs in the case that this lease to Mike Martynick was made in 1924 as of September, 1923. The complainant not only says that he knew nothing whatever of the lease, other than what was represented to him by the party through whom he went into possession, but that he never paid any rent to anyone; but he said he was given to understand by the party from whom he acquired possession, or "title" (if that is what he is going to call it) that he was to pay an annual rental and also pay taxes—and yet, he said he was in possession for two years and did not pay either.

Now, it appears very much to the Court, from the proofs submitted, that he was apparently there as a sort of squatter, or a usurper of somebody's rights. It does not appear to the Court as though he had acquired any valid rights to the title or possession of these premises under any paper writing through which he claims; and the Court would regard it as unconsionable that the complainant should be allowed to take $2,500 (or $1,500, which appears to be the amount in question in this chattel mortgage) from the defendant with-

out giving some consideration for it. Surely, it cannot be contended, I do not think seriously, as counsel with the complainant has intimated, that the scrap of paper, or piece of paper, referred to as Exhibit 2, which purports to be an assignment of the lease (and it is questionable as to whether there was any such) could be regarded as a proper consideration, and of the value of $1,500, in view of all of the other facts and proofs in the case. There was some effort on the part of the solicitor of the complainant to couple up the complainant with a lease which appears to be a paper offered in evidence to be now held by Mike Martynick, who was said to be the husband of the defendant. There was also an effort on the part of the counsel for the complainant to couple up the complainant with some paper offered in evidence and marked Exhibit C-2, which indicates that Michael Martynick received a sum of money from Thomas R. Cahill. The apparent effort was to establish an agency of some kind as between husband and wife; but I think it is well settled in law that the agency of a husband or wife as representing each other is not to be presumed in law but must be proven.

The Court is of the opinion that the papers through which this agency was attempted to be proven do not suffice to effectuate the purpose intended. These papers that have been referred to as "leases" prior to the lease made to Mike Martynick appear to be monthly lettings and to be non-transferrable—that is, the premises held under them are not to be sublet. The Court's attention has been called to the apparent fact, as evidenced by the paper, that it merely prohibits subletting and does not prohibit assignment. But the Court,

as indicated before, is in the position that there has been no proof whatever here of any lease having at any time been assigned to Cahill, and that the paper-writing purporting to be a lease as between the Public Service Corporation and Zilewicz was a monthly letting; that the premises could not be sublet without the Public Service Corporation's consent; and there was no form of a lease submitted to the Court, that the Court recalls, excepting some paper that was referred to and called such. The Court is in a quandary to determine what sort of a lease in indicated by the purported assignment from Cahill to the defendant. It merely refers to a lease of the premises, or some such lease as the complainant might be entitled to. It is very uncertain in its terms, and it leaves it conjectural as to whether the complainant had any rights whatever. Apparently, from a reading of the so-called "assignment," the complainant must have been somewhat dubious as to what rights he had in and to the premises, because he does not expressly undertake to assign a subsisting lease, but uses language to try to cover up such interest or rights that he may have to the premises.

Now, counsel for the complainant has indicated that what was handed or transferred to the complainant for the sum of $1,500 was that piece of paper referred to as the purported assignment from Cahill to the defendant; and the Court is of the opinion that where one undertakes to assign (as in this case the complainant undertook to assign) a lease, the party so undertaking indicates, and intends to indicate, that he has something in the nature of property which he can transfer—in other words, that he impliedly says to the other, "I have a lease which I am hereby assigning to

you." Now, there is nothing to indicate in this case that he ever had a lease, and the circumstances and the proofs seem to tend strongly to indicate to the Court that he had none such.

Because of all of the proofs in the case, and considering the pleadings and such allegations from the answer of the defendant as the Court considers must be taken as true by reason of the fact that they are not specifically denied or explained by the complainant in his reply thereto; and considering also that the complainant has not made out, in the opinion of the Court, a clear case and sustained the burden of proof required to be sustained under the circumstances in this case, the Court will advise a decree dismissing the complainant's bill of complaint, and will advise a decree granting the prayer of the defendant's counterclaim, enjoining the complainant from assigning any interest that he claims to have in the chattel mortgage in question, and from assigning said chattel mortgage to any third person, and also to effect the cancellation of the chattel mortgage in question. Counsel may prepare a proper form of decree and submit it to the Court as soon as possible. Counsel for the defendant had better submit that form of decree to counsel for the complainant before it is presented to the Court, with a view of having him approve of it as to the form thereof, if he will; if he will not, counsel may come before the Court, and the Court will settle the form of the decree. Now, is there anything else to be said in this case? Have you anything further to say.

Mr. Feinberg: No, sir.

The Vice-Chancellor: You have nothing, Mr. Seclow?

Mr. Seclow: I have nothing.

(Case Closed.)

Exhibit "C-1."

BACK OF MORTGAGE.

Dated — — October 1st 1923.

NELLIE MARTYNICK

TO

THOMAS R. CAHILL

MORTGAGE ON PERSONAL PROPERTY.

RECEIVED in the Register's Office of the County of Hudson, New Jersey, on the 2nd day of October, A. D., 1923 at 2:27 P. M. o'clock in the afternoon and recorded in Book 446 of Chattel Mortgages for said County, on page 68.

JOHN J. McMAHON,
Register.

TO ALL TO WHOM THESE PRESENTS SHALL COME, KNOW YE THAT I, NELLIE MARTYNICK, of the City of Bayonne, County of Hudson and State of New Jersey, herein known as the party of the first part, for securing the payment of the money hereinafter mentioned, and in consideration of the sum of one dollar to me duly paid by THOMAS R. CAHILL of the City of Jersey City, County of Hudson and State of New Jersey, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant, bargain and sell unto the said party of the second part his executors, administrators and assigns, all the goods and chattels mentioned

in the schedule hereunto annexed and now in premises known and numbered as 28 West 19th Street, in the City of Bayonne, New Jersey,

To Have and To Hold, all and singular the goods and chattels above bargained and sold, or intended so to be, unto the said party of the second part, his executors, administrators and assigns forever. And I the said party of the first part, for myself, my heirs, executors and administrators, all and singular for said goods and chattels, above bargained and sold, unto the said party of the second part, his executors and administrators and assigns, against me the said party of the first part, and against all and every person or persons whomsoever, shall and will warrant, and forever defend, Upon Condition, that if I the said party of the first part shall and do well and truly pay unto the said party of the second part, his executors, administrators or assigns the sum of Fifteen hundred dollars ($1500.00) in equal monthly installments of $25.00 each, on the first day of each and every month in advance, together with interest at six per cent. per annum then these presents shall be void. And I the said party of the first part, for myself, my heirs, executors, administrators and assigns, do covenant and agree to and with the said party of the second part, his executors, administrators and assigns, that in case default shall be made in the payment of the said sum above mentioned or in case the said party of the first part shall at any time before the day of payment herein provided for, remove the said goods and chattels or any of them, or permit or suffer any attachment or other process against property to be issued against me the said party of the first part, or permit or suffer any judgment to be entered

against me then the said sum of money herein mentioned shall become instantly due and payable, and it shall and may be lawful for, and I the said party of the first part, do hereby authorize and empower the said party of the second part his executors, administrators and assigns, with the aid and assistance of any person or persons, to enter dwelling-house, store and other premises, and such other place or places as the said goods or chattels are or may be placed, and take and carry away the said goods or chattels, and to sell and dispose of the same for the best price they can obtain; and out of the money arising therefrom, to refrain and pay the said sum above mentioned and all charges touching the same, rendering the overplus (if any) unto the said party of the first part, or to my executors, administrators or assigns. And until default be made in the payment of said sum of money the said party of the first part to remain and continue in the quiet and peaceful possession of the said goods and chattels, and a full and free enjoyment of the same. And I the said party of the first part for myself, my heirs, executors, administrators and assigns, do hereby covenant, promise and agree to and with the said party of the second part, his executors, administrators and assigns, to pay the said sum of money and interest above mentioned at the time and times, and in the manner above mentioned.

It is understood however, that if the leasehold interest which I now have in the said premises known and numbered as 28 West 19th Street, Bayonne, New Jersey, is terminated through no fault of mine, in that event the balance due on this mortgage shall cease, and the balance considered

as paid in full. It being understood that in the event of my losing the right of possession in said premises, this mortgage shall be considered null and void.

IN WITNESS WHEREOF, I the said party of the first part have hereunto set my hand and seal the first day of October, one thousand nine hundred and twenty-three.

Sealed and delivered in the presence of

JACOB STEINBERG.

her
NELLIE x MARTYNICK.
mark

SCHEDULE.

All those two one family frame buildings now situated at and located upon a lot known and numbered as 28 West 19th Street, in the City of Bayonne, County of Hudson and State of New Jersey.

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

BE IT REMEMBERED, that on this first day of October in the year of our Lord One Thousand Nine Hundred and twenty-three, before me personally appeared Nellie Marytnick, who, I am satisfied, is the grantor mentioned in the foregoing Chattel Mortgage, to whom I first made known the contents thereof, and thereupon acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein express:

JACOB STEINBERG,
Master in Chancery of N. J.

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

THOMAS R. CAHILL, of full age, being duly sworn, on his oath, saith that he is the holder of this mortgage. That the amount due and to grow due on said Mortgage is the sum of Fifteen hundred Dollars and no cents, together with interest on said sum at the rate of six per centum per annum, payable monthly. That the consideration of said mortgage is as follows: The said sum of $1500 being the balance due on the purchase price of the two houses mentioned herein, and also the assignment of my leasehold interest in and to the lot known and numbered as 28 West 19th Street, Bayonne, New Jersey.

THOMAS R. CAHILL.

Sworn and subscribed to before me }
this first day of October, 1923. }

JACOB STEINBERG,
Master in Chancery
of New Jersey.

Exhibit "C-2."

THIS INDENTURE, made the second day of August, in the year one thousand nine hundred and twenty-one, between Charles Wilder of the City of Bayonne, County of Hudson and State of New Jersey, of the first part, and Thomas R. Cahill, of the City of Jersey City, County of Hudson and State of New Jersey, party of the first part.

WITNESSETH, that the said party of the first part, in consideration of the sum of one dollar and other good and valuable consideration to him in hand paid by the party of the first part, of, in

and to all that certain lease or right to have a lease, or any right that they may have in the premises known as No. 28 West 19th Street, Bayonne, N. J., and of, in and to the building now standing upon said premises.

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

CHARLES WILDER (L. S.)

Signed, sealed and delivered in the presence of

ISRAEL LIPSHITZ.

ASSIGNMENT OF LEASE.

CHARLES WILDER
TO
THOMAS R. CAHILL.

I hereby assign all my right, title and interest in and to the within assignment of lease and in consideration of One Dollar to Nellie Martynick.
Dated Oct. 1, 1923.

THOMAS R. CAHILL.

In the presence of:
JACOB FEINBERG.

Exhibit "C-2."

Nov. 20—1923.

Received from Thomas R. Cahill, the sum of One hundred & twenty-two Dollars and sixty cents ($122.60) said amount to be paid to City of Bayonne for water from Dec. 3—1923 to date on Block 329 Lot 14 — 28 West 19th Street, Bayonne.

MIKE MARTYNICK.

Exhibit "C-3."

Jesse J. Feinberg Jacob Feinberg

FEINBERG & FEINBERG
Counsellors at Law
Opera House Building
Bayonne, N. J.

Telephone 986

Feb. 8th, 1924.

Thomas R. Cahill, Esq.
363 Ocean Avenue
Jersey City, N. J.

Dear Sir:

You will recall that on October 1st, last, you transferred all your interest of premises, 28 West 19th Street, Bayonne, N. J., to Nellie Martynick. At that time, if you remember, you affirmed that the premises were free and clear of any and all encumbrances whatsoever.

We are in receipt of a letter from Public Service Railway Company, showing that a monthly tenancy was created last May, at a rental of $14.00 per month, in addition to a payment of annual taxes existing against the improvements of the property, together with all charges for water used on said premises. Under this arrangement, there will be due the sum of $140.00 on March 1st, 1924, out of which sum there was due at the time of the execution of your agreement with Mrs. Martynick, the sum of $84.00. This latter amount should be paid by you. May I, therefore, expect a check from you for $84.00 during the next few days, as Mrs. Martynick has been served with a notice to vacate unless this amount is paid before the 14th of February.

If there is any question in your mind about this, I will be glad to take this matter up with you personally, but I shall expect to hear from you no later than Tuesday, February 12th.

Yours truly,

JACOB FEINBERG.

JF/AZ

Exhibit "D-1."

THIS AGREEMENT made this twentieth day of March, in the year of our Lord One thousand nine hundred and sixteen between Public Service Railway Company, a corporation and body politic of the State of New Jersey, hereinafter called the "Lessor" of the first part, and Adolf Zilewitch, hereinafter called "Lessee" of the second part.

WITNESSETH that the said lessor hath demised, let and rented and by these presents doth demise, let and rent to the lessee all that lot or tract of land and premises situate in the City of Bayonne, in the County of Hudson and State of New Jersey, being known and designated as No. 28 West 19th Street,

For the term of one (1) month from the fourth day of November in the year of our Lord one thousand nine hundred and fifteen, thence next ensuing for the monthly sum or rent of two and 9/100 dollars ($2.09) payable in advance.

It is mutually understood and agreed between the parties hereto that if the lessee remains over and continues in possession of the said premises by consent of the lessor at the expiration of the said one month hereby granted, then this agreement and all the terms and conditions herein contained are continued for another month and so

on from month to month, the term of the lessor however terminating at the end of each month in the same manner as if such term had been inserted herein.

The lessee hereby agrees to pay the said rent in advance, not to underlet the said premises except with the permission of the said lessor in writing to use the same only as a ———————— and not to make or suffer to be made any alterations or changes therein without permission in writing from said lessor, and at the end of the tenancy to surrender the premises in same good order and condition, usual wear and tear excepted, as they now are.

In case of any default in the terms and conditions hereof the Lessor may re-enter and possess itself of the said premises without any let or hinderance of the said lessee.

The said lessee may upon the payment of the said rent and performing the said covenants herein contained peaceably and quietly have, hold and enjoy the said premises for the term herein granted.

IN WITNESS WHEREOF, the said lessor acting by George Baker, its Real Estate agent, hath caused these to be signed, and sealed by him, and the said lessee hath properly executed these presents under seal, dated the day and year first above written.

PUBLIC SERVICE RAILWAY COMPANY,
Real Estate Agent (L. S.)
By GEORGE BAKER,
ADOLF ZILEWICH.

Signed, sealed and delivered
in the presence

ALLAN R. BICKMAN,
ROBERT W. WILLIAMS.

Exhibit "D-2."

THIS INDENTURE, made this first day of May in the year of our Lord one thousand nine hundred and twenty-three, between PUBLIC SERVICE RAILWAY COMPANY, a corporation of the State of New Jersey, hereinafter called "Lessor," of the first part, and MICHAEL MARTYNICK, of the City of Bayonne, in the County of Hudson and State of New Jersey, hereinafter called "Lessee," of the second part.

WITNESSETH, that the said Lessor hath demised and let and by these presents doth demise and let unto the said lessee Lot 14, Block 329 on the south side of West 19th Street, in the City of Bayonne, in the County of Hudson and State of New Jersey, for the term of two (2) months from the first day of May in the year of our Lord one thousand nine hundred and twenty-three (subject to termination as hereinafter expressed) at the rate of fourteen dollars ($14) per month payable in advance. In addition to said rent the said Lessee is to pay all taxes assessed against the improvements on said lot, and all water rents charged against the same.

It is understood and agreed by and between the parties hereto that until one party shall give to the other one (1) month's written notice as hereinafter expressed, this lease with all the terms and conditions hereof shall be deemed continued from the end hereof for the further period of two (2) months and so on for two (2) months at a time thereafter, but shall be deemed to be at an end on the first day of the month succeeding the giving of a one (1) month's notice in writing by either party to the other. Upon the giving of such

notice, the first day of the month specified therein, which shall be at least one (1) month after the giving of such notice, shall be deemed and taken to be the end of the term hereof, the same as though it were expressly herein written.

This lot is demised and let unto the said Lessee in order that he may keep and maintain therein the house now erected thereon which is the property of the said Lessee, and which the said Lessee is entirely to remove from said premises at the termination of this lease, leaving the said lot in proper order and condition.

And it is understood and agreed that if any rent shall be due and unpaid or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said lessor to re-enter the said demised premises and to remove all persons therefrom.

And the said Lessee doth hereby covenant to pay to the said Lessor the said rent as herein specified and that at the expiration of the said term the said Lessee will quit and surrender the said premises hereby demised in good order and condition.

And the said Lessor doth hereby covenant that the said Lessee on paying the said rent and performing the covenants herein contained shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

It is further distinctly understood and agreed by and between the parties hereto that the Lessee shall not re-let or under-let the whole or any part of the said premises, nor assign this lease without the written consent of the said Lessor.

IN WITNESS WHEREOF, the said Lessor hath caused these presents to be signed by its Vice-

President, attested by its Assistant Secretary, and its corporate seal to be hereunto affixed, and the said Lessee hath hereunto set his hand and seal; dated the day and year first above written.

PUBLIC SERVICE RAILWAY COMPANY,
By

Vice President.

MIKE MARTYNICK.

ATTEST:

CHARLES M. BUDER,
Assistant Secretary.

Signed, sealed and delivered
in the presence of

F. W. SCHMIDT.

or any of them, or permit or suffer any attachment or other process against property to be issued against me *the said party of the first part, or permit or suffer any judgment to be entered against* me *then the said sum of money herein mentioned*

shall become instantly due and payable, and it shall and may be lawful for, and I *the said party of the first part, do hereby authorize and empower the said party of the second part* his *executors, administrators and assigns, with the aid and assistance of any person or persons, to enter dwelling-house, store and other premises, and such other place or places as the said goods or chattels are or may be placed, and take and carry away the said goods or chattels, and to sell and dispose of the same for the best price they can obtain; and out of the money arising therefrom, to retain and pay the said sum above mentioned*

and all charges touching the same, rendering the overplus (if any) unto the said party of the first part, or to my *executors, administrators or assigns.* And *until default be made in the payment of said sum of money*

the said party of the first part to remain and continue in the quiet and peaceful possession of the said goods and chattels, and a full and free enjoyment of the same. And I *the said party of the first part for* myself, my *heirs, executors, administrators and assigns, do hereby covenant, promise and agree to and with the said party of the second part* his *executors, administrators and assigns, to pay the said sum of money and interest above mentioned at the time and times, and in the manner above mentioned.*

It is understood however, that if the leasehold interest which I now have in the said premises known and numbered as 28 West 19th Street, Bayonne, New Jersey, is terminated through no fault of mine, in that event the balance due on this mortgage shall cease, and the balance considered as paid in full. It being understood that ~~I shall have possession of the said premises during the life of this mortgage,~~ that in the event of my losing the right of possession in said premises, this mortgage shall be considered null and void.

In Witness Whereof, I *the said party of the first part have hereunto set* my *hand and seal the* first *day of* October *one thousand nine hundred and* twenty-three
Sealed and delivered in the presence of

Jas V Deintzig

her
Nellie × Martynick
mark

Answer to Petition of Appeal.

(Filed January 8th, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

THOMAS R. CAHILL,
Complainant-Appellant,

and

NELLIE MARTYNICK,
Defendant-Respondent.

On Appeal from the Court of Chancery.

The answer of the above named respondent, Nellie Martynick, 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 decree was, on the day in said petition mentioned, made and entered in the Court of Chancery in the causes for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof this respondent refers thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity and prays that the same may be affirmed with costs to be adjudged to this respondent.

FEINBERG & FEINBERG,
Solicitors of Respondent.

7 MAY.T.1923

New Jersey Court of Errors and Appeals

Between

THOMAS R. CAHILL,
Complainant-Appellant,

and

NELLIE MARTYNICK,
Defendant-Respondent.

} On Appeal.

BRIEF AND POINTS FOR APPELLANT.

Statement of Facts.

By a writing dated October 1st, 1923, appellant, in consideration of $2,500, assigned his right, title and interest in two buildings on leased lands, and also a certain assignment of lease made by one Charles Wilder (Case, p. 9). $1,000 was paid down and the balance of $1,500 was secured by a chattel mortgage on the two buildings, to be paid in monthly installments of $25 besides interest (Case, pp. 71-75). The mortgage did not cover the leasehold, but merely the two buildings. The lands were held by the Public Service Corporation and were formerly used as part of the right of way of a railroad (Case, p. 33).

No payments having been made on account of the chattel mortgage, foreclosure proceedings were commenced in the Court of Chancery about three years after the date of the mortgage, and the defendant interposed the defense that her right to occupy the lands being questioned, she, through

the agency of her husband, Martin Martynick, entered into a lease with the Public Service Company (Case, p. 8). Although the answer admits that her husband acted for the defendant, the lease for some unexplained reason was made to him (she retaining title to the buildings). The lease, though made about March 6th, 1924 (several months after defendant took possession), was nevertheless pre-dated to May 1st, 1923 (Case, p. 7).

The defendant in her answer denied the appellant's right to relief and counterclaimed for the cancellation of the mortgage upon the theory that the mortgage became invalid because of the failure of a covenant therein relative to a certain leasehold. The recital of this covenant in the answer (Case, p. 6), however, differed substantially from the actual recital in the mortgage (Case, p. 73), the photostat copy (Case, p. 83) showing the variance. The learned Vice-Chancellor held that the answer and counterclaim had not been sufficiently traversed under rules of pleading (Case, pp. 63-65-70). That the appellant having agreed to sign a lease, and having none, the mortgage was *nudum pactum*. That there was no proof before the Court that the buildings were chattels (Case, p. 65). That the appellee was deprived of the right of occupancy within the life of the mortgage. That there was an unreasonable delay in the foreclosure of the mortgage (Case, p. 66). That the appellant gave nothing to the appellee and that it was unconscionable to exact $2,500 for nothing. That no agency between the appellee and her husband had been established (Case, p. 68). That, in short, the appellant had the burden of proving that he held a subsisting lease and could transfer it, and that not having carried such burden, the learned Vice-Chancellor dismissed the bill of complaint and

sustained the counterclaim (Case, pp. 69-70). From the decree advised in accordance with the opinion, the appellant appealed.

POINT I.

The acceptance as established, of the allegations in the answer and counterclaim, because not properly traversed, was not proper.

1. The learned Vice-Chancellor in his opinion was quite manifestly moved to his decision by the supposed failure to traverse in the replication and answer to the counterclaim, all the allegations therein (Case, pp. 63-65-70). We submit that these views do find support under existing equity pleading. Chancery Rule 74 (P. L., 1915, p. 196) provides that the replication "shall be substantially in form stated in the annexed schedule." In the Schedule of Forms (No. 4) P. L., 1915, page 204, the following is stated as the context of a replication:

> "The complainant joins issue on the answer of the defendant."

The appellant's replication was as follows:

> "By way of replication to the answer of the defendant, this complainant joins issue thereon."

Chancery Rule 71 governs the pleading to a counterclaim. The appellee's counterclaim consisted of one paragraph (Case, p. 9) and the answer to the counterclaim (Case, p. 19) was adequate.

POINT II.

The rights of the appellee should not have been affected because he deferred action to foreclose.

1. Undoubtedly, undue weight was attached by the learned Vice-Chancellor to the delay in foreclosure (Case, p. 66). Even if it were conceded that he was under a duty to foreclose before the time required under the statute of limitations, the appellant had made an effort to secure payment of his mortgage a considerable time before the filing of his bill, and this effort was abandoned more than six months before, so that the question could be mooted judicially (Case, p. 4).

2. On the other hand, the appellant was under no duty to foreclose short of the statutory period of limitation, and even though he may have made previous efforts to procure payment, a narrative of such efforts should not strengthen his rights, nor should the failure to testify to such efforts impair them. The magnanimous mortgagee who delays to exact the penalty of foreclosure should be commended rather than censured.

POINT III.

The covenant of forfeiture in the chattel mortgage is unenforceable because vague, indefinite and uncertain.

1. The covenant relied upon to nullify the chattel mortgage reads as follows:

> "It is understood, however, that if the leasehold interest which I now have in the said premises known and numbered as 28 West 19th Street, Bayonne, New Jersey, is terminated through no fault of mine, in that event

> the balance due on this mortgage shall cease, and the balance considered as paid in full. It being understood that in the event of my losing the right of possession in said premises, this mortgage shall be considered null and void."

(Case, p. 73). There was no suggestion of any fraudulent representations as to the duration of the time the mortgagor's right to possession was to be free from molestation. Any rights or liabilities which the parties to the instrument may have, are derived from the chattel mortgage and the assignment of lease (Case, p. 75). Upon the construction of these two instruments, and nothing else, must depend the determination of their rights and obligations.

As to certainty, the rule is laid down in 13 C. J., pages 266-267, that:

> "It is essential to a contract that the nature and extent of its obligations be certain. * * * Therefore, if the offer is in any case so indefinite as to make it impossible for a court to decide just what it means, and to fix exactly the legal liability of the parties, its acceptance cannot result in an enforceable agreement."

In *Oetjen* v. *Robinson-Roders Co., Inc.*, 117 Atl. 629, 98 N. J. L. 282, this Court held that:

> "An agreement to extend trade acceptances, not stating the amount of or the period to be covered by the renewals, is too indefinite to be enforced."

While this is not a specific performance suit, the appellee invoked the aid of equity in cancelling the mortgage because of the alleged breach of a condition. Holding that the condition was breached, the learned Vice-Chancellor granted affirmative relief. Prof. Pomeroy (Vol. 5, pp. 2186-7) states the rule in specific performance suits as follows:

> "A contract that is incomplete, uncertain or indefinite in its material terms will not be specifically enforced in equity. * * * An uncertain contract is one which may indeed embrace all the material terms, but one or more of them is expressed in so unexact, indefinite, or obscure language, that the intent of the parties cannot be sufficiently ascertained to enable the court to carry it into effect."

To the same effect *Zukman* v. *Ihle*, 133 Atl. 779, 99 N. J. E. 702.

2. What is the real meaning of the covenant, and how susceptible is it of enforcement? Certainly there is not one word in it to signify the lapse of time during which it shall remain in force. The parties were not dealing with a fee, they could not have intended that the payments should remain in abeyance forever. Who shall set the time where they themselves failed to provide for it? The first part of the covenant reads:

> "If the leasehold interest * * * is terminated through no fault of mine * * * the balance due on this mortgage shall cease."

At this point it is pertinent to inquire what leasehold interest the parties dealt with. Cahill had assigned to the appellee,

> "all my right, title and interest in and to the within assignment of lease."

By a writing dated August 2nd, 1921, Charles Wilder doubtlessly attempted to transfer to Cahill, the appellant, his right

> "in and to all that certain lease or right to have a lease, or any right that they may have in the premises known as No. 28 West 19th Street, Bayonne, N. J., and of, in and to the building now standing upon the premises."

Aside from the building, the wording as to the lease is extremely uncertain, there is no pretense of assigning a real, subsisting lease. The language is couched in uncertainty and doubt. In the alternative there is an attempt to assign a "right to have a lease," "or any right they may have in the premises" (Case, p. 76).

It is stark and clear that this very instrument was before the parties at the execution of the chattel mortgage, and this was the entire subject-matter of the leasehold which the parties dealt with (Case, p. 76). If there were other muniments of title or right to possession why were they not demanded by the appellee? Both she and her solicitor knew there were none, that the meager and uncertain paper assigned to her carried any right to possession that went with it. They took it for what it was worth. Highly illuminative is the striking out of a more salutary provision in the covenant (Case, p. 83). The photostat copy shows the mortgagor was before the alteration "to have possession of the said premises during the life of the mortgage," but this obviously did not express the intention of the parties, dealing as they knew, with perhaps, the most meager of possibilities of a lease, a veritable phantom, a "right to have a lease or any right that they may have in the premises."

That this conclusion is irresistible is brought home by the following statement in the opinion of the learned Vice-Chancellor (Case, p. 69):

> "The Court is in a quandary to determine what sort of a lease is indicated by the purported assignment from Cahill to the defendant. It merely refers to a lease of the premises, or some such lease as the complainant might be entitled to. It is very uncertain in its terms, and it leaves it conjectural as to whether the complainant had any rights what-

> ever. Apparently, from a reading of the so-called 'assignment,' the complainant must have been somewhat dubious as to what rights he had in and to the premises, because he does not expressly undertake to assign a subsisting lease, but uses language to try to cover up such interest or rights that he may have to the premises."

The letter written by the appellee's attorneys on February 8th, 1924, for the appellee further discloses that even at a time more nearly contemporaneous with the transaction there was an utter lack of conception as to what rights Cahill was assigning (Case, p. 77). There is nothing in the letter which charges Cahill with even pretending to give more than his interest in the premises.

It afterward appeared by the testimony of Mr. Fred P. Schaber that no lease was in effect at that time (Case, p. 50). Cahill never pretended to assign a subsisting lease. The assignment from Cahill to the appellee (Case, p. 10, line 11) states the time of the lease as "for an indefinite period or perpetuity." It follows, therefore, that if there was no leasehold interest to terminate, there was no breach of any condition.

Clear, obvious and certain is this aspect of the entire transaction. That the parties were dealing with uncertainty of tenure, and knew it (Case, p. 44, lines 23-26). To hold that the parties contracted with relation to any fixed or determinable period of time not only makes a new contract for them, but obviously creates a contract which goes counter to their very intentions.

POINT IV.

The chattel mortgage was a valid and subsisting obligation.

The learned Vice-Chancellor held that the chattel mortgage, because of lack of consideration was *nudum pactum* (Case, p. 65, lines 22-37). These conclusions do not seem to be borne out by the conceded facts and the principles applicable to them. A contract which is unenforceable because of the lack of consideration is characterized as "*nudum pactum.*" The appellee was, prior to the sale of the buildings to her, a tenant of the buildings, and paid rent to the appellant for about a year (Case, p. 41, line 31). The mere relinquishment of such possession and the rents by the appellant was a sufficient consideration for the mortgage.

A very full definition of consideration is given in 13 C. J. 312 as follows:

> "Any act of plaintiff from which defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by plaintiff, however small the detriment or inconvenience may be, if such act is performed or inconvenience suffered by plaintiff, with the consent, express or implied, of defendant."

By instrument under seal (Case, p. 9), the appellant relinquished whatever right to possession he theretofore had. He relinquished the rents, and he sold the buildings. There does not exist in this case the remotest suggestion that there was the slightest infirmity to the title of the buildings sold by the appellee by the bill of sale (Case, p. 10). The appellant could have removed the buildings had she so desired. In her answer (Case, p. 7), the appellee admits having obtained through her

husband, a new lease from the Public Service Company. In this lease (Case, p. 81, lines 10 to 16), it is stated that:

> "This lot is demised and let unto the said Lessee in order that he may keep and maintain thereon the house now erected thereon which is the property of the said Lessee, and which the said Lessee is entirely to remove from said premises at the termination of this lease, leaving the said lot in proper order and condition."

Michael Martynick, the appellee's husband, testified that his wife was in possession of the property even at the time of the hearing (Case, p. 47). This, notwithstanding the appellee saw fit to have the new lease made to her husband.

POINT V.

There was sufficient proof that the buildings were chattels.

The learned Vice-Chancellor held that there was insufficient proof that the buildings were chattels (Case, p. 65). In *Cumberland National Bank* v. *Baker,* 40 Atl. 850, 57 N. J. E. 231, it was held that a chattel mortgage on crops and products of the soil is valid even against a subsequent mortgagee, and that

> "the power to assign and transfer property by way of chattel mortgage was exercised and recognized by our courts before there was any statute relating to chattel mortgages."

In the final analysis, whether or not the subject-matter be chattels, is purely a question of intention. In *Ames* v. *Trenton Brewing Co.,* 38 Atl. 858, 56 N. J. E. 309; affirmed by this Court in 45 Atl. 1090, 57 E. 347, it was held that such intention was the prevailing factor.

In 5 R. C. L. 402, the rule is laid down that

> "where a mortgage is executed on property not of a class upon which the statute authorizes, such a mortgage will be good as between the parties."

In *Ballou* v. *Jones,* 37 Ill. 95, it was held that a tenant who mortgaged a building on leased property as personalty, is estopped from denying the validity of the chattel mortgage.

As between the immediate parties, a chattel mortgage need not even be recorded. The recording act is for the protection of other classes of persons. To inquire as to whether this mortgage is a real estate or chattel mortgage becomes entirely gratuitous. It indubitably appears that a vendor's lien was intended and any incorrect nomenclature of the instrument cannot affect its validity.

POINT VI.

Proof as to the application of the moneys paid to Michael Martynick should not have been excluded.

Exhibit C-2 (Case, p. 76) shows moneys paid to the husband of the appellee for certain water rents which were due against the property. The recital therein that it was for water rents incurred "From December 3rd, 1923, to date" is obviously an error. The payment must have been for all water rents accruing from some prior period to November 20, 1923. According to the terms of the mortgage dated October 1, 1923 (Case, p. 72, line 24), two payments and interest aggregating $65 were already due at the time the moneys for the water bill were paid. It was pertinent and important to show that at this time the appellee had received a benefit from the appellant, and the testimony

of appellee's husband as to the application of the moneys for such purpose should have been received (Case, pp. 47-48). Even though she did not know her husband was going for the moneys, still he may have paid the water bill with it and afterwards informed her, or he may have paid the moneys over to the appellee, who might have been under the duty to tender its repayment in case of repudiation of the mortgage.

POINT VII.

The appellee was never deprived of possession.

The appellee contends that the covenant in the chattel mortgage contains an implied or express condition that the validity of the mortgage depends upon her continuing in possession. Even if we were to coincide with such interpretation we must still find a breach so as to entitle her to rescind. On February 8th, 1924, she wrote to the appellant through her attorneys (Case, p. 77), requesting payment of $84 for certain rents. Although this letter states a monthly tenancy with the Public Service Company had already been created, the testimony of Mr. Schaber (Case, p. 53) was that the lease had not yet been entered into, although it was subsequently made and pre-dated to May 1st, 1923. She was still in possession on March 6th, 1924 (Case, p. 7), when she obtained a lease (through her husband) and on March 14th, 1927, the date of the hearing, she was still in possession (Case, p. 47, line 40; p. 48, line 1). And she was in possession as a holdover tenant under the lease with the Public Service Company, which was a letting for two months only (Case, p. 80).

Physically, the mooted covenant in the mortgage is divisible in two parts. The first part provides

for the cancellation of the mortgage if there is a termination, without the fault of the mortgagor of the leasehold interest which she then had in the premises. Her insistence was that she had no leasehold interest at the date of the mortgage. If that be so, what was there to terminate?

The remaining portion of this covenant provides a further contingency for the invalidating of the mortgage. That condition is the losing of the right to possession. But even at the date of the hearing, several years later, she was still in possession and, apparently, rightfully so. It may be that there was an increased rental, but she nevertheless was in possession. There is no guarantee in the covenant that she is to remain in possession as a tenant without any rental whatsoever, nor that her rental would always remain fixed at a certain amount.

Probably the most favorable construction that the appellee can evolve from this covenant is that reading it as a whole it was her intention not to be deprived of the benefit of retaining her buildings on the supporting soil. That there was no such deprivation is obvious. Where then was the breach?

POINT VIII.

That portion of the decree canceling the appellant's mortgage without compensation is inequitable.

1. The appellee had an affirmative decree for the rendering up and the cancellation of the chattel mortgage (Case, pp. 23-24) upon her counterclaim. Upon sound principles of equity such affirmative relief cannot be predicated. The appellee did not come into court with clean hands. She entered into a new lease with the Public Ser-

vice Company about March 6, 1924, and for some reason had it pre-dated to May 1st, 1923. We can only surmise her reason from the general course of her conduct. What motive could have impelled her to pre-date the lease from a period running five months prior to her taking possession of the property unless it were for the purpose of securing some unjust advantage which might result in the defeat of the mortgage (Case, p. 7, line 32)? Why was it necessary to take the lease in the name of her husband? The lease itself was only for two months, and could be terminated upon one month's notice. As a matter of fact, she had remained in possession under whatever previous tenure or consent there may have been for more than five months before the making of the new lease. There were no proceedings to eject her. From a practical standpoint the appellee was better off without than with the new lease. Under the new lease, she was obliged to quit upon one month's notice, and a proceeding, summary in its nature, could be maintained for her eviction. It is doubtful if such expedition in eviction could be maintained under the tenure which she held if her own contention as to its uncertainty is true. On the other hand, if she was there as an assignee of Zilewich through mesne assignments (Case, p. 78) there was still a monthly letting, the only difference being in the amount of rent reserved. Presumably, the most that appellee could have expected by way of transfer of tenure, was a valid assignment of the monthly lease made in 1915 (Case, p. 78). This lease, although containing a covenant against subletting, does not operate against an assignment. *Corporate Board* v. *J. R. Evans,* 131 Atl. 880. That the identity of the occupant was of little consequence to the Public Service Company may be gathered from the fact that

one Nathan Galenti, and not the original lessee paid rent for about two years (Case, p. 51, line 25). *North* v. *Jersey Knitting Mills,* 118 Atl. 840; 98 N. J. L. 157. Galenti may well have been a holdover under the 1915 lease, and no writing was necessary. *Wilkinson* v. *Plaket,* 138 Atl. 517. He may have been there under an original letting. In any event, he was undoubtedly a monthly tenant (Case, p. 51). Galenti's letting could have been assigned by parol. (*Minton* v. *Sutton,* 139 Atl. 601, which holds that even a mortgage may be assigned by delivery and parol.) A lease for less than three years, and being personal property may be assigned by parol, and there need not even be a delivery of possession. (16 R. C. L. 325). Galenti, admittedly a lawful tenant, procured an assignment of any letting from Wilder to Cahill (Case, p. 42). Cahill was thereupon placed in possession, and the appellee was subsequently his tenant and paid him rent. The appellee as a tenant could not question Cahill's title.

On February 8th, 1924, about one month prior to the making of the new lease with the Public Service Company, the appellee through her attorneys wrote to Cahill asking for the payment of certain moneys paid by the appellee to the Public Service Company. The letter states that a lease had ALREADY BEEN "CREATED LAST MAY," and also mentions certain water charges. The statement that a lease was created on the preceding May was palpably untrue. What was its purpose? Why was the lease taken in the name of the husband? Every rational inference leads to the conclusion that the appellee had undoubtedly ascertained that she could have undisturbed possession if she would increase the former monthly rent of $2.09 (Case, p. 78) to $14, yet she conceived the adroit plan of taking the lease, which was

nothing more than a monthly letting in her husband's name, so she could have, as she conceived, a defense to the payment of the mortgage. But with the mere execution of this scheme she was not satisfied. She must first get all the moneys she could from Cahill. In her letter (Case, p. 77), she asks for the payment of the water bill and $140 in addition. Cahill did pay her husband $122.60, probably after the receipt of this letter (Case, p. 76) although the receipt is obviously pre-dated. Naturally, Cahill didn't pay the $140, because he was not obliged to keep the appellee in possession rent-free, he never having agreed to do so. The water bill was quite another matter. It was a charge against the buildings he had sold. But the point is the dubious conduct of the appellee. If the new lease was of such vital importance to the appellee why did she not take it in her own name? If it really made little difference to her whether there was a written lease from month to month or a verbal letting which would undoubtedly have answered the same purpose, why should the mortgage be canceled? What possible motive did she have in taking the lease in the name of a dummy, except to defeat payment of the mortgage? She did not come into court with clean hands and there should not have been a cancellation of the mortgage, resulting as it does in a reward for her shameful scheme.

2. On the other hand, from her own demand (Case, p. 77), the appellee didn't want to return what she received, she sought merely compensation. If she could establish her right thereto, justice would have been done. But it was not equitable to disregard the rights of the appellant to payment of his mortgage, less any offset she may have proved herself entitled to. The principle is stated in 1 Pomeroy Eq. Juris., p. 381 as follows:

> "Wherever a penalty or forfeiture is inserted merely to secure the payment of money, or the performance of some right or benefit, equity regards such payment, performance or enjoyment as the real and principal intent of the instrument, and the penalty or forfeiture as merely an accessory, and will therefore relieve the debtor partly from such penalty or forfeiture, whenever the actual damages sustained by the creditor can be adequately compensated."

This rule has been followed in New Jersey in *Reeves* v. *White,* 95 Atl. 184, 84 E. 661, and in *Bourgeois* v. *Risley,* 88 Atl. 199, 82 Eq. 211, the following principle laid down by Prof. Pomeroy is cited with approval:

> "He who seeks equity must do equity, is a cardinal maxim. The court of equity refuses its aid to give to the plaintiff what the law would give him if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the court considers he ought to comply with, although the subject of the condition should be one which the court would not otherwise enforce."

POINT IX.

The decree for the appellee resulted in a forfeiture which was contrary to equity.

The rule is stated in 1 Pomeroy Eq. 459, that

> "a court of equity will not interfere on behalf of the party entitled thereto and enforce a forfeiture, but will leave him to his legal remedies."

This rule has been followed by numerous decisions in this State. We cite a few of these cases: *Olden* v. *Sassman,* 67 E. 239, 57 Atl. 1075; *Morris* v. *Kettle,* 34 Atl. 376, 56 E. 826; *Schmidig* v. *O'Baggy,* 137 Atl. 560.

We have already stressed the vagueness of the condition upon which the appellee relies for a forfeiture of the mortgage. We have called attention to the undisputed continuance in possession by the appellee to show that even adopting her construction of the covenant, there was no breach, and lastly, we reiterate the argument in the last point, that the appellee's own demand for rents paid by her shows the compensability of her demand.

POINT X.

The appellee waived the enforcement of the forfeiture.

Assuming that the appellee ever had a right to enforce the forfeiture clause of the mortgage, and adopting her interpretation of its effect, she is estopped from asserting such forfeiture.

The appellee knew prior to her letter of February 8th, 1924, that any rights she may have had to declare a forfeiture of the mortgage had accrued. Yet she chose to ask for the payment of moneys (Case, p. 77). Part of this demand, the water rents, were actually paid by the appellant. According to all principles of fair dealing, aside from any legal duty imposed upon her, she should have immediately offered to place the appellant in *status quo,* she should have offered to rescind the entire transaction. Instead, while covertly building her plans for the nullification of the mortgage with one hand, she held out her other hand for moneys, the payment of which was to her mind in pursuance of the carrying out of the original transaction of sale.

For the $2,500 which formed the consideration of this transaction, she indisputably received two buildings, about which there is no question. If there is any question at all, it is about the right

to maintain these buildings on certain lands. The major portion of the purchase price was deferred by the mortgage payments. Prior to February 8th, 1924, she ascertained that she did not have some rights in the land which she thought Cahill should have transferred to her. Why did she not notify Cahill of this? Why did she not offer to rescind so as to give Cahill an opportunity to provide a remedy? The duty placed upon her is based upon plain common sense. Of course, it is obvious that she didn't want to return what she received and to be placed in *status quo,* because she expected to circumvent the purchase price of $2,500 by its reduction to $1,000.

In *Grigg* v. *Landis,* 21 Eq. 494, at page 508, this Court declined to impose a forfeiture because of failure to assert a breach, and the reasoning in that case can be applied here. Mr. Justice SCUDDER says:

> "Mr. Landis gave no intimation or notice that he intended to forfeit the contract because the improvements were not made at the time agreed upon. What would have been the practical effect if he had done so promptly? He could return all the purchase money he had received, and the parties would have been in *status quo.* No loss would be incurred, except to the purchaser a probable speculation in the value of the lot bought. By neglecting to give such notice promptly, the purchaser has been permitted to build a house, and make other improvements amounting to one thousand dollars. To forfeit the property after this has been done, is to permit the vendor to take advantage of his own wrong, and add the amount of these improvements to his large wealth, and take it from the purchaser, who has acted upon the fair presumption from his silence, that he would not insist on the forfeit. This cannot be equitable. There are intervening equities which cannot be taken away under such circumstances.

"Such it appears to me is the import of the terms used in this contract: 'In the event of the said S. K. Foster not complying with the above stipulations within the time specified, the said Landis to have the right to take back the said lands,' etc. He has a right, the exercise of which is optional with him, and for his benefit. Cartwright *v.* Gardner, 5 Cush. 273. The time to evoke it is when the default occurs. To manifest his intention some act must be done, some notice given, because the agreement does not become void upon the happening of an event, or the expiration of a fixed time, but it is voidable upon the volition of the vendor expressed in a particular way, by the repayment of the money which he has received before the default. He has made no expression of this determination, but has been quiet, and permitted the condition of the opposite party, and of the property, to become changed; and has not only been quiet, but has done other acts by which he is precluded in equity from asserting his former right to annul the contract."

In 41 C. J. 443, the rule is laid down that although a mortgage is fraudulent, illegal or otherwise invalid, the mortgagor may be estopped by his acts or omissions to deny its effect or contest its foreclosure, as by * * * continuing in possession of the property without offering to return it or attempting to rescind.

POINT XI.

We respectfully urge that the decree of the Court of Chancery should be reversed, and that there shall be a decree for the complainant on his bill and against the defendant on her counterclaim.

Respectfully submitted,

SECLOW & NESSANBAUM,
Solicitors of Complainant.

ALEXANDER SECLOW,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

THOMAS R. CAHILL,
Complainant-Appellant,

and

NELLIE MARTYNICK,
Defendant-Respondent.

On Appeal from Court of Chancery.

BRIEF AND POINTS FOR DEFENDANT-APPELLEE.

Statement of Facts.

By writing dated October 1st, 1923, the appellant, in consideration of $2,500.00, sold, assigned, transferred and set over unto the appellee an assignment of lease, made by one Charles Wilder (Case, p. 9) to appellant on August 2nd, 1921.

In said assignment the said appellant covenanted and agreed that the said premises covered by said assignment were free and clear from all other leases, judgments, executions, taxes, assessments and encumbrances whatsoever (Case, p. 10).

That by the said assignment the said appellant sold and conveyed to the appellee all his right, title and interest in and to the two buildings standing upon the said premises, to have and to hold the same forever. In consideration of said assignment of lease and assignment and conveyance of said two buildings, the appellee agreed to pay $2,500.00; $1,000.00 of which was paid down and

the appellee agreed to pay $1,500.00 in monthly installments of $25.00 besides interest, on the first day of each and every month, which said indebtedness of $1,500.00 was secured by a chattel mortgage, set forth in Schedule B (Case, pp. 11, 12, 13, 14, 15). The said chattel mortgage provides that the appellee is to remain and continue in quiet and peaceful possession of said goods and chattels in a full and free enjoyment of same (Case, p. 13). The said chattel mortgage further provides, viz. (Case, p. 14, lines 7 to 15):

> "IT IS UNDERSTOOD, HOWEVER, that IF THE LEASEHOLD INTEREST WHICH I NOW HAVE IN THE SAID PREMISES AND NUMBERED AS 28 WEST 19TH STREET, BAYONNE, NEW JERSEY, IS TERMINATED THROUGH NO FAULT OF MINE, IN THAT EVENT THE BALANCE DUE ON THIS MORTGAGE SHALL CEASE, AND THE BALANCE CONSIDERED AS PAID IN FULL. IT BEING UNDERSTOOD THAT I SHALL HAVE POSSESSION OF THE SAID PREMISES DURING THE LIFE OF THIS MORTGAGE."

The appellant had no lease on the lands upon which the said buildings were erected, so that the appellee did not get the possession of the said premises; the said leasehold interest which the appellant pretended to assign being terminated through the fault of the appellant. The leasehold interest is owned by Michael Martynick, husband of appellee, who entered into a lease with the Public Service Railway Company, the said Public Service Railway Company being the owners in fee of the lands covered by said leasehold. No payments were made by the appellee on account of said chattel mortgage, as she never obtained possession of the leasehold interest upon which the buildings are erected.

Appellant did not make any effort to collect the

amount due on said chattel mortgage, nor did he bring any proceedings for the collection of same for a period of three years, and on or about April 6th, 1926, attempted through Philip H. Levy, a Constable of Hudson County, to foreclose said chattel mortgage, but abandoned said proceedings and filed the bill of complaint in this Court for an equitable foreclosure of said chattel mortgage.

The appellee relying upon the assignment of lease from the appellant, expended the sum of $4,084.88 to improve the said buildings.

The learned Vice-Chancellor advised a decree dismissing the appellant's bill of complaint and granted the relief sought by the defendant, viz.: enjoining the complainant from assigning any interest in the chattel mortgage in question and decreeing a cancellation of said chattel mortgage.

POINT ONE.

The ruling that the allegations of the answer and counterclaim which were not denied by the reply where admitted was proper.

1. Rule 36, Laws of 1912, page 192, viz.:

> "Every material allegation of fact in a proceeding which is not denied by the adverse party is deemed to be admitted (except as against an infant or a person of unsound mind) unless such adverse party avers that he has no knowledge or information thereof sufficient to form a belief."

2. The Court did not prevent the appellant from establishing that the facts alleged in the said answer and counterclaim by the appellee were not true. On the contrary it appears from the testimony that the facts set forth in the appellee's answer and counterclaim were true. The claim

of the appellant is based upon a construction of the clause in the chattel mortgage terminating the said chattel mortgage. Under these circumstances appellant was not harmed by the acceptance, as established, of the allegations of the answer and counterclaim, because not denied.

POINT TWO.

The rights of the appellant were not affected because he deferred action to foreclose.

1. The learned Vice-Chancellor merely considered the delay of the appellant to foreclose his chattel mortgage as one of the circumstances in construing the clause in the chattel mortgage terminating the said mortgage.

2. It certainly tended to show that the complainant-appellant, himself, did not consider the chattel mortgage in force and effect after the defendant-appellee did not get any possession under the assignment of the leasehold interest. It is not reasonable to suppose that if he did consider the mortgage of any force and effect he would wait such length of time as he did before taking any action under the said chattel mortgage. There is nothing in the evidence to show that the complainant ever made any demands or requests for the payments under the said mortgage.

POINT THREE.

The covenant in the chattel mortgage that the mortgage shall cease and the balance considered as paid in full if the leasehold interest is terminated through no fault of defendant-appellee is enforcible.

1. The term during which the defendant-appellee is to enjoy possession of the said premises was fixed, determined and definite, inasmuch as the words fixing the period are, during the life of a mortgage, and the life of the mortgage by its terms is five years. Notwithstanding the fact that the interest the complainant was assigning to the defendant was indefinite, there is no question but that it was understood and agreed that the payments under said mortgage were only to be made while the defendant had the possession of said premises, and inasmuch as the defendant never had possession of said premises, no payments became due. The clause in the mortgage ending the same upon which the learned Vice-Chancellor granted affirmative relief cancelling the same is definite and certain. The learned Vice-Chancellor (Case, p. 9) in his opinion stated, that he was in a quandary to determine what sort of a lease was indicated by the purported assignment, but there is nothing in the opinion which indicates that the clause in the chattel mortgage ending the same was indefinite and uncertain.

POINT FOUR.

The chattel mortgage was not a valid and subsisting obligation.

1. From the evidence it appears that the defendant agreed to pay $2,500.00 to the complainant for an assignment of the leasehold interest and a

transfer of the buildings erected on said leasehold interest. Under the clause in the chattel mortgage terminating the same, it clearly appears that it was understood and agreed by both parties that the said leasehold interest should continue during the life of the mortgage, which was five years. The consideration of $2,500.00 was paid for both the assignment of leasehold interest and the conveyance of the buildings. It was not a separable and divisible transaction. The consideration included the assignment of a leasehold interest for five years, and the complainant never having any leasehold interest, nor any right to the same, no consideration passed to the defendant.

POINT FIVE.

There was insufficient proof that the buildings were chattels.

1. Generally buildings are considered part of the realty, and, therefore, real property, subject to be encumbered by a chattel mortgage. There was no evidence offered by the complainant to show any special circumstances of facts why the particular buildings in this suit should be taken out of the general class of realty and be considered personalty.

POINT SIX.

Proof as to the application of moneys paid to Michael Martynick should have been excluded.

1. There was no evidence offered to prove that Michael Martynick was the agent of the defendant, and consequently any acts performed by him were not binding upon the defendant.

POINT SEVEN.

Appellee was deprived of possession.

1. The undisputed evidence is that the Public Service Railway Company was the owner in fee of the premises in question, and that Michael Martynick was the only person who was their tenant and with whom they entered into a lease for possession of said premises.

POINT EIGHT.

The portion of the decree cancelling appellant's mortgage is equitable.

1. The appellee never having received possession under the leasehold interest purported to be assigned by complainant, the said chattel mortgage was at an end, and should be cancelled.

2. Inasmuch as Michael Martynick was not the agent of the defendant, none of the acts performed by him in the execution of the lease with the Public Service Railway Company are chargeable to this defendant.

POINT NINE.

The decree for appellee did not result in a forfeiture.

1. The mortgage by its terms was to end upon the happening of a contingency, that is, the loss of possession in leasehold interest by defendant. The defendant never having obtained possession under said leasehold interest no consideration moved to her for the execution of said chattel mortgage, said mortgage did not become a valid and subsisting lien.

POINT TEN.

The appellee did not waive her right to have the mortgage cancelled.

1. The defendant-appellee had no way in which to put complainant in *status quo*. The defendant did not receive possession under said leasehold interest assigned by complainant, so that she could not offer to return the leasehold interest in the estate.

POINT ELEVEN.

We respectfully urge that the decree of the Court of Chancery should be affirmed, with costs and counsel fee taxed against the complainant.

Respectfully submitted,

FEINBERG & FEINBERG,
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JACOB FEINBERG,
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