

I N D E X

	PAGE
Bill to Foreclose	1
Answer	12
Notice to Report	16
Affidavit of Naomi M. Sutton.....	17
COMPLAINANT'S TESTIMONY:	
James F. Koch—Direct	20
Cross	22
Recalled—Cross	29
DEFENDANT'S TESTIMONY:	
Ralph L. Chester—Direct	32
Cross	34
Clinton B. Price—Direct	38
Final Decree	41
Petition of William F. Shriver	44
Affidavit of Ralph L. Chester.....	62
Order to Show Cause and Restraint.....	63
COMPLAINANT'S TESTIMONY:	
Clinton B. Price—Direct	67
Cross	69

	PAGE
Affidavit of Robert K. Bell.....	74
Affidavit of Clinton B. Price.....	80
Affidavit of Naomi M. Sutton.....	87
Affidavit of James F. Koch.....	91
Affidavit of Stirling W. Cole.....	93
Conclusions	94
Order	103
Notice of Appeal	104
Petition for Stay Pending Appeal.....	106
Order	110
Order	112
Petition of Appeal	116
Answer to Petition of Appeal.....	122

BILL TO FORECLOSE.

(Filed June 14, 1929.)

73/480

IN CHANCERY OF NEW JERSEY.

Between
OCEAN CITY TITLE AND
TRUST COMPANY,
Complainant,
and
STRAND PROPERTIES INC., a
corp. &c. *et al.*,
Defendants. } Bill to Foreclose.

10

20

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

The complainant, Ocean City Title and Trust Company, a banking corporation of the State of New Jersey, conducting business in the City of Ocean City in the County of Cape May, said State, respectfully shows that:

30.

1. On January 16, 1926, Charlotte S. Chester and Ralph L. Chester, her husband, Naomi M. Sutton and Edward M. Sutton, her husband, being indebted to complainant in the sum of \$65,000 real debt, executed to it a bond of that date to secure that

sum, payable within 3 years from date with interest at the rate of 6 per centum per annum, payable semi-annually from the date of the bond.

2. To secure the payment of the bond said Charlotte S. Chester and Ralph L. Chester, her husband, Naomi M. Sutton and Edward M. Sutton, her husband, executed to complainant a mortgage of even date with said bond; and thereby conveyed to it in
10 fee the bond hereinafter described, on the express condition that such conveyance should be void if payment should be made in accordance with the terms of the bond, which mortgage having been first duly acknowledged and the certificate of acknowledgment being duly endorsed thereon, was recorded on January 29, 1926, in the clerk's office of Cape May County, in book 245 of Mortgages, page 223, &c.

3. The mortgaged premises are described as follows: Premises situate in the City of Ocean City, in the County of Cape May and State of New Jersey: Beginning in the southeasterly line of Atlantic Avenue 75 feet Southwestwardly from the Southwest-
20 erly line of Moorlyn Terrace; thence (1) Southwestwardly along said line of Atlantic Avenue the distance of 50 feet; thence (2) Southeastwardly parallel with Moorlyn Terrace 666.42 feet to the Exterior Line as established by the Riparian Commissioners under grant dated July 12, 1900, and re-
30 corded in Deed Book 152, page 125, or to the high-water line of the Atlantic Ocean, whichever is oceanward; thence (3) Northeastwardly, along said Exterior Line or high-water line, whichever oceanward, the distance of 53.2 feet or to a point 75 feet Southwestwardly at right-angles from the Southwesterly line of Moorlyn Terrace; thence (4) Northwest-

wardly parallel with Moorlyn Terrace the distance of 684.61 feet more or less, to the place of beginning.

4. It was the intent and purpose of the grantors-mortgagors pursuant to an agreement with complainant to grant and convey to the high-water line of the Atlantic Ocean and oceanward thereof between parallel lines of the width of said premises to the Exterior Line in the Atlantic Ocean established by the Riparian Commissioners of the State of New Jersey in the year 1910. 10

5. By deed dated the 6th day of May, 1927, and recorded in said clerk's office in Book 450 of Deeds, page 360, said Naomi M. Sutton and Edward M. Sutton, her husband, Charlotte S. Chester and Ralph L. Chester, her husband, granted and conveyed the mortgaged premises to Strand Properties, Inc., a corporation of the State of New Jersey with like intent and purpose as hereinabove set forth. Any interest which the said Strand Properties, Inc., a corporation of the State of New Jersey, may have in said premises by virtue of said deed is subject to the lien of complainant's mortgage. 20

6. By agreement dated November 30, 1927, and recorded on the 1st day of February, 1928, in Book 467 of Deeds, page 183, said Strand Properties, Inc., a corporation of the State of New Jersey, granted to the City of Ocean City, a municipal corporation of the State of New Jersey, a certain easement, rights in and to, over and upon a portion of the premises described in said mortgage, but all subject and subordinate to the rights of complainant. 30

7. By instrument dated September 12, 1928, and recorded September 17, 1928, in Mortgage Book

297, page 66, said Strand Properties, Inc., granted and conveyed to complainant the following described lands and premises.

Premises Ocean City, N. J.

10 Tract #1—Beginning in the Southeasterly line of Atlantic Avenue, 75 feet southwestwardly from the Southwesterly line of Moorlyn Terrace; continuing Southwestwardly along said line of Atlantic Avenue 50 feet; thence Southeastwardly between lines parallel with Moorlyn Terrace, 666.42 feet to the Exterior Line established by the Riparian Commissioners under Grant dated July 12, 1900, and recorded in Deed Book 152, page 125; thence Northeastwardly along said Exterior Line 53.2 feet to a point 75 feet Southwestwardly at right angles from the Southwesterly line of Moorlyn Terrace; thence Northwestwardly parallel with Moorlyn Terrace the distance of 684.61 feet to the place of beginning.

20 Being the same land and premises which Joseph Schwartz, by deed, dated January 2, 1923, recorded in Deed Book 370, page 256, granted and conveyed to Charlotte S. Chester in fee and in which said Charlotte S. Chester and husband, by deed dated January 22, 1923, recorded in Deed Book 375, page 37, granted and conveyed an undivided one-half interest to Naomi M. Sutton and which Charlotte S. Chester and husband and Naomi M. Sutton and husband, by deed, dated May 6, 1927, recorded in Deed Book 450, page 360, granted and conveyed to Strand Properties, Inc., in fee.

30 Tract #2. All right, title and interest now or hereafter acquired by said party of the first part, or by its successors or assigns, in that tract or parcel of land and premises wholly or in part under

the waters of the Atlantic Ocean, immediately adjacent to and oceanward of the premises hereinabove described, more particularly described as follows:

Beginning in the Former Riparian Commissioners Exterior Line in the Atlantic Ocean as more fully described in Riparian Grant to Ocean City Association dated July 12, 1900, recorded in Deed Book 152, page 125, at the distance of 75 feet Southwestwardly at right angles from the Southwesterly line of Moorlyn Terrace, extended, thence (1) Southwestwardly along said Former Exterior Line 50 feet, more or less, to a point 125 feet Southwestwardly at right angles from said line of Moorlyn Terrace; thence (2) Southeastwardly parallel with said line of Moorlyn Terrace, 1115 feet, more or less to the present Riparian Commissioners Exterior Line in the Atlantic Ocean, established March 24, 1910; thence (3) Northeastwardly along said present Exterior Line 50 feet, more or less, to a point 75 feet southwestwardly at right angles from said line of Moorlyn Terrace; extended; thence (4) Northwestwardly parallel with said line of Moorlyn Terrace, 1108 feet more or less, to the place of beginning.

This mortgage is given as additional security for, but not as an additional obligation to, a certain other mortgage given by Charlotte S. Chester and husband, and Naomi M. Sutton and husband, to Ocean City Title and Trust Company, dated January 16, 1926, and recorded in Mortgage Book 245, page 223.

Said mortgage grant was executed and delivered pursuant to the intent and purpose hereinabove recited and to confirm in the complainant the lien of and title to the premises described extending oceanward of Atlantic Avenue to the Highwater line of the Atlantic Ocean and thence oceanward thereof to

the Exterior Line established by the Riparian Commissioners of the State of New Jersey in the year 1910.

8. On said September 12, 1928, said Strand Properties, Inc., a corporation &c., entered into an agreement with Ocean City Title and Trust Company, complainant, which is recorded in Book 292 of Mortgages, page 320, in and by which it is provided:

10 “Now therefore, Strand Properties, Inc., for itself and its successors and assigns, in consideration of the premises and the further sum of \$1.00 paid to it by said Ocean City Title and Trust Company, covenants and agrees to and with said Ocean City Title and Trust Company, its successors and assigns, to secure with all reasonable speed, title in fee to all such lands and lands under water as described in Tract 2 in said confirmation mortgage (being the mortgage recorded in Book 297, page 66)
20 of September 12, 1928; and when so secured to immediately execute and deliver to said Ocean City Title and Trust Company a further bond and mortgage covering said lands and lands under water, in confirmation of, but not as an additional obligation to, the mortgage first herein mentioned.”

9. On said September 12, said Strand Properties, Inc., mortgaged to Naomi M. Sutton to secure the payment of the sum of \$37,500 the premises as first
30 described herein and with like intent and purpose as herein set forth and under and subject to complainant's mortgage, said mortgage being recorded in Book 298, page 23.

Any interest which the said Naomi M. Sutton may have in said premises by virtue of said mortgage is subject and subordinate to the rights of complainant under its mortgage.

10. By assignment dated December 26, 1928, and recorded January 3, 1929, in Book 35 of Assignments, page 178, said Naomi M. Sutton assigned said mortgage and the bond which it was given to secure to complainant as collateral security for the payment of said sum with interest, on which there is due interest from date of said assignment.

11. By agreement dated September 14, 1928, and recorded on September 19, 1928, in Book 478, page 306, said Strand Properties Inc., entered into an agreement with Moore and Slade, a corporation of the State of New Jersey, attempting to grant and convey to said Moore and Slade, a corporation &c., certain rights in, to, over and upon a portion of the mortgaged premises, but the rights of said Moore and Slade, a corporation, &c., if any, are subject and subordinate to the rights of complainant. 10

12. By deed dated April 15, 1929, and recorded the 25th day of said April in Book 486 of Deeds, page 464, said Charlotte S. Chester; Ralph L. Chester, her husband; and Naomi M. Sutton, widow granted and conveyed to Strand Properties, Inc., the following described premises: 20

Beginning in the Southeasterly line of Atlantic Avenue, 75 feet, southwestwardly from the southwestwardly line of Moorlyn Terrace; thence Southwestwardly along the Southeasterly line of Atlantic Avenue 50 feet in front, and extending thence South- 30
eastwardly between parallel lines of that width, parallel with Moorlyn Terrace, 900 feet, more or less, to the high-water line of the Atlantic Ocean.

Being the same land and premises which were conveyed or intended to be conveyed by deed from the parties of the first part to the party of the second

part, dated May 6, 1927, recorded in Deed Book 450, page 360, &c.

Under and subject nevertheless, to a certain mortgage from the parties of the first part to Ocean City Title and Trust Company, dated January 16, 1926, recorded in Mortgage Book 245, page 223, to secure the sum of \$65,000.00 and later mortgage of the said Strand Properties, Inc., to the said Ocean City Title and Trust Company, dated September 12, 1928, recorded in Mortgage Book 297, page 66, as additional security for the payment of the said mortgage debt of \$65,000.00.

Under and subject also, to a certain mortgage made by the said Strand Properties, Inc., to the said Naomi M. Sutton, dated September 12, 1928, recorded in Mortgage Book 298, page 23, to secure the sum of \$37,500.00 and later assigned by the said Naomi M. Sutton to Ocean City Title and Trust Company by assignment dated December 26, 1928, of record in Assignment Book, 35, page 178. Any interest which the said Strand Properties, Inc., a corp. &c., became vested of by reason of said deed is subject and subordinate to the interest of complainant under its mortgage.

13. On or about the 9th day of August, 1928, Strand Properties, Inc., filed its bill in this court against Jesse B. Field and Cora W. Field, his wife, to quiet the title to certain lands and premises in Ocean City bounded and described as follows: All that certain lot or parcel of land and premises, situate in the City of Ocean City, County of Cape May and State of New Jersey, bounded and described as follows:

Beginning in the Southeasterly line of Atlantic Avenue 75 feet Southwestwardly from the South-

westerly line of Moorlyn Terrace, thence (1) Southwestwardly along said line of Atlantic Avenue 50 feet; thence (2) Southeastwardly parallel with Moorlyn Terrace 650 feet, more or less, to the present 1928 high-water mark of the Atlantic Ocean, crossing the Exterior Line established by the Riparian Commissioners of the State of New Jersey in 1910; thence (3) Northeastwardly along the present 1928 high-water line of the Atlantic Ocean, 50 feet, more or less, to a point 75 feet Southwestwardly at right angles from the southwestwardly line of Moorlyn Terrace, if extended; thence (4) Northwestwardly parallel with Moorlyn Terrace, 670 feet, more or less, again crossing the Riparian Commissioners Exterior Line established in 1910 to the place of beginning. Such proceedings have been had thereon that final decree has been entered adjudging that the said Jesse B. Field and Cora W. Field have no interest in the premises described and that the title thereto is vested in said Strand Properties, Inc.

10

20

14. The premises so described are the same premises intended to be mortgaged by the mortgage to complainant for \$65,000 and the one to Sutton for \$37,500.

15. By deed dated December 20, 1907, and recorded the 21st day of said December in Book 221 of Deeds, page 322, Ira S. Champion, and Florence M. Champion, his wife, granted and conveyed to Jesse B. Field certain lands and premises therein described which complainant owns are the same lands and premises described in said bill to quiet title.

30

16. On the 16th day of January, 1929, the principal sum of complainant's said bond and mortgage, according to the terms thereof, became due and payable and no part thereof has yet been paid.

17. Complainant is informed and believes and therefore avers that Chloe Kopp and Catharine Strayer, trading as "The Treasure Shop" and Maurice J. Fein are in possession of certain portion
10 of the mortgaged premises but the terms of the leases, if any, are unknown to complainant.

Any interest which the said Chloe Kopp and Catharine Strayer, trading as "The Treasure Shop" and Maurice J. Fein may have in said premises is subject and subordinate to the lien of complainant's mortgage.

The defendants hereinafter named have from time to time possessed and enjoyed the said mortgaged premises and Strand Properties, Inc., a corporation,
20 &c., Chloe Kopp and Catharine Strayer, trading as "The Treasure Shop" and Maurice J. Fein are now in possession of the same but said possession is subject to complainant's mortgage.

The sum of \$65,000.00 with interest thereon from January 16, 1929, is due upon complainant's bond and mortgage.

Complainant is without adequate remedy in the Courts of Law and therefore prays:

30

I. That Strand Properties, Inc., a corporation of the State of New Jersey; the City of Ocean City, a municipal corporation of the State of New Jersey; Naomi M. Sutton; Moore and Slade, a corporation of the State of New Jersey; Chloe Kopp and Catharine Strayer, trading as "The Treasure

Shop''; and Maurice J. Fein; who are the defendants to this suit may answer this bill of complaint without oath and each statement therein made.

II. That an account may be taken of the amount due upon complainant's mortgage.

III. That the defendants, one or more of them, may be decreed to pay the complainant the amount so found to be due with interest and costs, by a short day to be appointed by this Court and that in default of such payment be debarred and foreclosed of all equity of redemption in said lands; or 10

IV. That a decree may be made for the sale of the mortgaged premises to raise and pay to the complainant the amount so found to be due on its mortgage with interest and costs.

That a writ of subpoena may issue commanding the said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises. 20

COLE & COLE,
Solicitors for and
C. L. COLE,
*Of Counsel with Com-
plainant.*

ANSWER.

IN CHANCERY OF NEW JERSEY.

73-480.

10

Between

OCEAN CITY TITLE &
TRUST COMPANY,*Complainant,*

and

STRAND PROPERTIES, INC.,
*et als.,**Defendants.*On Bill, &c.
Answer.

20

Strand Properties, Inc., one of the defendants in the above entitled cause says that:

1. It admits the allegations in paragraph No. 1 of the complaint, except as hereinafter denied.

2. It admits the allegations in paragraph Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of complaint.

30

3. It admits allegations in paragraph No. 14 of complaint except as hereinafter denied.

4. It admits allegations in paragraph No. 15.

5. It denies the allegations in paragraph No. 16

of complaint and practically denies that the principal sum of complainant's bond and mortgage came due on Jan. 16, 1929.

6. It admits the allegations of paragraph No. 17 of complaint except wherein it is stated that the sum of \$65,000 together with interest thereon from January 16, 1929, is due on defendant's bond and mortgage.

10

SPECIAL DEFENSE AND COUNTER-CLAIM.

1. Defendant further says, as a complete and separate defense, shows that the loan alleged in said complaint was made by complainant to Ralph L. Chester, Charlotte S. Chester, Edward M. Sutton, now deceased, and Naomi M. Sutton on a corrupt and unlawful agreement; in fact, said complainant did charge and take direct for the money loaned upon said mortgage of \$65,000 above the value of \$6.00 for the forbearance of \$100 for a year contrary to an Act entitled "An Act concerning Usury" and contrary to laws of the State of New Jersey.

20

2. That at the time of the execution of the mortgage described in the complaint, Naomi M. Sutton and Charlotte S. Chester were the owners of the property described therein.

30

3. That there was deducted by the complainant, through its officers, or duly authorized agents at said mortgage settlement the sum of \$4,000 from said sum of \$65,000 which is the face of the mortgage which is the subject of this action; and that there was received by said mortgagors on said mortgage

only the sum of \$61,000, said sum of \$4,000 having been deducted and reserved from the amount of said bond and mortgage by the complainant as a usurious and unlawful charge, contrary to an Act concerning usury, as mentioned aforesaid.

4. That mortgagors agreed to pay to said complainant, the said sum of \$65,000, whereas only \$61,000 was advanced on said bond and mortgage,
10 complainant reserving and securing to itself for the loan of the money on said bond and mortgage the sum of \$4,000.

5. That after said mortgage settlement the property covered by said mortgage was conveyed to Strand Properties, Inc., a corporation of the State of New Jersey; that said transfer was made to said corporation for the purpose of more conveniently
20 dividing the interest of said owners in said property and to avoid an ownership as tenants in common, and for various other purposes and reasons, all for the benefit of said owners; that said Charlotte S. Chester, Naomi M. Sutton were the owners of said property in that they owned the stock of said corporation.

6. That said transfer was not made for profit and there was no exchange of money for purchase and sale of said property at the time the deed for same
30 was executed.

7. That said Naomi M. Sutton has sold her stock in Strand Properties, Inc., to Charlotte S. Chester, said Charlotte S. Chester having full knowledge that the usurious charge or bonus of \$4,000 was retained by complainant at time of mortgage settlement, mentioned aforesaid.

8. That said Charlotte S. Chester and Naomi M. Sutton were in privity with the Strand Properties, Inc., and that they were the owners of the stock of said company which owned the property covered by the mortgage described in complaint.

9. That there is not due on said mortgage the sum of \$65,000 as is set forth in said complaint, but that the defendant, Strand Properties, Inc., is entitled to a credit of \$4,000 which was usuriously and unlawfully deducted as mentioned aforesaid, and is entitled to a credit of lawful interest on said sum from date of said mortgage. 10

F. STANLEY KREPS,
*Solicitor of Defendant, Strand
Properties, Inc.*

20

30

NOTICE TO REPORT.
IN CHANCERY OF NEW JERSEY.

73-480.

10

<p>Between OCEAN CITY TITLE & TRUST COMPANY, <i>Complainant,</i> and STRAND PROPERTIES, INC., <i>et als.,</i> <i>Defendants.</i></p>	}	<p>On Bill, &c. Notice to Report.</p>
--	---	---

20

Sirs:

Take notice that Naomi M. Sutton, one of the above named defendants, who holds a subsequent encumbrance to that of the complainant on the mortgaged premises, and who does not dispute the priorities set up in complainant's bill, in which there are no infant defendants named, desires that the lien of her encumbrance on the mortgaged premises be reported upon, and the amount due thereon fixed in the decree to be made in this cause.

30

Dated July 17, 1929.

Respectfully,
HERBERT R. VOORHEES,
Solicitor of Defendant,
Naomi M. Sutton.

TO COLE & COLE,
Solicitors of Complainant.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

Between
OCEAN CITY TITLE AND
TRUST Co.,
v.
STRAND PROPERTIES, INC. } On Bill, &c. 10
Affidavit.

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

NAOMI M. SUTTON, being duly sworn according to law, on her oath says: 20

1. That she is the owner of a bond made by Strand Properties, Inc., a corporation, and Ralph L. Chester to her conditioned for the payment of \$37,500 which bond bears date September 12, 1928, and also owns a mortgage made by Strand Properties, Inc., to her, given to secure payment out of the principal sum of said bond, and bearing even date herewith, which mortgage is recorded in the clerk's office of Cape May County in Book 298 of Mortgages, page 23, and which mortgage covers the premises described in the foreclosure bill in the above entitled matter. 30

2. Deponent further says that there is due to her

on said bond secured by said mortgage the sum of \$37,500 with interest from the twelfth day of September, 1929, at six per cent per annum, and the further sum of \$325.00 interest due September 12, 1929.

3. Deponent further says that on December 26, 1928, she assigned said bond and mortgage to Ocean City Title and Trust Company, the above named complainant, as collateral security for the payment
10 of two promissory notes made by her and discounted by said company, one of said notes being in the sum of \$11,500 and the other in the sum of \$1,100 which assignment is recorded in the clerk's office of Cape May County in Book 35 of Assignments of Mortgages, page 178, and that there is due to said Ocean City Title and Trust Company the sum of \$12,600 with interest from December 31, 1928, and that the Ocean City Title and Trust Company is entitled to
20 have this sum first paid to it out of the amount due to her under her bond and mortgage above set forth.

NAOMI M. SUTTON.

Sworn and subscribed before me this 15th day of November, 1929.

W. CLEVINGER,
M. C. C.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between	}	On Bill, &c. Final Hearing.	10
OCEAN CITY TITLE AND			
TRUST COMPANY,			
<i>Complainant,</i>			
and			
STRAND PROPERTIES, INC.,			
<i>Defendant.</i>			

Atlantic City, N. J., November 12, 1929.	20
--	----

TESTIMONY.

Before HON. R. H. INGERSOLL, Vice-Chancellor.

APPEARANCES:	30
For the complainant, MESSRS. COLE & COLE.	
For the defendant, F. STANLEY KREPS, ESQ.	

JAMES F. KOCH, SWORN.

Direct examination.

By Mr. Cole:

Q. Mr. Koch, what is your business?

10 A. Treasurer of the Ocean City Title and Trust Company.

Q. Is the Ocean City Title and Trust Company the owner of a certain bond and mortgage bearing date January 16, 1926, made by Charlotte S. Chester and Ralph S. Chester, her husband, Naomi M. Sutton and Edward M. Sutton, her husband, to the Ocean City Title and Trust Company in the sum of sixty-five thousand dollars real debt?

A. Yes, sir.

20 Q. Is that mortgage still in the hands of your company?

A. Yes, sir.

Q. Do you have it with you?

(Mortgage produced, offered and admitted in evidence, marked Exhibit C1.)

Q. Has anything been paid on account of that mortgage by anyone?

30 A. No, sir.

Q. How much principal sum is now due thereon?

A. \$65,000.

Q. With interest from what date?

A. January I think it is.

Q. Of what year?

A. 1929.

(Search No. 3545 made by the Ocean City Title and Trust Company covering mortgaged premises offered, received in evidence and marked Exhibit C2.)

The Court: Can any allowance be made for that? Can a complainant make his own search and charge for it?

Mr. Cole: I don't know, just a coincidence. That 10 is the situation. It may be an unfortunate coincidence.

The Court: I am afraid it is.

Mr. Cole: However, if we get the \$65,000, we will be satisfied.

Q. Are you familiar with the contents of this search and the charges therefor, Mr. Koch? 20

A. I believe I am. I have read it.

Q. Since the delivery of this mortgage offered in evidence was there a confirmation mortgage delivered to you by the present owners of the property?

A. Yes, sir.

Q. Is that mortgage in your possession?

A. Yes, sir.

(Mortgage produced.)

Mr. Kreps: If your Honor please, this is a mortgage which was given by the present owners of the property at the time the Boardwalk was moved in Ocean City and I have no objection to it except that that is given by Strand Properties, Inc., and the defense in this matter is usury and I wouldn't want

the fact that this mortgage was given by a corporation to be a defense to that action.

(Mortgage offered, received in evidence and marked Exhibit C3.)

Q. Has demand been made for the payment of the principal and interest due on this mortgage?

A. It has.

10 Q. To whom?

A. The Strand Properties, Incorporated.

Q. Upon one occasion or more than one?

A. I believe on more than one occasion verbally with myself and one of the officers of the corporation.

Q. What excuse, if any, was given you for non-payment?

A. Not any at the time we made demand.

20 Cross-examination.

By Mr. Kreps:

Q. Mr. Koch, what was your position with the Ocean City Title and Trust Company on January 16, 1926?

A. Treasurer, same position.

Q. You were treasurer then?

A. Yes.

(30 Q. You were familiar with this entire transaction then at its inception?

A. Yes, I might say so, I was, you see, only treasurer from the first of the year.

Q. But you were treasurer on this date?

A. When this mortgage was executed, yes.

Q. How much money was actually paid to the mortgagors?

Mr. Cole: I object to that.

The Court: What is the objection?

Mr. Cole: Objection is that the present owners of this property are Strand Properties, Incorporated, and the search discloses the fact that the original mortgagors under this mortgage conveyed the mortgaged premises to the Strand Properties, Incorporated, for a consideration of \$190,000, and the title is presently in the Strand Properties, Incorporated, a corporation of the State of New Jersey, and that they purchased the property subject to this mortgage of \$65,000 and that they are not, from a legal standpoint, to go into the question of what money was actually advanced at the time of the delivery of this mortgage and they are not in a position to offer the defense of usury and I object. 10

The Court: I will hear you, Mr. Kreps. 20

Mr. Kreps: If your Honor please, the answer sets up usury and it does more than that, it further shows a complete and separate defense. While it is true, ordinarily, a purchaser from an owner who has been charged a usurious fee cannot plead usury, however, a purchaser who is in privity with the payer of that usurious fee has the right to plead it. While the title to this property is now held by the Strand Properties, Inc., as a matter of fact the owner is the same owner who paid this usurious fee and the transfer was merely made for the purpose of holding title to the property to avoid a tenancy in common. As a matter of fact, as the Court may know, Mr. Sutton, who was the husband of Naomi Sutton here, was in a very poor state of health at 30

the time and that was one reason the property was transferred to a corporation, so while title was not actually in his name, was in his wife's name, it was done for the purpose of avoiding any trouble that might arise at a later date and the property was transferred to a corporation and I think there is a line of cases which holds that a person who is in privity with a party paying a usurious charge or bonus has the right —

10

The Court: A person, maybe, but can you take advantage if you are conveying to a corporation and then deny the responsibilities of such conveyance? You say you did it for certain advantages. You have done it for that advantage, can you say, yes, but we won't concede that we took it subject to the responsibilities? You are now saying, in effect that you did not convey it to a corporation, that you have never conveyed it, that you still own it.

20

Mr. Cole: The situation has changed, Vice-Chancellor, because at the present time the allegation is that Mrs. Chester is practically the sole owner of this situation, Mrs. Sutton has passed out of the picture completely, whereas, at the time of the delivery of the bond and mortgage Mrs. Sutton and Mr. Sutton were joint owners. The situation has changed considerably and, if your Honor will notice on the certificate of incorporation on the search, none of these parties are mentioned as incorporators, none of whom were at all interested in this mortgage.

30

Mr. Kreps: They were merely dummy incorporators.

The Court: I notice, according to this deed to the Strand Properties, sold subject to a mortgage in the amount of sixty thousand dollars. Is that supposed to be this one?

Mr. Cole: I suppose it is, Vice-Chancellor. I don't know whether that is a typographical error or what. I observed that myself.

The Court: I will sustain the objection. I don't think that the defense of usury is available to the defendant, Strand Properties, Incorporated. I will make my ruling broad enough so that you may have whatever advantages on appeal. I notice in this matter, Mr. Cole, although both mortgages call for a bond, none have been offered in evidence. 10

Mr. Cole: I haven't gotten to that, Vice-Chancellor. 20

Mr. Kreps: As your Honor is going to rule the way you have, I suppose is final, no use of me arguing further?

The Court: Until I rise I am glad to hear you.

Mr. Kreps: The mere fact the owners of this property, Mrs. Sutton and Mrs. Chester, conveyed that property to a corporation I submit did not bar them from the right to plead usury. 30

The Court: Doesn't bar them from doing it, but there is no responsibility on their part. I haven't ruled that at all. I have ruled that it bars the defendant, the Strand Properties.

Mr. Kreps: But, if your Honor please, they are barred of the right to plead usury, if the Strand Properties, Inc., can't plead usury because the Strand Properties, Inc., will be the owners of the property, holding the title for the company that actually paid the usury. Now, I submit that a holding company, merely incorporated for the purpose of holding title to a piece of property, and the stock being held by the people who originally owned the
10 property, stock not being sold to any other individuals, is certainly an evidence that their rights would be in privity with the original owners of the property.

The Court: I can't see how you can convey the land to a corporation, which relieves you of certain responsibilities, change the title of it, and then say we will take advantage of the Corporation Act, so far as we want to take advantage of it, but when
20 it comes to the point we don't want to, then we will say there is no corporation, in effect, but we are the actual owners.

Mr. Kreps: Insofar as the Ocean City Title and Trust Company is concerned, we don't say that. Their rights are the same as they always have been. We are taking no advantage of any rights so far as the Ocean City Title and Trust Company, their responsibility. You put them in a position where they
30 can take advantage.

The Court: I am not so sure. It may be they can take proceedings to prevent you from taking judgment against them.

Mr. Kreps: We don't want a judgment. We have

offered and tendered the amount of the mortgage less usury. We don't want any judgment. We are perfectly willing to pay them but they won't take it.

The Court: There are no contractual relations between the Strand Properties, Inc., and the Ocean City Company except that which arises by reason of a conveyance from the original mortgagors to the Strand Properties, Inc. Now when that conveyance arose, I think there is no doubt but that the Suttons and Chesters have, by their own act, prevented the defense of usury. 10

Mr. Kreps: Bought the property subject to this mortgage.

The Court: That is just exactly the point.

Mr. Kreps: In position where they have to pay 20 it.

The Court: That is just exactly the point.

Mr. Kreps: It means just this, while it is in fact the name Strand Properties, Inc., paying it, it is in fact the mortgagors paying it.

Mr. Cole: If your Honor please, that is not quite right. Strand Properties, Incorporated, is a legal entity. 30

Mr. Kreps: I understand it is a legal entity, but what I am getting at is this, merely a holding company holding title in order to avoid the tenancy in common, for that purpose only.

The Court: If there had been a pleading that they were not the owners of the land and that they held as trustee, it might be a different thing, but that is not the situation. They hold title to the land.

Mr. Kreps: That is true.

The Court: Not as trustees, but as the holding company. I will make the decree, and base it upon
10 my views in this matter, broad enough and not allow any search fee.

Mr. Kreps: Your Honor will base your reasons for it?

The Court: Yes, if you file a notice of appeal I will write an opinion that will cover the exact point.

Atlantic City, N. J., December 19, 1929.

(Trial of the cause continued.)

JAMES F. KOCH, recalled.

10

Cross-examination.

By Mr. Kreps:

Q. Mr. Koch, how much money was paid by the Ocean City Title and Trust Company to Charlotte S. Chester, Naomi S. Sutton and Ralph M. Chester and Edward M. Sutton for the \$65,000 mortgage which they executed and delivered to your company? 20

Mr. Cole: Objected to.

The Court: I will permit the question.

A. I would say \$65,000. I might go on to explain that there were various charges made up, including costs of a special premium, which amounted to \$4,000.

Q. Was a special premium of \$4,000 extracted from the settlement? 30

A. No.

Q. Did they pay to you four thousand dollars for this mortgage?

A. No.

Q. What was the four thousand dollars for?

A. The four thousand dollars was made up of various charges for insuring the title to the mortgage and making settlement.

Q. Weren't there other charges besides the four thousand dollars for title insurance?

A. No, sir.

Q. No other charges?

A. No, sir.

10 Q. Your premium in insuring the title to this property was four thousand dollars?

A. Yes, sir.

Q. What was so unusual about the title to this property that you had to charge a special fee of four thousand dollars?

Mr. Cole: I object to that.

The Court: I will permit it.

20

A. I can't say offhand what exactly was unusual. I know that there was a foreclosure under way at the time that we took the mortgage, the present mortgage at that time on the property was being foreclosed and we made the settlement with those people. The actual details, of course, I have nothing to do with. That was up to the title officers.

Q. You have the settlement statement there?

30 A. I won't say yes or no. I will have to look to see whether I do or not. I have a copy or rather figures made up which took up the amount involved in that settlement.

Q. Wasn't there a check of \$4,000 taken out of the settlement funds, title department settlement funds and delivered to the banking department?

A. No, sir.

Q. No such check?

A. No, sir. That was a charge made by the title department for insuring the title and went into the title department funds.

Q. You don't know of anything unusual about the title to this property, that the fee would be \$4,000?

A. No, sir; I can't say that.

Q. This property was merely a piece of beach front in the central part of the city, was it not?

A. Yes.

Q. Property which your company had searched 10 the title on before?

A. I can't answer that.

Q. Did you insure it for James Rowland?

A. We did insure it in 1923.

Q. And when did you issue the title policy that accompanied this mortgage?

A. 1926.

Q. Did anything unusual happen between—what was the charge that you made to Mr. Rowland for insuring the title to this property in 1923? 20

A. I can't answer that.

Mr. Cole: I object.

The Court: He says he can't answer. I will sustain the objection, however.

Q. Did anything happen between 1923 and 1926 that would require a considerable amount of work in searching the title to this property so that the 30 fee would have to be raised to a sum of \$4,000?

A. I can't answer that question.

Q. That is all.

Mr. Cole: I have the affidavit of the second mortgagee which I want to offer.

RALPH L. CHESTER, SWORN.

Direct examination.

By Mr. Kreps:

- Q. Mr. Chester, you are the husband of Charlotte S. Chester?
10 A. I am.
- Q. Is she ill at the present time?
A. Yes.
- Q. Is she in the hospital?
A. Yes.
- Q. Did you represent her and handle a transaction for her, relative to the placing of a mortgage by the Ocean City Title and Trust Company on property owned by Charlotte S. Chester and Naomi M. Sutton known as the Strand Theatre in Ocean City,
20 New Jersey, on or about January 16, 1926?
A. I did.
- Q. That mortgage has been introduced as an exhibit, \$65,000 given by Charlotte S. Chester, Ralph L. Chester, Naomi M. Sutton and Edward M. Sutton; as I say, it is in the sum of \$65,000; what sum did you receive for that mortgage?
A. I don't know the exact sum but the —
- Q. Was any charge made for placing that mortgage?
30 A. \$4,000, yes, sir.
- Q. Was that \$4,000 represented to you to be a title policy fee?
A. Absolutely not.
- Q. Were you told what the \$4,000 was for?
A. Yes.
- Q. What was it for?

A. Well, it was a charge made for taking the mortgage for a period of three years.

Q. Was that in addition to the regular six per cent interest?

A. Yes.

Q. Was that sum deducted from the settlement funds?

A. I think so, yes.

Q. Well, do you know whether it was or not?

A. I am not positive unless I look up my settlement sheet.

Q. Did you receive the full \$65,000?

A. No.

Q. Did you receive \$65,000 less \$4,000?

A. I —

Mr. Cole: I object to that. He says he doesn't know.

The Court: Sustain the objection.

20

Mr. Kreps: May I have the settlement statement you just read from, Mr. Koch?

Mr. Koch: I didn't read any settlement statement.

Mr. Kreps: You just read from a settlement statement showing how much was paid on the mortgage. 30

A. In fact I don't think there ever was any settlement statement.

Q. But you were charged \$4,000?

A. This was a verbal agreement that was made with the president of the bank.

Q. What happened at the time of settlement concerning this \$4,000?

A. Why the mortgage that was being foreclosed, the title company paid off this mortgage and deducted the \$4,000 service charge from the \$65,000.

Cross-examination.

By Mr. Cole:

10

Q. Mr. Chester, you are the secretary of Strand Properties, Inc.?

A. Yes.

Q. And you were the secretary of that company on May sixth, 1927?

A. I think so.

Q. And you were the secretary of that company on September 12, 1928?

A. I think so.

20

Q. During that period of time you prepared resolutions that were passed by that corporation at the duly convened meetings of its board of directors?

A. I would say so, yes.

Q. And did you give copies under your hand and seal to the complainant here of certain of those resolutions?

A. What resolutions do you —

30 Mr. Kreps: If your Honor please, I think the resolution should be produced and should be specified which ones he is speaking of.

The Court: Entitled to know which ones.

Q. I show you what purports to be resolution passed at a duly convened meeting of the board of

directors of the defendant, Strand Properties, Inc., and ask you if that is a copy of the resolution passed at the time indicated?

A. Yes, this resolution was drawn by the Ocean City Title and Trust Company with reference to their mortgage that they are foreclosing now.

Q. Was that resolution passed by the directors of your company?

A. I think so.

Q. And you have attested that as being a true 10
copy of the resolution so passed?

A. Yes, sir.

(Copy of resolution offered, received in evidence and marked Exhibit C1 of this date.)

Q. I show you what purports to be three certain other certified copies of resolutions passed at duly convened meetings of the board of directors of Strand Properties, Inc., and ask you if they are true 20
copies of the resolutions so passed?

A. Yes.

(Resolutions offered in evidence.)

Mr. Kreps: If the Court please, I object to these. I think they are entirely irrelevant and immaterial.

The Court: Upon what points?

30

Mr. Kreps: Resolutions concerning the pledging of some stock on the part of Mrs. Chester for the obtaining of a loan on a second mortgage on the same property, the stock being stock of the Strand Properties, Corporation.

Mr. Cole: Please, your Honor, the purpose of that is this: we propose to show by the present witness that Mrs. Naomi Sutton, one of the mortgagors in the mortgage under foreclosure, is no longer a stockholder of the Strand Properties, Inc., and these resolutions show that the company, as I understand it, authorized the execution and delivery of a second mortgage upon the premises in question to Mrs. Sutton in exchange for her interest in the Strand Properties, Inc., the contention being, as I understand it, that the only possible connection with the present corporation and the then mortgagors are one and the same, we want to show that Mrs. Naomi Sutton has parted with whatever interest she has in this corporation and that interest is by way of a second mortgage on this property.

The Court: I will permit them to be marked.

20

(Resolutions admitted and marked Exhibits C2, 3 and 4 of this date.)

Q. Mr. Chester, Mrs. Naomi Sutton is no longer a stockholder in Strand Properties, Inc., is she?

A. Not any longer.

Q. How is that?

A. No.

Q. To whom did she sell her stock?

30 A. Sold it to Charlotte S. Chester; as I remember.

Q. Did Strand Properties, Inc., execute and deliver to Mrs. Sutton a second mortgage upon the lands and premises under foreclosure?

A. Yes.

Q. Who are the present stockholders of Strand Properties, Inc.?

A. Charlotte S. Chester, Ralph L. Chester and Sarah S. Groff.

Q. Is that the only stockholders?

A. Yes.

Q. Isn't William F. Shriver a stockholder?

A. No, sir.

Q. He has no interest in the corporation?

A. No, sir.

By Mr. Kreps:

10

Q. How many shares of stock does Sarah S. Groff hold?

A. One share.

Q. For what purpose does she hold that share?

Mr. Cole: I object to that. We are not concerned with what purpose she holds it.

20

The Court: I will permit it.

Q. Is that stock assigned or does she own it outright?

A. What do you mean assigned?

Q. Is the assignment on the back of the certificate signed by Sarah S. Groff or does the share of stock actually belong to her?

A. It is assigned.

Q. To whom?

30

A. Either myself or Mrs. Chester.

Q. Mr. Chester, according to the bill of complaint, this property in question was conveyed by Naomi M. Sutton and Edward M. Sutton, Charlotte S. Chester and yourself to the Strand Properties, Inc., May 6, 1927. At that time who were the stockholders of the

Strand Properties, Inc., at the time the conveyance was made?

A. At the time the conveyance was made Mrs. Sutton, Edward M. Sutton, Charlotte S. Chester and Ralph L. Chester.

Q. Anyone else?

A. No one else.

Q. What was the purpose of the transfer of the title from those as individuals to the corporation?

10

Mr. Cole: I object to that.

The Court: Sustain the objection.

By Mr. Cole:

Q. Mr. Chester, was William F. Shriver ever a stockholder in this company?

A. No, sir.

20 Q. Did he ever hold a stock certificate of this company?

A. He has a certain number of shares of the Strand Properties, Inc., as collateral for a loan made by Ralph L. Chester, Incorporated.

Q. That is all.

30

CLINTON B. PRICE, SWORN.

Direct examination.

By Mr. Kreps:

Q. You are the title officer of the Ocean City Title and Trust Company?

A. Yes.

Q. Are you familiar with the mortgage settlement between Charlotte S. Chester and Naomi M. Sutton with the Ocean City Title and Trust Company pertaining to the \$65,000 mortgage which is the subject of this suit?

A. Only in a general way. I didn't make it and I have no direct knowledge on the point.

Q. Do you determine the fees for insuring the title? 10

A. Not in every case.

Q. Did you determine the fee in this case?

A. I did not.

Q. Who did?

A. I don't know now.

Q. Is a fee of \$4,000 for insuring this title an unusual fee?

A. A what?

Q. Is it an unusually large fee?

A. I don't know without rehearsing the title. 20

Q. Well, the title was insured by you in 1923 for James Rowland and in 1926 there was a mortgage policy issued to yourselves for property then owned by Ralph L. Chester and Edward M. Sutton and there was only one conveyance, the conveyance being from Rowland to Chester and Sutton; would a fee of four thousand dollars be your usual fee for making the title and issuing a title policy for \$65,000?

A. Probably not. 30

Q. Wouldn't be unusual?

A. I say it would probably not be our usual fee.

Q. If you were determining the amount to be fixed, that is your business, is it not?

A. It is.

Q. To fix the title fees?

A. Yes.

Q. Would you have fixed a fee of four thousand dollars?

A. I couldn't say what I would have fixed in this case without having the entire circumstances before me and I don't have any information as to what previous insurance we have issued on this tract.

Q. What is your rate for issuing the title policy?

A. There is no recognized rate.

10 Q. What is your usual rate for mortgagee policies?

A. There is no fixed rate on Ocean front properties.

Q. Do you remember how much you charged Mr. Rowland?

A. I have no recollection.

Q. But you do think four thousand dollars would be an unusually large fee?

A. I would say so, yes.

20 Q. Do you remember signing a check for \$4,000 that was delivered to the banking department of your company out of these settlement funds?

A. I do not.

(No cross-examination.)

TESTIMONY CLOSED.

30

The Court: At the time this case was originally heard I declined to permit the defendant to offer any proof to sustain his allegation of usury. After more mature reflection I felt that it was proper that he should present his proof and at my direction a continuance of the hearing was held today.

There can be no doubt, as I see it, that the defen-

dant has failed to prove usury. He has had the rather unusual advantage of the fact that after having the complainant's case heard he has been given several weeks to produce evidence to show that the original mortgagors had paid a usurious charge. He has signally failed to prove that. Of course, he has proven suspicious circumstances but I can't, in view of the testimony of the representatives of the complainant and in consideration of his own testimony, say that the defendant has proved usury in this case. 10

I will advise a decree in favor of the complainant for the amount of the face of the mortgage plus the interest there due and also to the second mortgagee the amount proven by his affidavit. You may prepare such a decree.

FINAL DECREE.

73-480.

20

IN CHANCERY OF NEW JERSEY.

Between

OCEAN CITY TITLE AND
TRUST COMPANY,

Complainant,

and

STRAND PROPERTIES, INC.,
a corp., &c., *et al.*,

Defendants.

} On Bill to Foreclose.
Final Decree.

30

This cause came on to be heard at chambers, Atlantic City, in the presence of Maurice Y. Cole, of

Cole & Cole, solicitors of complainant, and F. Stanley Kreps, solicitor for Strand Properties, Inc., on bill, answer and replication and proofs in open court, and on affidavit pursuant to rule of Naomi M. Sutton, holder of the second mortgage and one of the defendants, and the Court having read and considered the pleadings and heard and considered the proofs and the argument of respective counsel, and being of the opinion that the defendants, Strand
10 Properties, Inc., failed to establish the averments in its answer of usury, and that complainant is entitled to a decree for the amount set forth in its bill, to wit, the sum of sixty-five thousand dollars with interest from the 16th day of January, nineteen hundred and twenty-nine, and that Naomi M. Sutton, holder of the second mortgage, is entitled to a decree for the sum of thirty-seven thousand five hundred dollars, with interest from the 12th day of September, nineteen hundred and twenty-nine, and
20 the further sum of three hundred twenty-five dollars interest due on the 12th day of September, nineteen hundred and twenty-nine, and in all the sum of thirty-seven thousand eight hundred twenty-five dollars, with interest from said date, and that of said sum the Ocean City Title and Trust Company, assignee of the mortgage as collateral security for the payment of a loan, is first entitled to be paid the sum of twelve thousand six hundred dollars, with interest from the 31st day of December,
30 nineteen hundred and twenty-eight;

It is, on this 24th day of December, nineteen hundred and twenty-nine, on motion of Cole & Cole, solicitors for complainant, ordered, adjudged and decreed that so much of the mortgaged premises be sold as will be sufficient to raise and satisfy in the first place to the complainant the sum of sixty-five

thousand dollars, with interest from the 16th day of January, nineteen hundred and twenty-nine, together with the complainant's costs in this cause to be taxed, including a counsel fee of seven hundred and fifty dollars, which is hereby allowed to said complainant; and in the second place, to the defendant, Naomi M. Sutton, the sum of thirty-seven thousand eight hundred twenty-five dollars, with interest from the 12th day of September, nineteen hundred and twenty-nine, of which sum said Ocean City Title and Trust Company be first paid the sum of twelve thousand six hundred dollars, with interest from the 31st day of December, nineteen hundred and twenty-eight; and that a writ of *feri facias* issue for that purpose out of this court, directed to the sheriff of the County of Cape May, commanding him to make sale according to law of the mortgaged premises in said bill of complaint described, and that out of the money arising from said sale he pay to the complainant, or its solicitors, its said debt, interest and costs, and to the defendant, Naomi M. Sutton, or her solicitor, her said debt, interest and costs, subject to the Ocean City Title and Trust Company being first paid the amount of its loan to said defendant, Naomi M. Sutton, for which it holds said mortgage by assignment as collateral security; and that in case more money shall be raised by said sale than shall be sufficient to answer such several payments, that such surplus be brought into this court, to abide the further order of this Court, unless otherwise previously disposed of by this Court, and that the sheriff make return, without delay, of his proceedings by virtue of said writ.

And it is further ordered, adjudged and decreed that the defendants stand absolutely debarred and

foreclosed of and from all equity of redemption of,
in and to the said mortgaged premises, when sold
as aforesaid by virtue of this decree.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

10

PETITION OF WILLIAM F. SHRIVER.

(Filed Mar. 8, 1930.)

IN CHANCERY OF NEW JERSEY.

20

Between

OCEAN CITY TITLE AND
TRUST COMPANY,

Complainant,

and

STRAND PROPERTIES, INC.,
a corp., &c., *et al.*,

Defendants.

} On Bill, &c.
} Petition of William
} F. Shriver.

30

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

The petition of William F. Shriver, of the City of
Ocean City, County of Cape May and State of New
Jersey, respectfully shows that:

1. On or about the ninth day of April, 1926, petitioner loaned to Ralph L. Chester, Inc., a New Jersey corporation, the sum of \$100,000.00, and took as security therefor assignments of various mortgages on real estate upon which there was then due the sum of \$114,700.00. Said loan bore interest at six per cent per annum, and was represented and secured by the note of Ralph L. Chester, Inc., endorsed by Ralph L. Chester, personally, in addition to being secured by the aforementioned mortgages. 10

2. After April 9, 1926, and on or before May 17, 1927, said loan had been reduced by payments made thereon to the principal sum of \$73,500.00, and as payments were made on said loan, portions of the collateral pledged therewith were released by petitioner to said Ralph L. Chester, Inc., or to said Ralph L. Chester.

3. On or about May 17, 1927, petitioner agreed 20
with Ralph L. Chester, Inc., and with Ralph L. Chester, personally, that petitioner would accept as security for said balance of \$73,500.00 a note for that amount signed by Ralph L. Chester, Inc., and endorsed by Ralph L. Chester, personally; also retaining certain mortgages and releasing other mortgages held as collateral for said loan, accepting as a substitute for such released mortgages the assignment of 614 shares of the capital stock of Strand Properties, Inc., a New Jersey corporation, of the 30
par value of \$100.00 per share, which shares of stock then stood in the name of Ralph L. Chester, personally, on the books of Strand Properties, Inc.

ered to the petitioner certificate #6 of Strand Prop-

4. On the 17th day of May, 1927, there was deliv-

erties, Inc., for 614 shares of stock, together with a written assignment of such shares and a duly executed power of attorney for the transfer thereof. Said certificate of stock and power of attorney have been in possession of petitioner ever since said day.

10 5. From time to time after May 17, 1927, said loan was reduced by payments on account thereof, and as such payments were made, collateral was released from the pledge to secure the said loan. By reason of such payments, the loan has been reduced to \$32,500.00. No payments have been made on said loan since June 1, 1929, and interest is due petitioner on that amount from June 1, 1929. There has been no change made in the collateral affecting said loan since June 1, 1929, and since June 1, 1929, petitioner has had no other collateral than the aforementioned stock. Petitioner now holds the note of 20 Ralph L. Chester, Inc., endorsed by Ralph L. Chester, personally, dated June 1, 1929, for \$32,500, and said Ralph L. Chester and Ralph L. Chester, Inc., are still liable to petitioner on said note in said amount. Said loan to Ralph L. Chester, Inc., was duly authorized by said Ralph L. Chester, Inc.

30 6. At the time petitioner accepted the assignment of said 614 shares of stock as collateral for said loan, and ever since that time, petitioner has regarded the said shares of stock as of substantial value and has relied upon the said shares to protect him and to secure to him the repayment of the moneys due him on said loan.

7. The 614 shares of stock assigned to petitioner as aforesaid have never been transferred to him on the books of the corporation and petitioner has

never received notice of any meetings of said Strand Properties, Inc., and has never participated in any corporate acts of said Strand Properties, Inc., either as a stockholder or in any other capacity or manner whatever.

8. At the time petitioner accepted the 614 shares of Strand Properties, Inc., as collateral for his loan, he inquired as to the assets of the corporation and the encumbrances against the same. Petitioner was informed that the only mortgage against said assets was the \$65,000.00 mortgage held by the Ocean City Title & Trust Company, and also that practically the only asset of the said company consisted of the property covered by the said mortgage, being a piece of real estate on the Boardwalk at Ocean City, between Ninth Street and Moorlyn Terrace, known as the Strand Theatre. At the present time said piece of real estate constitutes practically the entire assets of the corporation. The mortgage held by the complainant in the above-entitled matter is the same mortgage of which petitioner was informed at the time he acquired the said stock. Petitioner did not learn of the existence of the mortgage made by Strand Properties, Inc., to Naomi M. Sutton, dated September 12, 1928, given to secure the payment of the sum of \$37,500.00, until the summer of 1929. Petitioner never consented to the creation of said mortgage and never participated in any action of said corporation leading up to the creation thereof. Petitioner, although not a party to the above-entitled cause, knew that the Ocean City Title and Trust Company had filed a bill to foreclose the mortgage held by it, but did not know that said foreclosure proceeding in any way involved the second mortgage and did not know that there could be a

10

20

30

decree in this cause providing for the payment of this second mortgage. It was not until about two weeks past that petitioner first learned that the second mortgage was involved in this proceeding and that there had been a decree providing for the payment of the same.

10 9. Upon inquiry regarding the said mortgage of Naomi M. Sutton, I learned that Strand Properties, Inc., received no consideration for said mortgage whatever. I learned that on or about August 25, 1927, Charlotte S. Chester, who is the wife of Ralph L. Chester, and Naomi M. Sutton and Edward M. Sutton, her husband, entered into a written agreement whereby Naomi M. Sutton and Edward M. Sutton agreed to sell and Charlotte S. Chester agreed to buy all of the shares of stock of Naomi M. Sutton and Edward M. Sutton in Strand Properties, Inc., for the total sum of \$49,860.19, of
20 which sum \$12,360.19 was paid in cash and the balance of which purchase price was to be paid by the execution and delivery by Strand Properties, Inc., of a mortgage for \$37,500.00, covering the real estate owned by Strand Properties, Inc., consisting of the aforementioned Strand Theatre property. The shares of stock owned by Naomi and Edward Sutton in Strand Properties, Inc., at the date of said agreement, total 625 shares, of which 624 shares
30 were owned by Naomi M. Sutton and one share by Edward M. Sutton. A true copy of the agreement relating to the said stock is attached hereto and marked Exhibit "A."

10. Said agreement of August 25, 1927, was carried out to the extent that said sum of \$12,360.19 was paid by Ralph L. Chester, said \$37,500.00 mort-

gage was executed and delivered by Strand Properties, Inc., to Naomi M. Sutton, and said 625 shares of stock were assigned, 624 shares thereof being issued to Ralph L. Chester and one share thereof being issued to Charlotte S. Chester, and said shares are still standing in the names of said parties on the books of Strand Properties, Inc. Strand Properties, Inc., never received any consideration whatever for the said mortgage, it having been given solely for the stock above mentioned. The \$37,500.00 mortgage referred to is the second mortgage referred to in the bill of complaint, recorded in Book 298, page 23. 10

11. Petitioner understands that said mortgage was assigned by Naomi M. Sutton to Ocean City Title and Trust Company for security for certain moneys due it and that Ocean City Title and Trust Company, complainant in this cause, claims an interest in the said second mortgage. 20

12. Petitioner has attempted to obtain other collateral in addition to, or in substitution for the shares of stock of Strand Properties, Inc., but has been unable to do so, and said stock represents the sole security for said debt. Petitioner has also attempted to obtain payment for said debt, but has not been able to do so, either from the maker or the endorser of said note, and says that if he is unable to realize on said stock, or to preserve the said stock, he will suffer a large loss on said loan. 30

13. Petitioner was not a party to the above-mentioned foreclosure suit and desires to intervene in said suit for the purpose of contesting the validity of the said mortgage made by Strand Properties,

- Inc., to Naomi M. Sutton. Petitioner says that Strand Properties, Inc., has not interposed any defense to the said second mortgage. Said company is under the control and direction of Ralph L. Chester, who was a party participating in the creation of the said mortgage, and who would probably be estopped from questioning the same. And said corporation would probably be unable to defend against the same. Unless petitioner is allowed to
- 10 interpose a defense to said second mortgage, he will be without remedy and the stock held by him will be worthless, and the loan held by him will be uncollectible. The value of the property owned by Strand Properties, Inc., is not sufficient to pay the said first and second mortgages and allow petitioner to receive anything on said stock to apply on his said loan. At the time the said mortgage was created, Strand Properties, Inc., was controlled by Ralph L. Chester and Naomi M. Sutton and Edward
- 20 M. Sutton and Charlotte S. Chester, and all of said named parties participated in said transaction at the time it was consummated and said parties constituted or controlled the entire board of directors of the company at the time.

14. Petitioner did not learn until Monday, March 3, 1930, that the mortgage given by Strand Properties, Inc., for \$37,500, above referred to, was invalid, and on said date was advised that said mortgage was not binding upon the corporation, and
- 30 it was not until that date that petitioner knew of his rights in the matter. Petitioner did not participate in the final hearing herein and no notice of the final hearing was given to him, and such information as he had obtained prior to March 3, 1930, as to the said proceedings, was obtained casually.

15. The sale has been advertised under the execution issued in this foreclosure matter, and was adjourned until Monday, March 10, at the request, as petitioner is informed, of Ralph L. Chester, or some person acting for him. If said sale is proceeded with, petitioner will be without remedy.

Petitioner, therefore, prays that:

1. He may be admitted as a party to this suit. 10

2. That the decree entered herein under date of December 24, 1929, be opened insofar as the same directs that there be paid to the defendant, Naomi M. Sutton, the sum of \$37,825.00, with interest from September 12, 1929, of which sum the Ocean City Title and Trust Company be first paid the sum of \$12,600.00, with interest from December 31, 1928.

20

3. That the said Naomi M. Sutton and Ocean City Title and Trust Company and Strand Properties, Inc., be required to answer this petition to the end that this Court will order and decree that the said mortgage made by Strand Properties, Inc., and Naomi M. Sutton, to secure the sum of \$37,500.00, is null and void, and that said mortgage should be cancelled.

4. That in the meanwhile, the Sheriff of Cape May County be restrained from proceeding with the sale under the execution issued herein, and that in any event the said sheriff be directed not to accept the receipt of the said Ocean City Title and Trust Company, or the said Naomi M. Sutton, for so much of the price received at the sale for 30

the premises covered by the said execution as may be represented by the said second mortgage, and that the said sheriff be required to pay into this Court any moneys received from the sale of the said premises over and above the amount decreed to be due the complainant herein for principal and interest on the first mortgage and for costs.

JOSEPH H. CARR,

*Solicitor for and of Counsel
with Petitioner.*

10

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

WILLIAM F. SHRIVER, being duly sworn according to law, upon his oath deposes and says:

20 1. I am the petitioner in the foregoing petition named. On or about April 9, 1926, I loaned to Ralph L. Chester, Inc., the sum of one hundred thousand dollars (\$100,000.00), taking as security therefor assignments of various mortgages on real estate upon which there was then due the sum of one hundred and fourteen thousand, seven hundred dollars (\$114,700.00). Said loan bore interest at six per cent per annum. Said loan was made by me upon the security above mentioned, and also
30 upon the security of the endorsement of Ralph L. Chester personally, who endorsed the note representing said obligation.

2. From time to time, reductions were made in the said loan by payments on account and collateral was relieved therefrom. On or about May 17, 1927,

said loan then being reduced to the sum of seventy-three thousand, five hundred dollars (\$73,500.00), I agreed with Ralph L. Chester, Inc.; to release certain collateral held by me and originally pledged with my original loan of one hundred thousand dollars (\$100,000.00), retaining three mortgages and substituting for the collateral released six hundred and fourteen shares of the capital stock of Strand Properties, Inc., a New Jersey corporation, of the par value of one hundred (\$100.00) dollars per share. On said 17th day of May, 1927, certificate #6 of Strand Properties, Inc., for six hundred and fourteen shares of stock in the name of Ralph L. Chester personally was delivered to me, together with a written assignment of said shares and a power of attorney for the transfer thereof. Said certificate of stock and said power of attorney for the transfer thereof have ever since that date been in my possession.

10

20

3. From time to time after May 17, 1927, payments were made upon the said loan and the amount now due to me on the said loan is thirty-two thousand, five hundred dollars (\$32,500.00), with interest from June 1, 1929. The various mortgages which were held by me as collateral to secure the loan made by me were released by me in consideration of the said payments, and since June 1, 1929, I have had no other collateral for said loan except the six hundred and fourteen shares of stock of Strand Properties, Inc., above referred to. There has been no change in the collateral affecting said loan since said date. The note now held by me, dated June 1, 1929, was endorsed by Ralph L. Chester, personally, and he is still liable to me on said note.

30

4. I have seen the minute of the meeting of February 9, 1926, of Ralph L. Chester, Inc., at which meeting the directors of that corporation authorized the making of said loan from me and authorized Ralph L. Chester to consummate the same. I have also seen the minutes of a meeting of Ralph L. Chester, Inc., of May 17, 1927, at which meeting it was directed that the six hundred and fourteen shares of stock of Ralph L. Chester in Strand Properties, Inc., be delivered to me as security for my
10 loan.

5. At all times since accepting the said six hundred and fourteen shares of stock of Strand Properties, Inc., as collateral for my loan and releasing the collateral which was released in consideration thereof, I have regarded said shares of stock as of substantial value and have relied upon my holding of said shares to protect me and to secure me for
20 the repayment of the moneys due me.

6. The stock held by me has never been transferred to my name on the books of the corporation, and I have never had notice of any meetings of said corporation and have never participated in any corporate acts of said Strand Properties, Inc., either as a stockholder, or in any other capacity or manner whatever. At the time I took this stock of Strand Properties, Inc., as security, I inquired of Ralph
30 L. Chester as to the amount of mortgage which was against the real estate of the company. I was informed that there was a first mortgage on the property for the amount of sixty-five thousand dollars (\$65,000.00) held by Ocean City Title & Trust Company and that there were no other mortgages thereon. I also know that the only asset of Strand

Properties, Inc., at the time I took the stock, and at the present time, is the property on the Boardwalk at Ocean City, between Ninth Street and Moorlyn Terrace, known as the Strand Theatre, although there may be some small assets in the way of miscellaneous personal property, and there are also some liabilities of the corporation.

7. The mortgage held by the complainant in this case is the mortgage of which I knew at the time I acquired the stock as stated, and the later mortgage given to the complainant covering additional ground was given for the same debt as the original sixty-five thousand dollar (\$65,000.00) mortgage held by complainant. It was not until the summer of 1929 that I learned of the existence of the mortgage made by Strand Properties, Inc., to Naomi M. Sutton, which was dated September 12, 1928, and given to secure the sum of said thirty-seven thousand five hundred dollars. I never consented to the creation of said mortgage and never participated in any action of the corporation leading up to the creation of the said mortgage.

8. I knew that the Ocean City Title & Trust Company had filed a bill to foreclose the mortgage held by it, but I did not know that this foreclosure proceeding in any way involved this second mortgage, and did not know that there could be any decree made in this cause providing for the payment of this second mortgage. It was not until about two weeks ago that I first learned that the second mortgage was involved in this proceeding and that there had been a decree providing for the payment of the mortgage.

9. Upon inquiry regarding the said mortgage and the consideration therefor, I learned that the said mortgage was given in part payment for the purchase from Naomi M. Sutton of six hundred and twenty-four shares and from Edward M. Sutton of one share of the capital stock of Strand Properties, Inc. The total purchase price for the said stock was forty-nine thousand, eight hundred and sixty dollars and nineteen cents (\$49,860.19), of which sum I am informed all but the amount represented by said mortgage was paid by Ralph L. Chester. I am informed that the corporation received nothing for the said mortgage and that the stock represented thereby was issued to Ralph L. Chester in the number of six hundred and twenty-four shares and Charlotte S. Chester, one share.

10. I was never made a party to this foreclosure suit and ask for leave to intervene in the suit myself because of the fact that Strand Properties, Inc., has not interposed any defense to the said mortgage, and I will be without any means of obtaining relief if I am not allowed to litigate this matter in my own name on behalf of the said corporation. Ralph L. Chester was an officer of Strand Properties, Inc., at the time said mortgage was made, and is still an officer thereof, and at that time and now is the leading factor in said company.

30 11. I have attempted to obtain other collateral in addition to or in substitution for the shares of stock of Strand Properties, Inc., which I hold, but I have been unable to do so. Said stock represents the sole security for my debt. I have also attempted to obtain payment but have not been able to do so, either from the maker or from the endorser of said note.

12. I was advised, on Monday, March 3, 1930, that the mortgage given by Strand Properties, Inc., to Naomi M. Sutton was illegal and not binding upon the corporation, and it was not until that date that I knew of my rights in the matter.

WILLIAM F. SHRIVER.

Sworn and subscribed to before me this sixth day of March, 1930.

EARLE V. WESCOTT,
Notary Public of N. J.

10

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

RALPH L. CHESTER, being duly sworn according to law, upon his oath deposes and says:

20

1. I was secretary of Strand Properties, Inc., in September of 1928, at the time of the execution and delivery to Naomi M. Sutton of the mortgage made to her by Strand Properties, Inc., bearing that date, and recorded in the office of the Clerk of Cape May County in Book 298 of Mortgages, page 23, given to secure the payment of the sum of thirty-seven thousand five hundred dollars (\$37,500.00). Said mortgage was given to Naomi M. Sutton by Strand Properties, Inc., pursuant to an agreement signed 30 by Charlotte S. Chester, Naomi M. Sutton, Edward M. Sutton and myself. A true copy of said agreement is attached hereto, marked Exhibit "A." The price of said stock over and above the mortgage of thirty-seven thousand five hundred dollars (\$37,500.00) was paid by me personally. Said mort-

gage of \$37,500.00 was given by Strand Properties, Inc., and the shares of stock of Naomi M. Sutton, consisting of six hundred and twenty-four shares, and of Edward M. Sutton, consisting of one share, were assigned to me to the extent of six hundred and twenty-four shares, and to Charlotte S. Chester to the extent of one share, and are still in said names. The Strand Properties, Inc., never received any money for said mortgage, and the only consideration for said mortgage was the stock transaction between Naomi M. Sutton and her husband, Edward M. Sutton, and between myself and my wife.

2. On or about April 9, 1926, Ralph L. Chester, Inc., borrowed from William F. Shriver the sum of one hundred thousand dollars (\$100,000.00), upon a note endorsed by myself and secured by various mortgages which were assigned to William F. Shriver as collateral. Said loan was reduced until, on May 17, 1927, the amount due to William F. Shriver was seventy-three thousand five hundred dollars (\$73,500.00). On May 17, 1927, in order to induce William F. Shriver to surrender certain of the mortgages held by him as security for said loan, there was substituted for such released collateral six hundred and fourteen shares of Strand Properties, Inc., stock, par value \$100.00 per share, which stood in my name on the books of that company. At that date, there were mortgages held as collateral by William F. Shriver for said loan in addition to said shares of stock. Between that date, May 17, 1927, and June 1, 1929, said mortgages were released as collateral for said loan and said loan was reduced to the sum of thirty-two thousand five hundred dollars (\$32,500.00). There is still due on said

loan thirty-two thousand five hundred dollars (\$32,500.00), with interest from June 1, 1929, and the only collateral held by Shriver therefor is the certificate for six hundred and fourteen shares of Strand Properties, Inc., above referred to. I am now and have always been liable as endorser on the said loan, and the stock delivered to William F. Shriver was given to him to secure my endorsement and to make my endorsement acceptable to him.

10

RALPH L. CHESTER.

Sworn and subscribed to before me this 6th day of March, A. D. 1930.

EARLE V. WESCOTT,
Notary Public of N. J.

EXHIBIT "A."

20

THIS AGREEMENT made this twenty-fifth day of August, A. D., 1927, between CHARLOTTE S. CHESTER, party of the first part and NAOMI M. SUTTON and EDWARD M. SUTTON, her husband, party of the second part:

WITNESSETH that the party of the first part agrees to buy and the party of the second part agrees to convey all their right, title and interest, of, in and to their shares of stock in STRAND PROPERTIES, INC., a corporation of the State of New Jersey, for the sum of FORTY NINE THOUSAND EIGHT HUNDRED SIXTY and 19/100 (\$49,860.19) DOLLARS under the following terms and conditions:

30

A first payment of ONE THOUSAND (\$1,000.00)

DOLLARS, receipt of which is hereby acknowledged by the party of the second part;

A second payment of FOUR THOUSAND (\$4,000.00) DOLLARS, on or before September 5, 1927; and

A third payment of Seven Thousand Three Hundred Sixty and 19/100 (\$7,360.19) Dollars on or before November 5, 1927;

10 IT IS UNDERSTOOD AND AGREED that, upon the surrender of the stock by the party of the second part to the party of the first part, and the election of new officers of STRAND PROPERTIES, INC., said Strand Properties, Inc. shall execute and deliver unto the said party of the second part a second mortgage in the amount of Thirty-seven Thousand Five Hundred (\$37,500.00) Dollars, for five years from date; bearing interest at six percent, payable semi-annually; with installments of Twenty-five Hundred (\$2500.00) Dollars payable
20 every six months; said mortgage to be under and subject to a first mortgage in the amount of Sixty-five Thousand (\$65,000.00) Dollars.

IT IS AGREED that all revenue derived from the operation of theatre and all rents due shall be retained by party of the first part from the date of this agreement; also notes in Ocean City National Bank, or any other notes having endorsements of either or both of the parties of the second part shall be assumed by the party of the first part; and
30 said parties of the second part shall be relieved of all responsibility for the payment of said notes; also party of the first part assumes and agrees to pay all taxes, interest, insurance, water and sewer rents and any other outstanding claims and bills against the property.

IT IS ALSO AGREED that Ralph L. Chester

shall give his personal bond with the second mortgage of \$37,500.00 on the Strand Theatre property. It is also agreed party of the first part assumes contract with D. Roscoe Faunce as to management of theatre.

The party of the first part hereby agrees to assume the payment of any commission that may be due DuBois Realty Company for its services in securing the purchaser, Mr. Hill, for the Strand Theatre, which sale was not consummated.

10

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals.

Charlotte S. Chester (SEAL)
Naomi M. Sutton (SEAL)
Edward M. Sutton (SEAL)
Ralph L. Chester (SEAL)

Signed, sealed and delivered
in the presence of

20

30

AFFIDAVIT.

(Filed Mar. 18, 1930.)

IN CHANCERY OF NEW JERSEY.

10

Between

OCEAN CITY TITLE AND
TRUST COMPANY,*Complainant,*

and

STRAND PROPERTIES, INC.,
a corp., &c., *et al.*,*Defendants.*On Bill, &c.
On Petition of
William F. Shriver.
Affidavit.

20

STATE OF NEW JERSEY, }
COUNTY OF CAPE MAY, } *ss.*

RALPH L. CHESTER, being duly sworn according to law, upon his oath deposes and says:

- 30 1. At the time of the execution and delivery of the agreement dated August 25, 1927, between Charlotte S. Chester, Naomi M. Sutton and Edward M. Sutton, all three of said persons and also myself were directors of Strand Properties, Inc. There were four directors of the company at that time, the fourth director being myself.

RALPH L. CHESTER.

Sworn and subscribed to before me this 11th day of March, A. D. 1930.

EARLE V. WESCOTT,
Notary Public of N. J.

ORDER TO SHOW CAUSE AND RESTRAINT.

IN CHANCERY OF NEW JERSEY. 10

Between
OCEAN CITY TITLE AND
TRUST COMPANY,
Complainant,
and
STRAND PROPERTIES, INC.,
a corp., &c., *et al.*,
Defendants. }
On Bill, &c.
On Petition of Wil-
liam F. Shriver.
Order to Show Cause
and Restraint. 20

William F. Shriver having filed his petition in this matter, and the Court having read the said petition and the accompanying affidavits, and having heard Joseph H. Carr, solicitor for the said William F. Shriver, and having considered the matter;

It is, on this eighth day of March, A. D. nineteen hundred and thirty, ordered that Ocean City Title and Trust Company, Naomi M. Sutton and Strand Properties, Inc., show cause before this Court at Chancery Chambers in Atlantic City, New Jersey, on Tuesday, the eighteenth day of March, 1930, why the said William F. Shriver should not be admitted 30

as a party to this suit and why the decree entered herein under date of December 24, 1929, should not be opened, insofar as the same directs that there be paid to the said Naomi M. Sutton the sum of \$37,825.00, with interest from September 12, 1929, and out of which sum the Ocean City Title and Trust Company be first paid the sum of \$12,600.00, with interest from December 31, 1928; and also show cause why the mortgage referred to in the said petition, made by Strand Properties, Inc., to Naomi M. Sutton to secure the sum of \$37,500.00 should not be decreed to be null and void and to be delivered up for cancellation; and why, pending the determination of the matters raised in the said petition, the Sheriff of Cape May County should not be restrained from proceeding with the sale under the execution issued in this cause; and why the said sheriff should not in any event be directed not to accept the receipt of the Ocean City Title and Trust Company, or of the said Naomi M. Sutton, for so much of the price received at any sale for the premises covered by the said execution as may be represented by the aforementioned mortgage; and why the sheriff should not be required to pay into this court any moneys received from the sale of the said premises over and above the amount decreed to be due the complainant herein for principal and interest on its first mortgage and for its costs;

And it is further ordered that, pending the return of this rule, Ocean City Title and Trust Company, complainant herein, Naomi M. Sutton and Forrest M. Rich, Sheriff of Cape May County, be restrained from making sale under the execution issued herein.

It is further ordered that a copy of this order to show cause and of the petition aforesaid be served upon the said Ocean City Title and Trust Company,

Naomi M. Sutton and Strand Properties, Inc., within four days from the date hereof, and that the copy of said order be served within the same time upon the Sheriff of Cape May County, and which copies of petition and order aforesaid need not be certified, except by the certificate of the solicitor for the said petitioner that they are true copies.

It is further ordered that petitioners have leave to present (at the return day) further affidavits providing same are served upon said defendants within four days from this date.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

20

30

TESTIMONY.
IN CHANCERY OF NEW JERSEY.

10	Between OCEAN CITY TITLE & TRUST COMPANY, <i>Complainant,</i> and STRAND PROPERTIES COR- PORATION, <i>Defendant.</i>	}	On Bill, etc. On Petition of Wil- liam F. Shriver to Open Final Decree.
----	---	---	--

20 Atlantic City, N. J., March 18, 1930.

TESTIMONY.

Before HON. ROBERT H. INGERSOLL, Vice-Chancellor.

30 For the petitioner, JOSEPH CARR, ESQ.
 For the complainant, C. L. COLE, ESQ., of MESSRS.
 COLE & COLE.

The Court: I would have no difficulty at all in
 this matter were it not for the affidavit of the officer

of the trust company, which seems to indicate, if it doesn't say so in exact words, that he knew that there was no consideration for this mortgage given to the company. I would like to hear you on that, Judge Cole, the affidavit of the officer of the company who says he knew that this mortgage was given for the transfer of the stock from the estate to Chester, not as it is specified in the minutes, for the purpose of cancellation, but that it was given in effect for the transfer of the stock from Sutton to 10 Chester.

Mr. Cole: Mr. Price is here, and if your Honor doesn't object we will call him on the stand and let him state.

The Court: I think I will permit that so he can be cross-examined.

20

CLINTON B. PRICE, SWORN.

Direct examination.

By Mr. Cole:

Q. Mr. Price, will you please state what took place, so far as you are concerned, touching this 30 transaction?

A. You wish me to read from the affidavit, is that what you mean?

Q. Just repeat from your recollection without regard to the affidavit, just what took place, unless you need that to aid your recollection, I don't know.

Mr. Carr: May I suggest to the witness, we don't want the affidavit read. That has been read.

Q. Can you tell us, Mr. Price, your recollection, independent of the affidavit, as to what took place as regards that transaction, so far as you are concerned?

A. There were 625 shares of stock which Chester was acquiring from the Suttons. They were to pay
10 for it partly in cash and partly from a mortgage to be executed by the company to Mrs. Chester or her assigns, in consideration for which execution Mrs. Chester was to surrender to the company 375 shares of stock. That was the consideration to the company for the execution of that mortgage, not in my affidavit because that was a matter between the company and Chester, but it is in the resolution of the company, in both the stockholders' and directors' resolution of the company authorizing the execution
20 of the mortgage.

Mr. Cole: I didn't read that resolution to your Honor. If you will permit me, I will read that part of it.

The Court: No, I can read that as well as you can.

Q. Is that your present recollection of what took
30 place?

A. So far as that particular question is concerned, there were a number of papers delivered by both of these with instructions from each stating what should happen and what should be done, and those instructions were carried out, and ultimately I delivered the Sutton stock to the attorneys for the com-

pany so as to permit him to complete the matter so far as his work was concerned.

Cross-examination.

By Mr. Carr:

Q. Mr. Price, in your affidavit, you say that the mortgage was—you can refer to this if you want, on the first page of the affidavit, you say that Mr. 10 Voorhees produced a certificate of stock, two certificates of stock and resignation to be delivered upon the payment to Mrs. Sutton of \$5,976.42, and the delivery to Mrs. Sutton of a \$37,500 mortgage.

The Court: I seem to be confused. The witness said the mortgage was to be made to Mrs. Chester. Am I confused on this?

A. If you will permit me, your Honor, the funda- 20 mental agreement was for the Chesters to purchase 625 shares of the Sutton stock. In turn, Chester made an agreement with the company that in consideration of the Chesters surrendering for cancellation 375 shares of that stock, the company would execute the mortgage to Chester or her assigns, and Mrs. Chester assigned that to Mrs. Sutton.

By Mr. Carr:

Q. Mr. Price, you spoke of a fundamental agree- 30 ment; had you seen this agreement?

A. I had not.

Q. Did you call for the agreement?

A. I did not.

Q. You spoke of an agreement between the cor-

poration and Chester; where is that agreement, have you seen that?

A. Between the corporation and Chester?

Q. Yes, the other part, the \$37,500 mortgage.

A. There is no agreement. There is evidence of it in the resolution of the directors.

Q. When you talk of an agreement, you refer to the minute in the book?

A. Yes.

10 Q. When did you first learn of this transaction? When was it first open to you?

A. A short time before this date of September 12th, 1928.

Q. I would like to know when that was. Did they consult with you personally, Mr. Price?

A. Yes. It was in August, 1928.

Q. What date?

A. The date of our application for title insurance is August 13th. I assume it was about that time.

20 Q. Did you receive that application yourself?

A. Yes.

Q. From whom?

A. I—it was the result of a conversation with Mr. Voorhees, Mr. Sutton, Mr. Bell and various people.

Q. You were then informed that the consideration for the mortgage was to be the transfer of this stock from Sutton to Chester, is that right?

A. I wouldn't say on that date, but subsequently during the proceedings.

30 Q. When was it first suggested that there should be a resolution about 375 shares of stock; whose idea was that?

A. I have no idea.

Q. You don't know whether that was suggested by you or by someone else?

A. That was probably their agreement before.

Q. I didn't ask you to conjecture, Mr. Price. Was there anything said? Who first mentioned that to you?

A. I presume ——

Q. If you don't know, I won't press it.

A. All right.

Q. You don't know whether that idea came from Mr. Bell or Mr. Voorhees?

A. I do not.

Q. Did it come from you? 10

A. I think not.

Q. Were you insuring this mortgage?

A. We were insuring the title.

Q. Did you say, when you learned that the shares of stock were to be given for the mortgage, did you state that that was not a legal transaction or question the transaction?

A. That the shares were to be given?

Q. Were to be given for the mortgage; did you question the transaction? 20

A. I did not.

Q. You never questioned it?

A. Not in view of that consideration.

Q. You are the title officer of the company?

A. I am.

Q. You knew that the check you were delivering was the corporation's check?

A. It was not.

Q. Strand Theatre check?

A. That is what it was. 30

Q. That is the corporation check?

A. So far as I know, it is not. That is a check simply signed Strand Theatre. The corporation is "Strand Properties."

Q. You don't know whether it was the corporation check or not?

A. I do not know, but there is a difference in name.

Q. But the mortgage was made by Strand Properties directly to Naomi Sutton?

A. Yes.

Q. For the amount mentioned in the agreement of August?

A. Yes.

Q. You never saw this agreement?

10 A. Not until Saturday of last week.

Q. And never asked for the agreement?

A. No. It wasn't necessary, because the parties

Q. Please don't volunteer. That is all.

The Court: Let me see the resolution authorizing this mortgage.

20 Mr. Carr: If the Court please, I may say this, I didn't know Mr. Price was going to testify, and if we are going to try out the matter orally, I would want the privilege of producing these other witnesses and examining them.

By the Court:

Q. Upon what resolution of the Strand Properties, Incorporated, did you approve the mortgage to Naomi Sutton?

30 A. Upon the resolution passed September 12th both by the directors and stockholders.

Q. Have you the contents of that?

A. I have the certified copy.

Q. Is there anywhere any authority for a mortgage to Naomi Sutton?

A. The minutes of the corporation refer to the

mortgage to Charlotte Chester or her assigns, and Charlotte Chester signed an assignment of that interest and a direction to the company to execute and deliver the mortgage to Mrs. Sutton.

By Mr. Carr:

Q. Mr. Price, when you made that settlement, did you receive 375 shares of stock for the mortgage?

A. I received more than that.

10

Q. Did you receive the 375 shares of stock from Charlotte Chester for the mortgage?

A. From Charlotte Chester?

Q. Yes.

A. The stock was received from Mrs. Sutton.

Q. Will you please answer the question? Did you receive 375 shares of stock from Charlotte Chester for that mortgage?

A. She didn't hand me any stock.

Q. You received no stock?

20

A. No.

Q. What you did receive for the mortgage was the stock from Mrs. Sutton?

A. Yes.

Q. And exchanged that mortgage for that stock, delivered the mortgage for that stock, is that what you did?

A. Part of the stock was to be exchanged.

Q. Isn't that what you did, Mr. Price?

A. No, because all the stock wasn't to be surrendered for cancellation.

30

Q. I am not asking you to volunteer. You delivered this mortgage to Mrs. Sutton for the certificate of 624 shares of stock from Mrs. Sutton, did you not?

A. That was a part of the consideration.

Q. What else did you deliver to Mrs. Sutton, the check?

A. Some cash.

Q. The check and stock you gave to Mrs. Sutton in exchange, check and mortgage you gave to Mrs. Sutton in exchange for her stock; is that right?

A. Yes.

Q. And you never collected 375 shares of stock from Charlotte Chester and gave it to anybody?

10 A. We didn't go through that formality.

Q. Please answer that, won't you, Mr. Price?

A. No.

TESTIMONY CLOSED.

AFFIDAVIT OF ROBERT K. BELL.

20 STATE OF NEW JERSEY, }
CAPE MAY COUNTY, } ss.

ROBERT K. BELL, of full age, being duly sworn according to law, deposes and says:

I am an attorney-at-law of the State of New Jersey.

30 On September 12, 1928, the directors of Strand Properties, Inc., being Charlotte S. Chester, president; Ralph L. Chester, secretary, and Naomi M. Sutton, met in my office and regularly passed a resolution authorizing the execution and delivery to Charlotte S. Chester, or her assigns, of a \$37,500 second bond and mortgage on the Strand Theatre property, a copy of which resolution is attached hereto and made a part hereof.

On the same date the stockholders of said cor-

poration, being Charlotte S. Chester, Ralph L. Chester, Naomi M. Sutton and the estate of Edward M. Sutton, deceased (represented by Naomi M. Sutton, one of his executors), also met in my office and regularly passed a resolution ratifying the action of the directors as aforesaid, a copy of which resolution being attached hereto and made a part hereof.

On October 30, 1928, I received from Ocean City Title and Trust Company (1) certificate No. 5 for one share of stock of Strand Properties, Inc., issued in the name of Edward M. Sutton, and by the executors of his estate endorsed in blank; (2) Certificate No. 4 for 624 shares of stock of Strand Properties, Inc., issued in the name of Naomi M. Sutton, and by her endorsed in blank; (3) Certificate No. 6 for 4 shares of stock of Strand Motion Picture Co., issued in the name of Naomi M. Sutton, and by her endorsed in blank; and (4) the resignation of Naomi M. Sutton as director and vice-president of Strand Properties, Inc., all of which I thereupon delivered to Ralph L. Chester, secretary of said Strand Properties, Inc.

At the stockholders' meeting of said corporation on September 12, 1928, aforesaid, I was informed by Charlotte S. Chester, Ralph L. Chester and Naomi M. Sutton, all of whom were present, that they, together with the estate of Edward M. Sutton, deceased (said estate being also represented by Naomi M. Sutton, one of its executors), were all the stockholders of said Strand Properties, Inc. They all voted in favor of the adoption of the aforesaid resolution. Neither then, nor prior thereto, had I any knowledge of any right, title or interest of William F. Shriver in any of the stock of said corporation; nor was he present at that meeting. The only other persons present than those herein-

before mentioned were H. R. Voorhees, Esq., attorney for Naomi M. Sutton; her son, Edward M. Sutton, Jr., and deponent.

ROBERT K. BELL.

Sworn and subscribed to before me this 17th day of March, A. D. 1930.

STANLEY Y. GANDY,

(Seal) *Notary Public of New Jersey.*

10 My commission expires Feb. 1, 1933.

Ralph L. Chester, Secretary, presented an offer of Charlotte S. Chester's to the company, as follows:

20 That Charlotte S. Chester should deliver to the company 375 shares of its capital stock, in consideration of the company executing to her or her assigns, a second mortgage on the property of the company, between Eighth and Ninth Streets on the Boardwalk, known as the Strand Theater property; said mortgage to be a second mortgage, under and subject to a first mortgage of \$65,000; the amount of the second mortgage to be \$37,500, said mortgage to be payable within four years from date, with interest at the rate of 6%, provided installments of \$2,500 should be paid, as follows:

30 \$2,500 one year from date.
\$2,500 each six months thereafter.

Balance to be paid within four years.

Said mortgage to contain such other usual terms and conditions as the officers of the company might approve.

Upon motion, made, seconded and carried, the offer of Charlotte S. Chester to the company was

accepted, and it was further resolved that the proper officers of the company to wit: the president and secretary, be, and they are hereby authorized to execute and deliver to Charlotte S. Chester, or her assigns, a mortgage in the sum of \$37,500, containing the terms as to payment, and other conditions as set forth in the offer hereabove made, provided that the action of the Board of Directors is duly ratified and approved by the stockholders of the company, at a meeting to be called by the president. 10

I, Ralph L. Chester, Secretary of the Strand Properties, Inc., a Corporation of the State of New Jersey, hereby certify that the foregoing is a true copy of a resolution passed by the Strand Properties, Inc., at a meeting of the Board of Directors of said corporation, held at the registered office of the Company, Ocean City, New Jersey, on September 12th, 1928. 20

All of the directors of the company were present when the above resolution was passed.

WITNESS my hand, and the seal of the corporation, this 12th day of September, A. D. 1928.

STRAND PROPERTIES, INC. (SEAL)

(signed) Ralph L. Chester,
Secretary.

Mr. Chester presented to the meeting the offer of Charlotte S. Chester to the company, which offer was passed upon, and accepted by the Directors of the company, and which was left to the stockholders to ratify.

The offer was as follows:

That Charlotte S. Chester should deliver to the company 375 shares of its capital stock, in consideration of the company executing to her or her assigns, a second mortgage on the property of the company between Eighth and Ninth Streets on the Boardwalk, known as the Strand Theater property; said mortgage to be a second mortgage, under and subject to a first mortgage of \$65,000; the amount of
10 the second mortgage to be \$37,500; said mortgage to be payable within four years from date, with interest at the rate of 6%, provided installments of \$2,500 should be paid, as follows:

\$2,500 one year from date.

\$2,500 each six months thereafter.

Balance to be paid within four years.

Said mortgage to contain such other usual terms and conditions as the officers of the company might approve.

20 Upon motion, made, seconded, and carried, it was resolved that the offer of Mrs. Chester to the company should be accepted and that the action of the Board of Directors on the offer pertaining to its acceptance, and the execution of the bond and mortgage in the sum of \$37,500 should be ratified, to the fullest extent.

The motion was unanimously passed.

30

I, Ralph L. Chester, Secretary of Strand Properties, Inc., a Corporation of the State of New Jersey, hereby certify that the above is a true copy of resolution passed by the stockholders of the Strand Properties, Inc., at a meeting of the stockholders of said corporation, held at the registered

office of the company, Ocean City, New Jersey, on September 12th, 1928.

I further certify that all the stockholders of the company were present at the meeting when the above resolution was passed.

WITNESS my hand and the seal of the corporation this 12th day of September, 1928.

STRAND PROPERTIES, INC. (SEAL)

(signed) Ralph L. Chester,
Secretary. 10

September 12th, 1928.

I, CHARLOTTE S. CHESTER, hereby assign all my right, title and interest in a certain mortgage in the sum of Thirty Seven Thousand Five Hundred (\$37,500.00) Dollars, which mortgage is to be executed by Strand Properties, Inc., covering the boardwalk property of the Strand Theatre, between Eighth and Ninth Streets on the Boardwalk, Ocean City, New Jersey, which said second mortgage is under and subject to a first mortgage of Sixty-five Thousand (\$65,000.00) Dollars, unto Naomi M. Sutton, and I hereby authorize and direct said Strand Properties, Inc., to execute and deliver said mortgage as above described to said Naomi M. Sutton, all in consideration of the sum of ONE (\$1.00) DOLLAR and other good and valuable consideration. 20

(signed) CHARLOTTE S. CHESTER (L.S.) 30

AFFIDAVIT OF CLINTON B. PRICE.

STATE OF NEW JERSEY, }
 CAPE MAY COUNTY, } ss.

CLINTON B. PRICE, of full age, being duly sworn according to law, deposes and says:

10 I am title officer of Ocean City Title and Trust Company.

On September 12, 1928, H. R. Voorhees, Esq., attorney for Naomi M. Sutton, delivered to me (1) Certificate No. 4 for six hundred twenty-four (624) shares of stock of Strand Properties, Inc., dated May 9, 1927, issued to Naomi M. Sutton, and by her assigned in blank; (2) Certificate No. 6 for four (4) shares of stock of Strand Motion Picture Company, dated May 9, 1927, issued to Naomi M. Sutton, and by her assigned in blank; (3) resignation of Naomi M. Sutton as director and vice-president of Strand Properties, Inc., with instructions to deliver all of them to Robert K. Bell, Esq., attorney for Charlotte S. Chester, Ralph L. Chester and Strand Properties, Inc., upon (1) the payment to Naomi M. Sutton of Five Thousand Nine Hundred Seventy-six Dollars and Forty-two Cents (\$5,976.42); (2) the execution and delivery and record, by Strand Properties, Inc., to Naomi M. Sutton, of its Thirty-seven Thousand Five Hundred (\$37,500.00) Dollars second bond and mortgage on the Strand Theater property in Ocean City; and (3) the approval, by H. R. Voorhees, as Mrs. Sutton's attorney, of the title under said mortgage.

30 At the same time Robert K. Bell, attorney as aforesaid, delivered to me (1) a check of "Strand

Theater" to Naomi M. Sutton for five thousand nine hundred seventy-six dollars and forty-two cents (\$5,976.42); (2) a copy of the resolution of the directors of Strand Properties, Inc., passed September 12, 1928, authorizing the execution and delivery of the aforesaid bond and mortgage, duly certified by Ralph L. Chester, its secretary, and further certifying that all directors of said corporation were present and voted in favor of its adoption; a copy of which resolution is attached hereto and made a part hereof; (3) a copy of the resolution of the stockholders of Strand Properties, Inc., passed September 12, 1928, approving the action of its board of directors as aforesaid, duly certified by Ralph L. Chester, its secretary, and further certifying that all stockholders of said corporation were present and voted in favor of its adoption, a copy of which resolution is attached hereto and made a part hereof; (4) the original of the assignment, from Charlotte S. Chester (duly executed by her) to Naomi M. Sutton, of all her right, title and interest in said bond and mortgage and directing said Strand Properties, Inc., to execute and deliver said bond and mortgage to Naomi M. Sutton; a copy of which assignment is attached hereto and made a part hereof; (5) the original bond and mortgage from Strand Properties, Inc., to Naomi M. Sutton, dated and executed September 12, 1928, for thirty-seven thousand five hundred (\$37,500.00) dollars, covering the Strand Theater property, as aforesaid, all with instructions to (1) record said mortgage, and (2) upon approval of the title by H. R. Voorhees, attorney for the mortgagee as aforesaid, and (3) upon the delivery to Robert K. Bell, attorney as aforesaid, of said stock and resignation as aforesaid, together with one additional share of stock of Strand Properties, Inc., outstanding in the

name of Edward M. Sutton, to (4) in turn deliver said check, bond and mortgage to Naomi M. Sutton.

Subsequently, Stirling W. Cole, trust officer of Ocean City Title and Trust Company, one of the executors of the estate of Edward M. Sutton, deceased, delivered to me Certificate No. 5 for one share of stock of said Strand Properties, Inc., issued to Edward M. Sutton, and by his executors assigned in blank.

- 10 The mortgage aforesaid was duly recorded in the clerk's office of Cape May County, New Jersey, September 17, 1928, in Book 298 of Mortgages, page 23.

On October 25, 1928, H. R. Voorhees, attorney as aforesaid, approved the title of said mortgaged property and authorized me to complete the settlement as aforesaid.

- 20 On October 26, 1928, Robert K. Bell, attorney as aforesaid, likewise approved the settlement and authorized its completion.

- 30 On October 26, 1928, I forwarded to Naomi M. Sutton the aforesaid sum of five thousand nine hundred seventy-six dollars and forty-two cents (\$5,976.42), less certain expenses assumed by her; and on October 30, 1928, I delivered to Robert K. Bell, attorney as aforesaid, the aforesaid certificates for six hundred twenty-five (625) shares of stock of Strand Properties, Inc., for four (4) shares of stock of Strand Motion Picture Company, and Mrs. Sutton's resignation as director and vice-president of Strand Properties, Inc. The recorded mortgage, as aforesaid, was forwarded to H. R. Voorhees, Esq., October 29, 1928.

During the progress of this settlement I talked with Ralph L. Chester on various occasions, concerning the matter; and was informed by him that

he and his wife, Charlotte S. Chester, were purchasing from the Suttons all the outstanding stock not already owned by them (the Chesters) and that he (Ralph L. Chester) and his wife (Charlotte S. Chester) would thereupon entirely own said Strand Properties, Inc.

At no time prior to the last two or three weeks had I any knowledge of any claim of any right, title or interest of William F. Shriver in any of the stock of said Strand Properties, Inc. 10

At no time prior to March 15, 1930, on which date an executed copy was produced to me by Edward M. Sutton, son of Naomi M. Sutton, had I any knowledge of the existence or contents of the agreement of August 25, 1927, between Charlotte S. Chester and Naomi M. and Edward M. Sutton concerning the purchase and sale of the Sutton interest in Strand Properties, Inc.

CLINTON B. PRICE.

20

Sworn and subscribed to before me this 17th day of March, A. D. 1930.

(Seal) STANLEY Y. GANDY,
Notary Public of New Jersey.
My commission expires Feb. 1, 1933.

Ralph L. Chester, Secretary, presented an offer 30
of Charlotte S. Chester's to the company, as follows:

That Charlotte S. Chester should deliver to the company 375 shares of its capital stock, in consideration of the company executing to her or her assigns, a second mortgage on the property of the company,

between Eighth and Ninth Street on the Boardwalk, known as the Strand Theater property; said mortgage to be a second mortgage, under and subject to a first mortgage of \$65,000; the amount of the second mortgage to be \$37,500, said mortgage to be payable within four years from date, with interest at the rate of 6%, provided installments of \$2,500 should be paid, as follows:

- \$2,500 one year from date.
- 10 \$2,500 each six months thereafter.
- Balance to be paid within four years.

Said mortgage to contain such other usual terms and conditions as the officers of the company might approve.

- 20 Upon motion made, seconded, and carried, the offer of Charlotte S. Chester to the company was accepted, and it was further resolved that the proper officers of the company to wit: the president and secretary, be, and they are hereby authorized to execute and deliver to Charlotte S. Chester, or her assigns, a mortgage in the sum of \$37,500, containing the terms as to payment, and other conditions as set forth in the offer hereabove made, provided that the action of the Board of Directors is duly ratified and approved by the stockholders of the company, at a meeting to be called by the president.

- 30 I, Ralph L. Chester, Secretary of the Strand Properties, Inc., a Corporation of the State of New Jersey, hereby certify that the foregoing is a true copy of a resolution passed by the Strand Properties, Inc., at a meeting of the Board of Directors of said corporation, held at the registered office of the Company, Ocean City, New Jersey, on September 12th, 1928.

All of the directors of the company were present when the above resolution was passed.

WITNESS my hand, and the seal of the corporation, this 12th day of September, A. D., 1928.

STRAND PROPERTIES, INC., (SEAL)
(signed) Ralph L. Chester,
Secretary.

Mr. Chester presented to the meeting the offer of Charlotte S. Chester to the company, which offer was passed upon, and accepted by the Directors of the company, and which was left to the stockholders to ratify. 10

The offer was as follows:

That Charlotte S. Chester should deliver to the company 375 shares of its capital stock, in consideration of the company executing to her or her assigns, a second mortgage on the property of the company between Eighth and Ninth Streets on the Boardwalk, known as the Strand Theater property; said mortgage to be a second mortgage, under and subject to a first mortgage of \$65,000.; the amount of the second mortgage to be \$37,500.; said mortgage to be payable within four years from date, with interest at the rate of 6%, provided installments of \$2,500. should be paid, as follows: 20

\$2,500. one year from date.

\$2,500. each six months thereafter.

Balance to be paid within four years.

Said mortgage to contain such other usual terms and conditions as the officers of the company might approve. 30

Upon motion made, seconded, and carried, it was resolved that the offer of Mrs. Chester to the company should be accepted and that the action of the Board of Directors on the offer pertaining to its

acceptance, and the execution of the bond and mortgage in the sum of \$37,500. should be ratified, to the fullest extent.

The motion was unanimously passed.

10 I, Ralph L. Chester, Secretary of Strand Properties, Inc., a Corporation of the State of New Jersey, hereby certify that the above is a true copy of resolution passed by the stockholders of the Strand Properties, Inc., at a meeting of the stockholders of said corporation, held at the registered office of the company, Ocean City, New Jersey, on September 12th, 1928.

I further certify that all the stockholders of the company were present at the meeting when the above resolution was passed.

20 WITNESS My hand and the seal of the corporation this Twelfth day of September, 1928.

STRAND PROPERTIES, INC. (SEAL)

Ralph L. Chester (Signed)

Secretary.

September 12, 1928.

30 I, CHARLOTTE S. CHESTER, hereby assign all my right, title and interest in a certain mortgage in the sum of Thirty Seven Thousand Five Hundred (\$37,500.00) Dollars, which mortgage is to be executed by Strand Properties, Inc., covering the boardwalk property of the Strand Theatre, between Eighth and Ninth Streets on the Boardwalk, Ocean City, New Jersey, which said second mortgage is under and subject to a first mortgage of

Sixty-five Thousand (\$65,000.00) Dollars, unto Naomi M. Sutton, and I hereby authorize and direct said Strand Properties, Inc., to execute and deliver said mortgage as above described to said Naomi M. Sutton, all in consideration of the sum of ONE (\$1.00) DOLLAR and other good and valuable consideration.

(signed) CHARLOTTE S. CHESTER (L.S.)

10

AFFIDAVIT OF NAOMI M. SUTTON.

STATE OF NEW JERSEY, }
CAPE MAY COUNTY, } ss.

NAOMI M. SUTTON, of full age, being duly sworn, according to law, on her oath deposes and says:

By Agreement dated August 25, 1927, a true copy 20
of which is hereto attached and made a part hereof,
my late husband, Edward M. Sutton, and I agreed
to sell our stock in "Strand Properties, Inc.," a
corporation of New Jersey, to Charlotte S. Chester,
for the consideration and under the conditions men-
tioned in said agreement.

The stock so agreed to be sold comprised six hun-
dred twenty-five (625) shares, or one-half the total
issued stock, of which half I owned six hundred
twenty-four (624) shares and my husband one (1) 30
share.

The other six hundred twenty-five (625) shares
were held by Charlotte S. Chester and her husband,
Ralph L. Chester.

The aforesaid agreement was also signed by
Ralph L. Chester, said persons so signing being all

the stockholders and all the directors of said Strand Properties, Inc.

Thereafter, various cash items were from time to time paid me on account of said agreement, until there remained due me the sum of five thousand nine hundred seventy-six dollars and forty-two cents (\$5,976.42) and the execution and delivery to me of the thirty-seven thousand five hundred (\$37,500.00) dollars second mortgage referred to in said
10 agreement.

On September 15, 1928, through my attorney, H. R. Voorhees, I delivered to the Ocean City Title and Trust Company (1) Stock Certificate No. 4 for six hundred twenty-four (624) shares of stock of Strand Properties, Inc., issued in my name and by me endorsed in blank; (2) Certificate No. 6 for four (4) shares of stock of Strand Motion Picture Company, issued in my name and by me endorsed in
20 blank; (3) my resignation as director and vice-president of Strand Properties, Inc.; and (4) subsequently delivered to said title company Certificate No. 5 for one (1) share of stock of Strand Properties, Inc., issued in the name of my husband, Edward M. Sutton, and by the executors of his estate endorsed in blank, all of which said title company was instructed to deliver to Robert K. Bell, attorney for Strand Properties, Inc., Charlotte S. Chester and Ralph L. Chester, upon (1) payment to me of
30 the balance of five thousand nine hundred seventy-six dollars and forty-two cents (\$5,976.42); (2) the execution, delivery and record of the thirty-seven thousand five hundred (\$37,500.00) dollars second bond and mortgage on the Strand Theatre property; and (3) the approval by my attorney, H. R. Voorhees, of the title as of the record of said second mortgage. Settlement as aforesaid was made by

said title company; and I thereafter received the aforesaid balance of cash due me and the said bond and mortgage.

Neither at the time of final settlement as aforesaid, or at any time prior thereto, had I any knowledge of any person either owning or having any interest in the half of the outstanding stock of Strand Properties, Inc., not owned by my husband and myself, than Charlotte S. Chester and Ralph L. Chester; and, particularly, I had no knowledge of any ownership of, or interest in, by William F. Shriver, of any stock of said Strand Properties, Inc. 10

NAOMI M. SUTTON.

Sworn and subscribed to this 17th day of March, A. D. 1930, before me.

(Seal) STANLEY Y. GANDY,
Notary Public of New Jersey.

My commission expires Feb. 1, 1933. 20

THIS AGREEMENT made this twenty-fifth day of August, A. D. 1927, between CHARLOTTE S. CHESTER, party of the first part and NAOMI M. SUTTON and EDWARD M. SUTTON, her husband, party of the second part:

WITNESSETH that the party of the first part agrees to buy and the party of the second part agrees to convey all their right, title and interest, of, in and to their shares of stock in STRAND PROPERTIES, INC., a corporation of the State of New Jersey, for the sum of FORTY-NINE THOUSAND EIGHT HUNDRED SIXTY and 19/100 (\$49,860.19) DOLLARS under the following terms and conditions: 30

A first payment of ONE THOUSAND (\$1,000.00) DOLLARS, receipt of which is hereby acknowledged by the party of the second part;

A second payment of FOUR THOUSAND (\$4,000.00) DOLLARS, on or before September 5, 1927; and

A third payment of Seven Thousand Three Hundred Sixty and 19/100 (\$7,360.19) Dollars on or before November 5, 1927;

- 10 IT IS UNDERSTOOD and AGREED that, upon the surrender of the stock by the party of the second part to the party of the first part, and the election of new officers of STRAND PROPERTIES, INC., said Strand Properties, Inc., shall execute and deliver unto the said party of the second part a second mortgage in the amount of Thirty-seven Thousand Five Hundred (\$37,500.00) Dollars, for five years from date; bearing interest at six per cent, payable semi-annually; with installments of Twenty-five
20 Hundred (\$2500.00) Dollars payable every six months; said mortgage to be under and subject to a first mortgage in the amount of Sixty-five Thousand (\$65,000.00) Dollars.

- 30 IT IS AGREED that all revenue derived from the operation of theatre and all rents due shall be retained by party of the first part from the date of this agreement; also notes in Ocean City National Bank, or any other notes having endorsements of either or both of the parties of the second part shall be assumed by the party of the first part; and said parties of the second part shall be relieved of all responsibility for the payment of said notes; also party of the first part assumes and agrees to pay all taxes, interest, insurance, water and sewer rents and any other outstanding claims and bills against the property.

IT IS ALSO AGREED that Ralph L. Chester shall give his personal bond with the second mortgage of \$37,500.00 on the Strand Theatre property.

It is also agreed party of the first part assumes contract with R. Roscoe Faunce as to management of Theatre.

The party of the first part hereby agrees to assume the payment of any commission that may be due DuBois Realty Company for its services in securing the purchaser, Mr. Hill, for the Strand Theatre, which sale was not consummated. 10

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals.

Charlotte S. Chester (signed) (SEAL)

Naomi M. Sutton (signed) (SEAL)

Edward M. Sutton (signed) (SEAL)

Ralph L. Chester (signed) (SEAL)

Signed, Sealed and Delivered
in the presence of

H. W. Townsend (Signed)

20

AFFIDAVIT OF JAMES F. KOCH.

STATE OF NEW JERSEY,)
CAPE MAY COUNTY,) ss.

JAMES F. KOCH, of full age, being duly sworn according to law, deposes and says: 30

I am secretary and treasurer of Ocean City Title and Trust Company.

By assignment dated, executed, acknowledged and delivered December 26, 1928, and recorded January 3, 1929, in the clerk's office of Cape May County, New Jersey, in Book 35 of Assignments of Mort-

gages, page 178, Naomi M. Sutton assigned to Ocean City Title and Trust Company a certain second bond and mortgage from Strand Properties, Inc., a corporation of New Jersey, to Naomi M. Sutton, said mortgage being dated September 12, 1928, and of record in said county clerk's office, in Book 298 of Mortgages, page 23.

10 On December 26, 1928, the date of execution and delivery of said assignment, William F. Shriver was a director of said Ocean City Title and Trust Company.

20 Within the last two weeks William F. Shriver showed me the certificate of stock of Strand Properties, Inc., a corporation of New Jersey, under which certificate he stated he claims an interest in said corporation. It was issued in the name of either Ralph L. Chester or Ralph L. Chester, Inc.; was for either 614 or 624 shares; and was accompanied by a separate assignment to William F. Shriver, but without anything indicating the transfer of said stock on the books of said corporation.

JAMES F. KOCH.

Sworn and subscribed to before me this 17th day of March, A. D. 1930.

(Seal) STANLEY Y. GANDY,
Notary Public of New Jersey.
My commission expires Feb. 1, 1933.

AFFIDAVIT OF STIRLING W. COLE.

STATE OF NEW JERSEY, }
CAPE MAY COUNTY, } ss.

STIRLING W. COLE, of full age, being duly sworn according to law, deposes and says:

I am trust officer of Ocean City Title and Trust Company, which company is co-executor, with Naomi M. Sutton, of the estate of her late husband, Edward M. Sutton. 10

On September 22, 1928, I delivered to Clinton B. Price, title officer of said company, Certificate No. 5 for one share of stock of Strand Properties, Inc., issued in the name of Edward M. Sutton, and by his executors, as aforesaid, assigned in blank, with instructions to deliver said certificate upon payment of \$80.00 representing the estimated value of said share, to said estate, which payment was, on October 26, 1928, duly received. 20

At that time it was my understanding that Charlotte S. Chester and Ralph L. Chester owned half the stock of said corporation; and that Naomi M. Sutton and the estate of Edward M. Sutton, deceased, owned the other half.

At no time prior to October 26, 1928, and, in fact, not until within the last few weeks, had I any knowledge of any claim of any right, title and interest of William F. Shriver in any of the stock of said Strand Properties, Inc. 30

STIRLING W. COLE.

Sworn and subscribed to before me this 17th day of March, A. D. 1930.

(Seal) STANLEY Y. GANDY,
Notary Public of New Jersey.
My commission expires Feb. 1, 1933.

CONCLUSIONS.

(Filed April 11, 1930.)

IN CHANCERY OF NEW JERSEY.

10

Between OCEAN CITY TITLE AND TRUST COMPANY, <i>Complainant,</i> and STRAND PROPERTIES, INC., a corp., &c., <i>et al.,</i> <i>Defendants.</i>	}	On Bill, &c. Conclusions.
---	---	------------------------------

20

MR. JOSEPH H. CARR for petitioner, William F. Shriver.

MESSRS. COLE & COLE and ROBERT K. BELL for defendants, Strand Properties, Inc., Ralph L. Chester and Charlotte S. Chester.

MR. HERBERT R. VOORHEES for defendant, Naomi M. Sutton.

30

INGERSOLL, V. C.:

1. By virtue of the General Corporation Act, a company may purchase shares of its stock for retirement at a price not exceeding its par value.

2. When all stockholders vote in favor of such purchase it will be deemed a waiver of their right to sell to the company a *pro rata* number of shares.

3. A holder of shares of stock as collateral security for a loan to an individual stockholder, no transfer thereof being made upon the books of the company, is not entitled to vote nor is he entitled to receive notice of meetings. The pledger of such stock retains the right to vote said stock. 10

The petitioner alleges that during the year 1926 he loaned to Ralph L. Chester, Inc., a New Jersey corporation, the sum of \$100,000.00 and that as security therefor assignments of various mortgages on real estate were made to him; that from time to time payments have been made until there is now due on the same the sum of \$32,500.00 together with interest; that on or about May 17, 1927, he entered into an agreement with the said Ralph L. Chester, Inc., and with Ralph L. Chester, personally, that he would accept for the balance then due him, \$73,500.00, a note signed by Ralph L. Chester, Inc., and endorsed by Ralph L. Chester, and as security for said note he would accept, in addition to certain mortgages held by him, the assignment of 614 shares of the capital stock of the Strand Properties, Inc., a New Jersey corporation, of the par value of \$100.00 per share; that certificate No. 6 of the Strand Properties, Inc., for said 614 shares of stock, together with a written assignment of such shares, were delivered to him and he is now in possession thereof; that from time to time, upon payments being made to reduce said loan, said mortgages were released or re-assigned and the said petitioner now holds no other security than said stock; that at the time of accepting said shares of stock as collateral he was 20 30

informed that the assets of the said company consisted almost entirely of what is known as the Strand Theatre in Ocean City and that the same was encumbered only to the extent of a mortgage of \$65,000.00.

10 He avers that the said Strand Properties, Inc., executed a mortgage to one Naomi M. Sutton to secure the payment of \$37,500.00 and alleges that the said Strand Properties, Inc., received no consid-
eration therefor; that on or about August 25, 1927,
Charlotte S. Chester, who is the wife of Ralph L. Chester, and Naomi M. Sutton and Edward M. Sutton, her husband, entered into a written agreement whereby Naomi M. Sutton and Edward M. Sutton agreed to sell and Charlotte S. Chester agreed to buy all of the shares of stock of Naomi M. Sutton and Edward M. Sutton in Strand Properties, Inc., for the total sum of \$49,860.19, of which sum \$12,360.19 was paid in cash and the balance of which
20 purchase price was to be paid by the execution and delivery by Strand Properties, Inc., of a mortgage for \$37,500.00, covering the real estate owned by Strand Properties, Inc., consisting of the aforementioned Strand Theatre property; that the shares of stock owned by Naomi and Edward Sutton in Strand Properties, Inc., at the date of said agreement totaled 625 shares, of which 624 shares were owned by Naomi M. Sutton and one share by Edward M. Sutton; that said agreement of August 25, 1927,
30 was carried out to the extent that said sum of \$12,360.19 was paid by Ralph L. Chester, said \$37,500.00 mortgage was executed and delivered by Strand Properties, Inc., to Naomi M. Sutton and said 625 shares of stock were assigned, 624 shares thereof being issued to Ralph L. Chester and one share thereof being issued to Charlotte S. Chester, and

said shares are still standing in the names of said parties on the books of the Strand Properties, Inc.; that Strand Properties, Inc., never received any consideration whatever for the said mortgage, it having been given solely for the stock above mentioned; that the \$37,500.00 mortgage referred to is the second mortgage referred to in the bill of complaint, recorded in Book 298, page 23.

He prays that the decree in the foreclosure proceedings be opened and that the Court order and decree that the mortgage made by Strand Properties, Inc., to Naomi M. Sutton in the sum of \$37,500.00 be declared null and void. 10

The facts as disclosed by the affidavits of defendants, insofar as this mortgage is concerned, are somewhat different from that alleged by the petitioner. It is manifest that the Strand Properties, Inc., was a close corporation, all of the stock being held by Ralph L. Chester and his wife, Charlotte S. Chester, and by the late Edward M. Sutton and Naomi M. Sutton. 20

Sometime before the death of Mr. Sutton, he and his wife entered into the agreement with Mrs. Chester as above recited. The number of shares held by the Suttons at that time amounted to 624 shares in the name of Naomi M. Sutton and one share in the name of Edward M. Sutton. Apparently nothing was done under this agreement except the payment, from time to time, of the amounts specified, until on or about the 12th day of September, 1928, when, at a meeting of the directors of the Strand Properties, Inc., Mrs. Chester presented an offer to the company as follows: 30

“That Charlotte S. Chester should deliver to the company 375 shares of its capital stock, in consideration of the company executing to her

or her assigns a second mortgage on the property of the company, between Eighth and Ninth Street on the Boardwalk, known as the Strand Theatre property; said mortgage to be a second mortgage, under and subject to a first mortgage of \$65,000.00; the amount of the second mortgage to be \$37,500.00, said mortgage to be payable within four years from date, with interest at the rate of 6%, provided installments of \$2,500 should be paid as follows:

10 \$2,500 one year from date.
 \$2,500 each six months thereafter.
 Balance to be paid within four years.
 Said mortgage to contain such other usual terms and conditions as the officers of the company might approve.”

The following minute appears of a meeting of the stockholders thereafter held:

20 “Mr. Chester presented to the meeting the offer of Charlotte S. Chester to the company, which offer was passed upon, and accepted by the Directors of the company, and which was left to the stockholders to ratify.

 The offer was as follows:

30 That Charlotte S. Chester should deliver to the company 375 shares of its capital stock, in consideration of the company executing to her or her assigns a second mortgage on the property of the company between Eighth and Ninth Streets on the Boardwalk, known as the Strand Theatre property; said mortgage to be a second mortgage, under and subject to a first mortgage of \$65,000; the amount of the second mortgage to be \$37,500; said mortgage to be payable within four years from date, with interest at the

rate of 6% provided installments of \$2,500 should be paid, as follows:

\$2,500 one year from date.

\$2,500 each six months thereafter.

Balance to be paid within four years.

Said mortgage to contain such other usual terms and conditions as the officers of the company might approve.

Upon motion made, seconded, and carried, it was resolved that the offer of Mrs. Chester to 10 the company should be accepted and that the action of the board of directors on the offer pertaining to its acceptance, and the execution of the bond and mortgage in the sum of \$37,500 should be ratified, to the fullest extent.

The motion was unanimously passed."

This action on the part of the directors was unanimously approved and adopted at a meeting of the stockholders of the company, held on the same 20 day, as above, the certificate of the secretary, Ralph L. Chester, certifying that all of the stockholders of the company were present at the meeting when the resolution was passed.

All of the stockholders of the company having the right to vote were present and voted in favor of the resolution. The stock held by Shriver, never having been transferred upon the books of the company, the pledgor retained the right to vote it as the pledgor had not transferred that right to the pledgee. 30
Thomas v. International Silver Co., 72 N. J. Eq. 224.

There can be no suggestion that Shriver, by reason of his holding these shares of stock not transferred on the books of the company, is entitled to notice of any meeting. Such notice would be useless and ineffective, he having no right to vote or partici-

pate in such meetings, the stock books being the only evidence as to who had the right to vote. In re Cedar Grove Cemetery, 61 N. J. L. 422.

A stockholder is not entitled to vote unless he be an original subscriber or unless he be registered on the company's books. Fidelity Trust Company v. Newark Milk and Cream Company, 89 N. J. Eq. 224.

10 The sole attack made in this case is as to the consideration of the mortgage. The consideration as between Sutton and Chester, whereby the Chesters nominated Mrs. Sutton to be the mortgagee is clear, precise and, insofar as any proof is presented, entirely without question. Mrs. Sutton received the consideration, which amounted to nearly \$50,000.00, in the manner and method agreed upon, for which she assigned her stock. It is clearly manifest that she must have known the consideration of the mortgage as between the corporation and the Chesters, as she participated in the directors' and stock-
20 holders' meetings at which the resolutions concerning Mrs. Chester's stock were adopted.

The company had the power to reduce its stock. Section 29 of the General Corporation Act, Comp. Stat., p. 1616 reads:

30 "The decrease of capital stock or of capital may be effected by * * * by the purchase of shares for retirement, either pro rata from all holders of shares of that class of stock or from time to time by purchase in the open market at not exceeding such price or prices as are fixed or approved by the stockholders entitled to vote upon the decrease to be effected in that manner."

Said Act provides that shares having a par value, not more than such par value shall be charged

against or retired out of the capital of the corporation, although in buying stock for retirement, a corporation is required to purchase ratably from each stockholder who desires to sell. *General Investment Co. v. American Hide, &c., Co.*, 98 N. J. Eq. 326.

All of the stock being held by the Chesters, either in person or in the name of corporations owned by them, and all stock having been voted in favor of the sale, no presumption of invalidity of such sale can be deemed to exist by reason of the lack of proof 10
of a minute indicating that the said purchase was pro rata from all holders of shares.

Said Section further provides that if such decrease shall result in the reduction of the capital of the corporation, a certificate stating such fact and the manner of effecting the same shall be published in fifteen days after the filing of the certificate of decrease in the office of the Secretary of State, and it provides that in default thereof the directors shall be liable for all debts of the corporation. 20

It will be noted that Mrs. Chester paid to Mrs. Sutton under the contract made during Mr. Sutton's lifetime approximately \$80.00 per share for the stock purchased by her and that she sold the same to the company at par \$100.00. If the true situation is that the 375 shares of stock have been redeemed by the company and the capital stock reduced to that extent, and in the absence of any fraud on the part of the Ocean City Title & Trust Company or of Mrs. Sutton, or notice of fraud by others which can be imputed to said trust Company or Mrs. Sutton, this 30
petition must fall.

This is an application to set aside a mortgage made by a corporation upon the ground that no consideration passed to the corporation. A consideration did pass, that is, par value of shares of stock

presented by a stockholder and accepted by the company for cancellation. Whether or not the stockholders of the corporation have the power to give a selected stockholder a mortgage lien on its assets or ~~of~~ stock is a question that is not presented by counsel in this matter. Petitioner held this stock by assignment as collateral for loans made by him by agreement or otherwise. He has refrained from causing this stock to be transferred on the books of the company, therefore, Chester, the one in whom the stock was registered in said books retained the voting rights thereof. The petitioner is bound by the acts of the stockholders or directors not *ultra vires* or fraudulent.

I will advise an order dismissing the order to show cause and vacating the restraint.

Determined: March 25, 1930.

20

30

ORDER.

IN CHANCERY OF NEW JERSEY.

73-480

Between OCEAN CITY TITLE AND TRUST Co., <i>Complainant,</i> and STRAND PROPERTIES, INC., <i>et al.,</i> <i>Defendants.</i>	}	On Bill to Foreclose. On Petition, &c. Order.	10
---	---	---	----

This matter coming on to be heard on the return 20
of the order to show cause and the Court having
read and considered the affidavits, and heard and
considered the testimony of Clinton B. Price, and
the argument of counsel as well as briefs submitted,
and being of the opinion that the petitioner is not
entitled to an injunction, and that the restraint
heretofore issued should be vacated and the order
to show cause dismissed;

It is on this 10th day of April, 1930, on motion of
Cole & Cole, solicitors of Ocean City Title and Trust 30
Company, ordered that the restraint be vacated and
the order to show cause dismissed, with costs.

E. R. WALKER,
C.

Respectfully advised:
R. H. INGERSOLL,
V. C.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

73-480

10

<p>Between OCEAN CITY TITLE & TRUST COMPANY, <i>Complainant,</i> and STRAND PROPERTIES, INC., <i>et als.,</i> <i>Defendants.</i></p>	}	<p>On Bill, &c. On Petition of Wil- liam F. Shriver. Notice of Appeal.</p>
---	---	---

20

*To the Ocean City Title & Trust Company and
 Naomi M. Sutton:*

William F. Shriver hereby appeals from the order or decree made by the Chancellor on the advice of Vice-Chancellor Ingersoll entered herein on April 10, 1930, upon the petition filed by him on March 8, 1930, and from each and every part thereof, to the
 30 Court of Errors and Appeals in the last resort in all causes.

Respectfully,
 JOSEPH H. CARR,
*Solicitor for and of Counsel
 with William F. Shriver.*

Dated: April 30, 1930.

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

JOSEPH H. CARR,
*Of Counsel with William F.
Shriver.*

[ENDORSED]

10

Service of the within notice is hereby acknowledged this day of May, A. D. 1930.

Cole & Cole,
Sol'r. for Ocean City
Title & Trust Com-
pany.
Herbert R. Voorhees,
Solicitor for Noami
M. Sutton.

20

30

PETITION FOR STAY PENDING APPEAL.
 IN CHANCERY OF NEW JERSEY.

10	Between OCEAN CITY TITLE & TRUST COMPANY, <i>Complainant,</i> and STRAND PROPERTIES, INC., <i>et als.,</i> <i>Defendants.</i>	}	On Bill, &c. Petition for Stay Pending Appeal.
----	--	---	--

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

William F. Shriver, of Ocean City, Cape May
 County, New Jersey, by his petition respectfully
 shows:

1. That on or about March 8, 1930, petitioner filed
 his petition in this cause praying that he be admitted
 as a party to this suit; that the decree entered
 30 herein under date of December 24, 1929, be opened
 insofar as the same directed that there be paid to the
 defendant, Naomi M. Sutton the sum of \$37,825.00,
 with interest from September 12, 1929, of which sum
 the Ocean City Title & Trust Company was to be
 first paid the sum of \$12,600.00, with interest from
 December 31, 1928; and praying that the said Naomi

M. Sutton and Ocean City Title & Trust Company and Strand Properties, Inc., be required to answer said petition to the end that this Court would order and decree that the mortgage made by Strand Properties, Inc., to Naomi M. Sutton to secure the sum of \$37,500.00 be null and void and should be cancelled.

2. And in said petition your petitioner further prayed that in the meanwhile the sheriff of Cape May County should be restrained from proceeding with sale under the execution issued in this cause and that in any event the said sheriff should be directed not to accept the receipt of the said Ocean City Title & Trust Company, or of the said Naomi M. Sutton, for so much of the price received on the sale for the premises covered by the said execution as might be represented by the said mortgage made by Strand Properties, Inc., to Naomi M. Sutton, and that the sheriff be required to pay into this court any moneys received from the sale of the said premises over and above the amount decreed to be due the complainant herein for principal and interest on its first mortgage, and for costs. 10 20

3. An order to show cause was issued on the said petition, returnable March 18, 1930, which order to show cause contained a temporary restraint against the sale under the execution herein, and on March 18, 1930, the Court heard the matter and argument, and on April 10, 1930, the said order to show cause was dismissed and the restraint vacated. 30

4. Petitioner did not know of the decision on said petition until April 10, 1930, and on April 11, 1930, petitioner served notice of appeal from said order upon Ocean City Title & Trust Company and Naomi

M. Sutton, and said notice of appeal has been placed in the mail directed to the clerk in Chancery at Trenton for filing in said office. Petitioner says that said appeal is taken in good faith upon the advice of counsel and not for the purpose of delay.

5. Petitioner further says that if the sheriff of Cape May County and said Ocean City Title & Trust Company and Naomi M. Sutton, or either of them,
10 be permitted to proceed with the said execution, the subject-matter of the appeal herein will be destroyed and petitioner's appeal will be made of no avail.

Petitioner, therefore, prays that this Court may order a stay of the proceedings under said execution, pending said appeal, at least so far as the mortgage made by Strand Properties, Inc., to Naomi M. Sutton is concerned, and that if sale shall be permitted to be made by virtue of said execution, the said
20 sheriff be directed not to accept the receipt of the said Ocean City Title & Trust Company or the said Naomi M. Sutton for so much of the price received at the sale for the premises covered by the said execution as may be represented by the said mortgage made by Strand Properties, Inc., to Naomi M. Sutton, and that the said sheriff be required to pay into this Court any moneys received from the sale of the said premises over and above the amount decreed to be due the complainant herein for principal
30 and interest on the first mortgage held by it and for costs; there to remain until the disposition of the said appeal and the further order of this Court.

JOSEPH H. CARR,

*Solicitor for and of Counsel
with Petitioner.*

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

10

WILLIAM F. SHRIVER, being duly sworn according to law, upon his oath deposes and says:

1. I am the petitioner in the foregoing petition named and have read each and every allegation therein. I know the same to be true.

2. Particularly do I know it to be true that if the execution herein be proceeded with and sale be made thereunder, the subject-matter of my appeal will be destroyed. 20

WILLIAM F. SHRIVER.

Sworn and subscribed to before me this 11th day of April, 1930.

EARLE V. WESCOTT,
Notary Public N. J.

30

ORDER.

IN CHANCERY OF NEW JERSEY.

73-480

10

Between OCEAN CITY TITLE & TRUST COMPANY, <i>Complainant,</i> and STRAND PROPERTIES, INC., <i>et als.,</i> <i>Defendants.</i>	}	On Bill, &c. On Petition of Wil- liam F. Shriver. Order.
--	---	---

20

William F. Shriver, having filed notice of appeal from the order entered herein on April 10, 1930, wherein an order to show cause issued on the petition of the said William F. Shriver was dismissed and the restraint thereby imposed was vacated, and application being made by the said William F. Shriver for a stay of execution, pending said appeal,

30

as set forth in the petition filed this day.
 It is, on this 12 day of April, A. D. nineteen hundred and thirty, on motion of Joseph H. Carr, solicitor for William F. Shriver, ordered that Ocean City Title & Trust Company and Naomi M. Sutton show cause before this Court on Tuesday the twenty-second day of April, 1930, at Chancery Chambers, at Real Estate and Law Building, Atlantic City, New

Jersey, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why proceedings on the execution issued therein should not be stayed as in said petition set forth pending said appeal, and the further order of this Court.

And it is further ordered that, pending the return of this order and until the further order of this Court, the said Ocean City Title & Trust Company, Naomi M. Sutton and the sheriff of Cape May County be and they are hereby restrained from making sale under the execution issued herein. 10

And it is further ordered that a copy of this order and of the petition whereon the same is based be served upon the said Ocean City Title & Trust Company and Naomi M. Sutton within five days from the date hereof, which copies need not be certified, except by the certificate of the solicitor for the said William F. Shriver that such copies are true copies.

E. R. WALKER,

C. 20

Respectfully advised,
R. H. INGERSOLL,
V. C.

sum of \$12,600.00, with interest from December 31, 1928, should be paid into Court pending the disposition of the said appeal and the further order of this Court, and the Court having heard Joseph H. Carr, solicitor for William F. Shriver, for the said petition, and Clarence L. Cole for the Ocean City Title & Trust Company, the complainant, and Herbert R. Voorhees for Naomi M. Sutton, defendant.

It is, on this 23rd day of April, 1930, ordered that the complainant herein have leave to proceed with the sale under execution now in the hands of the sheriff of Cape May County for the purpose of raising the sums of money therein directed to be raised, and the sheriff of Cape May County may accept the receipt of Ocean City Title & Trust Company, a complainant herein, for so much of the price received at any sale of the premises covered by the said execution as is represented by the first mortgage held by the complaint, and also for so much of the price received at such sale as is represented by the interest of Ocean City Title & Trust Company in the second mortgage of Naomi M. Sutton, above referred to, and shall pay the remaining money received from said sale into this Court.

It is further ordered that if the said Naomi M. Sutton shall be the successful bidder at such sale so much of the price as is in excess of the amount decreed to be due to the complainant on its first mortgage and as was decreed to be due to it out of said second mortgage of Naomi M. Sutton she may give her receipt therefor to the extent of the balance of the said sum decreed to be paid to her on her second mortgage, but not in excess thereof; but such right of Naomi M. Sutton is subject to the express direction that the deed to her or her nominees, pursuant to said sale shall contain a recital of the

conditions of this order and a direction that she shall be permitted to mortgage the premises described in the bill of complaint and covered by the execution herein only to the extent of the amount due to the complainant on its first mortgage and to the complainant on its interest in the said second mortgage and that her estate under such deed shall be subject to every provision of this order, including the further condition that the equity in such property over and above the amounts aforesaid shall be held by the
10 said Naomi M. Sutton in trust, subject to whatever future order or decree of this or any other Court respecting the claims of Strand Properties, Inc., or its stockholders or creditors or any person claiming under Strand Properties, Inc., and so that the equity in such property over and above the amounts aforesaid shall be in all respects subject to the same claims, conveyances and court orders as though the
20 said Naomi M. Sutton had paid the amount of her bid in cash deposited with this Court and so that the estate of the said Naomi M. Sutton or her nominees shall not be subject to lien or encumbrance of any nature or description, except as above set forth and may only be conveyed or transferred subject to each and every term hereof.

And it is further ordered that the payment of the Ocean City Title & Trust Company of the amount due to it, out of the said second mortgage, shall be without prejudice and subject to the express
30 provisions that the same may be ordered paid by this Court or any other Court having jurisdiction to Strand Properties, Inc., or its stockholders or creditors or any other person claiming under it, to the same extent as though the said monies had been paid into Court as the result of said sale.

It is further ordered that the disposition of the

income and profits from the said property described in the bill of complaint, covered by the execution aforesaid, shall be controlled by this Court and that William F. Shriver, Noami M. Sutton or any other person interested may apply to this Court after the said sale for the directors of this Court as to the disposition of the income therefrom and the keeping down of charges thereon.

E. R. WALKER,
C. 10

Respectfully advised:
R. H. INGERSOLL,
V. C.

We consent to the above order:

HERBERT R. VOORHEES,
Solr. Noami M. Sutton.
JOSEPH H. CARR,
Solicitor for William F. Shriver.
COLE & COLE, 20
Solrs. Ocean City T. & T. Co.

PETITION OF APPEAL.

COURT OF ERRORS AND APPEALS.

10	OCEAN CITY TITLE & TRUST COMPANY, <i>Complainant-Appellee,</i> v. STRAND PROPERTIES, INC., <i>defendant, NAOMI M.</i> SUTTON, <i>et als.,</i> <i>Defendants-Appellee.</i>	} On Appeal from the Court of Chancery. } On Petition of Wil- liam F. Shriver. } Petition of Appeal.
----	--	--

20 APPEAL OF WILLIAM F. SHRIVER.

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

The petition of William F. Shriver, the appellant in the above entitled cause, respectfully shows that:

- 30 1. The petitioner finds himself aggrieved by a certain order or decree made in the Court of Chancery of New Jersey by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date April 10, 1930, in a certain cause in said Court of Chancery wherein Ocean City Title & Trust Company was complainant and Strand Properties, Inc., Naomi M. Sutton and others were defendants, and in which cause petitioner, William F. Shriver, had filed a petition on March 8, 1930, praying:

(1) That he be named as a party to this suit.

(2) That the decree entered in said cause under date of December 24, 1929, be opened insofar as the same directs that there be paid to the defendant, Naomi M. Sutton, the sum of \$37,825.00, with interest from September 12, 1929, of which sum the Ocean City Title & Trust Company be first paid the sum of \$12,600.00, with interest from December 31, 1928.

10

(3) That the said Naomi M. Sutton and Ocean City Title and Trust Company and Strand Properties, Inc., be required to answer said petition to the end that the Court of Chancery should order and decree that the said mortgage made by Strand Properties, Inc., and Naomi M. Sutton, to secure the sum of \$37,500.00, be null and void, and that said mortgage should be cancelled.

20

(4) That in the meanwhile, the sheriff of Cape May County be restrained from proceeding with the sale under the execution issued in said cause and that in any event the said sheriff be directed not to accept the receipt of the said Ocean City Title and Trust Company, or the said Naomi M. Sutton, for so much of the price received at the sale for the premises covered by the said execution as may be represented by the said second mortgage and that the said sheriff be required to pay into the Court of Chancery any moneys received from the sale of the said premises over and above the amount decreed to be due the complainant in said cause for principal and interest on the first mortgage and for costs.

30

and upon which petition an order to show cause was entered on March 8, 1930, requiring Ocean City Title and Trust Company, Naomi M. Sutton and Strand Properties, Inc., to show cause why the prayer of the said petition should not be granted with a restraint of sale under execution issued in this cause.

2. Your petitioner, William F. Shriver, is aggrieved by said order of April 10, 1930, in this
10 respect, to wit, that the said order or decree adjudges that the restraint imposed by said order of March 8, 1930, be vacated and the order to show cause on said petition be dismissed with costs.

3. Petitioner, William F. Shriver, appeals from the entire decree or order aforesaid upon the ground that the same is erroneous in that:

(1) Your petitioner should have been admitted as
20 a party to this suit.

(2) That the decree entered in said cause under date of December 24, 1929, should be opened in the manner prayed for in said petition.

(3) The Ocean City Title and Trust Company, Naomi M. Sutton and Strand Properties, Inc., should have been required to answer the petition of William F. Shriver to the end that the Court of Chancery
30 should order and decree that the mortgage made by Strand Properties, Inc., to Naomi M. Sutton to secure the sum of \$37,500.00 be null and void and that said mortgage be cancelled.

(4) That in the meanwhile, the sheriff of Cape May County should have been restrained from pro-

ceeding with the sale under the execution issued in said cause and that in any event the said sheriff should have been directed not to accept the receipt of the said Ocean City Title and Trust Company, or the said Naomi M. Sutton, for so much of the price received at the sale for the premises covered by the said execution as was represented by the said second mortgage and that the said sheriff should have been required to pay into the Court of Chancery any moneys received from the sale of the said premises over and above the amount decreed to be due the complainant in said cause for principal and interest on the first mortgage and for costs. 10

(5) The appellant, William F. Shriver, should have been given a hearing on the petition filed by him and upon answers which should have been required to be filed by Ocean City Title & Trust Company and by the defendants, Naomi M. Sutton and Strand Properties, Inc., and in that manner should have been allowed to introduce evidence upon the issues presented with the right to subpoena and cross-examine witnesses, whereas the Court of Chancery disposed of appellant's application in a summary manner. 20

(6) The appellant, William F. Shriver, had a standing as the holder in pledge of 614 shares of stock in the corporation, Strand Properties, Inc., under the circumstances stated in the petition and supporting affidavits to maintain these proceedings and to obtain the relief sought. 30

(7) The mortgage made to Naomi M. Sutton and attacked by appellant was one for which the corporation, Strand Properties, Inc., received no consideration.

(8) The mortgage made to Naomi M. Sutton and attacked by appellant, William F. Shriver, constituted an appropriation of corporation assets by one of the directors of Strand Properties, Inc., to wit, said Naomi M. Sutton, said appropriation being participated in by the other directors and of which appropriation the Ocean City Title & Trust Company had notice or knowledge.

10 (9) The execution and delivery of the mortgage to Naomi M. Sutton was a breach of duty on the part of the directors of the Strand Properties, Inc., of which Naomi M. Sutton was one and in which the other directors participated and of which breach of duty the Ocean City Title & Trust Company had notice or knowledge.

20 (10) Under the affidavits and proofs submitted, the Court of Chancery should not have found that the mortgage was given for the purchase price of stock purchased from Charlotte S. Chester.

(11) The purchase of stock of Charlotte S. Chester by Strand Properties, Inc., under the circumstances of this case would have been *ultra vires* the corporation and void. Such purchase would not have been for a legitimate corporate purpose.

30 (12) The so-called purchase of stock of Charlotte S. Chester was a mere pretext, was never carried out and it was not a true transaction between the parties.

(13) The Ocean City Title & Trust Company had full knowledge of the infirmity in the said mortgage

and participated fully in the transaction whereby the same was created.

(14) Said Ocean City Title & Trust Company was not a holder of said mortgage for value without notice.

(15) Strand Properties, Inc., never purchased any of its stock as consideration for the said mortgage.

10

(16) The transaction complained of by appellant, William F. Shriver, constituted a fraud upon his rights as the holder of 614 shares of stock of Strand Properties, Inc., under the circumstances set forth in the petition and supporting affidavits.

Petitioner, therefore, prays that the said decree by the said Chancellor may be wholly reversed, set aside and for nothing holden and that said petitioner may have such other relief in the premises as to this Court shall seem proper. 20

JOSEPH H. CARR,
*Solicitor for and of Counsel
with William F. Shriver,
Appellant.*

30

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10 Between
 OCEAN CITY TITLE AND
 TRUST COMPANY,
Complainant-Respondent,
 and
 STRAND PROPERTIES, INC.,
 a corp., &c., *et al.*,
 Defendants-Appellant.

} On Appeal of Defen-
 } dant, William F.
 } Shriver.
 } Answer to Petition of
 } Appeal.

20

The answer of Ocean City Title and Trust Company, the above named respondent, to the petition of appeal of William F. Shriver, the above named appellant.

30 This respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that an order was, on April 10, 1930, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said order, this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said order is agreeable to equity; and it prays that

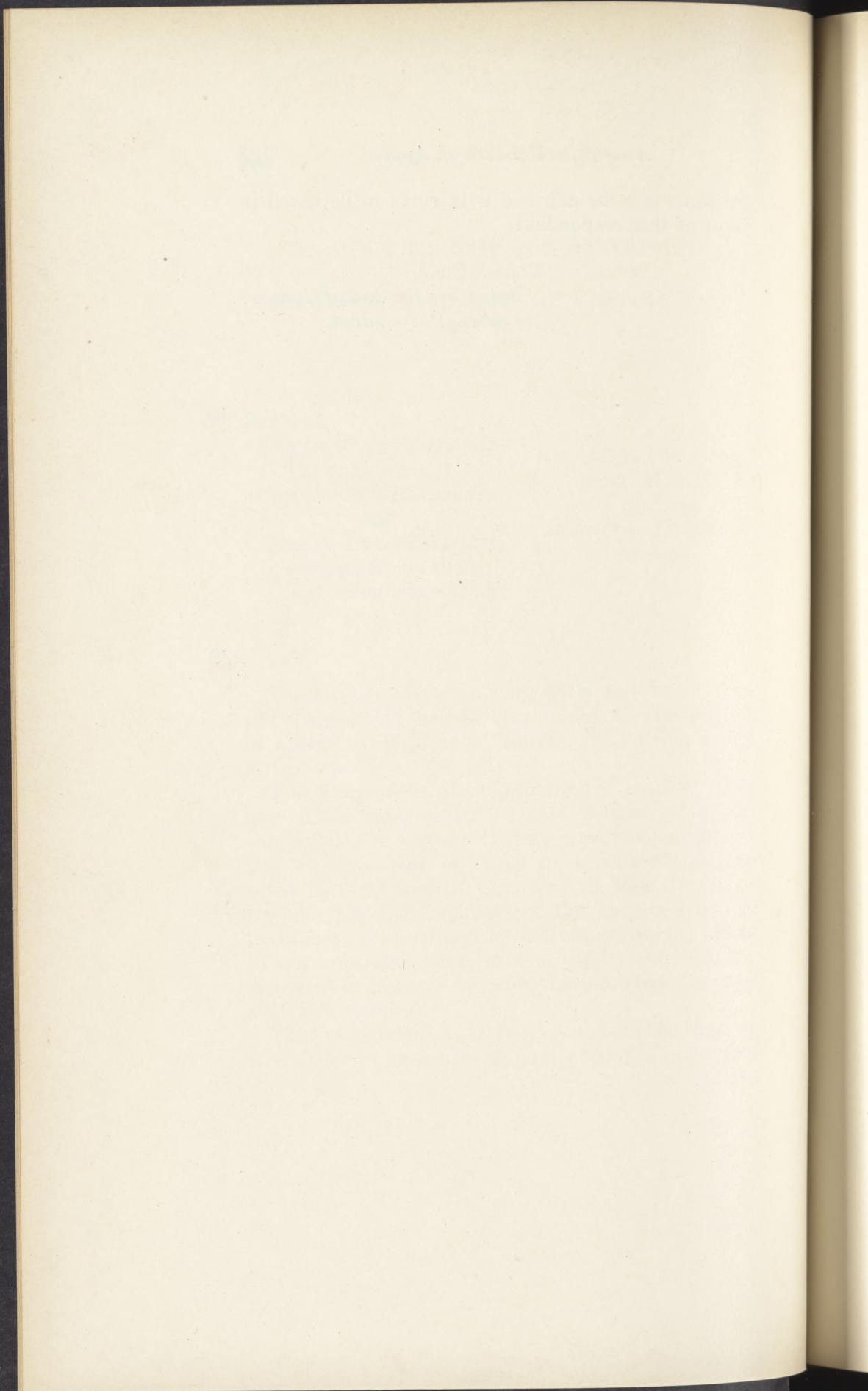
the same may be affirmed with costs to be taxed in favor of this respondent.

COLE & COLE,
*Solicitors for and of Counsel
with Respondent.*

10

20

30



NEW JERSEY COURT OF ERRORS AND
APPEALS.

OCEAN CITY TITLE & TRUST COMPANY,
Complainant-Respondent,

v.

STRAND PROPERTIES, INC., *et als.,*
Defendants.

ON PETITION OF WILLIAM F. SHRIVER.

BRIEF FOR WILLIAM F. SHRIVER,
APPELLANT.

ABSTRACT.

This appeal involves the right of a stockholder in a New Jersey corporation to intervene in a suit for the foreclosure of a first mortgage after final decree for the purpose of litigating the validity of a second mortgage made by Strand Properties, Inc. to Naomi M. Sutton to secure the payment of \$37,500 which was part of the subject-matter of the decree.

The bill was filed by Ocean City Title & Trust Company for the foreclosure of a first mortgage

held by it to secure the payment of \$65,000. The validity of this mortgage and the amount due on it are not questioned on this appeal. The bill also set forth that the defendant, Strand Properties, Inc., a New Jersey corporation, owner of the premises, mortgaged the same to Naomi M. Sutton, to secure the payment of the sum of \$37,500 and that this last mentioned mortgage was assigned to complainant as collateral security for a loan due it. (Case, pp. 6 and 7, paragraphs 9 and 10 of bill). The prayer of the bill was for the foreclosure of complainant's "mortgage", evidently referring to the first mortgage of \$65,000.

The Strand Properties, Inc. filed an answer setting up usury with which issue this appellant has no concern. The other defendants filed no answers, but the defendant, Naomi M. Sutton, filed a notice under the rules asking that her mortgage, which is the mortgage now in dispute, be reported upon. (Case, p. 16). There was a hearing on the bill and answer of Strand Properties, Inc., but the ^{only} proof submitted by the defendant, Naomi M. Sutton, was an affidavit (pp. 17 and 18), in which she stated that she was the owner of the \$37,500 bond and mortgage; that there was due to her thereon the sum of \$37,500 with interest from September 12th, 1929 at six per cent and the further sum of \$325 interest due September 12th, 1929; and that she assigned said bond and mortgage to the complainant to secure the payment of two promissory notes made by her and discounted by the complainant, and that there was due complainant thereon the sum of \$12,600 with interest from December 31st, 1928, which should be first paid out of the amount due her on the mortgage (p. 18). This affidavit was offered by the solicitor for the complainant at the hearing (p. 31,

Case) and was apparently admitted, although the transcript shows no ruling on it. There was at the hearing on the bill and answer, a passing reference to the sale of stock and to William F. Shriver (Case, pp. 36 and 37) but no issue was presented as to the validity of this Sutton mortgage. There was a decree for the complainant on its first mortgage which we do not dispute, and the decree for the payment secondly to Sutton of the amount shown by her affidavit, out of which complainant was to receive the amount shown by the affidavit to be due it (Case, pp. 42 and 43).

The next step in the cause was the filing of a petition by William F. Shriver, the dismissal of which is now before this Court. The petition and affidavit submitted therewith showed that in April, 1926, Shriver had loaned Ralph L. Chester, Inc. the sum of \$100,000, taking as security, assignments of various mortgages, the loan being represented by a note endorsed by Ralph L. Chester personally; that on or before May 17th, 1927, the loan had been reduced to \$73,500 and on or about that date, there was a substitution of collateral, Shriver giving up certain mortgages and receiving in exchange a certificate for 614 shares of the capital stock of Strand Properties, Inc. and that on May 17, 1927, the certificate was delivered to Shriver together with a written assignment of the shares and a duly executed power of attorney for the transfer thereof. (Case, pp. 45 and 46, paragraphs 1 to 4 inclusive of petition, Case, pp. 52 and 53, paragraphs 1 to 2 inclusive of affidavit). That the stock was never transferred but remained in the pledgor's name, and petitioner never participated in any corporate action of Strand Properties, Inc., in any way (Case, pp. 46 and 47, paragraph 7 of petition).

The petition and affidavits further showed that by June 1st, 1929, the petitioner's loan had been reduced to \$32,500 at which it remains, that as payments were made collateral was released and that since June 1st, 1929, Shriver has had no other collateral to secure his loan than the stock in Strand Properties, Inc. (Case, p. 46, paragraph 5 of petition, Case, p. 53, paragraph 3 of affidavit). That petitioner always regarded the stock as of substantial value, relied upon it to secure the payment of the loan, has attempted to secure other collateral or to secure payment, but without success. (Case, pp. 46 and 49, paragraphs 6 and 12 of petition, Case, pp. 54 and 56, paragraphs 5 and 11 of affidavit).

They further showed that at the time Shriver took the stock he inquired as to the assets of the company and its liabilities, learned of the \$65,000 mortgage, above referred to and that the only asset of consequence was the real estate covered by the mortgage, and that at the time of filing the petition this was the only asset. That he did not learn of the Sutton mortgage until the summer of 1929, never consented to it, nor participated in any action leading up to the Sutton mortgage; that he learned of the foreclosure of the Title Company mortgage for \$65,000, but did not know that the foreclosure in any way involved the Sutton mortgage, and did not know that there could be a decree in this case providing for the payment of the second mortgage, until about two weeks before filing his petition. (Case, pp. 47, 48, paragraph 8 of petition, Case, pp. 54, 55, paragraphs 6, 7, 8, 12, 14 and 15 of affidavit).

That the Sutton mortgage was given by the corporation for no consideration moving to the company. That on or about August 25, 1927, Charlotte S. Chester, who was the wife of Ralph L. Chester,

petitioner's debtor, entered into a written agreement with Naomi M. Sutton, (the holder of the mortgage in question) and Edward M. Sutton, her husband, whereby the Suttons agreed to sell to Charlotte S. Chester and Charlotte S. Chester agreed to buy all of the stock of the Suttons in Strand Properties, Inc., for the sum of \$49,860.19, of which \$12,360.19 was to be paid in cash and the balance was to be paid by the execution and delivery by Strand Properties, Inc., the corporation in question, of a mortgage for \$37,500, which is the mortgage now in question. A copy of this agreement was attached (Case, pp. 59 to 61, inclusive). That this agreement was carried out, and the mortgage afterwards assigned to the complainant to secure loans to Sutton. (Case, pp. 48, 49, paragraphs 9, 10, 11 of petition, Case, p. 56, paragraph 9 of affidavit and pp. 57 and 58, paragraphs 1 and 2 of Chester affidavit). And at the hearing on the bill and answer, Ralph L. Chester testified that Naomi M. Sutton had sold her stock to Mrs. Chester (Case, p. 36).

It further appeared from the petition and affidavits that at the time of the making of the agreement and the mortgage the Strand Properties, Inc. was under the control of Ralph L. Chester, Charlotte S. Chester, Edward M. Sutton and Naomi M. Sutton, who constituted the entire board of directors of the company (Case, p. 50, paragraph 13 of affidavit and Case, p. 62, Ralph L. Chester's affidavit). That at the time of filing the petition the Strand Properties, Inc., was under the control of Ralph L. Chester, that no defense had been interposed to the Sutton mortgage in this case, that Ralph L. Chester had participated in the transaction complained of and that if Shriver were not allowed to intervene and contest the validity of the mortgage in his capa-

city of a stockholder, he would be without remedy, the stock would be worthless and his loan uncollectible (Case, pp. 49, 50, paragraph 13, of petition, affidavit paragraph 10, p. 56). The testimony taken at the final hearing shows that Ralph L. Chester and his wife, Charlotte S. Chester were the only stockholders, in fact, Ralph L. Chester testified at that hearing that Shriver had no interest in the corporation and was not a stockholder (Case, p. 37), so that it was obvious that Shriver could hope for no relief through the two Chesters.

The prayer of the petition was that Shriver be admitted as a party; that the decree be opened insofar as it related to the second mortgage, and that Sutton and the Title Company should be required to answer the petition to the end that the \$37,500 mortgage should be declared null and void, and that in the meanwhile sale be restrained, or if allowed to go on that the proceeds of sale over and above the first mortgage and costs be paid into Court (Case, pp. 51, 52). An order to show cause issued on this petition with interlocutory restraint (Case, pp. 63, 65).

At the return of the order to show cause, no answer was filed but various affidavits were filed raising as the only issue that instead of the transaction referred to in the agreement (Case, pp. 59-61) having been carried out, the corporation in fact bought from Naomi M. Sutton her stock for the sum of \$37,500 represented by the mortgage, and a substantial question of disputed fact was thus presented to the Court.

The affidavits were those of Robert K. Bell, an attorney, Clinton B. Price, title officer of complainant, Naomi M. Sutton, James F. Koch, secretary and treasurer of complainant, Stirling W. Cole,

trust officer of complainant, and the Court also took the testimony of Price, orally.

Bell's affidavit stated that on Septemebr 12th, 1928 the directors of Strand Properties, Inc., being Charlotte S. Chester, Ralph L. Chester, Naomi M. Sutton, met in his office and adopted a resolution authorizing the company to execute and deliver to Charlotte S. Chester or her assigns, the \$37,500 mortgage and that the same three persons and the estate of Edward M. Sutton, deceased represented by the same Naomi M. Sutton, as one of his executors, met as all of the stockholders and ratified the acts of the directors. (Case, pp. 74-75). The resolutions were attached and in short, provided that Charlotte S. Chester should deliver to the company 375 shares of its capital stock, in consideration of the mortgage. (Case, pp. 76 to 79). That he (Bell) received from complainant, (1) a certificate for one share of stock issued to Edward M. Sutton and endorsed by his executors in blank (2) a certificate for 624 shares in the name of Naomi M. Sutton and endorsed in blank (3) certificate for 4 shares in Strand Motion Picture Company in the name of Naomi M. Sutton and endorsed in blank and the resignation of Naomi M. Sutton as director and vice-president of Strand Properties, Inc., all of which he delivered to Ralph L. Chester (Case, p. 75). That it was represented to him at the time, that Charlotte S. Chester, Ralph L. Chester, Naomi M. Sutton and the estate of Edward M. Sutton were the owners of all of the 1250 shares of stock of Strand Properties, Inc., and that he had no knowledge of William F. Shriver's interest. (Case, pp. 75-76).

The affidavit of Price says that on September 12, 1928 the attorney for Naomi M. Sutton, then H. R.

Voorhees, Esq., delivered to him the certificate for 624 shares in Strand Properties, Inc., the certificate for 4 shares in the name of Strand Motion Picture Company referred to; the resignation of Naomi M. Sutton as director and vice-president of Strand Properties, Inc., with instructions to deliver to Bell as attorney for Charlotte S. Chester, Ralph L. Chester and Strand Properties, Inc., upon (1) the payment to Naomi M. Sutton of \$5976.42 in cash; (2) the execution and delivery of the \$37,500 mortgage of Strand Properties, Inc. to Naomi M. Sutton and (3) the approval of Voorhees as Naomi M. Sutton's attorney of the title under the mortgage. That at the same time Bell delivered to him (1) check of "Strand Theatre" to Naomi M. Sutton for \$5976.42. (2 and 3) copies of the resolutions referred to by Bell, (4) an assignment from Charlotte S. Chester to Naomi M. Sutton of all her right, title and interest in the bond and mortgage and directing the execution and delivery of the same to Naomi M. Sutton (5) the original bond and mortgage, with instructions to record the mortgage, and upon approval of title by H. R. Voorhees, and upon delivery to Bell of the stock and resignation, together with one additional share of stock of Strand Properties, Inc., in the name of Edward M. Sutton, to deliver the check, bond and mortgage to Naomi M. Sutton; that he subsequently received from Cole, trust officer of the complainant, which was one of the executors of Edward M. Sutton estate, the certificate for the one share referred to; and that all of these conditions were met and everything carried out by him. He further said that during the progress of the settlement he talked with Ralph L. Chester on several occasions concerning this matter and was informed by him, that he and his wife, Char-

lotte S. Chester "were purchasing from the Suttons all the outstanding stock not already owned by them (the Chesters) and that he (Ralph L. Chester) and his wife (Charlotte S. Chester) would thereupon entirely own said Strand Properties, Inc."; and that he did not know of the agreement of August 25, 1927 until March 15, 1930 and had only just learned of Shriver's interest in the matter (Case, pp. 80 to 83). The assignment by Charlotte S. Chester to Naomi M. Sutton, referred to, is printed at pp. 86 and 87.

Naomi M. Sutton in her affidavit admits the agreement of August 25th, 1927 and says that she and her husband held half the total stock or 625 shares and Charlotte S. Chester and Ralph L. Chester the other half or 625 shares, and admits that the persons signing the agreement were all the directors of the company; sets out the settlement details in the same manner as the other affidavits and says she knew nothing of any interest of Shriver in the stock. (Case, pp. 87 to 89).

James F. Koch says that on December 26th, 1928, William F. Shriver was a director in complainant but does not attempt to say that William F. Shriver had any knowledge of this transaction or participated in it in any way and further says that in the last two weeks, William F. Shriver had shown him the pledged stock and assignments. (Case, pp. 91-92).

Stirling W. Cole says that as a representative of complainant, one of the executors of Edward M. Sutton, he delivered the share of stock referred to with instructions to deliver upon payment of \$80 which was paid, but it does not appear by whom this was paid. That at the time he understood Charlotte S. Chester and Ralph L. Chester owned half the stock and Naomi M. Sutton and Edward M.

Sutton, the other half, and never knew anything of Shriver's interest. (Case, p. 93).

After the reading of the affidavits, Vice-Chancellor Ingersoll permitted Price to testify in explanation of his affidavit. He testified that the "fundamental agreement" was for the Chesters to purchase 625 shares of the Sutton stock, and that Chester made an agreement with the company that in consideration of the Chesters surrendering for cancellation 375 shares of that stock, the company would execute the mortgage to Chester or her assigns and that Mrs. Chester assigned that to Mr. Chester, but he admitted he had not seen the so-called "fundamental agreement" and that there was no other agreement but only "evidence of it in the resolution". (Case, pp. 69-70). The testimony of Price as to the manner of making settlement is given at pp. 73-74 and he says he made the settlement for his company (which was insuring the mortgage, p. 71) without calling for the consideration, the 375 shares. (pp. 73-74). He was asked "The check and stock you gave to Mrs. Sutton in exchange, check and mortgage you gave to Mrs. Sutton in exchange for her stock, is that right? A. Yes. Q. And you never collected 375 shares of stock from Charlotte S. Chester and gave it to anybody? A. We didn't go through that formality. Q. Please answer that won't you Mr. Price? A. No."

The petitioner requested that if the matter was to be heard orally he wished the privilege of producing other witnesses and examining them, (Case, p. 72) but this privilege was not granted.

On April 10, 1930, the restraint allowed was vacated and the order to show cause dismissed with costs, from which order this appeal was promptly prosecuted.

Vice-Chancellor Ingersoll filed conclusions in which he accepted the theory advanced by Naomi M. Sutton and the complainant, that the corporation purchased 375 shares of stock in consideration for the mortgage as true and decided that everything had been done properly.

Subsequent to the appeal there was a petition for a stay as a result of which the moneys derived from the sale, over and above the first mortgage and costs, which under the decree would go to Mrs. Sutton, are deposited in the Court of Chancery and so much of such excess as was due to the complainant was ordered paid to it, without prejudice, all of said moneys to be subject to the disposition of this appeal or the further order of any Court having jurisdiction.

GROUNDS OF APPEAL.

1. William F. Shriver should have been admitted as a party to this suit.
2. That the decree entered in said cause under date of December 24, 1929, should be opened in the manner prayed for in said petition.
3. The Ocean City Title and Trust Company, Naomi M. Sutton and Strand Properties, Inc., should have been required to answer the petition of William F. Shriver to the end that the Court of Chancery should order and decree that the mortgage made by Strand Properties, Inc., to Naomi M. Sutton to secure the sum of \$37,500.00 be null and void and that said mortgage be cancelled.

4. That in the meanwhile, the sheriff of Cape May County should have been restrained from proceeding with the sale under the execution issued in said cause and that in any event the said sheriff should have been directed not to accept the receipt of the said Ocean City Title and Trust Company, or the said Naomi M. Sutton, for so much of the price received at the sale for the premises covered by the said execution as was represented by the said second mortgage and that the said sheriff should have been required to pay into the Court of Chancery any moneys received from the sale of the said premises over and above the amount decreed to be due the complainant in said cause for principal and interest on the first mortgage and for costs.

5. The appellant, William F. Shriver, should have been given a hearing on the petition filed by him and upon answers which should have been required to be filed by Ocean City Title and Trust Company and by the defendants, Naomi M. Sutton and Strand Properties, Inc., and in that manner should have been allowed to introduce evidence upon the issues presented with the right to subpoena and cross-examine witnesses, whereas the Court of Chancery disposed of appellant's application in a summary manner.

6. The appellant, William F. Shriver, had a standing as the holder in pledge of 614 shares of stock in the corporation, Strand Properties, Inc., under the circumstances stated in the petition and supporting affidavits to maintain these proceedings and to obtain the relief sought.

7. The mortgage made to Naomi M. Sutton and

attacked by appellant was one for which the corporation, Strand Properties, Inc., received no consideration.

8. The mortgage made to Naomi M. Sutton and attacked by appellant, William F. Shriver, constituted an appropriation of corporation assets by one of the directors of Strand Properties, Inc., to wit, said Naomi M. Sutton, said appropriation being participated in by the other directors and of which appropriation the Ocean City Title & Trust Company had notice or knowledge.

9. The execution and delivery of the mortgage to Naomi M. Sutton was a breach of duty on the part of the directors of the Strand Properties, Inc., of which Naomi M. Sutton was one and in which the other directors participated and of which breach of duty the Ocean City Title & Trust Company had notice or knowledge.

10. Under the affidavits and proofs submitted, the Court of Chancery should not have found that the mortgage was given for the purchase price of stock purchased from Charlotte S. Chester.

11. The purchase of stock of Charlotte S. Chester by Strand Properties, Inc., under the circumstances of this case would have been *ultra vires* the corporation and void. Such purchase would not have been for a legitimate corporate purpose.

12. The so-called purchase of stock of Charlotte S. Chester was a mere pretext, was never carried out and it was not a true transaction between the parties.

13. The Ocean City Title & Trust Company had full knowledge of the infirmity in the said mortgage and participated fully in the transaction whereby the same was created.

14. Said Ocean City Title & Trust Company was not a holder of said mortgage for value without notice.

15. Strand Properties, Inc., never purchased any of its stock as consideration for the said mortgage.

16. The transaction complained of by appellant, William F. Shriver, constituted a fraud upon his rights as the holder of 614 shares of stock of Strand Properties, Inc., under the circumstances set forth in the petition and supporting affidavits.

ARGUMENT.

1. Under a proper exercise of discretion, Shriver should have been admitted as a party, issues should have been framed and these issues should have been tried out upon the merits.

Rule No. 13 of the Court of Chancery provides as follows:

“The Court may determine the controversy as between the parties before it, where it can do so without prejudice to the rights of others.

Where a complete determination cannot be had without the presence of other parties the Court may direct them to be brought in, but in all cases where it shall appear to the Court that persons who might otherwise be deemed proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of

the Court, or incapable otherwise of being made parties, the Court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

Where a person, not a party, has an interest or title which the decree will affect, the Court, on his application, shall direct him to be made a party."

The opening of a final decree in the Court of Chancery on the ground of surprise, fraud, etc., is a matter of discretion, but that discretion is of a judicial nature and may be reviewed on appeal.

Mitchell v. Mitchell, 97 N. J. Equity, 298
(Court of Errors and Appeals);

Mayor etc., of Jersey City v. Jersey City Water Supply Co., 90 N. J. Equity, 14
@ 19 (Stevens V. C.);

Read v. Patterson, 44 N. J. Equity, 211 @
223 (Court of Errors and Appeals);

Day v. Allaire, 31 N. J. Equity, 303, @ 317
(Court of Errors and Appeals);

Cawley v. Leonard, 28 N. J. Equity 467
(Court of Errors and Appeals).

The modern practice is by petition and order to show cause.

Mitchell v. Mitchell, 97 N. J. Equity, 298
(Court of Errors and Appeals);

Jones v. Read-Jones, 84 N. J. Equity, 479
(Court of Errors and Appeals);

Watkinson v. Watkinson, 68 N. J. Equity,
632 (Court of Errors and Appeals);

In re: O'Mara, 106 N. J. Equity, 311 @
317-8 (Walker, O.).

This case is not within the cases holding that where an order refusing to open a decree is neither an abuse of discretion, nor the result of mistake or imposition the Court of Errors and Appeals will not substitute its discretion for that of the Court of Chancery, for the reason that there was here a clear abuse of discretion.

Williams v. Lowe, 79 N. J. Equity 173
(Court of Errors and Appeals);

Sandford v. Wellborn, 85 N. J. Equity 577,
@ 587-8 (Court of Errors and Appeals).

Upon such a petition, the Court should not decide the merits of the matter presented by the petition, but if the petition shows a meritorious case, the decree should be opened and the matter gone into in a full trial with oral testimony in the manner usual in the Court of Chancery.

Day v. Allaire, 31 N. J. Equity, 303, where this Court, speaking per Mr. Justice Scudder, said:

“It is certainly within the discretionary power of the Court to grant relief in such a case, if the defence shown be meritorious, and prompt application is made for its aid.

There has been no unreasonable delay in the petition in this case, and the only question that remains is, whether the petitioner has shown a meritorious defence. The facts are imperfectly set forth in the proofs that were taken for the defendants, which were not presented to the Chancellor before the decree was made, but were offered with the petition for rehearing. These proofs are, manifestly, incomplete.” * * *

It is not proper to decide the completeness of the defence, for this can only be done after

all the evidence has been taken; and more especially is that the case where there is a charge of fraud, which is denied, as in the present action."

The result in that case was that the order to show cause why the final decree should not be opened was made absolute, the order reversed, and the case was remitted for further proofs and a hearing. And that is the course which should be followed here.

Read v. Patterson, 44 N. J. Equity 211, @ 223 (Court of Errors and Appeals).

Cawley v. Leonard, 28 N. J. Equity, 467, was an application by a party affected by a foreclosure decree to be admitted as a party and to interpose a defence. The decree was entered more than three years before the petition was filed and had been executed by a sale. This Court, through Mr. Justice Scudder, said:

"In *Smith v. Alton*, 7 C. E. Gr. 572, a final decree was opened, the sheriff's sale set aside and the mortgagor let in to make defence, on the ground of surprise and great sacrifice. This order may be properly and equitably made on petition, where no new rights have intervened. *Campbell v. Gardner*, 3 Stock. 423. If, in the purchase of some of the lots, or all of them, such rights are found, they will be protected by the decree when the cause is heard on the merits. These applications are always addressed to the sound discretion of the Court. It is said they should be listened to generally with great caution. *Robertson v. Miller*, 2 Gr. Ch. 451. But in an old case (*Kemp v. Squire*, 1 Ves., Sr., 205), Lord Hardwicke said, on ap-

plication to set aside the enrollment of a decree, on circumstances: 'Any court of justice will incline, as far as in its power, to open what is concluded, that the merits may come before the Court, and that the plaintiff may not be precluded from entering therein and having justice done.' There must be caution used in such cases, but it must be balanced by a sense of justice to all parties, to constitute a sound legal discretion. *Brinkerhoff v. Franklin*, 6 C. E. Gr. 334, cites many cases for the rule that an enrollment will be vacated and a decree opened where it has been made unjustly against a right or interest that has not been heard or protected, and this has been done without laches or fault of the party who applies. See Dan. Ch. Pr. 1025."

A recent case is *Riverside Building and Loan Association v. Bishop*, 98 N. J. Equity 508 (V. C. Buchanan), where it was held that a creditor recovering judgment against the owner pending foreclosure, was entitled to be admitted as a defendant even after final decree, and to have his interest and priority determined as against the other defendants.

Section 23 of the Chancery Act provides:

"If the defendant shall not file his plea, demurrer or answer within the time hereby limited, or that granted by the Court, the bill of complaint shall be taken in term time or vacation, as confessed against such defendant, and such decree made thereon as by the Court shall be deemed equitable and just; or the Chancellor may, at his discretion, order the complainant to produce documents and witnesses to substantiate and prove the allegations in the bill of

complaint; or the Chancellor may examine the complainant on oath or affirmation, to ascertain the truth of the allegations in the said bill; and such decree shall be made in either case as the Chancellor shall think equitable and just; provided, to prevent fraud or mistake, the Chancellor may, at any time, upon notice and sufficient cause shown, grant a rule staying proceedings and to open such decree."

It is true that here there was no default decree against Shriver, because he was not a party, but under the circumstances there is more reason for opening this decree than if that situation existed.

In *Gifford v. McGuinness*, 63 N. J. Equity 834, a foreclosure suit, it was held not to be error for the Court of Chancery to require payment into court of money to be raised by execution under a decree in foreclosure, pending the determination of the questions raised by a petition filed after decree. This Court, per Mr. Justice Collins, said: "The only debatable question on this appeal is whether Mrs. McGuinness (the petitioner) made a case sufficient to warrant the inquiry ordered."

The Court of Chancery, in the case now under review, did not simply consider whether on the showing made in Shriver's petition he was entitled to defend, but attempted to determine the merits. The answering affidavits, which at the most, presented a disputed state of facts, were taken as true, and, as the opinion of the Court below shows, were made the basis of the order under review. Where affidavits on an application such as this present a dispute as to the facts the Court should *for that reason* require the framing of issues and proceed to a trial of the issues in the regular manner. The

procedure which should have been followed, it is respectfully submitted, was the same as is customary in cases of preliminary applications for relief, where, if a substantial dispute as to facts is shown, the matter is allowed to stand over for final hearing. It is hornbook law that no decree will be made under such circumstances which will have the effect of disposing of the merits of the controversy. Yet the refusal of Mr. Shriver's petition and the dismissal of the order to show cause was in effect a final disposition of his rights.

In the opinion of the Court below it is said (Case, page 100) that the sole attack was as to the consideration of the mortgage, and that question is disposed of upon the basis of the respondents' case, that the consideration for the mortgage was the purchase of stock by the corporation. Yet this stock purchase feature was new matter, set up in affidavits filed for the respondents, and was a matter which petitioner had no notice would be raised. Of course, under those circumstances, nothing was said in the petition about it. If there had been pleadings filed which raised that issue, and if upon those pleadings the same evidence had been introduced as was introduced here, then the question before this Court would simply be, whether or not the question had been properly decided on its merits. But in this case the question has not yet been put in position to be decided on its merits. The stock purchase theory of the respondents was attacked in argument and in the brief, of course, but could not have been made the subject-matter of the petition, as it was new matter in defence. As a matter of fact, at the hearing on the order to show cause, application was made for permission to Shriver to take oral testimony (Case, page 72), but this permission was not granted.

2. Shriver as a pledgee of stock of the corporation had a status to bring this suit in the right of a stockholder.

The assignment of the shares with the power to transfer on the books and the delivery of the certificate is a lawful method for transferring title, recognized in New Jersey in the early cases of *Broadway Bank v. McElrath*, 13 N. J. E. 24; *Mt. Holly, etc., Co. v. Ferree*, 17 N. J. E. 117; and reaffirmed by the uniform stock transfer law P. L. 1916, page 398, Section 1 (b).

As the bona fide pledgee of this stock, Mr. Shriver has a right, equal to that of a stockholder of record, to prevent the dissipation of corporate assets. In *Thompson on Corporations*, Third Edition, Section 4258 (former Section 4241), it is said:

“The pledgee has a right equal with the pledgor to appear and protect in the courts his interest in the stock and prevent a dissipation of corporate assets. This suit may be brought in the pledgor’s own name, and it is not required that he act through the corporation. The pledgee may lose this right by an unreasonable delay to assert it. He may sue to prevent removal from the place of the corporate domicile and their exchange for stock in other corporations. A pledgee cannot object to contracts entered into by the corporation by virtue of the vote of his pledgor where the corporation had no knowledge that the stock was pledged. So a pledgee has no standing to prevent the stockholders of the corporation from entering into a valid contract of consolidation with another corporation where the pledgee has not acquainted the officers of the corporation with the fact that he holds stock as pledgee; and this

though the effect of the consolidation would be injurious to his stock provided the corporation in all its proceedings acted in good faith. Since an ordinary stockholder has no right to sue the directors personally for mismanagement, it follows very clearly that a pledgee has no right to institute such a suit though the effect of the mismanagement is to render the pledge valueless."

A number of cases are cited in support of this doctrine and the whole subject of the rights of the pledgee and the pledgor in stock of a corporation is dealt with in the same work, Sections 4247 to Section 4268, inclusive. In equity this doctrine would seem to be clear and has been recognized in New Jersey in the case of *Archer v. American Water Works Company*, 50 N. J. E., page 33 (Chancellor Magill) in which matter the first paragraph of the syllabus reads as follows:

"1. If officers of a corporation manage, through the instrumentality of their power and position, to deprive an equitable owner of stock of any of his rights, their act in its consequence is a fraud, against which equity will give relief."

In the case of *O'Connor v. International Silver Co.*, 68 N. J. E. 67, Vice-Chancellor Pitney considered the power of the equitable owner of stock not transferred on the books of the corporation to maintain that suit, and after considering the theory of the right of such a person, said (p. 74):

"I am unable to perceive why a clear title to the shares of stock, with the immediate right to have the stock transferred on the books of the company, does not give the owner a right to the ear of this Court to protect his interest in the corporation and its management.

Of course, the holder of shares of stock, whether standing in his name or not, may in a proper case be subject to estoppel by reason of something done or omitted to be done by himself or his predecessor in title, and it may well be that the case he presents to the Court in asking its aid should show affirmatively that his shares are not burdened by any such estoppel. But such estoppel arises, if at all, quite independent of the status of the owner upon the books of the corporation."

If Shriver did not, as a bona fide pledgee, have a standing to maintain this proceeding until after foreclosing under the pledge and purchasing the stock, there would be a substantial denial of justice, as by that time it might be too late for him to do anything. It is common knowledge that many millions of dollars are loaned in just such a way as this, and if the lenders have no rights as to corporate affairs which the Courts will recognize then the "sure foundation" referred to by Mr. Justice Lloyd, speaking for this Court, in *Wallach v. Stein*, 103 N. J. L. 470, has no existence.

There never has been any question raised in this case as to the bona fide nature of the pledge, so far as Shriver was concerned.

3. Shriver had a standing to interpose this defense because of the failure of the corporation to do so.

The standing of Shriver in this respect was not disputed below, and, therefore, may be regarded as conceded. On the facts, the corporation was under the control of Ralph L. Chester, one of the active participants in the transaction attacked. He would

be responsible for the consequences of his acts to creditors or to stockholders. No demand upon the corporation, therefore, would be necessary.

Busch v. Riddle, 92 N. J. Equity, 265 (Court of Errors and Appeals);

Barry v. Moeller, 68 N. J. Equity, 483 (V. C. Garrison).

Appleton v. American Malting Co., 65 Equity 375, where Mr. Chief Justice Gummere, speaking for this Court, said:

“It is settled, in this State, that such application need not be made when the interest, or bias, of the directors makes it certain that, if it was made, it would be denied; or, if granted, that the litigation following would necessarily be under the direction of persons opposed to its success.

In any event, this matter, if put in issue, would be a proper question to be tried out in the Court of Chancery.

4. Shriver was not in laches, nor estopped.

There has been no acquiescence by Shriver in the transaction complained of and his position and right at this time to question the transaction is unimpaired by any conduct on his part. It does not appear that he had any knowledge of the transaction until a short while before filing his petition, and it is not even suggested that any facts have arisen which would raise an estoppel against him. In the cases to which we will refer, acquiescence is a defense and the burden is upon the parties seeking to sustain a directors' contract to establish acquiescence.

In the case of *Oliver v. Rahway Ice Co.*, 64 N. J. E. 596 (Stevens, V. C.), there apparently elapsed a

period of years between the execution of the mortgage and the time it became questioned, but it was held that this was not sufficient to constitute ratification, nor acquiescence. The Court referred with approval to the case of *Gardner v. Butler*, 30 N. J. E. 702-710 (Court of Errors and Appeals), in which a delay of over two years was not considered to be material.

The rules respecting acquiescence were laid down in *Stewart v. Lehigh Valley Railroad Company*, 38 Law 505, by this Court, particularly on pages 522 and 523, and the philosophy of the rule is stated. The only limitation therein set as to the time within which the transaction may be questioned is that it must be within a reasonable time. I do not believe there are any cases in this State which have restricted the right upon any narrow principle and believe that it will be found that the cases are liberal in permitting *cestui que* trust to exercise their rights at almost any time.

In *U. S. Steel Co. v. Hodge*, 64 N. J. E. 807, at pp. 813 to 817 (Court of Errors and Appeals), the various cases are considered and were applied to a transaction which was disclosed to all of the stockholders and one in which the Court held there was an entire absence of fraud, the result being that the transaction was sustained upon the theory of ratification as a result of the full disclosure which was made.

In *Booth v. Land Filling Co.*, 68 N. J. E. 536, Vice-Chancellor Garrison held that the contract there in question was not of the character approved in the Hodge case and is authority for the position of the appellant herein. See also *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. E. 197, at pp. 206 to 211 (V. C. Emery).

Shriver took the stock as security May 17, 1927

Case, pp. 45, 46, 52 and 53), while the mortgage in question was made in September, 1928 (Case, pp. 48, 49, 56, 57, 58), and the secret agreement between the Suttons and Chester for the sale and purchase of the stock was made in August, 1927 (Case, pp. 59-61). All of these things took place after Shriver's interest arose. Shriver, it is true, released other collateral in consideration of reductions in the loan, but released nothing after he learned of this Sutton mortgage (Case, pp. 46 and 53). Shriver never consented in any way to the mortgage, nor participated in the transaction in any way (Case, pp. 47, 48, 54, 55).

The affidavit of Koch states that on December 26, 1928, Shriver was a director in the complainant (Case, pp. 91-92), but it does not appear that Shriver in that connection ever heard of the transaction of the complainant respecting the mortgage, nor that he attended any meeting at which it was discussed, nor how long, before and after that date Shriver was, in fact, a director.

Consent of the parties interested in putting through the scheme which led up to the mortgage, cannot constitute any estoppel as to Shriver. All of the directors of the company joined in the agreement of August, 1927, and in the proceedings relative to the mortgage in September, 1928. Notice to them, or consent by them could in no way affect Shriver. It is significant that the fact that these parties were directors at the times in question was never referred to in the opinion of the Court below, although clearly shown on the affidavits, and not denied.

The fact that Shriver was not entitled under the law to notice of meetings because he had not caused his stock to be transferred on the books, as referred to by the Vice-Chancellor would not bind him to acts of the directors, which in their essential nature were

fraudulent. If Mrs. Sutton, the holder of the mortgage and one of the participating directors relies upon consent she would have to show that the real party in interest, that is, Shriver, consented.

As was said by Vice-Chancellor Leaming in *Arnold v. Searing*, 73 N. J. E. 262 (at p. 265):

“* * * the principle that a corporation cannot complain of a transaction to which all of its stockholders assent necessarily embodies the idea that the assent is upon the part of the real parties in interest. One who, in fact, though not in form, occupies the position of a non-assenting stockholder should not on any theory of unanimous consent be barred the assertion of his rights as such.”

Under the law, ownership of a certificate can be transferred without being entered on the books of the company. In fact, it is quite usual for stock to be transferred in that way. One holding such stock, of course, is bound to know that any lawful act voted for by the registered holder of that stock is good as against him. But he has the right to rely upon the rule of law and of morals that the directors of the corporation will not transfer to themselves from the company treasury \$37,500, in any form, by mortgage or otherwise, without consideration moving to the company, and also has the right to rely upon the rule of law that even if some consideration did pass, nevertheless the transaction would be subject to review by the Courts.

5. The Sutton mortgage is void as an improper appropriation of corporate assets on the part of directors, whether taken on the petitioner's proofs or on the proofs presented by the respondents.

The case made by the petition and supporting

affidavits is that Edward M. Sutton and Naomi M. Sutton, his wife, agreed to sell to Charlotte S. Chester all of the stock in the company and to pay for it partly in cash and partly by a mortgage of \$37,500, on the assets of the company (Case, pp. 48, 49, 56, to 61). The defendants' affidavits did not dispute the making of the agreement but set up resolutions directing the mortgage to be executed in consideration of the delivery of 375 shares of stock by Charlotte S. Chester, Charlotte S. Chester executing an assignment of any right she had to obtain such a mortgage to Naomi M. Sutton. All of these parties were directors of the company, at the time of making the August, 1927, agreement. In September, 1928, when the mortgage was given, Mrs. Sutton delivered a resignation as part of the settlement for her mortgage, but remained a director until the mortgage was delivered. Her husband had died, and the complainant, Ocean City Title & Trust Company, was his executor in September, 1928, and as such joined in the settlement (Case, pp. 74-76, 80-83, 87-89, 93).

Without regard to whether the petitioner's statement of the transaction was correct, or whether the claims of the respondents were correct, the transaction would be void on well recognized principles. On the petitioner's theory, the mortgage was an attempt to pay part of the purchase price due from Chester to the Suttons while they were all directors, and, therefore, the mortgage would be without consideration. On the respondents' theory, the mortgage was in payment of a sale made to the company by Charlotte S. Chester of stock, while all parties interested in the sale were directors. Therefore, the mortgage would be in the same category as any other agreement of directors whereby they received advantage at the expense of the corporation.

As a matter of fact we contend that the stock sale

by Charlotte S. Chester to the company was merely colorable and was never made, that the resolutions were a mere blind. But so far as this present point is concerned, it makes no difference whether the transaction was one thing or the other. Upon either theory the acts complained of were not merely acts done without authority, but were unlawful acts and a breach of trust upon the part of all participating directors.

In the opinion filed by Vice-Chancellor Ingersoll, he said that "Whether or not the stockholders of the corporation have the power to give a selected stockholder a mortgage lien on its assets for stock is a question that is not presented by counsel in this matter." It is true that the petition and petitioner's affidavits do not raise this question, because it could only raise as new matter when respondents' affidavits were received, *but this question was argued in the Court below, the stock transaction was attacked, as the briefs of respective counsel will show.* And the question is also raised by the grounds of appeal. No reference was made by the Vice-Chancellor in his opinion to the fact that the parties benefiting by the transaction were directors, yet that was raised and vigorously urged at the hearing and in the briefs.

There are several cases which seem to be quite close upon the facts. In the Court of Chancery, there is the case of *Oliver v. Rahway Ice Company*, 64 N. J. E., page 596. In that case a bill had been filed to foreclose a mortgage made by the defendant to the complainant to secure the sum of \$12,000.00. The complainant and his brother had been stockholders of the company, holding together 300 shares of the par value of \$100.00 each, on which shares \$15,000.00 had been paid into the treasury of the company. The company agreed to take these shares for what had been paid thereon. \$3,000.00 was paid

in cash and the balance was secured by the mortgage sought to be foreclosed. It will be noticed that in this case the attempt was to purchase the stock by the corporation, and not as in the present case the purchase of the stock by one of the directors from another director in consideration of the delivery to the vendor of a mortgage on the corporate property. It was held that the evidence did not bring the case within the decisions relating to the purchase by a corporation of its own capital stock. It was held, however, that inasmuch as these two brothers were directors of the company at the time the sale was sanctioned, the transaction would not be allowed to stand.

Another case quite similar on the facts is *Guild v. Parker*, 43 N. J. Law, in this court. The Hope Life Insurance Company offered to re-insure the New Jersey Mutual Life Insurance Company, to assume the obligations of the New Jersey company and to reimburse the stockholders of that company the amount of the guaranty capital with fifty per cent bonus thereon, payable out of the bonds and mortgages of the New Jersey corporation. It will be observed that in this matter the assets of the New Jersey company were to be used by the Hope Company for what was in effect a purchase of the assets of the New Jersey company. The transaction is discussed in detail in the opinion of the Court. It was held that the transaction fell directly within the operation of the rule that a director of a corporation cannot make for himself or for his own benefit, a contract that will bind the company and that the contract might be repudiated by the company, at the instance of a stockholder. This was upon the unanimous opinion of this Court upon facts almost identical with those now before the Court.

In the case of *Heidler v. Werner*, 97 N. J. Equity,

505, this Court, in affirming the Court of Chancery, said, per Mr. Justice Parker:

“A much more serious question is not raised at all, either by pleadings, evidence or argument. We mention it to avoid any inference of our giving countenance, even *sub silentio*, to the idea that a corporation may lawfully execute a bond secured by mortgage on its property, to the detriment of its creditors and stockholders, as a pure accommodation to one of its officers or stockholders, or, indeed, anyone else. This is precisely what was done in this case; the corporation made the bond and mortgage to secure the debt of Rose. The law is settled to the contrary.”

Other cases upon the general principle, to which reference may be made, are:

- Booth v. Land Filling Co.*, 68 N. J. E. 536 @ 540-542 (V. C. Garrison);
Mitchell v. United Box Co., 72 N. J. E. 580 (V. C. Emery);
Lillard v. Oil Co., 70 N. J. E. 1927 (Vice-Chancellor Emery);
Keely v. Black, 90 N. J. E. 439 (V. C. Backes);
Kelsey v. New England St. Ry. Co., 62 N. J. E. 742 (Court of Errors and Appeals);
Hilles v. Parrish, 14 N. J. E. 380 (Chancellor Green);
Purchase v. Atlantic Safe Dep. & Tr. Co., 81 E. 344 (Leaming, V. C.);
Stewart v. Lehigh Valley, 38 L. 505, @ 522 and 523 (Court of Errors and Appeals);
General Investment Co., v. American Hide and Leather Co. (Court of Errors and Appeals), 97 N. J. E. 214, 97 N. J. E. 230; 98 N. J. E. 326.

6. The alleged stock purchased by the company from ~~Shriver~~ ^{SUTTON} was *ultra vires* and void, aside from any question of the invalidity of the transaction because of directors' interest.

No direct testimony was introduced as to the purpose of the company in purchasing this stock. By inference, the purpose was to enable Charlotte S. Chester to pay Sutton for the stock. But unless the purchase was for a legitimate corporate purpose, and made when the company had a surplus over debts sufficient to make the purchase, as to which the proofs are silent, the transaction is *ultra vires*.

Chapman v. Ironclad Rheostat Co., 62 N. J. L. 497 (Sup. Ct.);

Oliver v. Rahway Ice Co., 64 N. J. E. 596 (Stevens, V. C.);

Berger v. U. S. Steel Corp., 63 N. J. E. 809 (Court of Errors and Appeals);

Knickerbocker Imp. Co. v. Board of Assessors, 74 N. J. L. 583 (Court of Errors and Appeals);

Beach v. Palisade Realty, etc., Co., 80 N. J. L. 238 (Court of Errors and Appeals);

Hoover Steel Ball Co. v. Schaefer Ball Bearing Co., 90 N. J. E. 164 (V. C. Lane).

In the opinion below, reference is made to the statute authorizing decrease of the capital stock, but there was no suggestion in the evidence from which it could be determined (if the stock transaction on the part of the company was carried out), whether the stock was purchased and became treasury stock, or was to be retired or what was to be done with it. All the proofs showed were the resolutions that the mortgage was to be executed in consideration of the "delivery" of the shares.

On its face the transaction upon the respondents' own proofs, was *ultra vires*.

7. There was, in fact, no purchase of stock by the company. The transaction set up in defense was a mere pretense.

The details of the settlement (so-called) which was made when the mortgage was executed and delivered are shown in the affidavits of Bell (pp. 75-76), Price (pp. 80-83), Sutton (pp. 87 to 89), Koch (pp. 91-92), Cole (p. 93), and the oral testimony of Price (73-74). These are abstracted above and will not be repeated here. This testimony makes manifest that no attempt was made to carry out any supposed purchase of stock by the company from Charlotte S. Chester, but that on the contrary the mortgage was delivered and exchanged for the Sutton stock, and that what really was done was that the agreement of August, 1927, was carried out and not the last minute arrangement shown in the minutes. The 375 shares of stock referred to as the consideration for the mortgage on the respondents' theory were, in fact, never delivered. As Mr. Price said (p. 74) "We didn't go through that formality."

8. The Ocean City Title & Trust Company had knowledge of the circumstances and is not an innocent holder for value.

So far as the title company is concerned, it does appear that that company was the executor of one of the parties to the agreement, was a vendor of a part of the stock, took the mortgage as security for moneys due it by the decedent for which it was executor, made a settlement without attempting to obtain the stock and insured the mortgage although no money had ever been advanced upon it and no consideration given therefor by anyone. It may be that the title company supposed that the purchase by

Chester of the stock would, under the circumstances, make the mortgage good as against him by way of estoppel and that, therefore, they were not concerned with the fact that there was no debt due upon the mortgage, but before that company could have safely relied upon estoppel to validate the transaction upon its face constituting a breach of trust, it should have made inquiry as to possible claims against the stock. The transaction was illegal in its nature and under the cases referred to the burden would be upon the one claiming in the mortgage to sustain it. It does not appear that the title company ever inquired at the time of the transaction as to the location of the certificates for the stock nor whether any persons other than Chester and Sutton were interested therein. By their failure to make that inquiry or to require the production of the certificates, they have made it possible for the directors of the corporation to commit a fraud upon an innocent, unsuspecting pledgee of stock who held the same as security for a large sum of money. If the transaction were merely one which involved acts not authorized, the transaction would be different, but it was in its nature a breach of trust.

It is respectfully submitted that the order of the Court of Chancery should be reversed and the cause remitted to the end that issues may be framed and the matters raised by the issues to be tried out according to the usual practice of the Court of Chancery, and that in the meanwhile, the moneys realized from the sale should remain subject to the order made at the time of the application for the stay pending the appeal.

JOSEPH H. CARR,

*Attorney for and of Counsel
with William F. Shriver,
Appellant.*

New Jersey Court of Errors and Appeals

—
Between

OCEAN CITY TITLE AND TRUST COMPANY,
Complainant-Respondent,

and

STRAND PROPERTIES, INC., ET AL.,
Defendants-Appellants.

—
ON PETITION OF WILLIAM F. SHRIVER.

—
ON APPEAL FROM COURT OF CHANCERY.

—
BRIEF FOR RESPONDENT.

—
STATEMENT.

The bottom question is the validity of a mortgage made by Strand Properties, Inc., to Naomi M. Sutton, and by her assigned to Ocean City Title and Trust Company as against petitioner-appellant,

William F. Shriver. There are no disputed facts and the question is one of law.

Mr. and Mrs. Sutton and Mr. and Mrs. Chester owned all of the stock of Strand Properties, Inc. Chester borrowed from Shriver and assigned as collateral for the loan, among other things, his 641 shares of the corporation, which Shriver did not have transferred on the books of the company. By agreement of August 25, 1927, among all the stockholders, Sutton and his wife were to sell and Charlotte S. Chester was to buy all the stock in Strand Properties, Inc., owned by the Suttons, and they were to receive the sum of \$49,868.19, a part of the consideration is the mortgage under contest.

On or about September 22, 1928, at a meeting of the corporation at which all the directors were present, a resolution was adopted as follows:

“That Charlotte S. Chester should deliver to the company 375 shares of its capital stock, in consideration of the company executing to her or her assigns, a second mortgage on the property of the company between Eighth and Ninth Streets on the boardwalk, known as the Strand Theatre property; said mortgage to be a second mortgage, under and subject to a first mortgage of \$65,000; the amount of the second mortgage to be \$37,500; said mortgage to be payable within four years from date, with interest at the rate of 6%, provided installments of \$2,500 should be paid, as follows.” &c.

This resolution was subsequently adopted by the vote of all the stockholders.

Sutton's stock was delivered to Ralph Chester, secretary of the company, for the express purpose of cancelling 375 shares of the stock in accordance with

the agreement and resolution. The mortgage transaction was closed at the office of the Title and Trust Company which insured the mortgage after disclosure of the foregoing facts, and at which time neither Mrs. Sutton nor anyone else as far as the record shows, had any knowledge of the fact that Shriver held the stock of Ralph Chester.

A bill was filed to foreclose the first mortgage, and Mrs. Sutton as holder of the second mortgage was made a party, she having in the meanwhile assigned the mortgage to the Title and Trust Company for a loan without knowledge of Shriver's ownership of the stock. After the property was advertised to be sold under foreclosure and before sale, Shriver filed his petition; sale was had subject to payment into Court of the surplus after satisfying the first mortgage with interest and costs. The contest is now over the surplus.

ARGUMENT.

THE MORTGAGE IS A VALID ONE AGAINST
SHRIVER.

Mrs. Sutton had no knowledge of the assignment by Ralph Chester of his stock to Shriver. She parted with her stock upon the theory that 375 shares of either her stock, or the Chesters' would be surrendered to the treasurer of the corporation for cancellation. The stock was par at \$100 and these shares represented the amount of the mortgage. No one of the stockholders could be heard to complain of the transaction as they all participated in it. No one of them does complain, nor does the corporation

complain. Shriver is without standing to complain. He could have protected himself by having his stock transferred on the books of the company, or notifying the stockholders and directors that he owned the stock, and thus made it impossible for any stockholder or director to assert that they did not know of his rights under the assignment of the stock to him, if any. As is pointed out in the opinion of the Vice-Chancellor, he has no right to vote on the resolution because he was not a stockholder of record, and he had no right to notice of a meeting of the stockholders because he was not a stockholder of record. Such is the decision in *Thomas v. International Silver Co.*, 72 Equity, where at page 226, it is said:

“According to Section 37 of the same Act (the Corporation Act) the pledgor may represent his stock at all meetings and vote thereon as a stockholder, ‘unless in the transfer to the pledgee on the books of the company he shall have expressly empowered the pledgee to vote thereon.’ ”

To the same effect is *Canadian Improvement Company v. Lea*, 74 Eq., page 250, where we have:

“The duty of the corporation is to recognize the registered holder shown on its transfer books. As we said in the case of *Argus Printing Company*, 12 L. R. A. 781: ‘It would indeed be a startling doctrine that “the legality of business transacted at stockholders’ meetings should be subject to the ultimate decision of complicated questions arising between different claimants of the same stock.” ’ ”

Mrs. Sutton and the Ocean City Title and Trust Company are innocent parties, and both gave value

for the mortgage without notice of Shriver's alleged interest. If the transaction was illegal as against him, he should be estopped from now asserting it, because he might have averted it either by having the stock transferred on the books of the company, which would have afforded at least constructive notice to Mrs. Sutton and the Title and Trust Company, or, by giving actual notice to the proper officer of the company.

But apart from the question of estoppel, the transaction was a valid one against Shriver. The corporation could not plead *ultra vires*, assuming the making of the mortgage was *ultra vires*.

But the making of the mortgage was not *ultra vires*. We quote from the opinion of the Vice-Chancellor:

"This is an application to set aside a mortgage made by a corporation upon the ground that no consideration passed to the corporation. A consideration did pass, that is, par value of shares of stock presented by a stockholder and accepted by the company for cancellation."

As previously stated, the proper officer of the corporation had delivered to him for cancellation 375 shares of the stock of the company which represented the value of the mortgage, and Mrs. Chester assigned to Mrs. Sutton her right to possess the mortgage upon surrender of 375 shares of stock. No question was made but that the stock was worth its par. The Vice-Chancellor found that the effect of the transaction was to decrease the capital stock and quotes from the general corporation Act which provides:

"The decrease of capital stock or of capital may be effected by * * * by the purchase of

shares for retirement, either pro rata from all holders of shares of that class of stock or from time to time by purchase in the open market at not exceeding such price or prices as are fixed or approved by the stockholders entitled to vote upon the decrease to be effected in that manner."

In consequence of the capital being reduced to the extent of the value of the mortgage, Shriver has not been injured as his stock is worth as much as ever it was worth. The corporation received value, dollar for dollar. Mrs. Sutton parted with stock worth par and Mrs. Chester surrendered for cancellation as per agreement and resolution of stockholders and directors, 375 shares of her stock. It is of no moment to Shriver what procedure was adopted; it may not have been in strict accordance with the statute which we do not concede, but so long as the spirit of the statute was followed and he has not been injured, he cannot complain. He does not claim that the stock was not worth par at the time of the transaction or at the time of the filing of his petition. Not having been injured, there is no relief to which he is entitled.

The Vice-Chancellor found as a fact that the transaction was neither *ultra vires* nor fraudulent, and says:

"Petitioner is bound by the acts of the stockholders or directors not *ultra vires* or fraudulent."

There is no error in the decree and it should therefore be affirmed.

Respectfully submitted,
COLE & COLE,

*Solicitors for and of Counsel
with Respondent.*

New Jersey Court of Errors and Appeals

OCEAN CITY TITLE & TRUST COMPANY,
Complainant-Respondent,

v.

STRAND PROPERTIES, INC., *et als.*,
Defendants.

APPEAL OF WILLIAM F. SHRIVER.

BRIEF FOR NAOMI M. SUTTON.

WHETHER OR NOT A FINAL DECREE
SHALL BE OPENED IS DISCRETIONARY IN
THE COURT OF CHANCERY.

In the case of *Williams v. Lowe* this Court held, whether or not a final decree shall be opened is discretionary in the Court of Chancery, and where an order refusing to open a decree was neither an abuse of such discretion nor the result of mistake or of any imposition practiced on that Court, this Court will not review such order for the mere pur-

pose of substituting its discretion for that of the Court of Chancery.

Williams v. Lowe, 79 N. J. Eq. 173;

Sandford v. Wellborn, 85 N. J. Eq. 577.

The exceptions to the above rule are in case of newly-discovered evidence or some special equity, such as fraud or surprise.

SHRIVER KNEW OF SUIT TO FORECLOSE
MORTGAGE PRIOR TO ENTERING OF FINAL
DECREE AND THEREFORE IN LACHES.

It is apparent that Shriver knew that the mortgage of \$37,500 had been given to Mrs. Sutton and that he had this knowledge prior to the entering of the final decree which he is now attempting to open.

Shriver himself admits in his petition to open the decree that he had such knowledge. "Petitioner did not learn of the existence of the mortgage made by Strand Properties, Inc., to Naomi M. Sutton, dated September 12, 1928, given to secure the payment of the sum of \$37,500.00, until the summer of 1929" (State of Case, page 47, lines 23-27). Since the final decree in this cause was not entered until December 24, 1929, Shriver had ample time to file a petition to be made a party to the original suit. This he failed and therefore is in laches and this application comes untimely, which is all the more reason why the Court of Chancery should refuse to open the final decree. It is submitted that for this reason alone, if for no other, that it cannot now be said that the Court of Chancery abused its discretionary power in refusing to open the decree.

IN A CLEAR CASE OF HYPOTHECATION,
AND WHERE THE STOCK HAS NOT BEEN
TRANSFERRED, THE RIGHT TO VOTE RE-
MAINS IN THE PLEDGOR.

“Hypothecation is conventional, and implies the power of rendering the subject available by way of sale to satisfy the debt on default of payment. The stock stood on the transfer books in the name of the voters. This is generally conclusive upon the inspectors; and we consider it so in this case.”

Thompson on Corporations, Section 961,
page 336;

Thomas v. International Silver Co., 72 N.
J. Eq. 224.

On the question of right as between pledgor and pledgee to vote the stock, the Supreme Court of Nebraska say:

“Undoubtedly, where the pledgee is registered as owner of the shares on the books of the company, its officers, in conducting an election, will not look behind the books to ascertain who are the real owners of the shares. But a court of equity may do so and may enjoin the pledgee from voting the shares pledged in prejudice to the rights of the pledgor.”

Haskell v. Read, 93 N. W. 997.

It is submitted, therefore, that even if Shriver had caused his stock to be transferred on the books of the company, that Chester could have invoked the aid of the Court of Chancery and have compelled Shriver to vote for the creation of the mortgage to

Mrs. Sutton. There is no allegation in the petition of Shriver to open the decree that the creation of the mortgage dissipated all of the assets of the Strand Properties, Inc., or at least there was no affidavit or proof submitted to the Court that such was the case.

THERE WAS CONSIDERATION FOR THE MORTGAGE.

It is submitted that there was ample consideration for the mortgage as is discussed in the opinion of Vice-Chancellor Ingersoll in his conclusions (State of Case, page 94).

It is submitted, therefore, that the order of the Court of Chancery should be confirmed.

Respectfully submitted,

F. STANLEY KREPS,
*Attorney for and of Counsel
with Naomi M. Sutton.*

