INDEX.

	Page
Bill of Complaint	1
Answer of Mary Wooster Sutton	7
Answer of Emma C. Reilly	11
Replication to Answer of Mary Wooster Sutton	17
Replication to Answer of Emma C. Reilly	18
Exhibits	127
Opinion	140
Final Decree	152
Notice of Appeal	154
Petition of Appeal	155
Answer to Petition of Appeal	157

Testimony.

	Direct	Cross
Augustus M. Minton	21	24
William O'Brien	25, 33	33, 34
Warren H. Smock	35, 54, 78	45, 121
Meta Von Glahn	55, 75	56
May Straus-Sherman	58, 76	No
Mary Wooster Sutton	60, 80, 87, 117	95
Emma C. Reilly	61	No
Edward J. Reilly	66, 73	72, 75
Leon Reussille	125	No

Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

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

The complainant, Augustus M. Minton, of the Borough of Red Bank, in the County of Monmouth and State of New Jersey, respectfully shows that:

1. On February 2nd, 1925, John H. Van Mater, Sheriff of Monmouth County, conveyed to complainant, August M. Minton, for a full and valuable consideration, by bargain and sale deed, in fee simple, the following described lands and premises in the Borough of Red Bank, in the County of Monmouth and State of New Jersey:

BEGINNING in the northerly line of Mechanic Street at the southwest corner of land of Mary E. Holbrook; thence westerly along Mechanic Street forty feet to a stake; thence north six degrees east one hundred and thirty-two feet and eight inches, more or less, to land of formerly Samuel T. Hendrickson; thence north seventy-nine degrees and thirty minutes east forty feet, more or less, along the last said line to a stone for a corner; thence south six degrees east one hundred and thirty-five feet along said Holbrook's land to the place of Beginning.

The said deed, having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was, on February 5th, 1925, duly recorded in the Clerk's Office of the County of Monmouth in Book 1283 of Deeds for said County, at pages 447 &c.

2. On March 5th, 1925, the complainant, Augustus M. Minton, conveyed said premises, in fee simple, to the complainant, Investment & Realty

Corporation, a corporation of the State of New Jersey, which is the present owner of record theeof in fee.

3. On or about December 20th, 1924, defendants became, by assignment of mortgage recorded December 26th, 1924 in the Monmouth County Clerk's Office in Book 92 of Assignments of Mortgages, page 58, the owners of record of the mortgage in said assignment mentioned purporting to cover complainants' premises and other adjoining premises not owned by complainants, and by virtue thereof claim and assert a lien on complainants' said premises. Said mortgage remains uncancelled of record and is recorded in Book 562 of Mortgages, page 260, in the Monmouth County Clerk's Office.

4. Said mortgage of defendants does not actually cover, and was never intended to cover complainants' premises, and, if so intended, does not operate as notice to complainants because the description therein is obscure and indefinite.

5. The mortgage claimed to be held by defendants and claimed to be a lien on complainants' premises was discharged by payment, or otherwise, and duly cancelled on or about October 1st, 1924, but was not cancelled of record. Said mortgage was then endorsed for cancellation and, in return for the amount then due thereon, was delivered up by the holder, or her agents or solicitors, to Mary Wooster Sutton, a solicitor of this court and one of the defendants to this suit, who then represented one who claimed to be the owner of the premises therein described. The defendant, Mary Wooster Sutton, well knew the effect of said cancellation and subsequently, with the design of reviving said mortgage, on or about December 20th, 1924, attempted to avoid the effect of said cancellation by causing

lines to be drawn through the said endorsement and by procuring, on or about the same time from the former holder of the mortgage, an attempted assignment of the same. The payment aforesaid was made for the admitted purpose only of settling certain foreclosure proceedings then pending on said mortgage, and of paying off said mortgage and the accompanying bond.

6. On or about the same date of the cancellation aforesaid, there was due on said mortgage, not only principal and interest, but also costs which had accrued in foreclosure proceedings then pending against the owners, Edward J. Reilly and his wife the defendant Emma C. Reilly, and on October 2nd, 1924, the solicitors of the owner of the mortgage, after cancelling the same as aforesaid, instructed the Sheriff of Monmouth County to return the execution in said foreclosure proceedings pending satisfied to the Clerk in Chancery as the mortgage had been paid with costs; and on October 3rd, 1924, the Sheriff of Monmouth, in accordance with said instructions, returned the execution satisfied to the Clerk of this Court where it still remains of record. Subsequently and on or about January 24th, 1925, the defendant Mary Wooster Sutton, in furtherance of her design to revive the lien of said mortgage, obtained from the former owner of the final decree in said foreclosure proceedings, an attempted assignment thereof, although at that time said final decree had been discharged, the foreclosure proceedings discontinued, and the execution returned satisfied.

7. Defendants claim title to their mortgage by assignment under date of October 1st, 1924, but at that time no assignment had actually been made. Said assignment, ineffective as aforesaid because of

cancellation of the mortgage, was actually completed by execution and delivery on or about December 20th, 1924, and no consideration was paid for same; and was not recorded until December 26th, 1924, which date was three days before complainant purchased his premises. The defendant, Mary Wooster Sutton, was then and still is solicitor of the defandant Emma C. Reilly, and, at the time of sale to complainant of his premises, thought that the holder of the mortgage, which had been assigned to defendants, had been made a party defendant in the foreclosure proceedings under which complainant took title, and defendants therefore accepted the assignment of their mortgage relying on other premises described in said mortgage and not on complainant's premises.

8. Defendant, Mary Wooster Sutton, was present at Sheriff's sale of complainant's premises representing, not only herself, but the defendant Emma C. Reilly and Edward J. Reilly, who claimed to be the owner. Before the property was struck off to complainant, the Sheriff asked those present if anyone had any statements or objections to sale. There were no statements or objections and the property was then struck off to complainant. Said Mary Wooster Sutton made no statement before said sale that she or defendant Emma C. Reilly claimed a lien on said premises so sold. Immediately after sale, defendant Mary Wooster Sutton, with intent to mislead and deceive complainant, stated that the "Brown" mortgages were still effective although they had in fact been cut off by sale, and made no mention of the mortgage held by herself and the defendant Emma C. Reilly and formerly owned by May Strauss Sherman, defendants' alleged assignor, and failed to disclose facts which she

was then in equity under a duty to disclose and now seeks, by the alleged lien, to profit by such failure and conduct. Conduct of defendants, Mary Wooster Sutton and Emma C. Reilly, is such as to estop them from asserting any lien on complainants' premises.

Complainants are without adequate remedy in the courts of law, and therefore pray:

1. That Mary Wooster Sutton and Emma C. Reilly, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That said defendants may be ordered and decreed to surrender their said bond and mortgage, properly indorsed for cancellation to complainants, or to one of them, or to deliver to complainant, or one of them, a proper release of mortgage covering complainants' premises.

3. That the said mortgage may be decreed to be null, void and cancelled of record, or that it be ordered and decreed that defendants' mortgage be no longer a lien upon complainants' premises, against said complainants or either of them, or any person or persons claiming by, from or under them or either of them.

4. That the said defendants and all persons claiming by, from or under them or either of them, may be debarred and perpetually enjoined from collecting any money upon the said mortgage and bond accompanying same, or that said defendants and all persons claiming by, from or under them or either of them, may be debarred and perpetually enjoined from asserting by claim, suit, or otherwise, any lien on complainants' premises under and by virtue of said mortgage, and that defendants have no estate, interest or right in, or encumbrance on said premises of complainants.

Bill of Complaint.

5. 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.

JOHN S. APPLEGATE & SON,

Solrs. for and of Counsel with Complainants.

Answer of Mary Wooster Sutton.

IN CHANCERY OF NEW JERSEY.

Between AUGUSTUS M. MINTON, Complainant and MARY WOOSTER SUTTON and EMMA C. REILLY, Defendants.	**On Bill, etc.** **ANSWER of MARY WOOSTER SUTTON** **To Amended Bill of Complaint.**

The answer of the defendant, Mary Wooster Sutton, to the amended bill of complaint.

This defendant answering says that:

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted excepting as to the date of becoming the owners of the mortgage in question which these defendants purchased for a full consideration paid to the original mortgagee, May H. Strauss (now Mrs. Sherman), through her solicitors Wilson & Smock in their office and to their clerk Miss Meta Von Glahn on October 1st, 1924, when the bond and mortgage were delivered to this defendant, who thereupon made inquiry as to whether there was also a deed of assignment ready for delivery and a reply in the negative was made by said clerk. This defendant immediately stated that she would see Mr. Warren H. Smock, one of the aforesaid firm of solicitors, about the matter later and accepted the bond and mortgage keeping them in her possession to date hereof, having made no

attempt to have said mortgage cancelled of record. Emma C. Reilly, defendant herein, actually kept the bond in her home for a short time in October, 1924, but since that period both instruments have been in the safe deposit box in the bank in the sole control of this defendant who took them therefrom upon certain necessary occasions and replaced them in said deposit box.

4. Paragraph 4, of complainant's bill, is denied.

5. The said mortgage was not duly cancelled on October 1, 1924, notwithstanding the fact that certain words were thereupon endorsed by the solicitor of Mrs. Sherman, but which said words were struck off by means of four heavy ink lines drawn through said words by the said solicitor himself at the request of this defendant who at the first opportunity she had informed said solicitor that these defendants did not want said words on the mortgage.

This defendant did not represent any person who claimed to be the owner of the premises described in said mortgage on the 1st day of October, 1924. The owner then and now is The Reilly Storage and Transportation Company (Louis E. Brown, in fact) in so far as the Second Tract of said mortgaged premises is concerned, and until December 29, 1924 title to the First Tract of said premises was also in said Company (Louis E. Brown), when by sheriff's sale the title to the First Tract was vested in Augustus M. Minton complainant herein. This defendant has never represented Louis E. Brown or the Reilly Storage & Transportation Company.

On the 20th day of December, 1924, this defendant received the deed of assignment duly executed by the original mortgagee, May H. Strauss Sherman on that date, from the hands of Mrs. Sherman herself, who had been instructed by letter from her said

solicitor, Mr. Smock, to execute the assignment and to deliver it to this defendant, expecting its return by mail to the office of said solicitor but as Mrs. Sherman lay at the point of death for several weeks in St. Vincent's hospital in New York City in the interim between October 1st, 1924 and December 20th, 1924, the deed of assignment was not mailed to Mr. Smock, and this defendant went to New York City on December 20th, 1924 and brought the executed assignment to Red Bank with her. It was necessary to have the County Clerk's Certificate from New York County to show the authority of the Notary Public who had taken the acknowledgment of Mrs. Sherman on December 20th (Saturday), and the required Certificate was not obtained until the 26th day of December, 1924, whereupon the deed of assignment was recorded on that date, being the earliest opportunity for so recording it, which was three days before the sheriff's sale of the First Tract of said mortgaged premises to Augustus M. Minton, complainant herein.

The payment of $2107.40 made by this defendant on the 1st day of October, 1924, was not made to pay off the said mortgage but to purchase it for these defendants according to an agreement made between them in January 1924 when Emma C. Reilly had paid $545.18 on account of said mortgage and bond leaving a balance due of $2000 which was to be equally divided between these defendants and full payment to be made for the bond and mortgage as soon as possible. The original mortgagor, Edward J. Reilly, consented to this plan, but took no part in supplying the moneys actually paid for the bond and mortgage, either on January 24, 1924 when Emma C. Reilly paid her separate funds, or on October 1, 1924 when this defendant paid the en-

Answer of Mary Wooster Sutton.

tire balance due without financial assistance from either Mr. or Mrs. Reilly, but entirely upon her own responsibility and from her own bank account.

6. The facts as stated in paragraph 6 were unknown to this defendant until January (last day or thereabouts) or February, 1925, when the solicitor of complainant Minton at Freehold, N. J., called the attention of this defendant to the situation in the sheriff's office, but previous to this discovery an assignment of the decree and a substitution of attorney had been made to this defendant by Mr. Smock and Mrs. Sherman.

7. Paragraph 7 has been partly answered in the foregoing paragraphs herein. This defendant admits that she thought, of course, that May H. Strauss Sherman had been made a party to the foreclosure suit brought by Augustus M. Minton in August, 1923, which resulted in the sale of December 29, 1924, and did not know of the omission of Mrs. Sherman as a party defendant until after the sale to Mr. Minton when this defendant was informed in January 1925, by the solicitor of Mr. Minton, that Mrs. Sherman was not a party to said suit.

8. In paragraph 8 the statement that this defendant made no mention of the mortgage then held by herself and Mrs. Reilly is admitted, but there was no intention to deceive or mislead any person. She believed that she and Mrs. Reilly had lost their money invested in the May Strauss Sherman mortgage. There was nothing to say. It is denied that the conduct of defendants is such as to estop them from asserting any lien on complainant's premises.

This defendant prays that she may be dismissed with her reasonable costs and charges in this suit.

MARY WOOSTER SUTTON,
Solicitor of Defendant.

Answer of Emma C. Reilly.

IN CHANCERY OF NEW JERSEY.

Between

AUGUSTUS M. MINTON,
Complainant

and

MARY WOOSTER SUTTON and EMMA C. REILLY,
Defendants.

On Bill, etc.

ANSWER of EMMA C. REILLY.

To Amended Bill of Complaint.

The answer of the defendant, Emma C. Reilly, to the amended bill of complaint.

This defendant says that:

1. Defendant has no knowledge or information sufficient to form a belief as to the statements in paragraphs 1 and 2.

2. Paragraph 3 is admitted excepting as to the date of becoming the owners of the mortgage in question. The true date of ownership of said bond and mortgage in its commencement is the 1st day of October, 1924, and not as stated by complainant to be December 20th, 1924.

3. Paragraph 4 is denied. The description of the premises covered by said mortgage now held by defendants is clear and definite, corresponding accurately with a map of the same made in 1897 by a competent civil engineer, and said description was made by Edmund Wilson, a former solicitor of this court, before whom the acknowledgment of its execution was taken. Describing lands situated in Red Bank, New Jersey, on the north side of Mechanic

Street, and continuing as follows:

BEGINNING at the southwest corner of land of Mary H. Holbrook; thence (1) in a northerly direction along the westerly boundary of her lands to a stake in the southerly boundary of lands of Lodge No. 233, Benevolent Protective Order of Elks; thence (2) in a westerly direction along the southerly boundary of lands of the said Elks Lodge and lands of Martin Griffin to a stake; thence (3) in a southerly direction, still along lands of said Griffin to a stake which marks the northwest corner of lands of Sigmund Eisner; thence (4) in an easterly direction along the northerly boundary of lands of Sigmund Eisner and T. F. Clusey, to the northeast corner of lands of the said Clusey; thence (5) again in a southerly direction along the easterly boundary of lands of said Clusey, to the north side of Mechanic Street; thence (6) easterly, along the northerly side of Mechanic Street, to the place of beginning.

The said mortgage was duly recorded on October 2, 1919, in the Clerk's office of the County of Monmouth, in Book 562 of Mortgages, page 260, etc., and remains uncancelled of record at date hereof, with the notice of assignment of said mortgage entered in the margin on said page 260, referring to Book 92 of Assignments of Mortgages, page 58.

The Solicitors of complainant failed to make the original mortgagee, May H. Strauss (now Mrs. Sherman), a party to a suit for the foreclosure of a certain mortgage held by Augustus M. Minton, complainant herein also, when the proceedings in foreclosure were begun August 21, 1923, by said Minton then represented by the same solicitors who represent him in this suit. Neither did said solicitors

make this defendant, Emma C. Reilly assignee of the mortgagee Mrs. Sherman, a party to the said foreclosure proceedings, but wholly overlooked said mortgage recorded October 2, 1919. The premises covered by the mortgage in question are composed of two tracts purchased by one Edward J. Reilly from different owners; the so-called First Tract was conveyed to said Reilly in two strips of land, the first in 1908 and the second strip in 1912, together forming a lot of land 40 feet wide. This First Tract is the property now owned by Minton, purchased at the sheriff's sale under his foreclosure suit, December 29, 1924. The Second Tract was conveyed to Edward J. Reilly in 1919 and is also 40 feet wide. The First Tract and the Second Tract are contiguous lands, and both of the said Tracts are covered by the mortgage now held by these defendants.

4. Paragraph 5 is denied as to the statement made claiming a discharge of said mortgage which has not been discharged or cancelled, although this defendant paid $545.18 for interest accumulated and costs to January 24, 1924, in connection with a foreclosure proceeding begun by the original mortgagee, Mrs. Sherman, on September 12, 1923. Said foreclosure was postponed, at request of these defendants, for several months in order to allow time for a decree to be made in a chancery suit to set aside a fraudulent conveyance of the identical First and Second Tracts covered by the mortgage in question. But on the 1st of October, 1924, further costs and interest had accummulated until the sum due on the bond and mortgage at said date amounted to $2107.40 which sum was paid by Mary Wooster Sutton, in the presence of this defendant, and of Edward J. Reilly (former owner of the premises but who had deeded both tracts to one Myron V. Brown

on August 24, 1920 and no reconveyance has yet been made to Reilly notwithstanding the fact that the Vice Chancellor who had charge of the fraudulent conveyance suit stated in his Conclusions filed August 11, 1924, that Reilly's real estate should be conveyed to Reilly upon certain conditions including a supplemental accounting ordered to ascertain "items of charge and discharge" not included in the original accounting in said suit, and which said supplemental accounting is still in the hands of the master and no decree has been filed), whom complainant herein erroneously designates as the "owner" of the premises in question. The aforementioned payment of $2107.40 to the solicitors of the original mortgagee, Mrs. Sherman, was made by means of two checks drawn by Mrs. Sutton upon her individual bank account and this defendant did not provide any part of said funds thus expended nor did Edward J. Reilly, husband of this defendant furnish any of the money paid to the solicitors of Mrs. Sherman for the bond and mortgage in question. The bond and mortgage were both delivered to Mrs. Sutton one of the co-assignees of Mrs. Sherman, and one of the defendants herein, in exchange for the two checks aforesaid amounting to $2107.40 on October 1, 1924. Mrs. Sutton has retained possession of both bond and mortgage and of the deed of assignment ever since she received them from Mrs. Sherman or her solicitors, Wilson & Smock, to date hereof with this defendant's consent as to her share therein. This defendant kept the bond a short time in October, 1924. In January, 1924, these defendants agreed between themselves and in the presence of Edward J. Reilly, who acquiesced in the plans proposed, that they should purchase the bond and mortgage from Mrs. Sherman and take

the assignment from her as recommended to these defendants by Vice Chancellor Foster on January 18, 1924 in open court at Long Branch, N. J. Each assignee decided to pay $1000 for her share of said bond and mortgage, but when October 1st, 1924, the date of the actual final payment for said bond and mortgage assignment and delivery for the full consideration thereon, arrived, it was Mary Wooster Sutton, individually and independently, with no financial assistance fom either Edward J. Reilly or Emma C. Reilly, who paid the full amount due to Mrs. Sherman on October 1, 1924, which sum in addition to the $545.18 paid by this defendant on January 24, 1924, completed the total amount due on the said bond and mortgage. No attempt has ever been made by either of these defendants to have said mortgage cancelled of record.

As to the remaining statements made in paragraph 5 of the amended bill of complaint this defendant has no knowledge or information sufficient to form a belief.

5. The statement made in paragraph 6 that foreclosure proceedings were pending against the "owners," Edward J. Reilly and his wife the defendant Emma C. Reilly, is denied. The title of the foreclosure suit referred to by complainant is May H. Strauss Sherman, Complainant, and The Reilly Storage & Transporation Company, Inc. et al., Defendants. Docket 54 page 245. The title to said premises is now in The Reilly Storage & Transportation Company, Inc., as to the Second Tract; in both tracts in 1924. As to the identity of Louis E. Brown and the Reilly Storage & Transportation Company, it is a matter of record in the case of Reilly et al., Complainants, v. Louis E. Brown et al.,

Answer of Emma C. Reilly.

Defendants, decided August 11, 1924 by Vice Chancellor John E. Foster.

This defendant has no knowledge or information sufficient to form a belief as to the rest of the statements in paragraph 6.

6. In paragraph 7 the statement that defendants relied upon other premises rather than upon complainant's premises when they accepted the assignment of their mortgage is denied. Defendants knew that the mortgage in question covered both tracts of the property owned by Edward J. Reilly, when he in October 1919 made the mortgage to May H. Strauss (Sherman), at the time these defendants accepted the bond and mortgage as their own.

This defendant denies that on October 1st, 1924, no assignment of said mortgage had been made, because the bond and the mortgage were delivered to Mary Wooster Sutton as solicitor of this defendant and also to herself personally as the two assignees who had paid for the assignment, and who were in no wise indebted to the assignor, Mrs. Sherman.

As to further statements in paragraph 7 this defendant has no knowledge.

7. Defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 8 except as to the conduct of defendant Emma C. Reilly being such as to estop her from asserting any lien on complainant's premises which accusation is denied.

This defendant prays that she be dismissed with her reasonable costs and charges in this suit.

MARY WOOSTER SUTTON,
Solicitor of Defendant,
EMMA C. REILLY.

Replication to Answers of Mary Wooster Sutton.

IN CHANCERY OF NEW JERSEY.

Between

AUGUSTUS M. MINTON,
Complainant

and

MARY WOOSTER SUTTON
and EMMA C. REILLY,
Defendants.

On Amended Bill, etc.

REPLICATION

The complainant joins issue on the Answer of the defendant, Mary Wooster Sutton.

JOHN S. APPLEGATE & SON,
Solicitors of Complainant.

Replication to Answers of Emma C. Reilly.

IN CHANCERY OF NEW JERSEY.

Between

AUGUSTUS M. MINTON,

Complainant

and

MARY WOOSTER SUTTON and EMMA C. REILLY,

Defendants.

On Amended Bill, etc.

REPLICATION

The complainant joins issue on the Answer of the defendant, Emma C. Reilly.

JOHN S. APPLEGATE & SON,
Solicitors of Complainant.

Testimony.

IN CHANCERY OF NEW JERSEY.

December 1, 1925.

Between

AUGUSTUS M. MINTON,

Petitioner,

and

MARY WOOSTER SUTTON and EMMA C. REILLY,

Defendants.

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, John H. Backes, Vice Chancellor, at the Chancery Chambers, in the city of Newark, New Jersey, in the presence of John S. Applegate & Son (Leon Reussille) for Petitioner and Mary Wooster Sutton, pro se, and for Emma C. Reilly, the other defendant.

MR. REUSSILLE: We have an amended complaint and answer thereto with replication and ask that they be filed.

I offer a stipulation—it is hereby stipulated between the parties of this suit, Investment Realty Company, has, since the institution of this suit, become the record owner in fee of the premises described in Paragraph 1 of the amnded bill of complaint and is still the legal record owner in fee of said premises and that its title thereto was conveyed to it by deed by Augustus M. Minton and wife

to said company, dated March 5, 1925, and recorded in Book 1290 of Deeds, page 159 of the Monmouth County Clerk's Office; this stipulation shall not operate as waiver of any proof that the defendant may offer as to the validity or invalidity of the foreclosure suit or deed under which the Investment Realty Company took title to said premises.

I also offer the following papers by consent.

Certified copy of deed of Edward J. Reilly to Myron V. Brown, recorded in Book 1123 for Deeds, page 19, of the Monmouth County Clerk's Office.

(Paper marked Exhibit C-1.)

MR. REUSSILLE: I also offer certified copy of deed from Myron V. Brown to the Reilly Storage Transportation Company, recorded in Book 1145 of Deeds, page 106 of the Monmouth County Clerk's office.

(Paper marked Exhibit C-2.)

MR. REUSSILLE: I offer certified copy of deed of John H. Van Mater, Sheriff, to Augustus M. Minton, recorded in Book 1283 of Deeds, page 447, of the Monmouth County Clerk's Office.

(Paper marked Exhibit C-3.)

MR. REUSSILLE: I offer certified copy of deed from Augustus M. Minton, and wife, to the Investment Realty Company, recorded in Book 1290, page 159 of the Monmouth County Clerk's office.

(Paper marked Exhibit C-4.)

MR. REUSSILLE: I offer certified copy of mortgage of Edward J. Reilly to May H. Straus, dated October 1st, 1919, recorded in Book 562 of Mortgages, page 260, of the Monmouth County Clerk's office.

(Paper marked Exhibit C-5.)

MR. REUSSILLE: I offer certified copy of assignment of mortgage from May H. Strauss-Sherman to Mary Wooster Sutton and Emma C. Reilly, recorded in Book 92 of Assignments, page 58, of the Monmouth County Clerk's Office.

(Paper marked Exhibit C-6.)

MR. REUSSILLE: I offer in evidence certified copy of the execution in foreclosure between May H. Strauss-Sherman, complainant, and the Reilly Storage Transportation Company, Incorporated, et als, defendant, Chancery Docket 54-245, together with Sheriff's return on said execution.

(Paper marked Exhibit C-7.)

AUGUSTUS M. MINTON, Sworn for Complainant.

DIRECT EXAMINATION by Mr. Reussille:

Q. You are one of the complainants in this suit, are you not?

A. Yes, sir.

Q. And were at one time the owner of the premises involved in this suit?

A. Yes, sir; I was.

Q. And when did you purchase the same?

A. Why, I purchased it February 2nd, I think, 1925.

Q. And that was in what kind of a proceeding?

A. Sheriff's sale foreclosure.

Q. Whose mortgage was being foreclosed in that proceeding?

A. My own.

Q. And you took title under these foreclosure proceedings?

A. I did.

Q. Did you later convey the property?

A. I did.

Q. When?

A. March 5th, 1925.

Q. To whom?

A. Investment Realty Corporation of Red Bank.

Q. Do you remember what the amount of your decree was in the foreclosure suit?

A. Why, $8300.

Q. And what was the amount which you bid for the property?

A. $6,000.

Q. Can you tell who was present at the sale?

A. Yes, sir; there was the Sheriff and the Clerk, Mr. O'Brien, Mrs. Sutton, Mr. Reussille and myself.

Q. And do you remember what occurred at the Sheriff's sale? Do you remember what occurred?

A. Remember what occurred?

Q. Yes. Yes or no. Do you remember what occurred at that sale?

THE COURT: What took place—what happened?

WITNESS: Yes, sir.

Q. Do you remember whether the Sheriff made any statement—(interrupted.)

THE COURT: What happened?

WITNESS: Why yes, the Sheriff asked "Is there anybody present who has any objection to the sale going on?"

Q. Was there any reply to that?

A. No, there was not. I didn't hear it.

Q. Did the sale then proceed?

A. The sale proceeded, yes, sir.

Q. Then what happened?

A. Why, I made the first bid, fifty five hundred dollars.

Q. You were the only bidder?

A. I was the only bidder.

Q. And the property was struck off to you?

A. At six thousand dollars.

Q. Was Mrs. Sutton present during the bidding?

A. She was; yes, sir.

Q. Do you know whether or not she made any statement to the Sheriff after the sale?

A. Yes, sir; she did make a statement.

Q. What was it?

A. She said the Straus mortgages and the—Mrs. Sutton said that the Brown mortgages and the Straus-Sherman mortgage would not be cut off by the sale.

THE COURT: How long was that after the sale?

WITNESS: Right away.

THE COURT: How long after?

AUGUSTUS M. MINTON—Cross.

WITNESS: Five minutes.

Q. Were the same parties still present when she made that statement?
A. Yes, sir.

THE COURT: After you signed the conditions of sale?

WITNESS: Yes, your Honor.

CROSS EXAMINATION by Mrs. Sutton:

Q. After the Sheriff had signed—Mr. Minton?
A. Yes, ma'am.
Q. Was the remark that you say I made, made after the papers had been drawn up and signed?

THE COURT: After the condition of sale had been signed?

WITNESS: They were made after I signed the papers.

Q. After you signed the papers?

THE COURT: That is what he said.

Q. Mr. Minton, didn't you and Mr. Reussille go into an adjoining room?
A. I do not remember it, no; never in any adjoining room. We were there at the sale and it was only just us there, and that is what was said.
Q. About how many minutes was it after the sale had closed and they had said "Sold" was it that I spoke?

WILLIAM O'BRIEN—Direct.

A. Just a few minutes—four or five minutes.
Q. One minute?
A. Two minutes; five minutes we were out of the place. We looked for you and you had gone home.

WILLIAM O'BRIEN, Sworn for Complainant.

DIRECT EXAMINATION by Mr. Reussille:

Q. You are chief clerk of the Sheriff of the Monmouth County Office?
A. Yes, sir.
Q. Still in that office?
A. Yes, sir.
Q. Do you remember the Straus-Sherman foreclosure suit?
A. Yes, sir.
Q. Have you your docket with you of entries in that suit?
A. I have.

MRS. SUTTON: I object. You said the Straus-Sherman foreclosure.

Q. Do you also remember the Augustus M. Minton foreclosure against the Reilly property?
A. Yes, sir.
Q. And have you your docket covering your entries on that?
A. Yes, sir.
Q. It is your duty to make these entries in this docket?
A. Yes, sir.
Q. This is your handwriting?
A. Yes, sir.

WILLIAM O'BRIEN—Direct.

THE COURT: Offer the book.

MR. REUSSILLE: I offer the book in evidence.

THE COURT: What is it called?

WITNESS: Docket 1 of Executions of the Sheriff's office.

THE COURT: The book will be regarded as Exhibit C-8 but not marked.

Q. Will you turn to the page on which your entries concerning the Straus-Sherman forecolsure are made?
A. Page 69.
Q. Can you tell from your entries there when the sale was first scheduled for?
A. Monday, January 28th, 1924.
Q. Read your record, won't you please, after the caption. What are the entries?
A. Sale would take place on Monday.

THE COURT: What are your entries in the docket after the caption, showing the amount due.

WITNESS: Yes, sir.

THE COURT: What appears?

WITNESS: Then the date received.

THE COURT: Read that, will you?

WITNESS: Received in the Sheriff's office on December 27th, 1923; returned to the Clerk's office on October 3, 1924.

WILLIAM O'BRIEN—Direct.

THE COURT: What clerk's office, Chancery Clerk's office?

WITNESS: Yes, sir, as it was a Chancery suit. Then it shows the Sheriff's fees.

THE COURT: I do not care for that.

WITNESS: Then a letter from Wilson & Smock dated October 2nd, 1924.

Q. On the letter head of Wilson & Smock?
A. Yes, sir.
Q. Addressed?
A. Honorable John H. Van Mater, Sheriff, Freehold, New Jersey, Dear Sir: I enclose check of Mrs. Sutton for thirty nine dollars and ninety cents and my check for forty seven dollars and fifty four cents balance of fee in the May Straus-Sherman v. Reilly Storage Corporation, et als. Will you kindly return the execution satisfied? Very truly yours, Warren H. Smock.

MR. REUSSILLE: I offer in evidence the file in the case of Straus-Sherman v. Reilly Storage & Transportation Company.

WITNESS: No. Edward J. Reilly.

THE COURT: May H. Straus-Sherman complainant and Edward J. Reilly, et als, defendant. Have you the docket number there?

WITNESS: No.

THE COURT: The files in the case in which the

execution was issued of which the witness is now speaking.

MRS. SUTTON: It was March 5th, 1925, that I got a substitution as attorney, because it was October, 1924, that we had taken the assignment and the entry of the May Straus-Sherman mortgage is wrong. That case is wrong. That case is May Straus-Sherman v. the Reilly Storage Transportation Company. That entry is wrong.

THE COURT: You have no right to say that at this time. You may establish it later, if you want to. Read the docket entry.

WITNESS: That is all of that.

THE COURT: Just read the caption, the title.

WITNESS: Execution of May H. Straus-Sherman, complainant, and Edward J. Reilly, Emma C. Reilly, his wife, the Reilly Storage Transportation Company, Incorporated, Louis E. Brown, Elizabeth McDonald and Standard Oil Company, a corporation, defendant.

THE COURT: That was not the title of the cause, was it, as you have now read—was not the title of the cause on your execution.

WITNESS: That is an exact copy of the execution.

THE COURT: All those names appear in the title?

WITNESS: Not on the outside, on the inside.

THE COURT: I mean that was not the title of the cause that you have now read.

WITNESS: No.

Q. Mr. O'Brien, you have read a letter which you received from Mr. Smock.

THE COURT: Have you the docket number?

MRS. SUTTON: I have. 54-245.

Q. Mr. O'Brien you have read a letter which you received from Mr. Warren H. Smock. Does your record show that Mr. Smock was solicitor of the complainant in that suit?
A. Yes, sir—Wilson & Smock.
Q. What did you do after you got it?

THE COURT: Did you make the return?

WITNESS: Made the return at once as he directed.

Q. As a result of that you returned the execution satisfied to the Clerk?
A. Yes, sir.
Q. Now, Mr. O'Brien, you were present, were you not, at the sale of the Minton foreclosure suit against Reilly?
A. Yes, sir.
Q. Your entries in that suit are in that same docket?
A. Yes, sir.
Q. Will you tell us what your docket says about the date of the sale? When did it take place?

A. December 29, 1924.
Q. Read it.
A. The title of the case is Augustus—(interrupted.)

THE COURT: I am also going to ask you to incorporate in full the docket entry of the Sherman mortgage. I may not need it, but read the Sherman first.

WITNESS: The same as I read before?

THE COURT: Right from the beginning.

WITNESS: "May H. Straus-Sherman, complainant, and Edward J. Reilly, Emma C. Reilly, his wife, the Reilly Storage & Transportation Company, Incorporated, Louis E. Brown, Elizabeth McDonald and Standard Oil Company, a corporation, defendant. In Chancery of New Jersey, fi fa. Returnable March 20, 1924, Wilson & Smock, solicitors; decree for complainant $2,263.90, interest from November 21, 1923, $36.59, costs tax at $172.50. Interest from December 5, 1923, $2,39. Decree for defendant Myron V. Brown, $679.06, interest from November 21, 1923, $10.98, costs tax $9.06; interest from December 5, 1923, 12 cents; total $3,174.60. Sheriff's fees $121.38; total $3,296.48. Received December 27, 1923, in Sheriff's office, returned to Clerk October 3rd, 1924." Then follows the letter pasted in the docket from Mr. Smock and stamped "Returned satisfied, money made without sale, October 3rd, 1924."

THE COURT: Those entries state the facts, do they?

WITNESS: Yes, sir.

THE COURT: So far as you know.

WITNESS: Yes, sir.

THE COURT: And the entries were made about the time.

WITNESS: At that time, October 3rd.

THE COURT: The entries were made about the time they bear date?

WITNESS: Yes, sir.

Q. Now the next one.
A. Page 488, docket 1. "Augustus M. Minton, complainant v. Edward J. Reilly, et als, as the Reilly Storage & Transportation Company, Incorporated, Louis E. Brown, Edward J. Reilly, Emma C. Reilly, Standard Oil Company of New Jersey, Myron V. Brown, Elizabeth McDonald, defendants. In Chancery of New Jersey, fi fa, returnable February 15, 1925; John S. Applegate & Sons, solicitor; decree for complainant $7,646.07, interest from October 27, 1924, $117.24; costs tax at $275.13, interest from November 5, 1924, $3.85; total $8042.29. Sheriff's fees, $217.64. Total $8,258.93. Received on November 12, 1924. Returned to Clerk February 6th, 1925." Then a receipt as follows: "Received from John H. Van Mater, Sheriff, February 3rd, 1925, full proceeds of the foreclosure sale of Augustus M. Minton, complainant, and Edward J. Reilly, et als, defendants, in Chancery of New Jersey, by delivery of deed to us for purchaser signed 'John S. Applegate & Sons, solicitor for complainants.'"

Q. Have you read the date of the sale, Mr. O'Brien?

A. December 29, 1924.

Q. And do you know who the property was struck off to?

A. Yes, sir; Mr. Minton.

Q. Do you remember the amount of his bid?

A. Yes, sir.

Q. How much was it?

A. Six thousand dollars.

Q. Do you remember who was present at that sale?

A. Yes, sir.

Q. Who?

A. The Sheriff, myself, you, member of Applegate & Sons office, Mr. Minton and Mrs. Sutton.

Q. Do you remember whether the Sheriff made any statement before the sale?

A. Yes, sir. The Sheriff has a peculiar way of saying, when he starts the sale, "Does anybody here object to this sale taking place?"

THE COURT: Looking for trouble?

WITNESS: I don't know why he does it. He always says that.

THE COURT: He is a doctor, isn't he?

WITNESS: Yes, sir.

Q. Did anyone make any reply to that statement?

A. No reply was made.

Q. Then what happened?

A. I read the conditions of sale, and I read the

description of the property and conditions of sale. There were two bids made, one five thousand and one six thousand.

Q. The property was struck off to Mr. Minton, as you said before.

A. Yes, sir, for six thousand dollars.

Q. Now do you know whether Mr. Minton signed the condition of sale immediately after?

A. In the conditions of sale I wrote the amount in, six thousand dollars, and handed it over to you and said, "I wish whoever bought it in would sign it." Mr. Minton signed the conditions of sale and handed them back to me. As he handed them back to me Mrs. Minton—or Mrs. Sutton made the announcement that this sale did not cut off the Straus-Sherman or the Brown mortgages. That is all that was said.

CROSS EXAMINATION by Mrs. Sutton:

Q. Mr. O'Brien, in entitling the causes in your docket is it your custom to name the owners—(interrupted.)

THE COURT: All defendants mentioned in the execution?

MRS. SUTTON: And it doesn't matter which one comes first so as to give the title the correct name?

THE COURT: No.

REDIRECT EXAMINATION by Mr. Reussille:

Q. During the pendency of the Minton fore-

closure suit do you ever remember anyone getting in touch with you and asking whether there had been a settlement of the Sherman suit—Straus-Sherman suit?

A. Yes, sir; there was a call over the phone.

Q. Who was it?

A. Your office, Applegate & Son.

Q. Did you refer to your docket?

A. I referred to the docket and read what I have read here, that it was returned satisfied.

Q. At that time had the execution been returned satisfied?

A. It had.

Q. And suit discontinued?

A. Suit as far as I know was discontinued because I returned the writ in to the Court of Chancery.

Q. Did you ever receive any notice of any assignment of the decree in that case?

A. No.

Q. Do you remember my visiting your office subsequent to October 1st, 1924? In order to refresh your memory do you remember showing me the letter of Mr. Smock already referred to in your docket?

A. I remember showing it to you, but the date I could not say, when it was.

THE COURT: Before the sale of the Minton?

WITNESS: Before the Minton sale; yes, sir.

RECROSS EXAMINATION by Mrs. Sutton:

Q. Was the call made to you from the John S. Applegate office that you spoke of, referring to the

supposed satisfaction of the May Straus mortgage—was that made before or after the Minton sale?

A. Before the Minton sale.

Q. Was the letter dated October 2nd or 3rd, 1924, shown to Mr. Reussille before the Minton sale or after?

A. Before the Minton sale.

Q. And how long ago?

A. Well, it was before the sale took place. Now just the date I can't say.

Q. Was it a day, week or month?

A. I couldn't tell you just the exact time. I know he came up and called on the phone about it and I read him the letter and he came up to the office, Mr. Reussille, and said, "Let me see that entry you have in your docket," and I referred him to the docket and he read it.

Q. You stated that I remarked at the sale that the two Brown mortgages and the—(interrupted.)

A. I didn't say two Brown—(interrupted.)

Q. There were two Brown mortgages.

A. You didn't say that. You said—(interrupted.)

Q. The Brown mortgage?

A. You said this sale does not cut off the Straus-Sherman or the Brown mortgage.

Q. Did it cut out the Brown mortgages?

A. Well, I don't know about that.

WARREN SMOCK, Sworn for Complainant:

DIRECT EXAMINATION by Mr. Reussille:

Q. Mr. Smock, you were the solicitor of the complainant, May Straus-Sherman in her foreclosure suit against Reilly, referred to already.

A. Yes, sir.

Q. And did you have authority to foreclose her mortgage and collect same?

A. I did. Give her the proceeds.

Q. Now, Mr. Smock, do you remember any payments made, any settlement of any amount due on that mortgage for principal and interest?

A. Well, there was a substantial payment made in January, 1924, at which time I agreed to continue the sale for several months.

Q. Before that let me ask you when your record shows the proceedings to have started—when did you file your bill?

A. August 22nd, 1923.

Q. In January you stated that you received the payment?

A. January, 1924.

Q. And does your record show who that payment was made by?

A. The docket shows it was paid by Mrs. Reilly.

Q. Was any assignment taken at that time of the bond and mortgage or partial assignment?

A. There was not.

Q. Was there a later payment made—by the way—what was the nature of this agreement to postpone the sale? I think you stated—

A. Yes, sir.

Q. And did you postpone the sale?

THE COURT: Have you any independent recollection?

WITNESS: Well, I have quite a distinct recollection of having received four or five hundred dollars and having told Mrs. Sutton that I would adjourn the sale for several months. I have forgotten just what time.

Q. And that payment was made by Emma C. Reilly, was it not?

A. It is so marked on my docket. That is the only thing I can say.

Q. And how long did you stand on that basis before you proceeded again?

A. Well, apparently I never proceeded again, because the mortgage was later paid. Perhaps there was an execution issued. I have forgotten about that.

Q. And was there a later payment on account of the mortgage and all the amount due?

A. The balance was paid October 1st, 1924.

Q. Do you know who made that payment?

A. Mrs. Sutton.

Q. Do you know whether or not you delivered any assignment to Mrs. Sutton.

A. At that time?

Q. At that time.

A. I know I did not.

Q. Do you know whether any assignment was demanded by Mrs. Sutton on October 1st, 1924?

A. Not at that time.

Q. Do you know whether or not Mrs. Sutton obtained—(interrupted.)

THE COURT: It would be much better to have Mr. Smock tell me what he recalls.

MR. REUSSILLE: It might be a little bit difficult for Mr. Smock to proceed.

THE COURT: That's the reason I asked Mr. Smock if he had an independent recollection.

WITNESS: I did, that one thing, but generally the thing is very hazy in my mind.

Q. Do you know whether or not any assignment of the decree was taken at that time, that is on October 1st?

A. There was not.

THE COURT: The money was not paid to you.

WITNESS: Yes; the money was paid to me.

THE COURT: To your clerk or to you?

WITNESS: It was paid in the office.

THE COURT: Not to you personally?

WITNESS: No, not to me personally. As I recall it, it was paid to Miss Von Glahn.

Q. Now subsequent to October 1st, 1924, Mr. Smock, did Mrs. Sutton ask you for an assignment of this mortgage?

A. She did.

Q. Do you remember what date that was?

A. No, I do not. I know it was quite some time after the money was paid.

Q. Have you any letter in your possession?

THE COURT: What would you say as to the "some time?"

WITNESS: Well, I told her when she asked me—(interrupted.)

THE COURT: What do you mean by "some time," days or weeks?

WITNESS: No; it was a question of weeks. It may have been as much as two or three months.

Q. Mr. Smock, have you the letter in your possession from Mrs. Sutton asking for an assignment?

A. Yes, sir; I have.

THE COURT: Is that the letter?

WITNESS: This is the letter.

MR. REUSSILLE: I offer it in evidence.

(Paper marked Exhibit C-9.)

Q. Does that recall to your mind the date when Mrs. Sutton requested the assignment?

A. Well, that is the first time that I recall she had said anything to me or written anything to me about giving an assignment. She later came to the office though.

THE COURT: What date is that?

WITNESS: That is December 10, 1924, and she later came to the office and spoke to me in person about it.

Q. And what was done at that time in your office?

A. And I told her that I saw no objection to giving an assignment and would advise Mrs. Straus to do so inasmuch as she assured me that the money came from her, and it was, in fact, her check—I saw no objection to it—and later an assignment was made.

Q. And do you remember writing a letter to Mrs. Straus?

A. Well, I am quite sure that I gave Mrs. Straus

—or sent Mrs. Straus a letter telling her that it would be all right for her to execute the assignment, as she was living in New York at that time.

Q. Do you know, Mr. Smock, at the date of the assignment, at the time the assignment was drawn —do you know whether or not you had paid off Mrs. Sherman, your client?

A. Mrs. Sherman was paid off October 3rd.

Q. That was two days after you received the payment from Mrs. Sutton, was it not?

A. Exactly.

Q. Do you know whether or not, representing Mrs. Straus-Sherman, there was anything due on her mortgage when this assignment was made—executed?

THE COURT: To Mrs. Sherman.

WITNESS: The mortgage was wholly paid October 1st.

THE COURT: As far as she was concerned?

WITNESS: As far as she was concerned. I know she was paid.

Q. Did you make a search in the foreclosure of your client's mortgage?

A. Well, it was made by our office.

Q. You examined the search, did you not?

A. Yes, sir.

Q. Did you find out whether Mary Wooster Sutton had any interest in the property at all as shown by the record at the time you made your search?

A. I assumed she did not, otherwise I would have made her a party.

THE COURT: Did the litigation between the Reillys or Mr. Reilly on the one side or Brown or the Browns on the other side show up on your search?

WITNESS: Oh, no; that was an independent suit.

THE COURT: Did not show up?

WITNESS: No other encumbrances.

THE COURT: Did not show up by way of litigation—by way of lis pendens?

WITNESS: No; I think not, but even if they had it would have no bearing on it because ours was a subsequent mortgage.

Q. Prior.

A. No; that was a subsequent mortgage.

THE COURT: The litigation did not show up in your searches.

WITNESS: Not at all. I only knew of it in a general way. Of course I had heard all about it around town.

RECESS.

Q. I show you a mortgage purporting to be a mortgage from Edward J. Reilly, widower, to May H. Straus, dated October 1st, 1919, and ask you if

that is the mortgage which you foreclosed for the mortgagee.

A. It was the mortgage satisfied. Started to foreclose. It was not consummated.

Q. And is this the mortgage which on October 1st was delivered up to Mrs. Sutton?

A. Yes, sir; it was.

Q. I call your attention to the following words on the back of the mortgage, "October 1st, 1924. This mortgage has been paid and satisfied in full, let it be cancelled of record," and ask you whether those words were on there when the mortgage was delivered to Mrs. Sutton?

A. Yes, sir.

Q. And whose signature is that to the cancellation?

A. Mine.

Q. And those four marks drawn across the cancellation endorsed on the mortgage, I ask you whether those marks were on the cancellation when it was delivered to Mrs. Sutton.

A. Not October 1st.

Q. Do you know when they were put on?

A. I do not remember; probably at the time that the assignment was made.

MR. REUSSILLE: I offer it in evidence.

(Paper marked Exhibit C-10.)

Q. Mr. Smock, did your search in the Straus-Sherman foreclosure suit show who the owners of record of the property in question were?

A. It did, at the time the bill was filed.

Q. And who was it?

A. The Reilly Storage Transportation Company.

MR. REUSSILLE: I would like to read a stipulation into the record now which has been consented to. "It is hereby stipulated between the parties to this suit, that on October 1st, 1924, and several months prior thereto and several months subsequent thereto the Reilly Storage and Transportation Company, a corporation of the state of New Jersey was the legal owner of record in fee of the premises described in Paragraph 1 of the amended bill of complaint, and that any arrangement and agreement made by the defendant that their mortgage remain a lien on said premises on and after October 1st, 1924, or any agreement of subrogation, was not made with the said Reilly Storage & Transportation Company, the then owner or any agent thereof, and that there never was any agreement made between the defendant, or either of them and said Reilly Storage & Transportation Company. This stipulation shall not operate as a waiver of any proof that the defendants may offer as to the validity or invalidity of the foreclosure sale or the deed under which the complainant, Investment Realty Corporation, took title to said property."

Q. Mr. Smock, you remember the conversation you had with Mrs. Sutton when she did come in for the assignment in December?

A. Well, I remember very little about it. I remember just in a general way that she said she would like to have an assignment of it and I told her at that time that I wondered that she hadn't asked for an assignment in the beginning, as long as she had paid it.

Q. Did you know at this time what Mr. Minton's rights were in the property?

A. What his rights were?

Q. Yes.

A. No, I did not.

MR. REUSSILLE: I would like to read the letter which has already been introduced, which was written by Mrs. Sutton to Mr. Smock.

WITNESS: Here is the original.

MR. REUSSILLE: (Reading.)

"December 10, 1924.

In re:
Assignment of Mortgage
May H. Strauss-Sherman to
Mary Wooster Sutton and Emma C. Reilly.
Mr. Warren H. Smock, Counsellor at Law,
Red Bank, N. J.
Dear Mr. Smock:

In regard to the mortgage for $2,000 which was held by Mrs. Sherman until October 1, 1924, and which was paid in full with all costs and interest due thereon by Mrs. Reilly and myself at said date, will you kindly request Mrs. Sherman to assign said mortgage to Mrs. Reilly and me, in lieu of cancelling the same, as we intended doing under the then existing circumstances when a conveyance of the premises in question was ordered made to Edward J. Reilly, the original mortgagor, and a merger seemed imminent.

Such conveyance has not yet been made to Mr. Reilly and the suit in Chancery concerning said premises is not closed, therefore we prefer to receive an assignment from Mrs. Sherman rather than merely to cancel the said mortgage of record. The same date, October 1, 1924, being the date of actual payment in full, can be used for the assignment. The acknowledgment being dated when

taken, of course. This assignment should be on record as soon as possible.

For any expense incurred by either you or Mrs. Sherman in complying with this request, please send me your bill and I will mail you my personal check promptly.

Yours truly,

MARY WOOSTER SUTTON.

Original Mortgage and
Assignment enclosed."

Q. Between October 1st, 1924, and December 10th, 1924, the date of the letter which I have just read, did Mrs. Sutton ever see you?

A. I couldn't tell you that, Mr. Reussille.

Q. If she had seen you and asked for an assignment, would you have remembered it?

A. I couldn't remember that. I know that it was several weeks after the mortgage was receipted that she spoke to me about an assignment. It might have been before this letter was written or shortly after. I can't remember. I would like to make a correction in my testimony of this morning. You direct my attention to lis pendens. I find upon conculting my papers that a lis pendens was filed by Mr. and Mrs. Reilly against Louis E. Brown and others, and the complainants in that lis pendens were made parties in my foreclosure suit, so that their interests so far as my client's mortgage was concerned, was cut off.

CROSS EXAMINATION by Mrs. Sutton:

Q. Mr. Smock, referring to the mortgage and to those four marks drawn through this typewriting, did you state that you made those marks?

A. I did not so state, but I am inclined to think I did.

Q. Do you know whether you made those marks or not?

A. My impression is that I did, but I am not sure.

Q. And how did you happen to make them, if you made them? How did you happen to make them, at whose request?

A. When you attempted to get the assignment, why, it was my intention to get rid of the receipt for you.

Q. The assignment—the actual deed of assignment—when this was drawn—when the deed of assignment was drawn—It is dated October 1st, 1924, —was that with or without your consent?

A. Well, I think you asked me if there was any objection to having it dated October 1st? I said I found none inasmuch as you had made the payment at that time.

Q. Not only made the payment, but what had I received in exchange for the payment on October 1st, 1924? What was actually given to me in exchange for it, the bond and mortgage?

A. The bond and mortgage.

THE COURT: A cancelled bond and mortgage.

WITNESS: Receipted, not cancelled. I don't know whether that is a distinction or not.

THE COURT: Is the bond marked "Paid?"

WITNESS: No, sir.

Q. Now in this original assignment, who drew the face, if you know—the face of the deed?

A. I cannot tell from here.

Q. I show you the paper.

A. Well, I do not think it was drawn by me.

Q. By your office?

A. I do not think in our office.

Q. How about the acknowledgment, as to where that acknowldgment was drawn?

A. Well, I can't distinguish that typewriting—the reason I say it was not drawn in our office is because I notice it is not on one of our blanks. All of our forms have our names on them and this hasn't.

Q. Then you do not know where the face of the deed of assignment was drawn.

A. No.

Q. Don't you recognize—or do you recognize the acknowledgment as to what typewriter that is?

A. No; I couldn't tell you, Mrs. Sutton.

Q. Do you remember when you wrote the letter to Mrs. Sherman, as you stated this morning, telling her that it was all right to execute this assignment, and do you remember having made any enclosure, and if so, what, in that letter?

A. Any what?

Q. Was there any enclosure sent to Mrs. Sherman in that letter?

THE COURT: The question is did you send the assignment in the letter to Mrs. Sherman.

WITNESS: The letter will speak for itself. I haven't the letter here.

Q. You communicated with her and told her it was all right. Did you send the assignment?

A. I am not sure. I am under the impression Mrs. Sutton took it herself, but I am not sure.

Q. The question is did you enclose the assignment in the letter you wrote to Mrs. Straus-Sherman, telling her that the assignment was all right?

A. If you show me the letter I maybe can tell.

Q. The original letter has been lost.

A. I have no copy of it.

Q. You don't know?

A. I do not.

Q. Do you remember that in January, 1924, before Mrs. Reilly made out her check, January 24th, 1924,—(showing witness check)—do you remember that you yourself and not your clerk transacted the business with us at that time?

A. That is my recollection.

Q. And do you remember this receipt which you handed to Mrs. Reilly? Do you recognize your signature?

A. This is my signature, and those are my words written in ink.

Q. And do you remember presenting us with this receipt in exchange for the money?

A. I assume I did, yes.

THE COURT: Have it marked.

MRS. SUTTON: I offer it.

(Paper marked Exhibit D-1.)

MRS. SUTTON: I offer the check.

(Check marked Exhibit D-2.)

Q. Do you remember about January 24th, 1924, that I had called at your office and talked with you about the assignment of the Straus-Sherman mortgage, with a message to you from Vice Chancellor Foster? Just previous, within a week.

Q. My recollection is that you never mentioned the assignment of that mortgage to me until some weeks after I had receipted it for cancellation.

MRS. SUTTON: I would like to offer for identification, letter from Vice Chancellor Foster to me dated January 22nd, 1924.

MR. REUSSILLE: That is objected to. You have not given any reason for offering it, and, in the second place you cannot possibly prove it. I don't know what is in it or what the offer is.

THE COURT: It is for the purpose of showing mental attitude, I suppose. I will let it in.

MRS. SUTTON: On cross examination I would like to show Mr. Smock—(interrupted.)

THE COURT: You can show him anything you want to show him.

Q. There is a carbon copy—(interrupted.)

THE COURT: What are you showing Mr. Smock?

MRS. SUTTON: I am showing Mr. Smock a copy of a letter written by me to Vice Chancellor Foster. The original cannot be found although diligent search has been made. I am showing a carbon copy.

THE COURT: Any objection to the copy being used instead of the original?

WARREN SMOCK—Cross.

MR. REUSSILLE: No, sir.

MRS. SUTTON: I offer it.

(Paper marked Exhibit D-3 for identification.)

MRS. SUTTON: And Vice Chancellor Foster's answer to the letter.

(Paper marked Exhibit D-4 for identification.)

Q. Now, I show you this Exhibit D-3, carbon copy, especially the third paragraph. Read the third paragraph in the letter, which refers to the May Straus-Sherman mortgage, and see if it refreshes your memory.

A. Do you want me to answer about this one?

THE COURT: What is the question?

MRS. SUTTON: The question is, Mr. Smock has stated—(interrupted.)

THE COURT: No. Ask your question.

Q. I want to know if that refreshes your memory as to the fact that I came to your office as stated therein and you and I talked over the May Straus mortgage and the assignment and you said you would give me one week to find an assignee and Vice Chancellor Foster's reply saying that if we could do that he would settle the rights of all the parties in May, in connection with the May Straus mortgage, and that within five days of the date of that letter the two assignees were in your office and making payment?

THE COURT: Does that refresh your memory?

WARREN SMOCK—Cross.

WITNESS: Well, I remember Mrs. Sutton spoke to me several times about the payment of this mortgage and shortly before she made the payment, January 24th, 1924, she asked me if I would be willing to give her a considerable length of time if she paid all the interest and then costs on the foreclosure. To that I replied that I would give her a reasonable time if she would make those payments. She told me at that time that there was some litigation pending between the Reilly transportation Company and Mr. and Mrs. Reilly and the Browns, I think it was—there were several people in the litigation—and that they would probably have it consummated some time in the spring of that year, and I think I told her then that I would give her until perhaps the first of June or July—I do not remember—but I think it was somewhere along there, and then afterwards she came to me and said it was not quite completed and asked for a little further time and it was finally continued until October 1st, when she made the payment. She may have said something to me about an assignment at the time she made this five hundred dollar payment, but I hardly think so because it was paid by Mrs. Reilly who really was the Reilly Transportation Company —it was the corporation, as I understood it, together with either of Mr. or Mrs. Reilly. That was my information. I am not sure. That is my recollection —but at any rate I know I am quite distinct in my recollection that nothing occurred about an assignment or nothing was said about assignment when she made the payment in October, 1924.

Q. Mr. Smock, were you in the town of Red Bank when that payment was made, October 1st, 1924?

A. Well, I am rather inclined to think it was made to Miss Von Glahn. I am not sure.

Q. Were the two checks handed to you?

A. Them, you mean?

Q. October 1st, 1924, did I hand my two checks to you?

A. As I say, my recollection is that they were paid to Miss Von Glahn.

Q. Were you in the office at the time?

A. I don't know. I cannot remember.

Q. Were you in the room when I delivered the check to Miss Von Glahn and she returned the bond and mortgage?

A. Well, I can't tell exactly that. Miss Von Glahn often received money for me. She was my main clerk. She may have done it.

Q. Do you remember seeing me hand those checks to Miss Von Glahn?

THE COURT: He says he has no recollection of it.

Q. Did you deliver the bond and mortgage to me yourself?

THE COURT: He says the lady did it for him. He has no recollection. You have your own testimony.

WITNESS: My recollection is that the receipt was put on there by me and the paper handed to Miss Von Glahn and she later delivered it and received checks. That is my best recollection, but I am not positive about it at all.

MRS. SUTTON: I would like to have this letter marked for identification.

THE COURT: What is it, a letter from whom?

MRS. SUTTON: Letter from Mr. Smock.

THE COURT: You wrote this letter?

WITNESS: Yes, sir.

THE COURT: Let it be marked.

(Paper marked Exhibit D-5 for identification.)

THE COURT: Now what do you want to know?

MRS. SUTTON: I will read—(interrupted.)

THE COURT: No.

Q. Mr. Smock, you stated a moment ago that you during the summer of 1924 decided that you would have to continue with the foreclosure, but you did not know just when. Does that letter refresh your memory as to when you decided that you would have to go on with the foreclosure proceeding? after having stopped in January?

A. This looks as if I might have continued it even up to September. It was written in September, 24th, 1924. I do know you did not pay it at the time it was originally agreed upon, and from time to time you asked me to continue it, informing me that the case was proceeding and that it would soon be determined and upon the promise that the thing would eventually be paid I continued it and continued it and continued it until October 1st, when you gave me the money.

Q. This letter is dated September 22, 1924, and the money was paid October 1st, 1924.

WARREN SMOCK—Re-Direct.

THE COURT: Anything more?

Q. Mr. Smock, did you have anything to do with substituting me as attorney in place of Wilson & Smock during this transaction? Did you have any part in it?

A. Well, I suppose I did if it was done. I do not remember.

THE COURT: You can prove all these things by your own testimony, can't you?

MRS. SUTTON: The only thing is I want to know what Mr. Smock is going to say because I want to call him back as my witness.

THE COURT: If you want to make him your witness, make him it now. You are asking a lot of questions that I presume you can testify to and unless it is controverted it will stand as the evidence in the case. Now things that Mr. Smock knows that he can establish for your benefit you might ask him.

MRS. SUTTON: That is all for cross examination, but Mr. Smock will come as my witness.

REDIRECT EXAMINATION by Mr. Reussille:

Q. You have testified to a payment made in January, 1924 by Mrs. Reilly. Do you remember whether that was payment on account of any part of principle?

THE COURT: Why no. It is perfectly clear. Paid the interest.

META VON GLAHN—Direct.

WITNESS: Interest and costs.

THE COURT: To stave off execution.

WITNESS: That is all.

META VON GLAHN, Sworn for Complainant:

DIRECT EXAMINATION by Mr. Reussille:

Q. You are employed in Mr. Smock's office, are you not?

A. Yes, sir.

Q. Do you remember—(interrupted.)

THE COURT: Managing clerk?

WITNESS: Yes, sir.

Q. And also stenographer?

A. Yes, sir.

Q. And do you remember a payment which Mrs. Sutton made on or about October 1st in settlement of a mortgage?

A. I do.

Q. Was that the Straus-Sherman mortgage?

A. Yes, sir.

Q. Would you recognize that mortgage if I showed it to you?

A. Yes, sir.

Q. Is this it?

A. Yes, sir; it is.

Q. And referring to the cancellation on the back of the mortgage—(interrupted.)

THE COURT: Ask her what happened. It will be so much better for me.

Q. What happened, Miss Von Glahn, at that time, on October 1st, when Mrs. Sutton was there with this payment?

THE COURT: What took place?

WITNESS: To the best of my recollection she came in and brought two checks and I handed her this mortgage which had already been receipted by Mr. Smock and the bond, and she left. I do not have any distinct recollection of anything that was said.

THE COURT: Evidently preparation had been made and you anticipated her calling.

WITNESS: Anticipated her calling. I think Mr. Smock had had me put the cancellation clause on in advance.

THE COURT: Is that all that happened?

WITNESS: I cannot remember anything more now.

Q. At that time do you know whether or not Mrs. Sutton asked for an assignment of the decree?

A. I cannot remember her doing so.

CROSS EXAMINATION by Mrs. Sutton:

Q. Do you remember my asking for an assignment of the mortgage?

A. No, I do not remember, Mrs. Sutton.

Q. Do you remember a telephone call which you answered while I was there in the office?

A. No, I do not remember.

Q. You do not remember a telephone call in which you came back to me and said, "Mrs. Sherman is on the wire now."

A. No; I do not remember.

Q. "Mrs. Sherman of New York City is on the wire now." Do you remember my asking for the insurance papers that should ordinarily have accompanied the mortgage?

A. I do not remember your asking for it, but I find on my notebook of that date a memorandum which said, "Ask Mrs. Sherman about insurance." I do not know in what connection I put it there.

Q. Did it refer to my call?

A. It said, "Ask Mrs. Sherman about insurance."

Q. In what case was that?

A. I think it was in connection with this case.

Q. Do you remember any other note that you made in your note book in connection with a telephone call that Mrs. Sherman made on you and you answered in my presence?

A. I do not remember about it.

Q. Is that note in the book?

A. I wouldn't make a memorandum of a telephone call in my note book.

Q. Do you remember or don't you remember that we—I asked for the insurance papers and you stated there had never been any insurance in the safe where the bond and mortgage had been kept?

A. No; I do not remember it.

Q. And that while we were speaking the telephine spoke—the telephone rang and Mrs. Sherman was there?

A. No, I do not.

Q. Do you remember that they were my checks

which I delivered to you in payment of the bond and mortgage?

A. I do not remember they were your checks, but I marked it so on the docket, received from Mary W. Sutton.

MRS. SUTTON: I would like to have Miss Von Glahn for my witness later and close the cross examination. I have not subpoenaed her.

REDIRECT EXAMINATION by Mr. Reussille:

Q. These marks on the back of the mortgage and across the cancellation, were they on the mortgage when they were delivered to Mrs. Sutton?

A. I have seen them since. I do not think I would ever turn over a cancelled mortgage that way.

THE COURT: Were they on when you gave them?

WITNESS: When I gave it I am quite sure they were not.

MAY STRAUS SHERMAN, Sworn for Complainant:

DIRECT EXAMINATION by Mr. Reussille:

Q. You were the owner of the mortgage which Mr. Smock was foreclosing, were you not?

A. Yes, sir.

Q. He represented you in that foreclosure suit.

A. Yes, sir.

Q. And can you state when Mr. Smock paid you the amount due on your bond and mortgage? Do you remember the date of it?

A. October 3rd.

Q. October 3rd, what year?

A. 1924.

Q. Do you remember Mrs. Sutton getting in touch with you subsequent to that date with regard to an assignment?

A. Mrs. Sutton getting in touch with me?

Q. Yes.

A. Prior to that?

Q. No, subsequent.

A. After, yes, sir.

Q. Do you remember what date that was?

A. No, sir; I do not.

Q. She came up to see you, didn't she?

A. Yes, sir.

Q. Can't you tell us about when it was by reference to some date?

A. Well, I signed the assignment some time in December.

Q. What year?

A. 1924.

Q. Was the acknowledgment taken on the day it was executed—on the day you signed it? That is, did you go before a notary and have your acknowledgment taken the same day?

A. Yes, sir; the same day.

Q. Was that when you first saw the paper?

A. Well, I don't remember. From the 5th of November until the 18th of December I was most of the time unconscious and it was in that time this letter came to me and I don't remember whether or not that paper was there, but I know that I signed the paper.

MARY W. SUTTON—Direct.

Q. You found the letter after you got well?
A. When I came back from the hospital the paper was there—the letter was there.
Q. When you made the assignment to Mrs. Sutton was there anything due on your bond and mortgage? Had you any interest—(interrupted.)

THE COURT: She said it had already been paid. Paid October 3rd.

NO CROSS EXAMINATION.

MARY W. SUTTON, Sworn for Complainant:

DIRECT EXAMINATION by Mr. Reussille:

Q. Mrs. Sutton, did you or didn't you make a payment to Mr. Smock for Mrs. Straus?
A. No. I made it to Miss Meta Von Glahn in the office of Mr. Smock.
Q. She is the lady that just testified?
A. Yes, sir.
Q. Did you know at that time who the owner of record was of the premises covered by the mortgage?
A. The Reilly Storage & Transportation Company are the owners of record.
Q. When you made that payment did you receive an assignment of the mortgage?

THE COURT: You got all that in.

COMPLAINANT RESTS.

EMMA C. REILLY—Direct.

EMMA C. REILLY, Sworn for Defendant:

DIRECT EXAMINATION by Mrs. Sutton.

MRS. SUTTON: I offer the whole file in the case of Edward J. Reilly against Louis E. Brown in this court, Docket 52—224, and 596, same volume.

Q. Mrs. Reilly, I show you a mortgage which has already been marked in evidence for the complainant, do you recognize that mortgage?
A. I do.
Q. Will you turn to the reverse side. Do you recognize the typewritten words on the back of it?
A. Yes, sir; I do.

THE COURT: The cancellation authority?

MRS. SUTTON: The cancellation authority.

WITNESS: Yes, sir.

Q. You recognize that?
A. Yes, sir.
Q. I show you a bond made by Edward J. Reilly and—(interrupted.)

THE COURT: Is that the one that accompanies the mortgage?

MRS. SUTTON: Yes, sir.

THE COURT: Never mind that. That is all before me.

Q. Where did you first see that bond and mortgage?

A. In Lawyer Smock's office.
Q. When?
A. That was on the 1st of October, 1924.
Q. Who had the mortgage and the bond when you first saw them?
A. Miss Meta Von Glahn.
Q. What did she do with them?
A. She passed them over to you when you paid her in check.
Q. Did you see me hand Meta Von Glahn—(interrupted.)

THE COURT: That is all in the case and not controverted.

MRS. SUTTON: Pardon me, but Mr. Smock was not quite sure.

THE COURT: But I am.

MRS. SUTTON: I am too.

Q. Now when I handed—when you saw me hand Meta Von Glahn my two checks did I say anything—or what did I say to Miss Von Glahn, if anything, about those typewritten words on the mortgage?
A. You didn't want that on there.

THE COURT: What did she say?

WITNESS: She said she didn't want that "cancelled" on there—didn't want that cancellation.

Q. What reply did Miss Von Glahn make to me at that time?
A. You asked her—you said you did not want

that and she said she had no authority to take that off.
Q. Did I ask her for anything else in addition to the bond and the mortgage?
A. Yes, ma'am, an assignment.
Q. I asked her for the assignment?
A. Yes.
Q. What was her reply to me when I asked her for the assignment?
A. She didn't have the assignment.
Q. What else did I ask her for if anything?
A. Well, you said you would come in and have that assignment. You asked her something about insurance.
A. Whether she had any insurance papers.
Q. What did she say?
A. She said, no, she did not.
Q. Did anything occur during that conversation?
A. Yes, I know the whole occurrence.
Q. What?
A. The telephone rang and she went to the telephone and she has got May Straus on the telephone.
Q. Mrs. Sraus-Sherman?
A. Mrs. Straus-Sherman on the telephone and they had a talk about the insurance papers over the telephone.
Q. And what did Miss Von Glahn say to me in reporting the telephone conversation?
A. That she—she couldn't do anything then for you, to come in again, something to that effect.
Q. Did Miss Von Glahn say what Mrs. Sherman had said over the telephone?
A. That there were no insurance papers.
Q. Did Miss Von Glahn make any particular search for insurance papers?

A. Not that I saw.
Q. What did she say about their being in the office?
A. There was none there.
Q. I show you a check already marked Exhibit D-2. Do you recognize that check?
A. Yes, sir; that is my check.
Q. What is the date?
A. January 24, 1924.
Q. How much is it for?
A. $545.18.
Q. Whose money paid that check?
A. My very own, that I worked for.
Q. Where did you get the money?

THE COURT: What do I care where she got the money? I am not interested in that at all. It is her check. It is presumed to be her money.

Q. I show you a receipt, or a paper purporting to be a receipt. Do you recognize that paper?
A. I do.
Q. When did you receive it?
A. I received it when I gave up the check to Mr. Smock.
Q. Did you give that to Mr. Smock personally?
A. Yes, right over the table.
Q. Or to his clerk. And this receipt shows you paid how much money?
A. $545.16.
Q. And that was with Mr. Smock himself.
A. Yes, sir.
Q. Was Mr. Smock in the room or in the office —in sight—when Miss Von Glahn delivered this bond and mortgage to me October 1st?
A. No; I do not think so.

Q. Can't you think and say you are sure?
A. I think he was there but not just at the time.
Q. Was Mr. Smock in sight of us when Miss Von Glahn delivered this bond and mortgage to me and when I delivered my two checks to her?
A. No.
Q. I show you two checks—

MRS. SUTTON: These ought to be marked.

(Papers marked Exhibits D-5 and D-6.)

Q. I show you exhibit D-5, a check.

THE COURT: Show her both checks.

Q. D-5 and D-6, have you seen those checks before?
A. Yes; I was there when you handed them in.
Q. These are the same checks?
A. These are the very same.
Q. Did you have anything to do with furnishing the money to meet those checks?
A. Absolutely not.
Q. Do you know where the money was procured by Mary Wooster Sutton to meet those checks?
A. No.

MRS. SUTTON: I got twelve promisory notes to show where I got the money. I want to put these in.

THE COURT: I do not intend to have them in.

NO CROSS EXAMINATION.

EDWARD J. REILLY—Direct.

EDWARD J. REILLY, Sworn for Defendant:

DIRECT EXAMINATION by Mrs. Sutton.

Q. Mr. Reilly, where do you live?
A. 49 Mechanic Street, Red Bank, New Jersey.
Q. Are the premises occupied by you now the same premises which are covered by the May Straus-Sherman mortgage?
A. Yes, sir, partly.
Q. And who owns the other part, the residence part?
A. It hasn't been settled.
Q. Who owns it this minute?
A. The Anderson brothers are trying to get a title to it.
Q. I didn't ask you that. Who owns the first tract of the premises in question?
A. I don't understand your question. Do you mean the warehouse part?
Q. Yes, the warehouse, first tract; who owns it?
A. It was sold at Sheriff's sale to Minton. He sold it to the realty company.
Q. Who owns the second tract, where the residence and the barn are?
A. Edward J. Reilly, Reilly Storage & Transportation Company has title to it at the present time, I believe.
Q. Do you remember deeding both tracts of the property to anybody in 1920?

THE COURT: To Mr. Brown, do you mean?

MRS. SUTTON: Yes.

THE COURT: Ask him.

EDWARD J. REILLY—Direct.

Q. Did you deed both tracts of what was formerly your property to Myron V. Brown, August 24, 1920?
A. I did, but I didn't know it was a deed at the time.
Q. But you deeded it.
A. I did.

THE COURT: You refer now to the eighty feet?

MRS. SUTTON: Yes, sir; the whole double tract.

Q. To whom did Myron Brown—(interrupted.)
A. The Reilly Storage & Transportation Company.
Q. Has it ever been reconveyed to you?
A. Yes, sir; I am waiting for the decree. I haven't got it yet.
Q. Has it ever been deeded back to you?
A. No, not yet.
Q. I show you Exhibit C-10, a mortgage purporting to be from Edward J. Reilly, widower—(interrupted.)
A. Yes.
Q. To May Straus.
A. Yes.
Q. And dated October 1st, 1919. Was this mortgage made by you before or after your marriage to the present Mrs. Reilly?
A. Before.
Q. You recognize the bond that accompanies the mortgage?
A. I do.
Q. Edward J. Reilly to May H. Straus.
A. Yes.
Q. After those papers were delivered to Mr. Ed-

New Jersey State Library

mund Wilson representing Mrs. May Straus-Sherman, at that time May Straus, when did you next see this bond and mortgage?

A. Next I seen of them Miss Von Glahn handed them to you.

Q. When was that?

A. That was on October 1st, 1924.

Q. Was Mr. Smock in the room or in sight anywhere when Miss Von Glahn handed the bond and mortgage to me?

A. No; he was nowheres in sight.

Q. Did Miss Von Glahn make any statement as to where Mr. Smock was at that time?

A. I think she said he was out of town. Now I won't be positive about that. I know you inquired for Mr. Smock.

Q. Do you recognize these typewritten words on the back of the mortgage?

A. I do.

Q. Do you remember what was said, if anything, to Miss Von Glahn by me referring to those typewritten words?

A. Yes.

Q. What did I say?

A. Well, I just can't remember what you said, but you didn't want them there. You said there was an assignment to come with that bond and mortgage.

Q. What did Miss Von Glahn answer?

A. She said she didn't have the authority to give you one.

Q. What did I say?

A. You said then you would call later and see Mr. Smock.

Q. Do you remember whether there was any telephone call?

A. There was.

Q. Who was it called on the phone?

A. Miss Von Glahn came back and said it was May Straus—May Straus-Sherman out on the phone.

Q. And what question had I just asked Miss Von Glahn when the telephone bell rang?

A. In regard to an insurance.

Q. And when Miss Von Glahn came back what did she say?

A. Miss Straus told her there was none.

Q. Mrs. Sherman you mean?

A. Yes.

Q. Said there was no insurance?

A. I am pretty positive that was the answer.

Q. What did Miss Von Glahn say as to the insurance papers being in the office of Wilson and Smock at that time?

A. She looked in the safe where the bond and mortgage was kept and there were no insurance papers there, if my memory serves me right, that is what happened.

Q. Was anything said to Miss Von Glahn about my expecting an assignment to accompany this bond and mortgage on October 1st, 1924—did I say anything to Miss Von Glahn?

A. Yes, sir; you said there was to be an assignment to accompany that.

THE COURT: He has already said that.

Q. What did Miss Von Glahn say?

A. She said she didn't have the authority to give you one or make one out, so you said you would call back and see Mr. Smock later.

Q. I show you two checks—(interrupted.)

EDWARD J. REILLY—Direct.

THE COURT: What is the use of going into that?

MRS. SUTTON: To have him corroborate it.

THE COURT: Nobody is going to deny it.

Q. Mr. Reilly, do you remember in the case of Reilly v. Brown, when we were appearing before Vice Chancellor Foster in Long Branch that the Vice Chancellor in order to keep the May Straus mortgage from interfering with the case of Reilly against Brown advised us, me as your attorney and you to take an assignment of the May Straus mortgage would be the simplest way to dispose of the mortgage—do you remember anything about it?

MR. REUSSILLE: I object.

THE COURT: Is Reilly against Brown the case in which you offer the files?

MRS. SUTTON: Yes.

Q. Mr. Reilly I show you a carbon copy of the letter which I wrote to Vice Chancellor Foster marked Exhibit D-3 for identification.

MR. REUSSILLE: She is proving her own letter.

MRS. SUTTON: I would like to have this marked in evidence.

MR. REUSSILLE: I object.

MRS. SUTTON: If your Honor please, Vice

EDWARD J. REILLY—Direct.

Chancellor Foster isn't here to return the original to me and I have made a search for it in his office.

THE COURT: The objection is not on that ground at all.

Q. Mr. Reilly, referring to the date when Mrs. Reilly gave her check for $545.18—you remember that was in January, January 24th, 1924—at that time was there any plan for an assignment of the May Straus mortgage to be made to Mrs. Reilly and to me?

MR. REUSSILLE: I object.

THE COURT: Overruled. Let him answer.

WITNESS: The only thing I know about that is that May Straus was behind in her interest.

THE COURT: Please answer the question. Do you know of any plan?

WITNESS: I don't know of any plan, only Vice Chancellor Foster said to pay up the interest and get an assignee—get an assignment of the two thousand mortgage.

Q. Do you know whether you knew about any particular plan made? Do you remember whether on January 24, 1924, the date of Mrs. Reilly's check, whether you knew any plan that Mrs. Reilly and I talked over with you about taking an assignment of the May Straus mortgage?

MR. REUSSILLE: I object on the ground that

he is not the owner and was not the owner at that time.

THE COURT: Objection overruled. Do you or do you not?

WITNESS: I have a slight recollection I heard it talked over.

Q. What plan did Mrs. Reilly and I make about taking the May Straus mortgage assignment?

A. Mrs. Reilly was to pay the interest and the costs and you were to raise the two thousand dollars to pay the mortgage and take the assignment, the—if I remember correctly.

Q. How did Mrs. Reilly and I state our plan in your presence to pay for that mortgage? How much for each one, do you remember?

A. Yes; a thousand dollars a piece.

Q. A thousand a piece for the assignment?

A. Yes.

Q. When did we make that plan?

A. I cannot remember the date, Mrs. Sutton.

Q. Was it anywhere near the time that Mrs. Reilly handed in her check for $545.18?

A. I think it was just a little before that time.

Q. When October 1st, 1924, came, did Mrs. Reilly pay one thousand dollars for the assignment?

A. No.

CROSS EXAMINATION by Mr. Reussille:

Q. Mr. Reilly, was the agreement that you speak of only made with Mrs. Sutton and Mrs. Reilly?

A. And myself.

Q. And yourself? Were you then the owner of the property?

A. No.

REDIRECT EXAMINATION by Mrs. Sutton:

Q. Mr. Reilly, what was the rest of the plan, that after Mrs. Reilly and I were to take the assignment, each one to pay a thousand dollars for the assignment, in addition to the $545.18, what did we say we would do with that assignment and that mortgage bond and the assignment afterwards? What did we plan to do?

A. I don't understand your question, Mrs. Sutton. What do you mean, with the money?

Q. No.

A. With the bond and mortgage?

Q. On January 24, 1924, after Mrs. Reilly's money had reduced the amount to make it two thousand dollars—(interrupted.)

THE COURT: What was the arrangement between the two women about taking up this mortgage, as you recall it?

WITNESS: Why, Mrs. Sutton was to put a note in the bank to get the money to pay the mortgage and Mrs. Reilly was to pay the interest and costs.

THE COURT: Is that what you want?

MRS. SUTTON: No.

THE COURT: What do you want?

MRS. SUTTON: I do not want January, 1924. I want to know if Mr. Reilly remembers what Mrs. Reilly and I had said we would do with the mortgage and the bond and the assignment after we owned it.

EDWARD J. REILLY—Re-Direct.

THE COURT: What arrangement was made to do with it after they got it?

WITNESS: Mrs. Sutton took the mortgage and Mrs. Reilly got the bond, and when they got that they would have a thousand dollars a piece that has got to be paid back in the bank to take the note up, of course.

THE COURT: Is that what you want?

MRS. SUTTON: I do not like to impeach my own witness.

WITNESS: Maybe I do not understand.

THE COURT: Yes you do.

Q. Mr. Reilly, did Mrs. Reilly borrow a thousand dollars from the bank?
A. No, not that I know of.

THE COURT: What was to be done with the mortgage after they took it up?

WITNESS: Why they bought the mortgage.

THE COURT: What was to be done with it—any arrangements—anything said about it?

WITNESS: Not that I know of; not to my knowledge.

THE COURT: Is that what you want?

MRS. SUTTON: No.

THE COURT: You can testify to it yourself.

META VON GLAHN—Direct.

RECROSS EXAMINATION by Mr. Reussille:

Q. You do not claim, Mr. Reilly, that the Minton mortgage was invalid for any reason?
A. No.

META VON GLAHN, Recalled for Defendant:

DIRECT EXAMINATION by Mrs. Sutton:

Q. Miss Von Glahn, having heard the testimony of other witnesses—(interrupted.)

THE COURT: No.

Q. Does it refresh your memory as to any telephone conversation that may have been held on Oct. 1st, 1924, between you and Mrs. Sherman?
A. No, it does not.
Q. Do you remember now my having asked for the insurance papers on October 1st, 1924?
A. I do not remember anything about it. As I told you I had a memorandum on my note book relating to insurance, so doubtless you did ask for insurance.
Q. Do you remember what your reply was?
A. I do not remember.
Q. Do you remember when you handed me the bond and mortgage and took the two checks that I asked you if there wasn't a deed of assignment to accompany the two papers?
A. No, I do not.
Q. The testimony offered here does not refresh your memory as to that?

A. No, it does not. I was very busy that day and I think this was just an incident of the day.

THE COURT: You cannot say whether an assignment was asked for or not?

WITNESS: No, I cannot say.

Q. Then do you remember what you said in reply to my request for the assignment?

THE COURT: She says she doesn't remember you asking for the assignment. If she doesn't remember that she doesn't remember the other. She has no recollection. It has passed from her if it occurred.

MAY S. SHERMAN, Recalled for Defendant:

DIRECT EXAMINATION by Mrs. Sutton:

Q. I show you the original assignment. Do you recognize your signature?

A. Yes, sir.

Q. Do you remember where you were when you signed this assignment?

A. In a notary public's office—undertaker's establishment.

Q. Do you remember the notary public, Mr. Gordon, himself, as being there?

A. Yes, sir.

Q. Do you remember him as being the one who subscribed as witness to your signature?

A. Yes, sir.

Q. Referring to the acknowledgment on the

back of the assignment, do you remember that it was Mr. Austin J. Gordon?

THE COURT: You do not have to prove those things.

MRS. SUTTON: I want to show she did it voluntarily.

THE COURT: It is there. It is presumed to be done voluntarily.

Q. Mrs. Sherman, do you remember on October 1st, 1924, that there was a telephone conversation between you and Miss Von Glahn?

A. Yes; I phoned Mr. Smock's office on October 1st, because I intended to be there and could not get there and I phoned and when I phoned she said that you were there and she said that you wanted —you were there to pay the bond and mortgage and she wanted to know if there are any insurance papers covering the bond and mortgage and I said there had never been any insurance papers. At the time the mortgage was drawn they said it was not necessary to put on that extra expense.

Q. How did you or where did you first see this assignment?

THE COURT: The lady has said that it came to the house when she was sick and she found it afterwards when she partly recovered.

MRS. SUTTON: I'd like to have it on record how she got in possession of it.

THE COURT: Came through the mail.

MRS. SUTTON: From whom, that is what I want to know.

THE COURT: Mr. Smock; is that right?

Q. You know?

A. Yes, Mr. Smock wrote me a letter and told me it was all right to sign the assignment.

Q. And in that letter it was enclosed?

A. I believe the assignment—the paper I signed, but I don't remember seeing it when I got the letter, because I was in the hospital.

Q. Now, when you received the letter from Mr. Smock enclosing the assignment, and you were too sick to attend to it at the time, in Mr. Smock's letter did he state that he enclosed the assignment and for you to sign it—what did the letter state?

A. He said it was all right for me to sign the assignment.

Q. In the letter?

A. In the letter, yes, sir.

Q. How did it happen you did not return this assignment?

A. I was unconscious.

Q. Within a reasonable time.

THE COURT: She wasn't sick within a reasonable time, she was sick.

Q. How did I come in possession of this?

A. You came into my house. I was in the house a couple of days from the hospital and I went to the notary public and signed it.

WARREN SMOCK, Recalled for Defendant:

DIRECT EXAMINATION by Mrs. Sutton:

Q. Mr. Smock, referring to January, 1924, do you

recollect now that you and I discussed the question of having an assignment of the May Straus mortgage under advice given me by Vice Chancellor Foster?

A. I do not. The mortgage was not paid at that time, Mrs. Sutton.

Q. No, the $545.18 was paid on it bringing it down to the face value of two thousand dollars.

THE COURT: Any discussion about an assignment at that time?

WITNESS: I do not recollect any discussion about the assignment.

THE COURT: It may have been?

WITNESS: Well, it may have, but I think not. I didn't know at that time whether she intended to pay the mortgage or take an assignment, and as a matter of fact, only the interest and costs were paid and I can see no reason why an assignment should be discussed at that time.

THE COURT: You delayed the execution of the decree.

WITNESS: Six months.

THE COURT: With the expectation it would be paid off?

WITNESS: That it would be paid.

THE COURT: Was there no discussion at the time of the deferment?

WITNESS: At the time of the deferment? There was plenty of talk about deferring the sale.

THE COURT: Was there any discussion at the time of the deferment about the assigning of the mortgage?

WITNESS: I do not recollect anything about the assignment until several weeks after October 1st.

Q. Does the testimony so far refresh your memory as to whether you were in the office or not and saw Miss Von Glahn deliver the bond and mortgage to me?

THE COURT: What difference does it make whether he was in the office or not?

MRS. SUTTON: Because if he wasn't there I couldn't ask him for the assignment.

THE COURT: He was not there. That is already in the case.

MARY WOOSTER SUTTON, Recalled for Defendant.

MRS. SUTTON: I would like to offer the assignment of the decree.

MR. REUSSILLE: I object to its admission on the ground that it was subsequent to January.

THE COURT: Do you waive the production of the original?

MR. REUSSILLE: Yes, sir; I do.

MRS. SUTTON: I have a certified copy of the substitution of attorney too. Shall I give my testimony in the form of question and answer or narrative.

THE COURT: Narrative, please.

WITNESS: In order to stop the foreclosure proceeding brought under the May Straus-Sherman mortgage which was begun in September, 1923, covering the same premises, first and second tracts of the so-called Reilly property and to take from us our subject—the subject matter of the case of Reilly against Brown, Chancery suit to set aside fraudulent conveyances, begun in July, 1922, I, as solicitor for Mr. and Mrs. Reilly, went to Vice Chancellor Foster in Long Branch in open court and asked him how I could stop the May Straus mortgage from being foreclosed. In doing so I wrote a letter to Vice Chancellor Foster, dictated to me in open court and I have here the notes which I took as he dictated and based on those notes I wrote the letter dated January 19th, reporting to Vice Chancellor Foster that I had done what he advised me to do when he spoke on Friday, January 18th. I would like to read some of this letter, if I may, your Honor.

THE COURT: You may do as you please.

MR. REUSSILLE: I understand it has not been introduced in evidence yet.

THE COURT: You are not making any objection.

MR. REUSSILLE: I object to the reading.

MRS. SUTTON: May I have this marked in evidence, your Honor? It is marked here for identification. May I have it marked in evidence?

THE COURT: You are conducting your case.

MRS. SUTTON: I will read the letter.

THE COURT: Counsel objects and the objection is sustained.

WITNESS: In this letter—(interrupted.)

THE COURT: No. You cannot read the letter; cannot read any document until it is admitted in evidence. You haven't offered it in evidence.

MRS. SUTTON: I do offer it in evidence and ask to have it marked, because Vice Chancellor Foster is dead and I cannot get the original.

MR. REUSSILLE: If Mrs. Sutton's intention is to show that on about January she procured an assignment, I am willing to admit it for that purpose, if that is the purpose and no other purpose.

MRS. SUTTON: May I state what my purpose is?

THE COURT: I think it will be very important.

MRS. SUTTON: My purpose was to follow Vice Chancellor Foster's advice and in five days from the date he gave me the advice I had done exactly

as he told me to and had stopped the May Straus foreclosure until October 1st, 1921, for nine months, and then when it was impossible to hold it back any longer I personally paid for it the full amount, that is I handed in my check to purchase the bond and mortgage and I expected a deed of assignment and the insurance papers to accompany them. When I paid my own money I asked Miss Von Glahn in the presence of Mr. and Mrs. Reilly if there was not a deed of assignment to accompany the bond and mortgage. Miss Von Glahn replied "I have no authority to draw one." I asked for the insurance papers and she said she didn't think they had any. At that instant the telephone bell rang and a telephone call from New York City—it was Mrs. Sherman on the New York end of the wire—was on the phone. Miss Von Glahn came back and said, "Mrs. Sherman is on the phone now. I asked her about the insurance papers and she said she never had any." Miss VonGlahn said, "We have never had any in the safe." I said, "Then if there aren't any, of course, I can't get them, and as to the assignment, I will call and see Mr. Smock later. I do not want to make you any trouble. Mrs. Sherman will have her money, out of the bond and mortgage, and I will see Mr. Smock as soon as possible about the rest." The very next day I went in to Mr. Smock's office and he was not there. I went three times. Miss White, who was here this morning and who is not here now, was there and saw me. Miss Von Glahn saw me also. I went nine different times before I found Mr. Smock. Meantime the bond and mortgage were never delivered up for cancellation, but were put in my safe deposit box in Red Bank in the Red Bank Trust Company and remained there, with no intention on my

part of having them cancelled. Now in January, 1924, when Mrs. Reilly paid the five hundred and forty five dollars and eighteen cents for the costs and interest up to January 28th, the date that the sale was advertised for—it left an even two thousand dollars and on that same day Mrs. Reilly and I said we would each pay one thousand dollars and buy the mortgage from Mrs. Straus later. It ran then for eight or nine months. Then we planned, in the presence of Mr. Reilly that we would each pay a thousand and we would own the bond and mortgage and after Mr. Reilly had received the conveyance from the Reilly Storage & Transportation Company of his property under a decree, which has not yet been filed,—after he received that we would sell the bond and mortgage to him, and he remarked, "That is all right. I might just as well pay you two, as to pay May Straus." But when October 1st—the month went by and the Reilly-Brown case was not ended and when it came to October 1st, 1924, this letter from Mr. Smock dated September 22, 1924, stating he will be obliged to continue the foreclosure, and there was only one thing to do, was to complete the payment in full to date and for us to take the bond and mortgage assigned to Mrs. Reilly and to me to keep that case of foreclosure out of the way, so that our very important case of Reilly v. Brown might continue. This letter was dated September 22. On October 1st I found that Mrs. Reilly could not pay any part of it—she had no way to meet it, and so I put in my own money, $2,107.40, and handed the two checks covering the Sheriff's fees and money for Mrs. Sherman—handed those to Miss Von Glahn and received in exchange the bond and mortgage minus the deed of assignment, for which I inquired on that same day, and

minus the insurance papers which were also non est.

ADJOURNED UNTIL TEN O'CLOCK TOMORROW MORNING.

IN CHANCERY OF NEW JERSEY.

December 2, 1925.

Between

AUGUSTUS M. MINTON,
Petitioner,

and

MARY WOOSTER SUTTON
and EMMA C. REILLY,
Defendants.

Case resumed pursuant to adjournment.

Counsel and parties as before stated.

MARY WOOSTER SUTTON, Resumes the Stand, for Further Direct Examination:

WITNESS: (Continuing.) I had received the bond and mortgage, I remarked to Mrs. Reilly, my co-assignee that now we owned the bond and mortgage, "You take the bond and I will take the mortgage, so that you will enjoy holding it a while and then I will come and get it and put it in the safe deposit box. So Mrs. Reilly carried the bond home and I took the mortgage, thinking it was perfectly safe in my possession and within a day or two I went to Mrs. Reilly, took the bond and I put the bond and the mortgage in my deposit box in the bank, but in the meantime—the next day after they were delivered to me I went three times to Mr. Smock's office to see if he was there, but he was

not, and I went again the next day, and it was very difficult to find him. Mr. Smock has business in Florida and was in Florida several times last year and I could not get him. So finally I wrote a letter to Mr. Smock. Finally, on the ninth trip, I did find him and at that time he drew the four lines through the typewritten words on the back of the mortgage. I saw him draw them.

THE COURT: What did you have to say to him at that time?

WITNESS: All I said was, "Mr. Smock, I do not want these words on this mortgage." Those words never meant anything to me, because I was not a party to them. They meant nothing to me at all. I simply ignored them. I said, "I don't want these," and he made no objection whatever, but he took his pen and ran right down through. Now I have a letter from Mr. Smock that I would like to put in evidence. It is dated December 12th—by the way, the letter which Mr. Reussille read in evidence was dated December 10th. I have the carbon copy. He read from the original. On my carbon copy I see that I have noted down here, "Original mortgage and assignment enclosed." Now that is December 10th after the mortgage had had the four ink lines drawn through the typewritten words.

MR. REUSSILLE: No objection to the letter.

MRS. SUTTON: I offer it.

(Paper marked Exhibit D-1 of this date.)

WITNESS: (Reading:) "December 12, 1924. Mrs. Mary Wooster Sutton, Red Bank. Dear Mrs. Sut-

ton: I acknowledge receipt of your letter of December 10th with enclosure. (That is this letter and the original mortgage and assignment were enclosed.) Will have the assignment executed. Very truly yours, Warren H. Smock." I never saw that assignment again until I went to New York City on December 20th to see why Mrs. Sherman had not returned the assignment which she had had for several weeks, but of course she was very very ill. which I didn't know at the time. She had been out of the hospital only two days when I found her at home. She immediately said she would execute the assignment as she intended to do long before, but was too ill to go to a notary public. So, as Mr. Smock sent the assignment himself to his own client and in his letter to her, which I read in New York City, he stated that it was all right for her to execute it, and with that authority she and I went to the undertaker who lived two or three doors from her—she wasn't strong enough to go down town and execute the assignment—and I saw her and Mr. Austin J. Gordon, the undertaker, himself, was a notary public, saw her, and he signed as subscribing witness. He also took her acknowledgment, but it was Saturday, and it was ten minutes to twelve before that was done. I couldn't get down town to the County Clerk's in time to have the certificate attached by the Clerk ready for recording of this assignment, so I came back to Red Bank and brought the assignment with me. The day after Christmas I went to New York—I went directly to the County Clerk's office; he attached the certificate of authority, and I went back to Red Bank, but at the Manhattan Transfer I met the County Clerk of Freehold; I handed him the assignment, paid him the fee; he took it to Freehold and

it is marked recorded three o'clock that same afternoon. That disposes of the assignment. Meantime I had stopped in Mr. Smock's office—I had taken the mortgage out to him, so that he could compare the mortgage with the assignment and see that the facts were all straight, and then I took that and put it in my safe deposit box, of course, never dreaming there was any trouble. At that time I did not know that May Straus-Sherman hadn't been made a party to the foreclosure suit of Minton's in August, 1923. The Sheriff's sale was the next scene; at the Sheriff's sale—(interrupted.)

THE COURT: At that time did you know that she had not been made a party?

WITNESS: I did not know, no, sir. I took it for granted back in August, 1923, they had made her a party. I was not interested in that. It didn't affect the Reilly v. Brown suit. At the Sheriff's sale there were the people present whose names have already been testified to and immediately after the sale, within one or two minutes, the little group gathered around the Sheriff's desk, consisting of Mr. Reussille, Mr. Minton, the Deputy Sheriff O'Brien, and myself—I do not seem to remember the Sheriff—I think he had gone out—were there, and I made this remark: "I did not know—" No—At that time I didn't know May Straus had not been made a party. I made this remark—the Brown mortgages were on both tracts. That sale disposed of only the first tract. There were two Brown mortgages, $3800 and $5700, and the May Straus $2000 mortgage that spread across the entire premises, the first and second, and I was doubtful as to what happened to those mortgages so far as the second

tract was concerned. I don't know yet. The remark that I made that seems to have been construed entirely different from what I intended it was almost exactly like this. I said, "The Brown mortgages and the May Straus mortgage are still in existence," and I was wondering how they were going to be apportioned between the two tracts. The first tract was sold at the foreclosure sale. I did know that that cut off all subsequent encumbrances who had been made parties—I didn't know that May Straus was not a party—but I did not see how it was going to affect our second tract. Not only that, but on January 12 I gave notice to Mr. Reussille that I was going to try to have that sale opened, and on January 16th we were before Vice Chancellor Foster in Long Branch and there I asked Vice Chancellor Foster, in connection with the Reilly v. Brown case, how we should account for those mortgages since that foreclosure sale had taken place, would Vice Chancellor Foster apportion the mortgage between the two tracts or would Judge who was special Master—how will we do it, and Vice Chancellor Foster said, "Mrs. Sutton, I will attend to that when the right time comes," and there we stopped. Now, the first I knew that May Straus had not been made a party to the Minton foreclosure on the first tract was when Mr. Reussille himself called me on the telephone and told me. I can repeat his exact language, because it is not my language. It wasn't New Year's Eve and it wasn't New Year's night, but might have been the second day of January. The sale took place December 29th, 1924. It was only a few evenings after that Mr. Reussille rang my phone and I answered. He said, "Mrs. Sutton, what do you think? I have made a mistake. I forgot to

make May Straus a party to the Minton foreclosure." I was astonished and he said, "Mr. Applegate—" Mr. Reussille is employed in the office of John S. Applegate & Son—he was then and he is now—Mr. Reussille said, "Mr. Applegate will give me the devil when he finds this out." Then Mr. Reussille said, "Are you going to be home?" I said, "Yes." It was in the evening—it was nearly eight o'clock. Mr. Reussille said, "I am going to come down to see you." Meantime, before we stopped talking, I said, "Hold the wire and I will look at my papers; I think in the Reilly Brown case I have the original subpoena, and I will see if you overlooked May Straus." I still was not convinced. I have those subpoenas with me and I would like those marked in evidence if you have no objection.

MR. REUSSILLE: No.

THE COURT: What is it?

WITNESS: Showing that May Straus Sherman is omitted as a party. That is how I found out.

(Paper marked Exhibit D-2 of this date.)

WITNESS: There are two subpoenaes, duplicates, one to Mr. and one to Mrs. Reilly. I went to the large drawer in which I kept all the papers and documents pertaining to the suit of Reilly v. Brown and there I found the original subpoena which had been given to me back in August, 1923, in connection with the May Straus mortgage case—September 23—the date here is the 30th of August. I looked over the list of defendants and I found that the name of May Straus was not here.

THE COURT: We have had all that.

WITNESS: It was then that I discovered that May Straus was not a party. I went back to the telephone—Mr. Reussille was holding the telephone all this time—I went back and I said, "You are right. My papers show that May Straus was not made a party to the mortgage," and it was the first time I knew it. Mr. Reussille came down that evening and stayed from eight o'clock until about ten. He was determined that the May Straus mortgage covered only the second tract, but I had maps and I had papers and I showed them to him and tried to convince him it covered both tracts. Now he admits it. That was the first week in January. In February Mr. Minton had received his deed to the first tract. In March Mr. Minton with Mr. Reussille—John S. Applegate & Son solicitor of record—started this suit that is before the Court today, of Minton v. Mary Wootser Sutton and Mrs. Reilly. Nothing of importance happened then.

THE COURT: Is that all?

WITNESS: I think that is all.

BY THE COURT:

Q. What interest had you in the Reilly-Brown suit?

A. Oh, I was the solicitor for—(interrupted.)

Q. What financial interest had you in it?

A. Not a penny.

Q. How were you to be compensated, out of the recovery?

A. Vice Chancellor Foster—(interrupted.)

Q. Answer my question, please.

A. No, sir; there was no agreement made between us.

Q. You had no contingent fee?

A. No, sir.

Q. Were you to be paid whether you won or lost?

A. No, sir; nothing was said about payment in any way.

Q. Did you expect to be paid whether you won or lost?

A. I don't suppose I will ever get a dollar for that suit.

Q. If you won.

A. I did win.

Q. If you had won a substantial victory you would expect to be paid out of the results?

A. If Mr. Reilly hadn't lost the first tract—(interrupted.)

Q. I am wondering why you bought the bond you bought this mortgage just because you had a financial interest in the outcome of that suit.

A. No, sir; not at all. Vice Chancellor Foster awarded me a counsel fee of a thousand dollars in open court.

Q. As against the defendant?

A. As against the defendant, Louis E. Brown.

Q. Were the Reillys able to pay you—were they financially able?

A. No, sir.

Q. Then your hopes of getting any money out of the Reillys was the successful outcome of the suit.

A. Well, if there was anything left, but already one tract had been taken away from them.

Q. If there was anything left if you were fin-

ancially successful you would have gotten your money out of that?

A. I don't know. Mrs. Reilly said, "Mrs. Sutton, I will work my fingers to the bone to pay your counsel fee," but she never could do it.

THE COURT: You were not at all practical. Go on.

WITNESS: I can only be myself. Mrs. Reilly and I bought the May Straus mortgage. She put five hundred and forty five dollars and eighteen cents into it.

THE COURT: She contributed towards the purchase to save whatever interest she might have in the land.

WITNESS: Well, if she thought of it. What we did it for was to stop the May Straus foreclosure so that the case of Reilly v. Brown could proceed, otherwise they were going to slip the whole thing away from us. I have these letters of Vice Chancellor Foster and I want to introduce them.

MR. REUSSILLE. I object. If they are only to prove the state of mind on the part of Mrs. Sutton we will admit that without their being introduced.

MRS. SUTTON: These will prove that I reported to Vice Chancellor Foster what Mr. Smock was to do about the assignment and I have Vice Chancellor Foster's written answer to me.

THE COURT: It doesn't make any difference what was reported, it was what was done.

MRS. SUTTON: It says what was done. It tells, and here is his answer.

THE COURT: I will not admit them now. I will read them. They are marked for identification and I will read them to see whether they are important.

CROSS EXAMINATION by Mr. Reussille:

Q. I think you stated you never intended to receive this bond and mortgage cancelled, is that so?

A. You are right.

Q. Why then did you say on your check in payment, given on that day, that they are in full payment of the bond and mortgage?

A. Because when I buy a thing naturally I speak of it as having paid for it—(interrupted.)

Q. Why?

A. Because when I buy a thing I speak of having paid for it, not in legal language perhaps, but it is my natural language.

Q. May I see that check? I notice your check dated October 1st, 1924, states "in full payment of mortgage and interest dated October 1st, 1919, for $2000—full payment of mortgage." Now if you intended an assignment, why didn't you say in full payment for the assignment?

THE COURT: She has already explained it.

WITNESS: It is my natural way of speaking.

Q. If you intended an assignment instead of a cancellation why did you mention to Mr. Smock in your letter of December 10th that it was your intention at one time to have the mortgage cancelled?

MARY WOOSTER SUTTON—Cross.

A. Because Mrs. Reilly and I in January, 1924, after she paid her five hundred and fifty four dollars and eighteen cents and left an even balance of two thousand dollars due—which also was the face of the mortgage—Mrs. Reilly and I said, playfully perhaps—partly in fun, partly in earnest—now, you take a thousand and I will take a thousand, we will each own it together; after Mr. Reilly receives his property back from Louis Brown in the case of Reilly v. Brown, Mr. Reilly can buy this bond and mortgage of us. Mr. Reilly said immediately, "Yes, that is all right; I might as well pay you two as to pay May Straus," but that time hasn't come yet. Mr. Reilly hasn't had a conveyance and therefore we haven't been able to sell the bond and mortgage to Mr. Reilly, which we intended doing, because Vice Chancellor Foster had already made his decision August 11th, 1924, that Reilly was to receive his property back again—and this all happened the first day of October when it seemed as though the Reilly and Brown case was coming to a close quickly.

Q. Do you say that, after your letter of December 10th, 1924, that it was never your intention to cancel that mortgage?

A. It has never been.

Q. Yes or no.

A. No.

Q. You say that in view of this letter of December 10th to Mr. Smock? You say, "No," it was never your intention to cancel that mortgage?

A. That is right. You mean cancel of record?

Q. Cancel the mortgage on the record.

A. I never intended for one second in my life to cancel the mortgage itself or of record.

MARY WOOSTER SUTTON—Cross.

THE COURT: You did not get an answer to that first question.

MR. REUSSILLE: I tried to get it.

THE COURT: You got a lot of words, not an answer. How does that letter read? Question her first about the letter.

Q. Your letter is as follows, the first paragraph, "In regard to the mortgage for $2,000 which was held by Mrs. Sherman until October 1, 1924, and which was paid in full with all costs and interest due thereon by Mrs. Reilly and myself at said date, will you kindly request Mrs. Sherman to assign said mortgage to Mrs. Reilly and to me, in lieu of cancelling the same, as we intended doing under the then existing circumstances when a conveyance of the premises in question was ordered made to Edward J. Reilly, the original mortgagor, and a merger seemed imminent." "In lieu of cancelling the same, as we intended doing under the then existing circumstances."

THE COURT: What did you mean by the last three words?

WITNESS: I meant the circumstances of this case of Reilly v. Brown being weighed in the balance and almost ready for closing and yet not closed; that while it was still so near a finish that Mrs. Reilly and I did intend to sell our bond and mortgage to Mr. Reilly after he had received the conveyance. That was the circumstances—those were the circumstances that I referred to.

Q. That is your explanation of that letter, is it?

A. It certainly is.

Q. And you say the words, "then existing circumstances" do not refer to October 1st, 1924?

A. No; it refers to the circumstances of the last two years.

Q. That is all, Mrs. Sutton. You have answered the question. Now, you stated, I think, in your direct examination, that you visited Mr. Smock and asked about an assignment in December some time, 1924, did you?

A. No, January, 1924.

Q. January, 1924?

A. Yes, sir.

Q. Then this was the first letter you wrote to Mr. Smock requesting an assignment, is that so?

A. As far as I know.

Q. And that was eleven or twelve weeks after October 1st?

A. Well, from October 1st to December 10th.

Q. Now, Mrs. Sutton, why didn't you yourself erase the cancellation if you didn't want it there?

A. Oh, I didn't think I had any right to do that.

Q. Why not, the mortgage was yours?

A. All the same I am not in the habit of cancelling legal papers.

Q. You knew that it meant what it said, that is the reason, isn't it?

A. I knew those words conveyed a meaning that I did not want on that mortgage and I asked Mr. Smock to strike them off and he put them on and he took them off.

Q. Did you think Mr. Smock was the only one, as representing Mrs. Sherman, that had authority to take them off?

A. I thought Mrs. Sherman or Mr. Smock would

be the only persons who had the right to erase what he put on.

Q. What you were doing was reviving the mortgage, were you not?

A. In my opinion it never died; it was always revived.

Q. Why didn't you erase them yourself? You considered Mr. Smock or Mrs. Sherman the only ones who had the authority to take that cancellation off?

A. I did—because Mr. Smock had put it on—let him take it off.

Q. Then you were attempting to revive the mortgage, weren't you, after it was cancelled.

THE COURT: Wasn't it highly proper? Wasn't the person to do that Mr. Smock, especially if she objected, as she said, at the time? I think you or I would have taken it to him to strike it off. It might be a forgery if she did that.

Q. Now you did speak to Mr. Smock in December, did you not?

A. Of what year?

Q. You stated Mr. Smock made marks across the cancellation.

A. Yes, sir.

Q. Now when was that done?

A. Some time previous to December 10th.

Q. Some time previous to December 10th.

A. After October 1st and previous to December 10th he cancelled that.

Q. Was it in December?

A. I don't know.

Q. No; was it in October?

A. No, it was not; it was longer than October.

Q. Longer than October?

A. Yes, sir.

Q. Didn't Mr. Smock tell you at the time you requested him to take those marks off that in his opinion the mortgage had been paid?

A. No.

Q. Didn't he tell you that the bond or the debt was merged in the decree?

A. No.

Q. Didn't he tell you that the decree had been satisfied?

A. No; I didn't know that until February, 1925, when you told me yourself.

Q. Didn't Mr. Smock tell you that he didn't think the assignment was any good, but that you could get it for what it was worth?

A. No, sir; nothing of the sort.

Q. Now, Mrs. Sutton, you remember the day of the sale?

A. December 29th, 1924.

Q. And you obtained an assignment of the decree after that sale—after the Minton sale, did you not, an assignment of the Straus-Sherman decree?

A. Yes, sir.

THE COURT: Under what date?

WITNESS: The 24th day of January, 1925.

Q. And did you look up the records to see whether that decree had been satisfied?

A. I did not.

Q. Did you subsequently find out that they were satisfied?

A. After you told me at Freehold?

Q. Do you still think you got something by that assignment?

A. My answer is I don't know.

Q. Was it not me that called your attention to the fact on the day of the sale—the Minton sale—and after you had made your statement at that sale, that you had taken no assignment of the decree in the Straus-Sherman case?

A. I do not remember anything having been said on December 29th.

Q. How did you happen to get an assignment of that decree—didn't I tell you about it?

A. No.

Q. Didn't I call your attention to the fact that you got no assignment of the decree?

A. No.

Q. Didn't I tell you that we had looked up the record and found out the decree to have been satisfied?

A. What month?

Q. After the Minton sale. It doesn't make any difference what month.

A. In February at Freehold. "Have you seen the letter that is in the Sheriff's office?" I said, "No." "Didn't you know it was there?" I said, "No." You repeated to me what the letter said.

Q. And it was after that that you got your assignment of the decree, was it not?

A. It was after that I got my substitution of attorney—solicitor—here it is. It is a substitution of attorney signed Wilson & Smock. Warren Smock himself signed it—dated March 5, 1925.

Q. Do you deny that you got your assignment of the Straus-Sherman decree after I spoke to you about it?

A. I can't tell. I know that I went into the Sheriff's office after I told you I did not doubt your word, but I would see the letter for myself—I went

in the Sheriff's office and saw the letter and saw what you had told me was true.

Q. Do you know what an assignment of the decree would indicate?

A. Yes, sir; I know that also.

Q. Why didn't you get one when you got the bond and mortgage?

A. I never thought of it. Mr. Alston Beekman suggested that to me, an honest lawyer in Red Bank—suggested that to me.

Q. Some dishonest lawyers in Red Bank?

THE COURT: There are no dishonest lawyers.

Q. Now did you tell Mr. Smock in advance, Mrs. Sutton, that you wanted an assignment? Did you ever tell him before October 1st, 1924?

A. I told him—(interrupted.)

Q. Yes or no.

A. Yes, sir.

Q. When?

A. Saturday—Saturday, January 19, 1924.

Q. And you stated in your direct examination that you expected to receive an assignment on October 25th,—did you not?

A. You mean October 1st?

Q. You stated in your direct examination that you expected to receive an assignment.

A. I did.

THE COURT: You haven't finished.

Q. October 1st, 1924.

A. October 1st.

Q. Why didn't you bring one with you?

A. It wasn't my duty to draw that assignment.

Q. It was for your benefit, wasn't it?

A. Doesn't make any difference.

Q. Doesn't make any difference?

A. No, sir; Mr. Smock's and Mrs. Sherman's business to make out an assignment along with the bond and mortgage and deliver it to me.

Q. And you deny, Mrs. Sutton, that you said, after the foreclosure sale—after the Minton sale—you deny that you said that the Straus-Sherman mortgage was not cut off?

A. I didn't say it at the sale. Here is what I said.

THE COURT: You have already told us what you said.

Q. Answer yes or no.

A. My answer is no, I did not.

Q. Did not?

A. I did not say that the Straus-Sherman mortgage was cut off.

Q. What did you say?

THE COURT: She has already told us.

WITNESS: Now I must give you the surrounding circumstances.

THE COURT: No; what did you say?

WITNESS: I said the Brown mortgages and the May Straus mortgage are still in existence.

Q. Well, that meant that they were not cut off.

A. No, it did not.

Q. What did it mean?

A. It strung across the two tracts; although you had cut it from one tract it was still on the other. That is what it meant.

Q. That is what you meant?

A. Yes, sir.

Q. Now you claim you invested your money in this mortgage October 1st.

A. I certainly do.

Q. Now at that time, on October 1st, 1924, did you know that Mr. Reilly's rights might be cut off as to the warehouse by the Minton foreclosure sale?

A. Yes; because he had been made a party.

Q. That is all. You have said yes, did you not? If that was so did you buy this mortgage relying on and having in mind the fact that his rights might be cut off by that sale?

A. Yes; because I still had three months in which to work with Vice Chancellor Foster to give us a decision in the big case, and in this letter from Vice Chancellor Foster he said, "I will settle all rights of the parties before the Sheriff's sale."

Q. You stated that you thought May Straus-Sherman had been made a party, did you not?

A. Yes.

Q. You were of the same opinion on October 1st, 1924.

A. Yes, sir.

Q. And you therefore purchased that mortgage, did you not, thinking that that mortgage would be cut off as to the warehouse premises?

A. Not cut off. I thought the case of Reilly against Brown was so nearly closed that we would finish our case and Vice Chancellor Foster would settle everything.

Q. You knew that the parties in the Reilly Brown case had all been made parties to the Minton

case and their rights would also be cut off, did you not?

A. Ask me the question again.

Q. You knew that all the parties to the Brown Minton case had been—or the Reilly case, had been made parties to the Minton case.

A. Didn't know anything about it, didn't pay any attention to it; it didn't interest me.

Q. Didn't you receive a subpoena as representing the Reillys?

A. I did not.

Q. Did you notice who the defendants were?

THE COURT: You did, in the foreclosure. You have it here.

WITNESS: Not on me personally; I thought he meant as a party.

Q. Didn't you represent Mr. and Mrs. Reilly?

THE COURT: He asked you whether you were representing them.

WITNESS: Mr. and Mrs. Reilly brought the subpoena—(interrupted.)

THE COURT: Won't you answer the questions and not make a long speech with each answer?

Q. Mrs. Sutton, didn't you know when you purchased the mortgage—you claim you purchased the mortgage on October 21st, 1924,—when you purchased that mortgage didn't you know that—did you suspect or think that May Straus Sherman had been made a party to that suit?

MARY WOOSTER SUTTON—Cross.

A. I thought of course she had been made a party.

THE COURT: Why can't you say yes?

WITNESS: Yes.

Q. When you purchased it you thought that your lien might be cut off as to the warehouse premises by the sale.

A. I didn't think anything about it.

Q. You didn't think anything about it?

A. No, sir.

Q. You didn't care what lien you had, did you, by that mortgage?

A. Except to stop the May Straus foreclosure suit from breaking up our big suit.

Q. That was the sole purpose for which you bought this mortgage.

A. Yes, sir.

Q. And you did it of your own accord.

A. Yes, sir.

Q. And on your own responsibility, as stated in your answer.

A. Yes, sir.

Q. And on your own initiative entirely.

A. Yes, sir.

Q. Not at the request of anybody.

A. No; but at the consent of the original mortgagor, Edward J. Reilly.

Q. I say not at the request of anybody, is that right?

A. No.

Q. Now, Mrs. Sutton, you stated that Mrs. Reilly took home the bond, is that so?

A. Yes, sir.

MARY WOOSTER SUTTON—Cross.

Q. And you stated that you subsequently got hold of the bond for safe keeping.

A. I went to the house and took the bond.

Q. Yes or no.

A. Yes, sir.

Q. And you kept practically all the Reilly papers for them, did you not?

A. All the most important papers.

Q. All the most important papers. You considered this an important paper?

A. Yes, sir; I put it in the safe deposit box in the bank.

Q. And the reason Mrs. Reilly gave you this bond was for safe keeping, isn't that so?

A. Yes, sir.

Q. And that is the sole reason; is that right?

A. Yes, sir.

Q. Do you remember me telling you after the Minton sale that the Sheriff's record showed the execution in the Straus Sherman case had been returned satisfied?

A. Yes, sir.

Q. And nevertheless you got an assignment of it after that, is that so?

A. I don't know.

Q. You don't know whether you got an assignment of it?

A. You mean an assignment of decree?

Q. Yes.

A. I don't know.

THE COURT: She got an assignment, but whether she got it afterwards she doesn't know.

WITNESS: No; I don't know that.

MARY WOOSTER SUTTON—Cross.

Q. You have already stated you got it in January or February, 1925.

THE COURT: She doesn't know whether it was after or before you spoke to her about it.

WITNESS: It is dated January 24th. That is the date of the assignment. I don't know whether you told me about it later, in the Sheriff's office or before that.

Q. Didn't I tell you right after the sale that the execution in the Straus-Sherman case had been returned satisfied?
A. No.
Q. I did not?
A. No.

THE COURT: You mean on the day of the sale and after.

MR. REUSSILLE: Yes.

Q. On the day of the sale and after, and didn't you tell me that Mr. Reilly had put the mortgage in his pocket and went home with it?

THE COURT: When?

Q. After October 1st—about October 1st when Mrs. Sherman was paid.
A. No; Mr. Reilly never—wait a minute—October 1st, 1924?

THE COURT: Answer the question, won't you?

WITNESS: Give me the question.

MARY WOOSTER SUTTON—Cross.

Q. What happened to the mortgage on October 1st, 1924, after your payment?
A. I took the mortgage and handed to Mrs. Reilly the bond, and then I said—(interrupted.)
Q. What happened to the mortgage?
A. Wait a minute now.

THE COURT: Now you answer.

WITNESS: What happened to the mortgage. I said, "We will let—" (interrupted.)

THE COURT: What happened to the mortgage?

WITNESS: Mr. Reilly took it. I took the bond back again from Mrs. Reilly and the mortgage and I said, "Here it is, Mr. Reilly—"(interrupted.)

THE COURT: Answer the question. She says she took the mortgage.

WITNESS: I took the mortgage and Mrs. Reilly had the bond.

Q. And didn't you tell me that you let Mr. Reilly take the mortgage home in his pocket?
A. Yes, sir, because—(interrupted.)
Q. That is all.
A. Wait a minute.
Q. No. That is all. No explanation. You can make your explanation later.

THE COURT: Let her make it now.

WITNESS: Mr. Reilly was going one direction half a block, as you know, around to his home—

I had an errand to do and I said to Mr. Reilly, "We will let you carry this bond and mortgage in your pocket. It will feel good to you to get hold of it again after it has made you so much trouble." On the way back I stopped at his house and got it—stopped at Mr. Reilly's house and got the mortgage and carried it to my home, when I returned to my home after we left the Smock office.

Q. You obtained it for safe keeping, is that so?

A. I did, and because I owned it, in a way—part of it.

Q. Now, Mrs. Sutton, you remember after the Minton foreclosure sale your appearing before Vice Chancellor Foster with objections to confirmation of that sale.

A. Yes, sir.

Q. And didn't you state as one of the reasons why you wanted the sale reopened was because you hadn't been made a party?

A. I hadn't been made a party?

THE COURT: No.

MR. REUSSILLE: That was not a valid reason, but I just wanted to see—(interrupted.)

THE COURT: She or her client?

MR. REUSSILLE: She and her client. She herself and also for her client.

WITNESS: No.

Q. And didn't Vice Chancellor Foster tell you that that reason was not available to you under such a proceeding?

A. I don't remember anything about that.

Q. You don't remember anything about that?

A. No. I would say no.

THE COURT: Would you say no because you do not remember it? I mean, do you mean to say you would say no in the face of your statement that you do not remember, is that what you mean?

WITNESS: When I do not remember a thing it probably did not happen.

Q. Mrs. Sutton, if you were confronted with the written reasons which you served on me for your objection to that sale, would that refresh your recollection at all?

A. No.

Q. It would not?

A. No; because I have them right here.

Q. You have the objections here?

A. Yes, sir, and all the affidavits, copies—my own copies.

Q. You have no objection to my reading from this?

A. No, not at all.

Q. "Please take notice—"(interrupted.)

THE COURT: Hand them over to the reporter to be written in the record.

IN CHANCERY OF NEW JERSEY.

Between

AUGUSTUS M. MINTON,

Complainant

and

EDWARD J. REILLY, et als,

Defendants.

ON BILL TO FORECLOSE.

NOTICE OF OBJECTION TO CONFIRMATION OF SALE AND AFFIDAVITS.

To John S. Applegate & Son,
Solicitors of Complainant.

Sirs:

Please take notice that on Friday, the 16th day of January, 1925, at Chancery Chambers in the City Hall at Long Branch, N. J., at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall apply to the Chancellor for an Order refusing to confirm the sale, or set aside the same, of the mortgaged premises made in this cause by John H. Van Mater, Sheriff of Monmouth County, on December 29th, 1924, on the ground that the price obtained at said sale is insufficient and further that a subsequent mortgagee having an existing lien on said premises was not made a party to the above entitled cause.

Affidavits upon which this application is made are hereto annexed.

(Signed) MARY WOOSTER SUTTON,
Solicitor of Defendants,
Edward J. Reilly and Emma C. Reilly, his wife.

Q. Why did you date the assignment back to October 1st, 1924, when as a matter of fact it was executed December 24th?

A. Because the assignment was drawn long before it was executed. It was necessary to have some date.

THE COURT: He asked you why you put in the first of October.

WITNESS: Because that was the day the money was paid and the bond and mortgage were delivered.

Q. I thought you said you did not draw the assignment at all.

A. Oh, no. I said I drew the face of the assignment and mailed it to Mr. Smock, and in his office they added the acknowledgment and sent the assignment to his client Mrs. Sherman in New York.

Q. Mrs. Sutton, you do not mean to say that you drew the assignment October 1st, do you?

A. Oh, no. No. I drew that early in December because Mr. Smock had entered the word, "December" in the acknowledgment. He did that before he mailed it to New York.

Q. Did you think there would be any difference in the effect if it was dated October 1st or December?

A. Not different in effect, but the money was paid October 1st; the bond and mortgage were delivered to me October 1st.

Q. I didn't ask you that.

THE COURT: Yes, you did.

WITNESS: That was the date and only date

that could have been put on before it was mailed to Mrs. Straus Sherman.

Q. That wasn't the date it was executed.

THE COURT: No.

Q. Now, Mrs. Sutton, did you ever have any agreement with the owner of the property, that is the one who was owner on October 1st, 1924, that this payment was to be considered a lien on the mortgage?

A. No, sir.

Q. Who was the owner at that time?

A. Louis E. Brown or the Reilly Storage & Transportation Company.

THE COURT: Or Mr. Reilly.

WITNESS: No; Mr. Reilly had nothing to do with it.

THE COURT: Mr. Reilly owned the property, it was conveyed to Brown, conveyed to the warehouse company and those deeds were set aside as fraudulent. Now somebody, one of the three was the owner, Reilly, Brown or the warehouse company.

WITNESS: It wasn't Reilly. I have Vice Chancellor Foster's conclusions right here. Vice Chancellor Foster said—(interrupted.)

THE COURT: Stop.

Q. Mrs. Sutton, after you read Vice Chancellor Foster's opinion you knew Mr. Reilly would never get possession or title to the premises, didn't you, by reason of the conditions which that decision imposed.

A. No, and I don't know it yet.

Q. You don't know whether he is going to get the title.

A. I believe he will have title to it.

Q. You knew his title, whatever it was, to the warehouse premises, had been cut off by the Minton foreclosure, did you not?

A. Yes, sir.

Q. Who did you consider the owner when you made the payments on the 1st of October?

A. Louis E. Brown or the Reilly Storage & Transportation Company, who are the same.

Q. And you never had any agreement with Mr. Brown or the Reilly Storage & Transportation Company.

A. No.

Q. I notice in Paragraph 5 of your answer you state that you did not represent on October 1st any person who claimed to be the owner of the premises; is that so?

A. In my answer or Mrs. Reilly's?

Q. Your answer, Paragraph 5, page 2.

A. I have it.

Q. You there said that you did not represent any person who claimed to be the owner of the premises described in the Straus-Sherman mortgage on October 1st, 1924.

A. Right.

Q. And you still say that is true?

A. Right.

THE COURT: Did you claim to represent the Reillys at that time?

WITNESS: No. I went up my own self out of curiosity.

THE COURT: What?

WITNESS: I did represent the Reillys.

THE COURT: What were you saying when I interrupted you?

WITNESS: I said I went to the Sheriff's sale out of curiosity, because I had never been to one, and I had a right to go to that one, so I went to see how they did it.

Q. You were interested in that sale outside of curiosity.

A. Oh, yes.

Q. You got a postponement of it once, didn't you, Mrs. Sutton?

A. Yes, for one week.

Q. At the end of Paragraph 5, I note you state in your answer that you paid this amount entirely on your own responsibility. That is so, is it not?

A. Oh, yes.

Q. And the payment was your own idea.

A. Yes, sir.

Q. And at the request of no one?

A. No.

DEFENDANT RESTS.

TESTIMONY CLOSED.

IN CHANCERY OF NEW JERSEY.

December 2, 1925.

Between

AUGUSTUS M. MINTON,
Complainant

and

MARY WOOSTER SUTTON
and EMMA C. REILLY,
Defendants.

Transcript of testimony taken in the above entitled cause before Hon. John H. Backes, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on Tuesday, the 16th day of November, A. D. 1926, at 11 o'clock A. M.

Appearances:

LEON E. REUSSILLE, JR., Esq.

MARY WOOSTER SUTTON

Case reopened for further examination by the Court and on application of the defendants to put in further testimony.

MARY WOOSTER SUTTON, recalled, testified as follows:

BY THE COURT:

Q. After your talk with Vice Chancellor Foster, did you go to see Mr. Smock?

A. Yes, sir.

Q. What occurred?

A. I went to see Mr. Smock. That was on Saturday, January 19th, 1924, that I found Mr. Smock in his office and I told him exactly what Vice Chancellor Foster told me.

Q. What did you tell him?

A. I told him that Vice Chancellor Foster said that the simplest way to dispose of the circumstances where the May Strauss mortgage foreclosure was likely to interfere with our case, that Vice Chancellor Foster said the simplest way was for me to take an assignment.

Q. Please tell me what you said to Mr. Smock?

A. I repeated that to Mr. Smock.

Q. Will you please tell me what you said to Mr. Smock?

A. I told him Vice Chancellor Foster said for me to tell him that the simplest way was to take an assignment, and I asked Mr. Smock if he would let me have an assignment of the May Strauss mortgage.

Q. What did he say?

A. What did he say?

Q. Yes.

A. Mr. Smock said: "I will advise my client to make an assignment provided the costs of foreclosure and the interest is, that they are paid to the date of the assignment."

THE COURT: In this case counsel has stated to me that the testimony just given by the witness is already in the case. In examining the case I found it was omitted. I was persuaded to believe that it was omitted accidentally in the witness being

her own lawyer. I thought that she testified so; that is why I called her.

THE WITNESS: Yes, I did.

BY MR. REUSSILLE:

Q. Mrs. Sutton, when the payment in January that you have just referred to was made——

A. Wait a minute, I haven't referred to any——

THE COURT: Please! You may object.

Q. When the payment in January to which you have just referred to was made in Mr. Smock's office, what was the length of time which Mr. Smock gave you in postponing his foreclosure?

MRS. SUTTON: I object to your question. You ask me what payment I refer to, and I have referred to no payment.

THE COURT: The objection is overruled.

BY THE COURT:

Q. What was the extension of time? Is that the question?

A. You will get the date all mixed up. On January 19th, Saturday, Mr. Smock told me that if I could get this assignee that he would hold off the suits, staying the sale for fully a week to give me time to get an assignee, but before the week was over, in exactly five days, on January 24th, I was before Mr. Smock with the money and Mrs. Reilly who furnished it, to pay Mr. Smock $545.18, cover-

ing the costs and interest to date, and Mr. Smock was satisfied.

Q. How long was he to hold off the sale of that property?

A. How long did he promise to hold it?

Q. Yes.

A. At that time I think he said until the 15th, May 15th, and then he extended it.

BY MR. REUSSILLE:

Q. Now, Mrs. Sutton, did you state that Mr. Smock agreed to give you one week to find an assignee?

A. On January 19th Mr. Smock adjourned his case at least one week to give me time to find an assignee.

Q. At the end of that week had you found an assignee?

A. Yes, two days before, on the 24th.

Q. January 24th?

A. January 24th we found our assignee.

Q. Who was it?

A. Mrs. Reilly, and the plan was that Mrs. Sutton and Mrs. Reilly——

Q. Who did you find?

A. I found Mrs. Reilly and Mrs. Sutton.

Q. Did you take an assignment at that time?

A. Because the mortgage——

Q. It was paid?

A. No.

Q. You only paid the interest and the costs at that time?

A. Yes, we had paid——

Q. Just a minute, Mrs. Sutton. Mr. Smock gave you one week from a date in January in which to find an assignee, is that so?

A. Yes.

Q. And you didn't take an assignment of the claim and no assignment was made at the end of that week, is that right?

A. You are right so far.

Q. And no assignment was made until almost a year later, is that so?

THE COURT: That already appears.

A. How could we take an assignment?

THE COURT: Don't argue.

A. (continued) We didn't take an assignment of the mortgage because nothing was paid on the mortgage.

MR. REUSSILLE: That is all.

THE COURT: Make your statement, please.

MR. REUSSILLE: In examining the record I find that I made no point in the testimony of having called up Mr. Smock's office, Mr. Smock himself, to ascertain that the mortgage which is attempted to be cancelled in this suit had been paid.

THE COURT: You made the point in your brief and don't find it reported in the record. I assume that that was a correct statement. You may support it, if you can, by Mr. Smock's testimony.

WARREN H. SMOCK, recalled for the defense.

BY MR. REUSSILLE:

Q. Mr. Smock, on or about December 1st, 1924,

do you remember my calling up and asking you whether the Strauss-Sherman suit had been settled?

A. Well, I have no recollection of it at all, Mr. Reussille. It may be very possible that you did, but——

Q. You have no recollection?

A. I have no recollection of it.

MR. REUSSILLE: If your Honor please, that is the question I wanted to ask Mr. Smock.

THE COURT: You may take the stand.

MR. REUSSILLE: I have a further question.

Q. Mr. Smock did you by reference to your records or diary in the office ascertain whether you were in Florida between the 1st of October and the 20th of December, 1924?

A. Between October 3rd and October 13th I was away in Kansas.

Q. That is about ten days in October?

A. And between November 24th and November 27th of the same year I was in Florida.

BY THE COURT:

Q. Any other days away?

A. Only for a day. Those were the only extended periods.

BY MR. REUSSILLE:

Q. On October 1st, 1924, were you in your office, to the best of your recollection?

A. I don't remember.

THE COURT: It appears from the testimony that he was not there at the time of the visit of Mrs. Sutton.

THE WITNESS: Is that the date the five hundred dollars was paid?

MR. REUSSILLE: No, that is the date the principal was paid, October.

THE WITNESS: I don't think it appears from my statement that I wasn't there. It does appear that I wasn't present when the money was paid, and I was possibly in another room.

BY MR. REUSSILLE:

Q. Mr. Smock, in January, 1924, do you remember a payment made by either Mrs. Reilly or Mrs. Sutton?

A. I remember there was a payment made. I don't remember the time.

Q. Do you remember whether at that time Mrs. Sutton asked for an assignment?

THE COURT: No.

Q. Before this payment was made, do you remember Mrs. Sutton coming to your office and asking you for an assignment?

A. No, I do not.

Q. Do you remember her asking you at all for an assignment previous or October 1st, 1924? Previous to or on October 1st, 1924?

A. I have no recollection of her asking for an assignment except at the time she came into my

office and I agreed to give her an assignment and strike out the cancellation.

THE COURT: That is the prior testimony.

Q. That was several months after October 1st, was it not?

A. That is right.

Q. Are you positive that she did not ask for any assignment previous to say December, 1924?

THE COURT: That is objectionable. The form of the question is objectionable.

MR. REUSSILLE: He stated he had no recollection.

THE COURT: How can you put it in his mouth that he is positive. Do you object to it, Mrs. Sutton?

MRS. SUTTON: I certainly do.

Q. Do you know, Mr. Smock, whether or not Mrs. Sutton made any request for assignment previous to October 1st?

A. My best recollection is that she did not. If you will permit me to add this to my testimony: It comes back to me now. I don't think it appeared before in my testimony, that she came to me at first and asked for an extension of time and I told her that I would give her a substantial extension if she would pay the accrued interest to date and the costs, but I have no recollection that she said anything about an assignment, and then a few days after that conversation she did in fact come back and pay

me something like five hundred dollars, which paid——

THE COURT: That is all in the testimony.

THE WITNESS: The first part of it wasn't, as I recall.

BY MRS. SUTTON:

Q. Mr. Smock, do you remember that I was in your office about five days before Mrs. Reilly paid the $545.18?

A. I have just stated that.

Q. Do you remember that I told you then I had a message from Vice Chancellor Foster and we talked it over?

A. I have a very distinct recollection that you showed me a letter, but it didn't impress me at all.

THE COURT: Is that all?

Q. Do you remember that when I came to your office that I told you Vice Chancellor Foster told me what to do and that you and I discussed the situation and that you said: "I will advise my client to make an assignment provided she is paid her costs under the foreclosure suit and interest?"

A. I never made any such statement, Mrs. Sutton.

LEON E. REUSSILLE, JR., sworn, made the following statement:

On or about December 1st, 1924, before the sale of the Minton foreclosure I made another search in

the County Clerk's office to ascertain the situation of the previous title. That I did for the purpose of showing Mr. Minton the condition of title in case he was compelled to buy it in. Among my search papers I found the mortgage which is sought to be cancelled and on it there was a question mark and a line drawn across the face of the paper which was done at my request by my stenographer, when she was requested not to insert that mortgage in the foreclosure search. I was in doubt as to whether this mortgage, just what it covered, and Mr. Smock and I have been informed by Mr. Minton, my client, that this mortgage had been paid but I was still in doubt as to where the line was and to just exactly what it covered. I therefore called Mr. Smock's office and found out from Mr. Smock on the telephone that that mortgage had been paid. This was on or about December 1st. Mr. Smock informed me at that time that he instructed the Clerk, instructed the Sheriff, to return the execution satisfied, and advised me to call the Sheriff up, and I called the Sheriff up, as the testimony shows, the testimony of William O'Brien, the Clerk in the Sheriff's office, and found out that what Mr. Smock said was true that he had sent a letter to the Sheriff instructing the Sheriff to return the execution satisfied. I later found out that the Sheriff had done that. I saw Mr. Smock's letter in the Sheriff's docket, and further obtained a copy of the execution from the Chancery Clerk upon which was endorsed the Sheriff's return.

THE COURT: All before the sale?

MR. REUSSILLE: Yes, sir.

EXHIBITS.

EXHIBIT C-1

Deed (Certified Copy)

Edward J. Reilly and Emma C. Reilly to Myron V. Brown, dated Aug. 24, 1920. Covers premises described in paragraph 1 of bill of complaint.

EXHIBIT C-2

Deed (Certified Copy)

Myron V. Brown and wife to Reilly Storage and Transportation Co., dated May 12, 1921. Covers same premises described in paragraph 1 of bill of complaint.

EXHIBIT C-3

Deed (Certified Copy)

John H. Van Mater, Sheriff, to Augustus M. Minton, dated Feb. 2, 1925. Covers same premises described in paragraph 1 of bill of complaint.

Recites: A certain decree in Chancery in a cause wherein Augustus M. Minton is complainant and defendants are Reilly Storage and Transportation Co., Inc., Louis E. Brown, Edward J. Reilly, Emma C. Reilly, et als.

EXHIBIT C-4

Deed (Certified Copy)

Augustus M. Minton and wife to Investment and Realty Corporation, dated March 5, 1925. Covers same premises described in paragraph 1 of bill of complaint.

EXHIBIT C-5

Mortgage (Certified Copy)

Edward J. Reilly to May H. Straus, dated October 1, 1919, for $2000 with interest at 5%. Covers a tract including same premises described in paragraph 1 of the bill of complaint, also a house and lot adjoining on the west.

EXHIBITS.

EXHIBIT C-6

Assignment of Mortgage (Certified Copy)

May H. Straus-Sherman to Mary Wooster Sutton and Emma C. Reilly. Consideration $2000. Dated October 1, 1924. Assigns mortgage described in Exhibit C-5. Covenants there is due on said mortgage $2000. Acknowledged, December 20, 1924. Recorded, December 26, 1924.

EXHIBIT C-7

Chancery Execution (Certified Copy)

In a cause in which May H. Straus-Sherman is complainant and Reilly Storage and Transportation Co., Edward J. Reilly, Emma C. Reilly, Louis E. Brown, et als, are defendants.

To foreclose mortgage described in Exhibit C-5. Execution dated December 20, 1923.

Endorsed by Sheriff as follows: "Returned satisfied, money made without sale. October 3, 1924. John H. Van Mater, Sheriff." Filed with Chancery Clerk Oct. 6, 1924.

EXHIBIT C-8

Is the Sheriff's execution docket referred to in testimony of William O'Brien, and in which the following entries appear relating to the foreclosure of the mortgage described in Exhibit C-5.

"Received in the Sheriff's office Dec. 27, 1923: returned to the Clerk's office on Oct. 3, 1924."

Letter from Wilson and Smock dated October 2nd, 1924: "Honorable John H. Van Mater, Sheriff, Freehold, N. J. Dear Sir: I enclose check for Mrs. Sutton for $39.90 and my check for $47.54 balance of fee in the May Straus-Sherman v. Reilly Storage Corporation, et als. Will you kindly return the execution satisfied."

Stamped on letter by Sheriff: "Returned satisfied, money made without sale, Oct. 3rd, 1924."

EXHIBITS.

EXHIBIT C-9

MARY WOOSTER SUTTON
Counsellor at Law
66 East Front Street
Red Bank, New Jersey

December 10, 1924.

In re
Assignment of Mortgage
May H. Strauss-Sherman to
Mary Wooster Sutton and Emma C. Reilly.

Mr. Warren H. Smock,
Counsellor at Law,
Red Bank, N. J.

Dear Mr. Smock:

In regard to the Mortgage for $2000. which was held by Mrs. Sherman until October 1, 1924, and which was paid in full with all costs and interest due thereon by Mrs. Reilly and myself at said date, will you kindly request Mrs. Sherman to assign said mortgage to Mrs. Reilly and to me, in lieu of cancelling the same, as we intended doing under the then existing circumstances when a conveyance of the premises in question was ordered made to Edward J. Reilly, the original mortgagor, and a merger seemed imminent.

Such conveyance has not yet been made to Mr. Reilly and the suit in Chancery concerning said premises is not closed, therefore we prefer to receive an assignment from Mrs. Sherman rather than merely to cancel the said mortgage of record. The same date, October 1, 1924, being the date of actual payment in full, can be used for the assignment. The acknowledgment being dated when taken, of course. This assignment should be on record as soon as possible.

For any expense incurred by either you or Mrs.

Sherman in complying with this request please send me your bill and I will mail you my personal check promptly.

Yours very truly,
MARY WOOSTER SUTTON.

Original Mortgage and
Assignment enclosed.

EXHIBIT C-10

Original of the mortgage of which Exhibit C-5 is a certified couy. Original endorsed as follows: "October 1st, 1924. This mortgage has been paid and satisfied in full, let it be cancelled of record.

(Signed) May H. Strauss-Sherman
by Warren H. Smock, her Att'y."

The cancellation endorsed on said mortgage had superimposed on it four parallel ink lines drawn at right angles to the typewritten cancellation. Said ink lines were made by Mr. Smock at Mrs. Sutton's request in December, 1924, several days before December 10th, 1924.

DEFENDANTS' EXHIBIT 1
WILSON AND SMOCK
Counsellors at Law
Red Bank, N. J.

Warren H. Smock
Henry D. Brinley January 24, 1924.

Received this day of Emma C. Reilly $289.17, being interest on mortgage under foreclosure in May H. Strauss-Sherman against Reilly Storage Transportation Company, et al, to January 28, 1924, leaving the amount due to complainant on her decree the sum of $2,000.

Received also the sum of $172.50 taxed costs, and interest $1.53.

Received also on account of Sheriff's Fees to date as on discontinuance the sum of $81.98.

In consideration of receipt of the foregoing, it is agreed that the sale of said premises in said foreclosure shall be continued to May 15, 1924.

Total amount paid $545.18.

(Signed) Warren H. Smock,
Solr. for Complt. in foreclosure.

DEFENDANTS' EXHIBIT 1A
WILSON AND SMOCK
Counsellors at Law
Red Bank, N. J.

Warren H. Smock
Henry D. Brinley Dec. 12, 1924.
Mrs. Mary W. Sutton,
Red Bank, N. J.

Dear Mrs. Sutton:

I acknowledge receipt of your letter of Dec. 10th with enclosure. Will have the assignment executed.

Very truly yours,
S/W (Signed) Warren H. Smock.
W.

DEFENDANTS' EXHIBIT 2
THE BROAD STREET NATIONAL BANK
OF RED BANK
Red Bank, New Jersey, January 24, 1924

No. 97

PAY TO THE ORDER OF Warren H. Smock, Atty. May Strauss-Sherman $545.18—Five Hundred Forty-Five and 18/100.....DOLLARS

(Signed) Emma C. Reilly

Endorsed: Pay RED BANK TRUST COMPANY, Red Bank, N. J., or order WARREN H. SMOCK, Atty. May Strauss-Sherman.
(Perforated by Bank), PAID * 1 . 25 . 24.

DEFENDANTS' EXHIBIT 3

Copy

MARY WOOSTER SUTTON
Counsellor at Law
Red Bank, N. J.

Saturday, January 19, 1924.

In re
E. J. Reilly vs. Louis E. Brown.
Vice Chancellor John E. Foster,
Newark, N. J.
My dear Sir:

Yesterday I found Mr. Parsons at his office. He is leaving today for a month's vacation in the south. He will be ready with his brief in the above named suit not later than April 1st, provided the accounting is completed by the Master before March 1st.

Mr. Applegate said that he could be ready by April 1st also provided my brief was ready a week or ten days before then so that he could reply to mine.

Mr. Smock was absent yesterday but I found him today. We discussed each point you mentioned to me in court yesterday. Mr. Smock said he would advise his client, Mrs. May Strauss-Sherman, mortgagee, to make an assignment of her mortgage provided she received payment in full for interest and costs due her to date of assignment. Or, if Mr. Reilly found it impossible to find an assignee for the mortgage, that the Sheriff's sale of the Reilly property would be postponed until the middle of May, in order to give us a chance to close our chancery suit, provided Mrs. Sherman be paid her interest, costs and whatever the Sheriff's fees were at the end. Mr. Smock agreed to adjourn the Sheriff's sale of the

Reilly property for one week at any rate, if we wished the time to find an assignee.

The Straus-Sherman mortgage is for $2000 plus interest for four years. I obtained the exact figures from Mr. Smock as follows:

Principal and interest to date of November 21, 1923	$2,263.90
(Evidently some interest already paid)	
Costs of foreclosure to date hereof	172.50
Additional expenses (according to W. H. Smock)	150.00
Total,	$2,586.40

The enclosed notice of the Sheriff's sale shows that MYRON V. BROWN has tacked on to the Mortgage with its expenses, a judgment which he has entered against E. J. Reilly (so Mr. Smock told me today). I have come across a similar state of affairs before, where Louis E. Brown had foreclosed a mortgage and Myron V. Brown added a judgment which was obtained against the mortgagor for money loaned. Now the printed advertisement says that the $3,314. is due on account of the decree of said Court concerning the mortgage. How Myron V. Brown rides along with his $700. plus costs, extras, is a puzzle to me. However, Mr. Smock will accept the $2,586.40 and assign the mortgage if Reilly gets an assignee. That will cut Myron V. Brown out of his anticipated haul.

Mr. Applegate said to me, "If the sale takes place, that stops the suit, doesn't it?" Then the sale must not take place. We will stop it if we can.

The May Straus-Sherman mortgage is a third mortgage on the so-called Second Tract of the Reilly property. On that Tract is the first mortgage held

by the Citizens' Building & Loan, $4400. originally but reduced by about $2000. now. The second mortgage is the $3800. held by Louis E. Brown, covering both the First and the Second Tracts. That mortgage we dispute and until the accounting is made we do not know what the real principal is. Therefore Myron V. Brown or Louis E. Brown, could buy in the entire Second Tract for about $6000. (excluding the L. E. Brown $3800. mortgage and Myron Brown's $700. judgment). That would let the purchaser oust the Reillys from their residence as the Second Tract covers that part.

We shall get an assignee and stop this complication.

I write all this so that when I appear before you next Friday the matter will be clearer.

Yours very respectfully,

DEFENDANTS' EXHIBIT 4

COURT OF CHANCERY OF NEW JERSEY

Vice Chancellor's Chambers

Newark, N. J., Jan. 22, 1924.

Mrs. Mary Wooster Sutton,
Counsellor at Law,
Red Bank, N. J.

Dear Madam:

Reilly v. Brown

I am writing to acknowledge receipt of yours of the nineteenth instant, enclosing newspaper clipping, which I am herewith returning to you.

The arrangement which you have made with Mr. Applegate and Mr. Parsons for the filing of briefs in the above case not later than April first, will be satisfactory to me, and I will endeavor, if the briefs are filed at the time named, to dispose of the matter

promptly, so that your agreement with Mr. Smock to have the sale postponed by the sheriff to the middle of May may be carried out, and if I can have the briefs and can dispose of the matter before the middle of May, all parties will then be in a position to know what their rights are at the time this sheriff's sale takes place.

Yours very truly,

(Signed) John E. Foster,
Vice Chancellor.

DEFENDANTS' EXHIBIT 5

No. 1170

Red Bank, N. J., October 1, 1924.

THE SECOND NATIONAL BANK
OF RED BANK, N. J.

PAY TO THE ORDER OF Wilson & Smock, Solicitors for May H. Strauss-Sherman, $2067.50
Two Thousand Sixty-seven and 50/100.....DOLLARS

(Signed) Mary Wooster Sutton

Full payment of Mortgage (and Interest)
dated Oct. 1/19 for $2000 made by Edward J. Reilly.
For E. J. Reilly Mtg.

Endorsed: PAY TO THE ORDER OF WARREN H. SMOCK, WILSON & SMOCK, Solicitors for May H. Strauss-Sherman.

Pay RED BANK TRUST COMPANY, RED BANK, N. J., or order WARREN H. SMOCK.
(Perforated by Bank) PAID 10 * 1 24.

EXHIBITS.

DEFENDANTS' EXHIBIT 6

No. 1171

Red Bank, N. J., October 1, 1924.

THE SECOND NATIONAL BANK
OF RED BANK, N. J.

PAY TO THE ORDER OF Sheriff John H. Van Mater $39.90

Thirty-Nine and 90/100 DOLLARS

(Signed) Mary Wooster Sutton

Adjournment fees—Sherman vs. Reilly, et al.
Mtg. foreclosure. In full to date.
For E. J. Reilly Mtg.

Endorsed: PAY TO THE ORDER OF ATLANTIC HIGHLANDS NATIONAL BANK, Atlantic Highlands, N. J. JOHN H. VAN MATER, John H. Van Mater, Sheriff of Monmouth County, N. J. (Perforated by Bank) PAID 10 14 24.

EXHIBITS.

DEFENDANTS' EXHIBIT 7

(FILED: MARCH 6, 1925.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

MAY H. STRAUSS-SHERMAN, Complainant

—and—

THE REILLY STORAGE & TRANSPORTATION COMPANY, INC. et al., Defendants

On Bill to Foreclose.

ASSIGNMENT OF DECREE.

I, MAY H. STRAUSS-SHERMAN, of the Borough of Manhattan, New York City, party of the first part, in consideration of the sum of ONE DOLLAR ($1.00), lawful money of the United States of America, to me in hand paid by MARY WOOSTER SUTTON and EMMA C. REILLY, both of the Borough of Red Bank, New Jersey, party of the second part, do hereby assign to the said party of the second part, the final Decree made in the above entitled cause, and also the accompanying proceedings under the foreclosure of the Mortgage made to me by Edward J. Reilly (Widower) on October 1, 1919, and recorded in Book 562 of Mortgages for Monmouth County, on pages 260 etc., and thereafter assigned to the party of the second part herein named on October 1, 1924, which said Assignment of Mortgage is recorded in the Clerk's Office of the

EXHIBITS.

County of Monmouth, in Book 92 Assignments of Mortgages, on pages 58 etc.

IN WITNESS WHEREOF I have hereunto set my hand and seal the 24th day of January, 1925.

(Signed) MAY H. STRAUSS SHERMAN. L.S.

Signed, Sealed and Delivered
in the presence of
(Signed) HARRY SILVERSTEIN.
Notary Public
New York Co. Clerk's No. 266
New York Co. Register No. 6073
My Commission Expires March 30, 1926.
Duly acknowledged Jan. 24, 1925, in N. Y. City.

EXHIBITS.

DEFENDANTS' EXHIBIT 8

(FILED: MARCH 6, 1925)

IN CHANCERY OF NEW JERSEY.

BETWEEN MAY H. STRAUSS-SHERMAN Complainant	On Bill To Foreclose.
—and—	
THE REILLY STORAGE & TRANSPORTATION COMPANY, INC. et al. Defendants	SUBSTITUTION of ATTORNEY.

We, WILSON & SMOCK, hereby consent to the substitution of MARY WOOSTER SUTTON as attorney of record, or solicitor, of the above named Complainant.

(Signed) WILSON & SMOCK.

Dated March 5, 1925.
Entered March 6, 1925.

IN CHANCERY OF NEW JERSEY.

Between

AUGUSTUS M. MINTON,

Complainant

and

MARY WOOSTER SUTTON and EMMA C. REILLY,

Defendants.

OPINION

1. An assignment of a mortgage, after payment of the mortgage debt by one entitled to be subrogated, is not valid at law. It is valid in equity as evidence of the subrogee's title.

2. The right of legal subrogation to security exists, where payment of the debt is necessary to protect an interest. The extent and quantity of the interest is not material.

3. A wife's inchoate right of dower is a sufficient interest to entitle her to subrogation of a mortgage on her husband's land paid by her to protect it.

4. A solicitor's lien for fees on his client's cause for action (C. S. C. S. 1805) is a sufficient interest to entitle him to subrogation of a mortgage paid by him to protect his lien.

5. The right of conventional subrogation exists where payment of the debt is made upon agreement with the debtor or creditor that the payer is to have the security. The agreement may be expressed or implied from the surrounding circumstances.

6. Self-serving letters, not purposefully written,

are admissible in evidence on behalf of the writer to prove his intention.

7. Enforcement of the right of subrogation is a matter of equitable discretion and is always exercised with due regard to the legal and equitable rights of others.

8. In order to work an estoppel because of silence, the silence must be under such circumstances that there are both a specific opportunity, and a real and apparent duty to speak.

9. To constitute an estoppel *in pais* there must be an admission intended to influence, or of such a nature as will naturally influence the conduct of another and so change his condition as materially to injure him, if the party making it is allowed to retract it.

For Complainant,

JOHN S. APPLEGATE & SON.

For Defendants,

MARY WOOSTER SUTTON.

BACKES, V. C.

The complainant foreclosed his mortgage and at the sheriff's sale purchased the property and took title. He failed to make May Strauss Sherman, the holder of a subsequent mortgage, a party to the foreclosure, and now brings this suit to have the Sherman mortgage, now claimed to be owned by the defendants, Mrs. Sutton and Mrs. Reilly, removed, as a cloud on his title, by compelling its surrender and cancellation of record. He alleges that the mortgage was paid by the defendants after his foreclos-

ure suit was begun and is no longer a lien. He also sets up that the defendants are estopped from asserting their mortgage because of their failure to assert it when he bid in the property under his foreclosure sale.

Edward J. Reilly owned a lot fronting eighty feet on Mechanic Street, Red Bank. A warehouse stood on the easterly and a dwelling on the westerly half of the lot. The complainant's mortgage covered the warehouse half. Lewis C. Brown held the second and fourth mortgages, and Mrs. Sherman the third, each covering the entire lot. Reilly conveyed the property, subject to the mortgages, to Myram H. Brown, who conveyed to the Reilly Storage & Transportation Co. All these interests, except Mrs. Sherman's, were barred by the complainant's foreclosure sale. Mrs. Sutton as the solicitor for the Reillys resisted the complainant's foreclosure, and previously had instituted a suit for the Reillys against the Browns and the Transportation Company to set aside their mortgages and conveyances for fraud, which, in August, 1924, was decided in their favor by Vice Chancellor Foster, who withheld the decree until the coming in of an accounting (2 N. J. Misc. Rep. 832). While these suits were pending, Mrs. Sherman filed her will to foreclose her mortgage, entered a decree by default, and under a fi fa advertised the property for sale January 28, 1924. The Reillys being in danger of losing the fruits of their suit against the Browns by the impending sale, Mrs. Sutton procured from Mr. Smock, solicitor of Mrs. Sherman, a postponement of the sale, upon the payment by Mrs. Reilly of the accrued interest and costs, $548.18. Under later pressure of threatened sale Mrs. Sutton, on October 1, 1924, paid the balance, $2107.40, by her two checks, one to the sheriff

for $39.40, for his fees, the other to the order of Mr. Smock's firm (Wilson & Smock) for $2067.50, upon which she wrote "Full payment of mortgage (and Interest) dated October 1/19 for $200. made by Edward J. Reilly. For E. J. Reilly Mtg." Mr. Smock, anticipating the payment, settlement having been promised, endorsed on the mortgage "October 1, 1924. This mortgage has been paid and satisfied in full. Let it be cancelled of record. M. H. Strauss Sherman by Warren H. Smock, her attorney," and left the bond and mortgage with his secretary who delivered them to Mrs. Sutton on receiving her checks. Under instructions from Mr. Smock the sheriff returned the fi fa into court October 3rd endorsed "Returned satisfied. Money made without sale." On December 10, 1924, Mrs. Sutton wrote to Mr. Smock:

> "In regard to the mortgage for $2,000. which was held by Mrs. Sherman until October 1, 1924, and which was paid in full with all costs and interest due thereon by Mrs. Reilly and myself at said date, will you kindly request Mrs. Sherman to assign said mortgage to Mrs. Reilly and me, in lieu of cancelling the same, as we intended doing under the then existing circumstances when a conveyance of the premises in question was ordered made to Edward J. Reilly, the original mortgagor, and a merger seemed imminent.
>
> Such conveyance has not yet been made to Mr. Reilly and the suit in Chancery concerning said premises is not closed, therefore we prefer to receive an assignment from Mrs. Sherman rather than merely to cancel the said mortgage of record."

Later, when they met, and upon Mrs. Sutton's re-

quest, Mr. Smock drew his pen through the cancellation endorsement and procured an assignment of the mortgage as well as an assignment of the decree to her and Mrs. Reilly and gave her a substitution as solicitor in the cause.

In the face of this documentary evidence Mrs. Sutton insists that she purchased, not paid, the mortgage debt, and asserts that when the sheriff's sale was upon her she, at Vice Chancellor Foster's suggestion, interviewed Mr. Smock and obtained from him assurances that he would advise his client to assign the mortgage to a purchaser upon payment of all the charges; that he agreed to and did postpone the sale upon the payment by Mrs. Reilly of the costs and interest to date, and that when she, Mrs. Sutton, finally paid the balance out of her own pocket, she asked Mr. Smock's secretary for an assignment, and when told by the secretary that she had no authority to prepare an assignment, replied that she would see Mr. Smock later about it, and that after many futile efforts to see him wrote the letter above quoted, and as a consequence the cancellation endorsement was erased and the assignments delivered. Mr. Smock says he has no recollection of any request for an assignment or a holding out by him that it would be forthcoming, and his secretary finds herself without recollection of a request for an assignment when Mrs. Sutton took the bond and cancelled mortgage. This failure to recall was not meant as attributable to faulty memory but in the sense of a qualified denial; that the things did not occur; and Mr. Smock's endorsement of payment on the mortgage and his written direction to the sheriff to return the execution satisfied reflects his then conception of the transaction and sustains his attitude that the mortgage was paid,

not purchased. The erasure of the cancellation endorsement and procuring the assignments was not due to an appreciation of an erroneous understanding on his part, and an effort at correction, but, to serve Mrs. Sutton and restore the security which she desired; which, of course, was abortive, if the mortgage debt in fact had been paid; and that that was the case and the assignment an afterthought is evinced by the letter of December 10th. Mrs. Sutton argues that the punctuation in the letter is controlling in its interpretation and that "in lieu of cancelling the same" being preceded and followed by commas, and parenthetically used, marks its true sense, but the sentiment of the letter as a whole, in the light of the attending circumstances, is, that when the final payment was made by Mrs. Sutton, Mr. Reilly's title was about to be restored and their interest would then be *inter sese,* "merged," as Mrs. Sutton put it, but as this hoped-for state of affairs had not materialized as speedily as had been expected that "therefore we prefer to receive an assignment from Mrs. Sherman rather than merely to cancel the said mortgage"; and this construction finds support in Mrs. Sutton's testimony that she and Mrs. Reilly had planned in the presence of Mr. Reilly that after Mr. Reilly's title had been restored they could sell the mortgage to him. The testimony taken in its most favorable aspect for the defendants indicates, that Mrs. Sutton obtained a postponement of the Sherman sale upon the payment of the accrued interest and costs; to give her a chance to find a purchaser; that Mr. Smock promised to advise his client to assign if she procured one and that failing to find one she paid the debt. This is as Mr. Smock and Mrs. Sherman evidently understood the matter. There was no agreement,

express or implied, by Mrs. Sherman to sell her mortgage, and as the burden is on the defendants to satisfactorily establish that they purchased it or redeemed it (19 N. J. Eq. 27), and having failed, their claim as assignees at law cannot be recognized.

The denial of a legal status, does not, however, involve the defendants' rights as equitable assignees, upon the principle of subrogation. Subrogation proceeds on the assumption that the debt has been paid. While the right does not extend to a mere stranger or volunteer on the other hand, as stated in 25 R. C. L. 1345 "Where subrogation is claimed on the ground that the payment was necessary to protect the interests of the subrogee, the extent or quantity of interest which is in jeopardy is not material. If he has any palpable interest which will be protected by the extinguishment of the debt, he may pay the debt and be entitled to hold and enforce it just as the creditor could." Mrs. Reilly had an inchoate right of dower at the time she laid out her share of the mortgage debt, and Mrs. Sutton as solicitor in the suit of the Reillys against the Browns and the Transportation Company had, by the statute, a lien on her client's cause of the action, the land, when she paid the balance (C. S. C. S. 1805). At that time a thousand dollar counsel fee had been awarded her. That the mortgage was paid by the defendants to prevent the foreclosure sale and stripping the Reillys of their equity, and incidentally Mrs. Sutton of her interest in the favorable outcome of the Reilly-Brown suit, is beyond question. They were forced to discharge it, or lose their all, and on the plainest principles of justice are entitled to be substituted, each *pro tanto*, in place of Mrs. Sherman. (Bigelow v. Cassedy, 26 N. J. Eq. 557; Shinn v. Budd, 14 N. J. Eq. 234; Sheldon on

Subr., Secs. 13 and 20; Robinson v. Leavitt, 7 N. H. 99.)

Not only are the defendants entitled to be substituted by operation of law, but a conventional subrogation may be spelled out of the established circumstances in favor of Mrs. Sutton. Mr. Reilly had the greater interest needing protection, and it was primarily to save his estate that the ladies paid off the mortgage; and that Mrs. Sutton paid the principal at his request may be implied from his conduct. They planned, so Mrs. Sutton says, in the presence of Mr. Reilly, that they would each pay a thousand dollars and after Mr. Reilly recovered his title they would sell the mortgage to him, to which he responded "That is all right. I might just as well pay you two as pay May Strauss," and later, when Mrs. Sutton assumed the burden, Mr. Reilly accompanied her to Mr. Smock's office where, with his approval, she paid the debt. Obviously it was the intention of Mr. Reilly, as well as Mrs. Sutton, that she should have the security of the mortgage; that was their understanding, their agreement. The writer of the text of Subrogation in 25 R. C. L. 1340 after adverting to the rule of the civil law requiring an absolute and express agreement, and that the courts are not in entire harmony as to such requirements, says "The generally accepted view at the present time, however, is that it is not necessary that there should be an express agreement that the prior lien shall be kept alive for the benefit of the one advancing the money to pay it, or that it is to be assigned, but if from all the circumstances surrounding the transaction it is clearly to be implied that it was the intention of the parties that the person making the advance was to have security of equal dignity and position with that discharged then

equity will so decree. In such cases equity, speaking from the standpoint of good conscience, substitutes the person so paying the debt to the place of the original creditor, so far as to enable him to enforce the security for the purpose of reimbursement." *A fortori* where he was to have the original security for the debt. The doctrine of the text is not inconsistent with Receiver v. Whortendyke, 27 N. J. E. 658, where, although it was said by the Court of Appeals that conventional subrogation can only result from an express agreement either with the debtor or the creditor, the point decided was, that it is not sufficient that a person paying the debt of another should do so merely with the understanding *on his part* that he should be subrogated to the rights of the creditor. In Tradesmen's Building &c. Association v. Thompson, 32 N. J. Eq. 133, it was held on the authority of Coe v. Midland R. Co., 31 N. J. Eq. 105, that a stranger who paid the debt of another with the *expectation* of being substituted in place of the creditor is entitled to subrogation. In the *Coe* case the *Wortendyke* case was distinguished. In the North River Construction Company Case, 38 N. J. Eq. 433 the rule of the *Coe* case was reiterated and was passed without criticism by the Court of Appeals in affirming the decree, 40 N. J. Eq. 340. It appears from the cases that the expectation must be based upon negotiations, not amounting to express agreement, but from which an agreement may be implied. Mrs. Sutton is entitled to be subrogated in the place of the holder of the mortgage, even though she had had no interest to protect.

The defendants, under objection, offered in evidence a letter written by Mrs. Sutton to Vice Chancellor Foster in January, 1924, in which she related

her efforts at staying the Sherman foreclosure suit and procuring a purchaser for the mortgage. The letter though self-serving is admissable to show her intentions at that time regarding the paying or purchasing of the mortgage. Speer v. Speer, 14 N. J. Eq. 240; Clark v. Likens, 26 N. J. L. 207; Hunter v. State, 40 N. J. L. 495, 7 Enc. of Ev. 612.

As to estoppel. Enforcement of the right of subrogation is a matter of equitable discretion and is always exercised with due regard to the legal and equitable rights of others. Gaskill v. Wales, 36 N. J. Eq. 57. Mrs. Sherman was not made a party to the Minton foreclosure suit because, as is alleged, but not proved, Minton's then solicitor was of the opinion that her mortgage did not embrace the land under foreclosure, although the description in the mortgage is plain enough. It is detectable from his cross examination of the witnesses, that after he filed the bill he was not altogether certain of his ground, and was anxious; and that before the sale took place he learned from the sheriff's records that the Sherman execution had been returned satisfied, and felt assured. On the other hand Mrs. Sutton was under the impression that Mrs. Sherman had been made a party, and in that belief attended the sale, December 29, 1924, and made no protest when the sheriff called for objections, but shortly after the property was struck off and in the hearing of all present, remarked, to the effect, that the sale did not affect the Sherman and Brown mortgages on the remainder of the lot. Mrs. Sutton's silence before and casual remarks after the sale are the grounds of the stoppel. It was during the first week in January following, that Mrs. Sutton learned from Minton's solicitor that he, as she says he said, had made a mistake and "forgot" to make Mrs. Sherman

a party. He, evidently, at that time, had found the assignment of the Sherman mortgage on record and had sensed the meaning of Mrs. Sutton's remark at the sheriff's sale, and, notwithstanding, and with knowledge of the Sutton-Reilly claim, had the sale confirmed and the sheriff's deed delivered.

It is a strained contention of the complainant that Mrs. Sutton's failure to make known her claim, when called upon by the sheriff, is responsible for the situation in which he finds himself and that she must suffer for her silence. The shoe is on the other foot. It was his solicitor's neglect to bring in Mrs. Sherman that lies at the bottom of his predicament. Mrs. Sutton lent no complication when she stood by in silence, at the sale, in the belief that it barred her mortgage as to the land sold, nor any when she expressed her view that it remained a lien on the remainder of the property. She conducted herself honestly, and spoke the truth, and moreover induced no material change of the complainant's position. If by any stretch of the imagination it can be said that her words and actions persuaded the complainant to alter his position from mortgagor to purchaser the change is not material. In either aspect the claim of the defendants was an outstanding lien upon the title. His solicitor's failure to retrace his steps and join Mrs. Sherman and those defendants as parties to this suit, after realizing his initial error, and his adding to the confusion by having the sale confirmed and taking title, with full knowledge of the defendant's claim, were of his election and in no wise chargeable to the defendants. "In order to work an estoppel the silence must be under such circumstances that there are both a specific opportunity, and real or apparent duty to speak." 10 R. C. L. 692. "To constitute an

estoppel *in pais* there must be an admission intended to influence, or of such a nature as will naturally influence the conduct of another and so change his condition as materially to injure him, if the party making it is allowed to retract it." Phillipsburgh Bank v. Fulmer 31 N. J. L. 52.

The bill will be dismissed.

Decree.

IN CHANCERY OF NEW JERSEY.

Between

AUGUSTUS M. MINTON,
Complainant

and

MARY WOOSTER SUTTON
and EMMA C. REILLY,
Defendants.

On Bill, etc.

DECREE.

This cause coming on to be heard in the presence of John S. Applegate & Son, of counsel with complainant, and Mary Wooster Sutton, of counsel with defendants:

And the court having examined the pleadings, and having taken proofs orally and in open court, and having heard and considered the arguments of counsel, and being of the opinion that the complainant is not entitled to the relief prayed for:

It is thereupon, on this 15th day of February, 1927, ORDERED, ADJUDGED and DECREED that the said bill of complaint be dismissed.

It is further ORDERED and DECREED that the complainant pay to the defendants, the costs of this suit to be taxed; and that in default of the payment of said taxed costs within 14 days after service upon the complainant of true but uncertified copies of said taxed costs and of this DECREE, execution issue against the goods and chattels, lands, tenements, hereditaments and real estate of said com-

Decree.

plainant, to make said taxed costs, according to the practice of this court.

E. R. WALKER,
Chancellor.

Respectfully advised:
JOHN H. BACKES,
V. C.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between

AUGUSTUS M. MINTON,
Complainant

and

MARY WOOSTER SUTTON
and EMMA C. REILLY,
Defendants.

On Bill, etc.

NOTICE OF APPEAL.

The complainants Augustus M. Minton and Investment & Realty Corporation hereby appeal from the final decree made in the above entitled cause on February 15th, 1927, by the Chancellor, on the advice of Vice Chancellor John H. Backes, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: February 19, 1927.

JOHN S. APPLEGATE & SON,
Solicitors for and of Counsel with Complainants.

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

LEON REUSSILLE, JR.,
Of Counsel with Complainants.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS
AND APPEALS

Between

AUGUSTUS M. MINTON,
Complainant-Appellant,

and

MARY WOOSTER SUTTON
and EMMA C. REILLY,
Defendants-Appellees.

On Appeal from the Court of Chancery

PETITION OF APPEAL.

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

The petition of August M. Minton, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the fifteenth day of February, 1927, in a certain cause in said Court of Chancery wherein the said August M. Minton and Investment and Realty Corporation were complainants and the said Mary Wooster Sutton and Emma C. Reilly were defendants, in this respect, to wit, that the said decree orders that the bill of complaint filed by the complainant-appellant Augustus M. Minton be dismissed, instead of granting relief prayed for in said bill of complaint.

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

Petition of Appeal.

1. The testimony shows the bond and mortgage in question was discharged by payment and the court failed to find accordingly.

2. The court should not have applied the principle of "legal" subrogation, or subrogation by operation of law, in favor of the defendant Emma C. Reilly.

3. The court should not have applied the principle of "legal" subrogation, or subrogation by operation of law, in favor of the defendant Mary Wooster Sutton.

4. The court should not have applied the doctrine of "conventional" subrogation, or subrogation by express agreement, in favor of the defendant Mary Wooster Sutton.

5. The court admitted in evidence the self-serving letter of the defendant Mary Wooster Sutton written in January, 1924.

6. The court failed to apply the principle of estoppel against the defandants and in favor of the complainants.

JOHN S. APPLEGATE & SON,
Solicitors for and of Counsel with Appellant.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

AUGUSTUS M. MINTON,
Complainant-Appellant,

and

MARY WOOSTER SUTTON
and EMMA C. REILLY,
Defendants-Respondents.

On Appeal from the Court of Chancery

ANSWER TO PETITION OF APPEAL.

The answer of the respondents to the petition of appeal of the appellant.

The respondents admit it to be true that a certain decree was made in the Court of Chancery as is stated in the petition of appeal, and that the decree orders that the bill of complaint be dismissed. And these respondents are advised and believe that said decree is agreeable to law and equity and they pray that the same may be affirmed.

MARY WOOSTER SUTTON,
Solictor for and of Counsel with
Defendants-Respondents.

New Jersey Court of Errors and Appeals.

AUGUSTUS M. MINTON,
Complainant-Appellant,

vs.

MARY WOOSTER SUTTON,
and
EMMA C. REIILY,
Defendants-Respondents.

On Bill, etc.

On Appeal From Court of Chancery.

INTRODUCTION.

Complainant appeals from a decree of the Court of Chancery dismissing a bill which prayed for the cancellation of record of a mortgage to which defendants claim title by an alleged assignment, or that defendants' mortgage be decreed to be a lien only on premises adjoining that of complainant.

The grounds relied on at the hearing were discharge of the mortgage debt by cancellation endorsed on the mortgage and othewise, and estoppel of defendants to assert a lien at least as to so much property described in said mortgage as was purchased by complainant.

The Court of Chancery upheld the mortgage on the theory of subrogation.

FACTS.

The complainant owned a first mortgage covering approximately the easterly half of the entire premises covered by a mortgage owned by May

Strauss Sherman, which was subsequent to complainant's. The complainant Minton, filed his bill to foreclose in August, 1923 and the solicitor did not make May Strauss Sherman a party defendant. May Strauss Sherman filed her bill to foreclose the following month—September, 1923 and in January, 1924, the defendant, Emma C. Reilly, by her solicitor, the defendant, Mary Wooster Sutton, paid to the solicitor of May Strauss Sherman by check of Emma C. Reilly all accrued interest on the Sherman mortgage and accrued foreclosure costs in return for an extension of the suit for several months. Mrs. Sherman's solicitor, nine months later in September, announced to defendants his intention to proceed with suit as no further payment had been made, and on October 1st, 1924, the defendant Sutton, went to his office and paid by her check, the balance of the mortgage debt and received in return the bond, and the mortgage endorsed with a receipt of payment in full, and with an authorization to the clerk to cancel the mortgage of record.

On the following day, October 2nd, 1924, the solicitor wrote the sheriff, directing him to return the execution satisfied, and on October 3rd, 1924, the execution was returned satisfied to the Chancery clerk by the sheriff. These facts subsequently came to the attention of complainant's solicitors who, before the sale to complainant, had been informed by Mr. Smock, May Sherman's solicitor that his client's mortgage had been paid and cancelled. Minton's solicitors had also, before the Minton sale, found support in this by reference to the sheriff's docket, wherein appeared the sheriff's entry as to return of the execution satisfied, under date of October 3rd, 1924, and in which also was pasted the letter of May Sherman's solicitor, Mr. Smock, under date of October 2nd, 1924, directing the sheriff to return the execution in the May Strauss Sherman

suit, satisfied. May Strauss Sherman received the amount due her on her mortgage on October 3rd, 1924, from her solicitor.

The complainant's foreclosure had been delayed by other litigation into which he was drawn as a defendant and holder of his mortgage, the nature of which is set forth in conclusions of Vice Chancellor Foster, reported in 2 N. J. Misc. Rep. p. 832, and the bill therein was dismissed as to him and he was allowed to proceed with his foreclosure, which reached sale on December 22, 1924. The defendant Sutton, ostensibly on behalf of Edward J. Reilly, complainant in the proceedings above referred to in 2 N. J. Misc. Rep., requested and obtained from the sheriff one week's postponement of complainant's sale to December 29, 1924, when sale was held and the premises were struck off to complainant Minton in the presence of Minton, his solicitor, the sheriff, and the defendant Sutton, representing the defendant Emma C. Reilly and Edward J. Reilly. The defendant Sutton, however, after the request for postponement and before sale, had during the week's interim caused to be placed on record what purported to be an assignment to herself and the defendant Emma C. Reilly of the May Straus Sherman mortgage which had been paid October 1, 1924 as heretofore mentioned and delivered up receipted in full and endorsed for cancellation. This assignment bore the date—October 1, 1924, but it is now admitted by defendants that the actual date coincides with the date of the acknowledgment which is December 20th, 1924, and it is further admitted that the assignment was executed by May Strauss Sherman at the request of the defendant Sutton, who, on or about the same time, visited Mr. Smock with the mortgage endorsed as previously mentioned and procured him to strike inked lines through the receipt and cancellation authority. Mr. Smock

was not then aware of Minton's foreclosure, nor of Minton's solicitor's possession of facts showing cancellation of his client's mortgage, nor of Mr. Minton's rights.

The defendants' assignment was later found to have been requested by the defendant Sutton by her letter to Mr. Smock, dated December 10, 1924, in which the suggestion was made that the assignment could be dated October 1st, 1924 and the letter sought its execution as soon as possible. No notice of the assignment was given to Minton or his solicitor.

Before the Minton sale at which Minton became purchaser, the sheriff announced to those present if there were any objections to sale or if any one wished to make any statement regarding the same. No one replied, and the property was struck off to complainant, the defendant Sutton making no bid either on her own behalf or anyone else. The defendant Sutton claims and admits she attended the sale thinking and under the impression that her assignor had been made a party defendant in complainant's foreclosure suit and that she had taken the assignment relying on property not covered by the Minton mortgage, and that she did not know until some days after the Minton sale that her assignor had not been made a party defendant in the Minton suit. Notwithstanding this, after she so found, which was several days after sale, she then notified Minton's solicitor that she would assert a lien on the premises purchased by Minton and as to which she thought her assignor's rights cut off at sale, as well as a lien on the adjoining property, not covered by the complainant's mortgage and sheriff's deed. Complainant's solicitor then called defendant Sutton's attention to the sheriff's docket in which the execution was returned satisfied on October 2nd, 1924 and Mrs. Sutton later produced

the mortgage as evidence of her ownership, said mortgage being cancelled as aforesaid and upon noticing the marks on the cancellation, Mr. Minton's solicitor was told by Mrs. Sutton that the cancellation was not effective and this suit was thereupon brought for cancellation of said mortgage of record.

The copies of subpoenas in complainant's foreclosure served on the Reillys, her clients, were delivered to the defendant Sutton by them in August, 1923 and up to the time of the Minton sale and sometime thereafter she was under the impression that her assignor May Strauss Sherman had been made a party, altho the subjoenas did not so read, and she had the opportunity of ascertaining the omission. While under this impression at the Minton sale, she made no bid to protect what she considered she had an interest in; notwithstanding this, an attempt is now made to assert a lien on premises where none was intended.

The alleged assignment was taken when it was thought the assignor had been made a party, whose rights would be cut off at sale If a lien was intended as to complainant's premises, the same was considered abandoned as nothing was done at sale to protect that interest, nor did the defendants, assignees apply to be made parties, or give any notice of the assignment until after sale.

PAYMENT AND DISCHARGE.

The testimony and exhibits shows the debt to have been paid and the mortgage satisfied and cancelled.

The checks representing the payments are noted. If care enough was taken to note on these checks what the payments were for, it would seem that their plain language should be strong evidence of

the purpose for which they were given. If defendants intended an assignment, it seems strange that the checks were not marked "for assignment" or "for purchase of bond and mortgage." The language, however, states **in payment.** (Defendant's Exhibits 5 and 6, pages 135 and 136.)

In addition is the endorsement on the back of the mortgage, the usual cancellation authority, placed thereon by the solicitor of the owner on October 1st, 1924 when payment was made (page 130, Exhibit C-10.) The marks drawn across the endorsement were made several months later when the attempted assignment was sought (page 42 lines 20-30, and page 46, lines 10-15, and pages 38 and 39) and were not on the mortgage when delivered to Mrs. Sutton with the bond on October 1st, 1924. Only the cancellation authority was on at that time. Mr. Smock's clerk testified that the receipt and cancellation was put on by him in advance (page 56, line 13) and handed to his clerk, Miss Von Glahn, who anticipated Mrs. Sutton's calling (page 56, lines 18-22.) If Mrs. Sutton had arranged to call, it would seem strange that, at the time, the request for the alleged assignment is not in the mind of either Mr. Smock or Miss Von Glahn. If Mrs. Sutton had arranged for an assignment, it is not likely that Mr. Smock would endorse on the mortgage a receipt in full payment and the cancellation authority. There is also the lack, at the time of payment October 1st, by either the alleged assignor or assignee of the production of any assignment in blank for execution.

The entire testimony of Mr. Smock and Miss Von Glahn is devoid of any assignment on October 1st, 1924. The first time it was called to Mr. Smock's attention was by Mrs. Sutton's letter of December 10th, 1924, and this letter, we think, shows conclusively, by specific wording and context as well,

that on October 1st, 1924 the mortgage had been paid and that at that time the intention was to procure its cancellation.

The letter appears on page 44 and 45 (also Exhibit C-9, on page 129) and, in referring to the mortgage, says, by way of description, "which was paid in full" on October 1st, 1924. There is no mention therein of said mortgage having been assigned to defendants. The request is, "kindly request Mrs. Sherman to assign said mortgage to Mrs. Reilly and me, **in lieu of cancelling the same, as we intended doing under the then existing circumstances * * *.**" These last words can, it seems, refer only to the only date mentioned, October 1st, 1924; but see the defendant Sutton's explanation (page 97 and 98.) The letter also refers to October 1st, 1924 as "being the date of actual payment in full."

Another circumstance showing almost conclusively payment of the debt is the request by Mr. Smock written October 1st or October 2nd, 1924, when payment was made, to the Sheriff to return the execution satisfied, on defendants' alleged mortgage (page 27, line 19), this being the letter pasted in Sheriff's docket, and the Sheriff's compliance with this request (page 29, lines 10-31). (See also return endorsed on execution, Exhibit C-7, page 128). Mr. Smock still had control over the proceedings. No assignment of the decree was obtained on October 1st, 1924 though defendants could have received such on demand from Mr. Smock. The debt once represented by the bond had for some time been merged in the decree which, on being satisfied by return of execution satisfied on or about October 1st, 1924, was discharged and any subsequent assignment thereof was a nullity. Discharge of the debt, merged in the decree, discharged the lien of the mortgage which became functus officio. In Wilson v. Brown, 13 N. J. Eq. 277, the court denied

subrogation in a case made where suit was pending, saying on page 279, "the execution, moreover, is satisfied, the debt is not transferred but extinguished and there are no rights under the judgment and execution which complainant could acquire by subrogation."

Another circumstance evincive of an intention by payors to discharge the debt was the fact that the bond and mortgage were, on October 1st, 1924, not delivered to defendant Sutton, but to the Reillys. Mrs. Sutton was, however, present representing them. The defendant Sutton's possession of the bond was for safekeeping only. Mrs. Sutton did not get the bond until several days later (page 86, and also Answer paragraph 3 on page 7.) The Reillys were accustomed to have Mrs. Sutton keep for them all important papers and Mrs. Sutton testifies that the bond was delivered to her for safekeeping only (page 107, lines 1-21.) As to the mortgage, Mrs. Sutton had forgotten an admission which she made to the effect that the mortgage was given to Mr. Reilly. She first says that after payment on October 1st, Mr. Reilly did not put the mortgage in his pocket and take it home with him (page 108, line 27) and then under pressure of examination states that he did (page 109, lines 18-30). The court, allowing Mrs. Sutton to make her explanation as to why this was done, receives what it seems to us is an explanation not worthy of belief (page 109, line 39 and page 110.)

Additional proof of payment is present in various portions of the testimony of Mr. Smock, Miss Von Glahn and Mrs. Sherman, defendants' assignor, who are disinterested witnesses, all in a position to possess knowledge of what actually was done (page 37, line 10-20; page 40, line 23; page 56, line 11; page 77, line 20-30.) Nowhere do they testify to an agreement to assign on payment; they know what occurred, and that the mortgage was paid and cancelled. The defense seems entirely an attempt to assert a lien where none was intended by all parties concerned. The delivery of the mortgage cancelled and the other circumstances just adverted to are consistent with an intent to pay and negative an intent to assign.

The fact that no assignment of the decree was obtained until long after the payment and after the assertion of lien by defendants (page 100), and the fact that no substitution of attorney in the Strauss Sherman suit was obtained on payment is evincive of payment. The former was attempted January 24th, 1925 (page 100, line 31) and the latter March 5th, 1925 (page 28, line 4; page 101, line 34) both long after the Minton sale, the latter after this suit for cancellation was started, and were no more effective than the attempted legal assignment for the suit had been discontinued, the decree discharged and the execution returned satisfied. There was no suit pending upon which an assignment of the decree and substitution of attorney could operate.

LEGAL ASSIGNMENT.

If defendants rely on an actual legal assignment, they have no lien.

The assignment was executed December 20th, 1924, the assignor stating that the acknowledgment was taken the day of execution of the assignment (page 59, line 29-33), which was almost three months after defendants' assignor has been paid in full (page 59, line 1-10) and nine months after the first payment to her solicitor (page 36, line 10-15).

The assignee takes subject to all defenses which are available against his assignor.

Traphagen v. Lyons, 38 N. J. Eq. 613.
Magie v. Reynolds, 51, N. J., Eq. 113.

No assignment was made or delivered defendants either on the date of the first payment in January, 1924 (page 36, lines 25-27) nor on the date of the final payment on October 1st, 1924 was any delivered or demanded by Mrs. Sutton (page 37, lines 10-30). If, therefore, defendants rely on an assignment at law, such was made by the assignor several months after she had been paid, and passed no rights to defendants for, when made, the assignor had been fully paid (page 59).

EQUITABLE ASSIGNMENT.

If defendants rely on an equitable assignment by delivery of the bond and mortgage to them October 1st, 1924, they cannot prevail, for

There was **no declared intention** upon the part of the assignor to assign on payment.

Although there may be an assignment in equity by mere delivery, and although no particular words are necessary to an equitable assignment, a declaration of intent on the part of the assignor or some acts indicative of such an intent must exist.

4 Cyc 45, 46
2 Ruling Case Law, 614
1 R. C. L. Supp., 589
4 R. C. L. Supp., 121
Re Interborough Consol Corp. 288 Fed. 334
Christmas v. Russell 14 Wall (U. S. 32, A. L. R. 932) 69.

In Re Interborough Consol Corp., the court said (32 A. L. R. on page 949):

> "No particular form of words seems necessary to make a valid, equitable assignment of a chose in action. A written or verbal declaration disclosing an intention to part with the ownership of the chose is all that is required." Citing cases. And on page 947, "The doctrine of equitable liens has been liberally extended in modern times to facilitate mercantile transactions. But it has been done to give effect to the intention of the parties to create specific charges, and that that intention might be justly and effectually carried out. But the courts are not authorized to find the intention when none existed. In Hopkinson v. Forster, L. R. 19 Eq. 74, at page 75, 23 Week. Rep. 310, 3 Eng. Rul. Cas. 755, the master of the rolls observed: 'you can have no charge in equity without an intent to charge.' "

And in Christmas v. Russell appears the following declaration by the United States Supreme Court:

> "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee."

In Cyc 45, 46:

> "In order to work an equitable assignment there must be an absolute appropriation by the assignor of the debt or fund sought to be assigned to the use of the assignee. The intention of the assignor must be to transfer a present interest in the debt or fund. And the assignor must surrender all control over the debt or fund. Where the transaction is evi-

denced by a written agreement or stipulation in writing, it depends, it seems, upon the intention of the parties as manifested in the writing, construed in the light of such extrinsic circumstances as, under the general rules of law, are admissible in aid of the interpretation of written instruments. Any words or transaction which show an intention on the one side to assign and an intention on the other to receive, if there is a valuable consideration, will operate as an effective equitable assignment."

Applying these principles to the facts in the instant case, there is an utter lack of any intent on the part of the assignor, May Strauss Sherman, or her solicitor Mr. Smock, who was conducting her foreclosure suit, to assign the debt represented by the bond, at the time of either the first payment in January, 1924, or the second in October, 1924. The January payment of interest and costs only, was made in exchange for Mr. Smock's promise to hold off sale for several months (page 36, line 12-37; page 51, line 1-15; page 53, line 33; page 80, line 1-14 and defendants' Exhibit 1 on page 131, line 3). Mr. Smock remembers no talk of any assignment at that time (page 79, line 14-18), but only "plenty of talk about deferring the sale," and allowed a delay of execution of the decree with the expectation of payment (page 80, line 1). The October payment was made to Miss Von Glahn, Mr. Smock's secretary, who delivered up the bond with the mortgage receipted for cancellation in return for checks noted "in payment." Miss Von Glahn recalled no demand by Mrs. Sutton for either an assignment of the bond and mortgage or of the final decree in the foreclosure suit then pending (page 56, lines 30-35; page 76, lines 4-8). Mr. Smock testifies that he then delivered no assignment to Mrs. Sutton and states

that she asked him for none (page 37, line 20-30; page 51, lines 30-36). Mr. Smock is distinct in his recollection that nothing occurred or was said about an assignment October, 1924 (page 49, line 3-6).

The solicitor of Mrs. Sherman moreover retained control of the proceedings and, the day after the payment on October 1st, 1924, instructed the Sheriff to return the execution satisfied (page 27, line 20-25), which the Sheriff did (page 29, line 21-31) and his docket so shows (page 30) as well as his return endorsed upon the execution (Exhibit C-7, page 128). The solicitor never relinquished control over the debt, once represented by the bond, and which at that time was merged in the final decree, the execution under which he ordered returned satisfied. The "control" test negatives any equitable assignment as of January, 1924, for the solicitor retained not only control over the debt then merged in the decree, but of the original evidences thereof, the bond and mortgage.

The solicitor's intent and idea of the effect of the transaction is also shown (page 37, line 11) where he states he did not proceed because "the mortgage was later paid" and (page 40, lines 10-25) "the mortgage was wholly paid October 1st."

There was not only a lack of any declared intention by the holder of the mortgage and decree to assign, but there were no acts on their part evincive of any intent that the delivery of the papers operated as an assignment. In fact, every move on solicitor's part, and some by defendants, manifested an intent to discharge the debt by payment. These acts and circumstances are elsewhere mentioned herein under Payment and Discharge and, taken together, are totally inconsistent with any intent by the payor and payee to treat the delivery as an assignment. The defendant Sutton testifies she asked

for an assignment. A mere intent by defendants to receive one unaccompanied by any act or declaration by the alleged assignor or her solicitor evincing an intent to assign, cannot operate as an assignment. It is important to remember that neither Miss Von Glahn nor Mr. Smock heard of any assignment until about December 10th, 1924, and that defendants alleged assignor, on the very date of payment (October 1st, 1924), had a call by 'phone from Miss Von Glahn who told her (Mrs. Sherman) that the defendant Sutton was there "to **pay** the bond and mortgage" (page 77, lines 20-30).

The case shows an utter lack of testimony on the part of anybody having the right and power to assign, evincive of an intent or even an inclination to assign on October 1, 1924. The only person who had the power to make any assignment of the mortgage in question was May Strauss Sherman, defendants' alleged assignor, who testifies that she had been paid in full on October 3, 1924 (page 59, lines 1-6), nor is there any testimony that she ever agreed to assign October 1, 1924, although she was called as a witness for defendants (page 76, etc.) The first time she ever heard of an assignment was shortly before her recovery in December, 1924, when she received a written assignment in blank from Mr. Smock, her solicitor, sent at defendants' request (Exhibit C-9, page 129). The assignment was executed not until December 20, 1924, (page 59, lines 29-40). There is no testimony on the part of the alleged assignor of any intent or agreement to assign on October 1, 1924. And it is to be noted that, although she was unconscious most of the time between November 5th and December 18th, she could have been approached between October 1, 1924 and November 5, 1924 (page 59, line 25-30). In fact on October 1st, 1924, Miss Von Glahn (Mrs. Sutton present) had Mrs. Sherman on the 'phone and she was

told that Mrs. Sutton was there to **pay** the bond and mortgage (page 77, lines 13-29).

Assuming that Mr. Smock, Mrs. Sherman's solicitor, had the authority to make an assignment by delivery on October 1, 1924, there is, as to him, no testimony indicative of any intent to assign. And it seems to us extremely important that Mr. Smock, when he crossed off the cancellation and receipt, did not know what Minton's rights were (page 43, line 36; page 44, line 1).

There being no intent to assign on October 1st, 1924, by the alleged assignor or anyone authorized to assign for her, there could be no equitable assignment as contended by defendants.

The state of case contains testimony and exhibits which negative any intent by defendants to receive an assignment by delivery on October 1, 1924.

Mr. Edward J. Reilly, asked by his own counsel, testifies (page 71, line 10-30) that he knew of no plan for any assignment on the date of the first payment. On page 72 he does testify to a plan by defendants inter se whereby each was to take One Thousand Dollars ($1000.00) of the mortgage, but cannot remember when (page 72, line 26.) In passing, it is to be noted that no such plan was adhered to, Mrs. Reilly only paying interest and costs.

Mrs. Sherman (page 77, line 20-30) says that she called Mr. Smock's office by 'phone on October 1, 1924, and was informed that Mrs. Sutton was there "to pay the bond and mortgage." Mr. Smock and Miss Von Glahn testify that there was no discussion at the time sale was postponed, of any assignment (page 79), and that none was demanded (pages 56, 57, 75, 123) and he is distinct in his recollection that nothing was said about an assignment on October 1, 1924 (page 51, line 30-35). Moreover, that he never said he would advise his client on defendants visit in January, 1924, or October, 1924, when the

payments were made, to execute an assignment (page 125, line 27-34).

Mrs. Sutton in several places testifies to having spoken to Mr. Smock about an assignment, but there is nowhere any promise or agreement by Mr. Smock or Mrs. Sherman that one would be given, or had been arranged for. Mrs. Sutton's attitude was one of expectation for an assignment (page 83, line 9-12). She says she asked Miss Von Glahn for an assignment, but there is no testimony that one was promised her, or arranged for. It seems strange that Mr. Smock would endorse the mortgage for cancellation, if an assignment had been promised by him. His clerk states (page 56, line 10-30) that Mrs. Sutton's call was anticipated and Mr. Smock had put the cancellation on in advance. It seems unlikely in the usual course of things that Mr. Smock was not then, in preparing for payment, instructed to prepare an assignment, or that Mrs. Sutton should not have one with her. Payment was not compulsory on October 1, 1924. If Miss Von Glahn was actually asked for an assignment, she would have called Mr. Smock's attention to the demand, but she remembers none and Mr. Smock is actually never asked to obtain one until several months later (Exhibit C-9, page 129). No request ever reached Mr. Smock for an assignment between October 1, 1924, and December 10, 1924, during which time defendant Sutton testifies she visited Mr. Smock's office nine times. Mrs. Sutton could have left word with her for Mr. Smock, or could have written to Mr. Smock. On October 1st, Mr. Reilly states (page 68 lines 17-20) that he is not positive about Mr. Smock's being away, and Mrs. Reilly states that then Mr. Smock was there but not just at the time the papers were delivered (page 64, lines 35-40 and page 65, lines 1-2. The court, for some reason, seemed to assume that Mr. Smock

was absent when Mrs. Sutton called on October 1st, 1924 (page 123, lines 1-3), but Mr. Smock corrects this impression several lines later (lines 15-19) saying "I don't think it appears from my statement that I wasn't there. It does appear that I wasn't present when the money was paid, and I was possibly in another room." Yet there is no attempt to see Mr. Smock personally. Mrs. Sutton is the only witness who states Mr. Smock was out of town. Mr. Smock did not so testify. In fact he testifies that during that period he was out of town no longer than 15 days (page 122).

There can be no equitable assignment if the intent was to discharge the obligation. Facts showing such an intent on October 1, 1924, are recited elsewhere herein under Payment and Discharge. The principal facts are:

1. Checks state in payment of bond and mortgage.

2. Mortgage delivered receipted for cancellation, free of any marks obliterating same.

3. Letter Sutton to Smock Exhibit C-9 page 129 shows in four places the mental attitude previous to its date, December 10, 1924.

(a) Refers to the mortgage as follows, "which was paid in full" (Exhibit C-9, page 129).

(b) Requests assignment "in lieu of cancelling the same" (Exhibit C-9, page 129).

(c) Prefers assignment "rather than merely to cancel the said mortgage of record" (Exhibit C-9, page 129).

(d) Refers to October 1st, 1924, as "being the date of actual payment in full."

4. Execution then pending ordered satisfied by solicitor.

5. Sheriff's return, shown in docket and on execution.

6. Bond and mortgage delivered to Reillys whom Mrs. Sutton represented. The papers were later taken by Mrs. Sutton for safekeeping, several days later (page 86) and Answer paragraph 3, page 8, lines 2-8).

It is submitted that the complainant's case shows payment and discharge of the mortgage, negativing any equitable assignment as of October 1st, 1924.

SUBROGATION.

Defendants are not entitled to subrogation. Subrogation is either "legal," arising by operation of law upon a given set of circumstances, such as a payment made by one liable as surety or otherwise, and to protect an interest; or "conventional" arising by agreement between the parties.

Wilson v. Brown, 13 N. J., Eq. 277
Shinn v. Budd, 14 N. J., Eq. 234
Receivers v. Wortendyke, 27 N. J., Eq. 658
Coe v. Midland Railroad, 31 N. J., Eq. 105
North River Construction Co., case 38 N. J., Eq. 433

The court, in part, sustained the mortgage sought to be cancelled upon the theory of conventional subrogation by implication. We do not seem to find any cases which go so far. By conventional subrogation is meant subrogation by express agreement and no case which we have examined on this point, either in this jurisdiction or any other, goes to the extent to which the Chancery Court does in its opinion herein, especially in view of the denial by the assignor, and her solicitor of any agreement, either express or implied.

Neither defendant testifies to any obligation either had to pay the debt, nor of the payment

being made to protect any interest. In fact, the defendant Sutton, questioned by the court (pages 92, 93, 94), says that she had no financial interest, was not to be compensated out of the recovery, had no agreement for a contingent fee. On pages 81-94 she states the purpose was "to stop the May Strauss foreclosure" and later (page 106, lines 18-26) that she bought the mortgage for that purpose only. Mr. Smock testifies (page 40, lines 30-40) that on making foreclosure search for Mrs. Sherman, he did not make Mrs. Sutton a party as she had no interest. At other points (page 94, lines 13, 14 and page 104, lines 10-13) she declares she "invested" in the mortgage with defendant Emma C. Reilly, her alleged co-assignee.

It will be insisted by defendants that the defendant Emma C. Reilly, by virtue of her relation to Edward J. Reilly, had an actual interest to protect by her payment of $545.18 and that she at least should be entitled to be subrogated to that amount. No doubt this payment was made at the instance of her solicitor "to stop the May Strauss foreclosure" (pages 94 and 106, lines 20). No other purpose is suggested except that the mortgage was bought (pages 94 and 104). Nowhere does it appear that Emma C. Reilly made the payment under such circumstances which would give rise to subrogation. The avowed purpose was as above stated. Both defendants must establish their equity to be subrogated by the weight of the evidence, and this they have failed to do.

The defendant Reilly's right to subrogation must fail for another reason. Subrogation is not applicable where only part of a debt be paid.

See 37 Cyc 379
Receivers v. Wortendyke, 27 N. J., Eq. 658
Wyckoff v. Noyes, 36 N. J., Eq. 227

The defendant Reilly's payment was for no part of the principal, but for interest and costs which had accrued on a mortgage being foreclosed (Exhibit D-2 page 131,) (Answer page 9, line 30, and case page 36, lines 35-40, page 79, line 11), and the balance was paid almost a year later by someone else besides the defendant Reilly (page 37, lines 15-20). It was a part payment and came within the operation of the rule denying subrogation unless payment be in full. Defendant Reilly never made any further payment (page 84, lines 32-40). The court in its opinion not only fails to apply this rule, but makes no mention thereof.

So much for subrogation arising by operation of law.

The defendants, under the evidence, cannot insist on conventional subrogation, or subrogation by agreement; they are mere volunteers.

The testimony shows that the defendants regarded as owner, not Edward J. Reilly but Louis E. Brown, or the Reilly Storage and Transportation Company (page 114, lines 10-35).

"Q. Now, Mrs. Sutton, did you ever have any agreement with the owner of the property, that is the one who was owner on October 1st, 1924, that this payment was to be considered a lien on the mortgage? A. No, sir.

"Q. Who was the owner at that time? A. Louis E. Brown or the Reilly Storage & Transportation Company.

"THE COURT: Or Mr. Reilly.

"Witness: No; Mr. Reilly had nothing to do with it.

"THE COURT: Mr. Reilly owned the property, it was conveyed to the warehouse company and those deeds were set aside as fraudulent. Now somebody, one of the three was the owner, Reilly, Brown or the warehouse company.

"Witness: It wasn't Reilly."

And later on page 115:

"Q. Who did you consider the owner when you made the payments on the 1st of October? A. Louis E. Brown or the Reilly Storage & Transportation Company, who are the same.

Q. And you never had any agreement with Mr. Brown or the Reilly Storage & Transportation Company. A. No.

"Q. I notice in Paragraph 5 of your answer you state that you did not represent on October 1st any person who claimed to be the owner of the premises; is that so? A. In my answer or Mrs. Reilly's?

"Q. Your answer, Paragraph 5, page 2. A. I have it.

"Q. You there said that you did not represent any person who claimed to be the owner of the premises described in the Strauss-Sherman mortgage on October 1st, 1924. A. Right.

"Q. And you still say that is true? A. Right."

And the stipulation read into the record (page 43) expressly states who was the legal owner in fee, and states that any subrogation agreement was not made with the Reilly Storage & Transportation Company, which company defendants regarded as owner. This line of testimony will exclude defendants from claiming any conventional subrogation. One claiming an equitable right to share in the

security of a mortgage which he has paid and to which he is not a party must establish, by the weight of the evidence, that all persons interested as mortgagors and mortgagees agreed that he also should be secured by the mortgage. There is no agreement here with the owner.

Boney v. Williams, 55 N. J., Eq. 691.

And this agreement must precede or coincide in time with the advancement of the money loaned. A promise made to the lender, after he has advanced the money, that he may share in the security of the mortgage, is voluntary and without consideration and cannot be enforced.

Boney v. Williams, 55 N. J., Eq. 691.

If this declaration be law, the defendants right to any subrogation by agreement must fail, for

1. The evidence shows no agreement with "all persons interested." It does show that the two defendants claim to have had inter se a plan, which was not adhered to (page 84). There is no agreement with the original mortgagor Edward J. Reilley nor with defendants assignor nor any request by the owner or mortgagor or at his instance, no agreement with Louis E. Brown or Reilly Storage & Transportation Company, whom defendants considered owners, and no agreement on October 1st, 1924 with the mortgagee Strauss Sherman or her solicitor Mr. Smock, as required by this rule. (page 114, lines 11-20).

2. Defendants have not, by their own case, established the agreement required by this rule by the weight of the evidence.

The evidence shows defendants to be volunteers, for it shows that the payments were not made either by full agreement with all parties concerned, or at

the instance of anyone and there is a total absence of any testimony by anyone who then owned or claimed an interest, Edward J. Reilly, Louis E. Brown or the Reilly Storage & Transportation Company, that the security was to be kept on foot for the defendants' benefit or anyone else. The voluntary nature of the payments is proved by testimony (pages 43, 92, 93; page 106, lines 18-35; page 114, lines 11-20; page 115, lines 12-40). On page 93, line 2 in response to the court's question as to how the defendant Sutton was to be compensated, the answer was, "No, sir; there was no agreement between us." On page 106 appears the following:

"Q. You didn't care what lien you had, did you, by that mortgage? A. Except to stop the May Strauss foreclosure suit and break up our big suit.

"Q. That was the sole purpose for which you bought this mortgage. A. Yes, sir.

"Q. And you did it of your own accord. A. Yes, sir.

"Q. And on your own responsibility, as stated in your answer. A. Yes, sir.

"Q. And on your own initiative entirely. A. Yes, sir.

"Q. Not at the request of anybody. A. No; but at the consent of the original mortgagor, Edward J. Reilly.

"Q. I say not at the request of anybody, is that right? A. No."

And on page 100 and 101:

"Q. At the end of Paragraph 5, I note you state in your answer that you paid this amount entirely on your own responsibility. That is so, is it not? A. Oh, yes.

"Q. And the payment was your own idea. A. Yes, sir.

"Q. And at the request of no one? A. No."

Paragraph 5 of the answer of defendant Sutton (page 9, line 23) states—"This defendant did not represent any person who claimed to be the owner of the premises described in said mortgage on the 1st of October, 1924" and the end of the same paragraph says the October 1st payment was made "entirely upon her own responsibility." The proof conforms to the answer. It is significant that the witness Edward J. Reilly called by defendants failed to testify to any agreement that he keep the security on foot, assuming he had the right to do so which is not conceded, for the defendants did not consider him the owner when payment was made.

Subrogation is never applied in favor of a mere volunteer.

> Wilson v. Brown, 13 N. J., Eq. 277
> Shinn v. Budd, 14 N. J., Eq. 234
> Fay v. Fay, 43 N. J., Eq. 438
> Re North River Co., 38 N. J., Eq. 433.

In Wilson v. Brown, 13 N. J. Eq. 277, the general rule is stated on page 278:

> "To entitle a party who pays the debt of another to the rights of the creditor by subrogation, the debt must be paid at the instance of the debtor, or the person paying it must be liable, as security or otherwise, for its payment."

The case is coincidental with the instant case in that the debt was merged in a decree under which an execution had been issued and satisfied, the court saying on page 279:

> "The execution, moreover, is satisfied, the debt is not transferred but extinguished, and there are no rights under the judgment and execution which the complainant could acquire by subrogation."

This reasoning seems applicable to the present case, the execution having been returned satisfied at the time of the October 1st and final payment, and there being no talk of or any actual assignment of the decree. The debt, therefore was extinguished and there were no rights under the decree and execution which defendants could acquire by subrogation.

In Shinn v. Budd, 14 N. J., Eq. 234, the facts were like the instant case. Mortgaged premises were advertised for sale and sold. Neither the advertisement, the conditions of sale, report or decree of confirmation contained any reference to the encumbrance. Complainant later paid the mortgage debt and **took his receipt therefor upon the bond.** The bill was filed to enforce the lien of the mortgage against the land in the hands of defendant, the owner, and prayed that he be substituted in place of the former holder of the mortgage and that he be subrogated to his rights.

The ground upon which relief was sought was that the purchaser at sale, through whom defendant took title, took subject to the mortgage, "that the sum due upon the mortgage was deducted from the amount of the purchase money and that the mortgage debt was paid by C..... out of his own funds."

There was no assignment of the bond and mortgage and the mortgage remained uncancelled of record.

"Complainant asks by subrogation to be substituted in the place of the mortgagee."

The court said, on page 236:

> "Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer."

And on page 238:

"I have seen no case in which a stranger who was in a condition to make terms for himself, and demand any security he might require, has been protected by the principal.

"In Sanford v. McLean, 3 Page 122, Chancellor Walworth states the principal with great clearness. 'It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor as a matter of course without any agreement to that effect. In other cases, the demand of a creditor, which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished'."

And again on page 238:

"The complainant is clearly not in a position to claim the benefit of the principle which he invokes for his relief. He had no interest in the land subject to the mortgage for the protection of which it was necessary that he should pay the mortgage debt. He was under no obligation to pay it, as surety or otherwise, out of his own funds."

And again on page 238:

"If he chose to advance the mortgage debt out of his own funds for the convenience of the purchaser, he was in a situation to require a new mortgage, or such other security as he saw fit for his own protection. Having neglected to do so, he has no claim to protection in equity by being subrogated to the rights of the mortgagee.

"The fact that the mortgage has not been

satisfied of record will not alter the case. **The holder of the mortgage neither assigned, nor agreed to assign the security. Upon the receipt of the money, he gave the administrator a receipt in full for the debt."**

And on page 239:

"Nor is the case aided by the fact, that the defendant was apprized at the time of his purchase of the claim of the complainant. Notice of an equitable lien will operate to charge the estate in the hands of the purchaser, but no notice will serve to render operative as an encumbrance a claim in itself inequitable."

The court dismissed the bill with costs, and stressed the lack of any assignment or agreement therefor by the holder of the security (in our case Mrs. Sherman); and mentions the fact that there was a receipt in full for the debt, as there was in the instant case. The court also said in effect that knowledge by the owner at the time of his purchase of the claim sought to be made a lien on his land, could not help claimant for "no notice will serve to render operative as an encumbrance a claim in itself inequitable." In the instant case, the complainant Minton at sale did not even have any knowledge of any claim and, after same was asserted by defendants, had the right to rest upon proof of satisfaction of the same, as to his premises at least, although he promptly started this suit when it was found that defendants asserted a lien.

In conventional subrogation, it is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he should be subrogated to the rights of the creditors.

Receivers of N. J. Midland Railroad v. Wortendyke, 27 N. J., Eq. 658.

In that case the court found no evidence of an agreement with creditors or the one bound by the security, but only an understanding on payor's part. The defendants in the instant case have proved nothing more and it is insisted that the evidence of disinterested witnesses shows even more, that no assignment was demanded, and that the intention of all parties was to extinguish the debt. This intent on defendants' part seems proved conclusively by the defendant Sutton's letter to Mr. Smock of December 10th, 1924 (page 44).

In connection with subrogation by agreement, it is also to be noted that the defendant Sutton's plan, if any, was only with the defendant Reilly, her alleged co-assignee, and that the plan was never adhered to (pages 72, 73 and 84).

Edward J. Reilly consented but testifies he was not the owner then (page 72, lines 35-40), (page 114, line 10-22).

Even if defendants would, under certain circumstances, be entitled to subrogation, it is insisted that the rule which prohibits the application of the doctrine to the prejudice of the rights of others should be applied in this case. This rule is stated and commented upon in:

27 Cyc 1438
37 Cyc 372
Traphagen v. Lyons, 38, N. J. Eq., 613
Rankin v. Coar, 46 N. J., Eq. 566
Boice v. Conover, 69 N. J., Eq. 580 (on 592, etc.)
Avon v. McDowell, 71 N. J., Eq. 116

In Traphagen v. Lyons, 38 N. J., Eq. 613, the appellants held judgments against Condit, liens on his lands. They alleged that Torrey, before the date of their judgment, recovered a judgment

against Condit, a lien on same land, that later judgment was paid and satisfied by Condit to Lyons but had later been assigned by Lyons to McCabe.

Prayer was for satisfaction of the judgment of record.

The court below denied relief on the ground that Lyons or McCabe was a purchaser of the judgment for value.

The Court of Errors and Appeals expressly dissented from the reasons given by the court below but reached the same result, holding that no payment and satisfaction was proved, it appearing that the lower court found a payment and satisfaction. The court said:

> "A judgment is an obligation of record, which may be discharged by payments, like any other obligation. Such payment will discharge the debtor and those who succeed to his rights. It will entitle them to enforce a satisfaction of the record which contains his obligation. It is settled that the fact of payment will not be permitted to defeat a title founded on a judicial sale, based on an unsatisfied judgment. Nichols v. Dissler, 2 Vr. 461. But this decision involves and depends on other principles. It manifestly cannot be contended that any one acquiring rights under the debtor, by his own act, could be debarred from relief against a paid judgment. Nor can it be contended that a judgment creditor, who has been paid in full, could assign the judgment so as to debar the judgment debtor, or those succeeding to his rights, from relief. In such case, the assignee admittedly takes the judgment subject to the right of the debtor and those interested under him, to defeat its enforcement, if it has been paid.

"It has also been settled that many obligations which have been discharged by payment or otherwise may, by the act of the contracting parties, be revived so as to possess renewed force as obligations. In Stout v. VanKirk, 2 Stock. 78, it was held that a judgment or obligation of record was susceptible of such revival by the joint act of the judgment debtor and judgment creditor. It is unnecessary to settle whether the doctrine there expressed is correct or not.

"Assuming that a judgment obligation may, like other obligations, after being once paid, be revived and vitalized by the parties, it cannot be doubted but that the power to revive is subject to such limitations and restrictions as have been judicially settled as attending the power to revive other obligations."

"The doctrine on this subject is settled in New Jersey. It is that the power to revive an obligation discharged by payment is limited in its effect, and does not extend so as to affect rights acquired prior to such revival. In Bolles v. Wade, 3 Gr. Ch. 458, it was held that a bond and mortgage, paid by the owner of the equity of redemption, was discharged as to subsequent encumbrancers, and that, while the owner of the equity might give new life to the mortgage by procuring its assignment to a third party for his benefit, yet it could not be thereby restored to its lost priority in respect to the subsequent encumbrancers.

"In Large v. Van Doren, 1 McCart. 208, Chancellor Green held that when a mortgage had been diminished by payment, it was not competent for the parties to re-establish it for

the full amount by reloaning the money paid thereon, to the prejudice of an encumbrancer who acquired rights after the mortgage, but prior to the reloaning. See, also, Underhill v. Atwater, 7 C. E. Gr. 16.

"In Stout v. Vankirk, supra, Chancellor Williamson held that neither a judgment debtor nor a judgment creditor could, after the judgment had been paid, revive it, as against a mortgage or judgment creditor whose lien was acquired prior to the act of the debtor by which it is sought to affect his lien. Payment by the debtor was held to operate for the benefit and as a release in favor of creditors having liens on the fund bound by the judgment.

"In Hoy v. Bramhall, 4 C. E. Gr. 563, this court held, in agreement with the court below, that an assignment of a mortgage made by the mortgagee at the request of the mortgagor, to a third person, who paid only a part of the amount due thereon, the remainder being paid by the mortgagor, gave to the mortgage a new vitality for the whole amount, so far as it affected the mortgage which he was estopped in equity from controverting; but that, as to subsequent encumbrancers or grantees of part of the mortgaged premises, intermediate the mortgage and its assignment, the assignee's rights were limited to the amount he had paid.

"And this was in accord with the view expressed by this court and the court of chancery, in Robinson v. Urquhart, 1 Beas. 515, that the right to repledge mortgages once paid was complete, except as to intervening encumbrancers.

"Applying the principles settled in these

cases (which are in accord with decisions elsewhere), the result is that neither Torrey, the judgment creditor, nor Condit, the judgment debtor, nor both of them, could revive this judgment, if it had been paid, so as to restore its lost priority of lien, or to give it force as against appellants who acquired rights intermediate the judgment and the time of the assignment, when its revival must be claimed to have been brought about, if at at all. If the opinion below was intended to declare that McCabe, the assignee, could enforce this judgment so as to cut off appellants' liens, I think it opposed to these principles, and erroneous."

This rule limiting the application of the doctrine of subrogation has, as in the Traphagen case, been most often applied to allow encumbrancers whose liens have intervened between the original obligation and its assignment, to assert a lien prior to the original lien. It is insisted that it should be applied in favor of any person having an equity which intervenes between the security sought to be asserted and its assignment. It is insisted that the complainant Minton acquired such an equity prior to the alleged assignment, by ascertaining that the mortgage sought to be a lien was settled, the foreclosure thereon then pending discontinued, and the execution returned satisfied (page 34, lines 10-20). As previously pointed out, this investigation was made by Minton's solicitors who never considered the alleged mortgage a lien on the premises being foreclosed, up to the time after sale took place, when they found the defendants claiming a lien and approached the defendant Sutton for the purpose of obtaining an admission of discharge or release (pages 90 and 91).

EQUITIES AND ESTOPPEL.

It may be well at this point to consider the right of defendants under the circumstances to insist upon a lien and whether the complainant has the right to insist upon its invalidity. The principle of subrogation will be applied only in the exercise of an equitable discretion and only with a due regard to the legal and equitable rights of others.

Gaskill v. Wales, 36 N. J., Eq. 527.

In the first place, Minton's solicitors failed to make a party defendant in the Minton foreclosure, of a subsequent mortgagee, for reasons, which were stated at the beginning of this brief. Assuming this failure is complainant's failure, it would seem that unless such failure would preclude him from later asserting that an alleged lien is not in fact a lien, he should not be precluded from denying its validity. Minton became a purchaser at his own sale. A purchaser is not estopped to deny the validity of an encumbrance by his acceptance of his deed even though stated to be a lien and he knew it.

27 Cyc 1360
Hackensack v. DeKay, 36 N. J., Eq 548
Trusdell v. Dowden, 47 N. J., Eq. 396
Magie v. Reynolds, 51 N. J., Eq. 113

And this is so even if an examination of the records would have disclosed a lien.

Sumner v. Seaton, 47 N. J., Eq. 103

It would seem, therefore, that complainants should not be precluded from asserting the invalidity of defendants' alleged lien.

On other equities, the evidence shows the balance to be in favor of complainants and against defendants.

It may occur to defendants to insist that complainant Minton could have retraced his steps as soon as he found defendants asserting a lien. This we think is without merit, for Minton's solicitor had, shortly after payment of the alleged lien and before the sale to Minton (page 35, lines 1-20) found that the foreclosure pending thereon had been settled, suit discontinued and execution returned satisfied, (page 34, lines 1-35; also page 125, line 35 and page 126, entire page) and, if under any duty in this respect, it was to take prompt steps to have the alleged lien declared invalid and such steps were promptly taken by filing the bill herein. It was not until the strange statement, made by the defendant Sutton after sale, was made that Minton had any idea a lien was asserted, and it seems that, as far as defendants were concerned, they claim not to have actually asserted a lien until they found that their alleged assignor was not made a party defendant, and this was some time after the sale. Defendant Sutton says she first found this out about January 2nd, 1925 (page 90 and 91) after Minton's solicitors became suspicious because of her statement made shortly after sale.

Another circumstance which it is thought is of the utmost import may be raised by the question. What did defendants intend to receive by the alleged assignment? The answer is that they expected to own a bond and mortgage, the lien of which would be cut off by a foreclosure of one of two prior mortgages then pending. They took an assignment of a third mortgage, knowing that the first (the complainant Minton's) was being foreclosed and thinking and under the impression, until after the Minton sale, that their alleged assignor, had been

made a party defendant in the foreclosure, and knowing that Edward J. Reilly's rights would be, cut off as to the tract in question, by sale (page 105, lines 35-40; page 106, lines 1-2). And this view and impression is admitted (See answer of defendant Sutton, page 10, line 18). Defendant Reilly and Edward J. Reilly had been made parties defendants in the Minton suit and brought to their solicitor Sutton the copy of the subpoena served on them (page 105). This same subpoena was the one which omitted the defendant's alleged assignor as a party defendant and defendant Sutton now claims she first knew of this omission after the Minton sale. On page 89, lines 18-25 she testifies that, at the date of Sheriff's sale, she took it for granted that her assignor was made a party and that she "was not interested in that." She says she first found out about the omission January 2nd, 1925 (page 90, line 36) several days after sale. She, therefore, considered her lien, if any she expected, cut off and elsewhere explains her statement at sale that her mortgage was not cut off (page 23, lines 31-35; page 33, lines 15-20) by saying that what she said was that they were still effective as to the remainder of the land (page 90 and page 103, lines 35-40; page 104, lines 1-5). If defendants, therefore, when they state they purchased by assignment on October 1st, 1924, expected a lien at all, it could not have been on the tract in question, but on the rest of the land covered by the Sherman mortgage. The testimony in places indicates that, if defendants were to get back the money they "invested," it was not in reliance of any lien on the premises in question. And it has already been shown that when defendant Sutton made the October 1st payment, she thought her alleged assignor had been made a party in the Minton suit. She tries to explain (page 96) why she mentioned "cancellation" in her letter to Mr. Smock

and here again appears a hope that, if and when Mr. Reilly got back his property, defendants were to be paid; but what property—that which was not covered by the Minton mortgage which was being foreclosed and in which said Reilly had been made a party defendant. She did not see how the omission "was going to affect our second tract" (page 90).

The foregoing is inconsistent with any estoppel on defendants' part to assert a lien by virtue of their silence at sale, for it assumes lack of knowledge by defendants of their rights at that time. But the testimony might be read so as to point to defendants' knowledge as to their rights at or before sale. The witnesses Minton and O'Brien state (page 23, lines 31-35; page 33, lines 15-20) that defendant Sutton specifically mentioned the Strauss Sherman mortgage at sale. In addition, defendant Sutton had been given a copy of the subpoena containing the omission of Mrs. Sherman as a defendant. Defendants testify to an assignment of the entire mortgage. And it may be asked why defendants did not obtain an assignment promptly on or after October 1st, 1924. It is to be noted that the actual assignment was recorded after the first date set for sale. This postponement was obtained by defendant Sutton who put her assignment on record just before the actual sale date. What could have occurred was that defendant Sutton, seeing that May Strauss Sherman had not been made a party defendant, obtained the assignment and hurried it to record before sale. In her letter to Mr. Smock (page 44) requesting the assignment, she says, "This assignment should be on record as soon as possible." The actual date of assignment was not used. On page 89 and 90, defendant Sutton leaves no doubt as to what she wants the court to believe as to her previous knowledge of the omission of her

alleged assignor as a party, for she offers the statement three times.

If these circumstances prove knowledge of defendants' rights at sale, it seems that they had no right, if they knew Minton had not made Mrs. Sherman a party, to allow Minton to purchase property in which they claimed a lien, and they would be estopped to assert one. They should have asserted their lien, if any, before sale and not have stood by in silence, knowing their conduct would mislead.

Collier v. Pfenning, 34 N. J., Eq. 22
Woodruff v. Morristown Bank, 34 N. J., Eq. 174
Kelley v. Repetto, 62 N. J., Eq. 246

Another circumstance which bears on the question of defendants' right to subrogation is their negligence and failure to take steps to be made parties defendants. If it is found that they were negligent in failing to ascertain that their assignor was not made a party (for they had the means of knowing, the copy of the subpoena being in their possession), then it must have been their fault in failing to be made parties. At the time of the alleged purchase, they state they knew of the foreclosure and thought their assignor had been made a party. Their alleged assignment was pending foreclosure, and they made no attempt to be made parties defendants although they thought their assignor had been. The inference is that they had no interest in the property on which Minton was foreclosing. If they thought that Strauss Sherman was a party, then they failed to be added parties defendants as her assignee pending foreclosure. If they should have known that their assignor was not made a party, then they were negligent in not applying themselves. (They attempted to do so after sale, page 112, Objections to Sale). If they

did know that she was omitted, then the doctrine of estoppel should be applied. According to defendants' own version, if their assignor had been made a party, the same result at sale would have been reached. Defendants made no attempt to bid up the property. They would have taken, according to their version, the same procedure at sale—silence, whether they or their assignor had been made parties to the Minton foreclosure.

The doctrine of subrogation is not applied when the party claiming it has been guilty of laches or negligence.

37 Cyc 373, 383.

This negligence may have consisted in the failure to obtain promptly and give notice to Minton of their assignment until after sale.

Another circumstance is that the defendant Sutton, representing herself and her co-defendant, were present at sale and saw and heard the property, on which they thought they had a lien, struck off for a sum which would not take care of even the mortgage being foreclosed. They made no bid to protect their mortgage which they thought was being cut off by said sale. They now attempt to profit by their inactivity and silence. Assuming both parties to have been innocent of any attempt to wrong the other, it would seem that defendants' conduct brings them within the rule which declares that, where one of two innocent persons must suffer, he must bear the loss who, by his negligence, has made injury to one or the other possible. There was no injury by Minton to defendants who claim to have purchased their mortgage under the view and knowledge that their assignor had been made a party. This omission could not hurt them.

Another rule which might operate against de-

fendants claiming subrogation is that which denies its application, either where the equities are equal or the rights of the claimant not clear.

25 R. C. L. 1321
3 R. C. L. Supp. 1452
L. R. A. 1918 D 732

Another rule which operates in complainant's favor is that which renders it unnecessary to make parties defendants, purchasers or encumbrancers who have acquired an interest **after the commencement of proceedings to foreclose.** Such parties need not be brought before the court and the title of the purchaser is not affected.

Dinsmore v. Westcott, 25 N. J., Eq. 302
Mott v. German Hospital, 55 N. J., Eq. 722

In the instant case, defendants' rights, if any, were obtained after the Minton foreclosure started. May Strauss Sherman may have been a necessary party but her assignees, pending foreclosure, were not. If this rule depends on constructive notice and it be claimed that defendants' examination of the Minton proceedings would not have revealed defendants' assignor as a party, then defendants would be bound by the actual notice already referred to of the Minton foreclosure.

Another circumstance which might affect Minton's right to equitable relief is that any neglect of his can be traced to his attorney. But this has been held in New Jersey to constitute no bar to equitable relief sought by him.

Institute Building & Loan Association v. Edwards, 81 N. J., Eq. 359.

EQUITIES.

One of the most important considerations which it is thought affects the defendants' claim is this: the defendant Sutton received a copy of the subpoena in the Minton foreclosure which had been served on the Reillys in August, 1923, when suit was begun (page 105, lines 13-30). From then until January, 1925, Mrs. Sutton testifies that she thought Mrs. Sherman, her alleged assignor, had been made a party in that suit, which terminated in the Sheriff's deed to Minton. (pages 89 and 90 in three places, also pages 104, lines 26-31; page 106, line 1). Notwithstanding, she claims she took an equitable assignment over a year later. She knew that Reillys' right, if any, would be cut off by sale, and thought that her assignor's lien would be. Her testimony on page 104, lines 10-31 is:

"Q. Now you claim you invested your money in this mortgage October 1st. A. I certainly do.

"Q. Now at that time, on October 1st, 1924, did you know that Mr. Reilly's rights might be cut off as to the warehouse by the Minton foreclosure sale? A. Yes; because he had been made a party.

"Q. That is all. You have said yes, did you not? If that was so did you buy this mortgage relying on and having in mind the fact that his rights might be cut off by that sale? A. Yes; because I still had three months in which to work with Vice Chancellor Foster to give us a decision in the big case, and in this letter from Vice Chancellor Foster he said, "I will settle all rights of the parties before the Sheriff's sale."

"Q. You stated that you thought May Strauss-

Sherman had been made a party, did you not? A. Yes.

"Q. You were of the same opinion on October 1st, 1924. A. Yes, sir."

The alleged assignment was taken without any inquiry as to whether defendants' alleged assignor had filed answer or notice in lieu thereof to have her mortgage reported upon, and further no bid was made at sale. In fact, the defendants were under the same impression the very date of sale, for she claims she found of the omission only several days after (pages 90 and 91). These facts being shown, it seems certain that defendants, if they had in mind any lien at all, in obtaining their mortgage, could not have had in mind any on that part of the premises described in their mortgage which was under foreclosure by Minton. And although Mrs. Sutton was present at the sale and still under the same impression, she made no attempt to bid up the property to a sum which would have realized a surplus over the amount of the decree. It is therefore, reasonable to assume that had defendants' alleged assignor been made a party, the same result at sale would have been reached. The defendants would have made no bid or taken any steps to protect their lien. They maintained strict silence, except after sale, and their lien if any would have been cut off, even if their assignor had been made a party. On page 89, lines 35 to page 90, line 16 of the State of Case the defendant Sutton says, "The **first** tract was sold at the foreclosure sale. I did know that that cut off all subsequent encumbrancers who had been made parties. I didn't know that May Strauss (Mrs. Sherman) was not a party, **but I did not see how it was going to affect our second tract."** She explains her statement made after sale to mean that the lien was alive as to the other tract not covered by the Minton mortgage (pages 89, 90 and 104, lines

1-5). The premises being foreclosed was a warehouse, and the rest of the property, included in the defendants' mortgage, was a house and lot, not covered by the Minton mortgage. On page 106, lines 11-30, referring to purchase of the mortgage, Mrs. Sutton is asked, "When you purchased it, you thought that your lien might be cut off as to the warehouse premises by the sale." She replies, "I didn't think anything about it" and later says she didn't care what lien she obtained and that her sole purpose was to stop the foreclosure from breaking up the other suit. The purpose of defendants is to assert a lien where none was intended, to the prejudice of the present owner. Under the impression from the alleged purchase of their mortgage that their assignor had been made a party, and under that impression at sale and after, and relying on a lien, if any at all, on the house and lot, not included in the Minton mortgage, and finding after sale from Minton's solicitors (pages 90, line 29; page 91, lines 26-27) that their assignor had not been made a party, they now asert a lien on premises to which they never looked for that purpose.

Respectfully submitted,

JOHN S. APPLEGATE & SON,
Solicitors for Complainant-Appellant.

New Jersey
Court of Errors and Appeals

On Appeal from Decree in Chancery of New Jersey

Between:

Augustus M. Minton,
Complainant-Appellant,

and

Mary Wooster Sutton and Emma C. Reilly,
Defendants-Respondents.

BRIEF OF ARGUMENT OF DEFENDANTS-RESPONDENTS.

Statement of Facts.

The mortgage which is the subject of this suit was made by Edward J. Reilly (widower) to May H. Strauss (now Mrs. Sherman) for $2,000, on October 1, 1919, duly recorded October 2, 1919, in the Clerk's office of Monmouth County, in Book 562 of Mortgages, page 260, etc., where it remains uncancelled of record with the notice of assignment of said mortgage entered in the margin thereof on page 260, referring to Book 92 of As-

signments of Mortgages, page 58. This mortgage covered the entire premises (two tracts) owned at that time by Edward J. Reilly but which were, on August 24, 1920, conveyed by Reilly and his wife, Emma C. Reilly, to Myron V. Brown, who on May 12, 1921, conveyed said premises to the Reilly Storage & Transportation Company, Louis E. Brown, President.

In a suit instituted in August, 1922, by Reilly and wife against Louis E. Brown, *et al.,* to have the two conveyances aforesaid set aside on the ground of fraud, the late Vice Chancellor Foster decided in favor of complainants August 11, 1924 (2. *N. J. Miscellaneous Reports,* pp. 832, etc.), but in his conclusions ordered a supplemental accounting and that if Reilly was found to owe Brown or the company anything, such indebtedness must be paid by Reilly and "then the transfer and conveyance of the property shall be made by the company to Reilly" (p. 850). The Master appointed to take testimony has not yet made his report; therefore no conveyance has been made to Reilly. The first tract (warehouse) was sold December 29, 1924, to Augustus M. Minton under foreclosure proceedings brought by Minton who held the first mortgage thereon. The second tract (residence) is now occupied by Reilly under power of an injunction granted during the continuance of the Reilly-Brown suit, but the title to the second tract is in the Reilly Storage & Transportation Company, which company is Louis E. Brown and is so found in conclusions (p. 846) where Vice Chancellor Foster says, "The answer to this is that Louis E. Brown was, in fact, the corporation; * * * furthermore, the company was not a purchaser for value." The

present situation is that Reilly is not the owner of either tract covered by the May Strauss-Sherman mortgage, and has not been since August 24, 1920 (Case, p. 67).

In September, 1923, foreclosure proceedings on behalf of Mrs. Sherman were begun by Warren H. Smock (Wilson & Smock, Solicitors), and the Sheriff's sale was advertised for January 28, 1924, covering both tracts of the property once Reilly's.

Although the Strauss-Sherman mortgage had no connection with the suit of *Reilly* v. *Brown,* the premises which were the subject of both were identical. Mary Wooster Sutton, as Solicitor for the Reillys, and who is a defendant in the present suit, appeared before Vice Chancellor Foster on Friday, January 18, 1924, calling to his attention the Strauss-Sherman foreclosure sale, and he advised Mrs. Sutton to get an assignee of the mortgage as being the simplest way to stop the proceedings. The next day, the 19th, Mrs. Sutton discussed the question of assigning the mortgage with Mr. Smock, in his office. Mr. Smock stated that he would advise his client, Mrs. Sherman, to make an assignment provided she received payment in full for interest and costs due her to date of assignment, and Mrs. Sutton wrote a letter to Vice Chancellor Foster the same day, telling him what Mr. Smock had promised (Case, p. 78, l. 39; p. 79, ll. 5 to 28; p. 81, ll. 14 to 33; p. 82, ll. 24 to 26: p. 94, ll. 14 etc. to p. 95, l. 10).

With the determination and fixed purpose in the minds of Mrs. Reilly and Mrs. Sutton that they would become the assignees of the Strauss-Sherman mortgage in order to prevent the sale

of the premises, a plan was made to this effect, and Mrs. Reilly made a payment of $545.18 by her check (Ex. D-2), being interest and costs due Mrs. Sherman to January 28, 1924, the date of sale advertised, drawn to order of Warren H. Smock, Attorney, dated January 24, 1924, thus reducing the indebtedness to $2,000, the face of the mortgage. With Mr. Smock's consent the sale was adjourned for several months (Case, p. 36, ll. 9 to 40; p. 64, ll. 9 to 36; p. 71, ll. 10 to 40; p. 72).

When the decision of August 11th, 1924, by Vice Chancellor Foster was filed and it seemed that the decree in *Reilly* v. *Brown* would soon be entered, and when the letter from Mr. Smock dated September 22, 1924, written to Mrs. Sutton stated:

> "Unless payment be made of the Sherman matter, I will be obliged to continue the foreclosure" (Case, p. 84, ll. 23 to 33),

it became necessary for Mrs. Reilly and Mrs. Sutton immediately to proceed with the plan for taking the assignment of the Strauss-Sherman mortgage in order to preserve the subject-matter of the *Reilly* v. *Brown* suit, then so nearly completed. Therefore, in continuation of the transaction of January 24, 1924, when Mrs. Reilly paid Mr. Smock $545.18 on account of the interest accrued on the mortgage, and costs, according to the agreement made with Mr. Smock on the 19th of January, 1924, only five days previous to the actual payment of the money (Case, p. 78, l. 39; p. 79, ll. 2 to 28) and the agreement was reported to Vice Chancellor Foster by letter of even date with the agreement (Case, p. 94, ll. 20 to 40; p. 95, ll. 5 to 10) the two assignees, Mrs.

Reilly and Mrs. Sutton, on the 1st day of October, 1924, accompanied by Mr. Reilly, went to the Wilson & Smock office according to appointment, to pay the balance due Mrs. Sherman for accumulated interest and further costs, and the $2,000 in addition for the bond and mortgage, thus fulfilling the conditions named by Mr. Smock January 19th, 1924, when he said he would advise his client to make an assignment of her bond and mortgage.

Mr. Smock was not in his office while Mr. and Mrs. Reilly and Mrs. Sutton were there, October 1, 1924. Miss Von Glahn, his clerk who attended to the business, said that he was out of town at the time (Case, pp. 51 and 52; p. 68, ll. 8 to 20; p. 80, ll. 16 to 30), and when Mrs. Sutton handed to Miss Von Glahn two checks (Ex. D-5 and Ex. D-6) totalling $2,107.40 in payment for the instruments, Miss Von Glahn delivered the bond and the mortgage to Mrs. Sutton in the presence of Mr. and Mrs. Reilly; immediately Mrs. Sutton asked if there was not a deed of assignment also, and insurance papers (Case, pp. 61, 62, 63 and 64, ll. 5 to 8; p. 68, ll. 24 to 40; p. 69, ll. 5 to 38; p. 82, ll. 38 to 40; p. 83, ll. 5 to 18), to which inquiry Miss Von Glahn replied in the negative and said that she had no authority to draw an assignment. Mrs. Sutton also spoke of the typewritten words endorsed on the mortgage and signed by Mr. Smock, and objected to them, but said that she (Mrs. Sutton) would come in again and see Mr. Smock about the matter (Case, p. 68, ll. 21 to 34; p. 69, ll. 5 to 38; p. 83, ll. 10 to 30), since the business was unfinished.

Mrs. Sutton retained the bond and mortgage in her possession until she and the Reillys reached the street, when she handed the bond to Mrs. Reilly and suggested that the two women permit Mr. Reilly to carry home the bond and the mortgage in his pocket, and that Mrs. Sutton would get the mortgage later. This was done (Case, p. 86, ll. 28 to 39; p. 87, ll. 5 to 8).

Mrs. Sutton took the mortgage to Mr. Smock at the earliest opportunity, to have him erase the words of receipt or cancellation he had placed thereon without her consent or knowledge, and Mr. Smock drew four heavy ink lines through the objectionable words (Case, p. 45, ll. 38 to 40; p. 46, ll. 5 to 16; p. 87, ll. 9 to 33).

No effort or attempt has been made by Mrs. Sutton to have the mortgage cancelled of record. The bond accompanying the mortgage is intact.

Mr. Smock was interviewed by Mrs. Sutton as soon as she could find him as to the deed of assignment she desired from Mrs. Sherman. Mr. Smock assented to have such assignment executed but asked Mrs. Sutton to draw the assignment and enclose it to him in a letter. This letter was written soon after the request and the assignment was prepared for execution and dated October 1, 1924, the date when the bond and mortgage were delivered and the money paid for them in full. The assignment and the mortgage (already corrected as to the mistaken cancellation) were enclosed in the letter dated December 10, 1924, and Mr. Smock had the acknowledgment prepared in his office, using the date of December therein, and he wrote a letter to Mrs. Sherman, dictating it in the presence of Mrs. Sutton, telling

Mrs. Sherman that it would be all right for her to execute the assignment enclosed by him (Case, p. 78, ll. 10 to 27).

On December 20, 1924, Mrs. Sutton went to the home of Mrs. Sherman in New York City to ascertain the reason for the delay in returning the deed of assignment, executed and acknowledged, to Mr. Smock's office. It was learned then that Mrs. Sherman had been seriously ill, unconscious most of the time, from the 5th of November until the 18th of December, 1924. When Mrs. Sherman came home from the hospital, she found Mr. Smock's letter, in which was enclosed the deed of assignment, awaiting her attention. She was too weak to act promptly in the matter, but when Mrs. Sutton arrived on December 20th, Mrs. Sherman accompanied her to a notary public's office and there executed and acknowledged the deed of assignment and delivered it to Mrs. Sutton, who had it recorded in the Clerk's office at Freehold, N. J., December 26, 1924 (Case, p. 21, ll. 10 to 15; p. 59, ll. 25 to 40; p. 60, ll. 5 to 7; p. 88, ll. 9 to 40; p. 89, ll. 5 to 7).

The Sheriff's sale, under the Minton foreclosure, of the first tract (warehouse) of the premises covered also by the Strauss-Sherman mortgage, was held December 29, 1924, when the property was struck off to Minton for $6,000. Instantly afterwards, Mrs. Sutton, who was present but had made no bid, exclaimed, wonderingly, "But the Brown mortgages and the May Strauss mortgage are still in existence." This remark was based upon the fact that the two Brown mortgages and the Strauss mortgage covered not only the first tract, which had just been sold, but also

covered the second tract (residence) of the premises. Mrs. Sutton was puzzled as to what effect the sale would have as to the three mortgages covering both tracts. At that date, December 29, 1924, Mrs. Sutton had no knowledge of the omission of May Strauss Sherman as one of the parties to the Minton foreclosure suit. Soon after the new year, 1925, opened, Mr. Reussille, of the office of John S. Applegate & Son, Solicitors for Minton, called Mrs. Sutton by telephone one evening and told her that he (Reussille) had "made a mistake," and explained that he had forgotten to make May Strauss a party to the Minton foreclosure suit when it was instituted in August, 1923, and that she had not been made a party at all. This was the first intimation that Mrs. Sutton had of the fact that the May Strauss mortgage remained an encumbrance upon the first tract (warehouse) sold to Minton (Case, p. 31, ll. 20 to 25; pp. 89, 90, 91 and 92, ll. 5 to 19).

On the 24th of January, 1925, May Strauss Sherman executed and acknowledged an assignment of decree to Mary Wooster Sutton and Emma C. Reilly in the foreclosure suit of Strauss-Sherman against Reilly Storage & Transportation Company (Docket 54, p. 245). This was done with the consent of Mr. Smock, who wrote to Mrs. Sherman that it was all right for her to make the assignment of the decree. Early in February, while in the Clerk's office at Freehold, Mr. Reussille called Mrs. Sutton's attention to the Sheriff's record and stated that the decree in the Strauss-Sherman foreclosure had been satisfied in October, 1924 (Case, p. 100, ll. 22 to 40; p. 101).

The decree was entered for a total amount of $3,296.48, but is made up from two distinct decrees, one in the Strauss mortgage suit for $2,263.90 against the premises belonging to the Reilly Storage & Transportation Company (Louis E. Brown), and the other for $679.06 in favor of Myron V. Brown (in a judgment obtained against Edward J. Reilly in the Supreme Court), with interest and costs on both, and the words, "Returned satisfied, money made without sale," and dated October 3, 1924 (Case, p. 30, ll. 10 to 38). The total sum necessary to satisfy the decree is $3,296.48, which has *not* been paid, notwithstanding the docket entry by the Sheriff. Mrs. Sherman was paid in full for her mortgage, bond, interest and costs, and her deed of assignment of her mortgage, October 1, 1924, but Myron V. Brown's part of the decree was not paid. The assignment of decree was filed March 6, 1925, and filed with it on even date was the substitution of attorney, whereby Mr. Smock consented that Mary Wooster Sutton be substituted as attorney of record, or solicitor of May H. Strauss Sherman, in the Strauss foreclosure suit, Docket 54, page 245 (Case, p. 101, ll. 30 to 34).

Law and Argument.

Complainant in his brief (p. 10, ll. 17 and 18) states, "There was no declared intention upon the part of the assignor to assign on payment." On Saturday, January 19th, 1924, Warren H. Smock, solicitor of the assignor, Mrs. Sherman, discussed the question of an assignment of the mortgage with Mrs. Sutton, solicitor for both assignees, and this discussion was reported to Vice

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Chancellor Foster by letter from Mrs. Sutton the same date, in which it is written:

> "Mr. Smock was absent yesterday but I found him today. We discussed each point you mentioned to me in court yesterday. Mr. Smock said he would advise his client, Mrs. May Strauss-Sherman, mortgagee, to make an assignment of her mortgage, provided she received payment in full for interest and costs due her to date of assignment. * * * Mr. Smock agreed to adjourn the Sheriff's sale of the Reilly property for one week at any rate, if we wished the time to find an assignee" (Case, p. 49, ll. 30 to 40; pp. 50 and 51, ll. 5 to 30; p. 94, ll. 14 to 39; p. 95, ll. 5 to 10; p. 102, ll. 19 to 26).

Before the week had passed, or within five days, exactly, Mrs. Reilly and Mrs. Sutton decided to become the assignees themselves, and in accordance with this arrangement, Mrs. Reilly paid $545.18 to Mr. Smock, for Mrs. Sherman's interest and costs, January 24th, 1924, leaving a balance due of $2,000. Mr. Smock was satisfied with this payment and nothing further was done in the matter until October 1, 1924, when the entire balance due Mrs. Sherman, being $2,107.40, was paid by Mrs. Sutton. Since Mr. Smock had said on January 19th that he would have the mortgage assigned under named conditions, and those conditions were met, naturally both assignees understood that when they paid the balance they would receive the bond, mortgage and deed of assignment, and inquiry was made for the missing assignment and insurance papers, also objection

was made to the words written on the mortgage as a "receipt," so called by Mr. Smock.

Although in Mr. Smock's testimony, he says (Case, p. 37, ll. 35 to 40), "but generally the thing is very hazy in my mind," and he seems doubtful as to having expected to deliver a deed of assignment to the assignees, it appears that he has confused the various happenings on the different dates when the subject was before him, namely, January 19th, January 24th, and October 1st, in 1924, but he apparently recollects that the topic of an assignment was discussed between him and Mrs. Sutton, because he testifies that he remembers that Mrs. Sutton spoke to him before January 24th and that "She may have said something to me about an assignment at the time she made the five hundred dollar payment." This was not said at the time when Mrs. Reilly (not Mrs. Sutton) paid the five hundred dollars, but was said on January 19th instead of on January 24th. As to October 1st, Mr. Smock was not present when the bond and mortgage were delivered to Mrs. Sutton. Again, Mr. Smock testifies (Case, p. 78, ll. 38 to 39; p. 79, ll. 5 to 28) in reply to the Court's questions, "Any discussion about an assignment at that time?" and "It may have been?" "Well, it may have, but I think not." Again Mr. Smock's mind is confused by the events occurring on different days. No assignment was discussed on January 24th with Mr. Smock, but he has a recollection of an assignment conversation with Mrs. Sutton on some occasion during the transaction in connection with the mortgage. Defendants, Sutton and Reilly, insist that they understood that they were to receive an assignment of the mortgage and bond whenever

they met the conditions imposed by Mr. Smock, full payment of interest, costs of foreclosure suit and the $2,000 principal sum. These conditions were met October 1, 1924, and the bond and mortgage were accepted by the assignees in good faith that a valid assignment was intended, but Mr. Smock was not present to rectify his error (through his misunderstanding, it appears) until in the December following, when he did procure the deed of assignment for the assignees, and struck out the "receipt" he had written on the mortgage.

The testimony of Miss Von Glahn consists principally of, "I do not remember." She fails to recall words and actions even when she has heard other witnesses who were present with her testify to them, and even when her notes show certain happenings. Mrs. Sherman's testimony proves conclusively the telephone conversation between her and Miss Von Glahn about the insurance, and three other witnesses, Mr. and Mrs. Reilly and Mrs. Sutton testified to that conversation also. Miss Von Glahn's testimony, or lack of testimony, is far outweighed by the positive statements made by Mrs. Sherman, Mr. Reilly, Mrs. Reilly, and Mrs. Sutton, as to the occurrences of October 1st, 1924, and, of course, Mr. Smock being absent, knows nothing about them.

Complainant states in his brief (p. 14, ll. 5 to 12):

> "It is important to remember that neither Miss Von Glahn nor Mr. Smock heard of any assignment until December 10th, 1924, and that defendants' alleged assignor, on the very date of payment (October 1st, 1924), had a call by 'phone from Miss Von Glahn who told her (Mrs. Sherman) that the defendant Sutton was there 'to pay the bond and mortgage'" (Case, p. 77, ll. 17 to 29).

The answer to this is that the testimony shows, as already pointed out, that Mr. Smock and Mrs. Sutton discussed the subject of assignment and the conditions imposed upon the 19th day of January, 1924; that Miss Von Glahn and Mrs. Sutton talked about the insurance and the "receipt" endorsed upon the mortgage and the expected deed of assignment on the 1st day of October, 1924. It was Mrs. Sherman who called Miss Von Glahn, and not *vice versa,* by telephone.

N. Y. Greenwood Lake Railway Co. v. *Daly,* 55 N. J. Eq. 595, affirmed by Court of Errors and Appeals, 57 Eq. 347. Opinion by Vice Chancellor Pitney, page 599 (1897).

> "And it seems to be well settled at this day in New Jersey, in fact, familiar and common learning, that a mere delivery of a bond and mortgage, with intention to pass the title, upon a proper consideration, will vest the equitable interest in the person to whom it is so delivered."

Also see citations by the Vice Chancellor on pages 599, etc.

Ruckman v. *Ruckman,* 33 N. J. Eq. 354, at page 356 (1880):

> "A bond and mortgage is a chose in action, and may be assigned in equity by a mere delivery."

"Delivery is one of the essential requisites."

Denton v. *Cole,* 30 N. J. Eq. 244 (1878):

"If the mortgage is paid with money of the owner, it will be considered satisfied."

"A mortgage may be assigned in equity by mere delivery without writing."

"Money was given, not to pay but to purchase the mortgage." (At page 246.)

"It is unreasonable and improbable that (Howell) should pay the mortgage."

Hoppock v. *Ramsey,* 28 N. J. Eq. 413:

"The law will presume that he intended what would best accord with his interests."

Hall v. *Lambert,* 7 N. J. Eq. 651 (1850) Court of Errors and Appeals:

"Question is whether the mortgage was paid and satisfied or is still an existing encumbrance." (Page 652.)

"It seems the obvious dictate of justice and equity that where a third party advances his money in good faith, at the request and for the benefit of the mortgagor, in satisfaction of the mortgage debt, and holds the bond and mortgage in his possession uncancelled, he should be permitted to stand in the shoes of the mortgagee, and to have the protection of the mortgage security, although there be no assignment of the security, or even though the mortgagee should absolutely refuse to assign. It

has been the constant policy of a Court of Equity to treat the mortgage either as cancelled or outstanding, as shall best promote the ends of justice, and the actual and just intention of the parties." (Page 653.)

In the present case before the Court, the actual delivery of the bond and mortgage to Mrs. Sutton (representing Mrs. Reilly and herself as co-assignees) and the payment therefor by Mrs. Sutton's own check on October 1st, 1924, $2,107.40, and the previous payment made January 24th, 1924, by Mrs. Reilly's own check, $545.18, together totalling the full amount due Mrs. Sherman, mortgagee, is not disputed. Therefore, does not the law apply, which holds that "A mortgage may be assigned by delivery merely"? Furthermore, since Louis E. Brown (or the corporation he controlled) was the owner of the entire premises covered by the Strauss-Sherman mortgage from May 12, 1921, until date hereof, what reason was possible to induce Mrs. Sutton and Mrs. Reilly to use their money in payment of an incumbrance upon property of Brown or the company? And why clear off at their own expense an indebtedness to Mrs. Sherman, mortgagee, when the purchase of the bond and mortgage and the assignment thereof would give the assignees a tangible consideration for their funds? In order to stop the foreclosure proceedings under the Strauss-Sherman mortgage in January, 1924, and so prevent them from interfering with the suit of *Reilly* v. *Brown,* Vice Chancellor Foster suggested to Mrs. Sutton that she take an assignment, or find some assignee as the simplest way out of the difficulty. This

advice was followed within five days and payment was begun by reducing the debt to $2,000 on January 24, 1924. Is it not equitable and just that where Mrs. Reilly and Mrs. Sutton advanced their money, as third parties, and accepted the bond and mortgage in exchange, relying upon the understanding with the solicitor of the mortgagee that assignment would be advised by him, that an equitable assignment was made on October 1st, 1924?

Mr. Smock took an active part in obtaining the deed of assignment in December, 1924, for Mrs. Sutton and Mrs. Reilly from Mrs. Sherman. It was he who wrote especially to Mrs. Sherman, enclosing the deed of assignment for her execution and acknowledgment, and agreed with Mrs. Sutton that the date of the deed of assignment should be October 1, 1924, because that was the date of delivery and of payment. If he now claims that it (the mortgage) was paid, it must be asking us to believe that he was engaged in a conspiracy to defraud Augustus M. Minton.

Complainant states in his brief (p. 34, ll. 16 to 19):

> "It was not until the strange statement, made by defendant Sutton after sale, was made, that Minton had any idea a lien was asserted."

Defendant Sutton spoke immediately after the sale, giving utterance to her puzzled thoughts as to how the sale affected the three mortgages which covered both tracts of the property, when only one of the tracts had been sold. She very innocently and frankly said: "But the Brown

mortgages and the May Strauss mortgage are still in existence." The fact that May Strauss Sherman had not been made a party to the suit was not known to Mrs. Sutton at the sale nor did she learn that fact until early in 1925, when Mr. Reussille himself told her and she verified his statement by searching papers for proof.

Complainant claims in his brief (p. 37, ll. 8 to 11) an estoppel against defendants:

> "They should have asserted their lien, if any, before sale, and not have stood by in silence, knowing their conduct would mislead."

Denton v. *Cole,* 30 N. J. Eq. 244 (1878):

> "In equity, he must bear the loss, who, by his negligence has made the injury possible."

Mott v. *Newark German Hospital,* 55 N. J. Eq. 722 (1897):

> "An estoppel will be worked, not because the loss to the party injured was a succeeding event to the act or omission of the party to be estopped, in dealing with the subject matter of the transaction, but because the act or omission of the party to be estopped was a moving cause which led the party injured to do the act or into the position resulting in the loss."

> "Under the statute, the recording of an assignment of a mortgage is notice, from the time the assignment is left for record, to all persons concerned, that the mortgage is assigned."

McCall v. *Yard,* 9 N. J. Eq. 358 (1853):

> "In a bill to foreclose a mortgage, the rights of all encumbrancers at the commencement of the suit not made parties, are not bound or affected by the decree."

> "If the first mortgagee brings a bill to foreclose against the mortgagor, and obtains a decree without making encumbrancers parties, their rights are not foreclosed. And their remedies still remain against a purchaser claiming under the decree."

Will complainant contend that Mrs. Sutton's conduct at the sale in not announcing that she was one of the assignees who owned the Strauss-Sherman mortgage, December 29th, 1924, was an act or omission which was a moving cause which led Minton into the position of becoming a purchaser of land encumbered by a lien which had existed thereon since August, 1923, and the owner thereof had been omitted as a party to the Minton foreclosure suit? Mrs. Sutton was under no duty to state her position as assignee even though she had known of the lien's existing after the sale (but she did not know it until 1925). The assignment was recorded several days before the sale and would have been recorded much earlier except for Mrs. Sherman's grave illness.

Is not the true test of an equitable assignment the question as to whether the debtor would be justified in paying the debt to the person claiming to be assignee?

The burden of proof is upon Minton since payment of the mortgage, or cancellation thereof, is

denied by defendants Sutton and Reilly, but payment for the mortgage, or the purchase thereof, is claimed by them.

Complainant refers to a letter dated December 10, 1924, written by Mrs. Sutton to Mr. Smock enclosing the mortgage, with "receipt" already struck out by Mr. Smock, and the deed of assignment to be sent to Mrs. Sherman. The letter is found set forth in full (Case, pp. 44 and 45), and is again the subject of testimony (Case, pp. 96 and 97). Further explanation may clear up the matter since complainant in his brief (p. 28, ll. 6 to 12) declares:

> "* * * that the intention of all parties was to extinguish the debt. This intent on defendants' part seems proved conclusively by the defendant Sutton's letter to Mr. Smock of December 10th, 1924."

And again in complainant's brief (p. 6, ll. 37 to 40; p. 7, ll. 5 to 8) he says:

> "The first time it (the assignment) was called to Mr. Smock's attention was by Mrs. Sutton's letter of December 10th, 1924, and this letter, we think, shows conclusively, by specific wording and context as well, that on October 1st, 1924, the mortgage had been paid and that at that time the intention was to procure its cancellation."

First: It was Mr. Smock who asked Mrs. Sutton to write him the letter of December 10th, 1924, and to enclose it in the deed of assignment and the mortgage, hence it is denied that it was the first time the assignment was "called to Mr.

Smock's attention." Previous to December 10th, Mr. Smock had drawn the four ink lines through his "receipt" on the mortgage and had agreed to have the assignment executed by Mrs. Sherman.

Second: As to complainant's construction of the letter that it was the intention of defendants to pay off the mortgage October 1st, 1924, and to have the mortgage cancelled of record, that also is denied. If Mrs. Sutton intended to cancel the mortgage of record on the first day or on any other day in October, 1924, what could have prevented her from carrying it to the Clerk's office at Freehold where she went several times in October? Or she could have mailed it to the Clerk. The same thing is true of any day in November and December, 1924. Is not an act the truest indication of an intent? Was there a single thing done or said by Mrs. Sutton between October 1st and December 26th, 1924, to have the mortgage cancelled of record? No, and why not? Because she never had the slightest intention to cancel it.

The testimony shows that Mrs. Sutton on October 1st, 1924, asked for the insurance papers, the deed of assignment, for Mr. Smock himself so that he might attend to the assignment, but he was absent. Why should all this have been done if her intention was to cancel the mortgage of record? The business was not finished and Mrs. Sutton announced that she would call again and see Mr. Smock about the affair. She did so nine times before she could find him to get the mistakes rectified. Mr. Smock was in Kansas City from October 3rd to October 13th, and in

Florida from November 24th to November 27th of the same year (1924), and also away from Red Bank for other days, one at a time, in the period included between October 1st, 1924, and December 6th, 1924, when Mrs. Sutton could not see him at his office in order to have the matter cleared up (Case, p. 122 of additional testimony taken on November 16th, 1926). Mr. Smock made not the slightest objection to setting the transaction right as soon as he saw Mrs. Sutton and heard her request. When he asked Mrs. Sutton why she did not get an assignment the first thing, she reminded him that she could not do so because he was not there to give it to her on October 1st, 1924, but that she had made diligent efforts to see him until she succeeded.

The language of the letter dated December 10th, 1924, may be a bit ambiguous. That cannot alter the facts. The phrase, "*in lieu of cancelling the same,*" refers to the cancellation which had been written on the mortgage by Mr. Smock and had already been struck off by him with the four ink lines drawn through the words, and ought to have been enclosed in parentheses, perhaps, to make the meaning plain and unmistakable, but if the phrase, "in lieu of cancelling the same," be omitted as being thrown in as an independent thought breaking the continuity of the sentence in which it occurs, the sentence will be found to read as follows:

> "* * * will you kindly request Mrs. Sherman to assign said mortgage to Mrs. Reilly and to me, * * * as we intended doing under the then existing circumstances when a conveyance of the premis-

es in question was ordered made to Edward J. Reilly."

In complainant's brief (pp. 17 and 18, ll. 5 to 14) it is stated:

> "There can be no equitable assignment if the intent was to discharge the obligation. Facts showing such an intent on October 1, 1924, are recited elsewhere herein under Payment and Discharge. The principal facts are:
>
> 1. Checks state in payment of bond and mortgage.
>
> 2. Mortgage delivered receipted for cancellation, free of any marks obliterating same.
>
> 3. Letter Sutton to Smock (Exhibit C-9, page 129) shows in four places the mental attitude previous to its date, December 10, 1924.
>
> (a) Refers to the mortgage as follows, 'which was paid in full.'
>
> (b) Requests assignment 'in lieu of cancelling the same.'
>
> (c) Prefers assignment 'rather than merely to cancel the said mortgage of record.'
>
> (d) Refers to October 1st, 1924, as 'being the date of actual payment in full.'
>
> 4. Execution then pending ordered satisfied by solicitor.

> 5. Sheriff's return, shown in docket and on execution.
>
> 6. Bond and mortgage delivered to Reillys whom Mrs. Sutton represented. The papers were later taken by Mrs. Sutton for safe keeping, several days later (Case, p. 86 and Answer, paragraph 3, p. 8, ll. 2-8).
>
> It is submitted that the complainant's case shows payment and discharge of the mortgage, negativing any equitable assignment as of October 1st, 1924."

Defendants, in reply to the foregoing statements, say that: As to the so-called facts set forth in the above form there are modifying phrases omitted, thus changing entirely the true meaning of the original letter, and direct misstatements as to others, namely, in Fact No. 1, the checks referred to, Nos. 1170 and 1171 (Defendants' Exhibits 5 and 6, Case, pp. 135 and 136) also have written upon them, "For E. J. Reilly Mtg." The full explanation concerning these checks is found in the testimony (Case, p. 95, ll. 18 to 36) where Mr. Reussille, pretending to quote correctly from words written on the face of the check, actually misquotes them by saying, " 'in full payment of mortgage and interest dated October 1st, 1919, for $2000—full payment of mortgage.' " Whereas the true words (Exhibits 5 and 6) are, "Full payment of Mortgage (and Interest) dated Oct. 1/19 for $2000 made by Edward J. Reilly. For E. J. Reilly Mtg." on check No. 1170.

And on check No. 1171, given to the Sheriff for adjournment fees for thirty-six weeks from

January 28, 1924, until October 1, 1924, at $1.00 per week, with some additional fee of $3.90, making the total charge $39.90, the words are "Adjournment fees—Sherman vs. Reilly, *et al.* Mtg. foreclosure. In full to date. For E. J. Reilly Mtg."

Defendants affirm their intention to pay for the E. J. Reilly mortgage held by May Strauss Sherman, and not to discharge it by a voluntary payment when they did not owe the mortgagee anything. To take an assignment of the mortgage and bond had been their only intention from January 24, 1924, until the close of the transaction.

As to Fact No. 2: Yes, delivered, but openly objected to by Mrs. Sutton in the presence of Miss Von Glahn, Mr. Reilly and Mrs. Reilly, at the instant she (Mrs. Sutton) took in her own hand the mortgage from Miss Von Glahn's hand and saw the objectionable words thereon, but left the matter to be corrected by Mr. Smock at the earliest opportunity (Case, p. 83).

Fact No. 3: The letter is fully explained by the writer (Case, p. 97) and on another page of this brief, to which may be added the further elucidation. The original mortgage and the assignment, partly prepared for Mrs. Sherman's approval and signature by Mrs. Sutton, were enclosed in the letter and sent to Mr. Smock, and in Mr. Smock's office (by Mr. Smock or one of his clerks) the assignment was completed for execution and was sent to Mrs. Sherman by Mr. Smock early in December, 1924. The enclosure is noted in the lower left-hand corner of the letter (Case, p. 130, ll. 10 and 11). Mr. Smock had arranged

with Mrs. Sutton beforehand as to what enclosures would be sent to him. There was no necessity to explain why the deed of assignment was enclosed. He knew (Case, p. 39, ll. 30 to 40; p. 40, ll. 5 to 8; pp. 46, 47 and 48, ll. 5 to 12).

Fact No. 4: Defendants knew nothing about the execution then pending and ordered satisfied by Mr. Smock, and as Mr. Smock was in Kansas City, Missouri, from October 3rd, 1924, until October 13th, 1924, it was impossible for Mrs. Sutton to see him and have the mistakes and any misunderstandings cleared away immediately, which occurred on October 1st, 1924.

Fact No. 5: Sheriff's return shows that money was made without sale of the property, and the mortgage foreclosure proceedings were never completed (Case, p. 42, ll. 5 to 30).

Fact No. 6: The bond and mortgage were not delivered to either of the Reillys. The bond and mortgage were both handed to Mrs. Sutton by Miss Von Glahn on October 1st, 1924. This fact is nowhere disputed in the testimony and any statement to the contrary is a mere imaginary whim of Mr. Reussille, the solicitor for complainant. After the formal delivery to Mrs. Sutton in exchange for her two checks completing full payment for the bond and mortgage, Mrs. Sutton carried both instruments out of Mr. Smock's office to the street. Before separating from the others, Mr. and Mrs. Reilly, Mrs. Sutton handed to Mrs. Reilly the bond, saying, "You keep the bond and I will keep the mortgage, since we both own them." Then after further conversation on Front Street, as they were going in different directions on various affairs, Mrs. Sutton said to

Mrs. Reilly, "Let's let Mr. Reilly put the papers in his pocket to carry them." Other remarks were made during this conversation (Case, pp. 86, 109 and 110, ll. 5 to 15). Mrs. Reilly did take both papers and put them in his pocket. A short time thereafter Mrs. Sutton went to Mr. Reilly's home and got the mortgage again to take it to Mr. Smock so that the "receipt" might be erased by him and Mrs. Sutton has had full control of the mortgage ever since the 1st of October, 1924. Mrs. Reilly kept the bond a few days and early in October, 1924, Mrs. Sutton took charge of both papers for their safe-keeping for the owners, Mrs. Reilly and Mrs. Sutton.

The Assignment of Decree in the Strauss-Sherman foreclosure suit, dated January 24, 1925, duly executed and acknowledged the same date by May H. Strauss-Sherman, was filed in the Chancery Clerk's office March 6, 1925, and the substitution of attorney in the suit, signed by Warren H. Smock, representing the firm "Wilson & Smock," was filed March 6, 1925, and shows the substitution of Mary Wooster Sutton, as solicitor (See Strauss-Sherman file, Docket 54, page 245, in evidence).

Complainant (p. 9, ll. 19 to 23) states that:

> "The suit had been discontinued, the decree discharged and the execution returned satisfied. There was no suit pending upon which an assignment of the decree and substitution of attorney could operate."

Disputing this contention, defendants call attention to the testimony of Mr. Smock, (Case, p. 41, ll. 38 to 40; p. 42, ll. 5 to 10) who answers:

> "It was the mortgage satisfied. Started to foreclose. It was not consummated."

Meaning that the foreclosure suit was not consummated, or completed, which shows that the decree was not carried out by sale of the premises, but as entered on the record, "Money made without sale."

In *Compiled Statutes of New Jersey,* under *Chancery,* at page 431, Section 57, "Satisfaction of Decree for foreclosure," states:

> "When the amount due on any decree in chancery for the foreclosure and sale of mortgaged premises shall be paid and satisfied in any other way than by a sale of the mortgaged premises, * * * satisfaction shall be entered on the margin of the enrollment by the party receiving satisfaction, or his solicitor, or by the clerk, by virtue of a warrant of attorney from the party duly acknowledged or proved, in the same manner as satisfaction is entered of judgments at law."

Was a mere letter from Mr. Smock's office to the Sheriff, saying that the mortgage (May Strauss-Sherman) was paid and execution satisfied, sufficient authority for the decree in the Strauss-Sherman foreclosure for $3,314 (as the advertised notice of sale by Sheriff gives the amount), to have satisfaction entered on the margin of the enrollment? The Sheriff had no formal notice properly acknowledged that the decree was satisfied.

The decree included about $700 for Myron V. Brown (who was not a party to the suit) which

had no connection with the Strauss-Sherman mortgage decree for about $2,600, but the two decrees were linked together, to form the total decree for $3,314. Does the payment of the Strauss-Sherman mortgage, interest and costs, to Mrs. Sherman in full for her assignment, also act as a satisfaction to Myron V. Brown for his claimed $700 which was not paid? The idea is absurd. The answer must be in the negative. Myron V. Brown's share in the decree is an existing lien on the premises, therefore, the whole decree is not satisfied and must necessarily still be in effect. See Deputy Sheriff O'Brien's testimony (Case, p. 30, ll. 10 to 38).

The decree, dated previous to December 28, 1923, was in existence and in force a full month before Emma C. Reilly made her payment of $545.18 on January 24, 1924, to apply on account of the mortgage interest and costs. The decree was in existence on October 1st, 1924, when Mrs. Sutton paid $2,107.40 as the balance due Mrs. Sherman. But where is Myron V. Brown's $700? The decree has not been satisfied (see files Docket 45, page 245). No notice was given to the two assignees, Mrs. Reilly and Mrs. Sutton that the satisfaction of the decree was ordered. Mr. Smock wrote to his client, Mrs. Sherman, that it would be all right for her to execute the assignment of decree and deliver it to Mrs. Sutton, in January, 1925.

See 27 *Cyc.* 1777 (Note 68):

> "Ordinarily a mortgage is a lien on the land not only for the debt secured but also for the costs of enforcing it, and a foreclosure suit is one *in rem* and not a personal action against defendant, and therefore the costs are to be paid out of the proceeds of the sale."

> Berlin Building Association v. Clifford, 30 N. J. Eq. 482;
> McPherson v. Housel, 13 N. J. Eq. 299.

See 27 *Cyc.* page 1669 (Note 86): *Operation and Effect of * * * Decree:*

> "And the decree * * * draws interest from the date of its rendition."

And page 1670 (Note 95):

> "A decree of foreclosure and sale fastens a liability upon the property mortgaged, which may be regarded as in the nature of a lien."

And page 1671: *Assignment of Decree:*

> "A decree for the foreclosure of a mortgage and sale thereunder is assignable, and the assignment passes to the assignee all the rights and powers possessed by the assignor, no more and no less, including the right to enforce the decree."

> Allen v. Wood, 31 N. J. Eq. 103.

In the present case Myron V. Brown was not a party to the Strauss-Sherman foreclosure suit, yet the decree was made to include $700 due him from Reilly on an independent judgment. The presumptions of regularity and validity of the decree cannot support it. However, it is held that setting a decree aside as to particular defendants does not necessarily vacate it as to others, therefore these defendants consider that so

much of the decree as actually concerns the foreclosure suit should stand, as it appears on the record exhibited by Deputy Sheriff O'Brien (Case, p. 30), but that the part of the decree relating to the Myron V. Brown claim should be eliminated from the record as he was neither a necessary party nor a proper party to the foreclosure suit. Otherwise Myron V. Brown's decree is *res adjudicata* and is enrolled as "satisfied," which is not the fact.

It is well settled that the decree does not by itself merge the debt secured by the mortgage, or extinguish its lien where the decree is not enforced by a valid and regular sale. That is the situation in the case now before the Court.

These defendants deny laches on their part in waiting from October 1, 1924, until January 24, 1925, before obtaining the assignment of decree from Mrs. Sherman, and for delay until March 6, 1925, before filing the assignment of decree and the substitution of attorney in the matter.

27 *Cyc.*, page 1671 (Note 5): *Dormancy of Decree:*

> "A decree of foreclosure becomes dormant after a lapse of a number of years."

And:

> "If the mortgagee fails or neglects to avail himself of the remedy and advantage given by such a decree, it does not release the land from the lien, nor prevent him from taking other means for obtaining satisfaction; the mortgage still remains a record and will support a *scire facias.*"
>
> Roberts v. Lawerence, 16 Ill. App. 453.

Summary.

FIRST: Defendants claim an equitable assignment of the Strauss-Sherman mortgage made to them October 1st, 1924. They paid their own money for the bond and mortgage, with interest and costs of foreclosure suit, according to agreement made with Mr. Smock (solicitor for Mrs. Sherman), on the 19th day of January, 1924, and fulfilled their promise by paying $545.18 January 24th, 1924, and the balance, $2,107.40, October 1st, 1924, totalling $2,652.58 as the consideration for which defendants received the bond and mortgage by delivery to Mrs. Sutton, October 1st, 1924, and by delivery of the deed of assignment to Mrs. Sutton, December 20th, 1924.

SECOND: Defendants claim the decree in the Strauss-Sherman foreclosure suit has not been satisfied, but exists as a lien upon the premises; and that they hold a valid assignment of the decree delivered to Mrs. Sutton January 24th, 1925, for a valuable consideration.

THIRD: Defendants claim that the failure of complainant Minton to make Mrs. Strauss-Sherman a party to the Minton foreclosure suit in August, 1923, or thereafter, results in the encumbrance formerly held by the junior mortgagee (Mrs. Sherman) being an existing lien upon the premises sold to complainant Minton under his foreclosure sale December 29th, 1924.

FOURTH: Defendants deny that they are estopped to assert their rights because of their silence at the sale December 29th, 1924, as to their ownership of the Strauss-Sherman mortgage and

bond. The mortgage and the assignment were duly recorded in the Clerk's office before the sale occurred.

As to the words spoken by Mrs. Sutton at the sale, when she remarked that the Brown mortgages and the May Strauss mortgage were still in existence, referring to their relation to the *second tract* of the premises, and not to the *first tract,* which was sold to Minton, defendants claim that no prejudice to any rights of Minton resulted.

FIFTH: The entire case made by complainant is based upon his imagination concerning the intentions of defendants and particularly the intentions of Mrs. Sutton. In the beginning all stress was laid upon the mistaken idea that the mortgage never covered the premises sold to Minton. When this failed, and the fact was admitted that the Strauss-Sherman mortgage covered both tracts, a fresh basis was introduced by complainant that the money paid for the bond and mortgage was not out of the defendants' own funds. Finding it impossible to prove that to be true, complainant now founds his suit upon what he conceives to be the intentions of defendants in the several transactions. Assuredly, the defendants know their own intentions better than complainant can know them, and the acts of defendants, such as not cancelling the mortgage of record, writing to Vice Chancellor Foster, reporting to him what had already been arranged as to the assignment contemplated (complainant objected to the admission of the carbon copy of said letter as evidence), securing the deed of assignment at the earliest day possible after the equitable assignment of the mortgage, do not coincide with the intentions attributed to these defendants by complainant.

SIXTH: Defendants claim their right to hold their mortgage and bond and to exercise full powers over them as asignees of the original owner, May H. Strauss-Sherman, assignor, in all circumstances.

Therefore, it is urgently requested that the mortgage which is the subject of this suit of *Minton* v. *Sutton and Reilly* may remain uncancelled of record, and that these defendants may be declared to be the rightful owners of the bond and mortgage in question.

Respectfully submitted,

MARY WOOSTER SUTTON,
Solicitor for and of Counsel
with Defendants-Respondents.