New Jersey Court of Errors and Appeals

SOPHIA HOLLANDER,
Defendant in Error,
vs.
NORMAN N. GALE, ET AL,
Complainant in Error.

ON ERROR.

On appeal from Court of Chancery.

STATE OF THE CASE.

Sat below INGERSOLL, V. C.

IN CHANCERY OF NEW JERSEY.

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

The complainant, Sophia Hollander, of Atlantic City, New Jersey, respectfully shows that:

1. On July 25, 1924, Norman N. Gale and May Guthrie Gale, his wife, being indebted to Thomas J. McHenry in the sum of $15,000, executed to him a bond of that date to secure that sum, payable at any time within three years from the date thereof, with interest at the rate of six per centum per annum payable half yearly from the date of the bond.

2. To secure payment of the bond, said Norman N. Gale and May Guthrie Gale, his wife, executed to said McHenry a mortgage of even date with the bond; and thereby conveyed to him, in fee, the land hereinafter described on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was recorded in the Clerk's Office of Atlantic County in Book No. 308 of Mortgages, page 275, etc.

3. The mortgaged premises are described as follows:

ALL that certain lot, tract or parcel of land and premises situate, lying and being in the City of Ventnor City, County of Atlantic and State of New Jersey, bounded and described as follows:

BEGINNING at a point in the intersection of the Southerly line of Atlantic Avenue and the Easterly line of Melbourne Avenue; and extending thence (1) Eastwardly, in and along the said Southerly line of Atlantic Avenue, sixty-two and five-tenths feet to a point; thence (2) Southwardly, parallel with said Melbourne Avenue, fifty feet to a point; thence (3) Westwardly, parallel with said Atlantic Avenue, sixty-two and five-tenths feet to a point in the Easterly line of said Melbourne Avenue; thence (4) Northwardly, in and along the said Easterly line of Melbourne Avenue, fifty feet to the first mentioned point and place of beginning. BEING known as Lot 1 in Block 100-B as shown on property Atlas of Ventnor City, N. J., for 1923.

4. Both bond and mortgage contained an agreement that if any installment of interest should remain unpaid for 30 days after the same should fall due, or if at any time default should be made in the payment of any taxes, municipal assessments or other charges in the nature thereof laid or assessed upon said mortgaged premises when the same become due and payable, or in the production to the mortgagee of receipts for said taxes or

assessments, then in every such case, the whole principal sum, with all unpaid interest, should, at the option of the mortgagee, his representative or assigns, become immediately due.

5. By written assignment, dated September 11, 1924, said Thomas J. McHenry assigned said bond and mortgage to complainant; which assignment was recorded in the Clerk's Office of Atlantic County in Book No. 68 of Assignments of Mortgages, page 486.

6. On September 13, 1924, Norman N. Gale and May Guthrie Gale, his wife, mortgaged said land to Thomas J. McHenry for $6,000.00, which mortgage was on September 16, 1924, recorded in the Clerk's Office of Atlantic County in Book No. 311 of Mortgages, page 169.

7. By written assignment, dated September 13, 1924, said Thomas J. McHenry assigned said bond and mortgage to Security Trades Corporation, a corporation of New Jersey, which assignment was recorded in the Clerk's Office of Atlantic County in Book No. 69 of Assignments of Mortgage, page 5.

Any interest which said Security Trades Corporation may have in said lands is subject to the lien of complainant's mortgage.

8. On January 25, 1926, one-half year's interest fell due on complainant's bond and mortgage and remained unpaid for more than 30 days thereafter, and no part thereof has yet been paid. Said Norman N. Gale and May Guthrie Gale, his wife, failed and neglected to pay the taxes assessed by the City of Atlantic City against said premises for the year 1925, amounting to $398.04, one-half of which became due and payable on May 20, 1925, and the balance on November 20, 1925, and the same are still unpaid. Said Norman N. Gale and May Guthrie Gale failed and neglected to pay a street assessment levied by the City of Atlantic City against the mortgaged premises amounting to $66.26, and the same is still unpaid. Complainant has therefore elected that the whole principal sum with all unpaid interest shall be now due.

9. Said Norman N. Gale and May Guthrie Gale, his wife, or one of them, have always been in possession of the mortgaged premises.

10. The whole amount of principal, with interest thereon from July 25, 1925, is due upon complainant's bond and mortgage.

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

1. That Norman N. Gale and May Guthrie Gale, his wife, and the said Security Trades Corporation, who are the defendants to this suit, may answer this bill of complaint and each statement therein made:

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

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

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

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

CASSMAN & GOTTLIEB,
Solicitors and Counsel with Complainant.

IN CHANCERY OF NEW JERSEY.

Between
SOPHIA HOLLANDER,
Complainant,
AND
NORMAN N. GALE, ET ALS,
Defendants.

ON BILL, ETC.
ANSWER.

The answer of Norman N. Gale, and May Guthrie Gale, to the above bill of complaint is as follows:

1. Defendants deny paragraph one of said complaint, inasmuch as it claims defendants are indebted in the sum of fifteen thousand dollars.

2. Defendants admit that they gave a mortgage for the sum of fifteen thousand dollars.

3. Defendants admit paragraph three of said complaint.

4. Defendants neither admit or deny paragraph four of said bill of complaint, as they have no information on the same.

5. Defendants admit the assignment of said mortgage from McHenry to complainant but the transaction of giving the said mortgage to McHenry and the assignment were made the same day.

6. Defendants admit paragraph six of said bill of complaint.

7. Defendants admit paragraph seven of said bill of complaint.

8. Defendants deny paragraph eight of said bill of complaint.

9. Defendants admit paragraph nine of said bill of complaint.

10. Defendants deny paragraph ten of said bill of complaint.

11. Defendants further answering said bill of complaint say that the true consideration of said mortgage is thirteen thousand five hundred dollars, but at the same time said mortgage was executed, complainant agreed to and with defendants that if they would execute a mortgage to complainant for the sum of fifteen thousand dollars, complainant would loan thirteen thousand five hundred dollars, being the amount paid for the mortgage of fifteen thousand dollars, on the express condition that defendants would not have to pay the principal of said mortgage for three years from the date thereof.

12. The defendants further answering say that the sum of fifteen hundred was paid as a bonus for the loan of said money aforesaid on condition that complainant would loan said money for the term of three years from the date of said mortgage, and that the thirty days clause in said mortgage did not apply.

13. The defendants further answering said bill of complaint say that they tendered the amount of interest due to complainant and she refused to accept the same.

14. The defendants further answering say that they now make tender into this Honorable Court of the sum of four hundred and fifty dollars, being the amount of interest due complainant.

15. The defendants further answering say that the said mortgage not being due on the contract set forth above, and by reason of said offer by them to pay the said interest, to wit, the sum of four hundred and fifty dollars, being six months' interest due on January 25, 1926, and the refusal of complainant to receive the same, the said complainant was and is precluded from the exercise of any alleged right to elect that the whole principal sum in said bond mentioned shall be due; and that said attempted election, and the commencement and prosecution of this suit is contrary to law, and against equity and good conscience; and they deny that said principal sum is now due, all of which matters and things these defendants are ready and willing to aver, maintain and

prove as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in that behalf most wrongfully sustained.

NORMAN N. GALE,
MAY GUTHRIE GALE,
Defendants.

ROBERT PEACOCK,
Solicitor of Defendants.

IN CHANCERY OF NEW JERSEY.

Between
SOPHIA HOLLANDER,
Complainant,
AND
NORMAN N. GALE, ET ALS,
Defendants.

ON BILL, ETC.
AMENDED
ANSWER.

The answer of Norman N. Gale, and May Guthrie Gale, to the above bill of complaint is as follows:

1. Defendants deny paragraph one of said complaint inasmuch as it claims defendants are indebted in the sum of fifteen thousand dollars.

2. Defendants admit that they gave a mortgage for the sum of fifteen thousand dollars.

3. Defendants admit paraghaph three of said complaint.

4. Defendants neither admit nor deny paragraph four of said bill of complaint, as they have no information on the same.

5. Defendants admit the assignment of said mortgage from McHenry to complainant but the transaction of giving the said mortgage to McHenry and the assignment were made on the same day.

6. Defendants admit paragraph six of said bill of complaint.

7. Defendants admit paragraph seven of said bill of complaint.

8. Defendants deny paragraph eight of said bill of complaint.

9. Defendants admit paragraph nine of said bill of complaint.

10. Defendants deny paragraph ten of said bill of complaint.

11. Defendants further answering said bill of complaint say that the true consideration of said mortgage is thirteen thousand five hundred dollars, but at the time said mortgage was executed, complainant agreed to and with defendants that if they would execute a mortgage to complainant for the sum of fifteen thousand dollars, complainant would loan thirteen thousand five hundred dollars, being the amount paid for the mortgage of fifteen thousand dollars, on the express condition that defendants would not have to pay the principal of said mortgage for three years from the date thereof.

12. Defendants further answering say that complainant has violated the provisions of an act concerning usury of the State of New Jersey, in that they charge fifteen hundred dollars for the loan of thirteen thousand five hundred dollars and that the only amount due from defendants is the sum of thirteen thousand five hundred dollars and that plaintiff has in her hands the sum of fifteen hundred dollars belonging to defendants from which they can apply for interest due from defendants as interest on said mortgage.

13. The defendants further answering say that they tendered the amount of interest due to plaintiff and that she refused to accept the same and that they further tendered it to complainant's attorney and they refused to accept the same.

14. And defendants further answering say that said interest was not tendered within the thirty days prescribed by the provisions of the mortgage but that complainant waived the thirty day provision by making an express contract with defendants that if they paid fifteen hundred dollars bonus defendants would be allowed the use of the money for the term of three years from the date thereof and under said express contract between plaintiff and defendants, complainant is precluded from foreclosing said mortgage until the expiration of three years from the date thereof.

15. The defendants further answering say that the

said mortgage not being due on the contract set forth above, and by reason of said offer by them to pay the said interest, to wit, the sum of four hundred and fifty dollars, being six months' interest due on January 25, 1926, and the refusal of complainant to accept the same the complainant is without remedy in this Court to foreclose said mortgage at this time.

16. The defendants further answering say that they now make tender in this Honorable Court of the sum of four hundred and fifty dollars, being the amount of interest due complainant.

17. The defendants further answering say that they are willing to pay the said four hundred and fifty dollars interest to complainant and now offer the same in Court and are willing to pay whatever sum this Court decrees to be due.

Defendants therefore pray to be hence dismissed in this action and their reasonable costs to be allowed by this Court.

NORMAN N. GALE,
MAY GUTHRIE GALE,
Defendants.

ROBERT PEACOCK,
Solicitor of Defendants.

IN CHANCERY OF NEW JERSEY.

Between
SOPHIA HOLLANDER,
Complainant,
AND
NORMAN N. GALE, ET ALS,
Defendants.

ON BILL, ETC.
REPLICATION.

Complainant, in reply to the amended answer filed by the defendants, says that:

1. She denies paragraph eleven, and says that the bond and mortgage therein mentioned were purchased by the complainant from Thomas J. McHenry in good faith on the express representation and statement of the defendants that there was due thereon the sum of $15,000, together with interest thereon at six per cent. per annum from July 25, 1925, payable half-yearly from the date of the bond, and that the complainant paid therefor the sum of $13,500 to the said McHenry on account of said representation.

2. She denies paragraph twelve.

3. She denies paragraph thirteen and says that defendants tendered a check in the sum of $453.80 on March 18, 1926, which complainant refused to accept because interest was payable within thirty days from January 27, 1926.

4. She denies paragraph fourteen.

5. She denies paragraph fifteen.

6. Complainant joins issue on the remainder of the answer.

CASSMAN & GOTTLIEB,
Solicitors of Complainant.

IN CHANCERY OF NEW JERSEY.

Between
SOPHIA HOLLANDER,
Complainant,
AND
NORMAN N. GALE, ET ALS,
Defendants.

ON BILL TO FORECLOSE.
NOTICE.

SIRS:

PLEASE TAKE NOTICE that defendant, Security Trades Corporation, not disputing the priorities set forth in the bill of complaint filed in this cause, desires that the lien of its mortgage be reported upon and the amount fixed in the decree to be made in this cause.

Respectfully,

HERBERT R. VOORHEES,
Solicitor of Defendant.
Security Trades Corporation.

Dated: April 22, 1926.

To: Cassman & Gottlieb, Esqrs.,
Solicitors of Complainant.

IN CHANCERY OF NEW JERSEY.

Between
SOPHIA HOLLANDER,
Complainant,
AND
NORMAN N. GALE, ET AL,
Defendants.

ON BILL TO FORECLOSE.
ON FINAL HEARING.
CONCLUSIONS.

Messrs. Cassman & Gottlieb for the Complainant.
Mr. Robert Peacock for the Defendants.
INGERSOLL, V. C.

One Norman N. Gale desired to obtain a loan of $13,500, for which he was willing to execute a mortgage of $15,000, in effect giving a bonus of $1,500 for the loan. In pursuance of this plan, he negotiated with the Associated Realtors Company to represent him in securing such a loan. One Baittenger, a salesman or representative of said company, secured the complainant as a purchaser of a $15,000 mortgage for the sum of $13,500.

Gale and wife made and executed a mortgage to one Thomas J. McHenry for the sum of $15,000, which mortgage was by McHenry assigned to the complainant in consideration of the sum of $13,500, advanced by complainant to the title company, which issued a policy to her as assignee.

I find as a fact, that Gale and the Realty Company entered into this agreement to negotiate such a loan to be secured by a mortgage, which was to be executed and assigned in the way and manner above referred to in order to avoid the effect of *Section 1 of "An Act Against Usury." Comp. Stat. 5704.*

Application was made by Gale to a reputable title company for title insurance of the mortgage in question. On July 25th the following paper was signed by Mrs. Hollander:

"Received of Sophia Hollander, draft on the Atlantic City National Bank of this city in the sum of $13,500. It is understood that this money is deposited with the South Jersey Title and Finance Company for the purchase of a certain bond and mortgage made by Norman Gale et ux to Thomas J. McHenry, bearing date July 25, 1924; payable any time within three (3) years with interest at 6 per cent., payable semi-annually, and accompanied by full fire insurance; said mortgage covering lands and premises situate in the City of Ventnor City at the Southeasterly corner of Melbourne and Atlantic Avenues, being a lot 50 feet front on Melbourne Avenue by 62.5 feet on Atlantic Avenue, upon which is erected a one and one-half story brick and concrete construction.

"You are hereby authorized and this shall be your sufficient warrant to use said funds in the purchase of the mortgage hereinabove mentioned when your company can issue policy in favor of Sophia Hollander insuring the mortgage hereinabove recited of $15,000, to be a first mortgage subject only to the usual exceptions contained in title policies, and restrictions. It is understood that the buildings on said lands are in the course of construction.

"It is required of your company insurance against mechanics' liens. The time limited for the disbursement of this money is when the South Jersey Title and Finance Company passes upon release of liens furnished by the builder on the completed building and is ready to issue its policy in accordance with the terms and conditions hereinabove mentioned.

"A survey is to be furnished on the day of settlement.

"I hereby agree to the foregoing conditions.

"SOPHIA HOLLANDER."

At the time of settlement, Gale executed a declaration

of no set off in the usual form, declaring that there was $15,000, together with interest, due on said mortgage.

The law as expressed in *Riley v. Hopkinson, 82 N. J. Eq. 469* is:

"By purchasing from mortgagor's agent at a discount a mortgage executed to a straw mortgagee without consideration, without making inquiry as to the nature of the transaction, the purchaser became charged with knowledge of the usury in the mortgage, so that mortgagor could set up that defence in a foreclosure action by the purchaser."

The question for determination is: Has the purchaser made all reasonable inquiries, which, under the circumstances, she should make?

She is a foreigner, not well versed in the English language, and therefore delegated to her daughter all the business affairs, except, as she expressed it,—"to sign the check." All transactions were with the Associated Realtors Company, Baittenger and the Title Company; and she and her daughter understood the mortgage to be in existence and she relied upon the title company and Mr. Byrne, of the Associated Realtors Company. It is evident that she took every reasonable precaution in purchasing this mortgage.

While this construction of the facts in this case prevents the defendant from taking advantage of the beneficial purpose of our statute against usury, it is because he and his associates have deceived the complainant and have so carefully covered their illegal tracks, that they have automatically prevented the Court from assisting them in availing themselves of the benefits of that act.

A decree will be advised in favor of complainant for the full amount of the mortgage with interest.

Determined: December 22nd, 1926.

IN CHANCERY OF NEW JERSEY.

Between
SOPHIA HOLLANDER,
Complainant,
AND
NORMAN N. GALE, ET ALS,
Defendants.

ON BILL, ETC.
FINAL DECREE.

This matter being opened to the Court by Cassman & Gottlieb, solicitors of the complainant, Sophia Hollander, in the presence of Robert Peacock, solicitor of the defendants, Norman N. Gale and May Guthrie Gale, his wife, and Herbert R. Voorhees, solicitor of Security Trades Corporation, on bill, answer and replication, and it appearing that the defendant Security Trades Corporation which holds a mortgage on the mortgaged premises described in the bill of complainant herein which is subsequent to the complainant's mortgage, has given notice to the complainant that it does not dispute the priority of the complainant's mortgage and that it desires to have its encumbrance reported upon; and the Court having read and considered the pleadings and proofs, and having heard and considered the arguments of counsel, and it appearing to the Court that the complainant is entitled to the relief sought and prayed for by her in her bill of complaint, and being satisfied that the amount due the complainant for principal and interest on her mortgage bearing date the 25th day of July, 1924, is the sum of $16,335, and the amount due the defendant Security Trades Corporation for principal and interest on its mortgage bearing date September 13, 1924, is the sum of $6,485; and that the premises comprised and described in the complainant's mortgage are the same premises comprised and described in the mortgage of the defendant Security Trades Corporation, and that the said complainant's mortgage was

made and recorded prior to the mortgage of the defendant Security Trades Corporation, and is entitled to priority of payment; and that it is necessary and advisable that the whole of the mortgaged premises should be sold to raise and pay the moneys due to the complainant and to the said defendant Security Trades Corporation, respectively, together with the costs of this suit;

IT IS on this 18th day of January, 1927, ORDERED, ADJUGED and DECREED that the said mortgaged premises be sold to raise and satisfy the money due to the complainant and to the said defendant, Security Trades Corporation; that is to say, to pay and satisfy unto the complainant the sum of $16,335, together with lawful interest thereon to be computed from the 18th day of January, 1927, with the complainant's costs to be taxed, including a counsel fee of $300, which is hereby allowed to said complainant, and to pay and satisfy unto the said defendant, Security Trades Corporation, the sum of $6,485, together with lawful interest thereon from the date last mentioned; and that a writ of fieri facias issue for that purpose out of this Court, directed to the Sheriff of the County of Atlantic, commanding him to make sale according to law of the said mortgaged premises, and that out of the money arising from said sale he pay to the complainant, or her solicitors, her said debt, interest and costs, and to the defendant, Security Trades Corporation, or its solicitor, its said debt, interest and costs, and that in case more money shall be raised by said sale than shall be sufficient to answer such several payments, that such surplus be brought into this Court, to abide the further order of this Court, unless otherwise previously disposed of by this Court, and that the Sheriff make return, without delay, of his proceedings by virtue of said writ.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, Norman N. Gale, May Guthrie Gale and Security Trades Corporation,

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

Respectfully advised,

R. H. INGERSOLL, *V. C.*
E. R. WALKER, *C.*

IN CHANCERY OF NEW JERSEY.

Between SOPHIA HOLLANDER, *Complainant,* AND NORMAN N. GALE, ET ALS, *Defendants.*	ON BILL, ETC. NOTICE OF APPEAL.

TO: CASSMAN & GOTTLIEB:

TAKE NOTICE that the defendants appeal from the whole of the judgment entered in this cause in the Court of Chancery of New Jersey to the New Jersey Court of Errors and Appeals on the following grounds:

1. The defendants were never indebted to Thomas J. McHenry as set forth in said bill in any sum of money.
2. The verdict of the Court was contrary to the evidence.
3. The interest on said mortgage was not due on January 25, 1926, but was due on March 25, 1926, and the interest on said mortgage had been tendered prior to March 25, 1926.
4. The mortgages were not executed on the date set forth in said mortgages and the mortgage of Gale to McHenry and the assignment of McHenry to Hollander were executed on the same day three months subsequent to the date set forth in said mortgage, which makes the interest bearing period on March 25, 1926, instead of January 25, 1926.
5. The mortgage for $15,000 given by Gale was executed with the express understanding between Gale and Hollander that the money was to be loaned for a period of three years in consideration of the execution of a $15,000 mortgage upon the consideration of $13,500 being paid.

6. The mortgage being executed for specific time of three years, the thirty days clause in said mortgage on default of interest did not apply.

7. The complainant, having knowledge of the fact that she was receiving a $15,000 mortgage in consideration of the payment of $13,500, cannot recover any more than $13,500 under the usury act of the State of New Jersey.

8. The mortgage upon which judgment was given by the Court of Chancery was not due at the time suit was commenced to recover the same.

9. The complainant could not recover any more than $13,500 on a judgment in the said case if any judgment at all should be entered for the complainant.

ROBERT PEACOCK,
Solicitor of Defendants.

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

Of Counsel with Defendants.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
SOPHIA HOLLANDER,
Defendant in Error,
AND
NORMAN N. GALE, ET ALS,
Plaintiff in Error.

ON APPEAL.
REASONS.

Afterwards, to wit; to New Jersey Court of Errors and Appeals comes the said Norman N. Gale, et als, by Robert Peacock, their attorney, says that in the record and proceedings aforesaid and also in the matters recited and contained in the said petition of appeal and also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit:

1. The defendants were never indebted to Thomas J. McHenry as set forth in said bill in any sum of money.

2. The verdict of the Court was contrary to the evidence.

3. The interest on said mortgage was not due on January 25, 1926, but was due on March 25, 1926, and the interest on said mortgage had been tendered prior to March 25, 1926.

4. The mortgages were not executed on the date set forth in said mortgages and the mortgage of Gale to McHenry and the assignment of McHenry to Hollander were executed on the same day three months subsequent to the date set forth in said mortgage, which makes the interest bearing period on March 25, 1926, instead of January 25, 1926.

5. The mortgage for $15,000 given by Gale was executed with the express understanding between Gale and Hollander that the money was to be loaned for a period

of three years in consideration of the execution of a $15,000 mortgage upon the consideration of $13,500 being paid.

6. The mortgage being executed for specific time of three years, the thirty days clause in said mortgage on default of interest did not apply.

7. The complainant, having knowledge of the fact that she was receiving a $15,000 mortgage in consideration of the payment of $13,500, cannot recover any more than $13,500 under the usury act of the State of New Jersey.

8. The mortgage upon which judgment was given by the Court of Chancery was not due at the time suit was commenced to recover the same.

9. The complainant could not recover any more than $13,500 on a judgment in the said case if any judgment at all should be entered for complainant.

10. Wherefore the said defendants, by their said attorney, prays judgment that the judgment aforesaid for the errors aforesaid and other errors found and being in the record and proceedings aforesaid, may be reversed, annulled and altogether held for nothing, and that judgment of the Court of Chancery of the State of New Jersey may be reversed, set aside and for nothing holden and that a new trial may be granted for said case.

ROBERT PEACOCK,
Attorney for Defendants.

IN CHANCERY OF NEW JERSEY.

Between
SOPHIA HOLLANDER,
Complainant,
AND
NORMAN N. GALE, ET AL,
Defendants.

ON BILL, ETC.
FINAL HEARING.

Atlantic City, N. J., November 16, 1926.

TESTIMONY.

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

Appearances:
For Complainant, CASSMAN & GOTTLIEB.
For Defendant, ROBERT PEACOCK, ESQ.

MR. GOTTLIEB: I wish to offer in evidence the bond Norman Gale et ux to Thomas J. McHenry.

(Bond admitted and market Exhibit C 1.)

Mortgage accompanying the bond.

(Mortgage admitted and marked Exhibit C 2.)

Assignment of said mortgage to Sophia Hollander, the complainant, as well as declaration of no offset.

(Assignment admitted and marked Exhibit C 3.)

(Declaration of no offset market Exhibit C 4.)

SOPHIA HOLLANDER, Sworn.

DIRECT EXAMINATION BY MR. GOTTLIEB:

Q. Mrs. Hollander, you are the complainant in this suit, aren't you?

A. Yes.

Q. Who is the holder of a mortgage Norman Gale and Mary Blanche Gale to Thomas J. McHenry? Who is the holder of that mortgage? Who holds that mortgage?

A. Mr. Gale.

Q. Who holds it? Is it your mortgage?

A. It is my mortgage, yes, sir.

Q. What is the principal of the mortgage? How much is it for?

A. Fifteen thousand.

Q. When was the last interest due on that mortgage which wasn't paid to you?

A. On the twenty-fifth of January, 1926.

Q. Did you receive the money for that interest?

A. I did not.

Q. Did the owner of that property produce to you the tax bills for 1925 paid?

A. No, he did not.

Q. Did they ever produce to you the tax bill receipted since the time you have taken that mortgage?

A. No, they didn't.

Q. Was the interest on the fifteen thousand dollars due on July twenty-fifth, 1926, tendered to you within thirty days from that time?

A. No.

Q. Did you receive any amount of money on that interest at all that was due at that time, January twenty-fifth, 1926?

A. 1926? No, sir.

Q. How much is due you now on that mortgage?

A. Fifteen thousand and the interest from January twenty-sixth.

Q. 1926?

A. 1926.

CROSS-EXAMINATION BY MR. PEACOCK:

Q. How much money did you loan on the mortgage, Mrs. Hollander, to Mr. Gale?

A. Fifteen thousand.

Q. You paid him fifteen thousand dollars?

A. I did what?

Q. You paid Mr. Gale fifteen thousand at the time you executed the mortgage?

A. Well, I gave him a check.

Q. I can't hear you.

A. I gave him a check for $13,500.

Q. You gave him a check for $13,500?

A. Yes, sir.

Q. And that is all the money you did pay, wasn't it?

A. Well—

Q. Look at me, please. I say that is all the money you did pay?

A. I gave him $13,500.

Q. On condition he would execute a fifteen thousand dollar mortgage, is that correct?

MR. GOTTLIEB: I object.

THE COURT: Permitted.

MR. GOTTLIEB: I object, your Honor. It is indefinite. He says gave him. What does he mean by "him"? Who did he give the money to, on condition and why?

THE COURT: Question has been all the time, Mr. Gale.

MR. GOTTLIEB: I wish he would repeat that.

Q. You gave Mr. Gale a check for $13,500 on condition that he and his wife would execute a mortgage to you for fifteen thousand, didn"t you?

A. No, I didn't give it to Mr. Gale at all.
Q. Who did you give the check to?
A. I did my business with the real estate company.
Q. What was his name?
A. His name is Baittenger.
Q. Baittenger?
A. Yes.
Q. You agreed with Mr. Baittenger then to place the $13,500 in consideration of a mortgage for $15,000 to be executed by Mr. and Mrs. Gale, is that correct?
A. Yes.
Q. And the settlement was made where?
A. At, what you call that office?
Q. South Jersey Title Company?
A. Yes, sir.
Q. You sign an agreement to that effect?
A. I did.
Q. Who did you sign the agreement with?

MR. GOTTLIEB: Your Honor, I don't want to interrupt, but I think I can make this simple by just asking one other question in this matter of Mrs. Hollander.

MR. PEACOCK: I submit, your Honor, it is cross-examination.

THE COURT: Entitled to cross-examine.

MR. GOTTLIEB: I don't think this woman knows what she is talking about.

THE COURT: Witness is apparently answering. In the midst of cross-examination.

MR. GOTTLIEB: It isn't cross-examination, your Honor.

THE COURT: Yes, it is. What is the objection to cross-examination?

MR. GOTTLIEB: I asked the question how much money was the mortgage and as to the amount due on that mortgage.

THE COURT: Yes.

MR. GOTTLIEB: If he wishes to establish his case it is up to him to call her as his witness.

THE COURT: Not necessarily so.

MR. GOTTLIEB: We have a right to rebut that.

THE COURT: You have asked how much is due on this mortgage. He is cross-examining on that now.

MR. GOTTLIEB: The question how much she put up, not a question how much is due. The mortgage calls for fifteen thousand dollars. I should have a right to cross-examine this witness if he is going to examine her.

THE COURT: In the midst of cross-examination at the present time.

A. May I say something?

THE COURT: No, just answer questions.

(Question repeated.)

Q. Answer that question, please.
A. Title Company.
Q. Who?

A. To the Title Company.

Q. In that agreement you signed at the title company you agreed for Mr. Gale to have this mortgage for three years, didn't you?

A. I had no business with Mr. Gale at all .

Q. You agreed with Mr. Baittenger, didn't you?

A. With Mr. Baittenger.

Q. You agreed that he should loan this money to Mr. Gale for three years, didn't you?

A. Yes, sir.

Q. On consideration that he pay you fifteen hundred dollars extra bonus, isn't that true?

A. No, sir; there was no bonus mentioned at all.

Q. Well, in consideration that you should receive a fifteen thousand dollar mortgage for $13,500 cash produced by you, you signed the agreement, didn't you?

A. I answer you just the way I know all about. I can't tell you any more.

Q. Will you answer my question.

A. I didn't do no business at all. My daughter attended to that. All I did was signing my name. I told them I can't speak English very good and I know enough to understand and she attended me whole affair, all I did sign the check.

Q. Mr. Baittenger was acting as your agent, wasn't he?

A. He did.

Q. And you signed this agreement with him, didn't you?

A. Well, my daughter attended to all that.

Q. Didn't you do that?

A. No, I didn't

Q. You just said you had signed an agreement with him. What did you mean?

A. Well, I only did what I was told. My daughter spoke for me and attended to the affair. All she come to me and said, "Mamma, sign that check."

Q. Mr. Baittenger present at that time?

A. Yes, sir.

Q. And he made the agreement with you for you to loan the money, didn't he?

A. No, with my daughter, all with my daughter.

Q. Your daughter acting for you?

A. She did, yes, sir.

Q. And you agreed to everything that your daughter did, didn't you?

A. Yes.

Q. Acting in your name?

A. Yes, sir.

Q. Did your daughter sign an agreement for you?

A. No, I signed myself.

Q. You signed that at the Title Company, didn't you?

A. Yes, sir.

Q. Now, who produced that agreement to you at the Title Company?

A. Mr. what is his name?

Q. Mr. Cook, wasn't it?

A. Mr. Cook.

Q. What was that agreement?

A. Couldn't tell?

Q. Explained to you at the time you signed it, wasn''t it?

A. No, it wasn't explained at all. I told you Miss Hollander, my daughter, she read it and I didn''t do nothing at all only to sign my name.

Q. Your daughter read the agreement then told you it was all right and then you signed it, is that correct?

A. Well, we had Mr. Green as a witness there, he has looked at it and we thought if he said it would be all right—

Q. Mr. Who?

A. Mr. Green.

Q. They were acting for you?

A. Yes.

Q. Whatever they did you agreed to?

A. Yes.
Q. Where did you leave that agreement that you signed?
A. I think at the Title Company, didn't I?
Q. And the same day you left a check for $13,500 at the Title Company, didn't you?
A. Yes, sir.
Q. That money laid in the Title Company's hands for some time before settlement was made with Mr. Gale, didn't it?
A. This I don't' know.
Q. And Mr. Gale paid the interest to you on that $13,500 from the time you deposited the money with the Title Company up until settlement was made, didn't he?
A. I don't know if he did.
Q. Understand my question?
A. Not correct.

(Question repeated.)

A. No, he didn"t.
Q. He didn't pay you extra interest?
A. No, he didn't.
Q. Did you get a copy of the settlement sheet from the Title Company like that?
A. I tell you I didn't get nothing. I left that all to my daughter because I am not very good in English.
Q. Can you read English?
A. I can read, yes.
Q. Can you read that?
A. Yes, I can read that.
Q. That says check deposited by you of $13,500, doesn't it?
A. Yes.
Q. Held by you $1,500, doesn't it?
A. Yes.
Q. Then the amount due you is $13,500, isn't it?

A. No, sir, $15,000 is due to me.
Q. All you ever paid was $13,500, all you ever loaned to Mr. Gale was $13,500, wasn't it?
A. My daughter could explain better. I speak good as I can. He said giving me—I had nothing to do with him at all. I never saw the man before. He sent to me Mr. Baittenger and he told him that he wants a mortgage and gives me $15,000, he needs the money, and my daughter told him that is all the money she has, she can give him, and he was satisfied to give her $15,000. Of course she can explain it better to you as I can. I left that all to her because I never attend to any business only my two children.
Q. You agreed if you got a $15,000 mortgage you would loan $13,500, didn't you?

MR. GOTTLIEB: Your Honor, I don't know whether this man has a right to press the question of terms, using those terms, the question is rather technical and I think this woman has been pressed enough on those points. We have the daughter here who took care of the whole transaction. He can ask her any question he wants.

MR. PEACOCK: This woman is the complainant.

THE COURT: Yes.

MR. GOTTLIEB: He has examined. She says she knows nothing about it.

THE COURT: When the question is asked she can say she doesn't know.

MR. GOTTLIEB: She said it four times. Her daughter took charge of it for her.

THE COURT: But she don't say she can't answer the particular question. She proceeds to answer.

MR. GOTTLIEB: I don't understand it.

THE COURT: Let that be struck from the record.

MR. GOTTLIEB: I don't understand why she would say it.

THE COURT: Didn't sound so.

MR. GOTTLIEB: I meant I didn't understand why she would do it.

(Question repeated.)

THE COURT: Of course, all of this is objectionable, but counsel doesn't seem to object to it on the objectionable ground. There is an agreement in writing which this woman signed, according to the testimony. There seems to be no objection made to her describing what is in that written instrument.

MR. PEACOCK: I ask counsel to produce the agreement.

MR. GOTTLIEB: I have no agreement. I told counsel I had no agreement.

MR. PEACOCK: Mr. Cook, have you the agreement with you?

MR. COOK: I have the duplicate copy.

(Copy produced by Mr. Cook.)

Q. I show you a paper dated July 25, 1924, and call your attention to the signature "Sophie Hollander," and ask you if that is your signature?
A. Well, I told you before—

Q. Answer that yes or no, please. Is that your signature?
A. Yes, that is my signature.

(Paper marked D 1 for identification.)

Q. Mrs. Hollander, you have testified in your direct examination concerning the taxes. Taxes were paid on this property by Mr. Gale, weren't they?
A. I couldn't tell you.
Q. You don't know?
A. No.

THE COURT: Then I do not understand. Your bill alleges that there is a man by the name of McHenry who loaned this money to Gale.

MR. GOTTLIEB: The bill, the foreclosure bill?

THE COURT: Yes.

MR. GOTTLIEB: It alleges in the assignment.

THE COURT: Yes, but does it anywhere allege that the defendant owed McHenry, indebted to McHenry in the sum of fifteen thousand dollars and made a bond and mortgage to him and that later it was assigned to the complainant?

MR. GOTTLIEB: Further alleges—the bill goes on to say, however, that they were still in possession of the property.

THE COURT: As it stands now there is no consideration whatever for the mortgage itself, according to your bill.

MR. GOTTLIEB: Oh, we allege that we are the

holders of the mortgage by assignment from McHenry.

THE COURT: Yes, but now your testimony is that McHenry never had any interest in the mortgage, nothing due to him admittedly.

MR. GOTTLIEB: We produce the bond, mortgage and assignment.

THE COURT: You also produce in evidence a witness who swore that she loaned the money to Gale. McHenry did not appear in the matter at all.

MR. GOTTLIEB: She didn't say that. She said she paid it to the title company.

THE COURT: I know but she said she loaned it to Gale.

MR. GOTTLIEB: I don't remember her saying that.

THE COURT: Certainly there is no proof that McHenry ever loaned anybody any money. Only reason for calling attention to it is to have your record straight.

JOHN B. COOK, Sworn for Complainant.

DIRECT EXAMINATION BY MR. GOTTLIEB:

Q. Mr. Cook, what is your position with the title company?
A. Settlement clerk South Jersey Title and Finance Company.
Q. Do you recall making settlement in this matter before the court?
A. Yes, sir.

Q. Have you got your papers with you?
A. Yes, sir.
Q. Whom does your figures show the money finally was received by paid in the settlement?

MR. PEACOCK: That is objected to.

THE COURT: I will permit that.

Q. Who was it paid to?
A. That I can't answer without getting my check, my figures here show just due mortgagor. I don't know whether the check was made to McHenry or made to Gale.
Q. Was—in the settlement paid out by your company?
A. Yes.
Q. You haven't got those figures here?
A. I have a copy of the figures but I don't have the exact wording that the check would bear.

BY THE COURT:

Q. Did McHenry appear in the matter at all?
A. The mortgage was made to McHenry, assigned by McHenry to Sophia Hollander.
Q. On the same day?
A. It was practically in the same settlement. The dates of the papers would speak better for that but it was in the same settlement.
Q. Do you mean then that the mortgage was given on July twenty-fifth and the assignment on September eleventh as appears by the dates on the papers?
A. How is that again, your Honor?

(Question repeated.)

A. Yes, sir.

Q. I call your attention to the acknowledgment of the mortgage and ask you if that refreshes your recollection?

A. Yes, calls for September eleventh.

Q. Then was the mortgage given on July twenty-fifth and assigned on September eleventh or was it given at the same time?

A. The mortgage was dated as of the date the check was deposited, that is in compliance with the receipt. The entire settlement was closed out on September eleventh and papers were acknowledged on that date.

Q. Who deposited the money with you?

A. Sophia Hollander.

BY MR. GOTTLIEB:

Q. Mr. Cook, is this the check was given to your company in settlement of this mortgage?

A. Yes, sir.

(Check offered, admitted in evidence and marked Exhibit C 5.)

Q. You haven't got any figures to show who that money was paid to, have you, Mr. Cook?

A. Not the final disbursement, as far as mortgagee or assignee was concerned. I have figures to show how disbursement was made of the major, of the greater portion of the fund.

CROSS-EXAMINATION BY MR. PEACOCK:

Q. Mr. Cook, what was the date of the settlement from your papers?

A. September eleventh, 1924.

Q. And that was the day that Mr. Gale signed the mortgage, wasn't it?

A. That was the day the acknowledgment was taken.

Q. That was the day he signed it, wasn't it? You are John B. Cook, aren't you?

A. Yes, sir.

Q. You signed that acknowledgment the eleventh day of September?

A. Yes, sir.

Q. That is the date he signed it before you, isn't that true?

A. Generally speaking it is. I am not quibbling for points or anything of that character, but you know sometimes papers are signed and acknowledgments are taken afterwards. I wouldn't want to give you a definite answer.

Q. Don't you know, Mr. Cook, that is the only day Mr. Gale came to your office in this settlement and he signed that mortgage that day and settlement was made on September eleventh?

A. Mr. Gale was in my office the day the check was deposited.

Q. Didn't he and his wife sign it the date as of the acknowledgment?

A. I can't give a definite answer on that.

Q. You won't deny it, will you?

A. I won't deny it, no, sir.

Q. On September eleventh didn't you date the mortgage back to July twenty-fifth because she had deposited the money on that date?

A. Yes, sir.

Q. Now Mr. McHenry did not assign this mortgage until the eleventh day of September, did he?

A. No, sir.

Q. Then you wouldn't give a mortgage to Mr. Gale on July twenty-fifth which was still in McHenry's name on September eleventh, would you?

A. What was that?

(Question repeated.)

Q. In other words, if the title to this mortgage was in Mr. McHenry's name on September eleventh, the date of this assignment, you wouldn't make a mortgage from Gale to Mrs. Hollander for the same amount covering the same transaction, would you, back in July?

A. No.

Q. You did do it, though, didn't you?

A. No.

Q. You didn't?

A. No, that mortgage was made to McHenry.

Q. Yes and that is the same mortgage which is the subject matter of this suit, isn't it, fifteen thousand dollar mortgage?

A. Yes, and that is the mortgage that is assigned.

Q. Declaration of no offset, what is the date of that?

A. September eleventh.

Q. Is that signed the same day as it bears date?

A. Yes, sir.

Q. And the bond, was that signed on September eleventh.

A. Yes, sir.

Q. As a matter of fact all of these papers were signed on September eleventh, weren't they, Mr. Cook?

A. As far as I know, yes.

Q. And the only money that passed through your hands representing the title company was the sum of thirteen thousand five hundred dollars, wasn't it?

A. Yes.

Q. And that shows by your settlement sheet?

A. Yes, sir.

Q. You never received any fifteen thousand dollars to settle this mortgage, did you?

A. The only money we had was $13,500.

Q. Did you ever make any payment to Mr. Gale or does your record show any payment to Mr. Gale from Mr. McHenry covering this subject matter?

A. You mean by that question did we pay our check or the balance that was due after disbursements had been

made or bills taken care of, you mean did we pay that check to McHenry or to Gale?

Q. To McHenry?

A. I would have to get my cancelled check to ascertain that. I answered that to Mr. Gottlieb by saying that my sheet here just shows "due mortgagor" a certain net amount.

Q. Did McHenry ever deposit any money with you to pay Mrs. Hollander for the assignment of mortgage?

A. No, sir.

Q. He did not?

A. No, sir.

Q. From your records you don't know whether any money was ever paid Mr. Gale or not, do you?

A. I cannot answer right now, whether we paid to Gale or to McHenry. I would have to get our cancelled checks to find out.

Q. Mrs. Hollander present the day settlement was made?

A. I don't remember.

Q. Was she present at your office at any time?

A. Yes, sir, the day the receipt was given.

Q. Did you have a conversation with her about loaning this money?

A. Nothing with the exception that I was there representing the title company at the time.

Q. She agree in your presence to loan $13,500 in consideration of Gale executing a $15,000 mortgage?

A. No; she agreed to purchase a mortgage.

Q. Agreed to purchase a mortgage?

A. Yes, sir.

Q. Was there any agreement signed there as she states except that receipt that you have, Mr. Cook?

A. That is all. That is all the agreement that I have ever seen.

Q. She agreed to purchase a mortgage from a man named McHenry, did she?

A. Yes, sir.

Q. But no transaction between Mrs. Hollander and Gale concerning the purchase of a mortgage, was there?
A. No, sir.
Q. That is all, thank you.

MR. GOTTLIEB: Your Honor, I call your attention to the paragraph somewhere in the answer that they admit having received $13,500, that the amount due from the defendant is the sum of $13,500.

THE COURT: Yes.

MR. GOTTLIEB: They do not deny that at least that much money they received. Now we don't say we put up $15,000. We say we put up $13,500. The only difference between us, what was the nature of the transaction? Was it the purchase of a mortgage or was it a mortgage created for the purpose of evading the act? I do not think the complainant would have to go any further than to show, so far as the answer of the defendant is concerned that they admit having received $13,500, but received it in the nature of a loan, but the question of usury is a special defence and should be therefore pleaded by them and proven by them.

THE COURT: I think they have pleaded it.

MR. GOTTLIEB: I do not think they pleaded a special defense, but plead in the answer this, they admit in their answer that they did receive the $13,500.

THE COURT: I do not think there is any question about that. That is admitted. The difficulty I was having is the fact that you allege that there was a mortgage to McHenry and then prove that there never was a mortgage to McHenry and it was a paper in that form.

MR. GOTTLIEB: That is the question here. The question that goes to prove whether or not McHenry was just a subterfuge in this matter and that would be up to them to prove that. We will have to rebut that.

THE COURT: You close your case?

MR. GOTTLIEB: Yes, sir.

COMPLAINANT RESTS.

DEFENDANTS' TESTIMONY.

NORMAN N. GALE, Sworn.

DIRECT EXAMINATION BY MR. PEACOCK:

Q. You the defendant in this case, Mr. Gale?
A. I am.
Q. What agreement was made by you at the time the mortgage was executed by you to Sophie Hollander $15,000, what agreement was made between you and Mrs. Hollander or her agent?
A. The agreement was that I would give them a $15,000 mortgage on a property for a three year term and give her $1,500; in other words the amount would be $13,500 deposited in the title company. At that time I hadn't the house completed and I asked them to deposit the money in the title company, that I would pay the interest from the date it was deposited in the title company.
Q. Who did you make that agreement with?
A. Berdell Baittinger was the agent during the transaction all the time.
Q. He represent Mrs. Hollander?
A. Well, that is the name was given to me all the time.

Q. Did you execute a mortgage that has been offered in evidence here?

A. I did.

Q. Have you paid the interest regularly on that mortgage?

A. I did.

Q. I show you a check March 18, 1926, drawn in the sum of $453.80, six months interest due on this mortgage, signed by Norman N. Gale; to whom did you send that check?

A. I brought that up to the lawyer up here.

Q. Cassman and Gottlieb?

A. I guess it was Mr. Gottlieb.

Q. Representing Mrs. Hollander at that time?

A. Yes, sir.

Q. Was that check returned?

A. That check, he wouldn't accept the check first and I went home and sent it in a letter to him and he sent it back to me in a letter.

Q. I show you a letter dated March 19, 1926, addressed Norman N. Gale and signed by Harry Gottlieb, did you receive that letter from Mr. Gottlieb?

A. Yes, that is the letter I received.

Q. And the envelope dated March nineteenth?

A. Yes.

Q. Was that check returned to you in that envelope with the letter at that time?

A. Yes, sir.

(Check, envelope and letter marked D 2, 3 and 4 for identification.)

Q. When did you execute the mortgage in question on September eleventh, the date of the settlement, or on July twenty-fifth which is the date in the body of the mortgage?

A. All papers were signed by myself on the date of settlement.

Q. September eleventh?

A. Yes.

Q. Paid the taxes on the property for 1924 and 1925 as set forth in the bill?

A. I have.

Q. Was your check for interest delivered on the date on which it was due?

A. I just don't get you.

Q. The check I have just shown you that you delivered to Cassman and Gottlieb's office, was that due at the time or past due?

A. It was past due.

Q. And did that pay the interest up to the date at the time you delivered it?

A. Yes, sir, interest on interest borrowed.

Q. What was said by Mr. Baittenger representing Mrs. Hollander to you concerning the loan of this money for three years?

A. Well, that was the time of the mortgage that I wanted, three years and nothing else, and I agreed to give three year mortgage.

Q. Was the money paid by you in consideration of you having the use of this money for three years?

A. Sure.

Q. Was that your agreement with them at that time?

A. Certainly was.

Q. Did you understand that you were to have the use of this money for three years?

MR. GOTTLIEB: I object.

THE COURT: Sustain the objection.

MR. PEACOCK: I think it is objectionable.

CROSS-EXAMINATION BY MR. GOTTLIEB:

Q. Have you got your tax bills with you, Mr. Gale?

A. No, sir.

Q. Did you ever produce your tax bills for 1924 or 1925 to Mrs. Hollander?

A. No, sir.

Q. Never showed her those tax bills?

A. Never showed them.

Q. Did you ever offer cash for interest within thirty days from January twenty-fifth, 1926, to Mrs. Hollander, her daughter or myself?

MR. PEACOCK: That is objected to on the ground we question whether your Honor is going to consider the interest date as the date of signing the mortgage, September eleventh, or July twenty-fifth which is the date. We contend the interest was not due because the mortgage was executed and acknowledged as of September eleventh. The interest was not due at the time this suit was started.

THE COURT: I will permit the question.

A. No, sir, that is not until the last date.

Q. Did you in March tender cash to Mrs. Hollander, Miss Hollander or myself in payment of that interest payment due on July twenty-fifth?

A. Unless check is cash.

Q. Will you answer that question, please.

A. Not cash.

Q. You paid Baittenger a commission to place this loan, didn't you?

A. I certainly did.

Q. He was your agent, wasn't he?

MR. PEACOCK: I object to that. Mrs. Hollander has testified he was her agent.

THE COURT: I will permit the question.

(Question repeated.)

MR. PEACOCK: And I object further that is a question of law and not for this witness.

THE COURT: If he doesn't know he can say so.

A. No.

Q. Didn't you ask him to sell a mortgage for you of fifteen thousand dollars?

A. He stopped at the house and asked me if I wanted to place a mortgage and what amount of mortgage I was hunting for and I says "I am hunting for fifteen thousand dollars for three years term."

Q. Did he ask you how much you would pay him to get the mortgage?

A. He certainly did. That is the first thing he asked me.

Q. How much did you say you would pay him?

A. I would pay him ten per cent. for the use of that fifteen thousand dollars.

Q. How much did you pay him personally?

A. Nothing.

Q. Didn't you pay him anything at all?

A. No, sir.

Q. Did you pay Byrnes Company anything?

A. No, sir.

Q. You pay the Associated Realtors anything to place this loan?

A. No, sir.

Q. I show you the settlement sheet of the South Jersey Title and Finance Company and ask you whether or not it was charged against your account, Associated Realtors $450 commission?

A. It certainly was.

Q. You paid that out of your money?

A. Out of the settlement.

Q. Out of your money, out of the $13,500 put up?

A. Well, I had never had it yet, wasn't my money, I had never got it.

Q. You received the amount of the check less the expenses including the commission?

A. Yes. I never had the money.

Q. Did you have the money for the fire insurance?

A. No, sir.

Q. You paid the fire insurance, didn't you?

A. I certainly did not. It was out of the settlement.

Q. Wasn't it out of your money?

A. It is out of the money put up. It wasn't my money until the mortgage was signed.

Q. You paid for the policy, six thousand dollars, $54; wasn't that out of your money?

A. I expect it was out of the settlement.

Q. How about the charge to Voorhees, solicitor's fee, what was that for? Do you know Mr. Voorhees?

A. Yes.

Q. Did he have anything to do with this mortgage?

A. I don't know.

Q. Don't you know what he had to do with it?

A. No, I do not.

Q. Let me refresh your memory, how about a mortgage to Security Building and Loan or Security Corporation of some kind, wasn't he connected with that?

A. He is connected with the Security Building and Loan.

Q. Did you place a second mortgage on this property at the same time?

A. I placed a second mortgage, which they still own, and I forget whether it was done right that same date or the next morning; it was within that same—

Q. Didn't you go to see Mr. Voorhees about that mortgage, the second mortgage?

A. I certainly did.

Q. And he was solicitor for that mortgage company that took that second mortgage?

A. Well, to be frank, I didn't go to him personally,

I go to the secretary, that is in this building down here on the third floor, of course he is their solicitor, that is all I know. I never go to him for a loan.

Q. They sent you to him?

A. No.

Q. How did you get to him?

A. I didn't go to him.

Q. Well, he had nothing to do with the Hollander mortgage, did he?

A. No.

Q. Still he was paid out of that money twenty-five dollars, wasn't he?

A. If it says so there, he was according to that.

Q. Don't it say so?

A. Yes, twenty-five dollars paid.

Q. That was out of your money?

A. Yes.

Q. It wasn't out of Mrs. Hollander's money, was it?

A. Well, yes, it was out of the money borrowed from Hollander.

Q. When was the first time you saw Mrs. Hollander in this matter?

A. I believe the day we sit around the table in the Title Company.

Q. That is the first time you saw her?

A. That is Mrs. Hollander?

Q. Yes?

A. Yes.

Q. Everything had been arranged before that time without her seeing you at all?

A. So far as I can recollect I never met her outside of in the Title Company. Now I might have met her and I forget around the job. Mr. Green, a builder I know, was down there, now whether the daughter or Mrs. Hollander was with him at the time he was looking through the house to pass on it, I forget.

Q. You never discussed the matter with her at least before you sat down to the table?

A. I don't believe I did; all through Mr. Baittinger.
Q. That is all.

JAMES BYRNE, Sworn.

DIRECT EXAMINATION BY MR. PEACOCK:

Q. Mr. Byrne, is Mr. Baittinger connected with your office?
A. Not at the present time, no, sir.
Q. Was he at the time of the Hollander-Gale transaction?
A. Yes, sir.
Q. You a knowledge of the agreement made between Mrs. Hollander and Mr. Baittinger concerning the Gale mortgage?
A. I don't recall, really.
Q. Have you records in your office concerning that agreement to place this mortgage?
A. No, sir.
Q. Were you present when it was made, when the agreement was made?
A. I, only on the day of the settlement, I was just sitting in there, but I didn't pay much attention to it as Mr. Baittinger handled the whole transaction practically.
Q. Mrs. Hollander present that day?
A. Yes, she was there.
Q. Who did you represent there?
A. I can't say either part.
Q. Were you present when the agreement was made between Mr. Gale and Mr. Baittinger concerning the placing of this money?
A. I don't recall.
Q. Do you know how much money was paid?
A. I don't recall.
Q. Then this agreement was made by Mr. Baittinger not in your presence, is that correct?
A. Mr. Baittinger is a salesman in my office.

Q. Didn't you know of the agreement he made representing your office?
A. No.
Q. You didn't know?
A. No.
Q. Never talked to him about it?
A. Not that I recall.
Q. Never talked with Mrs. Hollander about it?
A. Not that I recall, no, sir.

NO CROSS-EXAMINATION.

DEFENDANT RESTS.

COMPLAINANT'S REBUTTAL.

MISS HELEN HOLLANDER, Sworn.

DIRECT EXAMINATION BY MR. GOTTLIEB:

Q. What relation are you to the complainant in this case?
A. I am her daughter.
Q. Who handled the purchase of this mortgage?
A. I handled it entirely.
Q. With whom?
A. The Associated Realtors Company through Mr. Baittenger, their salesman.
Q. How did you come about taking this mortgage for your mother?
A. I met Mr. Baittenger on the street one day and I told him I had a sum of ten thousand dollars I wanted to invest in a mortgage.

MR. PEACOCK: I object to a conversation not in the presence of Mr. Gale.

THE COURT: How do you expect to present that agreement?

Q. As the result of the conversation with Mr. Baittenger what did you do with reference to the money of your mother?

A. I asked Mr. Green to accompany me to look at a piece of property that I was under the impression was to have a ten thousand dollar mortgage and upon seeing the property and Mr. Green agreeing that it was worth ten thousand I said I would take it. Then and there Mr. Baittenger said "this is a fifteen thousand"—

Q. Don't say what Mr. Baittenger said. What was the amount of the mortgage finally your mother took there?

A. Mother took a fifteen thousand dollar mortgage.

Q. How much did she pay for it?

A. Thirteen thousand five hundred.

Q. Did you handle the settlement for your mother?

A. I handled it entirely.

Q. What part did your mother take in the transaction up until the time of settlement?

A. None whatever.

Q. When did you first see Gale in the matter?

A. At the time we turned the check over to the Title Company.

Q. With whom did you do your business up until that time?

A. Mr. Baittenger of the Associated Realties Company.

CROSS-EXAMINATION BY MR. PEACOCK:

Q. Was your mother present at the settlement?

A. At the time we presented the check, yes.

Q. Who was Mr. McHenry?

A. Mr. McHenry? That you will have to ask the Associated Realties Company. My dealings were with

them. I bought the mortgage of the Associated Realties Company.

Q. Do you know Mr. McHenry?

A. No, but I know Mr. Byrne and Mr. Baittinger.

Q. Did you ever see Mr. McHenry?

A. I might have but I really don't know.

Q. Did you ever pay Mr. McHenry any money?

A. As I said, I did my dealings through the Associated Realties Company and what they did in turn I don't know.

Q. Who did you draw the check to?

A. The Title Company.

Q. You never made any check to the Associated Realties Company, did you?

A. At their suggestion we turned it over to the Title Company.

Q. You never made any check to the Associated Realties Company?

A. No. I made it to the Title Company.

Q. Mr. McHenry present at the date of the settlement?

A. That I couldn't tell you.

Q. Mr. McHenry was a straw man, wasn't he?

A. That I don't know.

Q. You don't know that?

A. No, my dealings with the Associated Realties Company.

Q. Didn't Mr. Gale sign a mortgage to Mr. McHenry at the date of settlement?

A. That I couldn't tell you. I don't know.

Q. And wasn't it signed over by Mr. McHenry on the same day that settlement was made?

A. That I can't answer that because I don't know.

Q. You were present, had charge of the entire transaction?

A. Yes, I was present.

Q. You don't know those things?

A. I do not.

Q. Mr. Gale agreed to execute a $15,000 mortgage in consideration of paying $13,500?

A. I had no dealings with Mr. Gale. My dealings were with the Associated Realties Company. I bought the mortgage from them for $13,500.

Q. No mortgage was in existence?

A. I was under the impression it was.

Q. Who told you that mortgage was in existence?

A. Mr. Baittenger.

Q. There wasn't any mortgage in existence?

A. That I cannot tell you because I don't know.

Q. You know now.

A. No, I don't know.

Q. And you know Mr. Gale never signed anything until September eleventh, the day you made settlement?

A. I don't know anything whatever. I merely know I bought a $15,000 mortgage for $13,500.

Q. You saw him sign it that day at the Title Company?

A. I didn't see him do a thing.

Q. Didn't see anything signed?

A. I know there was several signatures. I can only say was my mother's.

Q. Mr. Cook took those signatures, didn't he?

A. Mr. Cook took several signatures, yes.

Q. You didn't see those papers signed that have been offered in evidence that day, showing you bond and warrant, you didn't see these signed there by Mr. Gale and his wife?

A. No, I didn't receive any of these until the twelfth of September, I didn't receive any of these papers.

Q. I didn't ask you that.

A. I couldn't tell you whether these were signed or not. I left it to the Title Company and the Associated Realties Company, who represented me.

Q. You were present at the settlement and saw everything that transpired?

A. Not everything. I was there. I took their word

for granted, I thought they were looking out for my interest.

Q. This assignment was signed by Thomas J. McHenry on September eleventh; you see that paper there that day?

A. I really didn't see any papers whatever. I was merely relying on the word of the Title Company and Mr. Byrnes, of the Associated Realties Company, who represented me.

Q. You just stood by and paid over a check for $13,500—

A. Yes, because I had seen the property.

Q. —and you didn't know what was taking place, is that right? Did you deliver the check yourself?

A. Yes, I did.

Q. On the date which is set forth in the check?

A. What date is that?

Q. July 25, 1924.

A. Yes.

Q. And you delivered that check to whom?

A. Mr. Cook received it from Mr. Byrnes, it was handed to Mr. Byrnes first and Mr. Byrnes turned it to Mr. Cook.

Q. You gave it to Mr. Byrnes?

A. Yes, Mr. Byrnes received it, but it was made out to the Title Company.

TESTIMONY CLOSED.

THE COURT: Why aren't Baittinger and McHenry in this case here?

MR. PEACOCK: I hadn't any subpoenas from the Court, your Honor, and this morning I took a Master's summons, signed as solicitor in Chancery, I couldn't obtain a subpoena, and Mr. Gale served it on Mr. Baittinger.

THE COURT: I will continue this case. It seems useless to take a case of this sort and not have all the evidence that can be presented.

MR. PEACOCK: I have endeavored to get Mr. Baittinger here today. I suppose because of the fact he had not had a requisite subpoena, had a Master's subpoena, signed by me as a Master, Mr. Gale left it at his office and talked to him over the phone from my office and asked him to be here.

THE COURT: I will continue the matter until eleven o'clock tomorrow morning. If these witnesses are not here then I may have to continue it longer so it is to the advantage of each side to get the witnesses.

Atlantic City, N. J., November 17, 1926.
Trial of the cause resumed at 11 A. M.

G. BERDELL BAITTINGER, Sworn.

DIRECT EXAMINATION BY MR. PEACOCK:

Q. Where do you live, Mr. Baittinger?
A. Six North Richards Avenue, Ventnor.
Q. What is your occupation?
A. Real estate.
Q. Do you know Mr. Gale?
A. I do.
Q. Do you know Mrs. Hollander?
A. I do.
Q. Did you have charge of the transaction of the Gale-Hollander mortgage?
A. I did.
Q. At that time who were you employed by?

A. Associated Realtors.
Q. What connection does Mr. Byrne have with them?
A. Head of the firm.
Q. Did Mr. Byrne know about this transaction?
A. He did.
Q. Who told him about it?
A. I did.
Q. Did you acquaint him with all the details of it?
A. To the best of my ability I did.
Q. Who had charge of the settlement, you or Mr. Byrne?
A. Well, jointly, I should say, sir.
Q. Were you acquainted with real estate transactions at that time?
A. I was new at the business.
Q. Was this your first case in real estate business?
A. This was my first mortgage deal. I had had one settlement prior to that with another firm.
Q. Was Mr. Byrne your employer at that time?
A. He was.
Q. Did he go to the settlement with you?
A. He did.
Q. And he was conversant with all the facts concerning this transaction, was he?

MR. GOTTLIEB: Your Honor, if this is the purpose of contradicting his own witness I wish to object.

THE COURT: What is the objection?

MR. GOTTLIEB: He produced a witness and now wishes to contradict his own witness.

THE COURT: Perfectly proper. He can't impeach him but he can contradict him.

MR. GOTTLIEB: Isn't he trying to do that?

THE COURT: He is contradicting him, not impeaching him.

MR. PEACOCK: That is my purpose. Mr. Byrne testified he knew nothing about this.

Q. Mr. Baittinger, what agreement did you make with Mrs. Hollander concerning the placing of the Gale mortgage?

A. To buy a fifteen thousand—

MR. GOTTLIEB: Did you make the agreement with Mrs. Hollander or Miss Hollander?

A. Miss Hollander.

MR. GOTTLIEB: Will you state the name then, so we won't get that confusion.

Q. Did you have any transaction with Mrs. Hollander?

A. Mrs. Hollander and Miss Hollander were together but I was doing my business with Miss Hollander if I understood; am I correct?

Q. At that time did or did not Mrs. Hollander agree to place this money on the mortgage on the Gale property for three years?

A. I was to get a three year mortgage, if that is what you mean.

Q. She agreed to place the money there for three years?

A. With the mortgage for three years, yes.

Q. Was that agreed between Mrs. Hollander, Miss Hollander and yourself at the time this transaction took place, that it should be a three year mortgage?

A. I understand all first mortgages are three year mortgages.

Q. I show you assignment Thomas J. McHenry to

Sophie Hollander and direct your attention to signature J. B. Baittinger, whose signature is that?

A. That is mine, G. B. Baittinger.

Q. Who is Thomas McHenry?

A. Thomas McHenry is the man this mortgage was to.

Q. Is he employed in the Byrne's office?

A. Not to my knowledge.

Q. Is he connected with it?

A. Not to my knowledge.

Q. Did he ever pay any money over to Mr. Gale?

A. Not to my knowledge; I know nothing about monetary consideration.

Q. You were present at the settlement?

A. I was.

Q. Did you see him give any money to Mr. Gale?

A. He wasn't at the settlement.

Q. He wasn't at the settlement? Where were you when you witnessed Mr. McHenry's signature?

A. I am not positive if it was at the Astor Apartment or in the railroad yards of the Reading Railroad. It was either of the two places.

Q. Had any money to your knowledge ever passed between Gale and McHenry?

A. I hadn't seen any, sir.

Q. And was this signature placed on the assignment and acknowledgment taken as of the date of the assignment, to wit, September 11, 1924?

A. To the best of my knowledge, yes.

CROSS-EXAMINATION BY MR. GOTTLIEB:

Q. How did McHenry come into this mortgage transaction?

A. May I answer that in my own way? This is my first time as a witness. I don't hardly know how to answer questions. Miss Hollander asked me—Mr. Gale asked me to get him a fifteen thousand dollar mortgage

on his property. Miss Hollander had money to invest. I took the matter over and told her that I could buy a fifteen thousand dollar mortgage for her at a discount of ten per cent., and with that in view this mortgage was made to McHenry and sold to Miss Hollander for the discount of fifteen per cent.

Q. You told her you could buy a mortgage of fifteen thousand?

A. I told her I could buy a mortgage of fifteen thousand at ten per cent. discount, yes.

Q. Who brought McHenry into it? Was he known to the Hollanders?

A. No, I don't think he was.

Q. How did he come into it then?

A. Through the Associated Realtors.

Q. Who was the person who got this scheme up or worked this thought out of getting these people to take the mortgage through McHenry?

A. I presume that was the office. I am not sure, sir.

Q. Was it from Miss Hollander's talk with you? Did she ever tell you to give it to somebody else so she could get it?

A. No.

Q. Did she know McHenry or mention his name to you?

A. I don't think she knew him.

Q. Your conversation with Miss Hollander was all about her purchasing a fifteen thousand dollar mortgage?

A. Absolutely.

Q. Did she know at that time that there was not a mortgage in existence?

A. I don't think she did.

Q. You didn't tell her so, did you?

A. No.

Q. All her transaction was with you?

A. With me, yes, sir.

Q. What Byrnes knew about this matter came from you?

A. Absolutely.

Q. Did you ever bring Gale and Miss Hollander together until the time of the settlement?

A. I don't think so. I think the settlement was the first they met.

Q. All was done with you with Gale and from you to Miss Hollander?

A. Yes, I think that is correct.

Q. Would you say that up until the time that at no time did she realize that she was not buying a present existing mortgage on that property?

A. Well, that is a question I can't answer.

Q. Well, did you tell her anything to give her the impression?

A. No.

Q. You always mentioned the fact that she was buying a mortgage?

A. Yes.

Q. And that it was being sold to her at a discount?

A. Yes.

Q. Did you ever talk to Mrs. Hollander at all about this matter except through her daughter?

A. Which man?

Q. Mrs. Hollander, did you ever talk to Mrs. Hollander about this matter except through her daughter?

A. Mrs. and Miss were always together at the apartment when I called there.

Q. Who handled the transaction?

A. Miss Hollander was the one that I was dealing direct with. It was Miss Hollander—May I answer this?

Q. Yes?

A. It was Miss Hollander that said she had the money to invest so I assumed Miss Hollander was the one I was dealing with.

BY MR. PEACOCK:

Q. This mortgage made from Gale to McHenry and then assigned for the purpose of making it appear that Mrs. Hollander had purchased a mortgage, isn't that true?

A. I don't know just how to answer that. It was a created mortgage sold as a created mortgage. That is my understanding of it.

Q. No consideration given by McHenry to Gale or McHenry to Mrs. Hollander was there?

A. Not through me.

Q. Not through your office that had charge of it?

A. That is a question that I couldn't answer. That would be a question the head of the firm would have to answer.

Q. Who is the head of the firm?

A. James E. Byrne.

Q. You don't know whether McHenry was connected with the Byrnes office or not, you say?

A. To the best of my knowledge he is not connected with the office.

Q. Was he a realtor?

A. I don't think so.

Q. Who conceived the idea in your office of making the mortgage to McHenry and then assigning it?

A. I assume it was Mr. Byrne.

Q. Was it?

A. That is a question I can't answer because I didn't know Mr. McHenry myself.

Q. You talked to Mr. Byrne about it, Mr. Baittinger, didn't you, as to how you were going to place this loan?

A. Yes.

Q. Is that what he said he would do?

A. He said to have the mortgage created and gave me that name to have it created to.

Q. Then it is true it was placed in this man's name

for the purpose of appearing that it was a mortgage sold to this woman, isn't that true?

A. Well, whether there was any money passed or not if that is what you are referring to, I don't know. I never saw any money or handled any money.

Q. In other words he was just a straw man, wasn't he?

A. I don't know whether that is what you call it.

Q. You know that is what you call it. Isn't that true?

A. If there was any money passed he wouldn't be. That I can't answer because I didn't handle any money transaction.

Q. Didn't you explain that to Mrs. Hollander and Miss Hollander that is the way it would be created?

A. No.

Q. You arranged with Miss Hollander to go and inspect the Gale property on which the mortgage was placed?

A. I took Miss Hollander down there.

Q. She was to the property to inspect it before she placed the money?

A. Before she placed the money.

Q. She knew at that time that Mr. Gale was the one who was placing the mortgage on his property?

A. She knew he wanted the money.

Q. She knew she was going to loan money on Mr. Gale's property to Mr. Gale, didn't she?

A. She knew she was going to take a mortgage on the property.

BY THE COURT:

Q. Did Mrs. Hollander or Miss Hollander have any knowledge of where this $15,000 or $13,500 which they advanced was—to whom it was to be paid?

A. The only thing she knew that she was to be at

the Title Company on a certain day to put up this money to buy the mortgage.

Q. Had she any knowledge, so far as you know, either of them, whether there was an actual mortgage or whether there was a mortgage to be placed at the time she made the settlement?

A. I don't think so, sir.

BY MR. GOTTLIEB:

Q. Who was to pay you the commission in this matter?

A. Mr. Gale.

Q. Who were you acting for in this matter?

A. It looks to me like I was acting for both sides. Mr. Gale asked me to get the money for me and Miss Hollander said she had the money and I acted in placing her money for her.

Q. But you first got the application for mortgage from Gale, is that right?

A. Yes, that is correct.

Q. Then you went out to see if you could get the money for him?

A. Yes, sir.

Q. He said if you got this money he would pay you a commission of how much?

A. Three per cent.

BY MR. PEACOCK:

Q. Miss Hollander was present at the day of the settlement and Mr. Gale was present, wasn't he?

A. Yes.

Q. All of her transactions that day were with Mr. Gale and Mr. McHenry wasn't present?

A. Mr. McHenry wasn't present.

Q. All of her transactions with loaning this money

at the Title Company on September eleventh was with Mr. Gale, isn't that true?

A. Mr. Gale, Mr. Byrne, Mr. Cook, of the Title Company, and myself were the only ones present at that time.

Q. Mrs. Hollander knew that day that she was paying money over to Mr. Gale, didn't she?

A. She was paying money over to the Title Company for a mortgage that she was to receive from them.

Q. For Mr. Gale?

A. The mortgage was created.

BY MR. GOTTLIEB:

Q. What part did Gale take in the settlement of anything, did he say anything in the settlement?

A. I don't think Mr. or Mrs. Gale or myself had very much to say.

Q. Did he say anything to indicate that he was the fellow that was giving the mortgage and getting the money that day?

A. I don't recall it.

BY MR. PEACOCK:

Q. You said you represented both parties; were you paid by both parties?

A. I only received one commission which came to me from the Associated Realtors, the check was made by the Title Company for the commission of $450 which went to the Associated Realtors of which I received fifty per cent. break as the license law calls for.

Q. That is all.

MR. VOORHEES: Your Honor, please, I gave notice, representing a subsequent mortgagee in this procedure to have the mortgage reported on. I just learned this morning this hearing was on. I assume

I should report on the mortgage, being a party to the proceeding.

THE COURT: I thought the notice was filed. Yes, you may do so.

MR. PEACOCK: We have tried in every way possible to locate this man McHenry. After five minutes after we came into court we found an address I obtained from the Associated Realtors, first calling Mr. Siracusa and four or five other people, and he lives at a place called the Astor Apartments on Atlantic Avenue. If your Honor still desires getting his testimony, Mr. Gale and I worked last night and were out this morning early and his wife were out running around Atlantic City to see if we could find out who this man was and we couldn't obtain the information from Mr. Byrne and we found this from the Associated Realtors this morning, my information to the Court if the Court wants to hear Mr. McHenry.

MR. GOTTLIEB: I have nothing on that point at all. On some other matter I wanted to recall Mr. Gale.

THE COURT: You may do so.

NORMAN GALE, Recalled.

BY MR. GOTTLIEB:

Q. Mr. Gale, is this the duplicate tax bill you received from the tax office on this property?

A. We stopped in there today to show you the taxes were paid.

Q. When did you pay the taxes?

A. Taxes have been paid some time, this last month some time.

Q. For the year 1925?

A. On all my properties, yes, sir.

(Tax receipt offered, admitted and marked Exhibit C 6.)

MR. VOORHEES: I offered in evidence bond made by Norman N. Gale and May Guthrie Gale, to Thomas J. McHenry, dated September 13, 1924, conditioned for the payment of six thousand dollars within one year; mortgage made by the same parties to the said Thomas J. McHenry, bearing the same date to secure the payment of six thousand dollars, which mortgage was recorded in the Atlantic County Clerk's office on September 16, 1924, book 311 of mortgages, page 169, etc. The mortgage covers property in Ventnor at the Southeast corner of Atlantic and Melbourne Avenues.

Offer in evidence an assignment of that mortgage from Thomas J. McHenry to Security Trades Corporation, dated September 13, 1924, recorded Atlantic County Clerk's office on same date in book 68 of assignments of mortgages, page 5, etc.

Offer in evidence declaration of no set off from Norman N. Gale to Security Trades Corporation in reference to said mortgage which was also recorded in the clerk's office in book 69 of assignments of mortgage, page 84.

At the time that mortgage was taken I was solicitor for Security Trades Corporation and in October, 1925, became treasurer.

HERBERT R. VOORHEES, Sworn.

At that time I was solicitor for Security Trades

and in October of 1925 I became treasurer and I find from the books of the company that Mr. Gale had paid the interest on that mortgage in March of 1925 and he also paid the interest, when the principal became due, in September of 1925 and since that time nothing has been paid, due six thousand dollars with interest from September 13, 1925, and also the sum of $20.40 for fire insurance which was placed by Security Trades, the policies having expired and the mortgage had the provision that the mortgagee could place the insurance.

(Papers referred to admitted in evidence and marked as follows: Bond, S. T. 1, mortgage, S. T. 2, assignment, S. T. 3, and declaration of no set off, S. T. 4.)

MR. PEACOCK: I have no desire to have him here.

MR. GOTTLIEB: I have no interest in having him here.

THE COURT: How can you sustain your bill?

MR. GOTTLIEB: On this theory, your Honor, I suppose, the point I raised yesterday as to the question where the money went to.

THE COURT: The question is your allegation that Gale owed McHenry money, gave a bond to secure that money and a mortgage to secure the bond; the testimony indicates McHenry never was a creditor of Gale, so far as this money is concerned. I question the wisdom of closing the case when your own testimony shows that your bill is not true.

MR. GOTTLIEB: Do I understand your Honor to

say that in any case where the assignee is not a creditor that no bill can be—

THE COURT: Nobody suggested anything of that sort at all.

MR. GOTTLIEB: Assume for the moment that is the fact, that the testimony now stands that McHenry never received the money or, if he did, he just paid it over as a straw man to Gale, whether or not we haven't a right to have this mortgage foreclosed for the full amount of the mortgage?

THE COURT: Not if you have knowledge of that fact.

MR. GOTTLIEB: That is it, your Honor, the question is with that fact proven, but the fact that it had not been proven that these people never had knowledge of that transaction, isn't the complainant entitled—

THE COURT: The difficulty of that case now is that the testimony is that your client says that she had all her dealing with Gale, paid the money over or words to that effect.

MR. GOTTLIEB: Your Honor, I do say this, the testimony of Mrs. Hollander must be taken with some consideration as to the transaction itself with her daughter. I think she qualified her statement and said she really didn't know anything about it several times, that her daughter took charge of it and we must consider Baittinger's testimony, your Honor, in the face of that fact. After all, she is a woman, unrepresented by counsel or by an agent for that matter at that time, who was led to believe from the testimony of the defendant's own witness

that she was buying a present existing mortgage at a discount.

THE COURT: That may be exactly the reason it is desirable to have Mr. McHenry here. It may be that this is a case that might be considered by another court and I think all the matters should be here. If this woman has been deceived as to the situation, it may be that there are other proceedings that should be taken.

MR. GOTTLIEB: I have no objection to having him here, if your Honor would continue it. I would think, if your Honor thinks it means anything to my side of the case, I surely want him here. I don't know McHenry. These people never knew him and I don't have the slightest idea how to get in touch with him, except, of course, the same way they have done, and I thought Mr. Peacock would have him here. I don't see why he shouldn't be here and I am perfectly willing the matter should be continued. I for one want the whole facts known.

THE COURT: Of course, if there is knowledge on the part of the complainants that this was not an existing mortgage and that they participated in the deception of the record by having a mortgage created to avoid the statute, they can't now take advantage of it. If there was an existing mortgage and they purchased that mortgage, of course they had a perfect legal right to buy that mortgage for less than its face value and if it was a valid existing mortgage between Gale and McHenry, they, of course, can collect the entire amount, face of the mortgage. Now there is the whole question.

MR. GOTTLIEB: I now see your point, your Honor. I thought your question of McHenry was

to the question whether or not McHenry received the actual cash. That is a question, whether he can shed light on the transaction itself. I think we ought to have him.

THE COURT: That is clear. I understand quite clearly, if this was a subterfuge between the real estate company and the owner of the mortgage, of course, the mortgagor, to avoid the statute, it can't be permitted to succeed. If it was not a subterfuge in which the complainants joined and they have been deceived then there may be a different situation entirely. There is, as I see the case at the present moment, the entire point. It is quite clear from the facts, I think we will all agree, that there never was a bona fide existing mortgage between Gale and McHenry. That is evidently clear. Now there is only one point, did the complainants have knowledge of that fact and did they participate in this subterfuge or did they not? If they did not, of course, they can't be penalized for the act of someone else in creating this subterfuge. Whether or not that was an illegal act is a matter that I am not presently concerned in in case the complainants have not knowledge of it, but this court, I think, is justified in insisting on the facts which can be found and be presented here.

9:30 tomorrow morning if he can be secured. It seems to me there is no trouble, certainly the real estate agents who had this transaction in charge must have known where the man was because I take it that nobody would permit a mortgage of fifteen thousand dollars to be created to a man unless they either had control of him or had extreme confidence in him that he would assign at the time.

MR. GOTTLIEB: Gale would be the man. He is the man who created the mortgage on his property

to a man apparently he wasn't getting money from. He is the man should have seen to that.

MR. PEACOCK: I sent Mr. Gale to Mr. Byrne's office to see if he could give us any information of Mr. McHenry. He said he wiped his hands of the whole matter and would present nothing.

THE COURT: I wish you would present that in the nature of an affidavit. If Mr. Byrnes takes the position that he will endeavor to keep witnesses from this court, the court will have to take such action as may be necessary in the matter. I certainly will not permit a man to make efforts to prevent other witnesses from coming here.

Adjourned to November 18, 1926, at 9:30 A. M.

Atlantic City, N. J., November 18, 1926.

MR. PEACOCK: Concerning this witness, McHenry, Mr. Allen Endicott phoned me and told me that his client told him that Mr. McHenry lived at five Astor Place and worked with the Reading Railway and Mr. Gale went and found his wife and she said Mr. McHenry was out of town and would not be back until Friday night or Saturday morning.

MR. GOTTLIEB: Your Honor, please, I also tried to get him. I had Mr. Apple trying to get him and I think he has the same statement to make.

THE COURT: I will give you Tuesday morning.

Adjourned to November 23, 1926.

Atlantic City, N. J., November 23, 1926.
Trial continued pursuant to adjournment.

THOMAS J. MCHENRY, Sworn.

DIRECT EXAMINATION BY MR. PEACOCK:

Q. Is your name Thomas J. McHenry?
A. Yes, sir.
Q. Where do you live, Mr. McHenry?
A. Number five Astor Apartments.
Q. Where are you employed?
A. Reading Railroad.
Q. How long have you been employed by the Reading Railroad?
A. About ten or twelve years.
Q. Were you employed there on July twenty-fifth, 1924?
A. Yes, sir.
Q. Ever been in the real estate business in this city?
A. No, sir.
Q. Do you know Mr. Byrne, connected with the Associated Realtors?
A. Yes, sir.
Q. Ever been connected with his office?
A. No, sir.
Q. Did you ever loan any money to Norman Gale, the man sitting here?
A. No, sir.
Q. He ever owe you any money?
A. No, sir.
Q. Did you ever receive a mortgage in your name from Norman Gale?
A. I don't know.
Q. Did you ever assign a mortgage?
A. That I don't know.
Q. I show you an assignment which says Thomas J.

McHenry of Atlantic City to Sophie Hollander, signed Thomas J. McHenry, is that your signature?

A. Yes, sir.

Q. Why did you sign that assignment if no money ever due to you or you never loaned any to Mr. Gale?

A. I have signed lots of papers for Mr. Byrne.

Q. I didn't ask you that. Will you answer my question, please. Why did you sign the assignment if Mr. Gale never owed you any money or you never loaned any money to him?

A. Why the only way I could answer that is just as I have previously.

Q. Who asked you to sign that paper?

A. Why Mr. Baittinger was sent down by Mr. Byrne.

Q. James Byrne?

A. Yes.

Q. Your practice in doing that without knowing what you have signed?

A. I have signed lots of them, not the only one I have signed like that.

Q. And don't know what you have signed?

A. No, sir.

Q. Did you know what you were signing when you signed that paper?

A. No, sir.

Q. Why did you sign it?

A. By request of Mr. Byrne, sent the gentleman down asked me if I would sign it.

Q. What agreement did you have with Mr. Byrnes concerning signing this paper?

A. None whatever.

Q. Did you receive any compensation for signing it?

A. No, sir.

Q. Did you know that there was a mortgage in existence Norman Gale to you?

A. No, sir.

Q. Were you present at any settlement on September

eleventh concerning any assignment made by you to Sophie Hollander?

A. No, sir.

Q. Did you ever agree to sell a mortgage to Sophie Hollander?

A. Not that I know of.

Q. Did you?

A. No, sir.

Q. What is your answer?

A. No.

Q. Did you ever make any contract with Mrs. Hollander for the sale of a mortgage?

A. No, sir.

Q. Did you ever authorize anybody in your behalf to make any sale of any mortgage?

A. No, sir.

Q. Mr. Byrnes had you sign this paper with no agreement between you and him as to the contents of the same?

A. Yes, sir.

Q. You say that has been his practice to have you do that?

A. He sent several papers down, lots of them, for me to put a signature on. I never knew what they were, whether mortgages, whether they were just simply papers, just to be signed, or something, I didn't know, don't know anything about that either.

Q. I show you a mortgage which is dated July twenty-fifth and acknowledged on September eleventh, Norman Gale and May Guthrie Gale to Thomas J. McHenry; did you have anything to do whatever with that mortgage?

A. No, sir.

Q. Did you ever know it was in existence?

A. No, sir.

Q. Did you ever authorize anyone to draw that mortgage to you?

A. No, sir.

Q. I show you a bond Norman N. Gale and May Guthrie Gale to Thomas J. McHenry; did you ever authorize Mr. Byrne or anyone to execute that mortgage to you?

A. No.

Q. Did you know anything about it?

A. No, sir.

Q. Mr. Byrnes ever tell you he was going to do that?

A. No, not that I know of.

Q. Mr. Byrnes ever tell you that he was going to draw a bond from Norman N. Gale to you in the sum of thirty thousand dollars conditioned for the payment of fifteen thousand dollars?

A. No.

Q. You knew nothing about it?

A. No.

Q. Did you ever consent for Mr. Byrne to use your name in that mortgage?

A. No.

Q. And made no agreement whatever with Mrs. Hollander concerning it?

A. No.

CROSS-EXAMINATION BY MR. GOTTLIEB:

Q. Mr. McHenry, do you know Mrs. Hollander if you see her?

A. No.

Q. Did you ever see her?

A. No.

Q. Did you ever see her daughter in this matter?

A. No, sir.

Q. Did you ever speak to her?

A. No, sir.

Q. You were not at the settlement at the time, were you?

A. No, sir.

NORMAN N. GALE, Recalled.

BY MR. GOTTLIEB:

Q. Mr. Gale, you signed the mortgage and bond to McHenry, didn't you?

A. I did.

Q. At the Title Company you knew that McHenry assigned that mortgage to Mrs. Hollander, didn't you?

A. I don't know.

Q. McHenry wasn't there, was he?

A. I never saw him.

Q. You never saw him?

A. No.

Q. You knew that this mortgage was going to be created and sold?

A. Did I know?

Q. Yes.

A. No, I did not.

Q. Didn't you read the mortgage?

A. I read the mortgage, yes.

Q. You knew it was one to McHenry, didn't you?

A. McHenry's name was in it, yes, sir.

Q. You saw Mrs. Hollander deposit the money?

A. I did not.

Q. Weren't you there at the time of settlement?

A. I was there at the time of settlement, yes, sir.

Q. What is your business?

A. Contractor and builder.

Q. How many houses have you built in Atlantic City?

MR. PEACOCK: I object as immaterial.

THE COURT: I will permit it on his knowledge of settlements.

A. How many?

THE COURT: Yes.

A. I don't know, twenty-five or more.
Q. You financed them?
A. A few of them.
Q. You even financed a second mortgage on this property, didn't you?
A. Yes, sir.
Q. Who did you create that mortgage to?
A. Security Trades Corporation.
Q. They didn't take it directly, did they?
A. I don't think they did.
Q. You have done several of these transactions, haven't you, just the same? You know how it is done?
A. I know how they make you do it.
Q. They make you do it, they make you create the mortgage then assign it?
A. Yes, sir.
Q. You know it is done that way?
A. That is the only way I can borrow money.
Q. That is all.

BY MR. PEACOCK:

Q. Mr. Gale, did Mrs. Hollander demand that you pay the interest from July twenty-fifth to September eleventh, the day of settlement?
A. At the time the money was deposited.
Q. Did you pay her the interest from July twenty-fifth, the date of your mortgage?
A. I have been paying from the date of the mortgage.
Q. Did you pay her interest from the date that she deposited the money up until the date of the settlement, September eleventh?
A. Yes.

BY MR. GOTTLIEB:

Q. When did you pay it?
A. When the six months was up.
Q. When the six months was up?
A. Sure.

BY MR. PEACOCK:

Q. Didn't you also pay her interest on the money during the time it laid in the hands of the Title Company?
A. Only from the twenty-fifth to the six months I paid interest.
Q. From July twenty-fifth?
A. Only six months from the twenty-fifth I paid interest.
Q. And you paid all that interest to Mrs. Hollander?
A. Yes, sir.

TESTIMONY CLOSED.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
SOPHIA HOLLANDER,
Complainant-Respondent,
and
NORMAN N. GALE, *et als.,*
Defendants-Appellants.

ON BILL TO FORECLOSE.

ON APPEAL.

BRIEF FOR COMPLAINANT-RESPONDENT.

The appeal in this case brings up for review a decree of the Court of Chancery for the full sum of a mortgage on a bill of complaint to foreclose said mortgage.

FACTS.

The defendant, Norman N. Gale, a builder, desired to obtain a mortgage on property owned by him and on which he had just completed a building. He was

willing to execute a mortgage of $15,000 in order to realize thereon the sum of $13,500. In pursuance of this plan, he negotiated with the Associated Realtors Company, real estate agents, to represent him in securing such a loan. One Baittinger, a salesman or representative of said agents, secured the complainant as a purchaser of a $15,000 mortgage for the sum of $13,500. The complainant was informed that she was buying a present existing mortgage in the sum of $15,000. In order to carry out the scheme of making it appear to her that the mortgage was being purchased, Gale and his wife made and executed a mortgage to Thomas J. McHenry for the sum of $15,000, which mortgage was by McHenry assigned to the complainant in consideration of the sum of $13,500 advanced by the complainant to a title company, which issued a policy to her as assignee of said mortgage.

Gale and the realty company were familiar with the manner of creating mortgages for the purpose of selling them, and entered into this scheme to create the mortgage of $15,000 to a straw man without knowledge on the part of the complainant, and then sold the mortgage to the complainant at a discount in order to mislead the complainant in believing that she was not violating the act of usury. (Section 1 of an Act against Usury, Comp. Stat., p. 5704.)

At the time of settlement, there was delivered to the complainant the mortgage and bond to McHenry, an assignment of the mortgage from McHenry to the complainant, together with a written declaration of no set-off executed by Gale to the complainant declaring that there was due on said mortgage the full principal sum thereof, to wit, $15,000, together with interest from the date of said mortgage.

The bill of complaint to foreclose the mortgage

was on two grounds: First, because of the failure of the defendant to pay interest within thirty days of the due date of said interest payment in accordance with the terms of the mortgage; and, secondly, because of the failure of the defendant to pay taxes and produce receipted tax bills as and when the same should be paid and produced in accordance with the terms of said mortgage.

The answer did not deny the allegations of the bill of complaint as to the failure to pay taxes and to produce the receipted tax bills. The tax bill for 1925 was produced at the hearing, which showed that the taxes were paid only two days prior to the hearing. As to the charge against the defendant that he had not paid the interest, as alleged in the bill of complaint, the defendants set up the defense of usury.

ARGUMENT.

As to the question of the failure to pay the taxes for the year 1925, as alleged in the bill of complaint, Gale's own testimony on cross-examination is as follows (page 64, line 38):

> "Q. Mr. Gale, is this the duplicate tax bill you received from the tax office on this property?
>
> A. We stopped in there today to show you the taxes were paid.
>
> Q. When did you pay the taxes?
>
> A. Taxes have been paid sometime, this last month sometime.
>
> Q. For the year 1925?
>
> A. On all my properties, yes, sir."

There is no doubt that the complainant had a right to foreclose the mortgage on that ground alone.

Weiner v. Cullens, Vol. 3, N. J. Advance Reports, 590 (paper books).

As to the question of usury, the Vice-Chancellor stated the proposition as follows (page 69, line 8):

"The Court: This is clear. I understand quite clearly if this was a subterfuge between the real estate company and the owner of the mortgage, of course the mortgagor, to avoid the statute, it can't be permitted to succeed. If it was not a subterfuge in which the complainants joined and they have been deceived, then there may be a different situation entirely. There is, as I see the case at the present moment, the entire point. It is clear from the facts, I think we will all agree, that there was never a *bona fide* existing mortgage between Gale and McHenry. That is evidently clear. Now, there is only one point, did the complainants have knowledge of that fact, and did they participate in this subterfuge, or did they not? If they did, of course, they can't be penalized for the act of someone else in creating this subterfuge."

The testimony is clear that Mrs. Hollander, the complainant, was without knowledge of the subterfuge to evade the act of usury. The first time she met Gale was at the settlement. Everything had been arranged prior to the settlement. This was brought out in the examination by the Court of Gale on page 47, line 23, as follows:

"Q. When was the first time you saw Mrs. Hollander in this matter?

A. I believe the day we sat around the table in the title company."

Page 47, line 31:

"Q. Everything had been arranged before that time without her seeing you at all?

A. So far as I can recollect I never met her outside of in the title company. Now I might have met her and I forgot around the job. Mr. Green, a builder I know, was down there. Now whether the daughter or Mrs. Hollander was with him at the time he was looking through the house to pass on it, I forget.

Q. You never discussed the matter with her, at least, before you sat down at the table?

A. I don't believe I did; all through Mr. Baittinger."

The complainant was inexperienced in handling mortgages, as the testimony shows, and was relying on men with experience to sell to her at a discount a $15,000 mortgage which they represented to her then existed. This was clearly brought out in the direct examination of the witness for the defendant by the defendant's counsel. Baittinger, the salesman of the real estate agent, testified as follows (page 56, line 9):

"Q. Mr. Baittinger, what agreement did you make with Mrs. Hollander concerning the placing of the Gale mortgage?

A. To buy a $15,000."

And on cross-examination (page 58, line 13):

"Q. Who brought McHenry in the deal? Was he known to Hollanders?

A. No, I don't think he was.

Q. How did he come into it then?

A. Through the Associated Realtors.

Q. Who was the person who got this scheme

up or worked this thought out of getting these people to take the mortgage through McHenry?

A. I presume that was the office. I am not sure, sir.

Q. Was it there Miss Hollander talked with you? Did she ever tell you to give it to someone else so she could get it?

A. No.

Q. Did she know McHenry or mention his name to you?

A. I don't think she knew him.

Q. Your conversation with Miss Hollander was all about her purchasing a $15,000 mortgage?

A. Absolutely.

Q. Did she know at that time there was not a mortgage in existence?

A. I don't think she did.

Q. You didn't tell her so, did you?

A. No.

Q. All her transaction was with you?

A. With me, yes, sir."

And on re-direct examination, Baittinger testified (page 61, line 25):

"Q. Did you explain that to Miss Hollander that this is the way it would be created?

A. No."

And his testimony on examination by the Court, on page 61, line 36, is as follows:

"Q. Did Mrs. Hollander or Miss Hollander have any knowledge of where this $15,000 or $13,500 which they advanced was, to whom it was to be paid?

A. The only thing she knew that she was to

be at a title company on a certain day to put up this money to buy the mortgage.

Q. Had she any knowledge, so far as you know, either of them, whether there was an actual mortgage or whether there was a mortgage to be placed at the time she made settlement?

A. I don't think so, sir."

There is no doubt that McHenry, the straw man, was supplied without the knowledge or consent of the complainant, and further she didn't even know McHenry.

Cross-examination of McHenry (page 74, line 28):

"Q. Mr. McHenry, do you know Mrs. Hollander if you saw her?

A. No.

Q. Did you ever see her about this matter?

A. No, sir.

Q. Did you ever speak to her?

A. No, sir.

Q. You were not at the settlement at the time, were you?

A. No, sir."

And it is quite clear that not alone did Gale know that the mortgage was being created, but he also participated in the scheme to create the mortgage.

On page 76, line 8, he testified, on cross-examination:

"Q. You even financed a second mortgage on this property, didn't you?

A. Yes, sir.

Q. Whom did you create that mortgage to?

A. Security Trades Corporation.

Q. They didn't take it directly, did they?

A. I don't think they did.

Q. You have done several of these transactions, haven't you, just the same? You know how it is done?

A. I know how they make you do it.

Q. They make you do it; they make you create the mortgage, then assign it?

A. Yes, sir.

Q. And you know it is done that way?

A. That is the only way I can borrow money."

There is no doubt that a scheme had been concocted to evade the Usury Act, but in this scheme the complainant did not participate, nor did she have knowledge of it, and in that scheme, the defendant, Gale, was the moving factor.

The authorities cited by the defendant are not relevant to the facts in this case. The question depends upon the reasonableness of the inquiry, and in order to decide whether the inquiry was reasonable, the person who was obliged to make the inquiry must be taken into consideration. As the Court found, she is a foreigner and is not versed in the English language. She made diligent inquiry as was within her restricted ability, and at each step the defendant, Gale, had covered up his illegal tracks so that the loan would be concluded and the scheme would not be uncovered. She is a woman without business ability and with limited capacity for making investigation. She was at the mercy of an experienced builder, well versed in the methods of finance, and an ambitious real estate agent working for a commission. Both endeavored and succeeded in withholding any information from the complainant that would have informed her of the true nature of the creation of this mortgage.

The question of reasonable inquiry under a known state of facts is one of law for the courts (Vol. 2, Words and Phrases, page 5973), and the Vice-Chancellor, in reviewing the facts, concluded that this woman had made reasonable inquiry.

In the case of *Woodruff v. Morristown Institution for Saving, et al.*, 34 N. J. Eq. 174, the Court held that in this State it is provided by statute that in a suit by an assignee of a mortgage, all just set-offs and other defenses shall be allowed against him which would have been allowed if the assignor had brought the action. (Rev. 708, Sec. 31.) The mortgagor may, by concealing his equities or misleading the assignee, place himself in a position where justice will be defeated if he is allowed to set up against the assignee an equity on which he would be entitled to prevail in a suit by his mortgagee. When the conduct of a mortgagor leads to such a result, courts of equity hold that he is estopped.

We respectfully submit that for the reasons above discussed the decree should be affirmed.

CASSMAN & GOTTLIEB,
Solicitors of Complainant-Respondent.

135MAY.1.1927

New Jersey Court of Errors and Appeals

Between
SOPHIA HOLLANDER,
Complainant,
AND
NORMAN N. GALE, ET ALS,
Defendants.

ON APPEAL FROM THE COURT OF CHANCERY.

BRIEF OF DEFENDANT-APPELANT.

The above case is an appeal from the Court of Chancery of New Jersey on a decree entered by said court in which the court decreed in favor of complainant for the full sum of the mortgage with interest.

The complainant, Sophie Hollander, of Atlantic City, filed a bill in the Court of Chancery to foreclose a mortgage made by Norman N. Gale and his wife, for the sum of $15,000.00. The bill recites that on July 25, 1924, Norman Gale being indebted to Thomas J. McHenry in the sum of $15,000.00 to said McHenry, executed a bond and mortgage covering certain property in Ventnor City, in the County of Atlantic and State of New Jersey, and by an assignment, dated September 11, 1924, McHenry assigned said bond and mortgage to the complainant and that on January 25, 1926, one-half year's interest fell due on complainant's bond and mortgage and remained due and unpaid for more than thirty days thereafter. Complainant demands the full sum of $15,000.00 with interest.

Defendant, by his answer, says that he made an agreement with the complainant to execute a mortgage for the sum of $15,000.00 for a specific term of three years on

which complainant was to pay him the sum of $13,500.00, she receiving a bonus of $1,500.00 on condition that he was to use the money for three years.

Defendant further pleaded the Usury Act of the State of New Jersey. Defendant further made tender into court of the sum of $450.00, being amount of interest due at the time of said trial.

Defendants further pleaded that inasmuch as the money was loaned for a specific period of three years, that the default clause of thirty days in the mortgage did not apply to defendant.

Defendants further say that the mortgages and assignment of mortgages were not executed on July 25, 1924, but were executed on September 11, 1924, so that at the time of the filing of said bill, defendant was not in default in the payment of interest, to wit: January 25, 1926, but that said interest period was March 25, 1926, and that the interest on said mortgage had been tendered prior to March 25, 1926.

Defendant did further contend that there was no consideration in the mortgage given by Gale to McHenry but that he was a straw man used by the complainant in order to exact the $1,500.00 bonus which was usury under our law.

Under the reasons set forth by defendant for reversal of the judgment heretofore entered in this court, defendant assigned reasons as follows:

No. 1. The defendants were never indebted to Thomas J. McHenry as set forth in said bill in any sum of money as the court said on page 34, lines 23-27. As the case stands there is no consideration whatever for the mortgage itself according to the bill, and the Court further said on page 33, lines 34-36, that the allegation of the bill that Gale owed McHenry money, gave a bond to secure that money and a mortgage to secure the bond, the testimony indicates McHenry never was a creditor of Gale so far as the money is concerned and that the complainant testified she had all of her dealings with Gale

and paid money over or words to that effect. (State of Case, page 25, lines 1-23.) And in the testimony of Thomas J. McHenry, he said he never loaned any money to Norman Gale and that Gale never owed him any money. (State of Case, page 71, lines 30-34.) And that he never sold a mortgage to Sophie Hollander nor did he ever have any contract with Mrs. Hollander for the sale of the mortgage, nor did he ever authorize anybody in his behalf to make a sale of any mortgages to Mrs. Hollander. (State of Case, page 73, lines 13-18.)

McHenry was shown the mortgage, dated July 25th, and acknowledged September 11th, of Gale to McHenry, and asked if he had anything to do whatever with that mortgage and he said he did not, did not know it was in existence, nor had he ever authorized anyone to draw that mortgage for him. (State of Case, page 73, lines 30-39.) He further testified to the same set of facts concerning the bond that he had nothing to do with it whatever (State of Case, page 74, lines 1-7), or ever consented for Mr. Byrne to use his name in that mortgage or had any agreement with Mrs. Hollander concerning the same. (State of Case, page 74, lines 19-25.)

Mrs. Hollander testified that she gave Mr. Gale a check for $13,5000.00 for a $15,000.00 mortgage and that she paid this to Mr. Gale (State of Case, page 25, lines 10-19) and that she agreed with Mr. Baittenger to place $13,500.00 in consideration of a mortgage for $15,000.00 to be executed by Mr. and Mrs. Gale (State of Case, page 26, lines 10-13), and that she signed an agreement to that effect (State of Case, page 26, lines 19-20), and that she agreed with Mr. Baittenger and Mr. Gale that she would loan this money to Mr. Gale for three years (State of Case, page 28, lines 10-13).

Baittenger further testified that Mrs. Hollander agreed to place this mortgage for three years (State of Case, page 56, lines 26-33), so that from the testimony above, Mrs. Hollander knew that she was placing a mortgage for Mr. Gale for the sum of $15,000.00, on which she was

only paying $13,500.00, and that the using of McHenry was only subterfuge in order for her to collect a usurious charge of $1,500.00, and that she, having violated the Usury Law of the State of New Jersey, she is not in a position in the Chancery Court to ask that court to assist her, and whatever acts were performed by Mr. Baittenger were performed as her agent and that she is liable for his acts.

Baittenger said that he was acting with Miss Hollander and that at every time that he talked to Miss Hollander that Mrs. Hollander was with her (State of Case, page 59, lines 30-31), and that Miss Hollander inspected the Gale property before she placed the money and she knew Gale was requesting the money on a mortgage and that Hollanders were going to loan the money to Gale (State of Case, page 61, lines 19-33), and that he was acting as agent for both Gale and Hollander (State of Case, page 63, line 28), so that from the above facts under the second reason that the verdict of the court was contrary to the evidence, plainly shows that Mrs. Hollander had notice that she was placing a usurious mortgage and that she was dealing direct with Gale and that there was no consideration for any mortgage from Gale to McHenry.

On the third reason that the interest on said mortgage was not due on January 25th, the mortgage in question was never acknowledged by Mr. Gale until September 11, 1924 (State of Case, page 36, lines 33-38), and that the assignment from McHenry to Hollander was dated on September 11th, so that Mrs. Hollander could not collect interest from July but only could collect interest from September 11th because there was no title in Mrs. Hollander to this mortgage until September 11th. Mr. Cook's testimony is that on September 11th he dated the mortgage back to July 25th because the money had been deposited on that date and that Mr. McHenry did not assign the mortgage until the 11th day of September (State of Case, page 37, lines 27-34). Whereas Mrs.

Hollander had deposited the money with him on July 25th for Gale, whereas all of the papers were signed on September 11th and if the papers were signed on September 11th and if the mortgage was assigned by McHenry to Mrs. Hollander on September 11th, she had no claim for interest from Gale from July 25th to September 11th prior to the date the mortgage was assigned to her, so under the fourth reason, under Mr. Cook's testimony, the interest-bearing period would be from the date the mortgage was executed, to wit, September 11, 1924.

Under the fifth reason, that the mortgage was executed for a specific term of three years, Mrs. Hollander testified that she loaned this money to Mr. Gale for three years and that she made such an agreement with Mr. Baittenger (State of Case, page 28, lines 8-12), and Baittenger also testified that she was to place the money on the Gale property for three years (State of Case, page 56, lines 26-33). Gale testified that he was to give a $15,000.00 mortgage on a property for three-year term and to give her $1,500.00 for the use of the money (State of Case, page 41, lines 23-37). And that all of the papers were signed as of September 11th (State of Case, page 42, lines 33-39); that Mr. Baittenger, representing Mrs. Hollander, was to loan him the money for three years and that the $1,500.00 was paid in consideration of him having the use of this money for three years (State of Case, page 43, lines 18-28), so that there was a specific agreement that Mr. Gale could have the use of this money for three years on consideration of him paying a bonus of $1,500.00, and under that agreement the thirty-day default clause could not apply. Mrs. Hollander knew that she was placing this money on the Gale property and that she did not know any man by the name of McHenry as testified by Baittenger, and that she knew at the time that Gale was the one who was placing the mortgage on his property and she knew she was going to loan the money to Mr. Gale on Mr. Gale's property (State of Case, page 26, lines 10-13). As to the further knowledge of

Mrs. Hollander as to this illegal transaction, the first part of her cross-examination is as follows:

Q. You paid Mr. Gale 15,000 at the time you executed the mortgage? A. Well I gave him a check.

Q. I can't hear you. A. I gave him a check 13,500.

Q. You gave him a check for 13,500? A. Yes, sir.

Q. That is all the money you did pay wasn't it? A. Well.

Q. I say that is all the money you did pay? A. I gave him 13,500. (State of Case, page 25, lines 4-18.)

Further she testified:

Q. You agreed with Mr. Baittenger then to place a 13,500 in consideration of a mortgage for 15,000 to be executed by Mr. and Mrs. Gale, is that correct? A. Yes. (State of Case, page 26, lines 10-13.)

So that Mrs. Hollander knew at the time that she was to place the money on Gale property and that she was to give him $13,500.00 in consideration of receiving a $15,000.00 mortgage. Further:

Q. You agreed with Mr. Baittenger———— A. With Mr. Baittenger.

Q. You agreed he should loan this money to Mr. Gale for three years didn't you? A. Yes, sir. (State of Case, page 28, lines 8-12.)

Under the testimony of Mr. McHenry that Gale never owed him any money or that he never loaned any money to Gale or that he had no knowledge whatever concerning the mortgage of Gale to him, plainly shows there was no consideration for this mortgage.

"A mortgage which is not supported by a consideration was void in the hands of either the mortgagee or his assignee since the assignee would take subject to existing defenses of the mortgagor."

A mortgage to a straw mortgagee, without consideration, but delivered by the mortgagor to her own agent for sale for an amount less than the secured obligation was usurious as to a purchaser for such lesser money from the agent without inquiry.

By purchasing from mortgagor's agent at a discount a mortgage executed to a straw mortgagee without consideration, without making inquiry as to the nature of the transaction, the purchaser became charged with knowledge of the usury in the mortgage so that mortgagor could set up that defense in foreclosure action by the purchaser.

Riley vs. Hopkinson, 82 N. J. Eq. 469.
Magie vs. Reynolds, 51 N. J. Eq. 113.

The assignee of the mortgage securing a bond takes it subject to all defenses to the bond whether with or without notice as the mortgage is a mere incident of the debt.

Voorhees vs. Nixon, et al, 66 Atl. page 192.

The defense of usury is available in mortgage foreclosure to one who is a party to the bond as obligor and so ultimately liable for any deficiency though the mortgaged property was conveyed to her expressly subject to the mortgage.

Ahrens vs. Kelly, 105 Atl. page 237.

Our courts have held that the taking of usurious interest is contrary to the statute in this case.

"That no person or corporation, should upon contract take directly or indirectly for a loan of any money, wares, merchandise, goods and chattels above the value of $6.00 for the forbearance of $100 for a year and after that rate for a greater or lesser sum or for longer or shorter time."

Compiled Statutes of N. J. page 5704.

During the entire existence of this mortgage, Gale had paid $900.00 per year on $13,500.00 received by him whereas he should have only paid $810.00 per year so that ever since the execution of said mortgage, he has paid an excess of $90.00 interest per year. Computing

the excess interest from the execution date of said mortgage, he would not be in default of a payment of interest on said mortgage as of the date of bill was filed for foreclosure in this case. It was usury for Mrs. Hollander to accept a mortgage of $15,000.00 and pay $13,500.00, the difference of $1,500.00 being what constituted a bonus.

"A bonus taken for making a loan held to constitute usury."

Hughson vs. Loan Co., 57 N. J. Eq. 139.
Leipziger vs. Van Saun, 64 N. J. Eq. 37.

If this court decrees that Gale should pay any amount to Mrs. Hollander, we contend it should not be over $13,500.00 which he stands ready and willing and which his answer stated he stands ready and willing to pay or whatever sum this court decides to be due. A payment of $1,500.00 bonus should be deducted from the $15,000.00 mortgage.

"An illegal bonus for a loan must be applied on the security."

Hughson vs. Loan Co., 57 N. J. Eq. 139.

The testimony in this case plainly shows a usurious mortgage was executed and that the complainant, Mrs. Hollander, had knowledge of the same at the time it was executed and that the verdict of the court in giving a decree for the full amount of the mortgage was contrary to the testimony and law in the case.

We respectfully submit that the decision of the Court below be set aside.

ROBERT PEACOCK,

Of Counsel with Defendants.