INDEX

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New Jersey Court of Errors and Appeals

NEW MIAMI SHORES CORPORATION, *v.* FREDERIC L. DUGGAN, *Appellant.*	On Appeal from the Supreme Court. State of the Case.

New Miami Shores Corporations sued appellant in the New Jersey Supreme Court, to recover the principal and interest of 8 notes made by appellant to Miami Shores Company, for $247.50 each. Appellant pleaded payment, and the case was tried by Judge Oliphant without a jury at the Mercer Circuit. At the close of respondent's case, appellant moved for a judgment in his favor on the grounds that the notes were not negotiable and that there was a novation. The Circuit Judge denied the motion and gave judgment to respondent for the notes, with interest.

New Miami Shores Corporation and Miami Shores Company are separate corporate entities, and the parties have agreed to condense the State of the Case by the omission of a large part of the exhibits which has no bearing on the issue, and also by eliminating the restrictions from the contracts, and some of the repetition in the pleadings.

The notes were given to Miami Shores Company in part payment of the purchase price of two lots

of land in Florida, which Duggan by his contracts agreed to buy from it. The payee endorsed the contracts and notes to Commercial Bank & Trust Company, Trustee, which in turn was succeeded by the City National Bank & Trust Company of Miami as Trustee. Respondent's title to the contracts and notes was obtained by assignment of a Special Master in a foreclosure suit.

Duggan assigned his two purchase contracts to
10 A. W. Speedy, who assumed said contracts and the payment of the notes, the purchase price paid by Speedy was remitted to Duggan by Miami Shores Company, after it deducted a broker's commission of $522.00 and interest on its notes, amounting to $118.80.

The trust agreement and assignment (Exhibit 4) made by Miami Shores Company to Commercial Bank & Trust Company is dated July 20, 1925 and was recorded in the County Clerk's office of Dade
20 County, Florida, on November 30, 1926. In this agreement Duggan's notes and land purchase contracts were assigned to the bank as trustee. By sections 2 and 3 of the trust agreement, the bank is authorized in its discretion to record or file the land purchase contracts. Section 3 provides that all payments by Duggan shall be made to the trustee, and if the assignor Miami Shores Company received payments, they should be deposited forthwith with the trustee.

30 By an instrument executed November 30, 1926, the City National Bank & Trust Company of Miami was substituted as trustee in place of Commercial Bank & Trust Company.

Exhibit 5 is a record of a foreclosure suit in the Circuit Court of the 11th Judicial Circuit of Florida, Dade County, in Chancery, No. 18817-B, in which it appears that Third Mortgage Corporation foreclosed a mortgage on Duggan's two lots (with

many others), the parties defendant being Shoreland Company, Miami Shores Company, the City National Bank & Trust Company, Trustee, and others.

By virtue of the foreclosure suit, Marshall G. Twyman was appointed Special Master to sell the mortgaged premises, which he did, respondent New Miami Shores Company bid $764,000.00 for the lands and premises and the purchase contract and notes and received a special master's deed, after confirmation by the Court, for the lands and premises so sold, and also an assignment for all the purchase contract notes held by the Trustee including therein the contracts and notes given by the appellant Duggan.

Exhibit 6 is the order confirming the Master's sale. Exhibit 7 is the Master's assignment to the respondent hereinbefore referred to.

The New Miami Shores Company under the deed of conveyance from the Special Master received the title for the lands purchased by Duggan from the Miami Shores Company, and by the assignment from said Master it also received the title to the land purchase contracts and notes given by Duggan to said company. The New Miami Shores Company when this suit was commenced held the title to the land agreed to be conveyed to Duggan by the Miami Shores Company and also became the owner of the land purchase contracts and notes and they are now the owners thereof.

Exhibits 4, 5, 6 and 7 contain lengthy descriptions of land foreclosed and list of land purchase contracts and notes, all of which were described in the foreclosure proceedings and for that reason are not printed in this record.

THE STATE OF NEW JERSEY, TO
FREDERIC L. DUGGAN:

(L. S.)

You are summoned to answer the annexed complaint of New Miami Shores Corporation, a corporation, in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the
10 Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this 3rd day of May, 1929.

FRED L. BLOODGOOD,
Clerk.

20 PETER BACKES,
Attorney.

NEW JERSEY SUPREME COURT
MERCER COUNTY

NEW MIAMI SHORES CORPORATION, a corporation, *Plaintiff*, *v.* FREDERIC L. DUGGAN, *Defendant*.	Action at Law. Complaint.

10

The plaintiff, New Miami Shores Corporation, a corporation of the State of Florida, says that:

FIRST COUNT

1. It sues for the amount of a promissory note for $247.50, made by the defendant, Frederic L. Duggan, to the Miami Shores Company, a copy of which note is as follows:

39.60
No. 3 $247.50 Miami, Florida, February 19, 1925
On or before Eighteen (18) Months after date, for 20
value received, I promise to pay to the order of

MIAMI SHORE COMPANY

Two Hundred Forty-seven and 50/100.....Dollars at its office in Miami, Florida, with interest thereon at the rate of eight per cent. per annum from date until fully paid. Interest payable semi-annually The maker and endorser of this note further agree

to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred payments to bear interest from maturity at ten per cent. per annum semi-annually.

Due August 19th, 1926.

(signed) Frederic L. Duggan
(Seal)

10 930 Lot 21 Blk 63

Endorsed:
MIAMI SHORES COMPANY
By E. S. Harris, Vice-President
By J. B. Jeffries, Assistant Secretary

2. The plaintiff is now the owner and holds said note, which has not been paid.

Plaintiff demands as damages, $247.50, with interest from August 19, 1926.

Counts 2, 3, 4, 5, 6, 7 and 8 are like the first count
20 of the complaint, but describe the other notes, which aggregated $1980.00.

2. Plaintiff is the owner and now holds said note, which has not been paid.

Plaintiff demands as damages, $247.50, with interest from February 19, 1928.

PETER BACKES,
Attorney for Plaintiff.

ANSWER

Defendant, Frederic L. Duggan, residing in the Borough of Spring Lake in the County of Monmouth, and State of New Jersey, says that:

FIRST COUNT

1. Paragraph 1 is admitted.
2. Paragraph 2 is denied.

(The rest of the answer admits the first paragraph and denies the second paragraph of each count).

FIRST DEFENSE 10

1. All of the notes set forth in the complaint have been paid in full.

JAMES J. McGOOGAN,
Attorney for Defendant.

Plaintiff replying to the answer of defendant says:

REPLY TO FIRST DEFENSE

Plaintiff denies first defense.

PETER BACKES,
Attorney of Plaintiff. 20

INTERROGATORIES

Plaintiff demands of the defendant, answer under oath, to the following interrogatories within ten days after service hereof upon you:

In your answer to plaintiff's complaint and in the first defense thereto, you aver:

"All of the notes set forth in the complaint have been paid in full."

1. Who paid said notes?

2. Did the defendant pay said notes, if no, when and to whom was payment made therefore?

3. Was payment made by cash money or check, and if not by either cash money or check, how was
10 payment made?

4. Did you, the defendant, sign and enter into two agreements between the defendant and the Miami Shores Company, for the purchase of two lots; to wit, Nos. 21 and 22 in Block 63 on Plat of Miami Shores, dated February 19, 1925.

5. Are you the present holder of said agreements, if not when and to whom did you assign the same?

To Frederic L. Duggan, or
20 James J. McGoogan, Esq., his attorney.

PETER BACKES,
Attorney of Plaintiff.

ANSWERS TO INTERROGATORIES

To Peter Backes, Esq., attorney for plaintiff:
Sir:

Please take notice that the following are answers to interrogatories served on me on July 26, 1929.

1. Defendant.

2. Yes. To plaintiff's assignor.

30 3. By plaintiff's assignor taking title to the land for which the notes were given in payment.

4. Defendant has no recollection of signing two agreements dated February 19, 1925.

5. No. Defendant assigned to plaintiffs' assignor whatever agreements he may have signed.

Respectfully yours,

JAMES J. McGOOGAN,
Attorney for Defendant.

Dated, August 5, 1929.

Service of these answers is hereby acknowledged this 5th day of August, 1929. 10

PETER BACKES,
Attorney for Plaintiff.

Deposition of ROY H. HAWKINS, a witness produced, sworn and examined on the 15th day of January, A. D. 1931, at Miami, Florida, in the County of Dade and State of Florida, under and by virtue of an order issued out of the New Jersey Supreme Court, Mercer County, and dated the 19th day of September, A. D. 1929, in the matter wherein New Miami Shores Corporation, a corporation, is plaitniff, and Frederick L. Duggan, is defendant.

10

ROY H. HAWKINS, of the City of Miami, in the County of Dade and State of Florida, a witness produced on behalf of the plaintiff, being duly sworn, deposes and says:

I am the Vice-President of New Miami Shores Corporation, a Delaware corporation, duly authorized to transact business in the State of Florida, and as such officer it is my duty and I am charged with the management of said Company's affairs
20 and the collection of its accounts, and particularly the matter of the notes of Frederic L. Duggan, upon which notes this suit has been brought; that the said New Miami Shores Corporation, the plaintiff, is the owner and holder of the eight (8) notes made by Frederic L. Duggan, payable to the order of Miami Shores Company, dated the 19th day of February, A. D. 1925, each in the sum of $247.50, upon which this action was brought; that the whole amount of the principal due on each of said notes,
30 together with interest thereon, remains due and unpaid; that no part thereof has been paid; that the whole amount remains due and payable to the plaintiff; that the said notes have not been paid in full as set forth in the defendant's answer; that said notes were not paid or satisfied by the plaintiff's assignor taking title to the land for which

the notes were given, as stated by the defandant in his answer to the plaintiff's interrogatories; that the fact is, as appears from the records in my possessison, said defendant ion February 19, A. D. 1925, made and entered into two contracts in writing with Miami Shores Company to purchase two lots, to-wit, lots 21 and 22, in block 63 of the subdivision of Miami Shores, agreeing to pay $1,980.00 per lot, and paying in cash $495.00 on the purchase price of each lot, and giving as evidence of the unpaid purchase price of each lot, six (6) notes in the sum of $247.50 each, the notes of each series being payable each six months from date for thirty-six months; that the notes on which this suit is brought represent the notes given by the defendant for the purchase price of said lots.

The deponent further states that the defendant did not assign his said contract of purchase to this plaintiff's assignor; that in fact, as appears from the records in the office of the Clerk of the Circuit Court in and for Dade County, Florida, and as will be shown by exemplified copies of said records when produced, the defendant assigned both of said contracts of purchase to one A. W. Speedy on the 5th day of August, A. D. 1925; and that as appears from the records which have come into the possession of this deponent, on said 25th day of August, A. D. 1925, the re-sale department of Miami Shores Company reported to and made settlement with said defendant for the sale of said lots 21 and 22, block 63 of Miami Shores, showing a sale price received of $5,220.00, and that the balance remaining due and unpaid on the contracts of $2,970.00, was assumed by the assignee of said contracts, and after deducting interest adjustments and commission, the said re-sale department remitted to said defendant the sum of $1,609.00, which sum repaid to the defendant a profit of $619.00 on his contracts of pur-

chase, and in addition repaid to said defendant all the money that he had paid in cash on his purchase contracts, but did not release him from his obligation on his said notes now held by the plaintiff.

And the deponent further states that these notes have not been paid by Frederic L. Duggan, nor by A. W. Speedy to whom Duggan assigned his contracts and who assumed Duggan's obligations; that said notes are now past due and remain unpaid both
10 as to principal and interest, no part having been paid or satisfied, and that neither said Duggan nor said Speedy have any just set offs or counterclaims against the same.

ROY H. HAWKINS.

Examination taken, reduced to writing, subscribed and sworn to before me, this 15th day of January, A. D. 1931.

JAMES A. DIXON,
20 Commissioner and Notary Public, State of Florida at Large.

AGREED STATE OF FACTS

Frederic L. Duggan, the defendant in this suit admits that:

1. He is the maker of the eight notes set forth in plaintiff's complaint.

2. Said notes were given by him to the Miami Shores Company as part of the consideration or
30 purchase price for lot 21 in Block 63, Plat of Miami Shores, Section 1 to 7 inclusive on record in the office of the Clerk of the Circuit Court in and for

Dade County Florida, in Plat Book 10, pages 36 to 39 inclusive, and for lot 22 in the same block; and that the said lots were purchased by him under two agreements made by him with the said Miami Shores Company, each bearing date the 19th day of February, 1925. The making by defendant of said agreements is admitted and said agreements are hereto annexed and marked Exhibit 1.

3. On August 5, 1925, he assigned his said two agreements with the Miami Shores Company for the purchase of said two lots Nos. 21 and 22 in Block 63, Plat of Miami Shores Company to A. W. Speedy. The making of said assignments by defendant is admitted and copies of said assignments and of contracts are annexed and marked Exhibit 2.

4. The notes made by him upon which this suit is brought were not paid by him but the payment of said obligation was assumed by A. W. Speedy to whom the defendant assigned his two contracts of purchase as "a portion of the consideration of this assignment being that the party of the second part herein (A. W. Speedy) assumes all the obligations and agrees to pay all the payments described in said contract now due or to become due, together with all interest specified in said contract."

5. A re-sale of lots Nos. 21 and 22 in Block 63 of the Miami Shores was made for said Frederic L. Duggan by the Miami Shores Re-Sale Department and a settlement for the purchase thereof was made by said Miami Shores Re-Sale Department under date of August 25, 1925, a copy of the settlement sheet is hereto annexed and marked Exhibit 3.

6. Said eight notes upon which suit is brought are endorsed in blank by the Miami Shores Company by its Vice-President and Secretary, and the New Miami Shores Company is now the owner and holder of said notes. (Under the statute law of the State of Florida, interest at the rate of eight per

cent (8%) may be charged and paid on all contracts.)

7. On July 20, 1925, the Miami Shores Company transferred and assigned unto Commercial Bank and Trust Company, as trustee, all its rights, title and interest in and to the land purchase contracts, together with the notes relative thereto and all the obligations of the purchaser thereunder. The relative notes were endorsed in blank and were deposited with said trustee and said agreement further evidences the right of said trustee thereunder as appears by the endorsement on the agreement between New Miami Shores Co. and Frederic L. Duggan for two land purchase contracts and as will further appear by the copy of said agreement of trust (Exhibit 4) and which is recorded in the Dade County Clerk's office in Mortgage Book 732, page 1.

8. On November 30, 1926, the Commercial Bank and Trust Company and all the parties in interest transferred said trust to the City National Bank & Trust Company of Miami which agreement was recorded in Dade County Deed Book 1028, page 76.

9. By final decree dated January 6, 1928, made in a cause in the Circuit Court of the 11th Judicial Circuit of Florida, in and for the County of Dade, in Chancery, 18817-B, in a suit wherein the Third Mortgage Corporation was complainant and the Shoreland Company, Miami Shores Company, and City National Bank and Trust Company of Miami, as trustee, were defendants, it was among other things, ordered, that all of the land purchase contracts and relative notes thereto pledged, assigned, transferred and set over unto the trutees under the trust agreement between the Miami Shores Company and Commercial Bank and Trust Co. described in the cross bill of complaint and further described therein. (Exhibit 5). On page 52 of said final decree, setting forth the lot and block numbers cov-

ered by the land purchase contracts and the name or names of the makers of the relative notes thereto and the amounts thereof, is included the following: Lots 21 and 22, block 63, Frederic L. Duggan $990.00 (each).

10. On the 15th day of February, 1928, a decree confirming and approving the Master's report of sale was made in said cause. (Exhibit 6). And on page 12 thereof, the contract and relative notes of Frederic L. Duggan are listed. 10

11. By an assignment dated on the 16th day of February, 1928, Marshall D. Twyman, Special Master in Chancery, by virtue of said final decree, assigned unto the New Miami Shores Corporation, the land purchase contracts and relative notes made by Frederic L. Duggan to the Miami Shores Co. as will appear on page 6 of said assignment of land purchase contracts and relative notes. (Exhibit 7).

ARTICLES OF AGREEMENT, made this 19th day of February A. D. 1925, between MIAMI 20 SHORES COMPANY, a corporation exisiting under the Laws of the State of Florida, having its principal place of business in the County of Dade and State of Florida, party of the first part, and Frederic L. Duggan of Spring Lake, New Jersey, party of the second part,

WITNESS: That the party of the first part hereby covenants and agrees to sell, and the said party of the second part hereby covenants and agrees to purchase for the sum of NINETEEN HUNDRED 30 EIGHTY.....Dollars ($1980.00), the lot....., piece....., or parcel or ground situate in the County of Dade, State of Florida, known and described as follows, to-wit:

Lot Twenty-one (21), Block Sixty-Three (63), Plat of MIAMI SHORES, Sections One (1) to Seven (7), inclusive, (consisting of four sheets) on record in the office of the Clerk of the Circuit Court in and for Dade County, Florida, in Plat Book 10, Pages 36 to 39, inclusive.

The party of the second part, in addition to the
10 sum of FOUR HUNDRED NINETY-FIVE.....
.....Dollars ($495.00), already paid, receipt of which is hereby acknowledged, shall make further payments as follows:

TWO HUNDRED FORTY-SEVEN AND 50/100 DOLLARS ($247.50) each and every Six (6) Months from the date hereof for Thirty-Six (36) Months.

as evidenced by notes of even date drawn with in-
20 terest at the rate of eight per centum per annum, payable semi-annually on the whole sum remaining from time to time unpaid, and upon the last said payment, said party of the first part shall deliver to the said party of the second part, in fee simple clear of all encumbrances whatever, a good and sufficient warranty deed to said lot....., duly acknowledged with restrictions which shall run with the land and which the party of the second part agrees to accept as a part of the consideration thereof,
30 as follows: * * *

The party of the first part hereby agrees and binds itself, its successors and assigns forever, to fully and completely construct adequate paving upon all streets as shown by the plat referred to, to construct a cement sidewalk in front of all lots as

shown by the said plat, to provide water and electric light connections to each lot, and to adequately and artistically landscape the streets and parkways as shown by the said plat, and in addition thereto to adequately bulkhead and to fill to the line shown by the said plat; all lots fronting on Biscayne Bay.

IT IS MUTUALLY AGREED by and between the parties hereto that the time of payment shall be essential part of this contract, and that all covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators, successors and assigns of the respective parties.

The party of the second part shall pay all and singular the costs, charges and expenses, including attorney's fees and cost of examination of title, reasonably incurred or paid at any time by the party of the first part because of the failure of the party of the second part to perform, comply with and abide by each and every the stipulations, agreements, conditions and covenants herein contained, and every such payment shall bear interest from date at the rate of eight per cent. (8%) per annum.

If any of the said sums of money herein referred to be not promtply and fully paid within thirty (30) days next after the same severally become due and payable, or if each and every of the stipulations, agreements, conditions and covenants of this contract are not fully complied with and abided by, the said aggregate sum then remaining unpaid shall become due and payable forthwith or thereafter, at the option of the party of the first part, as fully and completely as if the said aggregate sum was originally stipulated to be paid on such day, anything herein to the contrary nothwithstanding.

A waiver of one breach of the foregoing provisions shall not be a waiver of any subsequent breach.

All taxes, assessments and impositions to be paid by the party of the second part from December 31, 1924.

IN WITNESS WHEREOF, the said party of the first part has caused these presents to be signed in its name by its Vice-President, and its corporate seal to be affixed, attested by Assistant Secretary,
10 the day and year first above written.

Signed, sealed and delivered in the presence of:

MIAMI SHORES COMPANY,
By E. S. Harris,
Vice-President.

WITNESS:

Martha C. Robinson,
Grace M. DeBlamer,
As to First Party.

20 Milward M. Denm,
Robert E. L. Dunn,
As to Second Party.

Attest:
Pratt Spears,
Assistant Secretary,
Party of First Part.

Frederic L. Duggan,
Party of the Second Part.

AGREEMENT FOR LOT 22 exactly the same with the exception of the description of the lot, which in agreement for Lot 22 is as follows:

Lot Twenty-Two (2), Block Sixty-three (63), Plat of Miami Shores, Sections One (1) to Seven (7), inclusive, (consisting of four sheets) on record in the office of the Clerk of the Circuit Court in and for Dade County, Florida, in Plat Book 10, Pages 36 to 39, inclusive. 10

Both agreements No. 930, for lot 21 and No. 930a for lot 22 are entitled AGREEMENT FOR DEED.

Between

MIAMI SHORES COMPANY OF MIAMI, FLORIDA, AND

Name Frederic L. Duggan,
Address Spring Lake, New Jersey
Date February 19th, 1925.

and bear on the face thereof the following endorsement: 20

COUNTY OF DADE }
STATE OF FLORIDA } ss.

MIAMI SHORES COMPANY hereby transfers, assigns and sets over unto Commercial Bank & Trust Company, at Trustee, under a certain Indenture and Agreement, between the undersigned and said Trustee, dated as of July 20, 1925, all its right, title and interest in and to the within land purchase contract, together with the notes relative thereto and all obligations of the purchaser thereunder. 30

The relative notes have been endorsed in blank and are herewith deposited with said Trustee and this assignment further evidences the right of said Trustee to the within, subject to the terms and provisions of said Indenture and Agreement.

IN WITNESS WHEREOF this agreement has been executed by Miami Shores Company, by its duly authorized officers and under its corporate seal, as of July 20, 1925.

10 MIAMI SHORES COMPANY,
By E. S. Harris,
Vice-President.

Attest:
J. B. Jeffries,
Assistant Secretary.
(SEAL)

STATE OF FLORIDA }
COUNTY OF DADE } ss.

I HEREBY CERTIFY, That on this day person-
20 onlly appeared before me, an officer duly authorized to administer oaths and take acknowledgments, Frederic L. Duggan to me well known to be the person described in and who executed the foregoing Agreement, and acknowledged before me that he executed the same freely and voluntarily for the purposes therein expressed. AND I FURTHER CERTIFY, That the said known to me to be the wife of the said on a separate and private examination taken and made
30 by and before me, separately and apart from her said husband, did acknowledge that she executed the said Agreement freely and voluntarily and without compulsion, constraint, apprehension or fear of or from her said husband.

WITNESS my hand and official seal at Asbury Park, County of Monmouth and State of New Jersey, this 3 day of Mar. A. D. 1925.

Ralph E. Pearce,
Notary Public, State of New Jersey.
My commission expires:
Nov. 25, 1929.
(SEAL)

STATE OF FLORIDA }
COUNTY OF DADE } ss. 10

I HEREBY CERTIFY, That on this 10th day of Mar. A. D. 1925, before me personally appeared E. S. Harris and Pratt Spears respectively, Vice-President and Assistant Secretary of MIAMI SHORES COMPANY, a corporation under the laws of the State of Florida, to me known to be the persons described in and who executed the foregoing Agreement, and severally acknowledged the execution 20 thereof to be their free act and deed as such officers, for the uses and purposes therein mentioned, and that they affixed thereto the official seal of said corporation, and the said instrument is the act and deed of said corporation.

WITNESS my signature and official seal at Miami, Dade County, Florida, the day and year last aforesaid.

Martha C. Robinson,
Notary Public, State of Florida at large. 30
(SEAL)

Exhibit P-2 and P-2½ being the two contracts above set forth and bear the following endorsement stamped thereon:

State of Florida, }
County of Dade, } ss.

Miami Shores Company hereby transfers, assigns and sets over unto Commercial Bank & Trust Company, as Trustee, under a certain Indenture and Agreement, between the undersigned and said Trustee, date as of July 20, 1925, all its right, title and interest in and to the within land purchase contract, together with the notes relative thereto and all obligaions of the purchaser thereunder. The relative notes have been endorsed in blank and are herewith deposited with said Trustee and this assignment further evidences the right of said Trustee to the within, subject to the terms and provisions of said Indenture and Agreement.

In Witness Whereof, this agreement has been executed by Miami Shores Company, by its duly authorized officers and under its corporate seal, as of July 20, 1925.

MIAMI SHORES COMPANY,
By E. S. Harris,
Vice-President.

Attest:
J. B. Jeffries,
Assistant Secretary.

MIAMI SHORES
Shoreland Company
Owners and Developers
Miami, Florida

Hugh M. Anderson, President
Roy C. Wright, Vice-President
Vernon C. Seaver, Vice-President
E. S. Harris, Vice-President
J. B. Jeffries, Sec'y-Treas.
Pratt Spears, Ass't Sec'y-Treas. 10
J. A. Riach, Publicity

Sales Department
J. B. Jeffries, Manager
J. A. Riach, Associate

August 25, 1925.

Mr. Frederic L. Duggan,
Spring Lake, N. J.

Dear Sir:

Re: Sale of lots 21 and 22, block 63, Miami Shores. 20

We are enclosing herewith check in the amount of $1609.20, being the balance due you on the sale of these two lots.

We report the sale of these lots to you as follows:

Sale price	$5220.00
Balance remaining on contracts assumed by purchaser	2970.00
Your total equity	$2250.00

Deductions

Interest accrued on two contracts which is a credit to the purchaser	$118.80	
Commission to salesman	522.00	
	$640.80	$640.80
Amount due you		$1609.20

10 We wired Mr. Fisher that check going forward to you was $1728.00. This was without the deduction for the accrued interest on the lot.

In accordance with Mr. Fisher's instructions we are holding these papers in escrow until he advises us to deliver same to the purchaser. Please get in touch with Mr. Fisher as early as possible, and have him advise us accordingly.

Yours very truly,

MIAMI SHORES RESALE DEPARTMENT,

20 NELL M. LEDDY.

ASSIGNMENT OF CONTRACT

Know all men by these presents:

That I, Frederic L. Duggan, of Spring Lake, Monmouth County, State of New Jersey, party of the first part, in consideration of the sum of one dollar and other valuable considerations to me in hand paid by A. W. SPEEDY of the County of State of part...of the

30 second part, at or before the ensealing and delivery

of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over unto the said part...of the second part,...heirs and assigns, forever, a certain land contract bearing date the 19th day of February A..D. 1925, made by MIAMI SHORES COMPANY, a Florida corporation to Frederic L. Duggan upon the following described piece or parcel of land, situate and being in Dade County, State of Florida, to-wit:

> Lot twenty-one (21), block sixty-three (63) Plat of Miami Shores, Sections one (1) to seven (7), inclusive, (consisting of four sheets) on record in the office of the Clerk of the Circuit Court in and for Dade County, Florida in Plat Book 10, pages 36 to 39 inclusive.

A portion of the consideration of this assignment being that the party of the second part herein assumes all the obligations and agrees to pay all the payments described in said contract now due or to become due, together with all interest specified in said contract.

And upon the performance of all the terms and conditions and the completion of all payments as set forth in said contract by the said party of the second part,.....heirs or assigns, the party of the first part does hereby authorize the said..... .....to make, execute and deliver a good and sufficient deed to the property hereinabove described, in like manner as though the original contract had been made and executed by the said Frederic L. Duggan with the said part...of the second part, instead of with.....

The party of the first part herein does hereby

certify that.....are the owner...and holder... of said contract and ha.....the full right and lawful authority to sell and assign the same.

TO HAVE AND TO HOLD the same unto the said part.....of the second part,.....heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal this 5th day of August, A. D. 1926.

10 C. H. Craig Frederic L. Duggan (SEAL
Francis J. Jones, Jr.

STATE OF NEW JERSEY
COUNTY OF MONMOUTH

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, Frederic L. Duggan (Single) to me well known to be the person described in and who executed the foregoing assignment, and he acknowledged before
20 me that he executed the same freely and voluntarily for the purposes therein expressed.

AND I FURTHER CERTIFY, that the said known to me to be the wife of the said ; on a separate and private examination taken and made by and before me, separately and apart from her said husband, did acknowledge that she made herself a party to said assignment for the purpose of renouncing, relinquishing and conveying all her right, title and
30 and interest, whether dower, homestead or of separate property, statutory or equitable in and to the lands described therein, and that she executed the

said assignment freely and voluntarily and without any compulsion, constraint, apprehension or fear of or from her said husband.

WITNESS my hand and official seal at Spring Lake, County of Monmouth, State of New Jersey, this 5th day of August A. D. 1925.

C. Henry Craig,
Notary Public, State of New Jersey at large.
My commission expires
Oct. 1, 1926.
(SEAL)

10

Filed March 31, 1926 at 10:16 o'clock A. M. and recorded in the Book noted above Geo. F. Holly, Clerk, Circuit Court, Dade County, Florida.

Filed in Deed Book 937, on page 529.

Marked Exhibit P-3, and Exhibit P-3½ is a like assignment for lot 21, block 63, and which was recorded on March 31, 1926, in Assignment Book 937, page 531.

20

OPINION

This matter is before the Court on an agreed state of facts. It is a suit by the plaintiff as holders of eight notes made by the defendant. The payee of all the notes was the Miami Shores Company. The notes were as follows:

"$247.50. Miami, Florida, February 19th, 1925. * * * * On or before eighteen months after date, for value received, I promise to pay to the order of

Miami Shores Company, two hundred forty-seven and 50/100 dollars at its office in Miami, Florida, with interest thereon at the rate of eight per cent per annum from date until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred payments to bear interest from maturity at ten per cent per annum semi-annually."

The notes were endorsed in blank by the payee and assigned by separate instrument to the Commercial Bank and Trust Company, trustee, under date of July 20, 1925. The pertinent part of the assignment is as follows: "All the land purchase contracts, together with the notes relative thereto and all the obligations of the purchaser thereunder. The relative notes have been endorsed in blank and are thereafter deposited with the Trustee and this assignment further evidences the right of the said Trustee to the within, subject to the provisions of said indenture agreement." The Commercial Bank and Trust Company, Trustee, later assigned the notes together with the land purchase contracts to the City National Bank and Trust Company as Trustee. A foreclosure suit was then prosecuted against the Miami Shores Company, Commercial Bank and Trust Company, Trustee, et als., and the Special Master under the foreclosure suit assigned the notes to the plaintiff corporation. Under date of August 5, 1926, the defendant assigned his two contracts of purchase to one Speedy, at which time the holder of the notes was the Commercial Bank and Trust Company, Trustee.

I am satisfied the notes sued on were not negotiable. While I have been unable to discover any

case in this State exactly in point, the Supreme Court of the State of Pennsylvania has held in a very recent case brought on notes identical in language with those in suit, that they do not meet the requirements of Sections One and Two of the Negotiable Instrument Act and are not negotiable instruments. *First National Bank of Miami, Fla. vs Bosler, et al.,* 147 *At. Rep.* 74. The States of Pennsylvania, Florida and New Jersey have all adopted the uniform Negotiable Instrument Act and I am in entire accord with that decision. 10

While these notes were not negotiable, they were assignable and a valid assignment was made to the Commercial Bank and Trust Company as Trustee and finally by assignment came to the plaintiff corporation. The defendant seeks to prove that there was a novation by reason of his assignment under date of August 5, 1926 to Speedy. It appeared that the Miami Shores Company acted as agent for Speedy, that it collected from Speedy $2250.00, and that it sent its check to Duggan for the sum of 20 $1609.20, as is evidenced by the settlement sheet from the Miami Shores Company, showing a sale of the lots for Duggan and a settlement with him.

There was no novation of the contracts or notes. Novation implies the extinguishment of an existing debt or obligation by the parties thereto and its transition into a new existence between the same or different parties, the consideration mutually being the discharge of the old contract. No extinguishment of plaintiff's debt can be implied from the Dug- 30 gan assignments or the Miami Shores Company settlement sheet. No new contract was substituted by Speedy with the Commercial Bank and Trust Company, Trustee, who were the holders of the notes at the time of the assignment from Duggan to Speedy. The Miami Shores Company could make no contract with either Speedy or Duggan, the first

to assume the debt and the other to be released therefrom, which could bind the Trustee. At no time was there a substitution of one debt for the other. If Speedy assumed Duggan's liability on the notes, this did not release Duggan from that liability. There was no acceptance by the Trustee of any release of Duggan and the acceptance of the assumption of the obligation by Speedy. There is no proof of any payment by Speedy to any of the holders of the notes in the chain of holders on account of the note in suit. The notes being non-negotible, the plaintiff being the holder thereof by assignment, there being no novation and no evidence of payments thereon, the plaintiff is entitled to a verdict in the sum of twenty-nine hundred and seventy dollars ($2970.00), representing the principal of the notes in suit and the interest thereon.

Judgment will accordingly be entered in that sum.

A. DAYTON OLIPHANT,
Judge.

ON POSTEA

	$2970.00
	62.00
	$3032.00

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of two thousand nine hundred and seventy dollars, besides costs to be taxed nisi.

On Motion of
BACKES & BACKES, *Attys.*

Entered June 1, 1931.

NEW JERSEY SUPREME COURT
MERCER COUNTY

NEW MIAMI SHORES CORPORATION, *Plaintiff,* v. FREDERIC L. DUGGAN, *Defendant.*	Action at Law. Notice of Appeal.

To Peter Backes, Esq., attorney for plaintiff: 10
Sir:

Please take notice that the defendant in the above-entitled action appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this action.

Respectfully yours,

JAMES J. McGOOGAN,
Attorney of Defendant.

Dated, June 10, 1931.

20

Service of this notice is hereby acknowledged this 26th day of June, 1931.

PETER BACKES,
Attorney for plaintiff.

NEW JERSEY COURT OF ERRORS AND APPEALS

NEW MIAMI SHORES CORPORATION, *Respondent,* *v.* FREDERIC L. DUGGAN, *Defendant.*	Action at Law. Grounds of Appeal.

10

To Peter Backes, Esq., attorney of respondent:

Sir:

Please take notice that the grounds of appeal are as follows:

1. Because the Supreme Court erred in giving judgment to respondent instead of appellant, in that:

a. Appellant's motion for direction of a verdict in his favor was denied.

20 b. Appellant's motion for a direction of verdict in his favor should have been granted, because the notes in suit were assigned without notice to appellant.

c. The assignment of the notes and contracts to respondent was subject to all equities and rights of appellant, including the defenses of estoppel, payment and novation.

d. Appellant had no notice of the transfer of the notes and contracts by assignment, and respondent's

30 assignor accepted a novation of the appellant's promises to pay.

e. Payment of appellant's notes was assumed by another party, with the consent of the respondent's assignor, and such other party then became the sole debtor.

f. There was a novation of the contract to pay the notes, by defendant's assignor remitting to appellant the purchase price of the land, after deducting its commission from the purchase price received by it from such other party.

g. The pleadings and proofs do not disclose a valid transfer of the notes to respondent, in so far as appellant is concerned. 10

h. All but two of the notes matured before transfer to respondent, who took them subject to appellant's defenses of payment, novation and estoppel, by the acceptance of such other party by respondent's assignor, as the sole debtor.

i. The consent of the trustee Commercial Bank & Trust Company was not essential to the novation.

Respectfully yours, 20

JAMES J. McGOOGAN,
Of counsel with appellant.

Date, June 24, 1931.

Service of these grounds of appeal is hereby acknowledged this 26th day of June, 1931.

PETER BACKES,
Counsel for respondent.

Kirkham & Guthrie, Printers, Trenton, N. J.

New Jersey
Court of Errors and Appeals

NEW MIAMI SHORES COMPANY, *Respondent,* *v.* FREDERIC L. DUGGAN, *Appellant.*	Action at Law.

BRIEF FOR RESPONDENT

This is an appeal from a judgment of Honorable A. Dayton Oliphant, Circuit Court Judge, rendered in a Supreme Court suit which was brought on certain notes given by Frederic L. Duggan, the maker thereof, to the Miami Shores Company to evidence his debt to said company on two land purchase contracts made by Duggan with said company. (State of Case, pages 15, 16, 17, 18 and 19.)

Duggan assigned his two contracts to A. W. Speedy (State of Case, pages 24, 25, 26 and 27) who paid Duggan a profit. Duggan bought these two land contracts for $3,960 (State of Case, page 15, line 30), and sold them to Speedy for $5,220 (State of Case, page 23, line 25), who assumed his debt thereon (State of Case, page 25, lines 19 to 24). Before these assignments were made to Speedy, the Miami Shores Company on July 20th, 1925, had also assigned its two land purchase contracts made by Duggan and the accompanying

notes to the Commercial Bank and Trust Company as its trustee and stamped and endorsed on said contracts an assignment thereof (State of Case, page 21, line 30 and page 22) and endorsed the notes in blank and delivered them to the said trustee. The Commercial Trust Company later assigned said contracts to the City National Bank and Trust Company as trustee (State of Case, page 14, line 18).

A foreclosure suit was then prosecuted and a final decree was made (State of Case, page 14, line 23) against the Miami Shores Company and the Commercial Trust Company, Trustee, et al., and these land contracts and notes (together with others) were assigned by a Special Master to the New Miami Shores Company, the plaintiff below, and the respondent herein (State of Case, page 15, lines 11 to 18).

At no time has the validity of these land purchase contracts, notes and assignments been questioned by the appellant, Frederic L. Duggan.

The appellant sold and assigned his two contracts of purchase to A. W. Speedy on August 5th, 1925 (State of Case, pages 24 and 25), who agreed to pay this debt and failed. Duggan, the original debtor, is endeavoring to escape liability on his notes, not by attacking the validity of said notes which he gave for his debt, but by asserting that said notes were not negotiable instruments and therefore that he should not be held liable thereon.

Assuming for this argument that they are non-negotiable instruments, yet this defect, if it exists, will not release Duggan from his indebtedness. The notes, if not negotiable, are surely assignable and they are now in the hands of the respondent by assignments, the validity of which is not questioned. They had been assigned and were in the hands of the trustee, the Commercial Bank and Trust Company, on July 20th, 1925 (State of Case, page 22, line 19), prior to the time when Duggan

assigned his interest in the land contracts to Speedy, and Duggan was not entitled to notice of such assignment.

Duggan, in making his contracts with Speedy, permitted his notes to remain outstanding and made no effort to have Speedy's indebtedness substituted for his own. Duggan was the primary debtor and he cannot escape the payment of his just debt simply because Speedy promised to pay the same and failed to do so.

It is to be noted that the Shoreland Company, through its Miami Shores Resale Department, was the agent of Duggan and/or Speedy in the matter of the assignment from Duggan to Speedy of his land purchase contracts (State of Case, pages 23 and 24). This company, namely, the Shoreland Company was a separate and distinct corporate entity from the Miami Shores Company and its acts in the assignment from Duggan to Speedy had no effect on the relation that existed between Duggan and the Miami Shores Company.

Even assuming that the Miami Shores Company was the agent of Duggan and/or Speedy in making the sale of Duggan's land purchase contracts to Speedy, still Duggan is liable on his notes to the Miami Shores Company.

Respondent denies the appellant's contention that there was a novation of these contracts and notes. The appellant has neither pleaded nor submitted any proofs tending to show a novation. The proofs submitted show the following dates and facts:

February 19th, 1925, Contracts and notes, Duggan and Miami Shores Company.

July 20th, 1925, Assignment, Duggan's contracts and notes to Commercial Bank and Trust Company, Trustee.

August 5th, 1925, Assignments of contracts and notes, Duggan to Speedy.

August 25th, 1925, Statement, Miami Shores Resale Department to Duggan.

Neither the assignments, Duggan to Speedy, nor the statement of the sales rendered by the Miami Shores

Resale Department to Duggan furnish any evidence of a novation of the two contracts and notes on which Duggan was liable and which contracts and notes were then the property of the Commercial Bank and Trust Company as trustee. The statement referred to shows only the transaction between Duggan and Speedy, and the credit to Speedy therein shown of $118.80 interest was a proper credit to Speedy and has no bearing whatsoever on the relation that existed betwen Duggan and the Miami Shores Company.

Appellant in support of his contention that there was a novation says on page 5 of his brief: "Novation means that, there being a contract in existence, some new contract is substituted therefor either between the same or different parties, the consideration mutually being the discharge of the old contract. Every novation embraces, necessarily, an accord and satisfaction, the principal distinguishing feature between them being that a novation implies the extinguishment of an existing debt by the parties thereto and its transition into a new existence between the same or different parties, whereas, an accord and satisfaction relates solely to the extinguishment of the debt or obligation." Cook v. McAdoo, 85 N. J. L. 692. This rule of law fails to support his contention that there was a novation. No extinguishment of respondent's debt can be implied from the Duggan assignment or from the Miami Shores Resale Department's statement. No new contract was substituted by Speedy with the Commercial Bank and Trust Company, Trustee, who then held said notes and contracts under assignment; and furthermore the Miami Shores Company could make no contract with either Speedy or Duggan, the first to assume the debt and the other to be released therefrom which could bind the trustee. At no time was there a substitution of one debt for the other. At best Speedy assumed Duggan's debt but this assumption did not release Duggan from liability on the notes.

While Speedy contracted with Duggan to assume his contracts and notes, yet he never substituted his personal

obligation for the same, nor secured an acceptance thereof from the trustee. The Miami Shores Resale Department, as the agent for either one or both parties to this assignment of contract from Duggan to Speedy, could not bind the trustee, the holder of the contract and notes, and there never was a substitution of Speedy's obligation in the place and stead of Duggan's notes. His liability always remained and continued thereon.

In 46 Corpus Juris 578, paragraph 11, the following rule is laid down: "In every novation there are four essential requisites: 1. A previous valid obligation. 2. The agreement of all the parties to the new contract. 3. The extinguishment of the old contract. 4. The validity of the new one. This enumeration is frequently stated in the cases. If these essentials or any one of them are wanting, there can be no novation." In the principal case there was no agreement of all the parties to the new contract but only an agreement between Duggan and Speedy. The Miami Shores Company in no way entered into this contract. Furthermore, there was no extinguishment of the old contract since the Miami Shores Company never agreed to release Duggan from his liability under the original contract (nor could the Miami Shores Company do so since the contract at that time was vested in the trustee). We therefore see that two of the essential elements are lacking and consequently there can be no novation.

Again in 46 Corpus Juris 591, paragraph 32, the following rule was set out: "In accordance with the general rule and in the absence of an agreement that the original obligation be extinguished and the new agreement substituted, the mere acceptance of the note or other obligation of the third person does not affect a discharge of an original obligation by way of novation, but will be considered only as a conditional payment or a receipt of a collateral security." In the present case there was not even an acceptance of an obligation of a third person, but merely an assignment of Duggan's

rights to Speedy. Therefore, under this rule, there is clearly no novation.

In 46 Corpus Juris 600, paragraph 43, the rule is set down that "it is necessary in order to effect a novation involving an introduction of a new party that there be a mutual agreement among the parties to the old and new obligations whereby the new obligation is substituted for the prior one." In the case at issue there was no such agreement between the parties; consequently, there is no novation.

In the case of Firth v. Fleetwood Motor Car Co., 129 Atl. Rep. 196, 2 N.J. M.R. 478-10 N.J.L. 537 where seller of a car breached his warranty, the substitution of agreement for another car providing also for release from liability for non-performance of the original contract on execution of second contract—held not a novation and until substituted contract was performed, right of recovery remained on original contract.

*In the case of Saffran v. Grillo, 133 Atl. Rep. 772, where defendant expressly agreed to return a piano on default in payment of note, giving of substituted notes, no question being made but that they were given for same considerations and were not paid, and there being no proof of waiver of right to enforce conditional sale, is no basis for novation which exists only by reason of an agreement. In the present case there was no agreement to release Duggan from his obligation and so under the rules set down in this case by the Supreme Court there can be no novation.

*In the case of Mooney v. Newbern, 137 Atl. Rep. 567, the Supreme Court lays down the rule that the creditor and the old and new debtor must concur in the substitution of the new and the release of the old debtor to constitute a novation. In the present case, there was no such concurrence of the creditor, old debtor and new debtor; consequently, there is no novation.

Respondent in answer to page 5 of appellant's brief says that Duggan by his assignment to Speedy and the latter's assumption of debt manifests Duggan's assent

*NOT OFFICIALLY REPORTED.

to have his notes remain as evidence of the debt on the contract. He did not demand their return nor did he provide for a substitution of his assignee's notes in the place and stead of his own and such substitution could not have been made by the Miami Shores Company, because they had no interest in these notes at the time, having previously assigned them and endorsed them over to its trustee.

In fact Duggan contracted for the sale of his land purchase contracts at an advanced price, assigned his contracts to Speedy, accepted the cash for the same, which included the cash originally paid by him on account of the purchase price, and his profit thereon, and did not concern himself in any way whatsoever as to his liability on the notes or who was then the holder and owner thereof.

And further answering the argument made by appellant on page 6 of his brief, the respondent says that Duggan, having sold all his interest in his land purchase contracts, was not entitled to a notice of the foreclosure. He had no right of redemption in these notes nor had he any right of tender of a deed for these lots. His rights of every kind therein had been assigned to Speedy and Speedy is the only person who can redeem these lots when he pays the debt due on these contracts. Duggan's remedy is against Speedy to recover the amount of money which he must pay on these contracts.

In either event on the payment of this debt either by Speedy or by Duggan, this respondent, who also became the purchaser of the lots in question under the foreclosure proceedings, is ready and willing to deliver a deed to such person or persons who may be entitled thereto.

The respondent therefore respectfully submits:

First—That the appellant under his plea of payment cannot avail himself of the non-negotiability of the notes in suit.

Secondly—That the appellant under his like plea of payment cannot have the benefit of his plea of novation.

For the reasons shown, it is respectfully submitted that the judgment rendered below should be affirmed, together with costs.

BACKES & BACKES,
Attorneys for Respondent.

PETER BACKES,
Of Counsel.

The VanBuskirk Press, Inc., 109 E. Hanover St., Trenton.

New Jersey Court of Errors and Appeals

NEW MIAMI SHORES CORPORATION, *Respondent,* v. FREDERIC L. DUGGAN, *Appellant.*	Action at Law. Brief for Appellant.

On February 19, 1925, appellant Duggan agreed in writing with Miami Shores Company (not the respondent) to buy two lots of land in Florida, for $3,960.00, paid $990.00 cash and gave his notes for $2,970.00 for the balance of the purchase price. The agreement of sale is on pages 15 to 21 of the State of the Case, and the notes were copied in the complaint.

Before any of the notes matured, Duggan assigned his two contracts of sale to A. W. Speedy, who expressly assumed payment of appellant's notes. This assignment begins on page 24 of the case, and the assumption clause is on page 25, lines 19 to 24.

Duggan's vendor, Miami Shores Company, collected from Speedy the purchase price of $5,220.00 and held the assignments in escrow pending instruction from Duggan to deliver them to Speedy. A complete written statement of the assignment transaction is contained in the Miami Company's letter to Duggan dated August 25, 1925, and printed on pages 23 and 24.

Speedy did not pay any of the notes, which were first transferred by Miami Shores Company to the

Commercial Bank & Trust Company of Miami (page 22), and the City National Bank & Trust Company of Miami was substituted as assignee (page 2, line 30).

In a foreclosure suit, brought by Third Mortgage Corporation against Miami Shores Company and others (page 2, line 34), the notes and the Duggan contracts were sold by the Master to respondent (page 3), which brought this suit against Duggan in the Supreme Court, for the recovery of the amount due on the notes.

Appellant moved for a direction at the close of respondent's case, which was heard by Circuit Court Judge Oliphant, without a jury. The trial court denied the motion, and advised the entry of a judgment for respondent for $2,970.00 (pages 27 to 30), and from the refusal to direct a verdict in favor of appellant, this appeal is taken. Appellant's motion for directed verdict was based on two grounds: first, there was a novation of Duggan's undertaking, in that plaintiff's assignor took Speedy as the debtor, and absolved Duggan from liability; and second, the notes were not negotiable. (Page 1, lines 14 to 17).

The trial court erred in refusing to direct a verdict for appellant, as the grounds of appeal in substance allege that the assignment of the notes and contracts to respondent was subject to Duggan's defense of estoppel, payment and novation, and was made without notice to him. These grounds of appeal are argued together.

The trial court decided that, while the notes were not negotiable, they were assignable, which appellant is willing to concede, with this reservation: the notes were assignable, but, could only be assigned subject to all defenses that Duggan had against the assignor. If the assignor Miami Shores Company

had sued him after it took Speedy as the debtor and had paid the Speedy purchase price to appellant, Duggan could have successfully defended that action on the ground that there had been a novation, because Miami Shores Company had ratified Duggan's assignment to Speedy, and by remitting to Duggan the Speedy purchase price, had freed Duggan from further liability on the agreements of sale. Consequently, the same defense was available to Duggan in this suit, after the original holder of the notes had assigned them to respondent, without notice to Duggan.

That the notes were non-negotiable, is held in *First National Bank of Miami v. Bosler,* 147 *Atl.* (*Pa.*) 74, where the same form of note was in suit.

Furthermore, the assignment made by Duggan to Speedy provided expressly that Speedy assumed payment of the notes. The Miami Shores Company acted for Duggan and Speedy in the assignment, and was therefore cognizant of the new assumption. Having such knowledge, if it had sued Duggan on the notes, assuming for the moment that there had been no assignment of the notes to the bank, Duggan's defense of novation and discharge would have been successful.

Miami Shores Company, acting for Duggan, sold the lots to Speedy, collected from Speedy the purchase price of $5,220.00 for Duggan, took $522.00, for its broker's commission on the sale to Speedy, and also accrued interest on the Duggan notes of $118.80, and paid to Duggan with its own check for $1,609.20, the balance of Speedy's purchase price, and thereby released Duggan from liability on the notes and contracts of sale. (Pages 23-24). Thenceforth Miami Shores looked to Speedy for completing the contracts of sale, and respondent's status is no better than its assignor's position.

Of course, if Duggan had actual or constructive knowledge of the assignments of the notes and contracts to the Florida banks, his defense could avail him nothing, but the trial court fell into an obvious error in holding (page 29, lines 32 to page 30, line 2) that the Miami Shores Company could make no agreement that could bind its trustee bank, because the proofs show that the assignment to the bank was dated July 20, 1925, but was not recorded until
10 November 30, 1926, (page 2, lines 16 to 20), whereas Duggan's assignment to Speedy was made on August 5, 1925, more than a year before the bank's assignment was recorded. There is no proof that actual or constructive notice of the assignment to the bank by Miami Shores Company had been given to Duggan by any one.

"It is well settled that an assignee of a non-negotiable or matured debt takes it subject to all the equitable defenses that the original debtor may
20 have." FISHER V. BULL, 52 Eq. 298.

"The assignment was not recorded until after the complainant's interest were fixed, and it is clear enough that in such case the record does not amount to notice." FISHER V. BULL, 52 Eq. at page 305.

Being ignorant of any assignment by his vendor to the bank, Duggan properly dealt with Miami Shores Company on the resale to Speedy.

In HOLDEN V. HAYN, 35 Eng. Reprint 594, the vendor filed his bill for specific performance of his
30 contract with Bacon, who had assigned it to Hayn, and the court dismissed the bill as against the original vendee, holding that: "It is therefore by the act of plaintiff himself, that Hayn is placed in the situation of purchaser, and he only."

Duggan's defense was payment by Speedy's assumption, and discharge from the debt.

That novation is a discharge and was effected in this case, is apparent from the authorities.

"Novation consists of a bilateral agreement for the substitution of one obligation for another and may take place either by the substitution of a new for an old party, or by the substitution of a new agreement between the same parties, or by a change of parties and agreement at the same time." PARSONS V. HAMILTON, 78 N. J. L., p. 311.

"Novation means that, there being a contract in existence, some new contract is substituted therefor either between the same or different parties, the consideration mutually being the discharge of the old contract. Every novation embraces, necessarily, an accord and satisfaction, the principal distinguishing feature between them being that a novation implies the extinguishment of an existing debt by the parties thereto and its transition into a new existence between the same or different parties, whereas, an accord and satisfaction relates solely to the extinguishment of the debt or obligation." COOK V. McADOO, 85 N. J. L. 692.

That respondent's assignor released Duggan from the agreements of sale is apparent from the fact that the assignment to Speedy was a "re-sale" of the lots. (Page 13, lines 26 to 32). If therefore, there was a re-sale of the lots, the consideration for the Duggan notes totally failed, with the consent of Miami Shores Company, and the assignment of the notes to the bank passed nothing that obligated Duggan. Moreover, the assignment of Duggan's contracts to the bank was nullified and abrogated by the re-sale to Speedy.

Duggan was not given his notes by Miami Shores Company on the sale to Speedy, because it had, without knowledge or consent of Duggan, assigned them to the bank, before the Speedy agreement was made.

Miami Shores Company suffered the mortgages on the lots to be foreclosed, without any notice to Duggan, thus depriving him of any equity that he might have had in them, and by accepting Speedy as the purchaser, placed Duggan in a position where he could not redeem the lots from the mortgages, and yet the bank trustee held his notes. The net result is that Duggan's lots, notes, and contracts are now in the possession of respondent (page 3, lines 10 18 to 29), with no right of redemption in Duggan. Respondent gets this undue advantage over Duggan by having lulled him into the belief that it had accepted Speedy as the purchaser.

On page 2, lines 25 to 29, the proof shows that all payments by Duggan should be made to the bank trustee, and if the assignor Miami Shores Company received any payments, they should be forthwith deposited with the trustee. Therefore, when the assignor vendor remitted the Speedy purchase price 20 to Duggan, it clearly showed that the payment was not due to the trustee, and thus recognized the elimination of Duggan as the debtor, for if it still looked to Duggan as the debtor, the payment of $1,609.20 (page 23, lines 20 and 21) would have been deposited with the assignor's trustee.

This was a suit for all unpaid installments of purchase money, and no allegation or proof of tender of a deed by either the vendor or its assignee to Duggan or Speedy is made. "But in an action, or count 30 in a declaration for the whole money, or for the last installment, after it became due, the plaintiff must aver a tender of a deed." BIDDLE V. CORYELL, 18 L. 377; LONG V. HARTWELL, 34 L. 116.

The judgment should be reversed.

Respectfully submitted,

JAMES J. McGOOGAN,
Attorney for Appellant.

INDEX

Witnesses for Plaintiff