

INDEX.

	PAGE
Amended Bill of Complaint	1
Schedule "A", Also Exhibit C-1, Articles of Agreement, dated September 28, 1929, between Jacob Maloyfsky and Fannie Maloyfsky and Louis Schiraldi	12
Answer to Amended Bill of Complaint	17
Replication	22
Rejoinder	26
Interrogatories	27
Case	31
Conclusions of Vice Chancellor	82
Final Decree	89
Notice of Appeal	91
Petition of Appeal	92

TESTIMONY.

Complainants' Witnesses:

I. H. Brand—	
Direct	31
Cross	36
Redirect	41
Thomas M. Stuhr—	
Direct	45
Samuel Harber—	
Direct	46
Cross	51

Defendants' Witnesses:

Thomas McClelland—	
Direct	56
Francis X. Goette—	
Direct	57
Cross	60

IN REBUTTAL.

Complainants' Witness:

	PAGE
Louis Levine—	
Direct	61
Cross	62

EXHIBITS.

Complainants':

	<i>Admitted Folio</i>	<i>Printed Page</i>
C-1. Articles of Agreement, dated September 28, 1929, between Jacob Maloyfsky and Fannie M a l o y f s k y and Louis Schiraldi	32	12
C-2. Letter from Samuel Harber to Pierson, S c h r o e d e r and Brand, dated November 19, 1929	42	64
C-3. Letter from Pierson, Schroeder and Brand to Samuel Harber, dated Nov. 18, 1929	42	65
C-4. Answers to Interrogatories....	52	70
C-5. Deed, dated May 28, 1928.....	62	76
C-6. Agreement, dated February 8, 1930, between Rubel Cor- poration and Senger Coal & Ice Corporation	63	76

Defendants':

D-1. Letter from Nathan Friedman to Isidor Brand, dated March 5, 1930	38	81
---	----	----

Amended Bill of Complaint.

(Filed July 3, 1930)

IN CHANCERY OF NEW JERSEY.

Between
JACOB MALOYFSKY and FANNIE
MALOYFSKY,
Complainants,

and

LEONARD SCHIRALDI, also known as
LOUIS SCHIRALDI, and SENDER
COAL & ICE CORPORATION, a Cor-
poration of the State of New Jer-
sey,

Defendants.

Amended
Bill of
Complaint.
For Speci-
fic Perform-
ance of
Contract.

10

20

TO THE HONORABLE EDWIN ROBERT WALKER, CHAN-
CELLOR OF THE STATE OF NEW JERSEY :

The complainants, Jacob Maloyfsky and Fannie Maloyfsky, of the City of Union, County of Hudson, and State of New Jersey, respectfully show that :

1. On or about the 28th day of September, 1929, the complainants were seized in fee simple of all that lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Union, in the County of Hudson and State of New Jersey and described as follows :

30

Beginning at a point formed by the intersection of the northerly side or line of Third Street and

40

Amended Bill of Complaint.

the westerly line or side of West Street as the said streets are laid out and constructed and running thence northerly and along the westerly side of West Street a distance of Ninety-nine (99) feet, thence westerly a distance of Fifty (50) feet to a point, thence southerly a distance of ninety-nine (99) feet to a point in the northerly side of Third Street and thence easterly and along the northerly side of Third Street a distance of fifty (50) feet to the point or place of beginning.

The said premises being vacant land. The said premises being fifty feet wide in front and rear and ninety-nine feet in depth throughout.

2. That on the said 28th day of September, 1929, the complainants entered into a certain written agreement in writing with the defendant Leonard Schiraldi, also known as Louis Schiraldi, wherein and whereby the complainants agreed to convey the said land and premises by deed of full covenant and warranty, subject to zoning ordinances or building restrictions of the City or municipal authorities, as set forth in the contract marked Schedule "A" hereto annexed, on or before the 28th day of October, 1929, to the said defendant, Leonard Schiraldi, also known as Louis Schiraldi, in consideration of the payment by the said Leonard Schiraldi, also known as Louis Schiraldi, of the sum of \$14,000.00 and the said defendant, Leonard Schiraldi, also known as Louis Schiraldi, agreed to pay to the complainants the said purchase price of \$14,000.00 as follows:

By way of deposit, on the execution of said agreement, the sum of \$1,000.00., and the payment of the remainder of said purchase price upon delivery by

Amended Bill of Complaint.

complainants of said deed to said defendant, Leonard Schiraldi, also known as Louis Schiraldi, by the payment of \$5,000., in cash or certified check, and the execution and delivery by said Leonard Schiraldi, also known as Louis Schiraldi, the defendant, to the complainants, Jacob Maloyfsky and Fannie Maloyfsky, of bond in the sum of \$8,000., to be secured by purchase money mortgage on the premises hereinbefore described, in like sum of \$8,000., and which bond and mortgage was to run for a period of five years from its date with interest at the rate of 6% per annum, payable quarterly—which bond and mortgage was to be in the form prescribed by the law of the State of New Jersey, and as otherwise specified and contained in said contract, reference being had thereto, marked Schedule “A”, and made a part hereof; the said deed to be delivered at the office of Counsellor at Law, Samuel Harber, 422 38th Street, Union City, N. J., on the 28th day of October, 1929, between the hours of nine o’clock in the forenoon, and six o’clock in the afternoon. The said agreement was duly acknowledged by Jacob Maloyfsky and Fannie Maloyfsky, complainants, on the said 28th day of September, 1929. A true copy of said written agreement is hereunto annexed and made a part hereof, and marked Schedule “A”. The said defendant, Leonard Schiraldi, also known as Louis Schiraldi, paid to the complainants the said sum of \$1,000. at the time of the execution and delivery of said agreement in writing, marked Schedule “A” hereto annexed, and thereafter on or about the 14th day of February, 1930, the said defendant, Leonard Schiraldi, also known as Louis Schiraldi, caused to be paid an additional sum of \$1,000. on account of said contract, hereto annexed.

10

20

30

40

Amended Bill of Complaint.

3. That the said defendant, Leonard Schiraldi, also known as Louis Schiraldi, failed and neglected to close the title to said premises in accordance with the agreement on the date specified therein, and on or about the 6th day of November your complainants caused a notice to be given to the said defendant Leonard Schiraldi, also known as Louis Schiraldi, and his attorney, fixing November 18th, 1929, at 4 P. M. in the afternoon at the office of Counsellor Samuel Harber, 422 38th Street, Union City, N. J., as the time and place for closing of title, making time of the essence thereof. That thereafter the said defendant, Leonard Schiraldi, also known as Louis Schiraldi, through his attorney, Isidor Brand, obtained an adjournment of the closing of the title to December 3rd, 1929, by stipulation, and again on December 3rd, 1929, obtained an adjournment for the closing until December 17th, 1929, at which latter date the defendant, Leonard Schiraldi, also known as Louis Schiraldi, failed to close the title, and thereafter your complainants caused a notice to be given to the said defendant for the closing of title on the 10th of February, 1930, at 4 P. M. in the afternoon, at the office of Counsellor, Samuel Harber, at the address aforementioned, which caused the said defendant to make a deposit of an additional sum of \$1,000., thereby securing a further adjournment until March 4th, 1930, and again at the latter date a further adjournment was granted to the defendant and his attorney to March 11th, 1930, at four o'clock in the afternoon of that day at the office of Samuel Harber, at the address aforementioned and it was then and there stipulated that the said time and place be fixed as a time for closing, and to be time of the essence, and that there were to be no further extensions without notice to either party.

Amended Bill of Complaint.

4. On the said 11th day of March, 1930, at the hour of 4 P. M. in the afternoon, the complainants duly attended at the office of their attorney, Samuel Harber, at 422 38th Street, Union City, New Jersey, and remained there until about 6 P. M. of that day, ready with a warranty deed conveying the lands and premises hereinabove described referred to, to the said Leonard Schiraldi, also known as Louis Schiraldi, duly executed and acknowledged by the complainants for the purpose of delivering the said deed to the said Leonard Schiraldi, also known as Louis Schiraldi, upon payment by said Leonard Schiraldi, also known as Louis Schiraldi, of the balance of the purchase money, pursuant to the terms of said agreement, and to receive the bond and mortgage as aforementioned, provided for in said agreement, and the said defendant, by his attorney, Isidor Brand, and associate attorney, acknowledged and admitted that they were unable and could not close the said title, at which time and place the complainants caused tender to be made of their warranty deed and other papers in accordance with the terms of said contract, to the said Isidor Brand and associate, attorneys, for Leonard Schiraldi, also known as Louis Schiraldi, and they acknowledged that they were in default, and could not, and were unable at said time and place to accept the tender thereof of the complainants and close the title, and acknowledged themselves in default of the said contract. The complainants have always been ready and willing and now tender themselves ready and willing to perform their part of said agreement, and on being paid the remainder of said purchase money with interest, to convey the said lands and premises to the said Leonard Schiraldi, also known as Louis

10

20

30

40

Amended Bill of Complaint.

Schiraldi, by warranty deed duly executed by the complainants. Your complainants have been continually patient, and have extended various adjournments, accommodating the said defendant and his attorney above mentioned, giving them every opportunity to close the said title, but the defendant Leonard Schiraldi, also known as Louis Schiraldi, and his attorney have neglected, failed and ignored the same, and although having taken the benefit of these adjournments have continually failed and refused and still refuse to close the said title, although your complainants have been ready and willing continually since the date set forth in the said contract, up to the date hereof, to close the said contract and perform the same as therein set forth.

20

5. Your complainants have lately been informed that the said defendant, Leonard Schiraldi, also known as Louis Schiraldi, purchased the said premises from your complainants according to the agreement hereto annexed marked Schedule "A" for and in behalf of his undisclosed principal, Rubel Ice Corporation, a Corporation of New Jersey, and/or Rubel Ice Corporation, a Corporation of New York, and that the purchase of said premises from your complainants by him were intended for and in behalf, and for the benefit of said principal, Rubel Ice Corporation, a Corporation of New Jersey, and/or Rubel Ice Corporation, a Corporation of New York, and not for himself, and that he has such an understanding between himself and the said Rubel Ice Corporation, a Corporation of New Jersey, and/or Rubel Ice Corporation, a Corporation of New York, that the purchase was for and in behalf of said Rubel Ice Corporation, a Corpo-

30

40

Amended Bill of Complaint.

ration of New Jersey, and/or Rubel Ice Corporation, a Corporation of New York, and that he in fact acted as an intermediary in the purchase of said premises under the said contract for the benefit of said principal, Corporation, Rubel Ice Corporation, a Corporation of New Jersey, and/or Rubel Ice Corporation, a Corporation of New York. Your complainants are informed that some assignment of the interest in this contract marked Schedule "A" hereto annexed was made by said defendant Leonard Schiraldi, also known as Louis Schiraldi, to the said principal, Rubel Ice Corporation, a Corporation of New Jersey, and/or Rubel Ice Corporation, a Corporation of New York, secretly, without disclosing the same to your complainants.

6. On or about the 7th day of April, 1930, your complainants were informed and advised, to their surprise, that the defendant, Senger Coal & Ice Corporation, a Corporation of the State of New Jersey, took an assignment of the contract hereto annexed marked Schedule "A", from said Leonard Schiraldi, also known as Louis Schiraldi, or Rubel Ice Corporation, a Corporation of New Jersey, and/or Rubel Ice Corporation, a Corporation of New York, or from either, both, or all of said parties, and which fact was heretofore unknown to your complainants, and the said Senger Coal & Ice Corporation agreed with Leonard Schiraldi, also known as Louis Schiraldi, or Rubel Ice Corporation, a Corporation of New Jersey, and/or Rubel Ice Corporation, a Corporation of New York, or either, both, or all of said parties, to carry out and perform the said contract hereto annexed. The said Senger Coal & Ice Corporation, by reason of

Amended Bill of Complaint.

the assignment or agreement heretofore made from Leonard Schiraldi, also known as Louis Schiraldi, or Rubel Ice Corporation, a Corporation of New Jersey, and/or Rubel Ice Corporation, a Corporation of New York, or from either, both or all of said parties, to it, of the said contract hereto annexed, covenanted and agreed to carry out and perform the terms of said contract hereto annexed marked Schedule "A", agreed to perform the same and take the conveyance thereof. That the said defendant, Senger Coal & Ice Corporation and its representatives made certain efforts to be released from the performance of said contract and were willing to pay your complainants a consideration to be relieved from the terms thereof, and the performance thereof, and that your complainants rejected the said offers, and insisted upon and do hereby insist upon the defendant Senger Coal & Ice Corporation carrying out the terms of said contract as hereto annexed marked Schedule "A".

7. The said contract hereto annexed provides for the performance of all and singular the covenants and agreements aforesaid, "said parties do bind themselves and their respective heirs, executors, administrators and assigns," and the said Senger Coal & Ice Corporation being the assignee of said contract hereto annexed marked Schedule "A", and having agreed with the said Leonard Schiraldi, also known as Louis Schiraldi, or Rubel Ice Corporation, a Corporation of New Jersey, and/or Rubel Ice Corporation, a Corporation of New York, to carry out and perform the terms of said contract by reason of said assignment made to said Senger Coal & Ice Corporation, said Senger Coal & Ice Corporation is bound thereby and by the covenants

Amended Bill of Complaint.

contained in said contract, and is bound to perform and carry out the terms thereof.

8. Your complainants respectfully allege that they are ready and willing and now offer and tender themselves ready and willing to perform their part of the said agreement on being paid the remainder of said purchase money with interest, and to receive bond and mortgage provided for in said contract from the said defendant, Senger Coal & Ice Corporation, and that they stand ready to convey the said lands and premises to the said Senger Coal & Ice Corporation by warranty deed to be duly executed by your complainants to the said Senger Coal & Ice Corporation in accordance with the said terms and conditions of said contract, and that they respectfully pray that said defendant Senger Coal & Ice Corporation should be compelled under said circumstances to perform and carry out the terms of said contract hereto annexed, pay the balance of said purchase price, and deliver the bond and mortgage therein provided for.

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

1. That the defendants, Leonard Schiraldi, also known as Louis Schiraldi, and Senger Coal & Ice Corporation, who are all defendants to this suit, may answer this Bill of Complaint and each statement therein made.

2. That the said Leonard Schiraldi, also known as Louis Schiraldi, and Senger Coal & Ice Corporation, or either of said defendants, or both of said

Amended Bill of Complaint.

defendants, or all of said defendants, may be compelled by the decree of this Court, specifically to perform the said agreement with your complainants, and to pay to your complainants the remainder of the said purchase money, as and in and by said agreement provided for, with interest from the time of said purchase money to have been paid, and be compelled to deliver the bond and mortgage provided for in said contract according to the terms thereof, with interest from the time or date that the same should have been executed and delivered to your complainants, on the delivery by your complainants to the said Leonard Schiraldi, also known as Louis Schiraldi, and Senger Coal & Ice Corporation, or either of them, of a deed executed by your complainants as in said agreement provided for.

3. That in case the said defendants, Leonard Schiraldi, also known as Louis Schiraldi, and Senger Coal & Ice Corporation, should, within the time limited by this Court for such performance of said contract, fail and neglect, upon the tender of said deed, to pay the said remainder of said purchase money as aforesaid, and execute and deliver the bond and mortgage provided for in said contract, for the amount of \$8,000., that then and in that event, the said sum, less what has been paid on account of the purchase price as alleged in this bill of complaint, together with interest and costs, may be and become a lien upon the said lands and premises in favor of your complainants, and that the said lands and premises may be sold under the direction of this Court for the consideration of such lien so imposed on said lands and premises, and in case a deficiency should arise upon said sale, that

Amended Bill of Complaint.

said defendants, either or all of them may be ordered by this Court to pay the said deficiency, together with interest and costs to these complainants.

4. 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. 10

5. For such other relief as may be just and equitable in the premises, and for such decree as this Court may make in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

SAMUEL HARBER,
Solicitor and of Counsel 20
with Complainants.

A true copy.

FERD GARRETSON,
Clerk.

30

40

Schedule "A".**Also Exhibit C-1.**

ARTICLES OF AGREEMENT, made the 28th day of September in the year of Our Lord One Thousand Nine Hundred and twenty nine BETWEEN Jacob Maloyfsky and Fannie Maloyfsky his wife of the City of Union in the County of Hudson and State of New Jersey party of the first part; and Louis Schiraldi of the City of Brooklyn in the County of Kings and State of New York party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Fourteen Thousand (\$14,000) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of full covenant and warranty free from all encumbrances except as hereinafter stated on or before the 28th day of October, 1929 next ensuing the date hereof, all that lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the City of Union in the County of Hudson and State of New Jersey and described as follows:—

Beginning at point formed by the intersection of the northerly side or line of Third Street and the westerly line or side of West Street as the said streets are laid out and constructed and running thence northerly and along the westerly side of West Street a distance of Ninety nine (99) feet, thence westerly a distance of Fifty (50) feet to a point, thence southerly a distance of ninety-nine

Schedule "A", also Exhibit C-1.

(99) feet to a point in the northerly side of Third Street and thence easterly and along the northerly side of Third Street a distance of fifty (50) feet to the point or place of beginning.

Subject to a state of facts that an accurate survey will show.

The said premises being vacant land.

10

The said premises being fifty wide in front and rear and ninety nine feet in depth throughout.

AND the said party of the second part for himself and his heirs, executors and administrators, doth covenant, promise, and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the sum of Fourteen Thousand (\$14,000) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

20

By way of deposit for which this contract is a receipt the sum of One Thousand Dollars

\$1000

On the day of closing of title as herein stated the sum of Five Thousand (\$5000) Dollars in cash or certified check

30

5000

By the party of the second part executing and delivering his bond in the sum of Eight Thousand (\$8000) Dollars to the party of the first part secured by a purchase money mortgage on the premises herein described and sold in the like sum of \$8000 and which bond and mortgage

40

Schedule "A", also Exhibit C-1.

shall run for a period of five years from its date with interest at the rate of six percent payable quarterly and which bond and mortgage shall be in the form prescribed by the laws of New Jersey and shall contain the usual thirty day interest and sixty day tax and assessment default clauses and a clause that the no deductions shall be paid by reason of the payment of any tax or assessment by the owner of said premises from said bond and mortgage and also an insurance clause that if any building is erected on the premises the owner shall at his expenses insure the premises and cover the interest of the mortgagee therein. Said bond and mortgage shall contain a further clause that the same may be paid at any time before maturity on thirty days prior written notice to the mortgagee that the owner desires to pay the same together with the interest up to the date of payment

8000

\$14,000

In the event that there shall be restrictions against the said premises of record not Zoning or Building restrictions of the City or municipality or the authorities, that then party of second may reject the title because of such restrictions of record and receive the return of his deposit herein paid but no costs or expenses and no damages and the contract shall then be at an end.

Schedule "A", also Exhibit C-1.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the 28th day of October, 1929 next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use providing title is closed and consideration is paid.

10

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of full covenant and warranty shall be delivered and received at the office of Counsellor Samuel Harber, 422 38th Street, Union City, N. J., between the hours of nine in the forenoon and six o'clock in the afternoon on the said 28th day of October, 1929, next ensuing the date hereof.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and assigns.

20

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

JACOB MALOYFSKY L.S.

FANNIE MALOYFSKY L.S.

LEONARD SHIRALDI L.S.

30

Signed, Sealed and Delivered }
in the presence of }
SAMUEL HARBER

In consideration of mutual promises and agreements hereinstated, we hereby agree to extend the date for the delivery of deed and execution of this contract to
at the same
hour and place.

WITNESS our hands and seals this day of

A. D. 19 .

40

Schedule "A", also Exhibit C-1.

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

10 BE IT REMEMBERED, That on this 28th day of September in the year of our Lord One Thousand Nine Hundred and twenty nine before me, the subscriber, A Master in Chancery of New Jersey, personally appeared Jacob Maloyfsky and Fannie Maloyfsky his wife who, I am satisfied, are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

20 SAMUEL HARBER,
 A Master in Chancery of N. J.

 (On Back)

CONTRACT FOR PROPERTY.

Jacob Maloyfsky et ux
 to
 30 Louis Schiraldi

Dated Sept. 28th 1929

Title adj to Monday—Nov 4 1929

40

Answer to Amended Bill of Complaint.

(Filed July 23, 1930)

IN CHANCERY OF NEW JERSEY.

Between JACOB MALOYFSKY and FANNIE MALOYFSKY, Complainants,	} On Bill, &c. Answer of Defendant Senger Coal & Ice Corporation to the Amended Bill of Complaint.	10
and LOUIS SCHIRALDI, <i>et als.</i> , Defendants.		

The defendant SENGGER COAL & ICE CORPORATION, a Corporation of the State of New Jersey, answering the Amended Bill of Complaint, says that: 20

1. It has no knowledge or information sufficient to form a belief as to allegations contained in paragraph 1 of the Amended Bill of Complaint.

2. It has no knowledge or information sufficient to form a belief as to allegations contained in paragraph 2 of the Amended Bill of Complaint.

3. It has no knowledge or information sufficient to form a belief as to allegations contained in paragraph 3 of the Amended Bill of Complaint. 30

4. It has no knowledge or information sufficient to form a belief as to allegations contained in paragraph 4 of the Amended Bill of Complaint.

5. It has no knowledge or information sufficient to form a belief as to allegations contained in paragraph 5 of the Amended Bill of Complaint. 40

Answer to Amended Bill of Complaint.

6. It denies the allegations contained in paragraph 6 of the Amended Bill of Complaint.

7. It denies the allegations contained in paragraph 7 of the Amended Bill of Complaint.

10 8. It denies the allegations contained in paragraph 8 of the Amended Bill of Complaint.

9. A suit for specific performance will not lie against this defendant, because it is not and never has been a party to an agreement of sale with the complainants.

20 10. The said amended Bill of Complaint discloses no legal agreement of sale between this defendant and the complainants.

11. The said Amended Bill of Complaint discloses a want of equity as against this defendant and discloses no grounds for the inter-position of a Court of equity.

12. The title to the premises fully described in the Amended Bill of Complaint is not marketable.

30 13. The title to the premises fully described in the Amended Bill of Complaint is defective in the following respects:

(a) It is subject to a lease made by Louis Lewin to The Highland Construction and Wrecking Co., dated May 24, 1923, for a period of ten years from June 1, 1923, which lease is recorded in the Register's Office of Hudson County, in Book 1513, on page 248.

40

Answer to Amended Bill of Complaint.

(b) It is subject to municipal taxes for the year 1929 in the amount of \$474.53.

(c) It is subject to a judgment rendered by the New Jersey Supreme Court in favor of Harris Thrown Silk Corporation, against Louis Levine, et al. which judgment was entered October 2, 1920 in the amount of \$4,150.00.

10

(d) It is subject to a judgment rendered by the New Jersey Supreme Court in favor of Max Posnock, against Louis Levine, *et al.*, which judgment was entered June 16, 1913 in the amount of \$402.79.

(e) It is subject to a judgment rendered by the New Jersey Supreme Court in favor of Central Trust Co. of Camden, N. J, against Louis A. Levin, which judgment was entered March 30, 1912, in the amount of \$4,802.87.

20

(f) It is subject to a judgment rendered by the New Jersey Supreme Court in favor of Builders' Material Corporation against Louis Levin, *et al.*, which judgment was entered October 29, 1926 in the amount of \$858.18.

(g) It is subject to a judgment rendered by the New Jersey Supreme Court in favor of the Manhattan Shirt Co., a Corporation against Louis Levin, *et al.*, which judgment was entered July 13, 1927 in the amount of \$813.84.

30

(h) It is subject to a decree rendered by the United States District Court, whereby Louis Levin was adjudicated bankrupt on April 29, 1918.

(i) It is subject to a judgment docketed in the Common Pleas Court of Hudson County in favor of New Jersey Roofing and Sheet Metal Works,

40

Answer to Amended Bill of Complaint.

Inc., against Louis Levin, *et al.*, which judgment was docketed on September 30, 1926 in Book 34 of Docketed Judgments for Hudson County, and on which remains due and unpaid the balance of \$375.00.

10 (j) It is subject to a judgment rendered by the Circuit Court of Hudson County in favor of Paul Horowitz against Lewis Levin, *et al.*, in the amount of \$690.25, which judgment was recorded in Book 36 of Judgments, on page 354.

(k) It is subject to a judgment rendered by the Circuit Court of Hudson County in favor of Max Posnock against Lewis Levin, *et al.*, in the amount of \$1,444.11, which judgment was recorded in Book 36 of Judgments, on page 390.

20 (l) It is subject to a Writ of Attachment in favor of Charles J. Larkey, against Louis Levin, which Writ of Attachment was issued September 23, 1920 in the amount of \$1,000.00, which was recorded in Book 9 of Attachments for the said County, on page 16.

30 (m) It is subject to a bond entered into by Louis Levin, *et al.*, to Louis Madigan, Sheriff of the County of Hudson, which bond was filed November 10, 1920 in Book 5, on page 138.

(n) It is subject to a mortgage executed by Jacob Maloyfsky to Louis Lewin, which mortgage is dated May 28, 1928 and recorded May 29, 1928 in Book 1507 of Mortgages for Hudson County, on page 266, which mortgage was given to secure the sum of \$9,000.00. Said mortgage was assigned to Hudson County National Bank of Jersey City, by assignment dated May 29, 1928 and recorded June

Answer to Amended Bill of Complaint.

5, 1928 in Book 187 of Assignments for said County, on page 332.

(c) A survey discloses an encroachment of a fence on the west side of the premises.

14. The deed, if any, tendered by the complainants is not in accordance with the terms of the agreement annexed to the Bill of Complaint and marked "Schedule A", inasmuch as it is not a Warranty Deed free from all encumbrances. 10

15. Any negotiations on the part of this defendant to be released from the claim of the complainants was without knowledge of its legal rights and that it was not bound to perform, and in all events said negotiations were made with intention to amicably settle the matter and with full knowledge of the fact on that part of the complainants, that this defendant was attempting to settle the matter, and by reason thereof, said negotiations are not an admission of liability. 20

16. Any negotiations entered into by this defendant were made without prejudice to their right to deny liability under said agreement.

17. In good conscience and equity, complainants are not entitled to enforce specific performance against this defendant. 30

SAMUEL J. RICH,
Solicitor of Defendants,
Senger Coal & Ice Corporation.

Replication.

(Filed September 19, 1930)

IN CHANCERY OF NEW JERSEY.

Between
JACOB MALOYFSKY and FANNIE
MALOYFSKY,
Complainants,
and
LEONARD SCHIRALDI, also known as
LOUIS SCHIRALDI, and SENG
COAL & ICE CORPORATION, a Cor-
poration of the State of New Jer-
sey,
Defendants.

20 The complainants, replying to the Answer filed by the defendant Senger Coal & Ice Corporation in the above entitled cause, says that:

1. Joins issue with the allegations contained in paragraphs 1 to 8, inclusive, of the Answer.

30 2. Deny that there is any merit contained in the objections or allegations contained in paragraphs 9 to 11, inclusive, of said Answer, and therefore denies the same.

3. Deny the allegations contained in paragraphs 12 and 13 and alleges that the said defendant never set up any objections to the title, but on the other hand deliberately refuse to take title to the said premises, and avoided and endeavored to avoid taking title to the said premises, acknowledging itself to be completely in default, and acknowledg-

40

Replication.

ing due and legal tender on the part of the said complainants of the performance of the said contract, and waived any tender on the part of the complainants, at all times endeavoring to avoid the performance of the said contract. The complainants deny the special defenses from a to o, inclusive, of said paragraph 13, and alleges that the said title is marketable. 10

4. Your complainants separately answer the said special defenses of paragraph 13 as follows:

13a. Denies the allegations contained therein and say that the said lease is not in effect and has been surrendered and cancelled and is of no force and effect, all of which is a matter of record in the Registrar's office of the County of Hudson, and all of which information was furnished to the defendants. 20

13b. Your complainants were ready, able and willing and are ready, able and willing to pay any taxes mentioned in said paragraph, all of which was to be adjusted, and was ready to be adjusted on the closing of the title, and which is ready to be paid at any time by the complainants.

13c; d; e; f; g; h; i; j; k; l; m. That the judgments, attachments, bonds and proceedings mentioned in all of said paragraphs are not against the said Louis Levine in the chain of title of the premises described in the complaint, but against another person by similar or other name, and are therefore not liens against the property or premises in question, and all of which information by way of affidavit was furnished to the defendant, its rep- 30 40

Replication.

representatives, agents and attorneys to that effect.

10 13n. The said mortgage was delivered and presented for cancellation or was offered and ready to be delivered and presented for cancellation, and was then and there ready at all times to close the title, and the mortgage was
20 ready to be cancelled and discharged of record by the said mortgagee, or collateral holder thereof, and by one Louis Levine, who was present, and who was prepared and made tender or offered to make tender of the discharge and cancellation of the said mortgage, that your complainants were ready, able and willing to discharge the said mortgage at the
30 time of the closing of the title, and were then and there ready to deliver a Deed in accordance with the terms of the contract, free and clear and discharged of the said mortgage, and are ready and willing to do so at all times. The defendant, and its representatives waived the actual cancellation and discharge of the said mortgage, claiming that they were not ready to perform, and were in default, acknowledging legal tender on the part of the complainants and refused to take title to the premises.

13o. That the said encroachment does not in any way affect the marketability of said title, and that the contract calls for subject to such state of facts as an accurate survey will show.

40 5. Denies the allegations contained in paragraph 14 and say that the deed was tendered in

Replication.

accordance with the terms of the contract free and clear of encumbrances and the same was duly acknowledged and admitted to be a proper tender by the defendants and their representatives and attorneys, and that the said defendants refused to perform the contract and acknowledged themselves to be in default and waived any tender on the part of the complainants and notified the complainants that they refused to take title to the said premises, and were endeavoring to avoid the performance thereof. 10

6. Deny the allegations contained in paragraph 15 and join issue with the same.

7. Deny the allegations contained in paragraph 16 and join issue with the same. 20

8. Deny the allegations contained in paragraph 17 and say that the complainants are entitled to specific performance of the contract against the defendant, who is an assignee thereof, and who assumed the terms and the performance of said contract.

SAMUEL HARBER,
Solicitor and of Counsel
with Complainants. 30

I hereby consent to the filing of the above Replication, and consent that an Order may be entered to that effect.

SAMUEL J. RICH,
Solicitor and of Counsel for
Defendant, Senger Coal &
Ice Corporation. 40

Rejoinder.

(Filed September 19, 1930)

IN CHANCERY OF NEW JERSEY.

10	Between JACOB MALOYFSKY and FANNIE MALOYFSKY, Complainants, and LOUIS SCHIRALDI, <i>et als.</i> , Defendants.	}	On Amend- ed Bill, &c. Rejoinder.
----	---	---	---

20 The defendant SENGER COAL AND ICE CORPORATION, a corporation of New Jersey, by way of Rejoinder to the Replication filed by the complainants says that:

1. It denies all the allegations contained in said Replication and joins issue on the same.

SAMUEL J. RICH,
 Solicitor of Defendant,
 Senger Coal and Ice Corporation.

30

40

Interrogatories.

IN CHANCERY OF NEW JERSEY.

Between
 JACOB MALOYFSKY and FANNIE
 MALOYFSKY,
 Complainants,

and

LEONARD SCHIRALDI, also known as
 LOUIS SCHIRALDI, and SENDER
 COAL & ICE CORPORATION, a Cor-
 poration of the State of New Jer-
 sey,
 Defendants.

On Amend-
 ed Bill, &c.

10

Interroga-
 tories.

To:

20

SENGER COAL & ICE CORPORATION, or its Solicitor,
 SAMUEL J. RICH.

SIRS:

PLEASE TAKE NOTICE, that the complainants, re-
 quire the defendants, Senger Coal & Ice Corpo-
 ration, to answer under oath within the time re-
 quired by the law, the following interrogatories, to
 wit:

30

1. When did the Senger Coal & Ice Corporation
 take an assignment of the contract annexed to the
 complaint?

2. From whom did the Senger Coal & Ice Corpo-
 ration obtain the assignment of said contract?

3. Set forth a complete copy of the agreement,
 written assignment, or agreement of assignment of

40

Interrogatories.

the contract annexed to the complaint, as made, executed and delivered to the defendant.

4. Where was said agreement or assignment or said contract executed and delivered?

10 5. Who represented the said defendant in the transaction whereby said contract annexed to the complaint was assigned to the defendant Senger Coal & Ice Corporation, and in whose office was the entire deal closed and consummated?

6. What consideration, if any, was paid by the Senger Coal & Ice Corporation in the taking over of or the assignment of said contract annexed to the complaint?

20 7. Did the complainants furnish the defendant or its assignor or assignors with affidavits that there were no judgments against Louis Levine?

8. When did the defendant or its assignor or assignors set up any objection to the title, if any, and if any objections to the title were set up, please set forth to whom, when, and what said objections were at the time?

30 9. Were all the objections answered fully by affidavit or other proof to the satisfaction of the Title Company or its Attorney representing the defendant Leonard Schiraldi also known as Louis Schiraldi, or his assignee or assignees?

10. Were there any intervening assignments from Schiraldi to any other party? If so, set forth

Interrogatories.

to whom, the nature of the agreement, and full copy of said agreement or assignment.

11. In what respect is the title in question unmarketable? Set forth the nature of the particulars or objections which cause said title to be unmarketable.

10

12. What efforts or endeavors did the defendant or its assignor or assignors make to close this title in question?

13. If the said title was not closed, why did not the defendant or its assignor or assignors close the title setting forth the reason or reasons therefor.

14. Why did the defendant negotiate an amicable settlement, if any?

20

15. What legal rights if any, was the defendant ignorant of at the time it endeavored to negotiate settlement?

16. What interest, if any, has the defendant Senger Coal & Ice Corporation in the contract annexed to the complaint if any. Set forth in detail.

30

17. In what respect does the Bill of Complaint fail to disclose want of equity as against this defendant?

18. If no legal tender was made by the complainants, what tender if any was made, and where, and what was the result thereof?

40

Interrogatories.

19. Did the defendants waive any tender on the part of the complainant?

20. What tenders did this defendant make to perform and close the contract, and what tenders did it make on its part, if any?

10 21. When, if ever, were the encroachments as indicated by the survey, disclosed to the complainants, and what is the nature of such encroachments?

22. In what respects is the Deed, which was tendered by the complainants not in accordance with the contract?

20 SAMUEL HARBER,
Solicitor of Complainants.

30

40

Case.*I. H. Brand. Called by Complainants. Direct.*

IN CHANCERY OF NEW JERSEY.

Between

JACOB MALOYFSKY, *et al.*,
MALOYFSKY,
Complainants,

and

LOUIS SCHIRALDI, *et als.*,
Defendants.

On Bill, &c.

10

Transcript of shorthand notes of testimony taken
on final hearing in above stated cause, at Chan-
cery Chambers, Jersey City, March 18, 1931, before
his Honor, James F. Fielder, Vice-Chancellor.

20

APPEARANCES:

Mr. SAMUEL HARBER and Mr. JOHN W. OCK-
FORD for Complainants.Mr. SAMUEL J. RICH for Defendant Senger
Coal & Ice Corporation.

30

COMPLAINANT'S CASE.

ISADORE H. BRAND, sworn as a witness on the
part of the complainants, testifies as follows:

DIRECT EXAMINATION BY MR. OCKFORD:

Q. Mr. Brand, you are a member of the bar of
this state, are you not? A. Yes.

40

I. H. Brand. Called by Complainants. Direct.

Q. And your office is in Hoboken? A. 85 Washington Street, Hoboken.

Q. Did you, in a professional capacity, have anything to do with the transaction arising out of a contract between the complainants in this case, Jacob Maloyfsky and Annie Maloyfsky, his wife, and one Louis Schiraldi? A. Yes.

10 Q. I show you what purports to be the original of the contract and ask you if that is the contract I have just referred to? A. I have the other duplicate. Yes; I guess it is.

Q. You have in your hands the original contract, have you not? A. The original contract between Jacob Maloyfsky and Annie Maloyfsky and Louis Schiraldi; yes.

20 BY THE COURT:

Q. Did you draw the contract? A. No; I did not.

Q. Whom did you represent in the transaction? A. The contract was brought to me—

Q. Whom did you represent? A. It was given to me by the Rubel Ice Company in Brooklyn, with whom Louis Schiraldi was employed as general manager.

30

Mr. Ockford: I offer the contract in evidence.
(Marked Exhibit C-1.)

BY MR. OCKFORD:

Q. In this transaction, after the contract was made, whom did you first represent? A. The Rubel Ice Company.

40 Q. Is that a corporation? A. It was a New York corporation at the time.

I. H. Brand. Called by Complainants. Direct.

Q. Did you then, in connection with this contract, take any action with respect to arranging for the closing? A. Yes. At the request of Mr. Rubel of the Rubel Ice Company, I succeeded in postponing the date of the closing until sometime in March, I think.

Q. March, 1930? A. March, 1930; yes.

Q. Did you after that represent any one else in connection with this same transaction, and if so, whom? A. About March 5, 1930, I received a letter from an attorney of New York, by the name of Nathan Friedman, to the effect that— 10

The Court: Don't tell us the contents of the letter.

Q. Did you represent any one else in connection with the transaction? A. I was supposed to represent the Senger Coal & Ice Company. 20

Q. Did you? A. I would say I did; yes.

Q. You met Mr. Senger in this transaction, did you? A. Yes; I did.

Q. You attended with Mr. Harber and with Mr. Senger, the president of the Coal & Ice Company? A. Yes.

Q. In connection with this transaction? A. Yes.

Q. Will you tell us the last step in the transaction that you had anything to do with? A. Well, the last step was, I think, the meeting we had at Mr. Harber's office in Union City. 30

Q. Can you fix the time? A. Well, I would say some time either in the latter part of April, or the beginning of May.

Q. Was it at a time that had been fixed for closing? A. Yes.

I. H. Brand. Called by Complainants. Direct.

BY THE COURT:

Q. 1929? A. 1930.

BY MR. OCKFORD:

10 Q. Did you attend on more than one occasion at Mr. Harber's office, at a time fixed for closing? A. Yes.

Q. Will you tell us how many times altogether you have been there? A. I may have been there two or three times.

Q. Was the transaction completed and the title closed on any of these occasions? A. No; it was not.

20 Q. Did you, Mr. Brand, arrange for any of the closings, as to time and place? A. Well, that was done by telephone with Mr. Harber, asking for a postponement, and then there was a signed stipulation postponing the closing.

Q. And the last postponement was requested by you on behalf of which client? A. The Senger Coal & Ice Company.

30 Q. Did you make any payments on account of the purchase price mentioned in this contract? A. I paid a thousand dollars. I think it was some time in February, 1930, if I am not mistaken.

Q. Can you give it to us exactly? A. I think you have my correspondence which would show a letter enclosing a check to Mr. Harber.

Q. I think you have it there, Mr. Brand. A. February 14th, I mailed a letter to Mr. Harber, enclosing a check for \$1,000 on account of the purchase price.

40 Q. Did you make any further payments? A. No; I do not think I did.

I. H. Brand. Called by Complainants. Direct.

BY THE COURT:

Q. Whose check did you mail? A. I mailed our personal check—the office.

Q. Your firm's check? A. The firm's check; yes.

BY MR. OCKFORD:

10

Q. Will you please tell us, what took place upon the last meeting at Mr. Harber's office with respect to this transaction? First, who was there? A. Mr. Harber was there; Mr. Harber's client, some man and woman—I think it was Mr. and Mrs. Maloyfsky; there was a young man representing Mr. Nathan Friedman, a New York attorney, who was the New York attorney for the Senger Coal & Ice Company.

Q. Do you know the young man's name? A. I cannot recall it. Mr. Senger was present. I do not recall whether one Saul Freedman, a real estate operator, for the Rubel Ice Company, was there or not. He may have been.

20

Q. At that meeting, what was done; what was said? A. Senger refused to go through with the contract, stating that he did not need the property; that he was saddled with it in conjunction with some other property in a transaction he had closed with the Rubel Ice Company and he wanted to be relieved of the contract by paying an additional sum. I do not recall whether the offer was a thousand dollars or fifteen hundred dollars.

30

Q. Was that offer accepted or rejected? A. It was rejected.

Q. Was there any further arrangement with respect to a time and place for closing? A. Not that I know of.

40

I. H. Brand. Called by Complainants. Cross.

Q. Was that the last word on the subject? A. That was the last word on the subject and I had nothing to do with it after that.

Q. Did you at that time, on behalf of your client, or did your client, make any objection to the title to the property? A. No; there was no objection made to the title.

10 Q. Had you made a search? A. No.

Q. Had any one made a search, do you know? A. I think there was a search begun by the New York Title Company. If I am not mistaken, there was a report issued by them that was submitted to me, and I think that some of the questions that were set up in that report of title, I mailed to Mr. Harber. That was before the Senger Coal & Ice Company came into the picture.

20 Q. Was there anything said about those objections at this meeting that you had in Mr. Harber's office? A. No; not a word.

Q. And at this time were you still acting for the Rubel Ice Company, as its attorney? A. Well, I would not say that. I was informed by the Rubel Ice Company that they were out of the picture.

Q. At what date? A. Some time in the early part of March.

30

CROSS EXAMINATION BY MR. RICH:

Q. Whom did you represent originally in this transaction? A. The Rubel Coal & Ice Company.

Q. Who came to you and hired you as attorney? A. They did not come to me. I happened to be at the office of Mr. Rubel of the Rubel Ice Company in Brooklyn, on election day, 1929. Mr. Rubel brought the subject up personally, and then introduced me

40

I. H. Brand. Called by Complainants. Cross.

to his real estate operator, Saul Freedman. Then he made an arrangement for the real estate operator to meet me at my office the following Thursday, and then the papers were submitted to me.

Q. Did the real estate operator meet you at your office? A. Yes.

Q. With whom? A. All alone.

Q. Is it not a fact that you were hired to represent Shiraldi in this matter? A. I would say that I was retained by Mr. Rubel to represent the purchaser of the property, if that is Shiraldi. 10

Q. Why, then, did you accept a contract in the name of Shiraldi? A. I did not. I was not there at the time the contract was executed. It was given to me after it was executed and delivered.

Q. You did not come into this transaction until after the contract had been executed? A. I came into this transaction two days after election day, 1929. That was about a month after the contract had been made. 20

Q. You testified that you attended at Mr. Harber's office several times to close this title? A. Yes.

Q. On behalf of whom? A. As to the Senger Coal & Ice Company, at the request of Nathan Friedman, of New York.

Q. Do you know Mr. Nathan Friedman? A. I never saw him in my life. 30

Q. Upon what dates did you attend at Mr. Harber's office? A. Offhand, I cannot say, but it was some time between the 5th of March and the first week in May of 1930.

Q. The several times that you attended Mr. Harber's office, you appeared for the Senger Coal & Ice Company? A. Yes; after March 5th.

Q. Can you tell us when you were engaged to appear for the Senger Coal & Ice Corporation? A. On the 5th of March, 1930. 40

I. H. Brand. Called by Complainants. Cross.

Q. By whom were you engaged? A. By Nathan Friedman, an attorney in the Woolworth Building, New York.

What was the extent of your authority? A. Do you want to see the letter he sent me? I have it right here.

10 Q. Will you answer the question? A. Only by a letter that I received from him on March 5th, to the effect that he was attorney for the Senger Coal & Ice Company, who had purchased from the Rubel Company.

Q. May I see that letter? A. Surely.

The Court: If you see it, you use it.

Mr. Rich: Yes, sir; I intend to use it.

(Letter is produced and handed to Mr.

20 Rich.)

Mr. Rich: I offer this letter in evidence.

Mr. Ockford: I have no objection.

(Market Exhibit D-1.)

Q. What next did you do on behalf of the Senger Coal & Ice Corporation, with respect to this title? A. I communicated with Mr. Harber relative to postponing the closing.

Q. Is that all? A. That is all.

30 Q. In other words, the Senger Coal & Ice Corporation merely requested an adjournment? A. I don't know what you would call it. Mr. Friedman asked me to continue in the matter with him and to get the matter postponed until Mr. Senger could appear in person.

Q. And that was the entire extent— A. That is all I did in the matter.

40 Q. You said you paid \$1,000 to Mr. Harber? A. Yes.

I. H. Brand. Called by Complainants. Cross.

Q. What was the purpose of that thousand dollar payment? A. It may have been that I applied for another extension or postponement of time of closing and that Mr. Harber refused to grant it and then the Rubel Company paid \$1,000 additional.

BY THE COURT:

10

Q. You say: "It may have been". Can you say whether it was? A. This is the way it was. I had postponed this matter on numerous occasions from November or December, 1929, until February, 1930. Mr. Harber then refused to continue it any further and then I was told to ask him if he would grant another postponement if he was paid an additional thousand dollars. I communicated that fact to Mr. Harber and then I got the thousand dollars.

20

BY MR. RICH:

Q. For whom did you request this postponement? A. That was for the Rubel Coal & Ice Corporation, or Shiraldi.

Q. And that thousand dollars was paid by your own check? A. Yes, sir.

Q. Were you reimbursed? A. The Rubel Ice Company sent us their check.

30

Q. Did you ever receive a report from the New York Title Company, in respect to this property? A. The report of the title company seems to have been issued by the time I got all the papers and Freedman, the real estate operator, delivered it to me.

Q. And as attorney for these parties did you pass that title for your client? A. I did not do

40

I. H. Brand. Called by Complainants. Cross.

anything after that. I did write a letter to Mr. Harber, setting out some objections to the title, and I did nothing with it afterward but request the title company to continue the search down to the date of the closing. I also told Mr. Friedman that, after he came into the case.

10 Q. Did this title report contain any objections to the title? A. It contained some questions—some judgments of record—

Q. Just state whether it contained any objections? A. Will you let me refer to our correspondence? Well, if you call them objections. They set up a mortgage and they set up several judgments against persons of a similar name in the title, all of which I conveyed to Mr. Harber. He said he could clear them up by an affidavit. I never did
20 anything further.

Q. You never passed upon this title for your clients, did you? A. No; I did not.

Q. You stated a few minutes ago that you wrote Mr. Harber in reference to these objections? A. Yes.

Q. Was there any action taken by Mr. Harber? A. Only to reply to my letter. I can give you his letter if you want it. On November 19, 1929, he said: "Answering your letter—"

30 Q. Never mind. Did Mr. Harber take any action to clear up these objections to your satisfaction? A. No; I never went any further in my correspondence.

Q. You stated that Mr. Senger, or some representative of the Senger Coal & Ice Corporation, offered to pay Maloyfsky a sum of money to settle this matter? A. That was the last time we were at Mr. Harber's office.

I. H. Brand. Called by Complainants. Redirect.

Q. Why was this offer of settlement made? A. Because he said he had no use for the property; that he did not want to go through with it; that he was saddled with it in conjunction with a lot of other real estate in a transaction with the Rubel Company.

Q. Is it not a fact that Mr. Maloyfsky, or Mr. Maloyfsky's attorney, threatened to institute an action against him? A. He said he would bring an action for specific performance, if he did not go through with the contract. 10

Q. Is it not a fact— A. He might have said it—I don't recollect.

Q. In your presence, was any offer made to Senger by Maloyfsky, or Maloyfsky's attorney, to accept a settlement of this case? A. Not that I can recall. Only something to the effect— No; if I recall correctly Mr. Harber stated there was \$8,000 still due under the contract. I don't remember. I cannot recall it. I have not refreshed my recollection on the matter at all. 20

Q. You said an offer of settlement was made by Senger? A. Senger said that he would give a thousand or \$1,500 to get out of the contract.

Q. Was that offer accepted? A. No, it was not.

Q. Was there a counter-offer made? A. I cannot recall any. 30

REDIRECT EXAMINATION BY MR. OCKFORD:

Q. You say you received a letter from Mr. Harber answering your letter in which you referred to certain objections. Will you produce that letter, please. A. (Witness does as requested.)

I. H. Brand. Called by Complainants. Redirect.

Mr. Ockford: Letter dated November 19, 1929, is produced. I ask to have it marked in evidence.

(Marked Exhibit C-2.)

10 Q. I show you a four page letter purporting to be from your firm to Mr. Harber and ask you if this is the letter you referred to in your testimony a few moments ago, as having been a letter containing objections? A. Yes.

Mr. Ockford: I ask to have the letter marked in evidence.

(Marked Exhibit C-3.)

Q. Who was Mr. Shiraldi in this transaction, if you know? A. He was associated with the Rubel Coal & Ice Company.

20 Q. In what capacity, if you know?

Mr. Rich: I object.

The Court: Objection sustained.

Q. Did you meet Mr. Shiraldi in the transaction at any time? A. Yes; he came to my office every time that there was a stipulation signed to postpone the closing.

30 Q. With whom did he come, if any one? A. He was alone sometimes and some times he came with Mr. Freedman, the real estate operator.

Q. Did you know Mr. Senger before this transaction?

Mr. Rich: I object.

The Court: I think the question is immaterial whether he knew him before the transaction or not.

I. H. Brand. Called by Complainants. Redirect.

BY THE COURT:

Q. Were the postponements of the closing of title agreed to in writing? A. Yes.

Q. Have you got them or any of them here? A. Here is one of them.

Q. Is this a duplicate original? A. Yes; and here is another one; and here is another one. They are all signed the same way. 10

Q. Were there not more than these three, do you know? A. That is all I seem to have in my papers.

The Court: Mr. Ockford, were there not more than three agreements of postponement?

Mr. Ockford: Yes; there were. There were, I think, at least six. I will show Mr. Brand all of them that I have—November 18th, December 3d, March 4th. 20

Q. Were there more in writing than these three which you produce? A. I cannot recollect.

Q. You don't know? A. No.

The Court: Will it be agreed by counsel that all of the stipulations for adjournment of closing, were signed by Jacob Maloyfsky and wife and by Louis Shiraldi? 30

Mr. Ockford: All that were in writing; yes, sir.

The Court: And by no other party to the suit?

Mr. Ockford: Yes, sir.

BY MR. OCKFORD:

Q. Did you at any time, up to and including the last day upon which you met at Mr. Harber's office, 40

I. H. Brand. Called by Complainants. Redirect.

state to Mr. Harber that you were acting for the clients for whom you were acting? A. I must have told Mr. Harber, immediately after I received notice from Friedman, the attorney, that I was then representing the Senger Coal & Ice Company.

Q. You say you must have told him. Did you? A. Well, I did. I have looked up my correspondence and I find that I did send Mr. Harber a letter every time I received one from Mr. Friedman.

Q. In any of these letters, did you mention the name of the client for whom you were acting? A. Yes; Mr. Senger.

Q. And can you give us the date of the first letter in which you mentioned Mr. Senger's name? A. I believe March 29, 1930.

Q. Is that the first date? A. That is the first date I wrote Mr. Harber a letter—the first date, I think.

Q. And that was after the date that you met for the closing, the time that you were unable to effect a settlement? A. No. The time we met, when we could not effect a settlement, was, I think, the first week in May.

Q. The last date of continuance of this title, according to this written stipulation, was March 11th. A. March 11th; that is right.

Q. Were there adjournments of the closing subsequent to March 11th, that were not reduced to written stipulations? A. I cannot recall that. I haven't any in my files.

Q. You don't know of any except what you have in your files? A. Except what I have in my files.

Q. Then you give us the last date that you met Mr. Harber and tried to negotiate the closing? A. I cannot recollect the date. It must have been the latter part of April or the beginning of May.

Thomas M. Stuhr. Called by Complainants. Direct.

Q. Did you at any time during the transaction, inform Mr. Harber that there had been an actual assignment of this contract by Schiraldi?

Mr. Rich: Objected to.

The Court: Objection sustained.

10

THOMAS M. STUHR, sworn as a witness on the part of the complainant, testified as follows:

DIRECT EXAMINATION BY MR. OCKFORD:

Q. You are connected with the New Jersey Title Guarantee & Trust Company, are you not? A. Yes.

Q. In what capacity? A. Lawyer.

20

Q. In what department? A. Title department.

Q. Did you, for your company, have charge of any transactions between the Rubel Ice Company and the Senger Coal & Ice Company?

The Court: How is that material to this issue?

Mr. Ockford: I will make it more specific.

30

Q. Did you, for your company, have charge of any transaction between the Rubel Ice Company and the Senger Coal & Ice Company, with respect to property, the title of which was in the name of Jacob Maloyfsky and Annie Maloyfsky, property in Third Street and West Street, Union City? A. No, sir.

No cross examination.

40

Samuel Harber. Called by Complainants. Direct.

SAMUEL HARBER, sworn as a witness on the part of the complainant, testifies as follows:

DIRECT EXAMINATION BY MR. OCKFORD:

Q. You are an attorney and counsellor at law of this State? A. I am.

10 Q. Referring to the contract, Exhibit C-1, did you have anything to do with the preparation of that contract? A. I did.

Q. For whom did you act in the transaction? A. For the vendors, Mr. and Mrs. Maloyfsky—Jake Maloyfsky.

Q. From that time on, did you continue to represent them in connection with this transaction? A. I did.

20 Q. What was done with respect to adjourn the closing, that is, from the time fixed by the contract, October 28, 1929? A. The vendee was not ready and numerous adjournments were obtained for the closing of the title by stipulation and otherwise.

Q. Were all those adjournments in writing, or not? A. No. I believe that most of them were in writing.

30 Q. Who requested the several adjournments? A. One postponement was requested in the beginning by Mr. Spingarn, an attorney of Union City, and thereafter all the other adjournments, or postponements, were requested by Mr. Brand.

Q. In this transaction, did you meet Mr. Schiraldi? A. I did.

Q. In person? A. I did.

40 Q. Did he attend your office on any of the occasions at which title was to be passed? A. The only time he appeared at my office, to my recollection, was when the contract was signed. He never appeared after that.

Samuel Harber. Called by Complainants. Direct.

BY THE COURT:

Q. Where did you meet him on these several occasions? A. I did not meet him. The stipulations were sent to the attorney, Mr. Brand, and came back signed.

Q. I understand you to say that the only time you met Mr. Shiraldi in this transaction was the day the contract was signed? A. Correct. 10

Q. He was not at your office at any other time? A. Not to my recollection.

BY MR. OCKFORD:

Q. Did you, on behalf of your client, receive an additional payment of \$1,000 on account? A. I did.

Q. And were there further postponements after the receipt of that money? A. There were. 20

Q. What was the last date fixed for closing, if there was a date finally fixed? A. I think it was the time that Mr. Senger was there, with Mr. Brand and some representative from Mr. Friedman's office, a lawyer in New York.

Q. Was that meeting pursuant to a previous arrangement? A. It was at the request of Mr. Brand. My clients were there at the time also and— 30

Q. Pardon me. Was Mr. Senger there on more than one occasion? A. That was the first time Mr. Senger was there.

Q. Was he there any any subsequent date? A. No, sir.

Q. He was there just once? A. That one time.

BY THE COURT:

Q. That was that final meeting? A. That was the final meeting. 40

Samuel Harber. Called by Complainants. Direct.

BY MR. OCKFORD:

Q. Go ahead. Who were there? A. Mr. and Mrs. Maloyfsky, Mr. Brand, myself, some young man representing Mr. Nathan Friedman's office, a lawyer of New York; an agent by the name of Freedman, and some other gentleman, but I do not know
10 who the other gentleman was at the present time.

Q. Please tell us what happened on that occasion. What was said by the different persons? A. Mr. Freedman, the agent and the other gentleman were requested to leave the room and to go to an adjourning room, which they did. Mr. Brand, or rather Mr. Senger, said that he was representing the Senger Coal & Ice Company—I believe he said he was the president of the company—and that he
20 did not want to go through with the taking of the title to this property, because he had no use for it, and he had been saddled with that and a lot of other property in some deal with the Rubel Ice Company and he wanted to be relieved from the contract and wanted to make a settlement; that he was not going to go through with the closing of this title, and negotiations were then made by him and Mr. Brand, participated in by this representative of Mr. Friedman, who said he represented the
30 Senger Coal & Ice Company, to settle the matter.

Q. What was said about it and by whom? A. Mr. Senger, and also Mr. Brand and the other gentleman, in the beginning offered \$1,000 more that they should be released from the contract, and my clients did not want that; they wanted them to take title and insisted upon their taking title all the way through. I then suggested as a matter of possible adjustment to my clients to consider a settlement and they declined and finally said that
40

Samuel Harber. Called by Complainants. Direct.

they would consider \$2,500, plus the payment of my fees.

BY THE COURT:

Q. Your clients said that? A. My clients said that; otherwise they wanted title to be closed; they insisted upon title closing. Mr. Brand then, after talking to Mr. Senger and the representative, came up to \$1,500 and there was considerable talk after that—I guess for about an hour or so. My clients insisted upon them taking title and would not come down any lower than the amount suggested by them, and finally I was called away and I left all of the parties there, and I said I would be back in twenty minutes or half an hour to see whether they could not adjust their differences. 10

Q. Did you come back? A. I did come back, and when I came back, Mr. and Mrs. Maloyfsky were there and all the other parties had left my office, with a message left by Mr. Brand, in which he said that his client would not take title, but he would again take up the matter with his client and Mr. Friedman, with reference to increasing their offer of adjustment. 20

Q. Was there any other time fixed for closing? A. There was not. 30

Q. Or any further notice? A. There was no further notice.

Q. What, if anything, was said at that time, about objections to the title? A. There were not any objections made. There wasn't anything said about the title. No objections, nothing said about that.

Q. At the time, were your clients ready to give a deed? A. They were ready at all times. 40

Samuel Harber. Called by Complainants. Direct.

Q. Had a deed actually been prepared? A. There was a deed prepared.

Q. Ready? A. Ready.

Q. What, if anything, was said about the deed?
A. Mr. Brand told me there wasn't any need to make a tender; that he would acknowledge a legal tender, in view of the fact that his clients did not want to take title.

Q. But you did have the deed there? A. I had.

Q. What, if anything, was said about objections to the title? A. There wasn't anything mentioned about objections.

Q. Was your client at that time making any disposition of the mortgage of \$9,000, which had been assigned to the Hudson County National Bank?

A. That mortgage was ready for cancellation at any time that they were ready to take title, and has since been cancelled of record.

Q. At this particular time, had you made arrangements for cancellation? A. Yes.

Q. Was there any objection made at that time with respect to any survey objection?

Mr. Rich: Mr. Harber has already stated there was no objection to the title. I do not think it is necessary to go into details.

The Court: I think the objection is well taken. You asked Mr. Harber whether there were any objections to the title and he said "No". That covers survey and everything else.

Q. As a matter of fact, at that time, you were prepared to close, were you not? A. Yes; I was prepared at all times.

Q. Subsequent to that, were negotiations ever reopened? A. Pursuant to the message left by

Samuel Harber. Called by Complainants. Cross.

Mr. Brand that he would communicate with me, I believe in a week or two, I called Mr. Brand on the wire and asked him what his intentions were and he said that his client refused to increase the offer and refused to take the property and that he was through with him—something to that effect.

Q. Up to and including the time of your last interview that you have just testified to, had you been informed by any one that the contract had been assigned? A. No. 10

Q. And when was it that you first ascertained that there had been an assignment?

The Court: Counsel for the defendant must listen to these questions. The question is: When was it that you were first informed that there had been an assignment? 20

Mr. Rich: I object to that.

The Court: Objection sustained.

CROSS EXAMINATION BY MR. RICH:

Q. You are a subscribing witness to the contract; is that right? A. If my name is on it, yes.

Q. This is a contract between Jacob and Annie Maloysky and Louis Shiraldi. 30

The Court: The contract is in evidence. It speaks for itself.

Mr. Rich: It is my intention to show that the contract was signed by some other party—not by Louis Shiraldi.

The Court: The contract is in evidence. It shows what it shows. I do not know how it is signed. 40

Samuel Harber. Called by Complainants. Cross.

Q. Did Mr. Shiraldi sign this contract in your presence? A. He did. All parties to the contract did.

Q. You received \$1,000, you state, to adjourn this closing?

10

The Court: Please do not repeat the testimony. He has testified that \$1,000 was paid.

Q. From whom did you receive this \$1,000? A. From Mr. Brand—through his firm.

Q. And the request for adjournment was made by Mr. Brand, for whom? A. I do not recollect whether it was made for any particular individual simply an adjournment. That is all.

20

Q. This agent, by the name of Freedman, who was present at the final attempted closing, was an agent for whom? A. I don't know who he was agent for at that time, but originally—

The Court: The answer must be directed to that time.

Q. Did you ever receive any objections to this title from Mr. Brand? A. Yes; in the form of a letter.

30

Mr. Ockford: I desire to offer in evidence answers to interrogatories by the defendant Senger Coal & Ice Company. Some of the interrogatories were struck out.

The Court: There is an order on file covering that. I think that is enough.

Mr. Ockford: I ask the other side to produce the contract between the Rubel Ice Com-

40

pany and the Senger Coal & Ice Company, which was called for.

Mr. Rich: I have the assignment here and the rest of the papers.

The Court: The assignment from the Rubel Ice Company to the Senger Coal & Ice Company?

Mr. Rich: Yes, sir, your Honor.

The Court: I thought there wasn't any.

Mr. Rich: It has been our contention right along that there is no liability on the part of Senger. 10

The Court: I am asking about the facts. Is there such an assignment?

Mr. Rich: There is an assignment which I offered to the other side.

Mr. Ockford: This assignment is produced. I ask to have it marked in evidence.

The Court: What you produce is an assignment made by Shiraldi? 20

Mr. Rich: No. The demand is for an assignment of contract to the Senger Coal & Ice Company.

The Court: Mr. Ockford's demand is for the production of assignment made by Rubel Ice Company to the Senger Coal & Ice Company.

Mr. Rich: I have no such assignment.

The Court: You produced a paper and when he offered it in evidence, you did not make any objection to it. I think there is a misconception by counsel of the situation and that the record ought to show counsel for the defendant did not understand apparently, the request or demand of counsel for the complainant, and that the answer of counsel for the defendant to the demand to produce assignment made by the Rubel Ice Company to the Senger Coal & Ice Corporation, should have 30 40

been: "I have no such assignment." That is true, is it not?

Mr. Rich: It is.

The Court: Is there such an assignment?

Mr. Rich: No, sir.

The Court: Is there such an assignment in your possession, made by the Rubel Ice Company to the Senger Coal & Ice Corporation?

10 Mr. Rich: No, sir.

Mr. Ockford: I ask the other side to produce the contract between the Rubel Ice Corporation and the Senger Coal & Ice Company, relative to the transfer of business and property, including all rights under this contract.

Mr. Rich: We have no such contract in our possession.

20 The Court: That is an equivocal answer. You are here representing the Senger Coal & Ice Company?

Mr. Rich: Yes, sir.

The Court: If there is any such paper in the possession of the Senger Coal & Ice Company, it is the duty of the Senger Coal & Ice Company to produce it. The fact that you haven't got it does not mean that there is not any.

30 Mr. Rich: This notice was served upon me at a quarter before five yesterday afternoon. I have had no time to see Mr. Senger to find out about such assignment.

The Court: Is he here in court?

Mr. Rich: No, sir.

The Court: You must give counsel for the defendant some time to look for the paper and make inquiry about it.

40 Mr. Ockford: I wish to state to the court that the complainants made an effort to serve a subpoena *duces tecum*, on both the Rubel

Ice Company and the Senger Company, both of which are New Jersey corporations. With respect to the Senger Company, the registered agent was the Corporation Bureau at Trenton. On the subpoena being sent to that company, they informed the process server that they had resigned. We thereupon investigated in the Secretary of State's office and found that Mr. Senger was the registered agent, with an office in Hoboken. We were unable to find such office. We also tried to serve the Rubel Company, but we were not successful. I would like to have it produced. There is such a document, I know. 10

The Court: I will certainly give defendant's counsel an opportunity to ascertain whether there is such a paper or not, and I am not going to close the trial of this case, until he makes a definite answer here in court, to your demand. Is there anything else? 20

Mr. Ockford: No.

The Court: I will now go on with the defense. Have you any witnesses to produce?

Mr. Rich: With reference to the contract, I have not had an opportunity to ascertain if there is such a document.

The Court: I am going to give you every opportunity to find out. 30

COMPLAINANTS REST.

Thomas McClelland. Called by Defendants. Direct.

DEFENDANTS' CASE.

THOMAS MCCLELLAND, sworn as a witness on the part of the defendants, testifies as follows:

DIRECT EXAMINATION BY MR. RICH:

10 Q. What is your occupation? A. Tax Collector, City of Union City.

Q. With reference to the tax records of that city, have you them with you? A. I have them here.

20 Q. If you will refer to those records, Mr. McClelland, with reference to the property owned by Jacob Maloyfsky situate on the northwest corner of Third and West Streets, Union City, known as lots 1-4, block 10, on the assessment map of Union City, will you tell the Court the status of the tax payments for the year 1929?

30 Mr. Ockford: I object to that upon the ground that it is in evidence that the question of taxes was raised in the letter of November 18th. Taxes for 1929, amounting to \$474.63, are still open, and in answer to that, Exhibit C-2, letter of November 19th, the statement was made that the taxes will be adjusted.

The Court: Objection overruled.

A. Taxes of Jacob Maloyfsky, lots 1 to 4, block 10, amount to \$474.53, the first half was paid on November 4, 1929, \$237.27, leaving a balance still open of \$237.26.

40 Q. In reference to the year 1930, on the same property, will you tell the court the status of the payment of taxes?

Francis X. Goette. Called by Defendants. Direct.

Mr. Ockford: I object to that.

The Court: Objection overruled.

A. Taxes on the same property, Jacob Maloyfsky, for block 10, lots 1 to 4, for the year 1930, still open, \$465.89.

No cross examination.

10

FRANCIS X. GOETTE, sworn as a witness on the part of the defendants, testifies as follows:

DIRECT EXAMINATION BY MR. RICH:

Q. What is your occupation? A. I am an attorney in the Newark office of the New York Title & Mortgage Company. 20

Q. Did you make a search on the property owned by Jacob Maloyfsky, in Jersey City, on the north-west corner of Third and West Streets? A. I did not make the search. The search was made under my supervision.

Q. Did you verify that search? A. Yes.

Q. Did you go over the records personally? A. I did. 30

Q. Everything in that search, do you know to be so, as disclosed by that search? A. Yes.

Q. Does that search disclose any defect in that title?

Mr. Ockford: Object to.

The Court: Objection sustained.

Q. Do you know of your own knowledge of any defects in that title? 40

Francis X. Goette. Called by Defendants. Direct.

Mr. Ockford: Objected to.

The Court: Objection sustained. Why not produce the search?

Mr. Rich: I am going to offer in evidence certified copies of the judgment records.

10 The Court: The record of the search is the best evidence of what was found. You can produce other evidence including the certified copies of any judgments, or mortgage that may have been of record.

Q. Have you the search verified by you? A. I have our original abstract.

Q. And that original abstract was verified by you? A. Yes, sir.

20 Q. How recently? A. Down to and including 4 P. M. last Monday.

Q. May I have it? A. (Witness produces abstract).

The Court: For the sake of brevity, will you permit this witness to testify, referring to his abstract, what alleged defects that abstract shows in the title?

Mr. Ockford: Certainly.

30 Mr. Rich: I would like to have the abstract marked.

(Marked Exhibit D-2.)

BY THE COURT:

40 Q. Referring to your abstract, what defects in title do you say that abstract shows? A. There are various judgments entered in the Hudson County Clerk's office against a Louis Levin and a Louis Levine, who was one of the earlier owners of the property.

Francis X. Goette. Called by Defendants. Direct.

Mr. Ockford: I move to strike that out. This witness cannot possibly testify to that.

The Court: I am sure he will amend his answer by saying "a person of a similar name."

Q. You will do that, will you not? A. Yes.

10

BY MR. RICH:

Q. Will you state what those judgments are?

A. There was a judgment by the New Jersey Roofing & Metal Company against Bernard Elkind and Louis Levine in the Hudson County Court of Common Pleas. The amount of the judgment is \$450, plus costs, making it \$480.80.

Mr. Rich: I offer in evidence certified copy of judgment.

20

Mr. Ockford: I wish to state to the court that there isn't any question that there are the matters referred to in Mr. Brand's letter of November 18th. Our contention is that Louis Levine, the former owner, is not the person against whom those judgments were recovered.

We may agree that there are these judgments as set forth in their letter of November 18th and that they were open at the time, and as far as we know, they may still be open.

30

The Court: Do you want to bring in every judgment that is mentioned in Mr. Brand's letter?

Mr. Rich: I believe there is only one more.

Q. Did you find any other encumbrance subsequent to the date of the report? A. On the 28th

40

Francis X. Goette. Called by Defendants. Cross.

of October, 1930, there was a judgment for \$57 against Jacob Maloyfsky, entered in the County Clerks' office.

Mr. Rich: I offer in evidence certified copies of these judgments.

Mr. Ockford: No objection.

10

The Court: I do not see the necessity of offering them. It is admitted by Mr. Ockford that the judgments mentioned in the letter of Mr. Brand to Mr. Harber were open of record, or are still open of record and were open of record at the date last fixed for closing title.

Mr. Ockford: Yes, and we state that the judgment of October 28th, has been paid. It was for \$57 and it was entered after the defendant refused to take title.

20

Q. Was this title passed by you for the New York Title Company?

Mr. Ockford: Objected to.

The Court: Objection sustained.

CROSS EXAMINATION BY MR. OCKFORD:

30

Q. Do you know, or have you the record of who ordered this report or to whom you made the report? A. Yes; I think Mr. Rich has the original report. I have a copy of it. Our report was made to Saul H. Freedman, 16 Court Street, Brooklyn, New York.

Q. And the date? A. 16th of October, 1929.

Q. Who ordered the search, do you know? A. Our applicant was Saul H. Freedman, care of King & Friedman, attorneys, 16 Court Street, Brooklyn.

40

Louis Levine. Called in Rebuttal. Direct.

Q. Who ordered the continuation? A. That I could not tell you. I simply know that they were ordered.

Q. And this last report to whom? A. To Mr. Freedman.

Q. This report that is brought up to the last minute? A. To Mr. Rich.

Q. The attorney sitting here? A. Yes, sir. 10

Q. May I ask; that judgment of October 28th, is in favor of whom? A. In favor of Abraham Levine. It is on appeal from a workmen's compensation case.

Mr. Rich: The contract is in New York. I have been informed it is on its way over here—the contract referred to by counsel.

The Court: Have you any further testimony? 20

Mr. Rich: That is all.

Defendants rest.

REBUTTAL.

LOUIS LEVINE, sworn as a witness on the part of the complainants, in rebuttal, testifies as follows: 30

DIRECT EXAMINATION BY MR. OCKFORD:

Q. Where do you live? A. 410 Fourth Street, Union City.

Q. Are you the Louis Levine who at one time was the owner of the premises at the northerly side of Third Street and westerly side of West Street, Union City? A. I am. 40

Louis Levine. Called in Rebuttal. Cross.

Q. I show you a deed dated May 28, 1928, covering these premises and ask you if you are the grantor named therein? A. Yes, sir.

Mr. Ockford: I offer the deed in evidence.
(Deed is marked Exhibit C-5.)

10 Q. At the time you made that conveyance, did you make an affidavit for the grantee, the purchaser? A. Yes, sir. That (indicating) is my signature.

The Court: The fact before me is whether there were any judgments against him, not what he said in an affidavit.

20 Q. Did the Harris Bros. Silk Company ever recover judgment against you in the New Jersey Supreme Court? A. Nobody. There is no judgment against me whatever.

CROSS EXAMINATION BY MR. RICH:

Q. Did you file a petition in bankruptcy in 1913? A. I never did.

30 Q. No adjudication of bankruptcy? A. I never did.

Mr. Ockford: I was mistaken as to the \$57 judgment.

The Court: You mean in stating it was paid?

Mr. Ockford: Yes. This is a compensation case, covered, as I am informed, by an insurance policy.

Mr. Rich: Here is the contract that has been called for.

40

Louis Levine. Called in Rebuttal. Cross.

Mr. Ockford: This is the contract referred to and it is now produced and I offer it in evidence.

Mr. Rich: I object to the admission of that contract. It is a contract between Rubel and Senger. The parties to the contract sued on were Maloyfsky and Shiraldi.

The Court: On motion, I dismissed the bill against Rubel, because the bill did not allege as I recall, that there was any assignment of the contract to Rubel. It was alleged in the bill that Shiraldi was agent for Rubel. 10

Mr. Rich: That is right.

The Court: I struck out Rubel, because it did not appear that there was no contract signed by him and under the statute of frauds, he was not liable. I am going to admit this contract in evidence for what it is worth. There may not be anything in it. 20

(Marked Exhibit C-6.)

CASE CLOSED.

30

40

Exhibit C-2.

SAMUEL HARBER
Counsellor-at-Law
422 Thirty Eighth Street
Union City, N. J.

NICHOLAS S. RAGO
JACOB FREESMAN

10

November 19, 1929.

Pierson, Schroeder and Brand, Attorneys,
84 Washington Street,
Hoboken, N. J.

Re: Maloyfsky to Schiraldi.

Dear Sirs:

Answering your letter in the above matter, I shall answer them in consecutive order.

20

1. This mortgage is ready for payment, and will be cancelled at the time of the closing of the title.

2. Our contract calls "Subject to a State of Facts".

3. This lease has been cancelled by a surrender filed about one month ago which is on record.

4. The taxes will be adjusted.

30

5. An affidavit is ready to cover the Levin Judgments.

6. Louis Levine is known by both names, and I have an affidavit to that effect.

This will all be adjusted at the time of the closing of the title.

Very truly yours,

SH/DF

SAMUEL HARBER

40

Exhibit C-3.

Law Offices of
 PIERSON, SCHROEDER & BRAND
 Hoboken Bank for Savings Building
 84 Washington Street
 Hoboken, N. J.

Nov. 18, 1929.

10

Samuel Harber Esq.,
 422—38th St.,
 Union City, N. J.

Re: Maloyfsky to Schiraldi

Dear Mr. Harber :

The New York Title & Mortgage Company of 135 Broadway, New York City, have made a report on the title to the premises mentioned in the contract dated Sept. 28, 1929 made between Jacob Maloyfsky and Fannie Maloyfsky his wife to Louis Schiraldi and they report as follows :

20

1. Mortgage, Jacob Maloyfsky to Louis Lewin dated May 28, 1928, recorded in Hudson County Register's Office in book 1507 page 266 to secure \$9000, due June 1, 1930, which mortgage was assigned to the Hudson County National Bank of Jersey City, by assignment recorded book 187 page 332.

30

2. Survey by Joseph C. Muhlbeck dated Oct. 12, 1929, shows fence on west side of premises to encroach on West St.

3. Lease, Louis Lewin to Highland Construction & Wrecking Company dated May 24, 1923 for 10 years from June 1, 1923, recorded in book 1513 page 248.

40

Exhibit C-3.

4. Taxes of 1929 amounting to \$474.53 are still open.

5. The Supreme Court search and the U. S. District Court search show as follows:

10	Harris Thrown Silk Corp. vs. Harry Levine, Louis Levine, Abraham Shapiro, partners as Plymouth Silk Company.	N. J. Supreme Court. Action of law attachment. David G. Smith, Atty. Affidavit filed Oct. 2, 1920. Amount sworn to \$4150.00. Writ to Warren for \$4150.00. Returnable Oct. 16, 1920.
—		
20	Max Posnock and Elansee Realty Co., Louis Levine, Jacob B. Cooper.	N. J. Supreme Court. Abstract of a Decree from Chancery made May 24, 1913. Filed in Supreme Court June 16, 1913. Amount decreed to be paid by Deft. \$300.00. Costs \$102.79. Total \$402.79. Aaron A. Melniker, Atty.
30	Central Trust Co. of Camden, N. J. vs. Louis A. Levin.	N. J. Supreme Court. On Contract Attachment. William C. Jones, Atty. Entered March 30, 1912. Amount \$4663.37 Costs \$139.50 \$4802.87
40		

Exhibit C-3.

Builders' Material Corp, a corp. of N. J.	N. J. Supreme Court. Action at Law Ascertainment and Assessment of Damages.	
vs.	Joseph Rothal, Atty.	
	Entered Oct. 29, 1926.	
B. Elkind, Louis Levin.	Amount \$815.40	
	Costs 42.78	10
	\$858.18	

The Manhattan Shirt Company, a corp.,	N. J. Supreme Court. Action at law by Default. David Nudelman, Atty. Entered	
vs.	July 13, 1927.	20
Louis L. Levin, Inc. & trdg. as Industrial	Amount \$760.06	
Men's Shop.	Costs 53.78	
	\$813.84	

In the Matter	U. S. District Court in Bankruptcy.	
of	Carl Weitz, Atty.	
	April 29, 1918 Petition filed.	30
The Petition of Louis Levin, of West New York, N. J., that he be declared Bank- rupt.	April 29, 1918, Adjudi- cation. Charles Young, of Jer- sey City, appointed Trustee. Discharge Nov. 25, 1918.	
Elmer W. Demarest, Jersey City, Referee.		40

Exhibit C-3.

	New Jersey Roofing and Sheet Metal Works, Inc.,	Book 34-351 Hudson Common Pleas.
	Plaintiff,	Debt \$450.00
		Costs 26.70
		Exec. 1.35
	vs.	D'k'tg. 2.75
10	Barnett Elkind and Louis Levine.	\$480.80 Ent. Sept. 7, 1926.
	Fred Feinberg, Atty. Execution iss. Sept. 7, 1926 Ret'd Sept. 29, 1927 partly satis. Balance due \$375.00. Filed Sept. 30, 1926.	
20	Paul Horowitz	Cir. 36-354. Ent. 5-26-1927.
	vs.	Dam. \$634.37
		Costs 55.88
	Barnet Elkind and Lewis Levin	Total \$690.25
	Friedman & Friedman, Atty.	
30	Max Posnock	Cir. 36-390. Ent. June 30, 1927.
	vs.	Dam. \$1374.99
	Barnet Elkind and Net- ty Elkind, wife, Lewis Levin and Dora Lev- in, wife, et als.	Costs 69.12 Total \$1444.11
40	Irving D. Grodberg, Atty.	

Exhibit C-3.

Charles J. Larkey	Attachment.
	Bk. 9-16.
vs.	Issued Sept. 23, 1920.
Louis Levin.	Amt. \$1000.

Hartford Accident and	Bond to Sheriff.	10
Indemnity Co.	Amount \$2000.	
Louis Levin	Bk. 5-138.	
to	Date: Nov. 10, 1920.	
Louis Madigan, Sh'ff.	Filed: Nov. 10, 1920.	

The Title Company further advised us that the present owner obtained title from Louis Lewin, also known as Louis Levin.

I wish you would advise me immediately whether these defects can be cleared up so that I can notify the Title Company with reference to the same. If you have affidavits in your files with reference to any of these matters I wish you would send me copies of them so that I could refer them to the Title Company.

Yours very truly,

I. H. BRAND. 30

B/I

Exhibit C-4.

IN CHANCERY OF NEW JERSEY

78—436.

10	Between JACOB MALOYFSKY and FANNIE MALOYFSKY, Complainants, and LEONARD SCHIRALDI, also known as LOUIS SCHIRALDI, and SENG COAL & ICE CORPORATION, a Cor poration of the State of New Jer sey, Defendants.	}	On Amended Bill, &c., Answers to Interroga tories.
----	--	---	--

20

TO THE COMPLAINANTS JACOB MALOYFSKY AND
FANNIE MALOYFSKY:

The Answer of the defendant SENG COAL & ICE
CORPORATION, to such of the Interrogatories served
upon it as it was required to answer by order of the
Court.

30 Interrogatory No. 1: For whom was the assign
ment made by Louis Schiraldi as heretofore an
nexed to Interrogatory No. 3 by the defendant, in
tended for?

Answer: This defendant has no knowledge or in
formation as to the intention of Louis Schiraldi.
Said assignment was transferred to it from Rubel
Ice Corporation.

Interrogatory No. 2: Who received this assign
ment of the contract from Louis Schiraldi?

40

Exhibit C-4.

Answer: This defendant repeats its answer to Interrogatory No. 1.

Interrogatory No. 5: To whom did Louis Schiraldi assign the contract made between him and Jacob and Fannie Maloyfsky, dated September 28, 1929?

Answer: This defendant repeats its answer to Interrogatory No. 1. 10

HENRY J. SENGGER,
President of the Senger
Coal & Ice Corporation.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.: 20

HENRY J. SENGGER, of full age being duly sworn according to law upon his oath, deposes and says:

1. I am the President of Senger Coal & Ice Corporation, a corporation of New Jersey, one of the defendants in the above entitled cause, and the defendant required to answer the interrogatories to which the foregoing answers are made.

The foregoing answers to the said interrogatories are true. 30

HENRY J. SENGGER,

Sworn and subscribed to before this }
7th day of November, 1930. }

PAUL HANSEN,
Notary Public of New Jersey, 40
My commission expires Nov. 8, 1933.

Exhibit C-4.

IN CHANCERY OF NEW JERSEY.

	Between	}
	JACOB MALOYFSKY and FANNIE	
	MALOYFSKY,	
	Complainants,	
10	and	
	LEONARD SCHIRALDI, <i>et als.</i> ,	}
	Defendants.	

TO THE COMPLAINANTS, JACOB MALOYFSKY and
FANNIE MALOYFSKY:

20 The answer of the defendant Senger Coal & Ice Corporation, a Corporation of New Jersey, to such of the Interrogatories served upon it as it was required to answer:

Interrogatory No. 3: Set forth a complete copy of the agreement, written assignment or agreement of assignment of the contract annexed to the complaint, as made, executed and delivered to the defendant.

Answer: Copy as annexed hereto and marked Exhibit "A".

30 Interrogatory No. 8: When did the defendant set up any objection to the title, if any, and if any objections to the title were set up, please set forth to whom, when and what said objections were at the time.

Answer: On the adjourned day of closing, objections to title as listed in title report were pointed out to complainants and attorney.

40 Interrogatory No. 10: Were there any intervening assignment from Schiraldi to any other party? If so, set forth to whom, the nature of the agree-

Exhibit C-4.

ment, and full copy of said agreement or assignment.

Answer: Defendant has no knowledge of any intervening assignment.

Interrogatory No. 14: Why did the defendant negotiate an amicable settlement, if any?

Answer: For the purpose of avoiding a law suit, defendant negotiated for settlement, all of which was done without prejudice to any of defendant's rights. 10

Interrogatory No. 15: What legal rights, if any, was the defendant ignorant of at the time it endeavored to negotiate settlement?

Answer: At time of negotiations on the part of defendant, no suit had been commenced against it by complainants and it was without knowledge of its legal rights and that it was not bound to perform. 20

Interrogatory No. 19: Did the defendant waive any tender on the part of the complaint?

Answer: No.

Interrogatory No. 20: What tender did this defendant make to perform and close the contract, and what tender did it make on its part, if any?

Answer: Defendant attended at the office of complainants' attorney on the adjourned day of closing and complainants failed to perform. 30

Interrogatory No. 21: When, if ever, were the encroachments as indicated by the survey, disclosed to the complainants and what is the nature of such encroachments?

Answer: On the adjourned day of closing, encroachments as indicated by a survey made by Joseph Muhlback dated October 21st, 1929, showing fence on the west side of premises to encroach on West Street was pointed out to complainants. 40

Exhibit C-4.

Interrogatory No. 22: In what respects is the deed, which was tendered by the complainants in accordance with the contract?

Answer: The deed was not a warranty deed free from all encumbrances, if any deed was ever tendered.

10

HENRY J. SENGER,
President of the Senger Coal
& Ice Corporation.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

20

HENRY J. SENGER, of full age being duly sworn according to law upon his oath, deposes and says:

1. I am the President of Senger Coal & Ice Corporation, a corporation of New Jersey, one of the defendants in the above entitled cause, and the defendant required to answer the interrogatories to which the foregoing answers are made.

30

The foregoing answers to the said interrogatories are true.

HENRY J. SENGER.

Sworn and subscribed to before me }
this 30th day of September, 1930. }

LESLIE HANDLER,
Notary Public,
Notary Stamp.

40

Schedule "A", Attached to Exhibit C-4.

In consideration of One Dollar and Other Good
and Valuable Consideration to me in hand paid by
of

receipt whereof is hereby acknowledged, I, Louis
Schiraldi of Brooklyn, New York, do hereby as-
sign, set over and transfer unto said
all my right, title and interest in and to a certain
contract for the purchase of land, between Jacob 10
and Fannie Maloyfsky and myself, dated Septem-
ber 28th, 1929, covering real estate located at the
corner of Third & West Streets, Union City, N. J.,
being 50' x 99' more or less, the price for which is
specified in said contract at \$14,000.00.

IN WITNESS WHEREOF, I, Louis Schiraldi, have
hereunto affixed my hand and seal the 1st day of
March, 1930. 20

LOUIS SCHIRALDI (LS)

In the Presence of:

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

On this 1st day of March, 1930, before me per- 30
sonally appeared Louis Schiraldi, to me known and
known to me to be the individual described in and
who executed the foregoing instrument and he duly
acknowledged to me that he executed the same.

SAUL H. FRIEDMAN
Notary Public, Kings County
Commission expires Mar. 30, 1930.

Exhibit C-5.

(Not to Be Printed)

Exhibit C-6.

10 AGREEMENT, dated as of the 8th day of February, 1930, between RUBEL CORPORATION, a corporation organized under the laws of the State of New York, having its office at Fulton Street and Waverly Avenue, in the Borough of Brooklyn, City of New York, hereinafter sometimes referred to as the "Seller" and SENER COAL & ICE CORPORATION, a corporation organized under the laws of the State of New Jersey, having its office at Union City, hereinafter sometimes referred to as the "Purchaser".

20

WITNESSETH:

1. The Seller agrees to sell to the Purchaser and the Purchaser agrees to buy from the Seller the ice plant, land buildings and improvements and ice manufacturing business, excluding any trucks, but including the good will thereof, now owned by and conducted by a wholly owned subsidiary corporation of the Seller, at #1600 Park Avenue, City of Hoboken, State of New Jersey, and the
30 Purchaser agrees to pay to the Seller for the said ice plant, business and good will, together with customers' contracts, which customers' contracts the Purchaser expressly agrees to assume and carry out, which said contracts are to be turned over to the Purchaser on the day of closing, the sum of \$374,000. plus an amount equal to the cost price of the coal on hand at the date of closing, plus the

40

Exhibit C-6.

value of the ice on hand, at 25 cents per cake, plus the amount of accounts receivable due from retail ice customers (not loaders), plus an amount equal to the amount expended by the Seller or its subsidiary corporation up to the date of the closing of this contract since October 1, 1929, for all improvements, repairs and additions, including the amounts paid for payroll and workmen's compensation paid on men employed on this work, and plus the assumption by the Seller of all outstanding and existing contracts for improvements, repairs and additions to the said plant or to the machinery of equipment thereof. 10

As a further consideration the Purchaser agrees to assume and hold the Seller harmless from a certain contract made by the Seller under date of September 28, 1928, to purchase from Jacob and Fanny Maloyfsky certain property at Union Hill, for the sum of \$14,000., and also to pay the legal fees of Isidore Brand, Esq., or his firm, for services in connection with the making of said contract, the searching and closing of title, and any title company fees in reference thereto; the purpose of this being that the Purchaser shall take over all costs in reference to this contract, and shall, on the closing hereof, re-pay to the Seller the amounts already paid by the Seller on account thereof. 20 30

Payments therefor to be made in the following manner, to wit:

No down payment shall be made, but on the closing of title the amount for coal, ice and accounts receivable and the amount expended for improvements, repairs and additions to the plant, machinery and equipment, and for payroll, plus the amount of workmen's compensation insurance 40

Exhibit C-6.

paid upon workmen employed in this work, as above stated, less a sum equal to the sum of \$6000. and less an amount to adjust the interest on the \$380,000. face value of bonds hereinafter referred to, from October 1, 1929 to the date of closing of title, shall be paid by the Purchaser giving its four months promissory note with interest at 6%, endorsed by Henry J. Senger, on the closing of title. The balance, \$380,000. shall be paid by the Purchaser delivering to the Seller \$170,000. face value, 6%, Serial Gold Bonds, with all coupons subsequent to October 1, 1929 attached, issued by the Rubel Coal and Ice Corporation under an indenture made by it to the Bank of United States, as Trustee, dated October 1, 1928, of which said bonds \$100,000. face value of said bonds shall mature on October 1, 1931; \$70,000. face value of said bonds shall mature on October 1, 1932; and in compensation of the balance, to wit, \$210,000. the Purchaser agrees to cause to be surrendered to the Trustee, on the closing of this Title, \$210,000 face value of bonds last maturing under the said indenture and to cause the Trustee to release from the lien of the said indenture all of the property described in said indenture as item "6", including the subdivisions A, B and C of said item, excepting any part of said property described in said item, which has already been released, so that the same shall vest in the Seller free and clear of the lien of the said Indentured.

Annexed hereto is a schedule showing (a) the expenditures made for improvements, repairs and additions to the date of this contract; (b) a list of the contracts which have been entered into to the date of this contract, and which are to be assumed by the Purchaser, together with all pay-

Exhibit C-6.

ments made by the Seller from October 1, 1929, as set forth in paragraph 1 hereof.

It is expressly understood and agreed between the parties hereto that no representation is made by the Seller as to the amount or nature of the business or the customers served by said business, or the conditions of the chattels, machinery and/or plant, the Purchaser purchasing the same and making this agreement after examination thereof; it being understood, however, that the plant shall be, on the day of closing, in as good condition as it is on this date, and that of this date the plant is being reconstructed and only a small part thereof is working. 10

The parties hereto agree that the water rates and taxes on the property shall be adjusted pro rata at the date of closing. 20

It is agreed between the parties that should it be found that there is any tax against this property, other than real estate taxes, for example, corporate franchise taxes, that this shall not be an objection to the closing of the title, but that the Seller shall nevertheless hold the Purchaser harmless from the said tax and shall pay the same as soon as the tax has been fixed and notice thereof given to the Purchaser. Should the Seller fail to pay said tax then the Purchaser may pay same and hold the Seller for the amount thereof. 30

This transaction shall close at the office of Walter Jeffreys Carlin, Esq., #2 Rector Street, Borough of Manhattan, City of New York, at 11 o'clock, a. m., on the 1st day of March, 1930.

The parties agree that no broker is interested in bringing about this contract, and neither of the said parties to this agreement shall be obliged to pay commissions to anyone. 40

Exhibit C-6.

IN WITNESS WHEREOF, the parties hereto have hereunto cause these presents to be signed by their duly authorized officers, and their respective corporate seals to be affixed hereto, the day and year first above written.

10

RUBEL CORPORATION,

By S. RUBEL,

President.

SENGER COAL AND ICE CORPORATION,

By HENRY J. SENGER,

President.

Witnessed by:

NATHAN FRIEDMAN

20

WALTER JEFFREYS CARLIN

(Acknowledgments and schedules attached.)

30

40

Exhibit D-1.

Law Offices
 NATHAN FRIEDMAN
 IRVING J. W. MARX
 Woolworth Building, 233 Broadway
 New York.

March 5th, 1930.

10

Isidor Brand, Esq.,
 84 Washington Street
 Hoboken, New Jersey

Dear Sir:

Some time ago you represented Rubel Ice Corporation in connection with the transaction of purchase of certain property from Jacob and Fannie Malofsky, for the price of \$14,000, which title I am informed is set for closing Tuesday next.

20

This contract has been assigned to my client, Senger Coal and Ice Corporation, which has taken an assignment thereof.

Will you kindly continue to act in our behalf in this matter and have the title policy issued in the name of Senger Coal and Ice Corporation. Please communicate with me letting me know just when the title closes and where so that I can arrange to cooperate with you in the closing of the transaction, and oblige.

30

Very truly yours,

NATHAN FRIEDMAN.

NF:JF

40

IN CHANCERY OF NEW JERSEY.

Between
10 JACOB MALOYFSKY and FANNIE
MALOYFSKY,
Complainants,
and
LEONARD SCHIRALDI, *et als.*,
Defendants.

On Bill, &c.
Conclusions.

20 The vendor in a contract for the sale of land cannot compel the assignee of the vendee to perform the contract.

Mr. SAMUEL HARBER and Mr. JOHN W. OCK-
FORD for complainants.

Mr. SAMUEL J. RICH for defendant Senger Coal
& Ice Co.

FIELDER, V. C.

This suit is brought to enforce the performance of a written contract for the sale and purchase of real estate situate in Union Hill, made by the complainants as vendors with the defendant Schiraldi, as vendee and dated September 28, 1929. The proofs disclose that although the contract was made by Schiraldi under his own hand and seal, he was acting for the Rubel Ice Company as an undisclosed principal; that that corporation through its attor-

Conclusions of Vice Chancellor.

ney, subsequently paid the complainants \$1000 on account of the purchase price for their consent to extend the time for closing title; that a written agreement was entered into by said corporation with Senger Coal & Ice Company, dated February 8, 1930 and signed by both parties thereto, for the sale of an ice plant in Hoboken, the only reference therein to the contract here sought to be enforced being the following: 10

“As a further consideration the purchaser (Senger Coal and Ice Co.) agrees to assume and hold the seller (Rubel Ice Co.) harmless from a certain contract made by the seller under date of September 28, 1929 to purchase from Jacob and Fanny Malofsky certain property at Union Hill, for the sum of \$14,000 and also to pay the legal fees of Isidore Brand, Esq. or his firm, for services in connection with the making of said contract, the searching and closing of title and any title company fees in reference thereto; the purpose of this being that the purchaser shall take over all costs in reference to this contract and shall on the closing hereof repay to the seller the amounts already paid by the seller on account thereof.” 20

The proofs further show that on March 1, 1930, Schiraldi executed an assignment of his contract with the complainants to a blank assignee and that such assignment was “transferred” to the Senger Coal & Ice Company by the Rubel Ice Company. 30

The defendants to the suit are Schiraldi and the Senger Coal & Ice Company (hereinafter called the Senger Company) and the relief prayed is that both, or one of them, be decreed to specifically per- 40

Conclusions of Vice Chancellor.

10 form the contract to purchase by paying the balance of the purchase price and accepting a deed from the complainants, or in case they fail so to do, that the balance of the purchase price be decreed a lien on said lands in favor of the complainants and that the lands be ordered sold to satisfy such lien and that, in case of a deficiency, judgment therefor be entered against the defendants. The defendant Senger Company answered denying the complainants' right to relief against it.

20 The complainants claim to be entitled to relief against the defendant Senger Company as the assignee of the vendee, whether the vendee be Schiraldi or the Rubel Ice Company. There is no evidence of an assignment made by Schiraldi to and accepted by said defendant. The assignment executed by Schiraldi does not contain the name of any assignee and the evidence does not show delivery of it by him to any one. Because he was the agent of the Rubel Ice Company in purchasing the property, it is a natural inference that his assignment was intended to be made to and was delivered to his principal. The evidence shows that the Rubel Ice Company "transferred" this assignment to Senger Company, but the agreement entered into between the Rubel Ice Company and the Senger Company does not contain an assignment of the contract and in what manner and why it was transferred does not appear.

30 Even had the contract been assigned by Schiraldi or Rubel Ice Company to Senger Company, the complainants are not entitled to enforce it against the Senger Company. Schiraldi, as vendee under the contract, acquired an interest in the lands agreed to be conveyed and it was such an interest

Conclusions of Vice Chancellor.

as he might assign. Section 5 of our statute of frauds (Comp. Stat. 2612) provides that no action shall be brought upon any contract for sale of lands, or any interest in or concerning them, unless the agreement upon which such action is brought shall be in writing and signed by the party to be charged therewith. This action is sought to be maintained upon the original contract and upon Schiraldi's assignment thereof, neither of which is signed by the Senger Company and therefore an action thereon will not lie against that defendant. 10

Nor can the vendor in a contract for the sale of land compel the assignee of the vendee to perform the contract. Persons who are not privies to such a contract are generally not proper parties to a bill for specific performance (*Bacot v. Wetmore*, 17 N. J. Eq. 250; *Mechanick v. Duschaneck*, 99 N. J. Eq. 86). This contract does not purport to bind Schiraldi's assignee and the complainants, on the facts here present, could not recover damages against Senger Company for failure to perform it. It contains covenants and promises which are personal to Schiraldi, from which he cannot be relieved (as to the complainants) by his assignment of it, and the acceptance of an assignment cannot be construed as a promise by his assignee to assume all Schiraldi's contract obligations so as to make the assignee liable to the complainants to perform Schiraldi's promises, without provision to such effect. Indeed, if this contract purported to bind not only Schiraldi, but his assignee as well, it would be inoperative to make the assignee liable under a simple form of assignment, on Schiraldi's personal covenants with the complainants. Therefore if the contract here sought to be enforced, was assigned 30 40

Conclusions of Vice Chancellor.

to the Senger Company, nothing has been shown which puts the defendant in privity of contract with the complainants as to Schiraldi's promises to them.

10 An assignee of a vendee may have specific performance of a contract such as this, in a suit against the vendor. Such relief is granted, although there is no privity of contract between the vendor and the assignee prior to the suit, because the assignee by bringing suit, agrees to be bound by the contract and submits himself to such decree as the court may pronounce, thus voluntarily placing himself in privity of contract with the vendor (Mc Voy v. Baumann, 93 N. J. Eq. 360-638), so that, if there is no privity of contract between the vendor and the assignee unless and until the assignee brings suit, the vendor cannot enforce the contract against the assignee.

20 Finally, the complainants contend that by the terms of the agreement entered into between the Rubel Ice Company and the Senger Company, the latter assumed the performance of the contract in question and therefore can now be compelled to perform it. Under this head the complainants urge that the Senger Company is in the position of a grantee who purchases property, and by the terms of the deed to him, agrees to assume and pay a mortgage on the property and by such assumption becomes bound to the mortgagee. Such an assumption, as between the grantor and the grantee, is held in equity to make the grantee the principal debtor and the liability of the grantor that of surety and since a creditor may have the benefit of all collateral obligations for the payment of his debt, which a person standing in the situation of a surety holds for his indemnity, a

30

40

Conclusions of Vice Chancellor.

decree for deficiency arising in foreclosure suits may be made against a subsequent grantee who has assumed the payment of the mortgage debt. Such remedy, however, is not available to a mortgagee when the grantor is not personally liable for the payment of the mortgage debt. (Crowell v. Hospital &c., 27 N. J. Eq. 650). The complainants in this suit could not have a decree for performance against the Rubel Ice Company as Schiraldi's undisclosed principal, because it was not a party to and had not signed the contract, the fifth section of our statute of frauds, referred to above, barring action on the contract against the Rubel Ice Company (Randolph v. General Investors Co., 97 N. J. Eq. 493) and since the complainants cannot have relief against the Rubel Company, they can have none against the Senger Company, had the latter agreed to assume the Rubel Ice Company's supposed obligation to perform the contract. But I cannot construe the clause which I have quoted above from the agreement between the Rubel Ice Company and the Senger Company, as an assumption by the latter corporation of the terms of the contract here under consideration. I regard it as nothing more than a promise by the Senger Company to hold the Rubel Ice Company harmless from any liability which it might have incurred under the contract and to pay certain money to or for the Rubel Ice Company. Further, had the Senger Company, by said agreement, assumed the performance of the contract, such assumption was for the benefit of and was personal to the Rubel Ice Company and the complainants can have no advantage from it. (Knapp v. Heidritter Lumber Co., 99 N. J. Eq. 381).

10

20

30

40

Conclusions of Vice Chancellor.

10 The bill of complaint will be dismissed as to the defendant Senger Company. Whether this court has jurisdiction to render a decree against the defendant Schiraldi for the relief prayed for by the complainants, has not been referred to by complainants' counsel. Schiraldi was not found in this state for service of process and he was served personally without the state with an order to answer, pursuant to the statute and rules of this court relating to absent defendants, but he failed to appear and answer the complainants' bill. The relief sought by the complainants against the defendant Schiraldi will be withheld until I hear further from their counsel.

20

30

40

Final Decree.
(Filed April 27, 1931)

IN CHANCERY OF NEW JERSEY.

#78-436.

Between JACOB MALOYFSKY and FANNIE MALOYFSKY, Complainants, and LEONARD SCHIRALDI, <i>et als.</i>, Defendants.	}	On Bill, &c. Final Decree.
---	---	--

10

This matter coming on to be heard in the presence of Samuel Harber and John W. Ockford, Solicitors of the Complainants Jacob Maloyfsky and Fannie Maloyfsky, and of Samuel J. Rich, Solicitor of the defendant Senger Coal & Ice Corporation, and the Court having examined the pleadings and having taken proofs orally and in open Court and heard and considered the arguments of counsel thereon; and the Court being of the opinion that the Complainants are not entitled to the relief pleaded for by them in their Bill of Complaint filed herein as against the defendant Senger Coal & Ice Corporation and Leonard Schiraldi.

20

30

It is on this 27th day of April, 1931, Ordered, Adjudged and Decreed, that the Complainants' Bill of Complaint be and the same is hereby dismissed as against the defendant Senger Coal & Ice Corporation, and it is further

40

Final Decree.

ORDERED, ADJUDGED and DECREED, that the Complainants' Bill of Complaint be and the same is hereby dismissed as against the defendant Leonard Schiraldi, without costs, and it is further

10 ORDERED, ADJUDGED and DECREED that the said Complainants pay to the said defendant Senger Coal & Ice Corporation, the costs of this suit to be taxed, including a counsel fee of \$200.00; and that, in default of such payment, execution issue therefor, according to the practice of this Court against the goods and chattels, lands, tenements, hereditaments and real estate of the said Complainants Jacob Maloyfsky and Fannie Maloyfsky.

Respectfully advised,

20 JAMES F. FIELDER,
V. C.

E. R. WALKER,
C.

30

40

Notice of Appeal.

(Filed July 10, 1931)

IN CHANCERY OF NEW JERSEY.

Between JACOB MALOYFSKY and FANNIE MALOYFSKY, Complainants, and LEONARD SCHIRALDI, <i>et al.</i>, Defendants.	}	On Bill, &c. Notice of Appeal. Appeal from the Court of Chancery. From a decree advised by Vice-Chan- cellor James F. Fielder and signed by His Honor the Chancellor.	10
---	---	--	----

SIRS:

PLEASE TAKE NOTICE, that the complainants ap-
 peal to the Court of Errors and Appeals in the last
 resort in all causes of the State of New Jersey from
 the final decree entered in this cause, advised by
 Vice Chancellor James F. Fielder, signed by his
 Honor the Chancellor.

Dated, June 10, 1931.

Yours, etc.,

SAMUEL HARBER,

Solicitor for and of Counsel with
 Complainants.

30

I conceive the foregoing Appeal to be well taken
 upon the merits thereof, and that the Complainants
 have a good and meritorious Appeal from the de-
 cree above recited.

SAMUEL HARBER,

Of Counsel with Complainant.

To:

SAMUEL J. RICH, Esq.,

Solicitor of the Defendant,

Senger Coal & Ice Corporation.

40

Petition of Appeal.

(Filed August 5, 1931)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	Between JACOB MALOYFSKY and FANNIE MALOYFSKY, Complainants-Appellants, and LEONARD SCHIRALDI, also known as LOUIS SCHIRALDI, and SENDER COAL & ICE CORPORATION, a Cor- poration of the State of New Jer- sey, Defendants-Respondents.	}	On Appeal From Court of Chancery Petition of Appeal.
20			

TO THE HONORABLE THE COURT OF ERRORS AND AP-
PEALS, IN THE LAST RESORT IN ALL CAUSES:

The petition of appeal of Jacob Maloyfsky and Fannie Maloysky, complainants below and the appellants in this case, respectfully shows that:

- 30 1. Your petitioners, Jacob Maloyfsky and Fannie Maloyfsky, respectively, find themselves aggrieved by the Final Decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, advised by his Honor, Vice Chancellor James F. Fielder, bearing date the 27th day of April, 1931, in a cause wherein your petitioners, Jacob Maloyfsky and Fannie Maloyfsky were complainants and Leonard Schiraldi, also known as Louis Shiraldi, and Senger
- 40 Coal & Ice Corporation, a corporation of New Jersey, were defendants, in this respect, to wit: That

Petition of Appeal.

the said decree ordered, adjudged and decreed that the complainants' bill of complaint be dismissed with costs and counsel fees.

2. Your petitioners, therefore, appeal from the said decree of the Chancellor which decreed a dismissal of the bill of complaint with costs and counsel fees, as aforesaid, upon the ground that the same is erroneous for the following reasons: 10

(a) Upon the pleadings and the evidence there should have been a decree for the complainants for specific performance of the contract set forth in the bill of complaint.

(b) The defendant, Senger Coal & Ice Corporation as the assignee of the vendee named in said contract should have been decreed to specifically perform the said contract for the reason that the contract bound the vendee's assigns. 20

(c) The defendant, Senger Coal & Ice Corporation, assumed the vendee's obligation to perform and should have been decreed to specifically perform the contract.

(d) Upon the pleadings and the evidence in the cause, the defendant Senger Coal & Ice Corporation was estopped from asserting a right to repudiate the contract for the reason that it not only assumed the contract, but also acted upon the same and obtained extensions of time from the vendor and thereby became estopped from denying its liability and responsibility as a vendee by assignment and assumption as well as by estoppel. 30

Petition of Appeal.

(e) Under the evidence in the case and the pleadings, it was established that there was a novation and the Senger Coal & Ice Corporation thereupon became liable to complainants as their vendee and there should have been a decree of specific performance against the defendant Senger Coal & Ice Corporation.

10

Your petitioners, therefore, pray that the said decree of the said Chancellor may be reversed and set aside and that the Court of Chancery be directed to render a decree in favor of your petitioners, as complainants, in accordance with their prayer for relief, and that they have specific performance of the contract aforesaid against the defendant Senger Coal & Ice Corporation and that your petitioners have such other and further relief as to this Honorable Court shall be deemed just and proper.

20

SAMUEL HARBER,
Solicitor for and of Counsel with
Petitioners who are Complain-
ants-Appellants.

30

40

80

New Jersey Court of Errors and Appeals

Between

JACOB MALOYFSKY and FANNIE
MALOYFSKY,
Complainants-Appellants,
and

LEONARD SCHIRALDI, also known as
LOUIS SHIRALDI, and SENER COAL
& ICE CORPORATION, a corporation
of the State of New Jersey,
Defendants-Respondents.

On Appeal
from Court
of Chancery.

BRIEF FOR COMPLAINANTS-APPELLANTS.

Statement.

In the Court below, complainants filed their Bill for specific performance of a contract for the sale by them of certain lands. The Court of Chancery dismissed the Bill of Complaint.

This is an appeal from that decree by the complainants who were the vendors in the transaction.

The defendant, Schiraldi, is not involved in this appeal. The defendant, Senger Coal & Ice Corporation is the only defendant involved in the present appeal.

The contract in the first instance was not made with the defendant, Senger Coal & Ice Corporation, but the contract was assumed by said defendant by an agreement in writing under seal.

Appellants' Contentions.

Appellants contend that the defendant, Senger Coal & Ice Corporation should be decreed to specifically perform the contract which it assumed. Appellants contend that this does not alone involve the question of the right to specific performance against the vendee's assignee, because in this case complainants do not seek to hold the Senger Company merely as an assignee, but do seek to hold it upon an express written assumption.

The defendant-respondent apparently claims that it should not be decreed to specifically perform for the reason that a vendee's assignee cannot be so held. Complainants-appellants do not attempt to hold the said defendant-respondent merely because it became the owner of the original vendee's rights in the contract, but does seek to hold defendant-respondent upon its express written assumption of the contract and because of its conduct subsequent to the assumption by it.

Complainants-appellants contend that the defendant-respondent not only expressly assumed the contract, but also sought and obtained continuances of the time for closing; negotiated for extensions and a settlement; raised objections to the title and also did and performed other acts whereby it became absolutely bound to carry out the contract.

Complainants-appellants further contend that to do otherwise than to decree specific performance would be to permit a fraud to have been practiced upon complainants by the defendant-respondent.

Statement of Facts.

There is practically no dispute of fact in this case.

Complainants owned certain property in Union City and on September 28, 1929, entered into a

contract in writing whereby they agreed to sell the said property for a stated consideration. This contract was, in form, with one, Louis Schiraldi, who was the general manager of the Rubel Ice Company (Case, p. 32, l. 27). The Rubel Ice Company, by agreement in writing under seal with the Senger Coal & Ice Corporation, impliedly adopted the contract entered into in the name of its general manager and thereby became the vendee (see Ex. C-6, Case, pp. 76 to 80 inclusive and particularly that part of said contract which is found in the State of Case on p. 77, ll. 17 to 31). By the same agreement (Ex. C-6, Case, pp. 76 to 80 inclusive) the Senger Coal & Ice Corporation assumed the contract. This agreement, which amounted to an adoption of the original contract by the Rubel contract and to an assumption of it by the Senger Company, was entered into February 8, 1930.

On March 5, 1930, the New York attorney for the Senger Company wrote to their New Jersey correspondent-attorney to act for the Senger Company (see Ex. D-1, Case, p. 81).

Thereafter, Mr. Brand, the New Jersey lawyer, communicated with the attorney for the vendors and obtained extensions of time within which to close the title (Case, p. 34, l. 20). He also attended at the office of the vendors' attorney with a representative of the New York lawyer and also with Mr. Senger, the President of the Senger Company (Case, p. 35, l. 21). This meeting occurred on the last date fixed for closing and at this time, Mr. Senger, on behalf of his Company requested a cancellation of the contract and offered to pay \$1,000.00 or \$1,500.00 for such cancellation (Case, p. 35, l. 32).

Prior to Mr. Brand's representation of the defendant, Senger, he had also represented the Rubel Company and in its behalf had paid an additional \$1,000.00 on account of the purchase price in order

to secure an extension of time (Case, p. 34, l. 37; p. 36, l. 32).

Between March 5, 1930, and the first week in May, 1930, Mr. Brand acting for the Senger Company, attended at the office of the vendors' attorney a number of times and obtained a number of adjournments (Case, p. 37, ll. 25 and 35).

At the trial of the case Mr. Brand, the New Jersey attorney, testified to the foregoing matters. Mr. Senger did not testify, nor did the defendant, Senger Company call any witnesses at all to contradict Mr. Brand's statements. The only witnesses called by the defendant Senger Company were witnesses to testify with respect to alleged objections to the title.

On November 18, 1929, at which time Mr. Brand was acting for the Rubel Company, objections to the title were made in the form of a letter (Ex. C-2, Case, p. 65). These objections had primarily to do with certain judgments of record which turned out to be against other parties. These objections were answered by a letter of the vendors' attorneys (Ex. C-2, Case, p. 64).

At the trial of the case testimony was offered which further cleared up all of the objections to the title and the defendant, Senger Company, did not argue in the Court below that there was any objection to the title. The decision of the Court below does not involve any question of a valid title and complainants-appellants assume that no question of valid title will be raised here.

Further facts which may be pertinent to the real issue in this case will be set forth in connection with the following argument and it seems unnecessary to make any further statement of fact at this time.

POINT I.

The defendant - respondent, Senger Coal & Ice Corporation, should be required to specifically perform the contract which it assumed by agreement in writing and which it thereafter acted upon.

The substantial question now before the Court is not whether specific performance can be had against a vendee's assignee. The real question is whether Rubel Company became obligated on the contract which had been entered into by its general manager. If it became so obligated, then the Senger Company became obligated by its assumption. If the Rubel Company never became bound then the assumption by the Senger Company cannot be enforced.

The question presented is a plain one, but as it is somewhat involved in a possible confusion of legal principles it may be well at this time to state as clearly as possible the appellants' position.

At the inception of the transaction a contract was entered into between vendors and one, Louis Schiraldi, the general manager of Rubel Company. So far as the vendors were concerned the Rubel Company was at that time an undisclosed principal. Appellants concede that until the agreement of February 8, 1930 (Ex. C-6), the Rubel Company could not have been held as an undisclosed principal. Appellants concede that in a real estate transaction where the agreement must be in writing an undisclosed principal cannot be held if the undisclosed principal can only be connected with the transaction by parol evidence.

In the case of *Randolph vs. General Investors Co.*, 97 N. J. E. 493, s. c. 128 Atl. 156, this Court held very plainly and distinctly that the Statute of Frauds prevented a showing by parol that there was an undisclosed principal in a real estate transaction.

Appellants, therefore, concede that the Rubel Company could not have been held, as an undisclosed principal, upon parol evidence of the fact that it was in reality the principal and that Schiraldi, its general manager, was merely acting for it. However, when the Rubel Company by formal agreement in writing under its corporate seal entered into an agreement on February 8, 1930, with the Senger Company (Ex. C-6, Case, p. 76) the objection of the Statute of Frauds ceased to have valid force for the reason that the undisclosed principal is now shown by an agreement in writing as formal as the one which had been theretofore signed by its agent. By the language of the said agreement the Rubel Company recited that the contract of September 28, 1928, to purchase from Jacob Maloyfsky and Fannie Maloyfsky certain property at Union Hill for the sum of \$14,000.00 had as a matter of fact been made by the Rubel Company (described in said contract as the seller). In other words on February 8, 1930, the Rubel Company by undisputed written evidence formally said that it had been and was the principal in the contract with complainants and that it was in fact the vendee of such contract. This undisclosed principal is not shown by parol but is shown by a written document under seal signed and executed by the Rubel Company. The objection of the Statute of Frauds ceases to have any force and effect and this case is not controlled by the decision in the case above cited of *Randolph vs. General Investors Co.* Thereupon and in the same agreement, the Senger Company formally by agreement in writing duly executed by

it under its seal assumed the obligation of the contract which had been entered into with the Rubel Company in the name of its general manager, Schiraldi.

We are not concerned here with the proposition that a vendee's assignee can not be held to specific performance because the Rubel Company was not the assignee of Schiraldi nor was the Senger Company the assignee of the Rubel Company. It is true that in the case there was some evidence that Schiraldi had executed an assignment of the contract in blank and that this assignment had been turned over to the Senger Company by the Rubel Company. This assignment appears in the record as Schedule A attached to Exhibit C-4 and is found in the State of Case on page 75. The name of the assignee was left blank. The assignment was in the possession of the Rubel Company and was transferred to the Senger Company in connection with the agreement of February 8, 1930. In Exhibit C-4, answers to interrogatories, the defendant, Senger Company, stated under oath that the assignment in question was transferred to it from Rubel Ice Corporation (Case, p. 70, l. 36).

Complainants-appellants did not rely upon this assignment and did not depend upon it. Except as a step in the transaction it is of no particular importance. The agreement of assumption is entirely sufficient and the assignment in blank may be ignored except insofar as it shows the clear intention on the part of the Rubel Company to turn everything that it had to the Senger Company and upon the part of the Senger Company to acquire any and all interests which the Rubel Company had.

The complainants-appellants do not contend that the contract between the Rubel Company and the Senger Company was made for their benefit. They

do not seek to enforce such assumption upon any such theory, but do seek to enforce it upon the well known and established equitable principle which allows a mortgagee to hold a mortgagor's grantee who assumes the mortgage upon the plain and simple equitable principle of preventing circuitry of suits and the principle which gives a creditor in equity all of the security which a debtor may have acquired after the creation of the original obligation.

For the further purpose of an attempt at clarity a few simple illustrations may not be out of place.

If A agrees to sell realty to B and B assigns to C, A cannot obtain specific performance against C. If, however, C not only accepts an assignment from B but also covenants to assume the contract, then A may obtain specific performance against C. A may continue to hold B, but he is not compelled to do so. A contracts to sell realty to B. B in fact is an agent for an undisclosed principal, C. If this agency can only be shown by parol, A cannot hold C. If, however, the undisclosed principal can be shown to be such by written evidence then A can hold either B or C at his election upon ascertaining the fact of the undisclosed agency.

In equity one who assumes an obligation can be held by the original creditor without any loss of right as against the original debtor.

Crowell vs. St. Barnabas Hospital, 27 N. J. E. 650.

In the case of *Keller vs. Ashford*, 133 U. S. 610, the United States Supreme Court stated the same principle and referred rather extensively in its opinion to the New Jersey cases as well as cases in other states. In fact it seems to be well settled that in equity to prevent circuitry of suits the holder of an

obligation may look directly to the last person who has assumed the obligation even though it may be through a series of similar previous assumptions. It is also true that the acceptance of a grant reciting an assumption binds the grantee without any signature on the part of the grantee.

Sparkman vs. Gove, 44 N. J. L. 252.

It appears to be, however, unnecessary to consider the effect of the acceptance of the assignment in blank because we have in this case the positive assumption signed by the Senger Company.

In the comparatively recent case of *Dunn vs. Clinchfield Railroad Co.*, 19 Fed. 2nd Series 810, one of the Circuit Courts of Appeal held a Railroad Company upon its assumption of an obligation in connection with a lease. The original obligation had been with the defendant's lessor, but the Court recognized and applied this equitable doctrine which does not involve the question at all of for whose benefit the subsequent contract may have been made.

POINT II.

Defendant, Senger Company, should be held to specific performance because of its conduct.

The Senger Company after entering into its agreement of assumption placed the matter of the completion of the contract with a New Jersey attorney. Mr. Brand, the New Jersey attorney requested and obtained adjournments. He attended with the President of the Senger Company. He participated in an offer of settlement. Certainly

the Senger Company and Mr. Brand at that time were not authorized to act for the Rubel Company or for its general manager. Mr. Brand and Mr. Senger had absolutely no right to appear at all except in behalf of the Senger Company. Their right arose out of the agreement of February 8, 1930. By this agreement they had become the principal. The Senger Company should be estopped from taking any contrary position for the reason that they would be perpetrating a fraud upon everyone unless they were acting lawfully and properly. If the Senger Company sought the continuances they either did so legally and lawfully or fraudulently.

A court of equity should place a construction upon their conduct compatible with fair dealing rather than one which would permit of fraud.

If the Senger Company had become the principal party liable on the contract then the conduct is entirely consistent with fairness and good equity. The Senger Company assumed the contract, Mr. Brand was instructed to represent the Senger Company. He obtained for it extensions of time. The Senger Company negotiated for a release of the contract. Objections to the title were made which were cleared up at the request of the Senger Company's attorney. Even at the trial of the case objections to the title were raised which were then again shown to be objections on paper and without real substance.

The defendant answered the Bill evasively and also answered interrogatories in a like manner. The defendant did not properly plead or otherwise answer so as to frankly reveal its connection with the transaction until the trial itself and then only after a direction from the Court. (Case, pp. 54 and 55.)

It was only after the contract between Rubel Company and the Senger Company was finally pro-

cured at the trial that the real facts of the case were ascertained for the first time by complainants and the Court. This is not at all a case of a mere assignment without an assumption and without affirmative action on the part of an assignee.

It would be very inequitable to allow the defendant, Senger Company, to avoid carrying out the agreement which it assumed and acted upon.

POINT III.

Equity looks at the substance and not at mere form.

No real difficulty is presented by this case notwithstanding some of its peculiarities. As was said in the case of *Woodbury Heights Land Co. vs. Loudenslager*, 55 N. J. E. 78, s. c. 35 Atl. 436.

“To the eye of equity the case will be judged not by its form, by intercurrent and insignificant instances, but by its substance.”

The United States Supreme Court in the case of *Mugler vs. Kansas*, 123 U. S. 623, said it is the solemn duty of a Court to look at the substance and not at the form.

The original contract was undoubtedly in fact made for the Rubel Company. The Rubel Company paid the money. It recognized that it was the principal by its contract with the Senger Company.

To argue that because the contract was in the name of Schiraldi and assigned by Schiraldi in blank that the Rubel Company had nothing to do with it and was not involved and was not liable is to argue that a court of equity is powerless to prevent the perpetration of fraud. To say that the

contract was not binding on the Rubel Company because it was made in the name of its general manager who then executed an assignment in blank is to contend that a court of equity is without power and resource.

It is perfectly true that the Statute of Frauds must be considered and that very often where the Statute applies the Court's hands are tied. Fortunately, however, in this case the connection of the Rubel Company is not shown merely by parol evidence but is clearly and absolutely established by documentary proof.

Upon sound equitable principle, the facts of the case, its merits and the equities of the parties, specific performance should be decreed and to that end it is respectfully submitted that the decree of the Court of Chancery should be reversed with direction to that Court to enter a decree of specific performance in favor of the complainants and against the defendant, Senger Coal & Ice Corporation.

JOHN W. OCKFORD,
Of Counsel with Complainants-Appellants.

80

New Jersey Court of Errors and Appeals

Between

JACOB MALOYFSKY and FANNIE
MALOYFSKY,
Complainants-Appellants,

and

LEONARD SCHIRALDI, also known
as LOUIS SHIRALDI, and SEN-
GER COAL & ICE CORPORATION,
a corporation of the State of
New Jersey,

Defendants,

SENGER COAL & ICE CORPORA-
TION, a corporation of the
State of New Jersey,
Defendant-Respondent.

On Appeal
from Court
of Chancery.

BRIEF FOR DEFENDANT-RESPONDENT SENGER COAL AND ICE CORPORATION.

Preliminary Statement.

This is an appeal from a decree of the Court of Chancery dismissing the Bill of Complaint as against the defendant Senger Coal & Ice Corporation.

Suit was instituted for specific performance of a contract for the sale of land by the vendors. The Bill of Complaint was dismissed as to all three defendants, as will be more fully set forth hereinafter.

The opinion of the Court below is set forth in the State of Case, Pages 82-88 inclusive; and is reported in 108 N. J. Eq. 190; 154 Atl. 404.

Statement of Facts.

On September 28th, 1929 the Complainants entered into a written contract to sell certain real property to Louis Schiraldi, which contract was signed by those parties. (State of Case, Pages 12-16 incl.). After numerous adjournments requested by Isadore Brand, Esq. the attorney of the vendee, title was not closed and suit was instituted by the Complainants for specific performance of the contract.

The defendants to this suit were Louis (Leonard) Schiraldi, the vendee and party to the contract; Rubel Ice Corporation, alleged to be the undisclosed principal of the vendee; and Senger Coal & Ice Corporation, alleged to be the assignee of the contract.

Upon motion the Bill of Complaint was dismissed as against Rubel Ice Corporation, the alleged undisclosed principal. (State of Case, Page 63, Line 10). Thereupon the Complainants amended the Bill of Complaint, without joining Rubel Ice Corporation as a defendant, and seeking no relief as against that company. The Amended Bill of Complaint pleaded no further allegations as to Rubel Ice Corporation, merely stating that it was the undisclosed principal of the vendee. (State of Case, Page 6, Line 21.).

The decree dismissing the Bill of Complaint as to Rubel Ice Corporation has never been appealed from. The Complainants abandoned all claim to remedy against that defendant.

The final decree dismissed the Bill of Complaint as against the vendee, Leonard Schiraldi. (State

of Case, Page 90, Line 1.) Neither has this dismissal been appealed, so that it is apparent that the Complainants have also abandoned all claims to remedy against the vendee.

The only defendant sought to be held is Senger Coal & Ice Corporation. The final decree dismissed the Bill of Complaint as to this defendant (State of Case, Page 89, Line 34) and it is from this dismissal that Complainants appeal. The bill of complaint alleges that Senger Coal & Ice Corporation took an assignment of the contract. (State of Case, Page, 7 Line 21).

Complainants seek to enforce specific performance against Senger Corporation on three theories:

1. An alleged assignment of the contract to Senger Corporation. (State of Case, Page 75, Line 1).

2. An alleged assumption of the liability of Rubel Ice Corporation to perform the contract, by virtue of a contract between Rubel Ice Corporation and Senger Corporation. (State of Case, Page 76-80 incl.).

3. The subsequent conduct of Senger Corporation which bound this defendant to the contract.

The testimony at the final hearing disclosed that at the day set for closing of title after one adjournment, Mr. Senger, accompanied by his New York attorney appeared at Mr. Harber's office and refused to perform Schiraldi's contract. (State of Case, Page 35, Line 11). That was the first and only time Mr. Senger or Senger Coal & Ice Corporation appeared in the transaction. After this refusal, suit was threatened and an offer of settlement was made by Mr. Senger. (State of Case, Page 41, Line 9).

No stipulations for adjournments of closing the title were signed by Senger Corporation, all being signed by the vendee, Louis Schiraldi. (State of Case, Page 43, Line 26). There was no proof of the relation of principal and agent as between Rubel Corporation and Schiraldi.

N. B. *All Italics Are My Own.*

For convenience Jacob and Fannie Maloyfsky are referred to herein as Complainants or Maloyfsky; Rubel Ice Corporation is referred to as Rubel Corporation; Senger Coal & Ice Corporation as Senger Corporation; and Louis (Leonard) Schiraldi as "vendee" or Schiraldi.

POINT I.

Senger Coal and Ice Corporation is not an assignee of the vendee.

There is no evidence, oral or written of any assignment of this contract to Senger Corporation. All the complainants rely upon is an assignment of the contract executed by Schiraldi; containing no name of an assignee, that being left blank. (State of Case, Page 75, Line 1). Nor is there any proof as to the time when, or the place where, or to whom and by whom the same was delivered if, in fact, it was delivered. As was said by the Court below, "The assignment executed by Schiraldi does not contain the name of any assignee and the evidence does not show delivery of it by him to anyone." (State of Case, Page 84, Line 19).

Furthermore, even if that assignment was delivered, it would be ineffectual, as it does not comply with the requirements of the Statute of

"T
tract
intere
upon w
note t
be cha

Frauds. A vendee under a contract for the sale of land possesses an equitable interest and title to the property, and by reason of the Statute of Frauds this equitable interest and title to land cannot be assigned or transferred except by a written instrument complying with the requirements of that statute.

"That no lease, estate or *interest*, either of freehold or term of years, or any uncertain interest of, in, to or out of any messuage, lands, tenements or hereditaments, *shall be assigned*, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same * * *."

P. L., 1877-444; 2 C. S. 2610.

Furthermore, the Statute of Frauds requires that a contract of sale of lands shall be in writing, and signed by the party to be charged therewith.

"That no action shall be brought * * * (4) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning therein, * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith * * *."

P. L. 1877-445; 2 C. S. 2612.

Although the Statute of Frauds provides that the memorandum of writing must be *signed* only by the assigning party or the party to be charged therewith, nevertheless, the Courts of this State have repeatedly held that the memorandum must contain the names of both parties.

Johnson v. Buck, 35 N. J. Law 339,

Bowers v. Glucksman, 68 N. J. Law 146;
52 At. 218.

Kamens v. Anderson, 99 N. J. Eq. 490;
133 At. 718.

This assignment was neither signed by the party to be charged, Senger Corporation, nor did it contain the name of any party but the assignor Schiraldi.

The omission of name cannot be supplemented by patrol testimony.

Randolph v. General Investors, 97 N. J. Eq. 493; 128 Atl. 156.

Jacobson v. Lambert, 109, N. J. Eq. 88;
156 At. 763.

Although this defendant is joined as a party defendant to the suit because it held an assignment of the contract, as alleged by the Bill of Complaint (State of Case, Page 7, Line 21), the Complainants now abandon this cause of action, and in their brief, filed herein, state "Complainants-Appellants did not rely upon this assignment and did not depend upon it" (Brief for Complainants-Appellants Page 7).

It is evident from the foregoing that no liability can be predicated against Senger Corporation by reason of the assignment.

POINT II.

Specific performance of a contract for the sale of real property cannot be obtained against the assignee of the vendee thereof.

A. Assuming, that Senger Corporation were the assignee of the vendee, which fact is neither proved nor admitted, specific performance cannot be obtained against it. There is no case, either in this jurisdiction or in any other jurisdiction, holding that specific performance may be had against the assignee of the vendee in an action brought by the vendor.

The purchaser's contract to buy is a personal one, and his assignee incurs by reason of an assignment, no personal liability to the vendor for the payment of the unpaid purchase money. The reason for this is that the acceptance of an assignment made by the purchaser does not place the assignee in privity of contract with the vendor. *The assignee is not party nor privy to the contract.* There exists a lack of mutuality of obligation.

"Although the assignee of the vendee has all the right of the vendee in the contract, he is not subject to the obligations of the contract, except upon his option to enforce specific performance. Thus he can proceed in equity against the vendor to secure the land, but the vendor cannot proceed against him, the assignee, to compel him to take the land. The remedy of the vendor is against the buyer (by way of enforcing the vendor's lien) against the land."

Pomeroy on Equity Jurisprudence, 4th Ed. Section 2274.

As far as counsel has been able to ascertain there are no decisions in the State of New Jersey directly upon this point, except the decision below.

However, it has been repeatedly held in this State that "the parties to the contract are the only proper parties to a common bill for the specific performance of a contract of sale of land."

Bacot v. Wetmore, 17 N. J. Eq. 250,
Schenck v. Spring Lake Beach Co., 47 N.
 J. Eq. 44,
Brisbane v. Sullivan, 93 N. J. Eq. 578;
 117 Atl. 37,
Mechanic v. Duschaneck, 99 N. J. Eq. 86;
 132 Atl. 854.

As was said by the Court below, "Nor can the vendor in a contract for the sale of land compel the assignee of the vendee to perform the contract. Persons who are not privies to such a contract are generally not proper parties to a bill for specific performance." (State of Case, Page 85, Line 14).

Conversely, the assignee of the vendee could have specific performance of the contract against the vendor. In such case the lack of mutuality is overcome by the assignee submitting himself to the jurisdiction of the Court, by instituting suit. Although there is no privity of contract, the assignee of the vendee places himself in privity by submitting voluntarily to the jurisdiction of the Court.

McVoy v. Bauman, 93 N. J. Eq. 360; affirmed 93 N. J. Eq. 638.

The reason for this rule is identical with that which allows the party not bound by a unilateral contract, to obtain specific performance. Not hav-

ing signed the contract, he is neither party nor privy to the contract until such time as he elects to secure performance. By instituting suit against the vendor, he becomes bound. Prior thereto he is under no obligation to perform.

Cohen v. Pool, 84 N. J. Eq. 77; affirmed
84 N. J. Eq. 189.

Kamens v. Anderson, 99 N. J. Eq. 490;
133 At. 718.

Since the lack of mutuality is remedied by the assignee of the vendee submitting to the Court's ruling by instituting suit, it must follow as a natural sequence that such lack of mutuality existed prior to the filing of the bill. Such lack of mutuality is fatal to a suit by the vendor, for his instituting action does not remedy the lack of mutuality. He was already bound to perform the contract.

"The unilateral contract becomes binding on the party who has not signed, only by the filing of the bill * * * *Richards v. Green*, 23 N. J. Eq. (8 C. E. Green) 536, 537. (Court of Errors and Appeals 1872, Chief Justice Beasley)—and up to that time he is free from any legal or equitable obligation."

Stengel v. Seargent, 74 N. J. Eq. 20; 68
At. 1106.

There being no privity of contract between the vendor and the assignee unless and until the assignee brings suit, the vendor cannot enforce the contract against the assignee.

B. *The rule in other jurisdictions is that the assignment of a contract for the sale of real prop-*

erty imposes upon the assignee no personal obligation to perform.

In the State of New York this question has often been before the Courts. It has been repeatedly held that the vendee's assignee incurs no liability to the vendor.

"The mere assignment of a bilateral executory contract may not be interpreted as a promise by the assignee to the assignor to assume the performance of the assignor's duties, so as to have the effect of creating a new liability on the part of the assignee to the other party to the contract assigned. The assignee of the vendee is under no personal engagement to the vendor where there is no privity between them."

Langel v. Betz, 250 N. Y. 159; 164 N. E. 890.

In a still later case, in 1929, the Court of Appeals again affirmed this rule, stating:

"A majority of the judges of the court are of the opinion that under our rulings in *Crowley v. Lewis*, 239 N. Y. 264, and *Langel v. Betz*, 250 N. Y. 159, the remedy of specific performance should have been confined to the defendant *Payne* (the vendee) and that the relief as to the plaintiff (the assignee of the vendee) should be limited to a dismissal of the complaint."

Ballen v. Potter, 251 N. Y. 224.

To the same effect are:

Genevets v. Feiering, 121 N. Y. Supp. 392; 136 App. Div. 736.

Forbes v. Reynard, 46 Misc. 154; 93 N. Y. Supp. 1097.

C. *In numerous other jurisdictions the law has been similarly well founded.*

Corbus v. Teed, 69 Ill. 205.

Gross v. Thornson's Estate, 286 Ill. 185;
121 N. E. 600.

Wilson v. Beazely, 186 Cal. 437; 199 Pac.
772.

Meyer v. Droegmueller, 165 Munn. 245;
206 N. W. 391.

Lavelle v. Gordon, 15 Mont. 515; 39 Pac.
740.

Morrison v. Chambers, 122 N. C. 689; 30
S. E. 141.

Southern Pacific v. Butterfield, 39 Nev.
177; 154 Pac. 932.

Bimrose v. Mathews, 78 Wash 32; 138
Pac. 319.

Fisher v. Brown, 24 W. Va. 713.

Lisenberg v. Newton, 120 Cal. 571; 52 Pac
813.

In view of these numerous decisions in many jurisdictions, it may be definitely stated that the law on this question has been definitely established:

The assignee of the vendee is not bound to perform the contract assigned and cannot be compelled to perform at the suit of the vendor.

This point is conceded by the Complainants.
(Brief for Complainants-Appellants, Page 8).

POINT III.

The agreement between Rubel Ice Corporation and Senger Coal & Ice Corporation does not constitute an assumption of the original contract of sale between Maloyfsky and Schiraldi.

A. The so-called contract of assumption was an agreement entered into between Rubel Corporation and Senger Corporation referring to the sale and purchase of an ice plant in Hoboken. (State of Case, Pages 76-80 incl.). Among its many provisions, it contained just one clause which Complainants contend constituted an assumption of Schiraldi's contract. This clause (State of Case, Page 77 Line 16) is as follows:

"As a further consideration the Purchaser (*Senger Coal & Ice Corporation*) agrees to assume and hold the Seller (*Rubel Corporation*) harmless from a certain contract made by the Seller under date of September 28, 1928, to purchase from *Jacob and Fanny Maloyfsky* certain property at Union Hill, for the sum of \$14,000, and also to pay the legal fees of *Isidore Brand, Esq.*, or his firm, for services in connection with the making of said contract, the searching and closing of title, and any title company fees in reference thereto; *the purpose of this being that the purchaser shall take over all costs in reference to this contract* and shall, on the closing hereof, repay to the Seller the amounts already paid by the Seller on account thereof."

This clause expressly states that it is for the purpose of taking over the costs in reference to a contract between Rubel Corporation, a corpora-

tion of New York, and Maloyfsky. There is no reference to the contract involved herein, that being a contract between Schiraldi and Maloyfsky.

This so-called contract of assumption not only fails to refer to the contract between Schiraldi and Maloyfsky, and cannot be connected therewith by means of legal evidence, but it is itself invalid to the extent that it comes within the Statute of Frauds, because;

1. *It fails to contain a sufficient description of the land.* The language used, "certain property at Union Hill" is not sufficiently definite to make this contract valid within the Statute of Frauds.

"It is true that the lands need only be described with reasonable certainty, but the description here is entirely uncertain."

Often v. Stout, 97 N. J. Eq. 122; 127 Atl. 677.

Bateman v. Riley, 72 N. J. Eq. 316.

The property involved in the Schiraldi contract was located in Union City, not Union Hill.

2. *It fails to name the parties.*

"But the courts with great uniformity have held that the substantive parts of the contract must appear in writing; accordingly the name or a sufficient description of the party seeking enforcement of the contract, is indispensable, because without it no complete contract is shown."

Kamens v. Anderson, 99 N. J. Eq. 490; 133 Atl. 718.

Having failed to comply with the requirements of the Statute of Frauds, this contract is not avail-

able to the Complainants, even if it were an assumption contract, which it is not.

B. *This so-called contract of assumption is nothing more than an indemnity agreement.*

The contract speaks for itself. The wording "to hold the seller harmless" can only mean one thing—*Indemnification*.

Indemnify—is defined by Webster to mean (1) *To save harmless*; to secure against future loss or damage. (2) To make up for what is past; to make good; to reimburse."

4 *Words and Phrases*—(1st Ed. p. 3539.

Indemnify. To secure or *save harmless* against loss or damage, of a specified character, which may happen in the future. * * To indemnify is said to be synonymous with "to save harmless."

Bouvier's Law Dictionary, Rawle's 3rd Ed. Vol. 2; p. 1532.

The agreement further explains the intention of the parties thereto, to enter into an indemnification contract only, by stating, "The purpose of this being that the purchaser (Senger) shall take over all costs in reference to this contract."

Where in this agreement is there any assumption of liability? Where in this contract is there any agreement by Senger Corporation to carry out and perform a contract entered into by Louis Schiraldi? Counsel is unable to find any such assumption of liability and agreement to perform, as is contended by Complainants. The Court below was unable to do so, for its opinion very fittingly says,

"But I cannot construe the clause which I have quoted above from the agreement between Rubel Ice Company and the Senger

Company, as an assumption by the latter corporation of the terms of the contract here under consideration. I regard it as nothing more than a promise by the Senger Company to hold the Rubel Ice Company harmless from any liability which it might have incurred under the contract and to pay certain money to or for Rubel Ice Company."

(State of Case, Page 87, Line 22).

C. *This so-called contract of assumption, being only an agreement to indemnify Rubel Corporation, and for its benefit alone, the Complainants cannot claim any rights or benefits under it.*

There is nothing in this contract or in the evidence, that the parties entered into this agreement for the benefit of the Complainants.

"In *Styles v. Long Co.*, 70 N. J. Law 301, affirming 67 N. J. Law 413 the Court held, that one not a party to a contract has no status to sue upon it if he be a person with whom the contracting parties never meant to come into contractual relations, and that a possible benefit to such party by the performance of the contract is not enough to give him the right to maintain an action upon it. To have that effect, it must appear that the contract was made for his benefit."

Knapp v. Heidritter Lumber Co., 99 N. J. Eq. 381; 131 At. 909.

To the same effect is:

Standard Gas Co. v. New England Casualty Co., 90 N. J. Law 570; 101 At. 281.

Brandt on Suretyship & Guaranty, 3rd Ed. page 20.

Being a contract of indemnity, this agreement should not be construed to imply undertakings not clearly embraced within the language of the agreement, and no liability should be imposed beyond the precise terms of the undertaking.

Skillman v. U. S. Fidelity & Guaranty Co., 101 N. J. Law 511; 130 At. 564.

In order to construe this agreement, as have done the Complainants, it would be necessary to read language into the contract not actually there, to draw inferences and make implications far beyond the legal construction of the contract, and to entirely ignore the express intention of the parties.

“Such a covenant (to indemnify and save harmless) is not equivalent to a covenant to pay existing debts.”

Miller v. Fries, 66 N. J. Law 377.

D. It is contended by Complainants that the agreement between Rubel and Senger overcame the effect of Statute of Frauds. (Brief of Complainant-Appellants, Page 6).

The reasoning thereof is fallacious. This agreement neither amounted to a contract with Complainants, nor to a ratification of a prior contract. It did not even specifically refer to the Schiraldi contract, and was itself defective in failing to meet the requirements of the Statute of Frauds, as has been shown hereinabove.

In order to connect the two distinct transactions Complainants necessarily resorted to inferences, implications and parol evidence. The two instruments must stand on their respective terms. Neither inference nor parol evidence can be used

to attempt to connect them. How then can a contract between Maloyfsky and Schiraldi be connected with a contract between Rubel and Senger, without specific reference therein, one to the other? It cannot be done, other than by inference and parol evidence, as have done the Complainants.

"The memorandum must contain the full terms of the contract—that is, the names of the buyer and seller, the subject of sale, the price, and terms of sale, if any there be. * * * To supplement this memorandum or supply any of the essential parts of the contract, parol testimony cannot be reserved."

* * * * *

"The connection between the signed and unsigned papers cannot be made by parol evidence without violating established principles of evidence with respect to transactions within the statute."

Johnson v. Buck, 35 N. J. Law 338

also

Stengel v. Sergeant, 74 N. J. Eq. 20;

Shinn v. Smiley, 94 N. J. Eq. 583; 122 Atl. 531.

Thus, it may be seen that this agreement is proof of nothing but itself; an agreement by Senger Corporation to indemnify Rubel Corporation; and is not available to Complaints as proof of anything but that.

Rubel Corporation at no time was in a position enabling it to obtain specific performance of the contract against the Complainants. It was alleged to be nothing more than an undisclosed principal not named in the contract and not connected thereto by any legal evidence.

POINT IV.

Even if this contract could be construed as one of assumption, it was at most an agreement by Senger Coal & Ice Corporation to assume any liability that Rubel Corporation may have had with reference to a contract for the purchase of certain property at Union Hill from complainants.

A. Rubel Ice Corporation never had any liability under the contract between Maloyfsky and Schiraldi. All that Complainants ever claimed was that Rubel was the undisclosed principal of Schiraldi, and so alleged in their Bill of Complaint. The Court below dismissed the Bill of Complaint as to Rubel, recognizing the well-established doctrine that an undisclosed principle cannot be held in specific performance.

Schenck v. Spring Lake Beach Co., 47 N. J. Eq. 44,
Randolph v. General Investors, 97 N. J. Eq. 493; 128 Atl. 156.

Nor have Complainants proven any other liability on the part of Rubel Ice Corporation. There is no evidence in this case, nor was any attempt made by Complainants, to prove liability against Rubel Ice Corporation.

Complainants have not appealed from the decree dismissing the Bill of Complaint as to Rubel Ice Corporation. Such being the case, the dismissal of Rubel establishes the law of this case to this extent: *Rubel Ice Corporation is not liable to a suit for specific performance of the Schiraldi*

contract. This is res adjudicata, or at least stare decisis.

As was said in the opinion below, "The Complainants in this suit could not have a decree for performance against Rubel Ice Company, as Schiraldi's undisclosed principal —." (State of Case, Page 87, Line 9.).

No liability having been shown to exist on the part of Rubel Ice Corporation, the defendant Senger Coal & Ice Corporation assumed no more liability than had Rubel Ice Corporation if the agreement be construed as an assumption of liability rather than an indemnity agreement. The clear and unmistakable meaning of this contract should not be extended to include any liability, which in fact, does not exist in favor of Complainants.

Complainants admit this contention for it is stated in their brief, "If the Rubel Company never became bound then the assumption by the Senger Company cannot be enforced." (Brief of Complainants-Appellants Page 5).

B. This transaction may be compared by way of analogy to the situation arising by the purchase of property subject to the lien of a mortgage.

This very suitable comparison is made by the Complainants in their brief. (Brief for Complainants-Appellants, Page 8).

Professor Ames of Harvard University has treated this analogy in an elaborate article. He said, in part:

"Similarly, as no decree will be given against an assignee of the mortgagor for the payment of the whole or any part of the mortgage debt, so no decree can be had

against the assignee of the buyer for the whole or any part of the purchase money."

Specific Performance for and Against Strangers to the Contract, 17 Harvard Law R. 174.

As the Complainants contend, a grantee who purchases property and agrees to assume and pay a mortgage lien on the property becomes bound thereby. (Brief for Complainants-Appellants, Page 8). The mortgagee may seek recovery from such a grantee. But the Complainants have misconstrued the basis of this liability. It is not based on the "simple equitable principle of preventing circuity of suits." This rule rests upon the doctrine that the grantee who assumes the payment of the mortgage becomes a security, which by *subrogation* inures to the benefit of the mortgagee. The assumption is held to render the grantee the principal and the purchaser the surety for the debt, *the promise being to indemnify the latter* in case he has to pay the debt.

Klapworth v. Dressler, 13 N. J. Eq. 62.

Crowell v. Hospital of Saint Barnabas,
27 N. J. Eq. 650.

Eakin v. Shuttz, 61 N. J. Eq. 156.

"The obligation of the Lewis Greascup Company, arising out of its covenant of assumption, is one which the complainant is entitled to enforce *by way of subrogation*."

Holland v. Delazier, 85 N. J. Eq. 497.

Consequently if the grantor is not himself liable, no liability can attach to the grantee. His contract being one of indemnification, it amounts to a nullity if the grantor is not liable; there is nothing to indemnify.

"And if the grantor is not personally liable for the mortgage debt, the mortgagee cannot look to the grantee personally, at all; because the assumption is but an indemnity, and the grantor not being liable, the indemnity is practically a mere nullity."

Mount v. Van Ness, 33 N. J. Eq. 262.

This same doctrine was expressed in:

Crowell v. Saint Barnabas, 27 N. J. Eq. 650.

Norwood v. Dehart, 30 N. J. Eq. 412.

Eakin v. Shuttz, 61 N. J. Eq. 156.

The case of *Keller v. Ashford*, 133 U. S. 610, referred to by Complainants (Brief for Complainants-Appellants, Page 8) is no authority to the contrary, for in that case the United States Supreme Court said, in adopting the language of *Crowell v. Saint Barnabas*, 27 N. J. Eq. 650:

"And it will not in any case be available to the mortgagee unless the grantor was himself personally liable for the payment of the mortgage debt."

Keller v. Asford, 133 U. S. 610.

Hence, if the contract between Rubel Corporation and Senger Corporation be construed as an assumption, still no liability could be imposed on this defendant. Senger Corporation is, by way of analogy, placed in the same position, in the instant case, as the purchaser of property assuming a mortgage, whose grantor was never liable to pay the mortgage. Such a contract is one of indemnity between Rubel and Senger, and is available to the Complainants only by way of subrogation. Since Rubel Corporation has no liability as an undisclosed principal, nor was any other liability

pleaded or proven against Rubel Corporation, it follows as a natural sequence from the rulings in the above cited cases, "the assumption is a nullity and worthless to the Complainants."

Upon this point the Court below followed the same analogy and reached the same conclusion. "Such remedy, however, is not available to a mortgage when the grantor is not personally liable for the payment of the mortgage debt." (State of Case, Page 87 Line 4).

POINT V.

No contract or liability can be implied against Senger Coal & Ice Corporation by the conduct of any of its alleged officers or agents subsequent to the time of the making of the original contract.

A. The evidence with respect to the alleged offer of Mr. Senger to pay a sum of money in settlement of a threatened law suit could not be the basis of any liability on the part of Senger Corporation. Testimony disclosed that the offer was made only after suit was threatened if Senger Corporation refused to perform Schiraldi's contract. (State of Case, Page 41, Line 11).

In answer to interrogatories Senger Corporation answered under oath:

"Interrogatory No. 14: Why did the defendant negotiate an amicable settlement, if any?

Answer: For the purpose of avoiding a law suit, defendant negotiated for settlement, all of which was done without prejudice to any of defendant's rights."
(State of Case, Page 72, Line 7.)

This answer to interrogatory was under oath, and offered in evidence by Complainants.

Furthermore the Complainant's attorney indicated that such legal action could be avoided by payment of money, and that his clients would accept a certain sum of money in settlement of this intended litigation. (State of Case, Page 48, Line 37). Such an attempt to avoid litigation or to effect a compromise does not impose any liability.

"Confidential overtures of pacification, or other offers or propositions between litigation parties, expressly stated to be made without prejudice, are excluded on the grounds of public policy."

"It is well settled that such admissions are competent unless it is expressly stated they are made without prejudice, or unless the party making them has had to believe by the conduct of the adversary that a compromise may probably be effected."

Richardson v. International Pottery Co.,
63 N. J. Law 248.

Nor is there any proof that Mr. Senger was authorized to make an offer of settlement on behalf of Senger Corporation.

Linden Co. v. Dannenhower Co., 7 Misc.
232; 145 At. 104.

Knopf v. Alma Park, Inc., 105 N. J. Eq.
299; 147 At. 590; affirmed 107 N. J.
Eq. 140; 152 At. 919.

B. Nor does the fact that Isidore Brand asked for an adjournment of the date for closing impose any liability on Senger Corporation.

There is no proof of Mr. Brand's authority to act for Senger Corporation, nor does any proof appear for the authority of Mr. Friedman, the New

York attorney, to request Mr. Brand to act for Senger Corporation.

It is an elementary rule of substantive law that in order to bind a principal, the act of the agent must be authorized, or be within the apparent authority of the agent.

Assuming for the purpose of argument that Mr. Brand was the attorney representing Senger Corporation, at most an attorney is a special agent, and persons acting with a special agent do so at their own peril.

Some examples of the tendency of the Courts to limit the powers of attorneys are as follows:

Callaway v. Equitable Trust Co., 67 N. J. Law 44.

Brewster v. Entz, 85 N. J. Eq. 469, affirmed 86 N. J. Eq. 242.

Leithoff v. Dennis, 86 N. J. Eq. 216.

Straus v. Rabe, 97 N. J. Eq. 208, affirmed 98 N. J. Eq. 700.

Even assuming further, that the request for an adjournment was made under authority granted by Senger Corporation, such a request does not bind the assignee of the vendee, and does not impose any liability which was nonexistent prior thereto.

"Plaintiff contends that the request for an adjournment should be construed (time not being of the essence of the contract) as an assertion of a right to such adjournment, and therefore as a binding act of enforcement, whereby defendant accepted the obligations of the assignee. Here again we have an equivocal act. There was no demand for an adjournment as a matter of right. The request may have been made without any intent to assert a right. It cannot be said

that by that act alone the assignee assumed the duty of performance.

Furthermore, no controlling authority may be found which holds that a mere demand for performance by the vendee's assignee creates a right in the complaining vendor to enforce the contract against him. *H. & H. Corporation v. Broad Holding Corporation*, 204 App. Div. 569, 198 N. Y. S. 763."

Langel v. Betz, 250 N. Y. 159; 164 N. E. 890.

(Court of Appeals, 1928).

The above cited case is the leading New York authority, and is dispositive of this entire case, being on all fours therewith.

Subsequent conduct has never been held to overcome the lack of mutuality and privity. A formal agreement, virtually amounting to a novation, must be proved. The allegation of novation asserted in the Petition of Appeal (State of Case, Page 94, Line 1) has not been argued by Complainants. It is well established that grounds of appeal not argued are waived.

Other cases holding that subsequent conduct imposes no liability are:

Wilson v. Beazely, 186 Cal. 437; 199 Pac. 772.

Realty Co. v. Kohn, 184 N. Y. Supp. 95.

Meyer v. Droegmueller, 165 Munn. 245; 206 N. W. 391.

Adron v. Evans, 217 N. W. 397.

and also:

"But if acceptance of the assignment does not bind the assignee, his subsequent conduct cannot have that effect. Thus it has

been held that an assignee does not assume the obligation to purchase by requesting an extension of the closing time, or by expressly demanding a conveyance."

"Even if a promise to render counter performance could be spelled out of such equivocal acts, still it would be without consideration unless the non-assigning party promised to do more than perform his contractual obligations. And since without such a new contract the assignee's liability must rest on a promise made to his assignor, his present intention to perform is immaterial unless it can be regarded as indicating a similar intent at the time of the assignment. The courts have been extremely reluctant, however, to find that such an intent existed."

42 *Harvard L. R.* 941.

C. No liability is imposed upon this defendant by reason of the fact that it has pleaded a defense of unmarketable title of the property. Even though Senger Corporation has disclaimed any liability whatsoever, it is still entitled to all available defenses. Inconsistent defenses may be pleaded in equity.

D. Complainants contend that Senger Corporation should be estopped, for it would be working a fraud.

1. Primarily, there is no estoppel pleaded by the Complainants, nor was proof offered to substantiate a theory of estoppel. Complainants first raise the theory of estoppel in their brief herein.

"Cases must be reviewed on the theory on which they are tried."

Bushko v. Society, 106 N. J. Law 504;
148 Atl. 724.

The case below was tried on the theory of assignment and assumption. Complainants are not privileged to argue the case on a new theory at this time.

2. Even if the theory of estoppel were available to the Complainants, this contention is groundless.

The elements of estoppel as outlined by Pomeroy are as follows:

1. "There must be conduct—acts, language or silence—amounting to a representation of material facts.

2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him.

3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and *at the time when it was acted upon by him.*

4. The conduct must be done with the *intention*, or at least with the *expectation*, that it will be acted upon by the other party, * * *

5. *The conduct must be relied upon* by the other party, and thus relying, he must be led to *act upon it.*

6. He must in fact act upon it in such a manner as to *change his position for the worse*; in other words he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it."

Pomeroy on Equity Jurisprudence 4th Ed. Page 1644.

Considering the evidence of this case it will be found that

1. Senger Corporation did not act or conceal material facts.

2. The Complainants were not unaware of any facts which might work an estoppel.

3. Any conduct by Senger Corporation was not intended, nor were Complainants led to expect, that it be acted upon.

4. Complainants did not rely upon any such conduct, nor were they led to act upon it.

5. The position of Complainants was not changed for the worse. They did not suffer a loss, nor did they forego or alter what they had done.

Complainants did not relinquish any rights which they might have had against Schiraldi and Rubel Corporation. They suffered no loss. They did not change their position. *The elements of estoppel are absent.*

Phillipsburgh Bank v. Fulmer, 31 N. J. Law 52.

Canda v. Canda, 113 Atl. 503.

Minton v. Sutton, 100 N. J. E. 403; 135 Atl. 693.

E. Lastly, Complainants appeal to the broad powers of equity. "Equity looks at the substance and not the form." (Brief for Complainants-Appellants, Page 11).

This maxim of equity is broad, but it is wholly inapplicable to the case in question. Equity's broad powers do not enable it to disregard established rules and fixed precedents. This case, and

all cases, are not decided on generalities or implications. Remedies are not granted unless grounds for relief are established by basic doctrines and principles.

Complainants are merely appealing to the "conscience of the Chancellor" for the remedy of an imagined grievance. Nothing in the pleadings, the testimony or the brief of Complainants, indicate that they have any right action against this defendant. Their accusations of fraud and misrepresentation are groundless and unproven.

"An 'equity' is not a Chancellor's sense of moral right, or any vague or indefinite opinion as altruism, but it is the right cognizable in a court of chancery, governed by established rule and fixed precedents."

Cashin & Co. Alamac Hotel Corp., 98 N. J. Eq. 432.

Conclusions.

In view of the fact that Complainants have not established their right to specific performance of the contract against Senger Corporation, by any established rules of law and equity, it is respectfully urged that the appeal should be dismissed, and the decision advised by Vice Chancellor Fielder should be affirmed with costs and the allowance of a reasonable counsel fee.

Respectfully submitted,

SAMUEL J. RICH,
Solicitor of Defendant-Respondent,
Senger Coal & Ice Corporation.

SAUL TISCHLER,
Of Counsel.

INDEX.

	PAGE
Petition for Discharge	1
Answer	2
Supplemental Petition	3
Affidavit of No Confusion	12
Answer to Supplemental Petition	13
Case	16
Conclusions of Advisory Master	232
Decree Not Appealed From	237
Notice of Appeal	240
Position of Appeal	251

TESTIMONY.

Plaintiff's Witnesses.

Edwin Michaels—

Direct	15
Cross	52

Recalled:

Direct	247
--------------	-----

Anna Hamilton—

Direct	35
Cross	99

Mrs. Ida Nussli—

Direct	101
Cross	161

Elizabeth Taylor—

Direct	114
Cross	123

Frank Taylor—

Direct	138
Cross	141

