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BILL OF COMPLAINT.

Filed December 17, 1926.

In Chancery of New Jersey

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

The complainants, Anton F. Muller and Mary M. Muller, his wife, of the City of Newark, County of Essex, and State of New Jersey, respectfully show:

1. On October 15, 1926, complainant Anton F. Muller was seized in fee simple of all that certain lot, tract or parcel of lands and premises in the Town of Irvington in said County of Essex more particularly described as follows:

BEGINNING at a point in the northerly line of Stuyvesant avenue distant southwesterly as measured along said line of Stuyvesant avenue, two hundred and twenty-nine and twenty hundredths feet from the point of intersection of the same with the southerly line of Lyons avenue, as extended, said beginning point being in the easterly line of land now or late of one Farrow, thence (1) along said line of Stuyvesant avenue, north fifty-six degrees, east seventy-five feet; thence (2) north thirty-two degrees fifty-six minutes west two hundred and twenty-five feet; thence (3) south fifty-six degrees west seventy-five feet; thence (4) south thirty-two degrees fifty-six minutes east two hundred and twenty-five feet to said line of Stuyvesant avenue and place of BEGINNING.

Being known and designated as lot No. 1 on a map of property of Walter D. Meeker,

surveyed November 12, 1902, by Geo. Gardner, surveyor.

2. On the date last mentioned complainants entered into a certain agreement in writing with Isaac Raskind wherein and whereby complainants agreed to convey the said lands and premises by deed of bargain and sale free from all encumbrances, except restrictions, if any, on November 15, 1926, to said Isaac Raskind in consideration of the payment by said Isaac Raskind of the sum of $15,500 and the said Isaac Raskind agreed to pay to the complainants said purchase price of $15,500 by the payment of $1,000 at the execution of said agreement and the payment of the remainder of said purchase price upon the delivery by complainants of said deed to said Isaac Raskind by the payment of $2,000 in cash and the execution of said Isaac Raskind to complainant, Anton F. Muller, of a bond and mortgage in the sum of $12,500 to run for a period of three years and bear interest at six per cent., payable monthly; the deed to be delivered at the office of Lintott, Kahrs & Young, 810 Broad street, Newark, New Jersey, between the hours of ten o'clock in the forenoon and one o'clock in the afternoon. Said agreement further provided that time was to be of the essence thereof. A true copy of said written agreement is hereunto annexed and made a part hereof.

3. The said Isaac Raskind paid to complainant the said sum of $1,000 at the time of the execution and delivery of the said agreement in writing.

4. On said November 15, 1926, at the appointed hour complainants duly attended at the office of said Lintott, Kahrs & Young with the

deed called for in said contract containing the lands and premises hereinbefore referred to drawn to the said Isaac Raskind, duly executed and acknowledged by complainants, for the purpose of delivering the said deed to the said Isaac Raskind upon the payment by the said Isaac Raskind to the complainants of the purchase money pursuant to the terms of the aforesaid agreement; the said Isaac Raskind did not appear at said time or place, but one Gus Picone appeared with Mr. Louis Levy of Levy, Fenster & McCloskey, attorneys at law of New Jersey, who had represented said Isaac Raskind at the time the contract of October 15, 1926, was made and stated that said Isaac Raskind had assigned his interest in the above mentioned agreement to said Gus Picone and demanded that the deed from complainants be redrawn so as to substitute said Gus Picone as grantee therein in the place and stead of Isaac Raskind and tendered said Gus Picone in the place and stead of Isaac Raskind and offered to execute the bond and mortgage in the place and stead of said Isaac Raskind, and which demand complainants refused to comply with.

5. Complainants have always been ready and willing and now tender themselves ready to perform their part of the said agreement and upon being paid the remainder of said purchase price with interest and upon delivery to them of the bond and mortgage called for in said agreement, executed by Isaac Raskind, to convey the said lands and premises to said Isaac Raskind by a bargain and sale deed free from all encumbrances, subject to restrictions, if any, duly executed by complainants.

6. On or about November 16, 1926, said Gus Picone instituted a suit at law in the Essex County Circuit Court against these complainants in order to recover the sum of $1,000 paid at the time of the signing of the contract of October 15, 1926, as aforesaid, together with search fees and damages for the alleged breach of contract on the part of these complainants.

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

1. That Isaac Raskind and Gus Picone, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That the said Isaac Raskind may be compelled by the decree of this Court specifically to perform the said agreement with complainants and to pay to complainants the remainder of the said purchase money as in and by said agreement provided, with interest from the time said purchase money ought to have been paid upon the delivery by complainants to said Isaac Raskind of the deed executed by complainants as in said agreement provided.

3. That in case the said defendant, Isaac Raskind, 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, that then and in that event the said sum, together with interest and costs, may be and become a lien upon the said lands and premises in favor of the complainants, and that the said lands and premises may be sold under the direction of this Court for the satisfaction of such

lien so impressed on said lands and premises; and in case a deficiency should arise upon said sale, that the said defendant may be ordered by this Court to pay said deficiency, together with interest and costs to these complainants.

4. That the said Gus Picone, his counsel, attorneys, lawyers, officers and agents and each and every one of them may be restrained and enjoined from further proceedings against said complainants in the said action at law commenced against them in the Essex County Circuit Court and now pending and at issue therein for the recovery as hereinabove described.

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

LINTOTT, KAHRS & YOUNG,
Solicitors for and of Counsel
with Complainants.

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

ANTON F. MULLER, of full age, being duly sworn according to law, on his oath deposes and says, I am one of the complainants herein and that I have read the above bill of complaint and swear that the contents thereof is true and further that on October 15, 1926, I was seized in fee simple of all that certain lot, tract or parcel of lands and premises in the Town of Irvington in said County of Essex more particularly described in the bill of complaint herein.

That on the date last mentioned Mrs. Muller and I entered into a certain agreement in writing

with Isaac Raskind wherein and whereby we agreed to convey the said lands and premises by deed of bargain and sale free from all encumbrances, except restrictions, if any, on November 15, 1926, to said Isaac Raskind in consideration of the payment by said Isaac Raskind of the sum of $15,500 and the said Isaac Raskind agreed to pay to us the said purchase price of $15,500 by the payment of $1,000 at the execution of said agreement and the payment of the remainder of said purchase price upon the delivery by us of said deed to said Isaac Raskind by the payment of $2,000 in cash and the execution of said Isaac Raskind to me of a bond and mortgage in the sum of $12,500 to run for a period of three years and bear interest at six per cent., payable monthly; the deed to be delivered at the office of Lintott, Kahrs & Young, 810 Broad street, Newark, New Jersey, between the hours of ten o'clock in the forenoon and one o'clock in the afternoon. Said agreement further provided that time was to be of the essence thereof. A true copy of said written agreement is hereunto annexed and made a part hereof.

That the said Isaac Raskind paid to me the said sum of $1,000 at the time of the execution and delivery of the said agreement in writing.

That on said November 15, 1926, at the appointed hour Mrs. Muller and I duly attended at the office of said Lintott, Kahrs & Young with the deed called for in said contract containing the lands and premises hereinbefore referred to drawn to the said Isaac Raskind, duly executed and acknowledged by us, for the purpose of delivering the said deed to the said Isaac Raskind upon the payment by the said Isaac Raskind to us of the purchase money pursuant to the terms of

the aforesaid agreement; the said Isaac Raskind did not appear at said time or place, but one Gus Picone appeared with Mr. Louis Levy of Levy, Fenster & McCloskey, attorneys at law of New Jersey, who had represented said Isaac Raskind at the time the contract of October 15, 1926, was made and stated that said Isaac Raskind had assigned his interest in the above-mentioned agreement to said Gus Picone and demanded that the deed from Mrs. Muller and me be redrawn so as to substitute said Gus Picone as grantee therein in the place and stead of Isaac Raskind and tendered said Gus Picone in the place and stead of Isaac Raskind and offered to execute the bond and mortgage in the place and stead of said Isaac Raskind, and which demand Mrs. Muller and I refused to comply with.

Mrs. Muller and I have always been ready and willing and now tender ourselves ready to perform our part of the said agreement and upon being paid the remainder of the said purchase price with interest and upon delivery to us of the bond and mortgage called for in said agreement, executed by Isaac Raskind, to convey the said lands and premises to said Isaac Raskind by a bargain and sale deed free from all encumbrances, subject to restrictions, if any, duly executed by us.

That on or about November 16, 1926, said Gus Picone instituted a suit at law in the Essex County Circuit Court against Mrs. Muller and me in order to recover the sum of $1,000 paid at the time of the signing of the contract of October 15, 1926, as aforesaid, together with search fees and damages for the alleged breach of contract on the part of Mrs. Muller and myself.

ANTON F. MULLER.

Sworn and subscribed to before
me this 17th day of December,
1926, at Newark, N. J.

AUGUST C. ULLRICH,
Notary Public of New Jersey.

ARTICLES OF AGREEMENT, made the fifteenth day of October in the year of our Lord one thousand nine hundred and twenty-six.

BETWEEN Anton F. Muller and Mary M. Muller, his wife, of the City of Newark, in the County of Essex and State of New Jersey, party of the first part; AND Isaac Raskind, of the of in the County of and State of party of the second part;

WITNESSETH, that the said party of the first part for and in consideration of the sum of fifteen thousand five hundred ($15,500) 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 Bargain and Sale free from all encumbrance, except restrictions, if any, on or before the fifteenth day of November, 1926, next ensuing the date hereof, all that lot, tract, or parcel of land and premises, hereinafter particularly described situate, lying and being in the Town of Irvington in the County of Essex and State of New Jersey.

BEGINNING at a point in the northerly line of Stuyvesant avenue distant southwesterly as measured along said line of Stuyvesant avenue, two hundred and twenty-nine and twenty hundredths feet from the point of intersection of the same with the southerly line of Lyons avenue, as extended, said beginning point being in the easterly line of land now or late of one Farrow, thence (1) along said line of Stuyvesant avenue, north fifty-six degrees, east seventy-five feet; thence (2) north thirty-two degrees fifty-six minutes west two hundred and twenty-five feet; thence (3) south fifty-six degrees west seventy-five feet; thence (4) south thirty-two degrees fifty-six minutes east two hundred and twenty-five feet to said line of Stuyvesant avenue and place of BEGINNING.

BEING known and designated as lot No. 1 on a map of property of Walter D. Meeker, surveyed November 12, 1906, by Geo. Gardner, surveyor.

BEING the same premises conveyed to Anton F. Muller by Catherine Ulrich (widow) dated July 9, 1914, and recorded in the Register's office of Essex County in Book U-54 of Deeds for said county on pages 64-66.

AND the said Isaac Raskind, for himself, 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 fifteen thousand five hundred dollars as and for the purchase money of the foregoing described land and premises in the following manner, that is to say:

$1,000 The sum of one thousand dollars to be paid upon the signing of this agreement, the receipt whereof is hereby acknowledged.

12,500 Party of the second part will give to party of the first part a bond and mortgage in the sum of twelve thousand five hundred dollars to run for a period of three years and bear interest at six per cent., interest to be payable monthly on the first day of each and every month, said bond and mortgage to contain a clause that the said mortgagor will not claim any deduction from the interest payable on said mortgage by reason of the taxable value of said land, also to contain the clause that should default be made in the payment of any interest for the space of ten (10) days or default be made in the payment of any taxes, assessments or other municipal charges for the space of thirty (30) days then the whole amount of said bond and mortgage shall immediately become due and owing.

2,000 The sum of Two Thousand Dollars to be paid in cash or certified check when the deed aforesaid is delivered.

$15,500 TOTAL.

The taxes for the year nineteen hundred and twenty-six are to be apportioned to November 1st, nineteen hundred and twenty-six.

It is expressly stipulated and agreed between the parties that time is of the essence of the within contract.

The purchase money mortgage above mentioned is to provide that the owner of the property is to have the privilege of paying the principal amount due on the same at any time before its maturity, provided forty-five days' notice in writing is given to the said Anton F. Muller. Said payment to be made with interest to date of payment.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any act for the sale of land for non-payment of the municipal taxes or assessments, or adverse or color of title possession.

The parties of the first part are to pay for all municipal improvements made on the said premises up to the date of the within agreement.

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 fifteenth day of November, 1926, next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

AND IT IS FURTHER AGREED, by the parties hereto, that the said deed of bargain and sale, shall be delivered and received at the office of Lintott, Kahrs & Young, Counselors at Law, 810 Broad street, Newark, N. J., between the hours of ten in the forenoon and one o'clock in the afternoon on the said fifteenth day of November, 1926, 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;

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

Signed, sealed and delivered
in the presence of

ANTON F. MULLER,
MARY M. MULLER,
ISAAC RASKIND.

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

BE IT REMEMBERED, that on this twentieth day of October in the year of our Lord one thousand nine hundred and twenty-six before me, the subscriber, an attorney-at-law of New Jersey, personally appeared Anton F. Muller, who, I am satisfied, is one of the grantors mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that, he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

LOUIS LEVY,
An Attorney-at-Law of New Jersey.

being by me privately examined, separate and apart from said husband , further acknowledged that signed, sealed and delivered the same as voluntary act and deed, FREELY, without any fear, threats or compulsion of said husband.

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

BE IT REMEMBERED, that on this day of October in the year of our Lord one thousand nine hundred and twenty-six before me, the subscriber, a notary public of New Jersey personally appeared Mary M. Muller, wife of Anton F. Muller, who, I am satisfied, is one of the grantors mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon she acknowledged that, she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

FRANK CREGER,
A Notary Public of New Jersey.

Order to Show Cause.

ORDER TO SHOW CAUSE.

Filed December 17, 1926.

IN CHANCERY OF NEW JERSEY.

Between	
ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,*	*On Bill, &c.*
and	*Order to Show Cause.*
ISAAC RASKIND and GUS PICONE, *Defendants.*	

A bill of complaint duly verified having been filed herein, by the complainants, Anton F. Muller and Mary M. Muller, setting forth that they entered into a contract with one Isaac Raskind, dated October 15, 1926, for the sale of certain real estate in the Town of Irvington, Essex County, New Jersey, and that the deed was to be delivered and the purchase price paid on November 15, 1926; that at the appointed time and place said Isaac Raskind failed to perform his part of the agreement; further that Gus Picone, one of the defendants herein claims to have an assignment of said contract from Isaac Raskind and has instituted a suit in the Essex County Circuit Court to recover from said complainants the amount of money paid at the time of the signing of said contract together with damages for breach of same on part of complainants, and said complainants praying that their contract with said Isaac Raskind be specifically enforced and that said Gus Picone, his counsel, attorneys, solicitors, officers and agents, and each and every one of

Order to Show Cause.

them may be restrained and enjoined from proceeding further against complainants in the said action at law,

It is, on this 17th day of December, nineteen hundred and twenty-six, ORDERED, that the defendant, Gus Picone, show cause before this court, on the 28th day of December, nineteen hundred and twenty-six, at the Chancery Chambers, in the City of Newark, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why he should not be enjoined as aforesaid.

It is, FURTHER ORDERED, that in the meantime and until the further order of this court, the said Gus Picone, his counsel, attorneys, solicitors, officers and agents, and each and every one of them be restrained and enjoined from proceeding further against complainants in said action at law commenced against them in the Essex County Circuit Court, and now pending and at issue therein.

It is, FURTHER ORDERED, that a true but uncertified copy of this order and of the bill of complaint and affidavit on which the same is founded be served upon said defendant, Gus Picone, within five days after the date hereof, either personally or upon his attorneys of record in said suit at law now pending.

E. R. WALKER.

Respectfully advised,

JOHN H. BACKES,
V.-C.

ANSWERING AFFIDAVITS.

Filed December 28, 1926.

IN CHANCERY OF NEW JERSEY.

Between	
ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,*	*On Bill, &c.*
and	*Order to Show Cause.*
ISAAC RASKIND and GUS PICONE, *Defendants.*	*Answering Affidavits.*

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

GUS PICONE, being duly sworn according to law, upon his oath deposes and says that he is one of the defendants in the above-entitled cause.

On November 12, 1926, Isaac Raskind, assigned the contract between the said Isaac Raskind and Anton F. Muller and Mary M. Muller, which contract is attached to and made a part of the bill of complaint in this cause. Said writing being attached to the original contract. Said assignment reads as follows: "For value received, I, the undersigned, do hereby assign all my right, title and interest, to the within agreement to Gus Picone. Dated November 12, 1926, and signed by Isaac Raskind." That I accepted said assignment.

On November 15th, the date designated in the said contract for closing of title, I went to the office of Lintott, Kahrs & Young, the place designated in the contract for the closing of said

title, together with my attorney, Mr. Louis Levy, and in the presence of Mr. Anton F. Muller, Mr. Louis Levy showed Mr. Anton F. Muller and Mr. Joseph Kahrs, his attorney, the original contract with the assignment attached.

Mr. Louis Levy at my request tendered the balance of the purchase price and Mr. Levy tendered Mr. Muller a check for two thousand thirty-four dollars and fifty-three cents ($2,034.53) made payable to Anton F. Muller and a copy of said certified check is herewith attached and made a part hereof and is marked Schedule B, and I tendered performance in accordance with the terms of the agreement between Isaac Raskind and Anton F. Muller and wife. That Mr. Anton F. Muller informed me that he would not accept a bond and mortgages unless Isaac Raskind would sign the bond and that he would not convey the property to me unless Isaac Raskind signed the bond.

Because of Mr. and Mrs. Muller's refusal to convey to me in accordance with the agreement between them and Mr. Raskind, who assigned, all his right, title and interest to me, I have elected to rescind the contract and have instituted suit in the Essex County Circuit Court for the return of the deposit and reasonable search fees and for damages sustained by me through his failure.

GUS PICONE.

Sworn and subscribed to before
me this 27th day of December,
1926.

EDWARD SCHWOERER,
An Attorney-at-Law of New Jersey.

Answering Affidavit of Isaac Raskind.

IN CHANCERY OF NEW JERSEY.

Between	
ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,*	*On Bill, &c.*
and	*Order to Show Cause.*
ISAAC RASKIND and GUS PICONE, *Defendants.*	*Answering Affidavits.*

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

ISAAC RASKIND, being duly sworn according to law, upon his oath deposes and says that on October 15, 1926, I entered into a written contract with Anton F. Muller and Mary M. Muller, the defendants, for the purpose of conveying property a copy of said contract being attached to and made a part of the bill of complaint in this cause.

That in pursuance of said terms of said agreement, I paid to the defendants the sum of one thousand ($1,000) dollars as part of the purchase price.

On November 12, 1926, I assigned, all my right, title and interest in the attached contract, said assignment being attached to the original contract and turned over said original contract together with the assignment to Mr. Gus Picone, one of the defendants in the within action.

ISAAC RASKIND.

Sworn and subscribed to before
me this 27th day of December,
1926.

EDWARD SCHWOERER,
An Attorney-at-Law of New Jersey.

Answering Affidavit of Louis Levy.

IN CHANCERY OF NEW JERSEY.

Between	
ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,*	*On Bill, &c.*
and	*Order to Show Cause.*
ISAAC RASKIND and GUS PICONE, *Defendants.*	*Answering Affidavits.*

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

LOUIS LEVY, being duly sworn according to law, upon his oath deposes and says that he is a member of the firm of Levy, Fenster & McCloskey, attorneys of the State of New Jersey, that the firm of Levy, Fenster & McCloskey, are the attorneys for Mr. Gus Picone, one of the defendants in the above-entitled cause.

On November 12, 1926, Isaac Raskind, assigned all his right, title and interest, in the contract, a copy of which contract is attached to bill of complaint and filed in this cause.

On November 13, 1926, I notified Lintott, Kahrs & Young, the attorneys for the defendants, of said assignment by a letter, copy of which is attached hereto and made a part hereof and which is marked in Schedule A.

On November 15, 1926, I accompanied Mr. Gus Picone, to the office of Lintott, Kahrs & Young, the place designated for the closing of title and that I showed Mr. Anton F. Muller, the original contract together with the assignment in the presence of Mr. Joseph Kahrs, who was representing Mr. Anton F. Muller. I tendered certi-

fied check, copy of which check is made a part hereof and marked Schedule B, to Mr. Anton F. Muller, and Mr. Gus Picone tendered performance in accordance with the terms of the agreement and requested Mr. Muller to deliver a deed to the premises mentioned in said contract. Mr. Muller refused to deliver said deed, stating that he would only deliver said deed provided Isaac Raskind joined in the execution of the bond and when informed, Mr. Isaac Raskind would not join in the execution of the bond he refused to convey.

LOUIS LEVY.

Sworn and subscribed to before
me this 27th day of December,
1926.

WILBUR J. BERNARD,
An Attorney-at-Law of New Jersey.

SCHEDULE "A"

November 12, 1926

Messrs. Lintott, Kahrs & Young,
810 Broad Street,
Newark, New Jersey.

Gentlemen:—

We understand that you represent Anton F. Muller, and wife, who agreed to sell to Isaac Raskind property located on Stuyvesant Avenue, Irvington, N. J.

The time set for closing is November 15th and it appears that the time is the essence of the contract.

Our client assigned this contract to Gus Picone, so kindly draw all the papers in this name and let us know what time on Monday will be satisfactory to close this title.

Very truly yours,

LEVY, FENSTER & McCLOSKEY,

By LOUIS LEVY

LL:FM

Answering Affidavit of Louis Levy.

SCHEDULE "B"

LEVY, FENSTER & McCLOSKEY, Trustees

No. 16010

Newark, N. J. Nov. 15th, 1926

Pay to the Order of: Anton F. Muller...$2034.50
Two thousand thirty-four and 50/100....Dollars.

To: FEDERAL TRUST COMPANY
NEWARK, N. J.

LEVY, FENSTER & McCLOSKEY, Trustees
By: Louis Levy

CERTIFIED: Nov. 15, 1926: FEDERAL TRUST CO., NEWARK, N. J.

Conclusions of Vice-Chancellor.

CONCLUSIONS OF VICE-CHANCELLOR.

Filed January 24, 1927.

IN CHANCERY OF NEW JERSEY.

Between

Anton F. Muller and Mary M. Muller, his wife, *Complainants,*

and

Isaac Raskind and Gus Picone, *Defendants.*

On Bill, &c.

On Order to Show Cause.

Conclusions.

Lintott, Kahrs & Young, for complainants.
Levy, Fenster & McCloskey, for defendants.

Berry, *V.-C.*

This bill prays the specific performance of a contract for the sale of lands. The complainants are the vendors and the defendants are respectively the vendee and his assignee. The contract price was $15,500, $1,000 of which was paid on execution of the contract, $2,000 was to be paid at settlement and the balance on mortgage provided for in these terms: "$12,500. Party of the second part will give to party of the first part a bond and mortgage in the sum of twelve thousand five hundred dollars to run for a period of three years, etc." The agreement further provides that the parties of the first part will convey "to the said party of the second part, his heirs and assigns, by deed," etc. Previous to the date fixed for settlement vendee assigned all his rights under the contract to the defendant, Picone, and on the day fixed for settlement,

Picone tendered the balance of the purchase price provided to be paid in cash and offered to execute and deliver a purchase money bond and mortgage for the amount fixed in the contract. The vendee refused to accept the bond and mortgage of Picone. Thereupon Picone notified the vendor that he rescinded the contract and demanded the down money which was refused. Picone then brought suit at law for the down money. The filing of this bill followed and an order to show cause why the prosecution of the suit at law should not be restrained pendente lite was issued with restraint pending its return. This matter now comes before me on the return of that order. The facts are not in material dispute. The sole question is whether or not the vendor was obliged to accept the bond and mortgage of the assignee of the contract of sale. This issue does not seem to have been squarely presented to the courts of this State before, although in two cases, *Moran* v. *Borello,* 132 Atl. Rep. 510 and *Seacoast Development Company* v. *Beringer,* 4 N. J. Adv. Repts. 1602, the point was touched upon.

The first case was an appeal to the Supreme Court from a judgment of the Second District Court of Jersey City, where the assignee of a contract of sale of lands was permitted to recover the down money and search fees. The judgment was affirmed by the Supreme Court. In that case it was objected that the assignee of the contract did not tender the bond of the vendee-assignor. On this point the Court said:

> "It has been held that, where a bond and mortgage are called for, the land, and not the personal responsibility of the vendor (vendee?) is the principal security looked for so that tender by the assignee of his own bond will suffice, 27 R. C. L. 536, Sec. 670. The contract provides: 'Seller to take back a purchase money mortgage of $2,500 at six per cent., payable, &c. Said mortgage can be paid off at any time.' It will be observed that this requirement provides for no bond."

The point here in issue was neither involved nor decided in that case and the language of the opinion above-quoted so far as it applies to the issue here was *obiter dictum.*

The second case was an appeal to the Court of Errors and Appeals from an order of the Court of Chancery, advised by me, in which I refused to strike out a counter-claim against the vendees named in the contract of sale and who had assigned their rights under the contract to the complainant. The order was affirmed. Mr. Justice Kalisch, speaking for the Court of Errors and Appeals, said:

> "The contract, *inter alia,* required that $63,000 of the purchase money be secured by the bond 'of the said parties of the second part,' namely, Cohen and Katz * * * it is quite obvious that Cohen and Katz are necessary parties in the securing of the payment of the $63,000, for it is apparent that the complainant is without legal power to compel them to execute the bond; and the defendant cannot be properly compelled by it to accept its bond or the bond of any other party in lieu of a bond of Cohen and Katz."

It is suggested by counsel for the defendants that this language is also *obiter dictum,* that the question here involved is an open one in this State and that this court should follow the general rule as indicated by the decisions of other jurisdictions. But if this be *obiter* it is of such respectable weight that in my judgment it should be followed by this court and the Court

of Errors and Appeals left to say whether its pronouncement has been correctly interpreted. It is worthy of note that in other jurisdictions the decisions on the question here involved are by no means uniform. It is also significant that the three judges who sat in the Supreme Court in *Moran* v. *Borello,* also sat in the Court of Errors and Appeals in *Seacoast Development Company* v. *Beringer,* and the opinion of that court was unanimous. If "parties of the second part" in the Seacoast Development Company case meant Cohen and Katz, as the Court of Errors and Appeals said it did, then "parties of the second part" in the contract *sub judice* means Raskind and no one else.

The restraint against the prosecution of the suit at law imposed by the order to show cause will, therefore, be continued until final hearing and I will advise an order accordingly.

Submitted December 28, 1926.
Heard January 10, 1927.
Decided January 21, 1927.

ORDER.

Filed January 25, 1927.

IN CHANCERY OF NEW JERSEY.

Between ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,* *and* ISAAC RASKIND and GUS PICONE, *Defendants.*	*On Bill, &c.* *Order.*

This matter being opened to the Court by Lintott, Kahrs & Young, solicitors of the complainants, Anton F. Muller and Mary M. Muller, his wife, and in the presence of Levy, Fenster & McCloskey, solicitors of defendant, Gus Picone, and the Court have considered the bill of complaint and affidavit filed herein and the affidavits on the part of the said defendant, and having heard and considered the arguments of counsel, and having considered that the complainants are entitled to an order to restrain the defendant, Gus Picone, his counsel, attorneys, solicitors, officers and agents, and each and every one of them from proceeding further against complainants in the action now pending in the Essex County Circuit Court in which Gus Picone is plaintiff and these complainants are defendants and now pending at issue therein.

And it appearing that the order to show cause made in this matter on the 17th day of December, 1926, has been duly served in the manner therein directed; it is on this 25th day of January, 1927,

Order.

ORDERED, that the said defendant, Gus Picone, his counsel, attorneys, solicitors, officers and agents, and each and every one of them be hereby enjoined and commanded to desist and refrain further against complainants in the action now pending in the Essex County Circuit Court, in which Gus Picone is plaintiff and these complainants are defendants, until the further order of this court.

E. R. WALKER,
C.

Respectfully advised,

MAJA L. BERRY,
V.-C.

Answer of Gus Picone.

ANSWER OF DEFENDANT GUS PICONE.

Filed February 26, 1927.

IN CHANCERY OF NEW JERSEY.

Between ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,* *and* ISAAC RASKIND and GUS PICONE, *Defendants.*	*On Bill, &c.* *Answer.*

The defendant, Gus Picone, residing at Madison, New Jersey, answering the bill of complaint, says that:

1. He admits the allegations contained in paragraphs 1, 2, 3, 4, of the complaint.

2. He has no knowledge or information sufficient to form a belief as to the matters contained in paragraph 5, so neither admits or denies the same, but leaves the same open to proof on the part of the complainant.

3. He admits the allegations contained in paragraph 6 of the complaint.

4. On or about the 12th day of November, 1926, the defendant, Isaac Raskind, assigned all his right, title and interest to the within defendant.

5. That notice of said assignment was given to the complainant and/or their agents and on the date set for performance, this defendant tendered performance in accordance with the terms of the agreement, as set forth in the com-

Answer of Gus Picone.

plaint and offered to pay the balance of the purchase price and also execute a bond and mortgage to secure the balance of said purchase price.

6. That the said complainants refused to convey said property to this defendant.

7. On or about the 16th day of November, 1926, this defendant instituted suit in the Essex County Circuit Court against the complainants to recover the sum of one thousand ($1,000) dollars paid at the time of the signing of the agreement by the said Isaac Raskind, together with search fees, and damages upon the breach of contract on the part of the complainants.

8. That thereafter these complainants made a motion to strike out the complaint in said suit instituted in the Essex County Circuit Court on the ground that the complainants (defendants in the lawsuit) were not required to deliver the deed to this defendant (plaintiff in the lawsuit) and accept his bond and mortgage in the place and stead of Isaac Raskind.

9. That on November 30, 1926, the said motion was denied on the ground that the complaint in the lawsuit set forth a good cause of action.

10. That on December 13, 1926, notice of motion to strike out the answer of the complainants (defendants in the lawsuit) on the ground that the answer was sham and frivolous, the said motion was returnable on December 18, 1926, but has not been argued due to the restraint of this Honorable Court.

11. That this Honorable Court has no jurisdiction to restrain said suit at law because these complainants attempt to assert as a ground on equitable jurisdiction, a pure and legal defense which was available in the court of law.

LEVY, FENSTER & McCLOSKEY,
Solicitors of Defendant, Gus Picone.

Replication.

REPLICATION.

Filed March 2, 1927.

IN CHANCERY OF NEW JERSEY.

Between	
ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,*	*On Bill, &c.*
and	*Replication.*
ISAAC RASKIND and GUS PICONE, *Defendants.*	

The complainants join issue on the answer of defendant, Gus Picone.

LINTOTT, KAHRS & YOUNG,
Solicitors of Complainants.

ANSWER OF DEFENDANT ISAAC RASKIND.

Filed February 26, 1927.

IN CHANCERY OF NEW JERSEY.

Between ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,* *and* ISAAC RASKIND and GUS PICONE, *Defendants.*	*On Bill, &c.* *Answer.*

The defendant, Isaac Raskind, residing in the City of Newark, New Jersey, answering the bill of complaint, says that:

1. He admits the allegations contained in paragraphs 1, 2, 3 of the complaint.

2. He has no knowledge or information sufficient to form a belief as to the matters contained in paragraphs 4, 5, 6, so neither admits or denies the same, but leaves the same open to proof on the part of the complainants.

3. That on or about the 12th day of November, 1926, this defendant assigned all his right, title and interest in the contract attached to the bill of complaint, to the defendant, Gus Picone.

4. That the said defendant, Gus Picone, tendered performance of said contract by tendering part of the purchase price in cash as called for in said contract and also tendered to execute the bond and mortgage as called for in said contract.

5. That the complainants by so refusing to convey the said deed to Gus Picone, were in default and therefor are not entitled to the relief as specific performance.

SAUL TISCHLER,
Solicitor of Defendant, Isaac Raskind.

REPLICATION.

Filed March 2, 1927.

IN CHANCERY OF NEW JERSEY.

Between ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,* *and* ISAAC RASKIND and GUS PICONE, *Defendants.*	*On Bill, &c.* *Replication.*

The complainants join issue on the answer of defendant, Isaac Raskind.

LINTOTT, KAHRS & YOUNG,
Solicitors of Complainants.

STIPULATION OF FACTS.

Filed September 26, 1927.

IN CHANCERY OF NEW JERSEY.

Between ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,* *and* ISAAC RASKIND and GUS PICONE, *Defendants.*	*On Bill, &c.* *Stipulation of Facts.*

The parties hereto by their solicitors hereby stipulate that the following stipulation of facts shall be used at the final hearing of the above-entitled cause in lieu of oral testimony:

1. On October 15, 1926, complainant, Anton F. Muller was seized in fee simple of all that certain lot, tract or parcel of lands and premises in the Town of Irvington in said County of Essex more particularly described as follows:

BEGINNING at a point in the northerly line of Stuyvesant avenue distant southwesterly as measured along said line of Stuyvesant avenue, two hundred and twenty-nine and twenty hundredths feet from the point of intersection of the same with the southerly line of Lyons avenue, as extended, said beginning point being in the easterly line of land now or late of one Farrow, thence (1) along said line of Stuyvesant avenue, north fifty-six degrees, east seventy-five feet; thence (2) north thirty-two degrees fifty-six minutes west two hundred and twenty-five feet;

thence (3) south fifty-six degrees west seventy-five feet; thence (4) south thirty-two degrees fifty-six minutes east two hundred and twenty-five feet to said line of Stuyvesant avenue and place of BEGINNING.

Being known and designated as lot No. 1 on a map of property of Walter D. Meeker, surveyed November 12, 1902, by Geo. Gardner, surveyor.

2. On the date last mentioned complainants entered into a certain agreement in writing with the defendant, Isaac Raskind, wherein and whereby complainants agreed to convey the said lands and premises, a true copy of said agreement being hereto annexed and made a part hereof.

3. The said Isaac Raskind paid to complainant the said sum of $1,000 at the time of the execution and delivery of the said agreement in writing.

4. On or about the 12th day of November, 1926, the defendant, Isaac Raskind, assigned all his right, title and interest in the contract referred to in paragraph 2 of the stipulated facts.

5. That notice of said assignment was given to the attorney for the complainants.

6. On said November 15, 1926, at the appointed hour, complainants duly attended at the office of said Lintott, Kahrs & Young, with the deed called for in said contract containing the lands and premises hereinbefore referred to drawn to the said defendant, Isaac Raskind, duly executed and acknowledged by complainants, for the purpose of delivering the said deed to the said defendant, Isaac Raskind, upon the payment by the said defendant, Isaac Raskind, to the complainants of the purchase money pursuant to the

terms of the aforesaid agreement; the said Isaac Raskind did not appear at said time or place, but the defendant, Gus Picone, appeared with Mr. Louis Levy of Levy, Fenster & McCloskey, attorney-at-law of New Jersey, and stated that said Isaac Raskind had assigned his interest in the above-mentioned agreement to said defendant, Gus Picone, and tendered the balance of the purchase price on behalf of the defendant, Gus Picone, and demanded that the deed from complainants be redrawn so as to substitute said defendant, Gus Picone, as grantee therein in the place and stead of Isaac Raskind, and tendered said defendant, Gus Picone, in the place and stead of defendant, Isaac Raskind, and offered to execute the bond and mortgage in the place and stead of said defendant, Isaac Raskind, and which demand complainants refused to comply with.

7. On or about the 16th day of November, 1926, said defendant, Gus Picone, instituted suit in the Essex County Circuit Court against the complainants to recover the sum of one thousand ($1,000) dollars, paid at the time of the signing of the agreement by the said Isaac Raskind, together with search fees, and damages for the breach of contract on the part of the complainants.

8. That thereafter these complainants made a motion to strike out the complaint in said suit instituted in the Essex County Circuit Court, on the ground that the complainants (defendants in the lawsuit) were not required to deliver the deed to said defendant, Gus Picone (plaintiff in the lawsuit) and accept his bond and mortgage in the place and stead of Isaac Raskind.

9. That on November 30, 1926, the said motion was denied on the ground that the complaint in the lawsuit set forth a good cause of action.

10. That on December 13, 1926, notice of motion to strike out the answer of the complainants (defendants in the lawsuit) on the ground that the answer was sham and frivolous, the said motion was returnable on December 18, 1926, but has not been argued due to the restraint of this Honorable Court.

LINTOTT, KAHRS & YOUNG,
Solicitors for Complainant.

LEVY, FENSTER & McCLOSKEY,
Solicitors for Defendant, Gus Picone.

SAUL TISCHLER,
Solicitor for Defendant, Isaac Raskind.

ARTICLES OF AGREEMENT, made the fifteenth day of October in the year of our Lord one thousand nine hundred and twenty-six, BETWEEN Anton F. Muller and Mary M. Muller, his wife, of the City of Newark, in the County of Essex and State of New Jersey, party of the first part; AND Isaac Raskind, of the of in the County of and State of party of the second part;

WITNESSETH, that the said party of the first part, for and in consideration of the sum of fifteen thousand five hundred ($15,500) 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 sec-

ond 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 Bargain and Sale free from all encumbrance except restrictions, if any, on or before the fifteenth day of November, 1926, next ensuing the date hereof, all that lot, tract, or parcel of land and premises, hereinafter particularly described situate, lying and being in the Town of Irvington in the County of Essex and State of New Jersey.

BEGINNING at a point in the northerly line of Stuyvesant avenue distant southwesterly as measured along said line of Stuyvesant avenue, two hundred and twenty-nine and twenty hundredths feet from the point of intersection of the same with the southerly line of Lyons avenue, as extended, said beginning point being in the easterly line of land now or late of one Farrow, thence (1) along said line of Stuyvesant avenue, north fifty-six degrees, east seventy-five feet; thence (2) north thirty-two degrees fifty-six minutes west two hundred and twenty-five feet; thence (3) south fifty-six degrees west seventy-five feet; thence (4) south thirty-two degrees fifty-six minutes east two hundred and twenty-five feet to said line of Stuyvesant avenue and place of BEGINNING.

BEING known and designated as lot No. 1 on a map of property of Walter D. Meeker, surveyed November 12, 1906, by Geo. Gardner, surveyor.

BEING the same premises conveyed to Anton F. Muller by Catherine Ulrich (widow) dated July 9, 1914, and recorded in the Register's Office of Essex County in Book U-54 of Deeds for said county on pages 64-66.

AND the said Isaac Raskind for himself, 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 fifteen thousand five hundred dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

$1,000 The sum of one thousand dollars to be paid upon the signing of this agreement, the receipt whereof is hereby acknowledged.

12,500 Party of the second part will give to party of the first part a bond and mortgage in the sum of twelve thousand five hundred dollars to run for a period of three years and bear interest at six per cent., interest to be payable monthly on the first day of each and every month, said bond and mortgage to contain a clause that the said mortgagor will not claim any deduction from the interest payable on said mortgage by reason of the taxable value of said land, also to contain the clause that should default be made in the payment of any interest for the space of ten (10) days or default be made in the payment of any taxes, assessments or other municipal charges for the space of thirty (30) days when the whole amount of said bond and mortgage shall immediately become due and owing.

2,000 The sum of two thousand dollars to be paid in case or certified check when the deed aforesaid is delivered.

$15,500 TOTAL.

The taxes for the year nineteen hundred and twenty-six are to be apportioned to November 1st, nineteen hundred and twenty-six.

It is expressly stipulated and agreed between the parties that time is of the essence of the within contract.

The purchase money mortgage above mentioned is to provide that the owner of the property is to have the privilege of paying the principal amount due on the same at any time before its maturity, provided forty-five days' notice in writing is given to the said Anton F. Muller. Said payment to be made with interest to date of payment.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act Proceedings or any act for the sale of land for non-payment of the municipal taxes or assessments, or adverse or color of title possession.

The parties of the first part are to pay for all municipal improvements made on the said premises up to the date of the within agreement.

And the said party of the part hereby agrees to pay to a commission of % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of

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 fifteenth day of November, 1926 next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of Bargain & Sale, shall be delivered and received at the office of Lintott, Kahrs & Young, Counsellors at law, 810 Broad Street, Newark, N. J. between the hours of ten in the forenoon and one o'clock in the afternoon on the said fifteenth day of November, 1926 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;

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

Signed, Sealed and Delivered
in the presence of

Anton F. Muller (L. S.)
Mary M. Muller (L. S.)
Isaac Raskind (L. S.)

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

WITNESS our hands and seals this day of A. D. 19

Stipulation of Facts.

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

BE IT REMEMBERED, That on this Twentieth day of October in the year of Our Lord One Thousand Nine Hundred and twenty-six before me, the subscriber, an Attorney at Law of New Jersey personally appeared Anton F. Muller who, I am satisfied, is one of the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that, he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

LOUIS LEVY
An Attorney-At-Law of New Jersey

being by me privately examined, separate and apart from said husband , further acknowledged that signed, sealed and delivered the same as voluntary act and deed, FREELY, without any fear, threats or compulsion of said husband.

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

BE IT REMEMBERED, That on this day of October in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me, the subscriber, a Notary Public of New Jersey personally appeared Mary M. Muller, wife of Anton F. Muller who, I am satisfied, is one of the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon she acknowledged that, she signed,

Stipulation of Facts.

sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

FRANK CREGAR
A Notary Public of New Jersey.

Decree.

DECREE.

Filed September 26, 1927.

IN CHANCEY OF NEW JERSEY.

Between	
ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,*	*On Bill, &c.*
and	*Decree.*
ISAAC RASKIND and GUS PICONE, *Defendants.*	

This cause coming on to be heard in the presence of Lintott, Kahrs & Young, solicitors of the complainants, and Levy, Fenster & McCloskey, solicitors of the defendants, and the Court having examined the pleadings and read the stipulation entered into between the parties hereto whereby all facts are admitted as alleged in complainants' bill of complaint and having heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the Court that the complainant Anton F. Muller was on October 15, 1926, seized in fee simple of all that certain lot, tract or parcel of land and premises situate in the Town of Irvington, in the County of Essex and State of New Jersey, more particularly described as follows:

BEGINNING at a point in the northerly line of Stuyvesant Avenue distant southwesterly as measured along said line of Stuyvesant Avenue, two hundred and twenty-nine and twenty hundredths feet from the point of intersection of the same with the southerly line of Lyons Avenue, as extended, said beginning point being in the easterly line of land now or late of one Farrow, thence (1) along said line of Stuyvesant Avenue, north fifty-six degrees, east seventy-five feet; thence (2) north thirty-two degrees fifty-six minutes west two hundred and twenty-five feet; thence (3) south fifty-six degrees west seventy-five feet; thence (4) south thirty-two degrees fifty-six minutes east two hundred and twenty-five feet to said line of Stuyvesant Avenue and place of BEGINNING.

Decree.

Being known and designated as lot #1 on a map of property of Walter D. Meeker, surveyed November 12, 1902, by Geo. Gardner, surveyor.

That on said 15th day of October, 1926, said complainant and the complainant's wife, Mary M. Muller, entered into an agreement in writing with the defendant Isaac Raskind wherein and whereby said complainants agreed to convey said lands and premises by deed of warranty on or before November 15, 1926, to the said Isaac Raskind and the said Isaac Raskind agreed to pay therefor the sum of $15,500 by the payment of $1,000, which was paid at the execution of said agreement and by the payment of the remainder of the purchase price upon the delivery of said deed by payment of $2,000 in cash and the execution of a purchase money mortgage in the sum of $12,500, the said title to be passed on the 15th day of November, 1926;

And it further appearing to the satisfaction of the Court that the said Isaac Raskind has refused and failed to perform the said agreement on his part and that the said complainants have always been and still are ready and willing in all things to comply with the terms of the said agreement on their part;

Decree.

And the Court being of the opinion that the complainants are entitled to the specific performance of the aforesaid agreement as prayed for in their bill of complaint filed herein;

And the Court being further of the opinion that the complainants are entitled to an order to restrain the defendant Gus Picone, his counsel, attorneys, solicitors, officers, and agent, and each and every one of them from proceeding further against complainants in the cause now pending in the Essex County Circuit Court in which Gus Picone is plaintiff and these complainants are defendants and now pending at issue therein,

It is, on this 26th day of September, 1927, ORDERED, ADJUDGED and DECREED that the said agreement be in all things specifically performed by the said defendant Isaac Raskind and that the said defendant Isaac Raskind on the 25th day of October, 1927, at the hour of ten o'clock in the forenoon, at the office of Joseph Kahrs, Esq., of Lintott, Kahrs & Young, 810 Broad street, in the City of Newark, in the County of Essex and State of New Jersey, pay to the said complainants the sum of $2,000 with interest thereon from November 16, 1926, at the rate of six per centum per annum, together with the taxed costs of this suit as hereinafter allowed, and at the same time make, execute and acknowledge in due form of law and according to the conditions called for in said agreement of sale, and deliver to the said complainants, Anton F. Muller and Mary M. Muller, his wife, his bond in the penal sum of $25,000, due in three years from November 15, 1926, with interest at the rate of six per centum per annum, and at the same time make, execute and acknowledge in due

Decree.

form of law and according to above-mentioned contract and deliver to said complainants, Anton F. Muller and Mary M. Muller, his wife, a purchase money mortgage on said lands and premises payable in three years from said 15th day of November, 1926, with interest at the rate of six per centum per annum, upon the delivery at the same time and place by said complainants to said Isaac Raskind of a warranty deed duly executed and acknowledged by the said complainants, Anton F. Muller and Mary M. Muller, his wife, conveying to the said Isaac Raskind the said lands and premises in fee, and it is FURTHER ORDERED, ADJUDGED and DECREED that if, at the time and place hereinbefore mentioned, the said defendant Isaac Raskind should fail or neglect to pay the sum of $2,000 with interest as aforesaid, together with said taxed costs as hereinbefore mentioned, and to deliver the bond and mortgage as hereinbefore described, duly executed and acknowledged, upon the tender of said deed, the aforesaid sums of $2,000, with interest as aforesaid, and $12,500, together with interest thereon from the 15th day of November, 1926, being a total of $14,500, together with the taxed costs of this suit as hereinbefore mentioned, shall be and become and are hereby impressed as a lien upon the said lands and premises in favor of the said complainants, to the end that said lands and premises may be sold, pursuant to law, and under the direction of this Court, to satisfy such lien, and that in case a deficiency should arise upon such sale, the said defendants may be ordered by this Court to pay such deficiency.

And it is FURTHER ORDERED, ADJUDGED and DECREED that the said defendant Gus Picone, his

Decree.

attorneys, counsel, solicitors, officers and agent, and each and every one of them, be and hereby are enjoined and commanded to desist and refrain from further proceedings against complainants in an action now pending in the Essex Couty Circuit Court in which Gus Picone is plaintiff and these complainants are defendants.

It is FURTHER ORDERED that the said defendant Isaac Raskind pay to the said complainants the costs of this suit to be taxed, including a counsel fee of $250, which is hereby allowed to said complainants.

And it is FURTHER ORDERED that true but uncertified copies of this decree and the said taxed costs be served on the solicitors of said defendants within ten days after the date hereof.

E. R. WALKER,
C.

Respectfully advised,

MAJA LEON BERRY,
V.-C.

Notice of Appeal.

NOTICE OF APPEAL.

Filed October 6, 1927.

IN CHANCERY OF NEW JERSEY.

Between	
ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,*	*On Bill, etc.*
and	*Notice of Appeal.*
ISAAC RASKIND and GUS PICONE, *Defendants.*	

The defendant Gus Picone hereby appeals from the final decree made in the above-entitled cause by Hon. Maja Leon Berry, Vice-Chancellor, on the 26th day of September, 1927, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

LEVY, FENSTER & McCLOSKEY,
Solicitors of Defendant, Gus Picone.

Dated: October 4, 1927.

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

JOHN J. McCLOSKEY,
Of Counsel with Defendant Gus Picone.

Service of a true copy of the within notice of appeal is hereby acknowledged this 4 day of Oct. 1927.

LINTOTT, KAHRS & YOUNG,
Sol'rs of Complainant.

NOTICE OF APPEAL.

Filed October 6, 1927.

IN CHANCERY OF NEW JERSEY.

Between ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants,* *and* ISAAC RASKIND and GUS PICONE, *Defendants.*	*On Bill, &c.* *Notice of Appeal.*

The defendant Isaac Raskind hereby appeals from the final decree made in the above-entitled cause by Hon. Maja Leon Berry, Vice-Chancellor, on the 26th day of September, 1927, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

SAUL TISCHLER,
Solicitor of Defendant, Isaac Raskind.

Dated: October 4, 1927.

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

JOHN J. McCLOSKEY,
Of Counsel with Defendant Isaac Raskind.

Service of a true copy of the within notice of appeal is hereby acknowledged this 4 day of Oct. 1927.

LINTOTT, KAHRS & YOUNG,
Sol'rs of Complainant.

PETITION OF APPEAL.

Filed October 24, 1927.

New Jersey Court of Errors and Appeals

Between ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants-Appellees,* *and* ISAAC RASKIND and GUS PICONE, *Defendants-Appellants.*	*On Appeal from the Court of Chancery.* *Petition of Appeal.*

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

The petition of Gus Picone, one of the appellants, in the above-entitled action, respectfully shows that:

1. Petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey (advised by his Honor, Maja Leon Berry, Vice-Chancellor), bearing date September 26, 1927, in a certain cause in said Court of Chancery, wherein the said Anton F. Muller and Mary M. Muller, his wife, are complainants, and Isaac Raskind and this appellant, Gus Picone, were defendants, in this respect, to wit, that said decree adjudges that this appellant, Gus Picone, be restrained from proceeding with an action pending in the Essex County Circuit Court, in which Gus Picone is plaintiff and Anton F. Muller and Mary M. Muller are defendants.

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the

ground that the same is erroneous in that the Court of Chancery is without jurisdiction to restrain the proceedings in the Court of Law, as it is attempting to have the Court of Chancery act as an appellate body to review the findings of the Essex County Circuit Court, and in that the complainants, Anton F. Muller and Mary M. Muller, were in default in refusing to accept the performance of the contract between the defendant Isaac Raskind and the complainants, Anton F. Muller and Mary M. Muller, by the said Gus Picone being an assignee of the defendant, Isaac Raskind.

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

LEVY, FENSTER & McCLOSKEY,
Solicitors of Defendant-Appellant,
Gus Picone.

CHARLES JONES,
Of Counsel.

Service of a true copy of the within petition of appeal is hereby acknowledged this 26th day of October, 1927.

LINTOTT, KAHRS & YOUNG,
Solicitors of Complainants-Appellees.

PETITION OF APPEAL.

Filed October 24, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	
ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants-Appellees,*	*On Appeal from Court of Chancery.*
and	
ISAAC RASKIND and GUS PICONE, *Defendants-Appellants.*	*Petition of Appeal.*

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

The petition of Isaac Raskind, one of the appellants in the above-entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey (advised by Maja Leon Berry, *V.-C.*), bearing date September 26, 1927, in a certain cause in said Court of Chancery wherein the said Anton F. Muller and Mary M. Muller, his wife, were complainants and Gus Picone and the said Isaac Raskind, were defendants, in this respect, to wit, that said decree adjudges that the said Isaac Raskind specifically performed a certain agreement made between the complainant and this appellant, Isaac Raskind.

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid upon

the grounds that the same is erroneous in that this appellant assigned all his right, title and interest in the said agreement to the appellant Gus Picone, who tendered performance of said agreement by offering to pay the balance of the purchase price and executing a bond and mortgage in accordance with the terms of said agreement.

That said complainants refused to convey to the said Gus Picone and therefore were in default and were not entitled to a decree of specific performance.

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

SAUL TISCHLER,
Solicitor for Defendant-Appellant,
Isaac Raskind.

CHARLES JONES,
Of Counsel with Defendant-Appellant,
Isaac Raskind.

Service of a true copy of the within petition of appeal is hereby acknowledged this 26th day of October, 1927.

LINTOTT, KAHRS & YOUNG,
Solicitors of Complainants-Appellees.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	*On Appeal from the Court of Chancery.*
ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants-Appellees,*	
and	*Answer to Petition of Appeal.*
ISAAC RASKIND and GUS PICONE, *Defendants-Appellants.*	

The answer of Anton F. Muller and Mary M. Muller, his wife, the above-named appellees, to the petition of appeal of Gus Picone, one of the above-named appellants.

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was, on September 26, 1927, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe that the said decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

LINTOTT, KAHRS & YOUNG,
Solicitors for and of Counsel with Appellees.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants-Appellees,* *and* ISAAC RASKIND and GUS PICONE, *Defendants-Appellants.*	*On Appeal from the Court of Chancery.* *Answer to Petition of Appeal.*

The answer of Anton F. Muller and Mary M. Muller, his wife, the above-named appellees, to the petition of appeal of Isaac Raskind, one of the above-named appellants.

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was, on September 26, 1927, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe that the said decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

LINTOTT, KAHRS & YOUNG,
Solicitors for and of Counsel with Appellees.

New Jersey Court of Errors and Appeals

Between ANTON F. MULLER and MARY M. MULLER, his wife, *Complainants-Appellees,* *and* ISAAC RASKIND and GUS PICONE, *Defendants-Appellants.*	*On Bill, etc.* *Brief of Complainants-Appellees.*

BRIEF IN BEHALF OF ANTON F. MULLER AND MARY M. MULLER, HIS WIFE, COMPLAINANTS-APPELLEES.

Bill filed in Court of Chancery in behalf of Anton F. Muller and Mary M. Muller, his wife, to compel specific performance against Isaac Raskind of a contract for the sale of land and to restrain defendant, Gus Picone, alleged assignee of said contract, from proceeding with a suit at law against Muller to recover earnest money paid when contract was made, together with damages for alleged breach.

FACTS

Anton F. Muller owned vacant lots at Irvington, Essex County, New Jersey, and on October 15, 1926, together with his wife, made a written contract with Isaac Raskind to sell said property for $15,500, of which $1,000 was paid in cash, with further provision that $2,000 cash was to be paid when deed was delivered on November 15, 1926, at an appointed time and place, and balance of purchase price to be secured by bond and purchase money

mortgage of Isaac Raskind, with terms provided for in contract.

At the appointed time and place for closing of title, where Mr. Muller attended, prepared with properly executed deed to Raskind and bond and mortgage drawn according to the terms of the contract for Raskind to execute, there appeared in the company of Mr. Louis Levy, attorney representing Raskind at the time of the signing of the contract, a stranger to Mr. Muller, and who was introduced as Gus Picone, and it was stated that he held the assignment of the contract and demanded that the deed be executed and delivered to him, and further stated that he was prepared to pay the balance of the purchase price and execute a bond and mortgage in the place of Raskind, who failed to appear.

Muller declined to accept Picone as his substitute.

The following day a suit was instituted in the Essex County Circuit Court by Picone against Mr. and Mrs. Muller for alleged breach of contract and issue has been joined in that suit.

Bill of complaint has been filed herein as heretofore stated.

QUESTION

There is no dispute as to facts and the question is whether the vendor in such a contract is compelled to accept grantee's assignee as a substitute and if vendee is relieved of his contractual obligations by assignment of his contract.

ARGUMENT

There is no question but that a contract of this character is assignable, but the statute so declaring its assignability is only for the purpose of authoriz-

ing the transfer of the assignee's rights under such contract, but *not his obligations thereunder.*

(See *Rappleye* vs. *Racine Seeder Co.,* 79 Iowa 220, 44 North Western 363, 7 L. R. A. 139.)

Holding

> "The law will permit a person to assign what is his, either in possession or by right of action, but not his obligations to another."

In this contract the granting clause reads,—

> "the said party of the first part will well and sufficiently convey to said party of the second part, his heirs and assigns by deed of Bargain & Sale * * *",

from which defendant Picone would like to have it inferred that the contract in general was assignable, but the rule has been laid down in 5 Corpus Juris, page 875, paragraph 96 (a) that

> "the mere fact that a contract otherwise assignable is in terms between the parties, 'their executors, administrators, and assigns' will not render it assignable contrary to the intent as indicated by the nature of the obligation imposed."

Wooster *vs.* Crane & Co., 73 Eq. 22, involved a bill to rescind certain contracts for publishing of complainant's school books. The defendant dissolved and transferred and assigned to a new company incorporated in Arizona

> "all its property, plant and contracts, including those between the complainant and the dedenfant."

The stockholders of the assignor company organized the new corporation and the personnel of the new company was that of the old.

Pitney, Advisory Master, said

> "The power, then, of the defendant to assign these contracts to the Arizona corporation is undoubted. But the question is whether, from the nature of the contracts themselves, the defendant could empower the new corporation to take its place in the contracts against the will and without the consent of the complainant, the other party to the contract."

The defendant in Wooster *vs.* Crane & Co. (supra), contended that the contracts in question by their terms were made assignable. The clause being,

> "The above agreements are made with the understanding that the said Crane & Co. and their representatives and assigns shall in substantial good faith keep and perform their agreement hereinafter contained."

Pitney, Advisory Master, in holding this contention could not be maintained, said

> "Upon careful consideration I am unable to give to the presence of the word 'assigns,' as above quoted, the force the defendant claims for it. I am unable to construe it as a contract on the part of Miss Wooster to deal with anybody to whom Crane & Company may assign that contract and to accept such assignee as paymaster. It will be observed that wherever there is a covenant on the part of Crane & Company to do anything on its part, the weighth of the covenant is placed entirely upon Crane & Company. Upon the whole I am of the opinion that the only effect of the word 'assigns' is to give the right which Crane & Company have without that word, viz., that their assignee would take whatever interest

> they had in the contract up to the time of the assignment, precisely as in the case of one partner selling out his interest in the partnership."

Accord and citing *Wooster* vs. *Crane, Central Brass & Stamping Co.* vs. *Stuber,* 220 Fed. Rep. 909; *American Smelting & Refining Co.* vs. *Bunker Hill & Sullivan Mining & Concentrating Co.* 248 Fed. Rep. 186; *Thomas-Bonner Co.* vs. *Hoover, Owens & Rentschler Co.,* 284 Fed. Rep. 386.

And, too, in Schlessinger *vs.* Forest Products Co. (78 Eq. 637 at 644), Justice Swayze in delivering the unanimous opinion of the Court of Errors & Appeals said,

> "The fact that Freeman agreed for himself, his heirs and assigns, does not make the contract assignable so as to bind Gaffinel. Its object was to bind Freeman's heirs to liability in case of breach and so far as concerns assigns is applicable only to the extent to which the contract might legally be assignable by Freeman. To hold that these words made the contract assignable in the wider sense would necessitate the conclusion that it might be performed by his heirs-at-law."

The phraseology in the printed form of contract is employed in order to provide for the particular terms to be used in the grantee clause of the deed and attention is especially called to the words "heirs *and* assigns," but not "or assigns."

Likewise, it is distinctly provided in the clause which arranges the terms of the purchase money mortgage that party of the second part—which is Isaac Raskind—will give to party of the first part a bond and mortgage, and therefore, grantor was

entirely within his rights in demanding the obligation of the party he elected to contract with.

The rule contended for by Picone would result in great injustice, because when a small part of the purchase price is paid in cash and the balance secured by bond and mortgage, the owner of the property generally selects a person to deal with who is financially able to make good any deficiency upon the bond in case of foreclosure, because he well knows the sometimes rapid fluctuations in real estate values and at the time of the default under the bond the land value may be insufficient to meet the balance due.

The Court of Errors & Appeals of this State in case of the Seacoast Developing Co. *vs.* Beringer, Jr. (134 Atl. 770), in which a motion was made to strike out a counter-claim against the purchasers in the contract of sale, who had assigned their rights under the contract to the complainant, who asks reformation and enforcement of the contract. On appeal from the Court of Chancery, in a unanimous opinion, Justice Kalisch, speaking for this Court, said,

> "The contract, inter alia, required that $63,000 of the purchase money be secured by the bond 'of the said parties of the second part,' namely, Cohen and Katz. * * * it is quite obvious that Cohen and Katz are necessary parties in the securing of the payment of the $63,000 for it is apparent that the complainant is without legal power to compel them to execute the bond; and the defendant cannot be properly compelled by it to accept its bond, or the bond of any other party in lieu of a bond of Cohen and Katz."

In Kutschinski *vs.* Thompson, Vol. V Adv. Rep. No. 36 Vice-Chancellor Fallon followed the language

of the Court of Errors and Appeals in the Seacoast Developing Co. *vs.* Beringer. The assignee of the vendee filed a bill for specific performance of a contract with an abatement of the purchase price due to an easement, termed a mill-race. The defendants refused to accept tender of the complainant's bond and mortgage and likewise refused to grant the abatement. The Vice-Chancellor said,

> "It appears manifest to me, that the vendors in the making of said contract, looked to the personal responsibility and liability of said vendee."

Vice-Chancellor Fallon in Kutschinski *vs.* Thompson expressly distinguished the case of Moran *vs.* Borrello, 132 Atl. Rep. 510, and stated it was inapplicable, it being apparent the land and not the personal responsibility of the assignor was looked to, as no provision had been made for a personal obligation.

In that case vendee's assignee brought an action in the Second District Court of Jersey City to recover deposit and search fees, on the ground of defendant's inability to give good title. It was objected that the plaintiff had not shown she was ready, able and willing to perform in that she was unable to tender the bond of her assignor. On an appeal to the Supreme Court and upon argument before Justices Parker, Black and Minturn the Court said,

> "The contract provides 'Seller to take back a purchase money mortgage of $2500 at 6 per cent. payable, etc. Said mortgage can be paid off at any time.'" "It will be observed," said the Court, "that this requirement provides for no bond, and in some jurisdictions promissory notes are substituted therefor."

It was pointed out in Wooster *vs.* Crane (supra), quoting from Pollock on Contracts,

> "Rights arising out of a contract cannot be transferred if they are coupled with *liabilities* or if they involve a relation of *personal confidence,* such as that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided."

and Pitney, the Advisory Master, advanced the following hypothetical case as an illustration,

> "Thus if A agrees to deliver to B, at a certain point, a certain quantity of any commodity, at a certain price at stated times in the future, and to take B's promissory note at three months for the price, manifestly B cannot assign that contract to C and compel A to take C's promissory note instead of B's, for which he had contracted."

In other jurisdictions the contention of complainant-appellee has been uniformly upheld.

Harney vs. *Hellgren* (322 Ill. 126, 152 N. E. 48).

The assignee of a purchaser of real property brings an action of specific performance and the Court said,

> "While it has been repeatedly held that the vendee's assignee of a contract for the purchase of real estate, while it is executory and nothing remains to be done, but to pay the purchase price or the balance thereof, may tender the same and on refusal by the vendor compel specific performance, yet it has never been held that the assignee of a vendee could, where a contract called for notes of the vendee secured by a mortgage as part of the purchase price, compel the vendor to accept the notes and mortgage of the assignee and make the assignee the personal debtor of the vendor without his consent."

And Court quotes Houchin *vs.* Salyards to the effect that the vendor can even compel vendee to give a bond and mortgage.

Houchin vs. *Salyards,* 155 Iowa 608, 133 North Western 48, Iowa Supreme Court.

The Court held that "an assignee's promise to execute a mortgage is no excuse and was not binding on the plaintiff as he did not consent or acquiesce, and not having done so, was not required to accept the obligation of E. Houchin or anyone in lieu of J. W. & Eudura Salyards."

Rappleye vs. *Racine Seeder Co.* (79 Iowa, 220, 44 North Western 363, 7 L. R. A. 139).

In the above case the manufacturers of a certain machine made a contract for sale of a number of them, which were to be paid for by promissory notes of purchasers. It was further provided by the contract that purchasers were to sell such machines within a given territory, receiving in payment therefor either cash, which was to be applied in payment of their notes, or notes, which were to be delivered to manufacturers as collateral security.

The Court held that the purchasers cannot assign the contract, so as to compel the manufacturers to take the notes of other persons in lieu of the purchasers' in payment of the machines.

(5 Corpus Juris, p. 879, paragraph 45.)

"It is also a general rule that a party to a contract may not, unless authorized by the other party, either in the contract itself or otherwise, so assign the contract as to escape liability for the perform-

ance of acts or duties imposed upon him by its terms."

Cases so holding:

In Weidenbaum, et al, *vs.* Raphael, 83 Eq. 17, a bill for specific performance of a written agreement for the sale of land was filed. The vendee was to pay $100 on signing the agreement, $6000 by assuming a first mortgage, $4250 by executing a purchase money mortgage and $1650 in cash on the passing of title. The vendee died intestate leaving three children and her husband. The vendor then entered into another contract to sell the property to another party, which party had notice of the prior contract. Vice-Chancellor Emery said,

> "But the vendee's right to specific performance is dependent on the fulfillment of the condition to be performed on his part, and the assignee of a vendee, even when under no disability, is not permitted to substitute his personal liability on the unperformed conditions against the consent of the vendor."

The leading case in the United States is:

> *Arkansas Valley Smelting Co.* vs. *Belden Mining Company* (127 U. S. 378, 8 Supreme Court 1308).

The facts of this case are:

Belden agreed to deliver ore to Bulings and Eilers at Leadville, Colorado.

> "All ore so delivered shall at once upon delivery become the property of the party of the second part, Bulings and Eilers."

Price to be determined by assay and New York quotations.

Bulings and Eilers sold out to Arkansas Smelting, and Belden Co. refused to go on with contract.

Justice Gray—

> "Original vendors of ore are not obliged to take successors of Bulings and Eilers as their debtors although they succeeded to the very same smelting works and business which Bulings and Eilers originally carried on."
>
> *Winslow* vs. *Dundom, et als* (125 Pacific 136, 46 Montana 71, 82).

The Court held,

> "The rule that a contract is assignable does not apply where the right created by the contract is coupled with a liability or where the contract involves a relation of *personal confidence* or is for personal service."
>
> *Rice vs. Gibbs* (58 N. W. 724).

The Supreme Court of Nebraska held a contract for the sale of real property was not assignable as the assignee of the vendee was not permitted to substitute his personal responsibility for that of the vendee, who was to make deferred payments on the purchase price.

> 5 Corpus Juris P. 880, P. 46.
>
> 384 Fed. Rep. 386 (supra).
>
> *Schlessinger* vs. *Forest Products Co.* (Supra).
>
> *Peoples Bank & Trust Co.* vs. *Weidinger* (44 Vroom 433).

Where it appears from the terms of the contract that reliance for its performance is placed upon the integrity, credit or responsibility of a party, or that confidence or trust is reposed in him personally for its performance, he may not assign the con-

tract even in the sense of delegating its performance to another.

Currier vs. *Taylor* (19 New Hampshire 189).

A party to a contract is not released from performance on his part by assigning it to another who agrees to perform it although the other party to the contract agreed to pay the assignee whatever might be due on the performance.

It is respectfully submitted that decree of Court of Chancery should be affirmed.

LINTOTT, KAHRS & YOUNG,
Solicitors for and of Counsel with Complainants-Appellees.

Baker Printing Co., Law Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

Between

ANTON F. MULLER and MARY M. MULLER, his wife,
Complainants-Appellees,
and
ISAAC RASKIND and GUS PICONE,
Defendants-Appellants.

On Bill, etc.
On Appeal from Court of Chancery.

REPLY BRIEF OF COMPLAINANTS-APPELLEES

REPLY TO BRIEF OF DEFENDANT-APPELLANT GUS PICONE

The brief of the defendant-appellant Gus Picone, is based entirely on a misconception of the contract to sell in that it states the agreement calls for a "bond and mortgage." The contract specifically states "*Party of the Second Part* will give to the party of the first part a bond and mortgage." (State of the Case, p. 10.)

A party may assign a contract ordinarily, but where the personal responsibility of the vendee is looked to, even though the words "heirs and assigns" are used, it does not allow the vendee to assign his liabilities. (*Wooster* vs. *Crane,* 73 N. J. Eq., 22.)

For the above reason and because of the acquiescence of the vendor to the assignment and his acceptance of the assignee, *McVoy* vs. *Baumann* (93 N. J. Eq., 638), is not controlling.

REPLY TO BRIEF OF DEFENDANT-APPELLANT ISAAC RASKIND

The contention of the defendant-appellant Isaac Raskind, that time being of the essence of the contract, the Court of Chancery should not grant specific performance, presupposes a reversal of the Court of Chancery in the present issue—as to whether or not the complainants-appellees must accept the bond of the assignee in lieu of the bond of the assignor.

The citations of the defendant-appelant, Isaac Raskind, are inapplicable, for either the vendor had consented to the assignment and accepted the assignee (*Sinclair and Rose* vs. *Armitage,* 12 N. J. Eq., 174, and *McVoy* vs. *Baumann,* 93 N. J. Eq., 638, 117 Atl., 717; *Ritz Realty Corp.* vs. *Eypper-Beckmann, Inc.*, 138 Atl., 900), or no bond and mortgage were to be given (*Grigg* vs. *Landis,* 21 N. J. Eq., 494, *Batement* vs. *Riley,* 72 N. J. Eq., 316), or no bond was contracted for (*South Jersey Furniture Co.* vs. *Dorsey,* 95 N. J. Eq., 530).

The California case of *Montgomery* vs. *DePicot,* 96 Pac., 305, the contract as regards payments speaks of the "party of the second part" and then, it would seem intentionally, omitted stating "party of the second part" when referring to the note secured by the mortgage.

It is respectfully submitted that decree of Court of Chancery should be affirmed.

LINTOTT, KAHRS & YOUNG,
Solicitors for and of Counsel with
Complainants-Appellees.

New Jersey Court of Errors and Appeals

Between ANTON F. MULLER and MARY M. MULLER, Complainants-Appellees, and ISAAC RASKIND and GUS PICONE, Defendants-Appellants.	On Bill, etc. On appeal from Court of Chancery.

BRIEF OF DEFENDANT-APPELLANT, ISAAC RASKIND.

Statement of Case.

This is an appeal by Isaac Raskind from a final decree of the Court of Chancery, (State of Case, page 44) advised by Maja Leon Berry, Vice Chancellor, ordering the Appellant, Isaac Raskind to specifically perform an agreement entered into between this Appellant and Complainants-Appellees.

The facts are not in dispute and are stipulated. (State of Case, page 34, etc).

On October 15, 1926, Complainants-Appellees entered into an agreement with the defendant-appellant, Isaac Raskind, to sell a certain tract of land in Irvington for a consideration of $15,500.00, to be paid as follows: $1,000.00 in cash at time of signing the agreement. $2,000.00 at the time of closing title and the balance of $12,500.00 by *a* bond and mortgage for three years. Title was to close on November 15th, 1926. Time being of the

essence. (Contract appears State of Case, pages 8 and 37.)

On November 14th, 1926, the defendant-appellant, Isaac Raskind, assigned all his right, title and interest in the agreement of sale, to the defendant-appellant, Gus Picone. Notice of said assignment was given to the Solicitors for complainants-appellees.

On November 15th, 1926, at the time and place set for closing, the defendant-appellant, Gus Picone, appeared, tendered to the complainants a certified check in accordance with the contract, in the sum of $2034.50, and offered to execute a bond and mortgage in the sum of $12,500.00 as called for in said agreement. The Complainants-Appellees refused said tender and demanded a bond and mortgage signed by this defendant-appellant, Isaac Raskind.

Subsequently the defendant-appellant, Gus Picone instituted suit in the Essex County Circuit Court to recover the deposit paid for this defendant-appellant and reasonable search fees, (in accordance with P. L. 1915 page 316). The complainants-appellees made a motion in the Essex County Circuit Court to strike out said complaint on the ground that it disclosed no cause of action, that they were not obligated to accept the bond of the defendant-appellant, Gus Picone. The motion was denied and an answer was filed to that suit by these complainants-appellees. A motion was then made to strike out the answer of the complainants-appellees on the ground that the answer was sham. Thereafter the complainants-appellees, filed a bill for specific performance against this defendant-appellant, Isaac Raskind and an application for an injunction against the defendant-appellant, Gus Picone to restrain his proceeding in the law suit. On the return date of the Order to Show Cause, an

interlocutory injunction was ordered restraining the defendant-appellant Gus Picone from proceeding in the law suit. (Conclusions State of Case, page 23). On final hearing, the Court ordered the defendant-appellant, Isaac Raskind, to specifically perform the agreement and perpetually restrained the defendant-appellant, Gus Picone, from proceeding in the law suit. (No conclusions filed.)

Specification of Error.

1. The Complainants-Appellees were in default and were not entitled to a decree of specific performance against this defendant-appellant.

Argument.

(N. B. All italics our own).

The Complainants-Appellees refused to convey their property to this defendant-appellant's assignee, Gus Picone, notwithstanding the fact that the said assignee tendered a certified check for $2034.50, and offered to execute a bond and mortgage in the sum of $12,500.00. (The custom among the Attorneys of this State is that the Attorneys for the seller are to draw up the bond and mortgage). The Complainants-appellees absolutely refused to convey their property to this defendant-appellant's assignee, Gus Picone.

It is a rule of Equity that specific performance will not be decreed in favor of one who has himself once refused to perform.

See 2 A. L. R. 416 (Annotated).

In the recent case of Thomessen vs. Absecon Land Co. (E & A) 98 N. J. E. 696; 130 Atl. 518, it was held that where one party to a contract failed to perform his contract without legal excuse,

the other party was justified in declaring the contract at an end and therefore the party who failed to perform could not ask for a decree of specific performance.

See also B. Holding Co. vs. Dubois, 5 N. J. A. R. 507; 136 Atl. 518.

It is to be remembered also, that time was stipulated to be of the essence of the contract. (See State of Case, page 40.) "It is expressly stipulated and agreed between the parties that time is of the essence of the within contract".

In another recent case that of Barry vs. Ruskin, 99 N. J. E., 730; 133 Atl. 528, affirmed per curiam by this Court in 5 N. J. A. R. 353, 135 Atl. 914—it was held where time is of the essence of the agreement, prompt performance at the stipulated time is essential.

* * * * *

"In all these contracts where time of payment by the vendee is essential and not simply material and a fortiari in those when if vendees payments are not made upon exact day named, the vendor may treat agreement as at an end. The vendee must make an actual tender of the price and a demand of deed at specified time as condition precedent to maintain his suit. *This is true of vendor when time of conveyance is made essential.* This rule is involved in the very notion of time being the essence of the contract."

Pom. Sp. Perf. (3rd Ed.) page 773.
Pom. Sp. Perf. (2nd Ed.) page 434.

It follows that if the complainants-appellees were obligated to convey to this defendant-appellant's assignee, Gus Picone upon his tender of performance, and refused to convey, they are not entitled to a decree of specific performance against this defendant-appellant.

2. The complainants-appellees were obligated to convey to this defendant-appellant's assignee, Gus Picone.

It is admitted that this defendant-appellant assigned all his right, title and interest in the contract which is the subject of the within litigation, to the defendant-appellant, Gus Picone.

The contract of sale for the purchase of property was assignable and transferred the rights of this appellant to the appellant, Gus Picone, so as to confer a right upon the appellant, Gus Picone, to demand a conveyance from the complainants-appellees to him, on his paying the balance of the purchase price and offering to execute a purchase money bond and mortgage.

(a)

Contracts for Sale of Real Estate are Assignable.

It is an elementary rule of law that contracts for the sale of real estate are assignable.

"Unless a contract is one which calls for personal service or one which in any manner depends upon the learning, skill, solvency, or other personal qualities of the party or is fiduciary in its nature, it may be assigned by the vendee or party who stands in the position analogous to the vendee. *This class of agreements, includes all ordinary contracts for sale or leasing of land or personal property.*"

Pom. Sp. Perf. (3rd Ed.) 976.
Pom. Sp. Perf. (2nd Ed.) 549.

"Contracts other than personal contracts or contracts containing a provision against assignment, or contracts forbidden to be assigned by Statute may be assigned at Modern Law".

4 Page Cont. (2nd Ed.) 3969 par. p. 2243.

"It is generally recognized that a purchaser of a particular tract of land prior to full performance on his part, has, by virtue of his contract, an interest in the land which he may assign, and his assignee will be entitled on the payment of purchase price, to require the vendor to make a conveyance."

27 R. C. L. 563.

"As a general rule, personal considerations do not enter into contract for sale of land."

Seabornes Law of Vendor and Purchaser of Real Estate (Jolly) 318.

"In absence of a stipulation to the contrary, a vendee may assign his written contract for purchase and his assignee succeeds to all his rights thereto."

5 Thomp. Real Prop. 389.

The above references are all to common law provisions.

The Legislature of this State has deemed fit to enact a provision to our Practice Act, P. L. 1903, page 540. 3 C. S. 4056, Section 19 which provides in part.

> *"All contracts for the sale and conveyance of lands * * * * shall be assignable at law and assignee may sue thereon in his own name."*

It is to be noted that the Statute provides that

"All contracts for the sale and conveyance of lands, shall be assignable at law."

An examination of the cases in this State, show that early in the law of our State, especially in equity, the rights of assignee of contracts for the sale of real estate were recognized.

In the case of Stoutenburgh vs. Tompkins, 9 N. J. E. 332, a suit for specific performance was brought by an assignee of a purchaser of real estate to compel specific performance of an agreement for the sale of certain real estate. The agreement provided that the defendant would convey to one Wilde, his heirs and assigns, upon payment of the purchase price. The contract also provided that a portion of the purchase price was to be by a bond, which bond was to be secured by a mortgage. By mesne assignment the contract became the property of the complainant. The court denied specific performance on the sole ground of laches of the assignee and held that the assignee must affirm the contract so as to make it mutual.

The Court said, p. 345:

> "But if the assignee, or a person holding under him, seeks a specific performance, he must affirm the contract and make it mutual within a reasonable time."

It is true that the first assignee was an assignee in bankruptcy and not a voluntary assignee, but there is no distinction in principle because, if this contract for the sale of real estate, calling for a part payment by a bond to be secured by a mortgage was a personal contract, nothing could pass to an assignee in bankruptcy.

In Neligh vs. Michenor, 11 N. J. E. 539, the court held that a vendee's interest under a contract to purchase could be mortgaged, holding that anything that could be assigned could be mortgaged.

In the case of Sinclair-Rose vs. Armitage, 12 N. J. E. 174, the Court held that a vendee under a contract to purchase could mortgage his interest. This contract also provided for a payment of $500.-00 to be secured by a bond and mortgage.

The court recognized that such a contract was assignable and that the assignee could perform such an agreement, the court said in part, at p. 177.

> "Can there be a doubt but that they might have assigned their benefit in this agreement to the complainants, and placed them in their stead in their relationship to the property, and as to their right of a conveyance from Allen?".

In Grigg vs. Landis, 21 N. J. E. 494, this court reversed the Court of Chancery and held that an assignee of a vendee under a contract to purchase, could obtain specific performance, notwithstanding the agreement contained a provision restraining assignment.

In Batement vs. Riley, 72 N. J. E. 316, 73 Atl. 1006, the Court of Chancery held that a bill for specific performance could be maintained by an assignee of a vendee.

In McVoy vs. Baumann, 93 N. J. E. 638, 117 Atl. 717, this Court held that where a contract for sale of lands required the vendor to convey the lands to the purchaser, his heirs, and assigns, the contract can be specifically enforced at the suit of the assignee.

In South Jersey Furniture Co. vs. Dorsey, 95 N. J. E. 530, 123 Atl. 543, the Court of Chancery directed a decree of specific performance in favor of an assignee of a vendee. The contract in question provided for a mortgage for part of the purchase price.

In Ritz Realty Corporation vs. Eypper & Beckmann, Inc., 5 A. R. 1327, 138 A. 900, the Court of Chancery directed a decree of specific performance in favor of an assignee of a vendee. The contract provided for a bond and mortgage for part of the purchase price.

In none of the above cases was the point precisely raised that the contract was personal and performance by the assignee was not valid. However, the inference is strong that the contracts are not personal and performance by an assignee is sufficient.

The Honorable Vice Chancellor in this case, felt that he was bound by the decision of this Court in Seacoast vs. Beringer, 4 N. J. Adv. Reps. 1602; 134 Atl. 770. In that case there was an appeal from the refusal to strike out a counterclaim against complainant's assignor. The Court said in part:

> "The contract inter alia required that $63,000.00 of the purchase money be secured by the bond of the parties of the second part, namely Cohen and Katz. Whether the contract be reformed and then enforced, as is sought by the complainant in its bill of complaint, or be enforced as written and as asked for in the defendant's counterclaim, it is quite obvious that Cohen and Katz are necessary parties in the securing of the payment of $63,000.00, for it is apparent that the complainant is without legal power to compel them to execute a bond; and the defendant cannot be properly compelled by it to accept its bond or the bond of any other party in lieu of a bond of Cohen and Katz".

An examination of that case does not disclose that the defendant agreed to convey to the complainants' assignors and their heirs and assigns, as provided in the contract between this complainant

and this defendant-appellant. (McVoy vs. Baumann, 93 N. J. E. 638 held that to be a test of assignability). The contract in the instant case does not provide that the balance of the purchase price was to be secured by a bond of the party of the second part, namely Isaac Raskind, it provides that party of the second part will give *a bond and mortgage in the sum of $12,500.00.* The defendant-appellant offered to give a bond and mortgage to the complainants-appellees and performed the contract. The bond and mortgage are given by the person purchasing the property.

It is also to be noted that in the Seacost case, the corporation was expressly formed by the vendee to take over the contract, and it is a matter of common knowledge that certain real estate corporations have no financial stability, and the corporation was formed for the express purpose of taking over the contract without any capital.

In two other cases, the point of the necessity of the assignee to tender the bond of the vendee was raised.

In the case of Moran vs. Borello, (Sup. Ct.) 4 Misc. 344; 133 Atl. Rep. 510, the suit was brought by the assignee to recover down money and search fees for failure of the vendor to convey (a suit similar to the one brought by this defendant-assignee in the Essex County Circuit Court and restrained by the Court of Chancery) an objection was made that the assignee did not tender the bond of the assignor, the Court said:

> "It has been held that where a bond and mortgage are called for, *the land* and not the personal responsibility of the vendor (probably meaning vendee?) *is the principal security looked for, so that tender by the assignee of his own bond will suffice,* 27 R. C. L. 536 page 670 * * * It will be observed that this requirement provides for no bond and in some jurisdictions, promissory notes are substituted therefor."

It is a matter of common knowledge that in this State a bond is usually given for part of the purchase price and secured by a mortgage, the bond being a primary obligation and a mortgage is ordinarily never given alone for the balance of the purchase price.

In Kutschinski vs. Thompson, 5 N. J. Adv. Rep. 1186; 138 Atl. 569, the Court from an examination of the contract, determined that the personal obligation of the vendee was required, as the contract expressly provided for a guarantee of the purchase money bond and mortgage by the vendee and it also appeared that the vendor had refused to convey the property to the assignee and would have nothing to do with the assignee. The Court recognized the rule set forth in Moran vs. Borello, *supra* but holds it inapplicable and says:

> "It is apparent from the proof in this case that the defendants would not have any dealings with the complainants and a fortiori would they not be satisfied with their bond or other obligation".

Moran vs. Borello, *supra,* recognizes the rule set forth in 27 R. C. L. 536, which holds as follows:

> "To constitute a valid tender or offer to pay purchase money, the purchaser must tender lawful money and where he fails to do so, the vender may refuse to accept the tender on the ground that it is not the proper kind of money, irrespective of his motive in so doing. Where the contract calls for the delivery of notes on the part of the purchaser for deferred payments of the purchase price, the per-

sonal liability of the latter enters as a controlling element into the contract and the offer or tender of notes of an assignee of the original purchaser does not satisfy the terms of the contract nor warrant such assignee in asserting a right of specific performance based on such tender. *Where, however, the contract calls for the giving of notes for the deferred payments secured by a purchase money mortgage and the contract runs to the purchaser and his assigns, the general construction will be that the note is a mere incident to the transaction and the principal thing relied on is the mortgage,* as it is a very easy matter, when reliance is to be placed on the financial responsibility of the original purchaser, to specify in the contract that in addition to the mortgage, his personal obligation is to be given."

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See also 27 R. C. L. p. 270, page 536.
Note 52, 39 Cyc. 1668.

This statement is based upon the decisions in the cases of Montgomery vs. DePicot, 153 Cal. 509; 96 Pac. 305; 126 Am. St. Rep. 84 and Rice vs. Gibbs, 33 Neb. 460, 50 N. W. 436 (reversed in 40 Neb. 264, 58 N. W. 724).

The case of Montgomery vs. DePicot, *supra,* involved the following facts: One, W. G. Bradshaw, purchased a tract of laid from the defendant, purchase price, $45,000.00 deposit $1500.00 balance, $10,000.00 at time of closing and $33,500.00 to be paid in five years evidenced by a promissory note secured by a mortgage upon the property. Bradshaw assigned his interest by mesne assignments to the plaintiff who was a straw man for said Bradshaw, and said plaintiff also was conceded to be financially irresponsible. Plaintiff tendered to the defendant, $10,000.00 cash and her personal note for $33,500.00 secured by a purchase money

mortgage. This tender was refused and a bill for specific performance was filed by the plaintiff. Defendant resisted on the ground that there should have been a tender of the note of Bradshaw. Counterclaim overruled and specific performance decreed against the defendant and affirmed.

The Court said in part:

> "It is insisted by appellants that their demurrer to the complaint should have been sustained, on the ground that the facts alleged showed that the plaintiff was not entitled to the relief prayed for. In other words, that the complaint does not show that the plaintiff offered to observe or comply with the terms of contract upon which said suit it brought. In support of this contention, it is claimed that the contract did not provide that the note of the plaintiff should be given in satisfaction of it as tendered; that the contract provided and meant that the note of Bradshaw and no other person, should be given. That it called for the personal obligation and liability of Bradshaw himself, and his assignee could not substitute her personal liability for that of Bradshaw and compel specific performance upon tender of her own note. It is undoubtedly true that where a contract for the sale of land calls for delivery of notes on the part of the vendee for deferred payments of purchase price, the personal liability of the latter enters as a controlling element into the contract and the offer or tender of notes of an assignee of the original vendee, does not satisfy the terms of the contract nor warrant such assignee in asserting a right of specific performance based on such tender. As said in Arkansas Valley Smelting Co. vs. Belden Mining Co., 127 U. S. 379; 8 Sup. Ct. 1308; 32 L. Ed. 246; 'Everyone has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his

consent'. In the familiar phrase of Lord Denman, 'you have a right to the benefit you anticipate from the credit and substance with whom you contract', and as is declared in our code, 'the burden of an obligation may not be transferred without consent of the party entitled to the benefit'. (Civ. Code p. 457). Whether a given contract is assignable or not, is a question of construction. Now as to the contract at bar. The reading of it discloses by its terms that it is assignable. It provides for conveyance by defendants of property to 'said party of the second part (Bradshaw) his heirs, executors and assigns', upon fulfillment of certain conditions by Bradshaw, his 'heirs, executors or assigns.' These however, are general provisions of the contract and are not conclusive upon subject of assignability. The use of such language is not in every case, absolute, determination of its character, Swarts vs. Electric Light, 26 R. I. 1436; 59 Atl. 111. Notwithstanding its use, the intention of the parties must be gathered from a consideration of its terms and entire tenor of the contract and if it appears that the contract calls for performance of an obligation, purely personal in its nature. The rule is general that the obligation is personal, cannot be assigned without consent of party to be benefited. Bethlehem vs. Annis, 40 N. H. 34, 77 Am. Dec. 700; Ice Co. vs. Potter, 123 Mass. 28, 25 Am. Rep. 9; Arkansas vs. Belden, supra.

In Rice vs. Gibbs, et al, 33 Neb. 460; 50 N. W., 436 (Court undoubtedly refers to 40 Neb. 264, 58 N. W. 724) an optional contract for sale was involved wherein it was provided that the covenants and agreements should extend to and be obligatory upon the heirs, executors and administrators and assigns of the respective parties. The contract provided for a deed to be made by the vendor on the payment of a certain specified amount in money and other payments to be made within

one and two years after making of the deed. Such deferred payments to bear interest. An assignee of the original vendee tendered the money in due time and notes for the deferred payments, but not made by the original vendee. It was held that notwithstanding the language of the contract, an assignee financially irresponsible could not substitute his own personal liability for that of the original vendee; that in a contract of sale where payments of portion of the purchase price is deferred and there is no provision for securing such payment, it is a necessary inference that the character and solvency of the vendee was an inducement of the contract and the contract cannot be assigned so as to permit the assignee to enforce it and compel the vendor to substitute the obligation of any other person than the one with whom the contract was made. In that case, however, the notes for the deferred payments were not to be secured by any lien or mortgage upon property to be conveyed. The contract did not so provide. The vendors obligated themselves to an absolute disposition of the property on the execution simply of the promissory notes for the deferred payments and obviously the financial responsibility of the original vendee must have entered as a controlling inducement to the contract. In this very essential respect, that case differs from the case at bar. In the contract here, notwithstanding the provisions for assignability, if it appears from a consideration of the whole contract that the personal financial responsibility of Bradshaw was a distinctive feature of it, or it appeared to be the material inducement to the contract, then under the general rule it would not be assignable without consent of vendors and assignee would have no right to enforce it. It seems quite plain from an examination of the contract, that personal financial responsibility of Bradshaw was not a material inducement for the execution.

What was really relied on, was a mortgage upon the property for unpaid purchase price and a 'promissory note' evidencing indebtedness, was to be given. *It is a matter of general knowledge that upon sale of real estate, a mortgage back for a portion of purchase price is one of the most common methods of dealing in such transactions. The mortgage is the main thing relied upon* and when a substantial prior payment as in this case is made the financial responsibility of the vendee itself on the note, is a matter of very little importance to the vendor. And in contracts which in terms run in favor of an assignee and which provide for a promissory note and mortgage to secure the balance of the purchase price, the general construction will be that the promissory note is a mere incident to the transaction *and the principal thing relied on is the mortgage. It is a very easy matter when reliance is intended to be placed on the financial responsibility of the original vendee to specify in the contract that in addition to the mortgage his personal obligation shall be given.* When this is not done and a mortgage to secure 'A promissory note' is alone called for as in the contract here, such provision will be construed as making the giving of a mortgage and not the giving of the note, the material inducement to the contract. *That under such circumstances the obligation is not personal and may be assigned* and specific performance in proper tender may be had at the suit of assignee and specific performance may be had at the suit of assignee."

In Rice vs. Gibbs, 33 Neb. 460, 50 N. W., 436, the court originally held that a tender of the notes of the assignee was sufficient, and that the contract was not personal.

Subsequently, on a rehearing of Rice vs. Gibbs, 40 Neb. 263, 58 N. W. 724, the court reversed its original ruling and held:

"In a contract of sale where payment of a portion of the purchase money is deferred and *there is no provision for securing such payment* it is a necessary inference that the character and solvency of the vendee was an inducement to the contract so that the contract cannot be enforced so as to permit vendee to enforce it or compel vendor to substitute the obligation of any other person for the obligation of the one with whom the contract was made." * * * *

"Tender of payment may be properly made by an assignee of the contract".

Note page 785, Pom. Sp. Per. (3rd Ed.)

A further examination of the contract in question disclosed the fact that in addition to the fact that the complainants-appellees agreed to convey the property to this appellant, "his heirs and assigns", it further provides (State of Case page 40)

"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 fifteenth day of November, 1926, next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use."

It can be readily seen that the parties contemplated an assignment as if it had been the parties intent to limit assignment, the complainants would not have agreed to allow the assigns of this appellant to enter said lands.

In Pomeroy vs. Fullerton, 113 Mo. 440; 21 S. W. 19, the case involved an assignment of a contract for sale of real estate at a price of 1/5 in cash, balance in equal payments in 1, 2, 3 and 4 years with interest to be secured by a deed of trust

(similar to our mortgage) and also contained a covenant for the assignor to build certain dwellings. Assignor assigned it to the plaintiff who tendered balance and deed of trust and it was refused. He subsequently filed a bill for specific performance. Defendant demurred and among other grounds urged that the contract was personal and not assignable. Demurrer overruled and the Court said:

> "The substance of the fourth and fifth objections to the petition is that the covenants provided for in the contract rest in personal trust and confidence and the contract cannot be assigned. This objection is answered by the terms of the covenants themselves as set forth in the petition. The contract contemplates an assignment of Reveley's interests and the obligations to perform the covenants by his assigns, run with the interest in the land assigned and can as well be performed by them as by him. This interest is assignable. Milton vs. Smith, 65 Mo. 320".

As was aptly said in LaRue vs. Groezinger, 84 Cal. 287, 24 Pac. 44, 18 Am. St. Rep., "And while it is to be conceded that men have a perfect liberty to contract with whom they choose and to exclude the idea of performance by another, yet in the absence of anything indicating such intention, we do not think the court should indulge in speculation as to possible prejudice or fancied preference. It should not be assumed that the parties were influenced by unusual or conjectural motives, merely because some men might be so affected under sumilar circumstances."

* * * * *

> "Since the intention of the parties must be deduced from the terms of the contract when considered in the light of surrounding circumstances and since the unexpressed intention of one party which is not made a part of the contract is inoperative, the personalty of the adversary party must be contracted for in express terms, or must be material from the nature of the subject matter of the contract and surrounding circumstances in order to render the contract non-assignable. The fact that one of the parties to the contract believes that the adversary party will perform in person, does not render the contract non-assignable, if such method is not contracted for expressly or is not fairly implied from the nature of the subject matters and surrounding circumstances."

4 Page Cont. (2nd Ed.) page 3980, par. 2249.

Complainants-Appellees will undoubtedly insist that the contract involved in this litigation was not assignable as it involved the personal credit of this defendant-appellant. There is no question that the contract expressly itself does not call for the personal credit of this defendant-appellant, nor can it be inferred from any of the surrounding circumstances.

Complainants-Appellees insist that the covenant calling for party of the second part (Isaac Raskind) to give a bond and mortgage involved the giving of credit to Isaac Raskind alone and will, no doubt, cite the case of Arkansas Valley Smelting Co. vs. Belden Mining Co., 127 U. S. 378; 8 Sup. Ct. 1308. In that case the Supreme Court approved the rule stated by Pollock on Contracts (4th Ed.) 425.

> "Rights arising out of contract cannot be transferred if they are coupled with liabilities or if they involve a relation of personal confidence, such that the party whose agreement conferred those rights must have intend-

ed to be exercised only by him in whom he actually confided."

While from a literal reading of the rule as thus expressed, it might seem that contractural rights may not be transferred, either where such rights are coupled with liabilities *or* if they involve a relation of personal trust and confidence between the parties, it does not appear that court meant to be so understood as thus expressed to be taken literally, as no contract would be assignable, as it would be difficult to conceive of any contract unaccompanied by liabilities. Undoubtedly the rule would be better expressed by the use of the conjunction "and" rather than the disjunctive "or". This is borne out by the fact that in a later case in the Supreme Court of the United States, Delaware County vs. Diebold Safe, 133 U. S., 473, 488; 10 Sup. Ct. 399, 404. Mr. Justice Gray who wrote the opinion in the Arkansas Smelting Co. vs. Belden, writing the opinion in the Delaware County vs. Diebold Safe case, citing the Arkansas Smelting Co. vs. Belden case, uses the conjunctive "and" and states the rule as follows:

"A contract to pay money may doubtless be assigned by the person to whom the money is payable if there is nothing in the terms of the contract which manifest an intention that it shall not be assignable. But when rights arising out of contract are coupled with obligations *and* involve personal confidence, that it must have been intended that the rights should be exercised and the obligations performed by him alone. The contract including both his rights and his obligations, cannot be assigned without the consent of the party to the original contract. Arkansas Co. vs. Belden Co., 127 U. S. 379-387-388; 8 Sup. Ct. 1308 32 L. Ed. 246.

And as stated in the later case of Burck vs. Taylor, 152 U. S. 634, 651, 14 Sup. Ct. 696, 38 L. Ed. 578, Mr. Justice Brewer said:

"The one outstanding feature inimical to the assignment of contracts of this character is the relationship of personal confidence between the contracting parties. If such a confidential relationship exists the contract may not be transferred".

It is our contention that there was no relationship of personal confidence involved in this contract for sale, which was an ordinary contract for sale of real estate with part payment to be made by a bond and mortgage.

Pomeroy in volume 3 of his learned work on Equity Jurisprudence, 4th Ed. ¶ 1274, says:

The following criterion is universally adopted all things in action which survive and pass to the personal representative of a decedent creditor or continue as liabilities against the representative of a deceased debtor are thus assignable,"—

Can there be any question in any persons mind that this contract would not die with Isaac Raskind should he have died prior to the closing date and that his heirs could have insisted on specific performance, upon tendering a bond and mortgage and the personal representative of Isaac Raskind, in that case, would be liable for the balance of the purchase price, or in the event that his heirs at law would not take a conveyance, the estate would be liable for any loss sustained.

Thus it can be seen that under the rule stated, the contract in this litigation was assignable and did not involve any *personal* confidence or trust.

Complainants-Appellees may also cite Rappleye vs. Racien Seeder Co., 79 Iowa, 220; 44 N. W. 363, 7 L. R. A. 139, as well as the Arkansas Smelting vs. Belden, supra cases. These cases involved the sale of personal property on credit, no security securing said purchase price.

Again it is to be remembered that in order to have a valid and enforceable lien by way of mortgage, it is necessary that the bond and mortgage be executed by the owner of the property, who could only be the assignee of this appellant, a conveyance to the assignee and a mortgage with a bond accompanying it, executed by the appellant would be a nullity.

In conclusion we wish to urge the fact that it was a simple matter for the Complainants-Appellees to insert in the contract that the bond was to be signed by Isaac Raskind or that the contract was not assignable, unless the complainants assented or that the complainants looked to the financial responsibility of this appellant.

Contracts for the sale of property are often traded in, especially in a rapid, increasing market and the usual method of transfer is by assignment. There was nothing in the contract to charge any assignee with the fact that the bond of the vendee was required, and to hold that the contract was assignable, and that the assignee couldn't fulfill it would be a mere "play on words" as it would be more or less impossible for one assignee to obtain the original vendee to sign the bond, especially in some cases where there are more than one assignment. The majority of the contracts for sale of land in this State, provide for part payment by bond and mortgage.

In a recent issue of "Title News" the official publication of "The American Title Association" for the month of December, 1927, at page 4, it is estimated that in the City of Newark, more than 90% of the contracts of sale provide for payment of part of the purchase price by bond and mortgage. There is no question in our mind that the same is true in the rest of this State.

"Are all these Contracts personal to the Vendee?"

Conclusion.

It is respectfully urged that the decree of the Court of Chancery adjudging this defendant-appellant to specifically perform, be set aside and for nothing holden, and it further appearing that the facts in the case are stipulated that if this Honorable Court feels that the Court of Chancery has committed error, that this Honorable Court should order that complainants-appellees bill be dismissed.

Skillman vs. U. S. Fidelity, 101 N. J. L. 511, 130 Atl. 564.

Respectfully submitted,

SAUL TISCHLER,
Solicitor of Defendant-Appellant,
Isaac Raskind.

CHARLES JONES,
of Counsel.

New Jersey Court of Errors and Appeals

Between

ANTON F. MULLER and MARY M. MULLER, his wife,
Complainants-Appellees,

and

ISAAC RASKIND and GUS PICONE,
Defendants-Appellants.

BRIEF FOR THE DEFENDANT-APPELLANT, GUS PICONE.

Facts.

The facts are not in dispute. They have been stipulated by agreement of counsel and appear in the state of the case (p. 34-43).

Briefly stated, complainant Anton F. Muller, agreed to convey to one "Isaac Raskind, his heirs *and assigns*" a parcel of land for $15,500.00—$3000.00 was to be paid in cash; $12,500.00 by "*a bond* and mortgage in the sum of $12,500.00."

Raskind assigned the contract to one Gus Picone, and so notified complainant. Time was of the essence. Complainant refused to carry out the contract, contending that he was entitled to a bond and mortgage signed by Raskind and not one signed by Picone. From all that appears from the agreed state of facts, Picone was as financially responsible as Raskind.

Picone, deeming that this was not a legal excuse for failure on the part of the complainant to con-

vey, thereafter rescinded the contract and sued in the Essex Circuit Court for his down money. The present action is for a decree restraining Picone's suit at law and to compel the defendant Raskind to specifically perform.

THE LAW.

POINT I.

The contract was assignable.

The *fact* that Raskind assigned the contract to Picone is admitted. His *right* to do so is challenged.

A long line of cases in our State have recognized that contracts for the sale of lands such as this *are assignable.*

> Stoutenberg vs. Tompkins, 9 N. J. Eq. p. 332;
> McVoy vs. Baumann, 93 N. J. Eq. p. 638;
> Grigg vs. Landis, 21 N. J. Eq. p. 494;
> Neligh vs. Michenor, 11 N. J. Eq. p. 539;
> Sinclair vs. Armitage, 12 N. J. Eq. p. 174;
> Batement vs. Reilly, 72 N. J. Eq. p. 316;
> South Jersey Furniture Co. vs. Dorsey, 95 N. J. Eq. 530.

The common law, thus abundantly recognized, was incorporated in our Practice Act, 3 Compiled Statutes, p. 406, Sec. 19.

> "All contracts for the sale and conveyance of lands shall be assignable at law, and the assignee may sue thereon in his own name."

Again, among the tests set forth in the text books of assignability are:

1. Do they survive the death of the contracting party?
2. Do they pass to the Trustee in case of bankruptcy?

If looked at from this standpoint, the contract is clearly assignable.

Consider the language of the present contract as tested by the case of *McVoy* vs. *Baumann*, 93 N. J. Eq. p. 638 (Court of Errors and Appeals). The fifth syllabus reads as follows:

> "Where a contract for the sale of lands required the vendor to convey the lands to the purchaser, his heirs *and assigns,* the contract can be specifically enforced in the suit of the assignee."

It is conceded that there is a class of contracts which call for personal service, or depend upon the learning, skill or solvency of the party contracted with. These of course, are not assignable. The present *is not* such a contract. Not a word or inference appears that the vendor was relying on the financial condition of Raskind; nor is a question raised on the agreed state of facts as to the financial responsibility of this assignee. Complainant drew the contract. If he was relying upon Raskind's supposed responsibility, he could have said so; he could have said that the contract was not to be assigned; he could have said in plain words, "a bond and mortgage signed by Raskind."

But, the contract is so drawn that the very opposite appears. Vendor agrees to convey to Raskind, "his heirs *and assigns.*" Vendor toward the end of the contract, agrees "that the party of the second part his heirs *and assigns* may enter upon said land and premises on the 15th day of November, 1926."

Unless the possibility of this contract being as-

signed was within the contemplation of the parties, the word *assigns* is empty and meaningless. Does the complainant, who drew the contract—who chose the verbiage, contract for "the bond and mortgage of Raskind" or for "bond and mortgage of the party of the second part?" Oh No! It says he will supply "*a bond* and mortgage in the sum of $12,500.00."

Keeping in mind that the language of the rest of the contract clearly shows the possibility of assignment of the contract was in the contemplation of the parties—in fact, constituting a consent to it—is it the province of the Court to read into the words "*a bond* and mortgage of $12,500.00" so as to be "a bond and mortgage signed by Raskind for $12,500.00." This would seem dangerously near having the Court make the contract, or read into it something which is not there.

The learned Vice Chancellor in his opinion (p. 24) says:

> "The sole question is whether or not the vendor was obliged to accept a bond and mortgage of the assignee of the contract of sale."

He says this question has not been squarely passed upon in this State. This will be discussed under the next head.

But in our humble opinion, the precise question is narrower—it is whether under the language of *this particular contract* (a contract that by its language contemplates assignment, and calls only for the delivery of "*a bond* and mortgage" as part of the purchase money) the vendor must not accept the bond and mortgage of the assignee.

POINT II.

The vendor's refusal to accept the bond and mortgage of the assignee Picone was not legally justifiable—time being of the essence the vendor should return the deposit.

The question of whether the vendor was legally justified in refusing to accept the assignee's bond and mortgage is said not to have been squarely passed upon in this State.

There are three cases in which the subject has been considered.

> Moran vs. Borello, 132 Atl. p. 510.
> Seacoast Development Co. vs. Beringer, 4 N. J. Ad. Rep. p. 1602.
> Kutchinski vs. Thompson, 5 Ad. Rep. p. 1186.

Moran vs. *Borello* was a suit at law by the assignee of a vendee for the return of a deposit. The defense was that the plaintiff was not ready with a bond and mortgage of the original vendee. The contract provides "seller to take back a purchase money mortgage of $2500.00 at 6% payable, etc." In the present case, he is to give to the party of the first part "*a bond* and mortgage." Though supporting our position, the Borello case was clearly decided on the language of the particular contract.

In *Kutchinski* vs. *Thompson,* (supra) the contract of sale was assigned—the right to do so seems to be assumed. But the original vendee had specifically agreed to "guarantee the payment of the purchase money mortgage." He also assumed payment of certain existing mortgages", and of course,

by the very language of the contract, it was necessary to look to the original vendee. No other reasonable construction can be put on it.

In *Seacoast Development Co.* vs. *Beringer,* 4 N. J. Ad. Rep. 1602, the question came up on the Court's refusal to strike the counterclaim against Cohen & Katz. The question was not squarely passed upon. It was not necessary for the decision. Moreover, it does not appear from the reported case that the contract was to convey to Cohen & Katz "their heirs *and assigns",* as in the present case. A reading of the actual state of the case shows that $36,800.00 was to be paid by "the assumption of a mortgage hereinbefore mentioned: $63,000.00 to be secured by *bond and mortgage of said parties of the second part.*

In this case, leaving out for the moment, that it did not turn purely on this point, there was a clear *personal* responsibility.

First: By contracting to *assume* the present mortgage.

Second: To give a bond; whose bond? *"The bond* of the party of the second part."

There is no such language in our case. It does not say whose bond. It says *a* bond and mortgage.

Under our statute on mortgages, Compiled Statutes p. 2421, there is a requirement that the mortgage be foreclosed before any action can be begun on the bond. It seems to indicate that the policy of our law is to compel the mortgagee to look to the land alone for the payment of the debt.

If the bond that was required to be given was to be Raskind's bond, it ought to say so. It should not be left to conjecture.

But this very matter has been met squarely in many of our sister States.

The case of *Montgomery* vs. *DePicot,* 153 Cal. p. 509, 96 Pac. Rep. p. 305, is peculiarly in point, as it is much like the present case in principle. Here, the price of the land was $45,000.00; $11,500.00 to be in cash; $33,500.00 by a promissory note secured by a purchase money mortgage. The contract was assigned and the note of the assignee with the purchase money mortgage was tendered. It was refused on the ground that the vendor had looked to the personal responsibility of the original purchaser. The Court said,

> "In contracts which in terms are not in favor of an assignee and which provide for a promissory note and mortgage to secure the balance of the purchase price, the general construction will be that the promissory note is a mere incident to the transaction and the principal thing relied on is the mortgage. It is a very easy matter when reliance is intended to be placed on the financial responsibility of the original vendee to specify in the contract that in addition to the mortgage his personal obligation shall be given. When this is not done, and a mortgage to secure a promissory note is called for, as in the contract here, such provision will be construed as making the giving of a *mortgage* and not the giving of the *note* the material inducement to the contract; that under such circumstances, the obligation is not personal and may be assigned and specific performance may be had at the suit of the assignee."

~~See also *Milton* vs. *Smith,* 65 Misc. p. 320.~~

Cases may be submitted to the Court by adversary which seen to uphold a different doctrine, but when these cases are carefully analyzed, practically all of them will be found to be cases either where the contract was not made to the party of the second "his heirs *and assigns"* or it appeared in

very convincing terms by the language of the contract, that the vendor looked to the personal responsibility of the vendee.

It is respectfully submitted that the decree of the Chancellor should be reversed and that a decree dismissing the bill of complaint should be directed to be entered.

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ADDENDA.

The instant case can be readily distinguished from the case cited in respondent's brief.

In *Wooster* vs. *Crane Co.* (73 N. J. Eq. 22),

> "The question," says the Vice Chancellor, "is whether *from the nature of the contracts* themselves, the defendant could empower a new corporation to take its place."

He then goes on to show this contract was one involving personal confidence and the pecuniary liability of Crane & Co. the other contracting party. The word "assigns" was not used in connection with the obligation to perform. All the covenants were made by Crane & Co.

In the present case, the vendor agreed to convey to the defendant, Isaac Raskind and * * *assigns, and also agreed to permit Isaac Raskind * * and assigns to enter into possession of the property.

In the case of *Schlessinger* vs. *Forest Products Co.,* (78 N. J. L. 637) this involved the manufacture of goods, and of course, there was a question of *personal confidence.* In fact, the syllabus reads as follows:

> "Where a contract for purchase of goods to be manufactured involving personal confidence, it is not assignable by the vendor."

The contract in this case contains no reference to assigns.

In *Harney* vs. *Hallgren,* (322 Ill. 126) the purchase price, according to the contract, was to be secured "by the *purchaser's notes* and mortgage

and trust deed on the premises." Also, as the Court says in the opinion,

> "The original contract was not in terms made to run with the land, and contained no provision that it was to be binding upon the *heirs and assigns* of the parties."

Moreover, under the Illinois law, the holder of a note and mortgage can sue either on the note or foreclose the mortgage. In our State, the Statute compels the mortgagee to look to the land.

In this case, it specifies clearly *whose notes* are required. There was a question of *personal responsibility* involved. It is quite probable that the decision of the Court would have been different if the contract had read "to be secured by a *note and a mortgage on the land.*" The distinction in the present case is that appellant's contract is to the vendee "and assigns" and requires only "a bond and mortgage."

In the case of *Houchin* vs. *Salyards,* (155 Iowa 608) it appears that the seller agreed to loan to the original purchaser $1800.00 presumably on note and mortgage. The purchaser went into possession without executing a mortgage. The suit was to recover the balance of the purchase price of $1800.00 as per the original contract, no mortgage ever having been executed. All that the Court held was that the promise of an assignee to execute the mortgage would not relieve the original purchaser on his agreement to pay the balance of the purchase price. No one can seriously disagree with that, but it does not shed much light on the present case.

In *Rappleye* vs. *Racine Seeder Co.* (79 Iowa 220) this involved the sale of machinery on credit to a certain vendee, and the notes of that particular vendee were required. There was no provision in the contract for assignment and no implied consent by the use of the word "assigns". It involved the sale of personal property, and of course, clearly a question of personal credit and responsibility.

In the case of *Winslow* vs. *Dundom* (46 Montana 71) the quotation in respondents' brief is misleading. An examination of the case will find that there was a lease made with one Anderson with an option to purchase the lands covered in the lease. Anderson assigned the lease and option to one Winslow and the Court held that Winslow could have specific performance of the option.

The case of *Rice* vs. *Gibbs* (58 N. W. 724), the contract called for the payment of the promissory notes of the particular vendee unsecured. There was a question of personal responsibility.

In the case of *Bonner* vs. *Hoover Owens* (284 Federal 286) this was a case of an executory contract for *personal* service, and of course, as such was not assignable. Furthermore, the Court found as a fact that the personal confidence and trust of the assignor was the inducement to the execution of the contract.

The statement in *Arkansas Valley Smelting Co.* vs. *Belden* (137 U. S. 378) has been commented upon in the brief of the appellant Isaac Raskind.

Weidenbaum vs. *Raphael,* (83 N. J. Eq. 17) this case involved the assumption of a mortgage, which of course, would involve personal liability, and it appeared that there was no person to enter into the covenants. The quotation of Vice Chancellor Emery is based on the statement in 26 Amer. & Eng. Ency. of Law, Second Edition, p. 126, which in turn, is based on Rice vs. Gibbs, which has already been commented upon.

Peoples Bank vs. *Weidinger* (73 N. J. L. 433),

this was a contract by a father to pay for the support of illegitimate children, and involved the *personal service* of the mother, and as such, was not assignable.

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