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New Jersey
Court of Errors and Appeals

Bill of Complaint.

(*Filed, August 18, 1925*)

IN THE CHANCERY OF NEW JERSEY

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

Complainants Louis Kuskin and Harry Rotberg of the City of Newark, County of Essex and State of New Jersey, respectfully show that:

1. On August twelfth, nineteen hundred twenty-five, Milton Guttman, single, and Lena Rosenbaum also known as Lea Solomon, widow, were the owners of all that single tract of land and premises situate, lying and being in the Township of Neptune, County of Monmouth, State of New Jersey, described as follows:

Beginning at a point at the southwest corner of Ocean Avenue and Brinley Avenue as laid out on the map of property situate at Bradley Beach, Ocean Township, Monmouth County, New Jersey: thence (1) westerly along the southerly line of Brinley Avenue one hundred fifty and eight hundredths feet; thence (2) southerly and parallel with Ocean Avenue ninety-five and thirty-four hundredths feet; thence (3) easterly and at right

angles to Ocean Avenue one hundred fifty feet to the westerly line of Ocean Avenue; thence (4) northerly along the westerly line of Ocean Avenue one hundred, and sixteen hundredths feet to the point and place of BEGINNING.

Being lots Nos. 32 and 33 on the above mentioned map.

2. On August twelfth, nineteen hundred twenty-five the said Lena Rosenbaum, also known as Lea Solomon, widow, and Milton Guttman, entered into a contract in writing wherein and whereby the said Lena Rosenbaum also known as Lea Solomon and Milton Guttman agreed to and with John A. Boehme, in consideration of the sum of thirty-eight thousand five hundred dollars, to well and sufficiently convey to the said John A. Boehme the property known and designated as 509-511 Ocean Avenue, Bradley Beach, Monmouth County, New Jersey, the description of which, by metes and bounds, is set forth in the first paragraph of this Bill.

The said John A. Boehme also executed said contract and agreed to pay the consideration in accordance with the terms of said contract, a true copy of which contract is annexed hereto and made part hereof.

3. In accordance with the terms of said contract the said John A. Boehme paid on account of the purchase price the sum of five hundred dollars.

4. Complainants further say that on the twelfth day of August, nineteen hundred twenty-five the

said John A. Boehme assigned all his rights in the property herein described and in the property mentioned herein, for a good and valuable consideration to these complainants.

5. Complainants further say that on August thirteenth, nineteen hundred twenty-five, an appointment was made for the said Lena Rosenbaum, also known as Lea Solomon, and Milton Guttman, to meet at the office of their attorney, J. Everett Newman, in Asbury Park, New Jersey, for the purpose of executing another contract as provided for in the contract, a copy of which is annexed hereto. These complainants attended said time and place for that purpose but the said Lena Rosenbaum also known as Lea Solomon, and Milton Guttman, did not appear.

6. Complainants further say that they have always been ready, able and willing and hereby tender and offer themselves, ready and willing to comply with all the terms of the agreement, a copy of which annexed hereto.

7. Complainants further say that on August fourteenth, nineteen hundred twenty-five, at ten a. m. they caused to be recorded in the Clerk's Office of the County of Monmouth, the original of the contract, a copy of which is annexed hereto, at which time they discovered that on August fourteenth, nineteen hundred twenty-five at eight a. m. there was recorded what purported to be a deed of conveyance, conveying the within described property to one Morris Greenberg of the City of Newark, County of Essex and State of New Jersey, which deed is dated August four-

teenth and acknowledged August fourteenth, and there was also recorded according to the records of said County Clerk's Office a purchase money mortgage made by the said Morris Greenberg and Pearl Greenberg, his wife, to the said Milton Guttman and Lena Rosenbaum, sometimes known as Lea Solomon, in the sum of seventeen thousand five hundred dollars due in six months from the date hereof, and that said mortgage was dated and acknowledged August fourteenth, nineteen hundred twenty-five and recorded at ten a. m. on the same day.

8. Complainants charge and assert that the deed and mortgage described in the preceding paragraph were made by the said Milton Guttman and Lena Rosenbaum, also known as Lea Solomon and Morris Greenberg and Pearl Greenberg, his wife, for the express purpose of hindering, delaying and defrauding these complainants, and that the said Morris Greenberg and Pearl Greenberg, his wife, had full knowledge and notice of complainants' rights, and that said deed and mortgage were executed, acknowledged and delivered subject to the rights of these complainants in the premises herein described.

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

1. That Milton Guttman and Lena Rosenbaum, also known as Lea Salomon, Morris Greenberg and Pearl Greenberg, who are the defendants in this suit, may answer this bill of complaint, without oath, and each statement therein made;

2. That said defendants Milton Guttman, Lena Rosenbaum also known as Lea Solomon, may be decreed to specifically perform the articles of agreement dated August twelfth, nineteen hundred twenty-five, in accordance with its terms, conditions and covenants, and to do and perform all other things as required under and by virtue of the said agreement as this Honorable Court may direct;

3. That the said Morris Greenberg and Pearl Greenberg, his wife, may be restrained and enjoined by the decree of this Honorable Court from asserting any rights in the premises herein described and from taking any legal proceedings as owner or otherwise, until the further order of this Honorable Court;

4. That the said Morris Greenberg and Pearl Greenberg, his wife, may be decreed to convey to the complainants the lands and premises herein described so that the deed herein described to them may be cancelled and made null and void;

5. That the defendants Milton Guttman and Lena Rosenbaum, also known as Lea Solomon, may be restrained from assigning, transferring or otherwise conveying the mortgage of seventeen thousand five hundred dollars herein described, and that they may be decreed to surrender said bond and mortgage for cancellation;

6. 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.

E. R. McGLYNN,
Solicitor for and of Counsel
with Complainants.

August 17, 1925.

CONTRACT

(*Attached to Bill of Complaint*)

August 12, 1925.

Received from John A. Boehme, Five Hundred ($500.00) dollars, deposit on purchase price of No. 509-511 Ocean Ave., Bradley Beach, Monmouth County, New Jersey.

Purchase Price, $38,500.00, payable as follows:

Deposit,	$ 500.00
Cash, Aug. 26, 1925,	1,500.00
On Nov. 1, 1925,	3,000.00

Balance on Bond and mortgage as per agreement of sale to be drawn on August 13, 1925, subject to approval of purchaser.

LEA SOLOMON
MILTON GUTTMAN
JOHN A. BOEHME

Witness
H. W. Mehrtens

Bill of Complaint

In consideration of one Dollar and other valuable considerations to me in hand paid I hereby assign to Kuskin & Rotberg all my rights in the above property.

JOHN A. BOEHME.

State of New Jersey, }
County of Monmouth. } ss:

On this 14th day of August, 1925, appeared before me Henry W. Mehrtens who being duly sworn deposes nad says that he saw Lea Solomon and Milton Guttman sign the within agreement and heard them acknowledge that they signed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

H. W. MEHRTENS.

Sworn and subscribed to this
14th day of August, 1925.
E. R. McGlynn,
Master in Chancery of New Jersey.

Notice of Lis Pendens.

(*Recorded, August 18, 1925*)

IN CHANCERY OF NEW JERSEY

Between, LOUIS KUSKIN and HARRY ROTBERG, Complainants, and MILTON GUTTMAN, LENA ROSENBAUM (Sometimes and also known as LEA SOLOMON), MORRIS GREENBERG and PEARL GREENBERG, his wife, Defendants.	On Bill, etc.,

TAKE NOTICE that a suit entitled as above set forth has been commenced nad is pending in the Court of Chancery, State of New Jersey. The general object of said suit is to compel the specific performance of a contract for the sale of premises known and designated as Nos. 509-511 Ocean Avenue, Bradley Beach, Monmouth County, New Jersey, and more particularly described as hereinafter set forth. Said contract being dated August twelfth, nineteen hundred twenty-five, and to set aside the conveyance, dated August fourteenth nineteen hundred twenty-five made by the said Milton Guttman and Lena Rosenbaum, widow, also known as Lea Solomon, to Morris Greenberg, affecting the same premises, together with a mortgage of even date therewith made by the said Morris Greenberg and

Notice of Lis Pendens

Pearl Greenberg, his wife, to the said Milton Guttman and Lena Rosenbaum also known as Lea Solomon.

The lands and real estate to be affected by said suit are described as follows:

Premises in the Township of Neptume, County of Monmouth and State of New Jersey:

BEGINNING at a point at the southwest corner of Ocean Avenue and Brinley Avenue as laid out on the map of property situate at Bradley Beach, Ocean Township, Monmouth County, New Jersey; thence (1) westerly along the southerly line of Bradley Avenue one hundred fifty and eight hundredths feet; thence (2) southerly and parallel with Ocean Avenue ninety-five and thirty-four hundredths feet; thence easterly and at right angles to Ocean Avenue one hundred fifty feet to the westerly line of Ocean Avenue; thence (4) northerly along the westerly line of Ocean Avenue one hundred and sixteen hundredths feet to the point and place of BEGINNING.

Being lots Nos. 32 and 33 on the above mentioned map.

Dated, Newark, N. J.,
August 17th, 1925.

Solicitor of Complainants.

Notice of Motion.

(*Filed, September 14, 1925*)

IN CHANCERY OF NEW JERSEY

Between, LOUIS KUSKIN and HARRY ROTBERG, Complainants, and MILTON GUTTMAN, *et al.*, Defendants.	On Bill, etc.

To Edward R. McGlynn, Esq., Solicitor for and of Counsel with Complainants:

TAKE NOTICE that on the eleventh day of September, 1925, at ten o'clock in the forenoon or as soon thereafter as the matter can be heard at the Chancery Chambers, located in the City Hall in the City of Long Branch, I shall apply to His Honor, Vice Chancellor Berry, or to such other Vice Chancellor as shall then and there be holding Court for the Chancellor, for an order striking out the bill of complaint filed herein as against the defendants, Morris Greenberg and Pearl Greenberg.

And take further notice that my said motion will be predicated upon the following grounds, to wit:

1. The action is brought upon an invalid and incomplete alleged agreement which sets forth merely the intention of the parties thereto to negotiate and eventually to enter into an agreement

relative to the purchase and sale of the property in question.

2. There is no privity of contract existing or alleged as between the complainants and the defendants, Morris Greenberg and Pearl Greenberg.

3. The alleged contract which complainants seek to enforce, constitutes neither a property right nor a chose in action whereof the complainants could properly acquire possession by assignment, and the latter are, therefore, precluded from maintaining this action as alleged assignees.

4. The bill of complaint does not allege either the source of complainant's knowledge or the grounds of their belief for the allegation constituting a part of paragraph 8 of the bill wherein it is set forth "that the said Morris Greenberg and Pearl Greenberg, his wife, had full knowledge and notice of complainants' right." The bill sets forth no facts or circumstances whereon complainants' said allegation as to defendants, Morris Greenberg and Pearl Greenberg can be predicated. The allegation constitutes a conclusion unsuported by facts.

5. The defendant, Morris Greenberg, is an innocent purchaser for value without notice of any alleged rights of the complainants herein, and the bill does not properly and sufficiently set forth the contrary.

And take further notice that at the said time and place, application will also be made for the dismissal and discharge of the lis pendens filed by the complainants herein in the office of the County

Clerk of the County of Monmouth; and for such further and other relief as may be just.

Dated, September 3d, 1925.

I. B. GLUECKFIELD,
Solicitor for and of counsel
with defendants, Morris
Greenberg and Pearl Greenberg.

Notice of Application.

IN CHANCERY OF NEW JERSEY

(*Filed, September 14, 1925*)

Between,

LOUIS KUSKIN and HARRY ROTBERG,
Complainants,
and
MILTON GUTTMAN, *et al.*,
Defendants.

} On Bill &c.

To:
Edward R. McGlynn, Esq.,
Solicitor for Complainants,
810 Broad Street,
Newark, New Jersey.

SIR:

TAKE NOTICE that on the 18th day of September instant, at ten o'clock in the forenoon, or as soon

thereafter as we can be heard, we shall apply to the Court of Chancery in the City Hall in the City of Long Branch, New Jersey, for an order striking out the bill of complaint filed herein against Milton Guttman and Lena Rosenbaum and others, on behalf of the two said named defendants, upon the following grounds, namely:

1. The memorandum whereon this action is based is insufficient under the law as evidence of a contract for the sale of lands.

2. No legal contract is shown to exist, or did in fact exist between the parties thereto.

3. The said memorandum indicates that it was the intention of the parties to meet at the time therein specified for the purpose of completing and executing a contract.

4. The said bill is in other respects imperfect and insufficient.

Dated, September 14, 1925.

Yours respectfully,

McCARTER & ENGLISH
Solicitors for Milton Guttman and
Lena Rosenbaum.

Conclusion.

IN CHANCERY OF NEW JERSEY

Between, LOUIS KUSKIN and HARRY ROTBERG, Complainants, and MILTON GUTTMAN, *et als.*, Defendants.	On Motion to Dismiss Bill of Complaint.

MR. ROBERT H. MCCARTER,
MR. JOSEPH E. STRICKER and
MR. I. BENJAMIN GLUECKFIELD
for motion.

MR. E. R. MCGLYNN, opposed.

BERRY, V. C.

This matter comes before me on a motion to strike out the bill of complaint filed herein which prays specific performance of an alleged contract of sale of land, copy of which is attached to the bill and is in the following form:

"August 12, 1925.

"Received from John A. Boehme, Five Hundred ($500.00) Dollars, deposit on purchase price of No. 509-511 Ocean Ave., Bradley Beach, Monmouth County, New Jersey.

On Nov. 1, 1925 3,000.00

Conclusion

Purchase price $38,500.00, payable as follows:

Deposit	$500.00
Cash, Aug. 26, 1925	1,500.00

Balance on Bond and Mortgage, as per agreement of sale to be drawn on August 13, 1925, subject to approval of purchaser.

LEA SOLOMON
MILTON GUTTMAN
JOHN A. BOEHME.

Witness:
H. W. Mehrtens.

In consideration of One Dollar and other valuable considerations to me in hand paid I hereby assign to Kuskin & Rotberg all my rights in the above property.

JOHN A. BOEHME.

State of New Jersey, }
County of Monmouth. } ss:

On this 14th day of August, 1925, appeared before me, Henry W. Mehrtens who being duly sworn deposes and says that he saw Lea Solomon and Milton Guttman sign the within agreement and heard them acknowledge that they signed and delivered the same as their voluntary act and deed for the use and purposes therein expressed.

H. W. MEHRTENS.

Sworn and subscribed to
this 14th day of
August, 1925.
E. R. McGlynn,
Master in Chancery of New Jersey."

Conclusion

The motion is based upon the ground and the alleged contract is not complete and that, in fact, no legal contract ever existed between the parties. It appears from the copy of the alleged contract quoted above and which is dated August 12, 1925, that a formal contract was to have been entered into on the following day. It also appears that whatever rights John A. Boehme had under the alleged contract were, on August 12, 1925, assigned to the complainants in this suit. The complainants allege that the defendants Guttman and Solomon failed to keep an appointment made for them on August 13, 1925, for the purpose of executing the formal contract. By whom this appointment was made is not disclosed, nor does it appear from the bill that the defendants ever assented thereto. On August 14th, the complainants, assignees of John A. Boehme, had the original written contract proved by the subscribing witness and caused it to be recorded in the Clerk's Office of Monmouth County and at that time learned that a short time previous on the same day a deed from the defendants Guttman and Solomon conveying the property to the defendants Morris Greenberg and Pearl Greenberg had been recorded in said Clerk's Office.

A motion to strike out a bill takes the place of a demurrer under the old practice and on such motion the facts alleged in the bill of complaint, but those only, must be considered as admitted for the purpose of the motion.

There are no material facts alleged in the bill other than those above recited. Paragraph 8 of the bill, however, contains the charge that the

conveyance from the defendants Guttman and Solomon to the defendants Greenberg was "for the express purpose of hindering, delaying and defrauding these complainants." This is the only charge of fraud contained in the bill, and the facts alleged in the bill are insufficient to support this charge. The allegation is a mere conclusion, to arrive at which from a consideration of specific facts alleged, is the province of the Court. Fraud is, therefore, not to be taken as admitted by the defendants.

I feel that my decision on this motion should be governed by the case of B*ettcher v. Knapp,* 94 N. J. Eq. 433. In that case the Court held, "Where the parties to a contract for sale of lands make it an esential part of their agreement that it be embodied in a formal written instrument, the matter remains in *fieri* until the written instrument has been delivered."

See also the very recent case of *Kurtz v. Busch,* 3 Misc. Rep. 389, a case very similar to the case at bar.

Other cases to the same effect are

McKibben v. Brown, 1 McCarter 19, 2 McC. 498.

Wharton v. Stoutenberg, 35 N. J. Eq., 266.

Moore v. Galupo, 65 N. J. Eq., 195.

Donnelly v. Currie Hardware Co., 66 N. J. L., 388.

Jersey City v. Brown, 32 N. J. L., 504.

Trenton and Mercer County Traction

Conclusion

Corporation v. Trenton, 90 N. J. L. 378; affirmed 91 N. J. L. 719.

Mente & Co. v. Heller, 123 Atl. Rep. 755.

Domestic Telegraph Company v. Metropolitan Telephone Company, 36 N. J. Eq., 160.

Porter v. Hollister, 45 N. J. Eq., 508.

Complainant in his brief alleges that the failure of the original parties to the proposed sale to execute a formal contract was due to the fault of the defendant vendors and invokes the rule that, "where there is a fraudulent omission to have an agreement reduced to writing, which induces an irretrievable change of position, equity will grant relief," citing *Pomeroy's Equity Jurisprudence*, 4th Edition, Vol. 5, p. 5035.

It is not necessary to consider the application of this rule, however, as this charge of fraudulent omission is *dehors* the record. Many other statements are contained in complainants' brief which if contained in the bill of complaint might be considered as a basis of fraud; but on an application of this kind the Court cannot consider any facts not alleged in the bill.

An inspection of the alleged contract, which is merely a receipt and acknowledgment that certain negotiations for the sale of land have been had between the parties, indicates too plainly for argument that there was no completed contract. The "agreement of sale to be drawn" was expressly "subject to approval of purchaser." From this it would appear that the minds of the parties had

never met. This Court cannot make a contract for the parties and if their negotiations are incomplete, must leave the parties where it finds them.

The motion to strike out the bill will be granted.

Heard Sept. 29, 1925.

Submitted Oct. 12, 1925.

Decided Oct. 15, 1925.

Order.

IN CHANCERY OF NEW JERSEY

Between, Louis Kuskin and Harry Rotberg, Complainants and Milton Guttman, *et al.*, Defendants.	On Bill &c.

Notice having been given of an application on behalf of Milton Guttman and Lena Rosenbaum to strike out the bill of complaint for the reasons therein stated, and Edward R. McGlynn having been heard in opposition to said motion, and Robert H. McCarter on behalf of the above named defendants,

Order Dismissing Bill

It is on this 24th day of October, 1925, on motion of McCarter & English, Solicitors of Milton Guttman and Lena Rosenbaum, ORDERED that the said application be granted, and the bill of complaint be stricken out with costs.

E. R. WALKER,
C.

Respectfully Advised,
Maja Leon Berry,
V. C.

Order Dismissing Bill.

IN CHANCERY OF NEW JERSEY

Between, LOUIS KUSKIN and HARRY ROTBERG, Complainants, and MILTON GUTTMAN, *et als.*, Defendants.	On Bill, etc.

This matter coming on to be heard in the presence of Edward R. McGlynn, Solicitor of the complainants, and of I. Benjamin Glueckfield, Solicitor of the defendants, Morris Greenberg and Pearl Greenberg, (Joseph E. Stricker, of counsel), and the court having heard the arguments of

Order Dismissing Bill

the said solicitors, and being of the opinion that the bill of complaint filed herein discloses no cause of action; and it further appearing that due notice of the said defendants' motion to dismiss the bill of complaint for the cause aforesaid has been given to said complainants:

It is thereupon on this 26th day of October, 1925, ordered, adjudged and decree that the complainants' said bill of complaint be and the same is hereby dismissed with costs.

E. R. WALKER,
C.

Respectfully advised,
Maja Leon Berry,
V. C.

Order Discharging Lis Pendens.

IN CHANCERY OF NEW JERSEY

Between, LOUIS KUSKIN and HARRY ROTBERG, Complainants, and MILTON GUTTMAN, *et als.*, Defendants.	On Bill, etc.

It appearing to the Court that, upon the commencement of this action, the complainants herein filed in the office of the Clerk of the County of Monmouth wherein the lands described in the bill of complaint filed herein are located, a notice of the pendency of this suit, which notice was duly recorded in Book 5 of Lis Pendens for said county at page 157; and it further appearing that said lands and real estate are more particularly described as follows:

Premises in the Township of Neptune, County of Monmouth and State of New Jersey:

BEGINNING at a point at the southwest corner of Ocean Avenue and Brinley Avenue as laid out on the map of property situate at Bradley Beach, Ocean Township, Monmouth County, New Jersey; thence (1) westerly along the southerly line of Brinley Avenue one hundred fifty and eight hundredths feet; thence (2) southerly and parallel with Ocean Avenue ninety-five and thirty-four hundredths feet; thence (3) easterly and at right angles to Ocean Avenue one hundred fifty feet to

the westerly line of Ocean Avenue; thence (4) northerly along the westerly line of Ocean Avenue one hundred and sixteen hundredths feet to the point and place of BEGINNING.

Being lots Nos. 32 and 33 on the above mentioned map.

And it further appearing that, by an order made herein on the day of the date hereof, the bill of complaint filed in the suit referred to in said notice was dismissed;

And it further appearing that due notice of the defendants' motion to dismiss the said notice has been given to the said complainants:

It is thereupon on this 26th day of October, 1925, upon motion of I. Benjamin Glueckfield, solicitor of the defendants, Morris Greenberg and Pearl Greenberg, (Joseph E. Stricker of counsel), ordered that the said notice of lis pendens be and it is hereby discharged, and that the said lands and real estate described in such notice, be and they are hereby discharged from the claim sought by the bill of complaint filed herein to be enforced against said lands and real estate.

E. R. WALKER,
C.

Respectfully advised
Maja Leon Berry,
V. C.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY

Between,
LOUIS KUSKIN and HARRY ROTBERG,
Complainants,
and
MILTON GUTTMAN, LENA ROSENBAUM (sometimes and also known as LEAH SOLOMON) MORRIS GREENBERG and PEARL GREENBERG, his wife,
Defendants.

On Bill, etc.

The complainants hereby appeal from the three orders entered in the above entitled cause, one on the twenty-fourth day of October, nineteen hundred twenty-five and two on the twenty-sixth day of October, nineteen hundred twenty-five, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes.

Dated, November 6th, 1925.

E. R. McGLYNN,
Solicitor for and of Counsel with
Complainants.

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

E. R. McGLYNN,
Of Counsel with Complainants.

Petition.

(Filed, November 20, 1925)

NEW JERSEY COURT OF ERRORS AND APPEALS

Between, Louis Kuskin and Harry Rotberg, Complainants-Appellants, and Milton Guttman, Lena Rosenbaum (sometimes and also known as Leah Solomon) Morris Greenberg and Pearl Greenberg, his wife, Defendants-Respondents.	On Bill, etc.,

The petition of Louis Kuskin and Harry Rotberg, plaintiffs-appellants in the above stated cause, respectfully show, that;

1. Your petitioners find themselves aggrieved by three orders made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, one bearing date October twenty-fourth, nineteen hundred twenty-five and the other two dated October twenty-sixth, nineeteen hundred twenty-five, wherein the said Louis Kuskin and Harry Rotberg are complainants and the said Milton Guttman, Lena Rosenbaum (sometimes and also known as Leah Solomon) Morris Greenberg and Pearl Greenberg, his wife, are defendants, in this respect; that the

said orders ORDER, ADJUDGE and DECREE that the complainants' bill of complaint be and the same is hereby dismissed with costs. And further providing that the Notice of Lis Pendens filed in the above entitled matter, be discharged. And your petitioners humbly appeal from the orders of the Chancellor which order as aforesaid upon the ground that the same is erroneous, because the bill of complaint should not have been dismissed as the contract, a copy of which is annexed to said bill of complaint, was complete and final.

2. And your petitioners therefore pray that the said orders of the said Chancellor may be in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

E. R. McGLYNN,
Solicitor and of Counsel with
Complainants-Appellants.

Answer.

(*Filed, November 25, 1925*)

IN CHANCERY OF NEW JERSEY

Between, LOUIS KUSKIN and HARRY ROTBERG, Complainants, and MILTON GUTTMAN, *et als.*, Defendants.	On Bill, etc. On Petition of Appeal

The answer of Morris Greenberg and Pearl Greenberg, two of the above named defendants-respondents to the Petition of Appeal of the above named complainants-appellants.

These respondents not acknowledging all or any of the matters which, in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that three orders were entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as therein stated; but as to the substance and form thereof respectively, these respondents pray to refer thereto when they shall be produced. And these respondents are advised and believe that the said orders are agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents.

I. B. GLUECKFIELD,
Solicitor for and of counsel
with respondents, Morris
Greenberg and Pearl Greenberg.

Answer to Petition of Appeal.

(Filed, November 26, 1925)

NEW JERSEY COURT OF ERRORS AND APPEALS

Between, Louis Kuskin and Harry Rotberg, Complainants-Appellants, and Milton Guttman, Lena Rosenbaum (sometimes and also known as Leah Solomon) Morris Greenberg and Pearl Greenberg, his wife, Defendants-Respondents.	On Bill &c.

The answer of Milton Guttman and Lena Rosenbaum (sometimes and also known as Leah Solomon) to the petition of appeal of the Appellants Louis Kuskin and Harry Rotberg.

These respondents not acknowledging all or any of the matters, which in the said petition of appeal are contained, to be true, in answer thereto, nevertheless, say and admit that an order was on the 24th day of October, 1925, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe

that the said order is agreeable to equity, and they pray that the same may be affirmed with costs.

McCARTER & ENGLISH,
Solicitors for and of Counsel with
Defendants-Respondents, Milton
Guttman and Lena Rosenbaum.

New Jersey
Court of Errors and Appeals

Between: LOUIS KUSKIN and HARRY ROTBERG, Complainants-Appellants, and MILTON GUTTMAN, *et als.*, Defendants-Respondents.	On Appeal from Chancery.

Facts.

This is an appeal from three orders of the Court of Chancery in the above-entitled matter, two of which orders dismissed the bill of complaint, one order on the motion of each of two groups of defendants, and the other order discharged the notice of *lis pendens* which had been filed by the complainants upon the institution of this suit.

The bill which was filed by the complainants was for the specific performance of a contract in writing involving a piece of real estate in Bradley Beach, Monmouth County, New Jersey, and the defendants, four in number, divided themselves into two groups, one being the original vendors and the other being grantees of the original vendors, and instead of filing answers to the

bill of complaint, both made motions to dismiss the bill of complaint and the reasons assigned in both motions were practically the same.

These motions came on for argument and the Honorable Vice Chancellor who heard the motions advised orders dismissing the bill of complaint and discharging the *lis pendens* from which orders this appeal was taken.

The contract of sale around which all this litigation centered, was very brief and is set forth in full as follows:

"August 12, 1925.

Received from John A. Boehme, Five Hundred ($500.00) dollars, deposit on purchase price of No. 509-511 Ocean Ave., Bradley Beach, Monmouth County, New Jersey.

Purchase Price, $38,500.00, payable as follows:

Deposit	$ 500.00
Cash, Aug. 26, 1925	1,500.00
On Nov. 1, 1925	3,000.00

Balance on Bond and Mortgage as per agreement of sale to be drawn on August 13, 1925, subject to approval of purchaser.

LEA SOLOMON
MILTON GUTTMAN
JOHN A. BOEHME.

Witness,
H. W. Mehrtens.

In consideration of one Dollar and other valuable consideration to me in hand paid, I hereby assign to Kuskin & Rotberg all my rights in the above property.

JOHN A. BOEHME.

State of New Jersey,
County of Essex. } ss:

On this 14th day of August, 1925, appeared before me Henry W. Mehrtens who being duly sworn, deposes and says that he saw Lea Solomon and Milton Guttman sign the within agreement and heard them acknowledge that they signed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

H. W. MEHRTENS.

Sworn and subscribed to this
14th day of August, 1925.
E. R. McGlynn,
Master in Chancery of New Jersey."

(See State of Case, pages 6 and 7.)

As will be seen from a reading of the above, the original vendee assigned all his rights in the contract to the present complainants.

As provided in said contract, an appointment was made by the vendors for a meeting at the office of their attorney in Asbury Park, New Jersey, for the purpose of executing another contract, as provided for in the agreement set forth above. The appellants attended at the time and place fixed for that purpose but the respondents Lea Solomon (Lena Rosenbaum) and Milton Guttman, the then owners of the property, did not appear.

On the following morning, to wit, August 14th, at ten A. M., appellants caused to be recorded in the Clerk's Office of the County of Monmouth, the original of the above contract, at which time

they discovered that on the same day at eight A. M., there was recorded what purported to be a deed of conveyance, conveying the property described in the agreement which they had purchased, to one Morris Greenberg of the City of Newark, Essex County, New Jersey, which deed, although recorded at eight A. M. on August 14th, was dated and acknowledged August 14th, and the acknowledgment had been taken in the County of Essex.

There was also recorded at or about the same time with said alleged deed, a purchase money mortgage made by Greenberg and his wife to the respondents Lena Rosenbaum and Milton Guttman, in the sum of Seventeen thousand five hundred dollars, which mortgage, although dated and acknowledged August 14th, also in the County of Essex, had been recorded in the County of Monmouth at or about the same time with the deed above mentioned.

Appellants charge in the bill of complaint filed by them that the deed and mortgage above mentioned (see paragraph 8, Bill of Complaint, State of Case, page 4) had been made for the express purpose of hindering, delaying and defrauding them, and that the said Greenberg and his wife had full knowledge and notice of appellants' rights, and that said deed and mortgage were executed, acknowledged and delivered subject to the rights of appellants in the premises described in the bill of complaint and the agreement above set forth. Appellants contended before the Honorable Vice Chancellor that the facts concerning both the contract which they sought to enforce and the deed and mortgage which had been given by the defendants Rosenbaum and

Guttman, under the suspicious circumstances outlined in the above statements of facts, were very important factors in the Court's construction of the agreement involved in the litigation, and as these facts could not be placed properly before the Court on such a motion, the bill of complaint should not be dismissed but should be retained and the matter disposed of at final hearing when the Court would have had ample opportunity of hearing all the evidence concerning both the execution of the agreement which appellants sought to enforce and all the attending facts and circumstances connected with the suspicious deed and mortgage outlined in the allegations of the bill of complaint and set forth in these statements of facts.

The principal ground relied upon by both sets of defendants as the basis for their motions to dismiss the bill of complaint was that the agreement, a copy of which is annexed to the bill of complaint and which is set forth in this brief in full, was not a complete contract: first, because it did not contain all of the terms of sale, and second, because it apparently provided for "an agreement of sale" which admittedly had never been executed.

Appellants' contention in answer to the above arguments was, first, that the agreement which was the subject-matter of the litigation, was a complete and binding agreement containing all the necessary terms, conditions and covenants of a contract for the sale of land; and secondly, that that portion of the agreement, to wit: "as per agreement of sale to be drawn on August 13, 1925, subject to approval of purchaser," was not an express term that a formal agreement should

be prepared and signed by the parties, but was merely an expression by the parties that although they had entered into a legally binding contract, that for greater certainty they merely desired to have the same expressed in a more formal document.

The Honorable Vice Chancellor disagreed with the contention of the appellants and as will be seen from his conclusions (State of the Case, pages 14 to 19) really based his decision on the same cases, which, strange to say, the appellants had cited as authorities for the retention of the bill and the awarding to them of the equitable relief for which they prayed.

ARGUMENT.

POINT 1.

Motions to dismiss should not have been decided until final hearing.

As was strenuously contended by the appellants on the argument of the motion described herein, the facts and circumstances connected not only with the execution of the agreement which the appellants desired to have specifically enforced, but also the amazing facts in connection with the execution and delivery by the owners of the land of the deed and mortgage described in the bill of complaint, and in the statement of facts in this brief should have been fully and amply testified to by witnesses, and such facts heard by the Honorable Vice Chancellor before

he dismissed the bill of complaint filed by the appellants herein.

As will be seen from a reading of the entire bill of complaint which was very short, the inequitable and fraudulent conduct of all the defendants was alleged to be a most important factor in connection with the construction of the agreement sought to be enforced.

Although it is of course a fundamental rule of law that parol evidence may not be introduced to vary or alter the terms of a written contract, it is nevertheless true that where a contract is disputed, one party claiming that there was no contract while the other party asserts with equal vehemence that the whole matter had been definitely and finally agreed upon and settled, it therefore becomes the duty of the Court to look at the attending circumstances in an effort to determine from them just what the situation was and which side is correct in its contention.

Morris Canal & Banking Co. v. Matthiesen, 17 N. J. Eq., page 385,

> "If the Court should now proceed to decide upon the construction of said agreement its decision would be final, and rights and claims of a highly valuable and important character would be thereby definitely settled, so far as this court is concerned. I have no doubt of the power of the Court to construe an instrument of writing, upon a motion to dissolve, and in some cases it would be its duty to do so. But it is a matter always resting in the discretion of the Court which is to be exercised according to the nature and circumstances of each

particular case. This is in accordance with the doctrine held in *Clum* v. *Brewer*, 2 Curtis C. C. R. 518, where, upon a motion for an injunction, the Judge said he felt it to be his duty to construe a certain written instrument before him in that case; but he added, 'there may be cases in which there is so much doubt what the parties to an instrument intended to effect by it, that the Court may think it proper to suspend its judgment until the surrounding circumstances can be more fully and safely examined on final hearing.'

"The agreement in the present case, as set forth in the pleadings, is before the Court, and it must be construed according to the intent and meaning of the parties as manifested by the instrument itself. Parol evidence is not admissible to contradict or vary its terms. Yet it is a well-established rule, that where the construction of a written instrument is doubtful, the Court may look into the surrounding circumstances and avail itself of such light as they may afford in ascertaining the true meaning of the terms and language employed."

Naughton v. Elliott, 68 N. J. Eq. page 259;
Ryer v. Turkel, 75 N. J. L. 677;
Axford v. Meeks, 59 N. J. L. 502.

In view of the importance of the litigation in this case and the substantial amount involved, appellants insist that based upon the above authorities they were at least entitled to their day

in court where they would have been permitted to introduce their evidence in support of the sufficiency of their contract and to sustain the charge of fraud, especially where as in this case the whole conduct of the above defendants if the charges of the appellants were true, should have, as a matter of equity and good conscience, deprived them of the aid of the Court of Chancery inasmuch as they made their own default the basis of the relief they obtained when they succeeded in having the bill of complaint dismissed.

POINT 2.

All the facts and logical inferences from facts alleged in the bill of complaint were admitted by reason of the defendants' motion.

The motion to strike out the bill of complaint carries with it the admission that all the facts well pleaded in the bill are true. That the motion to strike out takes the place of a demurrer at common law and admits all the facts well pleaded in the pleadings sought to be stricken out is a proposition almost too elementary to require the citations of the authorities.

> "It should be remembered that a demurrer admits the facts pleaded and merely refers the question of their legal sufficiency to the decision of the Court."

1 Chitty's Pleading, page 661.
Robert H. Ingersoll & Bro. v. Hahne & Co., 88 N. J. Eq., pages 222 *et seq.*

> "The case is before me as if upon demurrer, and I must assume that the statements of the bill that the effect of the acts of the defendant will be the destruction of complainant's business are true. The contract authorized by the statute is admitted; its breach is admitted; the effect of its breach must be considered as above."
>
> Crawford v. Winterbottom, 88 N. J. L. 588.
>
> "The question for a solution, then, is, admitting the truth of the plaintiffs' allegations, *and every inference of fact which can be legitimately drawn therefrom* in law, are the plaintiffs precluded from maintaining their action?"

In this connection, Rules 44 and 45 of the Court of Chancery are respectively pointed out to the Court:

> Rule 44: "All pleadings must contain a plain * * * and concise statement of the facts on which the pleader relies, and no others, *but not of the evidence by which they are to be proved.*"
>
> Rule 45: "When the pleader relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence * * * particulars of the wrong, with dates and items if necessary, shall be stated in the pleading so far as practical."

It is therefore respectfully pointed out that it is rather difficult for a careful and conscientious solicitor to know just how far he is required to go in the allegations of his bill and how much

of his evidence he is to disclose to the opposite side in order to amply protect the interests of his clients and yet conform to the present-day rules of pleading.

It is further contended on behalf of these appellants that sufficient facts, together with dates and surrounding circumstances dealing with the allegation of fraud, are set forth in the bill filed in this case, and comply not only with the spirit but with the letter of the above-quoted rules.

It is respectfully pointed out to this Honorable Court that, keeping in mind the allegations in paragraph No. 5 of the bill (see State of Case, page 3) wherein it is alleged that the defendants Rosenbaum and Guttman did not keep the appointment made, as provided for in the contract; and the allegations of paragraphs Nos. 7 and 8 of the bill of complaint (State of Case, pages 3 and 4) wherein it is alleged that a deed and mortgage, apparently executed on August 14th, 1925, in the County of Essex, State of New Jersey, which were recorded on the same day at eight o'clock in the morning, coupled with the charge that said deed and mortgage were made for the express purpose of hindering, delaying and defrauding these appellants, and that the defendants Morris Greenberg and his wife had full knowledge and notice of appellants' rights, and that the deed and mortgage were executed, acknowledged and delivered, subject to the rights of appellants, are sufficient charges of fraud. Surely this Court would not hold that it was necessary for the appellants to allege in their bill of complaint that the defendants Rosenbaum and Guttman interviewed several attorneys and conveyancers in Bradley Beach, New Jersey, on the

afternoon of August 13th, 1925, for the purpose of having them draw a deed of conveyance for the property involved in this litigation, to the defendant Morris Greenberg, and a purchase money mortgage from the said Greenberg and his wife back to the defendants Rosenbaum and Guttman, and that failing to secure anyone who would draw up and attend to the execution of these documents, said defendants traveled by automobile from Bradley Beach to Newark, New Jersey, at eleven or twelve o'clock at night, where they were finally able to secure the services of a member of the bar who was related to one of said owners, and that said deed and mortgage were drawn up and the details of said transaction were completed at one o'clock in the morning and were taken by one of said defendants to Freehold, New Jersey, where said defendant awaited the openig of the County Clerk's office for the purpose of recording said documents, and that the grantee in said deed did not follow the usual practice in securing an agreement of purchase and did not follow the usual practice in having a search of said title made, but made a pretended consummation of said purchase all within the matter of fifteen hours of the time of the vendors' appointment to meet appellants and their assignor.

It is the contention of these appellants that if their bill of complaint had contained such detailed statements of the evidence which was in their possession and which they intended to produce at the final hearing, it would only have served to give the defendants an opportunity to produce evidence in advance to overcome the natural inference which their statement of facts carries with it, to wit, that said transaction was not a legitimate one and the only purpose sought to

be served by its consummation was to remove the subject-matter of the contract beyond the reach of appellants' attempt to make the vendors comply with their agreement.

POINT 3.

The contract is sufficiently complete and definite in all its terms.

As intimated in the early part of this brief, the principal point relied upon in the court below by the respondents, was that the contract which the appellants sought to have specifically enforced was incomplete, and that therefore equity could not grant relief.

It is seriously and strenuously contended on behalf of the appellants that the contract is sufficiently complete in all its terms so that the Court of Chancery could and should have granted the relief prayed for by appellants in their bill of complaint.

It is sufficient to comply with the provisions of the Statute of Frauds as it is a memorandum in writing signed by the parties to be charged. The subject-matter is described with sufficient particularity, and finally, the terms of payment are set out in such a way that there can be no doubt in the mind of any reasonable man that the minds of the parties had met and that there was an agreement, definite and complete in all its terms.

The leading case in this State, the one on which appellants relied in the Court below, is the case of

> Wharton v. Stoutenburgh (Court of Errors and Appeals), 35 N. J. Eq. 266 to 279, at page 273:

"The principal ground of contention against this decree was that no contract, definite and complete in all its terms, was concluded between the parties.

"The fact that parties negotiating a contract, contemplated that a formal agreement should be prepared and signed, is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed. *But nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding, and which, for greater certainty, or to answer some requirement of the law, they designed to have expressed in some formal written agreement.*

The question as to the degree of completeness in an agreement requisite to relief by way of specific performance, has generally arisen when the negotiations have been conducted in writing, and the inquiry has been whether the writings produced comply with the requirements of the statute. In *Chinnock* v. *Marchioness of Ely,* 4 De G. J. & S. 645-6, Lord Westbury states, with precision, the doctrine of courts of equity. He says: 'I entirely accept the doctrine that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding,

although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract. But, if to a proposal or offer an assent be given, subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.'

Substantially the same views are expressed by Lord Cranworth, in *Ridgway* v. *Wharton*, 6 H. of L. Cas. 264, 268, in which he affirms the binding force of an agreement, all the terms of which have been agreed on, though the parties contemplated that the agreement should be reduced into form before it is finally executed; and, in referring to the fact that a formal agreement was in contemplation before the business was to be concluded, as cogent evidence that the parties did not intend to bind themselves until the agreement was reduced into form, he adds: 'That, however, is a question of fact, which must depend upon the circumstances of each particular case.' Other cases to the same ef-

fect are collected in a note in Pomeroy on Cont., 89."

The two particulars in which the contract now before this Honorable Court for construction was alleged to be incomplete, were:

1: That no time was fixed or due date set forth for the mortgage which was to be given for the balance of the purchase price as described in said agreement, and

2: That the clause in the agreement, to wit: "as per agreement of sale to be drawn on August 13, 1925, subject to approval of purchaser," indicated that the paper writing relied upon was only preliminary.

Answering the first objection appellants relied in the Court below and again in this Honorable Court, on the case of

> Green v. Richards, 23 N. J. Eq. page 31; later affirmed by this Court, 23 N. J. Eq. 536.

The following statements from the Vice Chancellor's opinion are herein repeated:

> "The written contract with Mrs. Green is dated May 9th, 1868, one year after the verbal contract with Mr. Green. It was endorsed on a receipt in these words: 'Received from Mrs. Catharine Green, $100 on account of payment on house No. 71 Ferry Street. Due on account of rent to date, $120. Thomas E. Richards.' Endorsed: 'This is to show that I agree to sell to Mrs. Capt. Green, house and lot No. 71 Ferry Street, for the sum of $2500, and that when there is $500 paid, and the back

rent, I will give her the deed, and take a mortgage for $2000. T. E. Richards.'

This is a contract certain and definite as to the subject-matter—the price and the condition precedent, the payment of the back rent. The time is sufficiently certain; it is whenever the back rent shall be paid up and the terms of payment complied with, which makes the defendant liable to perform on demand, within a reasonable time. Performance was demanded within a year, which is not denied to be within a reasonable time. The only material part of this contract that is not definite, is the credit to be given on the mortgage, and whether with interest or not. A mortgage payable at the end of two years, without interest, would be a literal compliance with this contract.

It has been held in this court when one of the terms of a sale is that part of the consideration is to be secured by mortgage payable at a time to be fixed and agreed upon by the parties, that the contract is not sufficiently definite to entitle the purchase to a decree for specific performance. *McKibbin* v. *Brown,* 1 McCarter 13. * * *

But in those cases it was part of the agreement that time was to be given for payment. That time was a material part of the agreement, and it was left undetermined. Here there is no agreement for any time. The purchaser is not entitled to any credit. In such case the mortgage should be made payable on demand; and it

is the duty of a court of equity, in order to prevent a fair and just agreement from being defeated by a mere technical objection, to presume that such was the intention of the parties, and to give the agreement that construction. This makes the written agreement certain in all its parts."

The following statements from the opinion of the Court of Errors are respectfully repeated:

"It is true that there are exceptions to the rule that a court of equity will not perform unilateral contracts, as, for instance, in those cases where an agreement which the Statute of Frauds requires to be in writing, has been signed by one of the parties only, or when the contract, by its terms, gives to one party a right to the performance which it does not confer upon the other, an example of which is exhibited in the instance of a lease for years which gives an option to the lessee to purchase during the term. But it will be observed that when such contracts come to be enforced in equity, they cease to be unilateral for upon filing the bill, the party who was before unbound puts himself under all the obligations of the contract. By his own act he makes the contract mutual, and the other party is enabled to enforce it. The consequence is that in every case that I can find, where specific performance has been ordered, a mutual remedy existed upon it at the time of the rendering of the decree. It seems to me that the rule is universal to this extent, that equity will not direct a performance of the terms of

an agreement by the one party when, at the time of such order, the other party is at liberty to reject the obligations of such agreement."

And at page 540:

"With respect to the objection that the agreement is imperfect, inasmuch as it does not appear when the mortgage which is to be given for the balance of the consideration money is to be payable, I concur with the opinion expressed in the Court of Chancery. Where nothing is said about a credit to be given, and there are no circumstances from which an inference can be made that it was the intention of the parties that the time of payment should be postponed, the money is payable immediately."

Reynolds v. O'Neil, 26 N. J. Eq. 223 (Chancery).

The contract in question was in writing and was as follows:

"Received, Jersey City, March 10th, 1874, from Mr. Dominick Reynolds, the sum of four hundred dollars, on account of his purchase of the house and lot known and situate at No. 164 Morgan Street, Jersey City; sold to him this day for the sum of four thousand dollars. It is agreed that if the title of the above property should prove unsatisfactory, that the above sum shall be returned to said Dominick Reynolds.

$400. (Signed) J. M. GIBSON.
Agent for Terence O'Neil, Owner."

> * * * In support of the objection based on alleged want of certainty in the contract, reliance is placed on the omission to fix a time for the payment of the balance of the purchase money and the delivery of the deed. The court will construe this contract as providing for a delivery of the deed on demand, within a reasonable time, accompanied by a tender of the balance of the purchase money. The objection made on the face of the contract cannot prevail."

Also see the following cases:

> Bowne v. Ritter, 26 N. J. Eq. 457;
> Luczak v. Mariove, 92 N. J. Eq. 377, affirmed 93 Eq. 501;
> Cavanna v. Brooks, 3 N. J. Advanced Reports, 173.

In answer to the Second Point, the Court's especial attention is directed to the statements made in the case of *Wharton* v. *Stoutenburgh,* cited *supra,* containing citations from English cases, which it is urged thoroughly establishes the point that whether or not the contract for the sale of land containing a term or provision that a more formal or another contract is to be executed, is a question of fact which must depend upon the circumstances of each particular case, and in this connection it is strenuously urged that all the facts in this case prove conclusively that the agreement which it was sought to specifically endorse, contained all the terms of a legally binding contract for the sale of land, and that the clause quoted above merely was evidence that the parties simply desired to have their bind-

ing contract, already in full force and effect, merely reduced to a more formal document.

In this connection appellants point out for the serious consideration of this Court the fact that the clause cited contains this very significant statement, which it is urged, conclusively proves that all the terms of the contract had been discussed and agreed upon. The clause referred to is as follows:

> "SUBJECT TO APPROVAL OF PURCHASER."
> Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. (Court of Errors), page 209, 39 N. E. Rep. page 75.

> "When the parties intend that a mere verbal agreement shall be finally reduced to writing as the evidence of the terms of the contract, it may be true that nothing is binding until the writing is executed. But here the contract was already in writing and it was none the less obligatory on both parties because they intended that it should be put into another form. * * *

> In this case it is apparent that the minds of the parties met, through the correspondence, upon all its terms, as well as the subject-matter, of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached * * *"
> Pratt v. Railroad Co., 21 N. Y. page 305;
> Pelletreau v. Brennan, *et als.*, 99 N. Y. Supplements, page 955;

Mente & Co., Inc. v. Heller, *et al.* (N. J. Court of Errors & Appeals), 123 Atl. page 755; 99 N. J. L. 475.

Appellants realize that the most difficult problem for them in connection with this appeal is to differentiate to the Court's satisfaction between the case at bar and the two very recent cases in this state, to wit:

Bettcher v. Knapp, 94 N. J. Eq. 433, *et seq.;*
Tansey v. Suskoneck, 3 N. J. Adv. Reports, 1520.

The first case above mentioned, it is respectfully urged, does not control the case now before the court for the principal reason that the vendors in that case were executors of an estate and that the Court, in its opinion, dwelt with especial significance upon that fact, indicating that that was the underlying reason which prompted its decision.

The second case above cited it is respectfully urged, is entirely different than the one now before the Court because, in the contract which was construed in that case, in the very same sentence which contained all of the material terms of the contract, it was provided "formal agreement to be executed and additional amount paid on November 7, 1924." There was no suggestion there as in this case that all of the terms of the contract had been agreed upon between the parties, and that only the purchaser was to have the right to approve the form of the more formal document which was to evidence the terms of the contract already agreed upon between the parties.

The most important matter, which, in the opinion of appellants, makes the case at bar different than the last two cases cited, *supra,* is the fact that in this case, *"Fraud"* upon the part of the defendants was specifically charged and alleged in the bill of complaint and would have been one of the most important factors of the evidence if this case had gone to final hearing. It is respectfully pointed out to the Court that in neither of the last two cases cited, *supra,* and in fact in no case which has been brought to the attention of the Court up to this time, is *"Fraud"* charged, suggested or intimated in the pleadings, the argument or in the opinion of the Court.

Appellants, upon the argument of the motion to dismiss in the court below, felt that the charge of *"Fraud"* was so all-important that it was suggested that if the Honorable Vice Chancellor felt that the bill of complaint which had been filed did not make specific enough appellants' charge of fraud, that if the details of such fraud should have been amplified in the bill of complaint, that appellants be given an opportunity to amend their bill of complaint before a decision was handed down on the motion to dismiss the bill of complaint.

Appellants again repeat that keeping in mind the fraud which was charged by them on the part of the original vendors and their so-called grantees, the contract now before the Court should and ought to be construed so as to be specifically enforced.

In connection with the last point in this argument the Court's attention is respectfully referred

to a statement in Pomeroy's Equity Jurisprudence, Vol. 5, page 5035, 4th Edition:

> "Independently of the doctrine of part performance, relief may be granted when the defendant has been guilty of fraud which leads to an irretrievable change of position. * * * Likewise, where there is a fraudulent omission to have an agreement reduced to writing, which induces an irretrievable change of position, equity will grant relief."

Also, 36 Cyc., page 590:

> "Terms which the law implies by legal presumption need not be expressly stated; and a statement of a term in general language is sufficient when the law will supply the details. The certainty that is required is not a technical but only a reasonable one."

The following statement from Pomeroy's Equity Jurisprudence, Fourth Edition, page 1929, is considered quite significant:

> "921. The Statute of Frauds not an Instrument of Fraud.
>
> It is a most important principle, thoroughly established in equity and applying in every transaction where the statute is invoked, that the Statute of Frauds having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or abiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudu-

lent scheme. This most righteous principle lies at the basis of many forms of equitable relief, among which are the specific enforcement of verbal agreements for the sale of land which have been partly performed, the reformation and enforcement of agreements and conveyances imperfect through fraud or mistake, the cancellation of fraudulent agreements and conveyances, and the like. The particular instance of relief will be mentioned as an illustration. Where an agreement has been verbally made which the statute requires to be in writing, and through the actual fraud of one party, the execution of the written instrument is prevented, and the other party is induced to accept and rely upon the verbal agreement as valid and binding, a court of equity will not permit the fraudulent party to set up the Statute of Frauds as a defense, but will enforce the agreement against him although it is merely verbal."

Also Bispham Principles of Equity, Seventh Edition, page 535:

"Again the terms of an agreement must be certain * * * This rule is, however, subject to two qualifications, first, that specific performance will not be refused if the uncertainty is owing to the fault of the defendant; and second, that in obedience to the maxim, *id certum est quod certum reddi potest,* performance will be decreed if the means of ascertaining the contract are at hand."

It is respectfully submitted that the appellants met the test of both of the above principles, first, because the uncertainty is owing to the fault of the defendants; and second, that the means of ascertaining the terms are at hand, namely, that they were to be satisfactory to the purchaser.

It is respectfully submitted that in the case of *Moore* v. *Galupo,* 65 N. J. Eq. 205, Vice Chancellor Grey makes a statement which is directly in line with the argument the appellants are trying to impress upon the Court in this case, and the statement is repeated here in full:

> "The contract, in express terms, declares that the remaining purchase money shall be secured by one or more mortgages, *but it fails to reserve to either party the right to decide which it shall be—one mortgage* or two, ten or forty-four."

Along this same line, Chief Justice Gummere, in the case of *Ridgeley* v. *Walker,* 80 Atlantic Rep. 109, also makes a very significant statement:

> "or else to show that the defendants had fraudulently refused to agree upon any terms and conditions of sale."

Also the following statement from Page on Contracts, Second Edition, Vol. 6, page 5785, which will be seen has very special significance in connection with the fact that the contract was to be satisfactory to the purchaser:

> "If an option as to the method of performance is given to one party, such as an option to name the grantee to whom the property is to be conveyed, or if one party

> is given an option as to time, within certain limits, or as to the selection of a certain quantity of the subject-matter out of a larger quantity, the existence of such option, and the impracticability of determining in advance how it will be exercised, does not render the contract indefinite."

It is therefore respectfully urged that the three orders in the Court of Chancery dismissing the bill of complaint and discharging the notice of *lis pendens,* should be reversed.

E. R. McGLYNN,
Solicitor and of Counsel
with Appellants.

New Jersey
Court of Errors and Appeals

Between LOUIS KUSKIN and HARRY ROTBERG, Complainants-Appellants, and MILTON GUTTMAN, LENA ROSENBAUM, MORRIS GREENBERG and PEARL GREENBERG, his wife, Defendants-Respondents.	On Bill, Etc. On Appeal from Chancery.

BRIEF OF RESPONDENTS, MORRIS GREENBERG AND PEARL GREENBERG.

This is an appeal by the complainants below from three orders entered in the Court of Chancery—one upon the motion of the solicitors for the respondents, Milton Guttman and Lena Rosenbaum, and two upon the motion of counsel for the respondents Morris Greenberg and Pearl Greenberg. Two of the orders so respectively applied for, directed the dismissal of the bill as against the respective defendants below, while the third order directed the discharge of the *lis pendens* filed by the complainants below, in the office of

the Clerk of the County of Monmouth, wherein the lands involved in this suit are located. This brief is filed in behalf of the respondents Morris Greenberg and Pearl Greenberg.

The Facts.

Counsel for the appellants has, in his brief, expatiated at length upon what he terms "the facts" in this matter. Strictly speaking, however, we contend that there are practically no so-called facts to be considered. Appellants filed a bill for specific performance of an alleged contract (State of Case, page 6, line 20), the respondents moved to strike the bill, the motion was granted and the orders appealed from were thereupon duly entered. It follows, therefore, that, in a strict sense, there are no facts before the Court, other than the Bill of Complaint, the Notice of *Lis Pendens,* the notices of the respective motions, the conclusion of the Court below upon the law and the orders predicated thereon, all of which are contained in the state of the case as filed. In view of the fact, however, that counsel for the appellants has gone outside of the record in his argument upon alleged "facts," we feel called upon briefly to reply thereto, although we apprehend that what counsel has said or what we may say in answer are all entirely *dehors* the record.

Early in the evening of August 12, 1925, the instrument sued on was, after being drawn by complainant's assignor, signed by the respective parties—the defendants Guttman and Solomon as vendors, receiving an uncertified check for $500 as a proposed deposit. The parties parted with

the understanding that the vendee, Boehme, would call for the vendors at 9:30 o'clock the following morning for the purpose of proceeding to an attorney's office to complete the transaction by settling the final terms of sale with particular reference to the terms and conditions of payment of the purchase price above the small initial payments. Shortly after nine the following morning, Boehme telephoned saying that he was obliged to make the appointment for a later hour that day and that he would again telephone Guttman during the afternoon. Guttman waited until after five o'clock, but it was not until 5:45 that Boehme or someone in his behalf, telephoned. It is denied that either Guttman or Mrs. Solomon had made any appointment to be present at any attorney's office or that they had made an appointment with any attorney, or that they had authorized anyone to make such an appointment in their behalf. Indeed, no definite time for meeting except as above stated, was set. It is submitted that upon the failure of Boehme to keep his appointments with the vendors, they were at liberty to assume that he had decided to abandon the transaction and they were justified, therefore, in proceeding that night with the consummation of the transaction with another purchaser, to wit, the respondent Greenberg.

Counsel for appellants seems to attach great significance to the fact that the deed to Greenberg was recorded early in the morning of August 14th. Barring only the chagrin of the complainants in finding that that deed had already been recorded when they sought to record their alleged assigned contract, there is nothing significant about the matter. The transaction between the

vendors and the defendants Greenberg was consummated in Newark, whither the parties came from Bradley Beach, where the property in question is located, with the result that the closing of the transaction lasted until shortly after midnight. The acknowledgment on the Guttman-Greenberg papers was then of necessity dated August 14, 1925.

It is a well-known and was a much-publicly advertised fact that during the month of August, a sizeable "boom" in seashore real estate along the New Jersey coast was in progress and that quick sales and speedy turnovers were the order of the day. Complainants themselves realized that fact, as evidenced by their hurried trip to Freehold for the purpose of recording their alleged agreement about thirty-six hours after it had been executed. No criticism can, therefore, be directed to Greenberg's desire to protect himself in the best manner possible.

Counsel insists (appellant's brief, page 5) that the transaction between the respective groups of respondents was consummated "under suspicious circumstances." The fact is briefly, that the respondents, Milton Guttman and Lena Rosenbaum, upon being advised that the paper writing for the establishment of which the suit below was instituted, was not a legal and binding contract, proceeded to sell the property in question to the next ready buyer.

In view of the further fact that so many of the transactions were in the nature of "curb transactions," in that they were begun and completed in a short space of time during the height of

the boom, there was nothing unusual in the circumstances.

Upon the filing of the appeal below we moved for dismissal thereof predicating our motion upon five grounds. (See notice of motion, S. of C., pages 10-12) which, in essence or in substance, were adopted by the Court below in its conclusions resulting in the dismissal of the bill. These grounds, with one or two additions, constitute the various points hereinafter discussed.

THE LAW.

POINT ONE.

Upon a motion to strike out a Bill of Complaint, only such facts as are expressly and not inferentially alleged therein are deemed as admitted for the purpose of the motion.

The bill contains allegations regarding the making of the alleged contract, the subsequent sale to the defendants Greenberg and then closes (p. 4, l. 20) with a general allegation to the effect that the sale to Morris Greenberg was "for the express purpose of hindering, delaying and defrauding these complainants, and that the said Morris Greenberg and Pearl Greenberg, his wife, had full knowledge and notice of complainants' rights." This is the only allegation contained in the bill setting up the element of fraud.

We contend that since the bill contains no proper, material allegations of fraud and since,

by the complainants' own arguments the element of fraud, instead of being sufficiently expressed in the bill is only inferentially stated, the motion to strike cannot be deemed an admission of fraud. By the thoroughly well-settled practice in this State, the accepted rule is as stated above. We cannot be held to have admitted the truth of anything beyond the material and properly-pleaded allegations of the bill.

POINT TWO.

The alleged contract is incomplete and does not express a meeting of the minds of the parties and is indicative only of the pendency of negotiations.

A mere reading of the instrument (p. 6, l. 20), coupled with an examination of the opinion of Vice Chancellor Berry, will make it apparent at once that the alleged contract cannot, by any stretch of imagination or construction, be deemed a valid binding contract, since there was plainly left for future negotiations, the manner of the payment of the purchase price, the duration of the purchase money mortgage, the rate of interest payable upon the principal thereof, the manner and time of repayment of that principal, the kind of deed which the prospective purchasers were to receive, and then, above and beyond all was the fact that even after an understanding would have been arrived at, the agreement as drawn would still have to be "subject to the approval of the purchaser."

The weight of authority in this State is that a contract does not become complete until reduced

to writing and signed if that appears to be the intention of the parties.

Jersey City Water Commission vs. Brown, 32 N. J. L. 504.

In New York the rule has been carried so far that it has been held that even if all the terms are set, though neither party may refuse to execute the formal contract, still the final contract is not enforceable until duly executed.

Pratt v. Hudson River R. R. Co., 21 N. Y. 305.

In *Miss. S. S. Co.* v. *Swift,* 86 Me. 248, it was held that even if all of the terms are definitely set, but a written contract is specified, the contract is not binding until the formal one is executed. See also *Mayor of Jersey City* v. *Town of Harrison,* 71 N. J. L. 69, and *Rehill* v. *Jersey City,* 71 N. J. L. 69.

Authorities on this point, culled from the reports from almost every state in the union, could be multiplied in support of our contention. We shall confine ourselves, however, to a discussion of three cases recently decided in this state—two of them in this court.

In the case of *Bettcher* v. *Knapp,* 94 N. J. Eq. 433, 120 Atl. Rep. 39, a suit was instituted for specified performance of a contract to sell real estate. The purchaser signed the instrument in duplicate and forwarded it, with all of the terms as orally agreed upon, together with a check as deposit to the seller. The seller signed, but then changed his mind and refused to deliver the contract. Suit was thereupon brought and, by subsequent appeal, decided in this court. In the opin-

ion written by Justice Swayze, it was held that, even though the signing of the instrument brought the case within the Statute of Frauds, since all that is needed is a memorandum signed by the party to be charged, still it was intended that a formal contract should be executed and delivered and therefore, until that was done there was no contract *in esse*.

In the words of Justice Swayze:

> "Where the parties to a contract for the sale of lands make it an essential part of their agreement, that it be embodied in a formal written instrument, the matter remains *in fieri* until the written instrument has been delivered."

In a second recent case, that of *Kurtz* v. *Busch*, 128 Atl. Rep. 552, 3 Misc. 389 (N. J. Supreme Court) a preliminary memorandum had been drawn to the following effect:

> "Said purchaser agrees to execute a contract of purchase on the following terms: Price $20,400; deposited herewith $500; additional cash on signing the contract to be drawn and submitted August 14, 1924, $500 * * * by second mortgage at six per cent, said mortgage to be reduced as follows: standing five years, interest every six months $6400 * * * Contract will be drawn, executed and acknowledged by said parties, August 14, 1924."

In pursuance of that memorandum, the seller drew the contract, but the buyer refused to sign, and instead, sued at law for the return of his deposit. In rendering judgment for the plaintiff, the Court held, citing *Wharton* v. *Stoutenburgh*,

35 N. J. Eq. 266, that since a formal contract had been contemplated between the parties but never executed, there was no valid contract in existence.

The most recent case touching upon the subject was decided in this court at the very time that Vice Chancellor Berry was considering this case after its submission upon argument of motion. We refer to the case of *Tansey* v. *Suckoneck,* 130 Atl. Rep. 528 (see advance sheets of Nov. 12, 1925). This case parallels the case *sub judice* as closely as one case can possibly parallel another. The instrument there sued upon was as follows:

> "Received, Newark, N. J., Tuesday, October 28, 1924, from Heime Suckoneck, two hundred and fifty dollars on account of purchase price 100 x 100 S. W. corner Miller Street and Avenue C, Newark, for $10,000, formal agreement to be executed and additional amount paid on November 7, 1924; title to be taken as soon as searches are made.
>
> $5,000 cash and $5,000 mortgage.
>
> H. SUCKONECK.
> MICHAEL J. TANSEY.
>
> $250.00

This Court held in the *Tansey* case that, since it was apparent from the writing that it was not intended as a final and complete agreement of the parties but that there were outstanding features of the bargain to be settled by further treaty and to be embodied in a completed contract, equity will refuse its aid in an action for specific performance.

> "The basis for the decision in the present case," says Justice Parker, speaking for this Court in the *Tansey* case, "is that (quoting Justice Knapp in *Brown* v. *Brown,* 33 N. J. Eq. 650, 655) the paper is on its face preliminary and not final, and by its very language indicates that other features left unsettled are to be settled by further negotiation; and this requires the application of the well-settled and fundamental rule that to support a decree of specific performance for the sale and purchase of real estate—
>
> "the bargain must have been completely determined between the parties, and its terms definitely ascertained. So long as negotiations are pending over matters relating to the contract, and which the parties regard as material to it, and until they are settled and their minds meet upon them, it is not a contract, although as to some matters they may be agreed."

Counsel for appellants "realizes" his difficulty in attempting to differentiate in the case at bar from *Bettcher* v. *Knapp* and *Tansey* v. *Suckoneck* (App. Brief, p. 22). His difficulty is real for any attempt to differentiate would seem to us both futile and impossible. Counsel contends that the element of differentiation is to be found in the capitalized, italicized "Fraud" (Appellants' Brief, p. 23); but this leads back to the matter discussed under Point One and under subsequent points with regard to the allegation of fraud.

The differentiation is labored and tortuous at best. The mere use of the word fraud either in a pleading or an argument can certainly not be

deemed sufficient in lieu of a proper allegation relating thereto and supported by facts or circumstances indicative thereof.

Appellants' brief quotes copiously from Pomeroy's Equity Jurisprudence, volume 5, p. 5035, 4th edition and Bispham's Principles of Equity, 7th edition, p. 535 (Appellants' Brief, pp. 23, 24 and 25). Reference to the pages shows at once, however, that the authorities there are dealing with cases and questions involving outright and established or admitted fraud. In the present case the bill makes no proper allegation of fraud but merely of failure to perform. Moreover, the action being for specific performance, cannot be predicated upon any other allegation than refusal to perform as the bill now alleges. It follows that counsel's excerpts from Pomeroy and Bispham have really no bearing upon the present issue.

It is pertinent to remark at this point that whatever uncertainty, if any, surrounds the understanding or lack of understanding between the parties is chargeable to the appellants for, admittedly, their assignor drew the memorandum in his own office, upon his own stationery and in his own phraseology. If no other questions were involved and the sole issue in this case were the one of construing any uncertainty in the terms of the contract, the decision might well turn upon this point—that, since the appellants' assignor, by his own act, caused the uncertainty the law should leave the loss flowing therefrom exactly where it finds it.

The appellants seem to rely upon the decision by this court in the case of *Wharton* v. *Stoutenburgh*, 35 N. J. Eq. 266 (Appellants' Brief, pp. 13, 14 and 15).

Oddly enough we are ready to predicate our own case upon that decision. Indeed, not only does the court below rely upon and cite the *Wharton* case, but this Court in the *Tansey* case also employs it as an authority. A close examination of the decision will indicate, we believe, that the excerpts used in appellants' brief constitute not matter of decision, but rather of *obliter dictum*. There was involved in the *Wharton* case the matter of a lease which was enforced by reason of the fact that there had been part performance of the agreement. In the case of *Trenton, etc., Corp.* v. *Inhabitants of Trenton,* 101 Atl. Rep. 562, the Court distinguished the *Wharton* case from that of *Water Commission* v. *Brown, supra,* by pointing out that the lease in the *Wharton* case had been drafted and assented to by all of the parties in its final form and had been made binding by part performance, while in the *Water Commission* case the defendants had not assented to any terms of a formal contract. Similarly our case must be distinguished from the *Wharton* case on this point, though the authority of the *Wharton* case is strongly applicable.

Other controlling cases in this State on the point are:

McKibbin v. Brown, 14 N. J. Eq. 19 (aff. 15 N. J. Eq. 498).
Moore v. Galupo, 65 N. J. Eq. 195.
Donnelly v. Currie Hdw. Co., 66 N. J. L. 388.
Mente & Co. v. Heller, 99 N. J. L. 475.
Domestic Telegraph Co. v. Metro Telephone Co., 39 N. J. Eq. 160.
Potter v. Hollister, 45 N. J. Eq. 508.

Davilla v. United Fruit Co., 88 N. J. Eq. 602.

See also:

Fry on Specific Performance, Sections 164 and 203.

POINT THREE.

The respondent, Morris Greenberg is an innocent purchaser for value, without notice of any alleged rights of the appellants, and the Bill does not properly and sufficiently set forth the contrary.

The only allegation embodied in the bill relating to a denial of the respondent Greenberg's contention of innocence, is that contained in paragraph 8 thereof (S. of C., p. 4, l. 27), to the effect that "the said Morris Greenberg and Pearl Greenberg, his wife, had full knowledge and notice of complainants' right." The bill, however, sets forth no facts or circumstances whereon that allegation as to the respondents, Morris Greenberg and his wife, can be predicated. The allegation constitutes merely a broad conclusion unsupported by relating facts. We are willing to rest upon the decision of the Court below on this point and upon the proposition that upon our motion to strike the bill, there was no tacit admission of fraud not duly alleged in the bill.

In the early case of *Lummis* v. *Stratton*, 2 N. J. L. 245, an action for deceit, it was held that the allegation was insufficient—that the alleged deceit should be set out specifically; so also in

Hogar v. *Stillwell,* 3 N. J. L. 901, and *Byard* v. *Holmes,* 34 N. J. L. 296.

In *Connor* v. *Dundee Chemical Works,* 50 N. J. L. 257, it was held that a general allegation that a sealed instrument was obtained by fraud was not enough; that the pleading must state the nature of the fraud. So in *Smith Administrator* v. *Wood,* 42 N. J. Eq. 513, it was held that a suitor seeking relief on the ground of fraud must set out the facts of the fraud.

In *Holmes* vs. *Seashore Electric Rwy. Co.,* 57 N. J. L. 502, a pleading was held insufficient and bad for its allegation that a certain "mortgage is not a subsisting lien and has been cancelled." The ruling was that the pleading must set out the manner in which the cancellation was effected and by whom authorized.

In the case at bar appellants contented themselves with the mere general allegation of notice. There is no statement regarding the manner in which the alleged knowledge and notice were obtained by the respondents Morris Greenberg and his wife, whether the knowledge and notice were actual or constructive, or of what the notice consisted. The bill contains no allegation relative to alleged knowledge on the part of Greenberg or his wife of the existence of the alleged agreement or of any agreement between the appellants and the other two respondents. We contend that the bill was in so far insufficient and faulty.

POINT FOUR.

The alleged contract which appellants seek to enforce, constitutes neither a property right nor a chose in action whereof the appellants could properly acquire possession by assignment and the latter are therefore precluded from maintaining this action as alleged assignees.

If, as we contend under Points Two and Three, there is no valid binding contract expressive of a meeting of the minds of the parties, there cannot be a valid assignment of that which does not exist.

It has repeatedly been held that on a contract for the sale of property by warranty deed, the purchaser has a right to insist that the deed shall be executed by the person with whom he contracted, inasmuch as the purchaser may properly want the responsibility of the seller on the warranties in the deed.

> Chicago Title & Trust Co. vs. MacDonald, 192 Ill. App. 132; 139 N. W. 586.

It would seem to follow that where two parties agreed to enter into a contract, then even though they be bound to execute such a contract, each has a right to demand the responsibility of the other. If the appellants' contentions are well founded, they may insist upon a deed in proper form, while the respondents would be without any say as to the responsibility of the obligor in the bond accompanying the purchase money mortgage and

could even be compelled to accept as such obligor a person who is insolvent. It may be true generally, that almost any contract is assignable; still, we contend there must be a thing *in esse* to assign before any rights can pass under an assignment as against third persons.

Since no valid contract is in existence and no valid assignment could consequently be made, we respectfully submit that the appellants are not parties in interest and cannot therefore maintain this action.

POINT FIVE.

The decision of the Court below should, upon the grounds hereinabove stated, be affirmed.

I. B. GLUECKFIELD

and

JOSEPH E. STRICKER,
Solicitors for and of Counsel with
Defendants-Respondents, Morris
Greenberg and Pearl Greenberg.

The Otsego Press, Cooperstown, N. Y.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

LOUIS KUSKIN and HARRY ROTBERG,
Complainants-Appellants,

and

MILTON GUTTMAN, LENA ROSENBAUM (sometimes and also known as Leah Solomon), MORRIS GREENBERG and PEARL GREENBERG, his wife,
Defendants-Respondents.

On Bill.

On Appeal from Chancery.

BRIEF FOR RESPONDENTS, MILTON GUTTMAN and LENA ROSENBAUM.

This is a very simple case. Specific performance is sought by the assignees of an alleged contract of sale of land at Belmar, in this State, against the vendors and persons to whom the vendors later conveyed the premises. The original contracting parties were Rosenbaum and Guttman, the owners, and Boehme. A memorandum was on the 12th of August, 1925, signed by the parties. A copy thereof is attached to the bill of complaint, and is found on page 6 of the State of the Case.

The fourth paragraph of the bill alleges that Boehme, on the 12th of August, the same day as the signing of the memorandum, assigned his rights in the property growing out of the alleged contract to the appellants.

The fifth paragraph alleges that on the next day, August 13th,

> "an appointment was made for the said Lena Rosenbaum, also known as Leah Soloman, and Milton Guttman, to meet at the office of their attorney, J. Everett Newman, in Asbury Park, New Jersey, for the purpose of executing another contract as provided in the contract, a copy of which is annexed hereto. These complainants attended said time and place for that purpose; but the said Lena Rosenbaum, also known as Leah Solomon, and Milton Guttman did not appear."

Webster defines an appointment as

> "an engagement or arrangement for a meeting."

Who made this appointment, whether Boehme or the appellants, or Rosenbaum or Solomon, does not appear, nor is there anything to indicate that Rosenbaum and Solomon had any knowledge of, or assented to the proposed appointment.

The bill further shows that on the morning of August 14th, a deed for this property to the respondent, Greenberg, from Guttman and Rosenbaum, together with a purchase money mortgage, were executed, acknowledged and recorded, and the claim is that this deed, made two days after the alleged contract in suit, was made

> "for the express purpose of hindering, delaying and defrauding these complainants, and that the said Morris Greenberg and Pearl Greenberg, his wife, had full knowledge and notice of complainants' rights, and that said deed and mortgage were executed, acknowledged and delivered, subject to the rights of these complainants in the premises herein described."

Motions were made shortly after the filing of the bill to strike it out on behalf of the defend-

ants, the original contractors and the grantees under the said deed being represented by different counsel. This motion was granted and the bill and *lis pendens* filed therewith, were stricken out, by an order advised by Vice-Chancellor Berry upon the ground that the memorandum above referred to was insufficient and incomplete, and on its face indicated that the parties had not finally reached an agreement upon all the essential matters, and provided for a later meeting at which a completed contract should be prepared and executed.

The appeal is from this order. I contend that the order was correct; that no other course could, or should have been taken, and that it should be affirmed. All that the parties have upon which to base this suit is a memorandum dated and signed on the 12th of August, 1925, reading as follows:

> "Received from John A. Boehme, Five Hundred ($500.00) dollars, deposit on purchase price of No. 509-511 Ocean Ave., Bradley Beach, Monmouth County, New Jersey.
>
> Purchase Price, $38,500,00 payable as follows:
>
> | | |
> |---|---|
> | Deposit | $ 500.00 |
> | Cash, Aug. 26, 1925, | 1,500.00 |
> | On Nov. 1, 1925, | 3,000.00 |
>
> Balance on Bond and mortgage as per agreement of sale to be drawn on August 13, 1925, subject to approval of purchaser.
>
> Lea Solomon
> Milton Guttman
> John A. Boehme
>
> Witness
> H. W. Mehrtens."

Three matters should be noted in connection with this memorandum:

1. A subsequent memorandum of sale is provided for.

2. A mortgage of $33,500 was to be given, the terms of which were unfixed, and were to be expressly "subject to approval of purchaser" and to be set out in the proposed contract.

3. There was to be a bond by the vendee, as well as a mortgage, and as the balance of the consideration—$33,500 out of $38,500—is so large a proportion of the total price, the importance of the bond and the financial responsibility of the obligor are evident.

I.

The memorandum, which is all the appellants have on which to base any rights, is incomplete in that it expressly calls for the preparation and execution of a formal contract.

The rule was early established by this Court in *Water Commissioners* v. *Brown,* 32 N. J. Law 504, that

> "if it appears that the parties, although they have agreed on all the terms of their contract, mean to have them reduced to writing and signed before the bargain shall be considered as complete, neither party will be bound until that is done so long as the contract remains without any acts done under it on either side."

This Court, as well, of course, as the Supreme Court and the Court of Chancery, have studiously adhered to this rule. *Donnolly* v. *Currie Hardware Co.,* 66 N. J. Law 388; *Trenton and Mercer County Traction Co.* v. *Trenton,* 90 *Id.* 378, affirmed 91 *Id.* 719; *Wharton* v. *Stouten-*

burgh, 35 N. J. Equity 266; *Bettcher* v. *Knapp,* 94 *Id.* 433; *Kurtz* v. *Busch,* 3 N. J. Advance Reports 389.

The foregoing rule applies regardless of the fact as to whether otherwise the essential terms of the contract appear, either expressly or by legal inference, in the temporary memorandum.

II.

Not only was there a formal contract to be drawn, but the minds of the parties had not yet met upon the terms of the mortgage which had yet to be fixed and approved by the purchaser.

It is, of course, true that if a contract for the sale of lands includes in its terms for the giving of a mortgage, without defining the due date, or interest payable thereon, the Court will, upon a claim of insufficiency, conclude that the mortgage is payable upon demand, with interest at the legal rate. *Luckzak* v. *Mariove,* 92 N. J. Equity 377, affirmed 93 *Id.* 591; *Cavanna* v. *Brooks* (Court of E. & A. 1925), 127 Atl. 247. This doctrine was first authoritatively announced in this State in *Green* v. *Richards,* 23 N. J. Equity 32.

If, however, there be anything in the contract to indicate that the due date of the mortgage is to be postponed to an unfixed time, or that the inference that the interest provided for is legal interest is an improper inference, and that the minds of the parties were yet to meet upon either of these points, the rule is different. *Binns* v. *Smith,* 93 N. J. Equity 736; *Moore* v. *Galupo,* 65 *Id.* 194.

If the memorandum in this case had been otherwise complete, and had not provided for

a formal contract, and instead of providing "balance on bond and mortgage * * * *subject to approval of purchaser,*" it might have been contended that the mortgage would be due on demand, and subject to legal interest; but the presence of the underscored words "subject to approval of purchaser" makes it impossible for this inference to be drawn, and indicates that the required agreement upon all the terms of the contract had not been reached. Obviously, by the very terms of this memorandum, the necessary mutuality as to the language of the mortgage was missing. The vendee might insist upon a mortgage at a ridiculously low rate of interest, or for an absurdly long period of time to run. See also *Shaw* v. *Woodbury Glass Works,* 52 N. J. Law, p. 7 (Beasley, C. J.); *Ridgley* v. *Walker,* 80 Atl. Reporter 108 (Gummere, *C. J.*); *Hale* v. *Kumler,* 85 Federal 161.

III.

The complainants are assignees of the vendee and as such not entitled to enforce this contract even if it were complete.

While it has been held under ordinary circumstances (*Bateman* v. *Riley,* 72 N. J. Equity 316; *South Jersey* v. *Dorsey,* 95 *Id.* 530), that the vendee named in a complete contract for sale of land may assign his rights, and the assignee may assert them by a bill for specific performance, it has never, so far as I am aware, been held that this rule will extend to a case of this kind where, as already indicated, the memorandum, informal and incomplete as it was in other respects, was careful to provide for a bond, as well as a mortgage; and as the deferred consideration to be secured by the mortgage and

evidenced by the bond is six-sevenths of the total consideration, something more than is expressed here must be made to appear before the vendors in such a contract (assumed in other respects to be complete) could be compelled to accept the bond not of their contractee, but of some unknown and irresponsible person, for so large a part of the consideration.

It is submitted that each one of the foregoing reasons is quite sufficient to support the order made by the Vice-Chancellor, and it should be affirmed.

The appellants have sought to throw dust into this case by unspecified and unalleged assertions of fraud. Apart from the entire absence of a single fact alleged in the bill to support the claim of fraud, the claim itself is not made with reference to the form of the memorandum which is the sole basis of the rights of the complainants, but is directed to transactions that are claimed to have occurred two days after the memorandum was made. If it were claimed that by chicanery the execution on the 12th of August, of a complete memorandum was prevented, possibly under *Chetwood* v. *Brittan,* 2 N. J. Equity 438-449, that fact could be shown to prevent the assertion by the fraud doer of the consequent insufficiency of the memorandum. Here no one suggests that the memorandum or receipt of August 12th was not just what was intended. Surely, there is no fraud in an alleged contractor for the sale of land to repent of his verbal bargain before he has signed a proper agreement. *Wood* v. *Midgly,* 5 DeG., McN. & G., pp. 40-45. The bill states that on the same day the memorandum was signed, August 12th, Boehme, the vendee named therein, assigned it to Kuskin and Rotberg, with whom the respond-

ents had had no relations whatever, and upon their substitution, particularly as it involved their giving a bond for six-sevenths of the consideration, we can well understand why the vendors declined to go further; and surely, the inference that they were dissatisfied to accept the assignees in lieu of their contractee, is quite as strong as of any later fraud which the bill does not allege and which the brief claims to have existed in transactions that later occurred.

It is respectfully submitted that the decree should be affirmed.

Dated, February Term, 1926.

ROBERT H. McCARTER,
Counsel for Defendants-Respondents,
Milton Guttman and Lena Rosenbaum.