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BILL OF COMPLAINT.

Filed August 1, 1925.

In Chancery of New Jersey

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

The complainants, Morris Breitman and Anna Breitman, his wife, and Nathan Turkel and Augusta Turkel, his wife, all of the City of Newark, County of Essex ond State of New Jersey, say that:

1. On May 26, 1925, complainants entered into an agreement with the defendants, Henry Jaehnel and Ida Jaehnel, his wife, whereby complainants agreed to convey premises known as No. 835 Stuyvesant avenue, Irvington, New Jersey, and being a tract of land forty-eight feet in width, front and rear, and one hundred and five feet in depth, to the defendants, by deed of warranty, on or before July 7, 1925, for the sum of $24,500, a copy of which agreement is hereto annexed and made a part hereof.

2. By said agreement the defendants, Henry Jaehnel and Ida Jaehnel, his wife, agreed to purchase said premises and pay said sum of $24,500 in the following manner:

By paying $1,000 as a deposit on execution of said contract, which sum the defendants paid.

By taking said premises subject to a mortgage held by the Patriotic Building and Loan Association of the City of Newark in the sum of $14,000.

By conveying to the complainants by deed of warranty, free and clear of all encumbrances, two lots of land lying in the Township of Maplewood, County of Essex and State of New Jersey, and being lots Nos. 232-233 on a map of Maple Crest, which lots were valued at $5,000.

By the payment of the balance of $4,500 in cash upon the delivery of the deeds.

3. On or about July 7, 1925, the complainants tendered a deed of warranty to the defendants, which deed of warranty was duly executed and acknowledged, and demanded the balance of the purchase price, and a deed from the defendants for the premises located in Maplewood, in accordance with the said agreement.

4. The defendants then and there refused to carry out the terms of said agreement and still refuse to carry out the terms of the said agreement, although often requested to do so by the complainants.

5. Defendants have refused to consummate the said agreement, and to take title to said premises.

6. Complainants have always been and are still ready, able and willing to convey said premises in accordance with the terms of said agreement, and have asked the said defendants to consummate the said agreement, which defendants have refused to do.

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

1. That Henry Jaehnel and Ida Jaehnel, his wife, who are the defendants in this suit, may

answer this bill of complaint and each statement therein made.

2. That the said Henry Jaehnel and Ida Jaehnel, his wife, may be decreed to specifically perform their said agreement, and to accept title to said premises and pay complainants the balance of the purchase price therefor, in accordance with said agreement, and to execute and deliver to complainants a deed of warranty, free and clear of all encumbrances, to the premises in the Township of Maplewood hereinabove mentioned.

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

BENJAMIN NEWMAN,
Solicitor for and of Counsel with Complainants.

ANSWER AND COUNTER-CLAIM.

Filed August 12, 1925.

IN CHANCERY OF NEW JERSEY.

Between MORRIS BREITMAN, *et al.*, *Complainants,* *and* HENRY JAEHNEL, *et al.*, *Defendants.*	*On Bill, etc. Answer and Counter-claim.*

The defendants, Henry Jaehnel and Ida Jaehnel, answering the bill of complaint, says that:

1. They admit the allegations in paragraphs 1 to 5 inclusive.

2. They admit the allegations in paragraph 6, except they deny that the complainants are able to convey said premises in accordance with said agreement.

Further answering the bill of complaint and by way of counter-claim, these defendants allege that:

1. On or about August 1, 1911, Marie Sodano, by warranty deed recorded in Book I 49 of Deeds for Essex County, pages 524, etc., conveyed the premises in question to Salvatore Dicomo, Giuseppe Dicomo and Giuseppe Russo, who thereby became owners as tenants in common.

2. On or about January 19, 1915, the aforesaid Salvatore Dicomo, Giuseppe Dicomo and

Giuseppe Russo, and their respective wives, executed a mortgage for $3,500 to one August Bange and Henry Bange on the aforesaid lands and premises, which said mortgage was recorded in Book T 33 of Mortgages for Essex County, pages 328, etc.

3. Subsequently, on or about December 23, 1917, the said Giuseppe Dicomo died intestate, leaving him surviving his wife, Cathalda Dicomo, and three infant children, namely, Tony Dicomo, age four years; Michael Dicomo, age one and one-half years, and Giuseppe Dicomo, age five months, who became seized of a one-third interest in the premises aforesaid, and who became tenants in common with said Salvatore Dicomo and Giuseppe Russo.

4. On or about September 13, 1919, Salvatore Dicomo, one of the tenants in common aforesaid, purchased said premises from the Sheriff of Essex County, the said Sheriff of Essex County having exposed the same for sale in pursuance to an order of the Court of Chancery of New Jersey in a cause wherein Mary Bange and Henry Bange (the holders of the mortgage aforesaid) were complainants and Salvatore Dicomo and others (being all the co-tenants) were defendants.

5. The complainants purchased the said premises for value from the said Salvatore Dicomo, the purchaser at the foreclosure sale aforesaid.

6. These defendants allege that by reason of the purchase of said premises from the Sheriff of Essex County at said foreclosure sale, the said Salvatore Dicomo became seized thereof

as trustee for himself and his other co-tenants, and the attempted conveyance by him to the complainants was of no effect and void as to his other co-tenants, and particularly the infant co-tenants, namely, Tony Dicomo, Michael Dicomo and Giuseppe Dicomo, all of whom have the right to contribute their respective portions of the cost of said property at any reasonable time after they arrive at their majority and thereby redeem their interest in said lands and premises.

Your defendants therefore pray:

1. That it may be decreed that the complainants are unable to convey title to the premises aforesaid free and clear of all incumbrance and in accordance with said agreement, and that the defendants be released and relieved from the performance of said agreement, and that the deposit of $1,000 paid by the defendants be returned to the defendants.

2. That the bill of complaint may be dismissed and that the defendants may have such further relief as may be equitable and just.

E. A. and W. A. SCHILLING,
Solicitors for and of Counsel with Defendants.

ANSWER TO COUNTER-CLAIM.

Filed.

IN CHANCERY OF NEW JERSEY.

Between MORRIS BREITMAN, *et al.*, *Complainants,* *and* HENRY JAEHNEL, *et al.*, *Defendants.*	*On Bill, etc. Answer to Counter-claim.*

The complainants, residing in the City of Newark, County of Essex, New Jersey, answering the counter-claim of the defendants, say:

1. The complainants admit paragraphs 1, 2, 3, 4 and 5 of the counter-claim.

2. They deny paragraph 6 and the balance of the counter-claim.

BENJAMIN NEWMAN,
Solicitor for Complainants.

AGREED STATEMENT OF FACTS.

IN CHANCERY OF NEW JERSEY.

Between MORRIS BREITMAN, *et al.*, *Complainants,* *and* HENRY JAEHNEL, *et al.*, *Defendants.*	*On Bill, etc. Agreed Statement of Facts.*

The complainants, by their solicitor, Mr. Benjamin Newman, and the defendants, by their solicitors, Messrs. Edward A. Schilling and William A. Schilling, stipulate and agree that the following is a correct statement of the facts upon which this case rests and upon which it is to be decided:

1. This is a bill for specific performance brought by the complainants as vendors against the defendants as purchasers of certain property commonly known and designated as #835 Stuyvesant avenue, Irvington, N. J. The allegations of the bill of complaint are entirely admitted, and while the defendants are willing to purchase this property, they contend that they are justified in refusing to accept the conveyance because they allege that the complainants' title thereto is not marketable owing to the existence of the facts hereinafter set forth. The defendants are not only willing, but anxious, to accept the conveyance of said property, if the decree of this Court shall adjudge the complainants' title marketable.

Agreed Statement of Facts.

2. On August 1, 1911, by deed of that date, one Maria Rosa Sodano, a widow of Newark, conveyed to Salvatore Dicomo, Giuseppe Russo and Giuseppe Dicomo the fee simple of a large parcel of land located in the Town of Irvington, Essex County, New Jersey, at the southwest corner of Stuyvesant avenue and Prospect avenue, having an approximate frontage on Prospect avenue of 212 feet by approximately 223 feet on Stuyvesant avenue. This deed was on August 1, 1911, duly acknowledged, and duly recorded on August 9, 1911, in Book I 49 of Deeds for Essex County, on pages 524, etc. The premises agreed to be conveyed and described in the bill of complaint, are a part of the lands conveyed by the deed in this paragraph referred to.

3. On January 19, 1915, by a mortgage of that date, the said Salvatore Dicomo, Giuseppe Russo and Giuseppe Dicomo, still being the owners in fee simple of said premises together with their respective wives, mortgaged said lands and premises to Augusta Bange and Henry Bange for the sum of $3,500, payable in three years from that date and to bear interest at six per cent. payable semi-annually. This mortgage was duly acknowledged, and recorded on January 20, 1915, in Book T 33 of Mortgages for Essex County, on page 328, and covers the entire premises conveyed to the mortgagors first named by the deed referred to in paragraph 2 hereof.

4. On December 23, 1917, said Giuseppe Dicomo (also known as Joseph Dicomo) died intestate, leaving him surviving as his only heirs-at-law and next of kin, his wife, Catalda Dicomo,

of full age, and three children, Tony, Michelina and Giuseppe, the last three being minors.

5. After the mortgage referred to in paragraph 3 herein became due, which was subsequent to December 23, 1917, the said Augusta Bange and Henry Bange demanded the payment of the sums due thereon from the then owners of the property, no change in the title thereto having occurred except as above stated. The widow, minor children, and personal representatives of said Giuseppe (or Joseph) Dicomo, being apparently unable or unwilling to meet this demand, and Salvatore Dicomo and Giuseppe Russo being also apparently unwilling or unable to raise the money due on said mortgage, refused to pay the same, so that the mortgagees were compelled to institute foreclosure proceedings on their mortgage. They filed their bill of complaint in this Court on February 14, 1919, including all necessary and proper parties as defendants, and all of them were duly served. An order was made appointing the Clerk of this Court guardian *ad litem* for the infant heirs-at-law of Giuseppe Dicomo, deceased, and due appearance and answer was entered and filed for them by said guardian. The matter was referred to a Master and the procedure applicable to this class of foreclosure was duly followed. Further proceedings were had in said cause, so that on June 19, 1919, a final decree to foreclose was entered for the complainants, Augusta Bange and Henry Bange, in the sum of $3,683.75, which confirmed the report of the Master, and decreed that the entire mortgaged premises be sold in order to pay the amount and costs due to complainants, that an execution issue to the Essex County Sheriff for that purpose, and that all

the defendants stand absolutely debarred and foreclosed of and from all equity of redemption, of, in and to the mortgaged premises. The writ *fi. fa.* was issued on July 3, 1919, and on September 2, 1919, at a public sale pursuant to the statute, the entire premises were sold to the said Salvatore Dicomo by the Sheriff of the County of Essex for the sum of $6,000, the then reasonable value of the lands and premises referred to in paragraph 2 hereof. Said sale having been on September 13, 1919, duly confirmed, the Sheriff of Essex County executed and delivered a deed dated September 13, 1919, proved October 2, 1919, and recorded on December 23, 1919, in the office of the Register of Essex County, in Book X 62 of Deeds for Essex County, on page 18, thereby conveying the mortgaged premises to Salvatore Dicomo, the purchaser at said foreclosure sale, for the sum of $6,000, and the said Salvatore Dicomo paid the purchase price mentioned in said Sheriff's deed. As a result of said sale there was a surplus of $1,955.28 left and paid to the Clerk in Chancery, of which share the widow and the infant heirs-at-law of Giuseppe Dicomo, received their proportionate part from the Clerk in Chancery. The proceedings for foreclosure, sale and distribution of surplus were all due and regular. The shares of the infants were paid to their respective guardians, who were duly authorized to receive same.

6. On December 22, 1919, the said Salvatore Dicomo and his wife conveyed to the said Giuseppe Russo and Kate Russo, his wife, as tenants in the entirety, an equal undivided one-quarter of, in and to all the lands and premises described in paragraph 2 herein. This deed was

duly acknowledged on December 22, 1919, and was recorded in Book X 62 of Deeds for Essex County, on page 20, on December 23, 1919. Said undivided one-quarter interest conveyed to the said Giuseppe Russo and Kate Russo, his wife, was re-conveyed by the said Giuseppe Russo and Kate Russo, his wife, to the said Salvatore Dicomo and Angela Dicomo, his wife, as tenants in the entirety by deed dated March 18, 1922, duly acknowledged the same day, and recorded on March 20, 1922, in Book I 66 of Deeds for Essex County, on pages 185, etc. This conveyance was for all of the premises described in paragraph 2, excepting certain portions not affecting the premises described in this bill for specific performance. Several conveyances of various portions of the property referred to in paragraph 2 hereof were made by the Dicomos or Russos of various parcels of the premises referred to in paragraph 2, but such conveyances were not of any portion of the property agreed to be conveyed to the defendants in this action.

7. On January 22, 1924, the said Salvatore Dicomo and his wife conveyed to Morris Breitman, one of the complainants herein, a portion of the premises described in paragraph 2, in size 153 feet on Stuyvesant avenue and 105 feet on Prospect avenue. This deed was duly acknowledged, and was recorded on January 22, 1924, in Book M 69 of Deeds for Essex County, on page 597, conveying certain premises of which the premises described in the bill of complaint is a part. The consideration for said last-mentioned conveyance was the sum of approximately $11,000. The said Morris Breitman on February 11, 1924, conveyed a half interest

of the premises referred to in his deed to the other complainant herein, that is Nathan Turkel, by deed of that date, and recorded in Book Y 69 of Deeds for Essex County, on page 447.

8. The complainants, Morris Breitman and Nathan Turkel, since their purchase of the premises referred to in paragraph 7, have erected three large buildings on said premises, having a total approximate value of sixty thousand ($60,000) dollars, and one of which buildings has been agreed to be conveyed to the defendants.

9. It is admitted that Morris Breitman and Nathan Turkel are bona fide purchasers for a valuable consideration, without any notice of any equities outstanding or trust interest, if any, except such as may be presumed from a recital of the facts hereinabove set forth. The complainants and their respective wives are ready and willing to perform the contract mentioned in the bill of complaint and are able to convey the title of the premises therein mentioned, as required by the contract, unless the facts hereinabove recited disclose that they have no marketable title.

BENJAMIN NEWMAN,
Solicitor of Complainants.

E. A. and W. A. SCHILLING,
Solicitors of Defendants.

Newark, N. J., November 5, 1925.

CONCLUSIONS OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

Between MORRIS BREITMAN, *et al.*, *Complainants,* *and* HENRY JAEHNEL, *et als.*, *Defendants.*	*58/620* *On Bill, &c.* *Conclusions.*

Benjamin Newman, solicitor for complainants.

E. A. and W. A. Schilling, solicitors for defendants.

BERRY, *V. C.*

This is a bill for specific performance of a contract for the sale of land. The complainants are the vendors and the defendants the vendees. The matter is submitted to me on the pleadings and on agreed state of facts. The defense to this suit is that the complainants are unable to convey a marketable title, and that there is a strong probability that the defendants will be subjecting themselves to litigation if they take title and be obliged at some future time to defend their title against claims of persons not now *sui juris,* and that claim is based on the facts as they appear in the stipulation. Those facts, so far as it is necessary to detail them here, are as follows:

On August 1, 1911, Salvatore Dicomo, Guiseppe Russo and Guiseppe Dicomo acquired, as tenants in common, by deed, a tract of land in Irvington, New Jersey, of which the premises involved in this suit are a part. On January 19, 1915, these

co-tenants with their wives joined in a mortgage covering the whole tract. Guiseppe Dicomo, one of the co-tenants, died, on December 23, 1917, intestate, leaving him surviving his wife and three children, all of which children were and still are minors. The mortgage became due after the death of Guiseppe Dicomo and demand for payment was made by the mortgagee upon all parties in interest. Payment being refused, foreclosure proceedings were instituted which resulted in a sale of the premises and at that sale Salvatore Dicomo, one of the co-tenants, became the purchaser. Immediately after receiving the Sheriff's deed, Salvatore Dicomo conveyed an undivided one-fourth interest in the property so purchased, to Guiseppe Russo, one of the original co-tenants. In 1922, Russo reconveyed this interest to Salvatore Dicomo. The widow and infant children of Guiseppe Dicomo were made parties defendant to the foreclosure suit, a guardian *ad litem* was appointed for the infant children and due appearance and answer was entered and filed by the guardian. At the foreclosure sale the property sold for $6,000, the then reasonable value of the lands, and the sale also produced a surplus which was deposited with the Clerk of this Court, and which was thereafter distributed amongst the parties entitled thereto, including the widow and the guardian of the infant heirs-at-law of Guiseppe Dicomo.

The deeds and mortgage hereinabove referred to were all duly recorded and all the facts above recited are matters of public record. In January, 1924, Salvatore Dicomo conveyed a portion of the property which he purchased at the foreclosure sale to the complainant Morris Breitman, and Breitman in turn conveyed a half interest in those premises to Nathan Turkel, the other

complainant. The premises which are the subject of this suit are a portion of the lands conveyed by Salvatore Dicomo to Breitman in January 1924. Since the date of this conveyance the complainants have erected three large buildings on the premises purchased by them and one of those buildings is located on the lands which the complainants agreed to convey to the defendants.

Breitman & Turkel are bona fide purchasers for a valuable consideration without notice of any outstanding equities or trust interests except such as may be inferred from the records. The complainants are ready and willing to perform but the defendants have declined to accept a conveyance, alleging that the complainants have not a marketable title.

The first question here presented is whether or not Salvatore Dicomo acquired absolute title to the premises of which he became the purchaser at the foreclosure sale, or whether or not that property was, upon such purchase, impressed with a trust in favor of the other co-tenants. This is, to my mind, a mixed question of law and fact and no one not a party to this suit is bound by the stipulated facts. Second, if so impressed, whether or not the complainants took title to the premises the subject of this suit with notice of that trust; and third, whether under all the circumstances, the title is unmarketable.

I.

The general rule in this country is that "a tenant in common in possession and enjoyment of a common property occupies a confidential relation to his co-tenants, and because of this relation there is an implied obligation on his

part to sustain and protect the common title. Therefore, if a co-tenant in possession of common property purchases that property, either directly or indirectly, at a sale under foreclosure or a mortgage or deed of trust, the purchase will be deemed to have been made for the benefit of all the co-tenants; provided, however, the other co-tenants elect within a reasonable time so to consider the purchase and offer to contribute their respective proportions of the purchase price.

7 R. C. L. p. 857, Sec. 51, *et seq.* 19 L. R. A. (N. S.) 591 note 7 Am. Law Repts. 297 and cases cited, 38 Cyc. 40; 1 Washburn's real property, Vol. 1, p. 430, Chapter 13, Sec. 14.

That this general rule, in principle, obtains in New Jersey is shown by *Weller* v. *Rolason,* 17 N. J. Eq. 13, where it was held that "where two or more persons having an interest in lands claim under an imperfect title, and one of them buys in the outstanding title, such purchase will inure to the common benefit upon contribution made to repay the purchase money."

See also

United New Jersey Railroad and Canal Company v. *Consolidated Fruit Jar Company,* 55 Atl. Rep. 46;

Ennis v. *Hutchinson,* 30 N. J. Eq. 110;

Roll v. *Everett,* 73 N. J. Eq. 697.

In the case of *Ennis* v. *Hutchinson,* the principle was applied to the purchase at a judicial sale by one co-tenant, of the interest of the other co-tenants in a boat; and in *Roll* v. *Everett,* the principle was applied to the purchase of a tax title to common property by one of the co-tenants. I have found no reported case in New Jersey where the rights of infant co-tenants in

the common lands purchased by an adult cotenant at foreclosure sale, under the circumstances of this case, have been determined. Counsel for complainants has directed my attention to the unreported case of *Abramson* v. *Abramson,* Docket 55, page 199, in which he claims that this question was there decided in this Court adversely to these defendants. I understand that case was tried on its merits and the bill was dismissed. But what moved the Court to that action is purely a matter of conjecture; as no opinion was filed, and, therefore, I do not feel that is dispositive of the issue here. Nor do I deem it either necessary or proper for me to here attempt to determine whether or not the infant heirs of Guiseppe Dicomo have any interest in the lands here involved, because any conclusion to which I might arrive with respect to that question would not be binding upon them nor would it be binding upon Salvatore Dicomo, the purchaser at the foreclosure sale, because none of these persons are parties to this suit and their rights ought not to be prejudiced by my pronouncement here; and second, because it is not necessary that I determine definitely that there is an outstanding interest in these infant heirs, or the extent of that interest if it exists, in order to sustain the defense here, but only that there is a "doubtful question of law or fact affecting the title." I have referred to the foregoing rule and cited authorities to show its general application, and that the principle therein involved obtains in this State, merely for the purpose of indicating that there is a strong probability that the defendants, if they accepted the title which the complainants offer, would be subjecting themselves to serious litigation.

II.

Assuming, but not deciding, that the premises purchased by Salvatore Dicomo became immediately impressed with a trust in favor of his other co-tenants, it seems to me clear that the complainants acquired title with full notice of whatever outstanding equities or trusts this property was charged with as a result of the circumstances above detailed. A purchaser of real property is chargeable with notice of such facts affecting the title as may be ascertained by reference to the chain of title of such property as spread forth upon the public records.

Den v. *McKnight,* 11 N. J. L. 385 at 393;
Mitchell v. *D'Olier,* 68 N. J. L. 375;
Bock v. *Moch,* 4 N. J. Adv. Repts. 185

As all of the facts upon which the infant heirs of Guiseppe Dicomo might base their claim to an interest in this property are matters of record, the complainants' title is subject to whatever claim these infants have (7 R. C. L. p. 863, Sec. 55) and as they are still infants, such claim as they do have is not barred by their failure to press their claim up to this time.

III.

The next question to be considered is whether or not the situation existing here renders the title to the premises in question unmarketable and, therefore, justifies the defendants in refusing to perform.

It has been uniformly held in this State that a court will never compel a purchaser to take a title unless it be one which puts the purchaser in all reasonable security that no flaw or doubt

will come up to disturb its marketable title; provided, that the doubt be real and not fanciful.

Barger v. *Gery,* 64 N. J. Eq. 263;
Methodist Episcopal Church v. *Roberson,* 68 N. J. Eq. 433;
Potter v. *Ogden,* 68 N. J. Eq. 412;
Zelman v. *Kaufherr,* 76 N. J. Eq. 52;
Deseumeur v. *Rondel,* 76 N. J. Eq. 402;
Kohlrepp v. *Ram,* 79 N. J. Eq. 386;
Gosman v. *Pfistner,* 80 N. J. Eq. 432.

In *Gosman* v. *Pfistner, supra,* which was a suit for specific performance where the record title to land showed a conveyance by the trustee to a third person and a reconveyance to the trustee individually, the Court refused to compel the purchaser to take the title. In that case Vice-Chancellor Howell, referring to the case of *Tillotson* v. *Gesner,* 33 N. J. Eq. 313, said:

> "That was a case for specific performance in which it appeared that there was a conveyance of land voluntary on its face made by the defendant in a suit just before a judgment for a large sum was rendered against him, which would have been a lien on the land if such conveyance had not been made. Specific performance of the agreement was not enforced upon the ground that there was apparent upon the face of the papers a situation which might subject the purchaser to litigation and make the title doubtful, and that if the title to land be doubtful equity will not compel the defendant to take it and so expose himself to the hazard of litigation. Upon this theory courts of equity have frequently declined to compel a purchaser to accept title which though questionable, the court believed to be good. * * * I

> am therefore driven to the conclusion that the record title contains a notice to any purchaser that the title to the land in question might become subject to litigation to which he could be made a party on the ground of notice."

There is here presented, at least, "a doubtful question of law or fact affecting the title of the vendor" and it seems to me all too plain that if the defendants were obliged to accept the title to these premises, under the circumstances, they would very likely be purchasing a lawsuit and it is not necessary for me to forecast the result of that lawsuit in order to dispose of the question of specific performance here.

For the reasons above stated I am of the opinion that the defendants ought not to be compelled to perform, and I will, therefore, advise a decree dismissing the bill.

Decided February 10, 1926.

Final Decree.

FINAL DECREE.

Filed April 8, 1926.

IN CHANCERY OF NEW JERSEY.

Between MORRIS BREITMAN, *et al.*, *Complainants,* *and* HENRY JAEHNEL, *et als.*, *Defendants.*	*On Bill, etc.* *Final Decree.*

This cause coming on to be heard in the presence of Benjamin Newman, solicitor for the complainants, and E. A. and W. A. Schilling, solicitors for the defendants, on bill, answer, counter-claim, answer to counter-claim, agreed statement of facts and briefs submitted by the said solicitors, and it appearing to the satisfaction of the Court that the complainants and defendants entered into an agreement whereby the defendants agreed to purchase and the complainants agreed to convey certain lands and premises, more particularly described in said agreement, by warranty deed, free and clear of all encumbrances, excepting restrictions of record, zoning ordinances and such conditions as appear on a survey made by C. F. Lemassena, surveyor, dated April 4, 1924; and it further appearing to the satisfaction of the Court that the said defendants have always been and are ready, able and willing in all things to comply with the stipulations of the said articles of agreement on their part, but that the complainants are unable to convey a marketable title, and that there

Final Decree.

is a strong probability that the defendants will be subjecting themselves to litigation if they take title and may be obliged at some future time to defend their title against claims of persons not now *sui juris:*

It is on this 6th day of April, 1926, ORDERED, ADJUDGED and DECREED that the bill of complaint herein filed be and the same is hereby dismissed; and that the complainants pay to the defendants the sum of $1,000, the deposit heretofore paid by the defendants to the complainants, together with interest thereon from July 7, 1925, and that the complainants pay to E. A and W. A. Schilling, solicitors of the defendants, the sum of $150, attorney fees for the examination of the title to the premises described in the said agreement.

Respectfully advised,

MAJA LEON BERRY.

I hereby consent to the making and entering of the above decree as to form and notice only.

BENJ. NEWMAN,
Solicitor of Complainants.

Notice of Appeal.

NOTICE OF APPEAL.

Filed April 8, 1926.

IN CHANCERY OF NEW JERSEY.

Between MORRIS BREITMAN, *et al.*, *Complainants,* *and* HENRY JAEHNEL, *et als.*, *Defendants.*	*On Bill, &c.* *Notice of Appeal.*

The complainants, Morris Breitman and Nathan Turkel, hereby appeal from the final decree by V.-C. Maja L. Berry in the above-entitled cause on April 6, 1926, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

Dated, April 7, 1926.

BENJAMIN NEWMAN,
Solicitor for and of Counsel with
Complainants, Morris Breitman
and Nathan Turkel.

Service of the within notice of appeal is hereby acknowledged this 7th day of April, 1926.

E. A. and W. A. SCHILLING,
Attys. of Defendants.

PETITION OF APPEAL.

Filed April 22, 1926.

New Jersey Court of Errors and Appeals

MORRIS BREITMAN, *et al.*, *Complainants-Appellants,* *vs.* HENRY JAEHNEL, *et al.*, *Defendants-Appellees.*	*On Appeal from Chancery.* *Petition of Appeal.*

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

The petition of Morris Breitman, Anna Breitman, Nathan Turkel and Augusta Turkel, appellants, respectfully shows that your petitioners find themselves aggrieved by a decree made in the Court of Chancery of New Jersey, by his Honor, Edwin Robert Walker (advised by the Hon. Maja Leon Berry, Vice-Chancellor), bearing date April 6, 1926, in a certain cause wherein Morris Breitman, Anna Breitman, Nathan Turkel and Augusta Turkel, these petitioners, were the complainants, and Henry Jaehnel and Ida Jaehnel, his wife, were the defendants, in the following respects, to wit:

1. The said decree adjudges that the defendants have always been and are ready, able and willing in all things to comply with the stipulations of the articles of agreement, dated May 26, 1925, made by the complainants and the defendants.

2. The said decree adjudges that the complainants are unable to convey a marketable title to the premises by them to be conveyed as described in the agreement, dated May 26, 1925, made by the complainants and the defendants.

3. The said decree adjudges that there is a strong probability that the defendants will be subjecting themselves to litigation if they take title to the premises agreed to be conveyed to the defendants by the complainants as described in the agreement dated May 28, 1925, made by the complainants and the defendants.

4. The said decree adjudges that the defendants may be obliged at some future time to defend their title (to the premises to be conveyed to the defendants by the complainants as described in the agreement dated May 26, 1925, made by the complainants and the defendants) against claims of persons not now *sui juris*.

5. The said decree orders and adjudges that the bill of complaint shall be dismissed.

6. The said decree orders and adjudges that the complainants pay to the defendants the sum of $1,000, the deposit heretofore paid by the defendants to the complainants, together with interest thereon from July 7, 1925, and that the complainants pay to E. A. and W. A. Schilling, solicitors of the defendants, the sum of $150 attorney fees for the examination of the title to the premises agreed to be conveyed by the complainants as described in the said agreement.

7. The said decree fails to adjudge and order that the defendants specifically perform the terms of the agreement, dated May 26, 1925, made by the complainants and the defendants.

Petition of Appeal.

8. The said decree fails to adjudge and order that the defendants accept the title agreed to be conveyed to them of the premises described in the said agreement and pay to the complainants the balance of the purchase price therefor.

9. The said decree fails to adjudge and order that the defendants convey to the complainants the premises which the said defendants agreed and contracted to convey to the said complainants by the terms of the contract dated May 26, 1925, made by the complainants and the defendants.

Your petitioners humbly appeal from the said parts of said decree as aforesaid, and from every part thereof, on the ground that the same is erroneous, for that:

1. The defendants have not always been, and are not ready, able and willing in all things to comply with the stipulations of the articles of agreement, dated May 26, 1925, made by the complainants and the defendants.

2. The complainants are able to convey a marketable title to the premises described in the agreement, dated May 26, 1925, made by the complainants and the defendants.

3. There is no probability that the defendants will be subjecting themselves to litigation if they take title to the premises agreed to be conveyed to the defendants by the complainants as described in the agreement dated May 26, 1925, made by the complainants and the defendants.

4. The defendants will not be obliged at some future time to defend their title (to the premises to be conveyed to the defendants by the com-

plainants as described in the agreement dated May 26, 1925, made by the complainants and the defendants) against claims of persons not now *sui juris.*

5. It should have been adjudged and decreed that the complainants have sustained the allegations of the bill of complaint and that the relief prayed for by them therein should have been granted, and that the defendants have not sustained the allegations of their counter-claim and that said counter-claim should have been dismissed.

6. A decree should have been made directing that the complainants are not required to pay to the defendants the sum of $1,000, the deposit heretofore paid by the defendants to the complainants, together with interest thereon from July 7, 1925, and that the complainants are not required to pay to E. A. and W. A. Schilling, solicitors of the defendants, the sum of $150 attorneys' fees for the examination of the title to the premises agreed to be conveyed by the complainants as described in the said agreement.

7. A decree should have been made directing that the defendants specifically perform the terms of the agreement, dated May 26, 1925, made by the complainants and the defendants.

8. A decree should have been made directing that the defendants accept the title agreed to be conveyed to them of the premises described in the said agreement and pay to the complainants the balance of the purchase price therefore.

9. A decree should have been made directing that the defendants convey to the complainants

the premises which the said defendants agreed and contracted to convey to the said complainants by the terms of the contract dated May 26, 1925, made by the complainants and the defendants.

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

BENJAMIN NEWMAN,
Solicitor for and of Counsel
with Appellant.

April 10, 1926.

Service of the foregoing petition of appeal, and of a copy thereof, is hereby acknowledged this 21st day of April, 1926.

E. A. and W. A. SCHILLING,
Solicitor for and of Counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

Filed April 26, 1926.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MORRIS BREITMAN, *et al.*, *Complainants-Appellants,* *vs.* HENRY JAEHNEL, *et al.*, *Defendants-Appellees.*	*On Appeal from Chancery.* *Answer to Petition of Appeal.*

The answer of Henry Jaehnel and Ida Jaehnel, appellees, to the petition of appeal of Morris Breitman, Anna Breitman, Nathan Turkel and Augusta Turkel, appellants.

1. These appellees, answering, say that they admit the allegations contained in paragraphs 1 to six, both inclusive, of the petition of appeal filed herein.

2. These appellees are advised, believe and submit that the decree made by the Court of Chancery in this cause, and the rulings of the Court, are just and in accordance with law, in every part.

3. They therefore pray that the said decree may be in all things affirmed.

E. A. and W. A. SCHILLING,
Solicitors of Appellees.

EDWARD A. SCHILLING,
Of Counsel.

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

New Jersey Court of Errors and Appeals

Between

MORRIS BREITMAN, *et al.*,
Complainants-Appellants,

and

HENRY JAEHNEL, *et al.*,
Defendants-Appellees.

On Bill, &c.

BRIEF FOR COMPLAINANTS-APPELLANTS.

This case is brought on a bill for specific performance to compel the defendants to purchase certain real estate owned by the complainants, and the facts involved herein have been agreed upon between the parties and are set up in a stipulation which is a part of the state of the case. There are no facts which are in dispute, and the questions that arise in this matter, result from an examination of the record title of complainants-appellants and the examination of a foreclosure proceeding which is a part of that record.

Complainants' chain of title, briefly stated, is as follows:

(a) Conveyance August 1, 1911, to Salvatore DiComo, Giussepe Russo and Giussepe DiComo, by deed I 49, page 425 (see paragraph 2 of agreed statement of facts).

(b) Mortgage January 19, 1915, from three last mentioned owners to Augusta Bang and Henry Bang for $3,500 by mortgage T 33, page 328 (see paragraph 3 of agreed statement of facts).

(c) December 23, 1917, intestate death of Giussepe DiComo, one of the three tenants in common, leaving a wife, Catalda, and three infant heirs-at-law, Tony, Michelina and Giussepe (see paragraph 4 of agreed statement of facts).

(d) February 14, 1919, foreclosure proceedings instituted against "all necessary and proper parties as defendants," "all of them were duly served," "guardian *ad litem* for the infant heirs-at-law" appointed, "due appearance was entered for them by said guardian," "and procedure applicable to this class of foreclosure was duly followed"; final decree was entered on June 19, 1919, that premises be sold and defendants stand debarred and foreclosed of and from all equity of redemption; *fi. fa.* issued July 3, 1919, and property sold for $6,000 "the then reasonable value of the lands and premises," to Salvatore DiComo; sale confirmed on September 13, 1919, and Sheriff's deed, dated, September 13, 1919, duly delivered and recorded; surplus, above the amount necessary to satisfy the mortgage, was $1,955.28, from which the widow and infant heirs-at-law received their proportionate part, the share of the infants being paid to their respective duly authorized guardians. "The proceedings for foreclosure, sale and distribution of surplus were all due and regular" (see paragraph 5 of agreed statement of facts).

(e) Conveyance on December 22, 1919, by Salvatore DiComo, *et ux.*, to Guissepe Russo, *et ux.*, of a one-quarter interest in the premises, and a re-conveyance by Guissepe Russo, *et ux.*, to Salvatore Di Como, *et ux.*, on March 18, 1922; conveyance of various portions of the mortgaged premises to various grantees, and a conveyance on January 22nd of the premises involved in this case to complainants. It is to be noted that

all the premises covered by the mortgage foreclosed, as originally owned by the three tenants in common, were not conveyed to complainants, but only a part thereof; and that complainants erected upon the premises buildings of the value of approximately $60,000 (see paragraphs 6 and 8 of agreed statement of facts).

From the above record title the defendants in their answer to the bill of complaint have set up and raised but one issue, and that is, that when Salvatore DiComo purchased the property at said foreclosure sale he became seized of the same as trustee for himself, and his other co-tenants.

In addition to the above Vice-Chancellor Berry, who sat in the Court below, has added in his opinion a discussion on the question of the marketability of complainants' title, and dismissed the bill of complaint on the further ground that complainants' title rested upon a doubtful question of law or fact, and was hence unmarketable.

POINT I.

Can a tenant in common purchase the common property at a foreclosure sale, and hold the title so acquired by him for his own benefit, or is it impressed with a trust in favor of his other co-tenants?

I am unable to find any case directly in point on this question in our State.

The general rule of law throughout this country seems to be as is stated by Vice-Chancellor Berry in his opinion below, that

> "A tenant in common in possession and enjoyment of a common property occupies a confidential relation to his co-tenants, and because of this relation there is an implied

> obligation on his part to sustain and protect the common title. Therefore, if a co-tenant in possession of common property purchases that property, either directly or indirectly at a sale under foreclosure or a mortgage or deed of trust, the purchase will be deemed to have been made for the benefit of all of the co-tenants; provided however, the other co-tenants elect within a reasonable time so to consider the purchase and offer to contribute their respective proportions of the purchase price" (this is copied from 6 American Law Reports, p. 297).

The other rule is also set up in 6 American Law Reports 297, page 305, and is as follows:

> "In a few jurisdictions, the mere relation of co-tenancy is not considered to be of such a confidential nature as to forbid the purchase by one co-tenant of the common property at a foreclosure sale, for his own benefit. It is the rule, therefore, in those jurisdictions that if a co-tenant in possession of the common property purchases the property at a foreclosure sale, he acquires the absolute title, divested of any claim or right of his former co-tenants, provided the sale was properly advertised and *entirely free from fraud.* Starkweather *v.* Jenner (1910) 216 U. S. 524, 54 L. ed. 602, 30 Sup. Ct. Rep. 382, 17 Ann. Cas. 1167; Jackson *v.* Baird (1908) 148 N. C. 29, 19 L. R. A. (N. S.) 591, 61 S. E. 632; Troxler *v.* Gant (1917) 173 N. C. 422, 92 S. E. 152; Kennedy *v.* DeTrafford (1897) A. C. (Eng.) 180, 66 L. J. Ch. N. S. 413, 76 L. T. N. S. 427, 45 Week. Rep. 671."

The general rule of law as first above quoted is not a rule of law that is hard and fast, and cannot even in those jurisdictions that hold it to be the law, be regarded as fixed and set and applied indiscriminately to all cases and conditions.

The leading case cited to maintain the general rule is the case of *Van Horn* v. *Fonda,* 5 Johns. Chancery 409, N. Y. In this case the opinion was

written by Chancellor Kent, and he says at the commencement of his opinion, "I will not say, however, that one tenant in common, may not, in any case purchase in an outstanding title for his exclusive benefit."

The general rule of law rests upon certain presumptions, namely; that the community of possession necessarily brings those entitled to the possession in frequent contact with one another and thereby affords to the designing abundant opportunities for securing the confidence of the unwary; that the interest of each co-tenant can usually be advanced only through the general welfare of all; that each tenant in law is deemed to be in possession with the other (see Freeman on Co-tenancy and Partition, paragraph 150). And in the case of a purchase under a tax lien rests upon the theory that one cannot be allowed to acquire a right by his own default, and on the above ground that a confidential relationship exists between co-tenants (*Roll* v. *Everett,* 73 Eq. 697). These are stated as being axioms of the relationship of co-tenancy, but a careful study of the cases to support the general rule will show that they are usually applied where fraud is present in some degree, and that whenever fraud is present the Court eagerly seized upon the presumptions to sustain the general rule.

In our case here before the Court I stress particularly the facts that:

(a) There are no elements of fraud in this case. The three co-tenants, being apparently unable or unwilling to pay the mortgage, *refused* to pay the same and the mortgage was foreclosed by the Sheriff of Essex County at a usual foreclosure sale (see paragraph 5 of the Stipulation of Facts, lines 14-21).

(b) All the parties to the foreclosure sale were properly served; a guardian *ad litem* appeared for the infant defendants, and the property was sold for more than the amount of the decree, showing that there must have been some bidding at the Sheriff's sale (which latter is, of course, a conclusion I draw from the Stipulation of Facts).

(c) The sale price to Salvatore DiComo, it has been stipulated, was the then reasonable value of the lands and premises foreclosed (see p. 11 of State of the Case, line 11).

(d) The sale to DiComo was confirmed by an Order of the Court of Chancery, and a deed given to him by the Sheriff.

(e) The infant and other co-tenants have ratified the sale in that after the sale they made application to the Court of Chancery for their share of the surplus fund, and received it.

(f) That the complainants, Breitman and Turkel, are innocent holders for value, and have improved their lands and premises by substantial improvements.

Freeman, in his book on Co-tenancy, section 156, says that:

> "The purchase made by a co-tenant of an outstanding title or encumbrance is not void, nor does the interest so acquired by him, or any part of it by operation of law, vest in his co-tenants. They may not wish to share in the benefits of his purchase, for in their judgment, the title purchased by him may not be paramount to that before held in common. The law gives them a privilege which they may assert: * * * The privilege may be waived by an express refusal to reimburse the co-tenants for his outlay, or by such a course of action as necessarily implies a refusal."

"But where the purchasing co-tenant has paid his taxes, and is therefore free from fault, and there is nothing in the relations between the parties imposing any obligation on either to pay the charge upon the moiety of the other, then it is difficult to assign any reason for restraining the tenant not in default from bidding for his own use at the tax rate sale" (see Freeman on Co-tenancy and Partition, section 158).

"The reasons which prevent a co-tenant from purchasing and asserting an outstanding title, do not apply with equal, and generally not with any, force against his purchasing the title of his co-tenants, whether the sale be voluntary or involuntary. Unless some *fraud* can be shown to have been perpetrated, or some *superior knowledge taken advantage of,* there is no doubt that a co-tenant may purchase at an execution or judicial sale the moiety of any of his companions in interest, and that he may retain and assert the title thereby acquired as fully as though he were a stranger to the judgment defendant" (see Freeman on Co-tenancy and Partition, section 165).

In 38 Cyc., page 45, 6th line, on the subject involved, it is there stated that:

"Since the principle that the one in possession acts on behalf of all with whom he has a common interest in the property, is based largely on the special circumstances under and intentions with which the act alleged or claimed to have been done for the benefit of all was performed, and as presumption generally enters very largely into the determination of the intention with which the act was done, it necessarily follows *that if there be direct evidence, making presumption unnecessary, the question of common interest will be determined on the evidence adduced and not on the general rule based on presumption.* Thus the purchase of a reversion by one co-tenant is not adverse to the interest of

> his termor co-tenant; nor is the purchase by one co-tenant of a life-estate adverse to the interests of the co-tenants in the remainder; nor, the evidence not showing distinctly that the purchase was made on behalf of the co-tenants, does the purchase by one of them of certain land excepted from the conveyance under which they acquired title from one who had bought it both tracts at tax sale, create a trust. The purchase of an outstanding title by a tenant in common to purchase peace does not inure to the benefit of his co-tenants who were made his co-defenants, but failed to join him in the defense."

It is my opinion, and I submit that none of the presumptions which go to make up the general rule can be resolved against Salvatore DiComo, the co-tenant, who purchased in at the foreclosure sale. He had a right to protect himself, and he had a right to be even selfish to protect himself. His other co-tenants had refused to take care of their own common interest. If the general rule is to be laid down in this case, then Salvatore DiComo could not make a bid to protect his individual one-third interest at the Sheriff's sale, but would have to take whatever strangers would bid for the property. Besides if he did not care to sit idly by and see his property sold and desired to purchase for himself then he must perpetrate a fraud upon the Court and buy the property in for himself using someone as a subterfuge. I contend that on the facts set forth in our stipulation this foreclosure sale was in effect a partition at which a tenant in common may freely purchase.

The leading case referred to in setting up the minority rule is the United States Supreme Court case of *Starkweather* v. *Jenner,* 216 U. S.

524, particularly at page 528, 54 L. Ed. 602, 30 Sup. Ct. 382, where the Court states:

> "But is it plain that the principal which turns a co-tenant into a trustee who buys for himself a hostile outstanding title *can have no proper application to a public sale of the common property, either under legal process* or under a power in a deed of trust. In such a situation, the sale not being in anywise the result of collusion nor subject to the control of such a bidder, he is as free, all deceit and fraud out of the way, as any one of the general public."
>
> "Even a trustee has been held competent to purchase the trust property at a judicial sale, which he has no interest in, nor any part in bringing about, in which sale he in no way controls." Twinlick Oil Co. *v.* Marbury, 91 U. S. 587; Allen *v.* Gillette, 127 U. S. 589.

In England the rule that has been followed in a case, where the facts are almost the same as here, is set up in the matter of *Kennedy* v. *De-Trafford* (*supra*). There two tenants in common made a mortgage and the mortgagee sold it to one of the co-tenants under a power of sale in the mortgage. The mortgagee communicated his intentions to sell the property before his sale to both owners. He received no answer from the appellant and sold to the other co-tenant. The Court says, page 189:

> "But then it is said the mere fact that Kennedy was co-owner with Dodson of this property creates such a relationship between them that the one co-owner could not take this property and hold it for himself, but that the other co-owner is entitled on equitable grounds to have it declared that the benefit of one-half of that purchase should be his. My Lords, no authority has been cited in support of such a proposition. Cases have been referred to, of a very different description, where the owner of an

estate under a settlement, a tenant for life for example, has been held incapable of obtaining an enlargement of that estate for himself alone. It has been said that whatever benefit he gets must inure to the benefit of all taking under settlement. That is a totally different case from this case."

"The only authority, if it can be so called, which has been cited is the case before Chancellor Kent (apparently VanHorn *v.* Fonda, cited above); but he commences his observations by saying that he is not going to lay down a general rule which would be applicable to such a case as this. He deals with the particular case, the circumstances of which were peculiar and of immense complication, and he certainly does not lay down any rule or doctrine of law which supports the argument which has been addressed to your Lordships. It is not necessary to enter into the details of that case. It is enough to say that even if it is to be taken as enunciating a rule of law which would be as applicable in this country as in America, it does not enunciate any rule of law which would be sufficient for the appellant in the present case."

It is interesting to read the reasons given in a Carolina case in point for sustaining a sale. In that case, *Jackson* v. *Baird,* 148 N. C. 29, 61 S. E. 632, decided in 1908, the Court says:

"It is likewise held in England that *there is no fiduciary relation existing between tenants in common,* as such, and that *a tenant in common* of property previously mortgaged *who purchased the entire property at the mortgage sale, was entitled to hold it for his own benefit.* This is an interesting case decided by the House of Lords and Privy Council in which an elaborate opinon is delivered by Lord Herschell (*supra*) and concurred in by the other Lord Justices. See also 17 Am. & Eng. 676, and cases cited; also, Freeman on Co-tenancy, sections 162-165; Blodgett *v.*

Hildreth, 90 Mass. 186; Sutton *v.* Jenkins (at this term) 60 S. E. 643."

"When the land in controversy descended upon these plaintiffs and their co-heirs, John Baird, it was encumbered with the mortgage to Reid made by their ancestors. *When that mortgage was foreclosed in the manner allowed by law, any one of the heirs had a right to purchase the entire estate to protect his own interest, and he would acquire the title discharged of any trust to his co-heirs.* There is no evidence that John Baird agreed to purchase for the benefit of the other heirs, or endeavored to suppress bidding, or practice any other fraud upon his co-tenants. So far as the record discloses, the sale appears to have been fairly made by the trustee, and it was open to the plaintiffs or any one of them to attend and purchase if they so desired."

For the same reasons that Lord Herschell refused to follow the general rule of law, I submit the general rule can not be followed in this case. I regard the infants' acceptance, through their guardian, of the surplus in the hands of the Court of Chancery as an election to accept the sale. There was no fraud involved. The sale on the decree to foreclose, was in my opinion, manifestly a partition of the real estate, or at least a termination of the co-tenancy and left each co-tenant free to bid for himself alone.

There are any number of titles in this State that rest upon a similar state of facts, and that stand marked unmarketable with the opinion in this case in the Court below.

I submit that the general rule of law as first stated herein is based on presumptions and where, as here, the presumptions fail, the rule must fall. I, therefore, submit that complainants' title is good and that the opinion of the Court below be reversed.

POINT II.

Given a certain set of facts, involving a question of disputed law, how far must the Court delve into the problem of law, when it is hearing a case in which the complainant seeks to specifically enforce a contract for the sale of land upon a defendant?

In the case at bar, Vice-Chancellor Berry in his opinion discusses this case as involving a disputed question of law or fact. I submit there are no facts in dispute in this case as they have all been stipulated and agreed upon.

The dispute in this case, is one as to law, and on that question the rule of law in this State is stated by Vice-Chancellor Stevenson in *Barger* v. *Gery,* 64 Eq. 268, as being;

> "Where the alleged doubt in regard to the offered title relates to a matter of law, a decision of the Court in the suit for specific performance, undertaking to establish what the law is, must, of necessity, have some effect either to strengthen or to disspell the doubt. How far the Court will undertake to settle a disputed question of law out of which the doubt in regard to the title has arisen, has been the subject of a variance of judicial opinion, although the general trend has been toward enlarging the jurisdiction of the Court of Equity in dealing with the doubtful matter of law."
>
> "But whatever curative power upon a doubtful title the Court of Chancery or the Court of Errors and Appeals, on appeal from the Court of Chancery, can exercise in a suit for specific performance, where the doubt relates to some general rule of law, or the constructions of some form of language employed in a writing, practically very little, if any, such curative power can be exercised where the doubt relates to a mere fact. The reason is apparent. A disputed

> fact may be proved in one litigation today and be disproved in another litigation between different parties tomorrow. The evidence which clearly established a fact at one time may be wholly beyond reach a year or five years later."

In the case of *Newark City National Bank* v. *Crane,* 45 Atl. at 976, Vice-Chancellor Pitney said:

> New Jersey cases "have fairly established the rule that, in a suit for specific performance of a contract for the conveyance of land, where the defendant sets up as a defense the defect of the title of the complainant and its validity depends upon the construction of a written instrument, deed or will, the Court may construe the deed or will and the construction, so adopted, so far at least as is necessary for the determination of the question then before the Court, will be binding—subject always to the right of appeal—on all persons interested in the question whether parties to the suit or not. Such determination is the determination of a question at law."
>
> "It is quite impossible to entertain the notion that after the Court of Errors and Appeals has determined that a particular estate has passed and become vested by virtue of a particular clause in a deed or will, and compel the purchaser to accept and pay for the property on the strength of such determination, it will afterwards permit a person, not a party to the record in which that determination was made to procure from it a contrary determination."
>
> "It is on the very ground that the Court will in such case stand by its determination that it undertakes to construe deeds and wills in debatable cases for the purpose of specific performance. The case of Crukchank *v.* Parker, 51 Eq. 21, 52 Eq. 310, above cited is an illustration of the power of the Court to determine and finally settle a debatable question of that kind."

In the case of *Fahy* v. *Cavanagh,* 59 Eq., page 282, 44 Atl. 156, Vice-Chancellor Pitney said:

> "It is well settled and I think so settled upon sound principles that in suits for the specific performance of contracts, this Court may compel a defendant to take a title, the validity of which depends upon what may be properly described as a doubtful question of law, and may itself, determine that question of law for the purposes of the particular case."
>
> "No harm will be done to the defendant because by an appeal to the Court of Errors and Appeals that Court, which is at once a court of law and of equity, may finally determine the question of law and settle it as against all the world for the parties to the suit or not.
>
> But if the title depends upon a question of facts, which is not a matter of record and cannot be so made, then the rule is equally well settled the other way, namely, that this court will not compel an unwilling purchaser to take the title."

In *Kohlrepp* v. *Rem,* 79 Eq., p. 389, V.-C. Garrison makes the following statement:

> "In the case at bar there has been enough said to show that there are questions of two kinds to be considered—the first, relating to the execution of the deed, is a question of law; the second, relating to declarations of sale and the question of adverse possession, are issues of fact. They are both properly characterized as 'doubtful.' The Court of Chancery in a line of specific performance cases has been dealing with the question of how far it should go in deciding doubtful question of law—holding that upon a question of fact they would not force the title upon an unwilling purchaser, unless the facts to be established to make his title good were provable by public records, or by other evidence obtainable by a holder of the title at any time thereafter when needed. *But the various* judges who *have dealt* with

> the matter in the Court of Chancery have seemed to be of the opinion that they could not escape the responsibility of determining the proper decision of a doubtful question of *law.*"

In the case of *Methodist Episcopal Church* v. *Roberson,* 68 Eq., page 433, Vice-Chancellor Bergen said:

> "The facts submitted to the Court by the stipulation are very meager and unsatisfactory, but I must determine the question upon the case as counsel have submitted it."

The case of *Deseumeur* v. *Rondel,* 76 Eq., page 402, Vice-Chancellor Garrison, refusing to decree specific performance, states:

> "In case of specific performance, in this state, it has been held that the Court should to the extent to which it is possible to do so, settle doubtful questions of law affecting the title and compel the vendee to take a title which it finds free from defect, so far as doubtful questions of law are concerned."

I, therefore, respectfully submit on this point that as there are no facts in dispute in this case and only a doubtful question of law, the Court below should have entered into the question of law and decided it as it pertained to this case.

Respectfully submitted,

BENJAMIN NEWMAN,
Solicitor for and of Counsel
with Complainants-Appellants.

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

New Jersey Court of Errors and Appeals

Between

MORRIS BREITMAN, *et al.*,
Complainants-Appellants,

and

HENRY JAEHNEL, *et al.*,
Defendants-Appellees.

On Bill, &c.

BRIEF OF DEFENDANTS-APPELLEES.

This is an action for the specific performance by the complainants of an agreement of sale, whereby the defendants agreed to purchase from the complainants certain premises in the Town of Irvington by warranty deed, free and clear of all encumbrance. The defendants allege that the complainants are unable to convey said premises according to said agreement by reason of the fact that the grantor of the complainants, one Salvatore DiComo, being a tenant in common with a number of other persons, purchased said premises from the sheriff of Essex County at a foreclosure sale, and that he thereby became seized of said premises as trustee for himself and his other co-tenants, three of whom are minors, and could not give good title to the complainants. The agreed state of facts clearly disclose the true situation.

POINT I.

A purchase by one co-tenant at a foreclosure sale, or any other sale, of an outstanding title or encumbrance is deemed to have been made for all the co-tenants, and such purchase by him, in his own name, is impressed with a trust in favor of his other co-tenants.

Defendants' contention is based on the almost universal rule that "one co-tenant cannot purchase an outstanding title or encumbrance affecting the common estate for his own exclusive benefit, and assert such right against his co-tenants."

An exhaustive search discloses but one case which might seem, at first glance, to be opposed to the above doctrine, namely, *Jackson* v. *Baird* (19 L. R. A. (N. S.) 591), which holds that an encumbrance given by a predecessor in title is not an outstanding title within the meaning of the *rule* that the purchase of such title by one co-tenant will inure to the benefit of all. This case,however, expressly recognizes the above rule (on page 593), but is decided on the theory that a mortgage made by a common ancestor is not an outstanding adverse title. In the present case the mortgage foreclosed, and on which title is based, was not made by the common ancestor, but by three co-tenants, one of whom was the grantor of the complainants, and another of whom died intestate, leaving him surviving his widow and three infant children. Complainants and defendants, however, agree that it is immaterial whether the lien or outstanding interest was created by the common ancestor or not. A few other cases might be found apparently holding contrary to the above rule, but upon examination of the facts in each case it is apparent

that they are decided upon other facts and are not contrary to said doctrine. The note to *Jackson* v. *Baird,* above cited, clearly distinguishes those cases cited therein. None of these cases are authority for *Jackson* v. *Baird.*

On the other hand, there are a great number of cases throughout the country upholding the doctrine above set forth. A number of these cases are hereinafter discussed.

In *United N. J. R. & C. Co.* v. *Consolidated Fruit Jar Co.,* 55 Atl. 46, on page 48 (last line), the Court said:

> "It is well established that, as a general rule, one tenant in common will not be permitted to purchase a superior outstanding claim for his own exclusive benefit. Freeman on Co-Tenancy, paragraph 154. * * * It is not necessary to decide this question, for here, as I have stated, a relation of confidence did in fact exist, and, according to all the cases, this would prevent the tenant purchasing the outstanding title from claiming the exclusive benefit of his purchase."

In 7 Am. Law Reports 297 the general rule is laid down that

> "a tenant in common in possession and enjoyment of the common property occupies a confidential relation to his co-tenants, and because of this relation there is an implied obligation on his part to sustain and protect the common property or title. It is, therefore a general rule that if a co-tenant in possession of common property purchases that property, either directly or indirectly, at a sale under foreclosure of a mortgage or deed of trust, the purchase will be deemed to have been made for the benefit of all the co-tenants; provided, however, the other co-tenants elect within a reasonable time so to consider the purchase and offer to contribute their respective proportions of the purchase price."

In *Barnes* v. *Boardman,* 25 N. E. 623, on page 623 (last paragraph), the Court recognized

> "the rule that, when tenants in common are actually in possession, or are entitled to immediate possession, a purchase of an *encumbrance* on the property will generally be deemed to have been made for the benefit of all, if they shall consent to pay their proportionate share thereof, and that to this extent a certain fiduciary relation exists between the tenants in common, is one that is sustained by many authorities."

On page 624 of the same case the Court said

> "if the life-tenant could purchase a mortgage, of which he is bound to pay the interest, and then enforce it on his own estate and that of the reversioner, it is obvious that, if the property is worth more than the mortgage, and the life estate is thus of value, injustice would be done the reversioners * * *." In spite of the fact that "there was no evidence of any intentional concealment on the part of the defendant Boardman Jr. of the assignment, foreclosure, or conveyance to him, or any attempt to mislead the parties in interest in regard thereto, or in regard to any material fact, unless it is to be inferred from the absence of evidence that he communicated these facts" (page 623), the Court (on page 624) said: "Before he could complete a foreclosure which should deprive them of this estate they were entitled to know from him that it was imperiled by his proceeding, and that he was the life tenant, liable, if he would preserve his tenancy, to contribute to the payment of the mortgage. As between him and them it is for him to show that he has given them the opportunity so to do by informing them of the purchase of the mortgage by himself and of his ownership of the life estate. This he has failed to do."

In *Carpenter* v. *Carpenter,* 29 N. E. 1013, which was an action to set aside a purchase by

one co-tenant of a property at a *foreclosure* sale, the Court said (on page 1015):

> "the defendants and the plaintiffs had a community of interest arising under the devise. The defendants, or some of them, were in the actual possession and control of the common property. They were barred to do nothing with a view to prejudice the interests of the plaintiffs. They could not buy an outstanding title to defeat the right of their co-tenants."

In *Knowles* v. *Barnhardt,* 7 N. Y. 474, on page 480, the Court said:

> "There was also a purchase money mortgage to Durfee upon which was due at the death of Barnhardt about $300, which the widow also paid; and when it was paid, in 1841, took an assignment to herself, and in 1870 foreclosed the same and bid in the premises in her own name, and claims that the interests of the heirs were thereby cut off. This claim cannot be sustained. First: The presumption is that the mortgage was paid from the rents and profits. Second: When it was paid it became extinguished and could only be available to the defendant upon an accounting. Third: The defendant occupied such a fiduciary relation to the property (co-tenant) and the heirs as prevented her from purchasing or foreclosing the mortgage for her individual benefit. She cannot be regarded as a mortgagee in possession, and she sustained other and more confidential relations than those of a mere mortgagee."

In *McPheeters* v. *Wright,* 24 N. E. 734, on page 737, the Court said:

> "Joint tenants, parceners and tenants in common are within this principle (that no party can be permitted to purchase an interest where he has a duty to perform inconsistent with the character of a purchaser), and, therefore, a joint tenant coparcener, or tenant in common is not per-

mitted to purchase an outstanding title or incumbrance for his own exclusive benefit, or to set up such title as against his co-tenant. But such purchase will inure to the joint benefit of all the co-tenants upon their contributing to the expense of it, in proportion to their respective interests."

Again in *Ladd* v. *Kuhn,* 61 N. E. 747, on page 749:

"Where two devisees are in possession under an imperfect title, derived from the common ancestor, there would seem naturally and equitably to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim to the prejudice of the other. It is like an expense laid out upon a common subject by one of the owners, in which all are entitled to the common benefit, or bearing a due portion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one then should be able, without the consent of the other, to buy in an outstanding title and appropriate the whole subject to himself, and thus undermine and oust his companions. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each others' equal claim, which the relationship of the parties as joint devisees created. Community of interest produces a community of duty, and there is no real difference on the ground of policy or justice whether one co-tenant buys up an outstanding incumbrance or an adverse title to disseize and expel his co-tenant.

Kent v. *Barger,* 105 N. E. 741, at page 742:

"It has long been the settled law in this state, that a tenant in common in possession cannot acquire color of title in himself to

the whole of the premises by procuring for his own exclusive benefit an outstanding, adverse title; that the title so acquired inures to the benefit of all the tenants in common." The property in question was purchased by one of the co-tenants at a *foreclosure* sale of a mortgage made by the common ancestor. "The argument of counsel that defendants-in-error are barred by their own laches in neglecting for years (Maude Barger for near *13 years* and the two Kent boys *from the time they became of age,* 11 and 9 years, respectively) to assert their alleged rights in the land * * * cannot be upheld."

Stianson v. *Stianson,* 167 N. W. 237, at page 241:

"While the *rule* is well settled that *equity will not permit a co-tenant to acquire an adverse claim* to common property through administration proceedings or otherwise *for his own benefit* to the exclusion of his co-tenants; it requires the exercise of reasonable diligence on the part of a co-tenant, *having or charged with knowledge of all the facts,* in making an election to participate in the benefits of such transaction, and within a reasonable time to bear his portion of the expenditures necessarily involved therein."

On page 240 of the same case:

"For more than nine years *after the minors became of age,* these plaintiffs, with knowledge of all the facts, have slept upon their rights without seeking to participate in the benefits of the purchase by defendant of this property at the *foreclosure sale,* and without at any time offering to pay any share of the incumbrance on the land, or any of the taxes accruing thereon for more than seventeen years."

Moy v. *Moy,* 56 N. W. 568:

"It is well settled that one tenant in common cannot purchase an outstanding in-

cumbrance (here one co-tenant bought at a *foreclosure sale,* and, after obtaining a sheriff's deed, attempted to oust his co-tenant) and, after it matures into a title, set it up against his co-tenant."

Wyatt v. *Wyatt,* 32 So. 317, at page 318:

"The legal title to the Oregon plantation at the death of Lydia Wyatt was in her, and upon her death it descended to her husband and children in equal parts, and they became co-tenants thereof * * * . The purchase, therefore, of the Oregon plantation by F. A. Wyatt (under a *mortgage foreclosure sale*), one of the co-tenants, at the sale of it under the trust deed, did not give him a greater right or interest in it than he had before the purchase."

Watson v. *Vinson,* 67 So. 61, at page 63:

"Dr. Watson did not acquire full title to the land at the sale in foreclosure of the deed of trust given by his former wife, then deceased, and himself. When Mrs. Watson died in 1884, intestate, her three children, all very young, and her husband were her heirs at law, and they together inherited the land, each receiving an equal interest. His purchase of the land under the deed of trust (*like a mortgage in New Jersey*) inured to the benefit of all of the co-tenants. *The title remained in the four as before the sale.*"

Hill v. *Coburn,* 75 Atl. 67, at page 73:

"It is undoubtedly a well-settled general *rule* that one co-tenant cannot purchase an outstanding title or *incumbrance* affecting the common estate for his own exclusive benefit, and assert such right against the other co-tenants. Such a purchase will inure to the benefit of him and his co-tenants providing the latter elect within a reasonable time to avail themselves of such adverse title, and contribute their ratable share of the expense of acquiring it."

The point in question is also fully discussed in 7 R. C. L. 857, 19 L. R. A. (N. S.) 591, 6 Am. Law Reports 297, 19 Am. Dig. 146, and in the following cases;

Hinters v. *Hinters,* 21 S. W. 456;
Oliver v. *Hedderly,* 21 N. W. 478;
Montague v. *Selb,* 106 Ill. 49;
Van Horne v. *Fonda,* 5 Johns, Ch. 388;
Tisdale v. *Tisdale,* 64 Am. Dec. 775, and
Ennis v. *Hutchinson,* 30 N. J. Eq. 110.

A number of cases have been decided in this State while uphold the rule that if one co-tenant purchase at a *tax sale,* he thereby becomes trustee for the other co-tenants and is entitled to contribution from them. We submit that there is no difference between a tax sale and a judicial sale. Among these cases are:

Woolston v. *Pullen,* 88 N. J. Eq. 35, on page 38:

"tenants in common are equally obligated to pay all the taxes upon the common property, and, where one of them redeems the property from taxes or discharges a lien upon the common property, he has a right of contribution from his co-tenants according to their respective shares.

Roll v. *Everett,* 73 N. J. Eq. 697, at page 701:

"The law is well settled that where one tenant in common acquires a tax title or redeems land from a tax sale, his act inures to the benefit of his co-tenant upon their reimbursing him for their proportionate share of the amount paid by him. The principle is in some cases put upon the ground of a confidential relationship between the tenants in common. Other cases rest the doctrine upon the principle that one cannot be allowed to acquire a *right* by his own default. This principle would be violated if a tenant in common, who is equally obligated to pay all the taxes upon the joint property, were allowed to acquire rights superior to his co-

tenant by defaulting in his obligation, and forcing the public authorities to take proceedings for the collection of the tax."

In the same case, on page 702:

"The right of a tenant in common who discharges a *lien* upon the common property, is entitled to contribution from his co-tenant, and as security he is entitled to a lien upon his co-tenants' share of the property."

Hopping v. *Gray,* 82 N. J. Eq. 502, on page 506:

"It is not competent for a trustee to assert a legal title by adverse possession against the *cestui que* trust; his title is that of the *cestui que* trust, and there are none of the elements of adverse possession in the relation between them. One tenant in common holds possession for all tenants in common, and except under very peculiar circumstances, one cannot assert title by adverse possession against the other."

Coburn v. *Page,* 74 Atl. 1026, at page 1027:

"It is the well-settled doctrine that tenants in common stand in such confidential relation to one another in respect to their interests in the common property and the common title under which they hold it that it would generally be inequitable to permit one, without the consent of the others, to buy in an outstanding adversary claim and assert it for his exclusive benefit to undermine the common title, and thereby injure and prejudice the interests of his co-tenants. In such case the purchasing tenant is regarded as holding the claim so purchased in trust for the benefit of all his co-tenants in proportion to their respective interests in the common property, who seasonably contribute their share of his necessary expenditure."

The authorities are collected in this case and are quite fully discussed.

In the case of *Egan* v. *Egan,* reported in 131 Atl. page 129, the obligations and duties of co-tenants toward each other are fully discussed. On page 130 the Court said,

> "It is elementary that, if one co-tenant acquires a tax title, or redeems land from a tax sale, his act inures to the benefit of all his co-tenants upon their reimbursing him for their proportionate share of the amount paid by him, and, until such payment is made, he has a lien upon his co-tenant's share."

We contend there is no difference between a purchase at a tax sale and a mortgage sale.

POINT II.

A purchaserof real estate is chargeable with notice of such facts affecting the title as may be ascertained by reference to the chain of title of such property as spread forth upon the public records.

In *Den* v. *McKnight,* 11 N. J. L. 385, at page 393, the Court said:

> "The defendant, although a purchaser from the executors of Burton, for a valuable consideration, is chargeable with notice of the *legal fraud,* and stands, therefore, on no more firm ground that Burton would have done. The title of the premises in his hands is as liable to be impugned as if in the hands of Burton. A purchaser with notice is in no better situation than the person from whom he derives his title and is bound by the same equity * * *. He is presumed conusant of the deeds under which he claims * * *. The deeds from Burton and wife and Taylor to Abbott and from Abbott to Burton and wife, bore date on *successive days* and were for the same amount of consideration money. A sale and conveyance on the very next day after the purchase, is, in the country, out of the

> ordinary sphere of hasty speculation, an unusual occurrence; still more so, if for the same price, and yet more, if to the very same person from whom the purchase was made. Would not such facts awaken suspicion in the most unthinking confidence? Now if these facts are not in themselves presumptive evidence of legal fraud, yet they are such as should have excited attention and have put the defendant upon inquiry. Information sufficient to put a party in inquiry is constructive notice, or notice in law."

To like effect are *Mitchell* v. *D'Olier,* 68 N. J. L. 375, and *Bock* v. *Koch,* 4 N. J. Adv. Reports 185.

In the case at bar we particularly call to the attention of the Court the following facts: On *December 23, 1919,* Salvatore Di Como, one of the co-tenants, purchased said premises in his own name at a foreclosure sale, and on *the same day* conveyed a one-quarter interest to Guiseppe Russo, one of the original co-tenants. The widow and children of the third co-tenant, namely Guiseppe Di Como (who had died on December 23, 1917), did not, at any time after said sale become the record owners of said property, or any portion thereof.

Under these circumstances, the appellants acquired title to the premises in question with full notice of whatever outstanding equities or trusts this property was charged with.

While it is true that Salvatore Di Como purchased the premises at the sheriff's sale for a valuable consideration, we contend that he had *actual notice of existing equities and was not a holder without notice,* as he is chargeable with knowledge of the law, which we believe (and as is hereinbefore set forth) prevented him from

purchasing the premises in his own name free of the interests of his co-tenants. We submit that it was a joint and several obligation of all the co-tenants to pay the interest on the mortgage when the same became due, and, if the other co-tenants failed to pay the same, it was his duty to make payment. By his paying the same, he would thereby have an equitable lien to that extent. The common ancestor died on December 23, *1917* and the foreclosure proceedings were instituted on February 14, *1919,* a period of over one year. During this period, interest and taxes were paid by someone. If paid by Salvatore Di Como, then, upon a demand on and a refusal by the other co-tenants, he had a right to file a bill for the partition of the lands. He should not have permitted the interest on the mortgage, his own obligation as well as that of the other co-tenants, to remain in default so that the mortgagee foreclosed. He owed both a legal and equitable duty to his co-tenants and could not take advantage of his own default of this duty.

POINT III.

A Court of Chancery will never compel a purchaser to take title when there is a probability that the acceptance thereof may involve the purchaser in litigation, or where there is a doubtful question of law or fact.

In the case of *Barger* v. *Gery*, cited by the appellants, in 64 N. J. Eq. 263 at page 270,

> "the authorities, I think, establish the rule as a safe one that a title dependent upon a fact must be regarded as marketable when (1) the fact is so *conclusively* proved in the suit for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law, and

(2) where there is no reasonable ground for apprehending that the same fact cannot be, in like manner, proved, if necessary, at any time thereafter for the protection of the purchaser."

And again in the same case at page 269,

"a specific performance suit will never be decreed at the suit of the vendor whenever the doubt concerning his title is one which can only be settled by a further litigation, or when the Court can see that the purchaser will, with reasonable probability be exposed to *bona fide* adverse claims on the part of third persons, and to the risk of litigation for the purpose of removing such claims * * * The purchaser should have a title which should enable him not only to hold his land but to hold it in peace; and if he wishes to sell it to be reasonably sure that no flaw or doubt will come up to disturb its marketable value."

The case of *Newark City National Bank* v. *Crane,* 45 Atl. 976, which is also cited by the appellants, is a suit involving the construction of a will and not one involving specific performance.

The facts in that case were that the construction of a clause of a will had been determined by the Court of Chancery in a previous suit of *Crane* v. *Bolles,* and which Court ruled on the particular clause of the will involved. On page 976 the Court said:

"it is plain, therefore, that neither party is bound by the decree proper in either cause, which is relied upon, unless the failure of the bank to make itself a party to the first suit had that effect. But there is a clear distinction between a decree and the law decreed by the Court which produces that decree, and though a party may not be bound by a decree, as such, he may be bound so to

> speak, by the law which produces the decree."

We submit that in the above-cited case there was a decree previously made establishing the law as to the point involved; there was no longer any doubt. However, in the case at bar, there has been no previous adjudication or ruling. In fact, the legal question involved is a debatable one. In other words, there is here involved a doubtful question of law.

In *Tillotson* v. *Gesner,* 33 N. J. Eq. 313, at page 326, the Court said,

> "if the character of the title be doubtful, although the Court were able to come to the conclusion that, on the whole, a title could be made that would not probably be overthrown, this would not be good title enough; for the Court had no right to say that their conclusion, or their opinion would bind the whole world, and prevent an onslaught on the title * * *. The Court cannot satisfactorily or conclusively settle a title in the absence of parties who are not before them in the suit to assert their estate or interest in the lands."

In *Gosman* v. *Pfistner,* 80 N. J. Eq. 432, which was a suit for specific performance where the record title to land showed a conveyance by the trustee to a third person and a reconveyance to the trustee individually, the Court refused to compel the purchaser to take the title. In that case Vice-Chancellor Howell said:

> "That was a case for specific performance in which it appeared that there was a conveyance of land voluntary on its face made by the defendant in a suit just before a judgment for a large sum was rendered against him, which would have been a lien on the land if such conveyance had not been made. Specific performance of the agreement was not enforced upon the ground

> that there was apparent upon the face of the papers a situation which might subject the purchaser to litigation and make the title doubtful, and that if the title to land be doubtful equity will not compel the defendant to take it and so expose himself to the hazard of litigation. Upon this theory courts of equity have frequently declined to compel a purchaser to accept title which, though questionable, the Court believed to be good. * * * I am therefore driven to the conclusion that the record title contains a notice to any purchaser that the title to the land in question might become subject to litigation to which he could be made a party on the ground of notice."

In *Kahlrepp* v. *Rem,* 79 N. J. Eq. 386, *V.-C.* Garrison said,

> "where a purchaser's objection to the title of the vendor related to the existence of outstanding interests arising under declarations of sale for taxes, equity will not compel the purchaser to specifically perform his contract of purchase because the title of the vendor would rest on the facts in an issue between himself and a third person not a party to the suit for specific performance."

Other cases to like effect are:

Deseumeur v. *Rondel,* 76 N. J. Eq. 402;
Zelman v. *Kaufherr,* 76 N. J. Eq. 52;
Potter v. *Ogden,* 68 N. J. Eq. 412; and
Methodist Episcopal Church v. *Roberson,* 68 N. J. Eq. 433.

That there is a disputed question of law in the present case is all too apparent. The appellants, however, contend that there is no dispute of the facts in this case. There is a very material dispute and it appears manifest on the face of the records, and it made itself plain immediately to the solicitors of the appellees when an abstract of title was made. The disputed question is,

"Was this a foreclosure instituted by the mortgagee bona fidely because of a default in the payment of interest, or was it a foreclosure designed by the surviving adult co-tenants to deprive the infants of their just share of the property?"

The state of the case on page 10, line 33, *et seq.*, shows that there was *$3,683.75* due the complainants on the mortgage, and on page 11, line 20, *et seq.*, that the property was sold for *$6,000* to one of the co-tenants, and on page 12, line 38, *et seq.*, that the consideration for the conveyance by said co-tenants and the other adult co-tenant, to whom a one-quarter interest had been conveyed, was *$11,000.* There is therefore no question but what the adult co-tenants knew at the time of the default in the payment of interest that the property would bring more than the amount due, and that they would have been amply protected in paying the interest, or any other sums due, and upon a partition of the property had an accounting with the infants for such sums advanced. There is no proof of any kind of any default by the infant co-tenants with knowledge that the persistence by them of such default would result in their losing the property, nor is there any proof that an opportunity was given said infant co-tenants to join in the purchase of the property at the foreclosure sale by paying a proportionate share of the amount due on said mortgage. In fact, there is no proof that the infants had knowledge of the existence of the mortgage, the default in the payment thereof, the foreclosure, or the purchase by one of the adult co-tenants at the foreclosure sale. From a reading of the agreed state of facts it must be irresistably concluded that the infant co-tenants never had any knowledge of any kind of the foreclosure. The oldest infant co-tenant at that time

was but *six years old* and the youngest less than *two.* Under such circumstances should the appellee-purchasers be compelled to assume the risk of accounting to the infants for their interest in the property which they were entitled to and should have received?

We respectfully submit that there is a doubtful question of law and fact affecting the title of the vendor, and should the appellees be obliged to accept the title to these premises, that then they would be purchasing a lawsuit.

POINT IV.

Any claim which the infant co-tenants may have in said premises is not barred by failure to press their claim until they arrive at their majority.

The contention of the complainants that the acceptance and receipt by the infants of their share of the surplus should be regarded as an acceptance by them of the sale and their election that the sale to Salvatore DiComo was free of any claims on their part is not a sound one. We contend that there could be no acceptance or election by the infants until they become of age.

Ryason v. *Dunten,* 73 N. E. 74, is a case almost in point. The facts briefly are as follows: The father of the appellant died seized of certain property which was encumbered by a mortgage. The mother, one of the appellees, purchased said premises at a foreclosure sale and collected the rents, etc., and paid all carrying charges. In *1889* the appellant became of age and in *1897* the *mother sold* the property to a stranger (another of the appellees), "who bought said land in good faith and had no actual knowledge or notice of the claim of the *son* until *1902,* when he *filed his*

bill to recover possession of the premises." Counsel for the appellant contended, among other things, "that the facts that the appellant was not of age until *1889;* that his mother was his guardian, and that they were tenants in common, prevented the statute of limitations from running." On page 75 the Court said: "We have no doubt that such was the trust relationship between the appellant and his mother that upon an action *seasonably brought she would not have been permitted to have availed herself of a title built upon an encumbrance against the common estate.*" The court decided that the appellant had no equitable remedy because he was in laches; that he could not sit from *1889* (when he became of age) to *1902* (when he started suit), a period of *thirteen* years *after he became of age* and in the interim permit his mother to collect rents, pay taxes, and then sell the property. *However,* in reading the case, there is no doubt but what *the court would have granted the relief had he seasonably brought his action after his majority.* It recognizes the fact that neither laches nor the statute of limitations can run against an infant.

In *Watson* v. *Vinson,* 67 So. 61, at page 63, the Court said:

> "Dr. Watson did not obtain entire title through adverse possession against his co-tenants. These co-tenants were his own children. When they, with their father, acquired title upon the death of their mother, they were mere babies. They were still very young when their father remarried, and still in early childhood when he *attempted to obtain title by purchase in his own name at a foreclosure sale. * * * There could be no running of the statute of limitations against them until they reached their majority.*"

The fact that there was a surplus arising from the foreclosure sale and that this was disbursed among the co-tenants, including the guardian of the infant co-tenants, is not an acceptance or election by said infants. The receipt by the guardian of said infants of the distributive share could in no way in law be construed an acceptance or election by them because of the fact that they were infants, and could, at any time after they arrived at their majority, bring an action against the adult co-tenants or the property.

We therefore respectfully submit that the appellants are unable to convey the premises described by deed of warranty free and clear of all encumbrance, and that the decree of the Court of Chancery dismissing the bill of complaint herein filed should be affirmed.

Respectfully submitted,

E. A. & W. A. SCHILLING,
Solicitors for and of Counsel with
Defendants-Appellees.