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49/136
760.

Mcvoy
vs
Baumann

15-61-364

Note
4 Papers taken to Y.C. Buchanan
1 Paper Not charge

Vineland Natl Bk Smolinsky 317

In Chancery of New Jersey.

BILL OF COMPLAINT.

Filed November 23, 1920.

To His Honor EDWIN ROBERT WALKER, Chancellor of the State of New Jersey:

The complainant, Mary E. McVoy, of the Town of Westfield, in the county of Union, and State of New Jersey, respectfully shows; that:

Prior to the 19th day of July, 1920, Karl Baumann was seized in fee simple of lands and premises situated on Orchard Street, in the Town of Westfield, in the County of Union, and State of New Jersey, which are more particularly described as follows: ALL that lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the Town of Westfield, in the County of Union, and State of New Jersey.

BEGINNING at a stake standing in the southeasterly line of Orchard Street, said stake being the most westerly corner of now or formerly Ann Hetfield's house lot; thence from said beginning and binding on said now or formerly Hetfield's line of land southeasterly two hundred and twenty feet to a stake in line of Presbyterian Burying Ground; thence along line of said Burying Ground southwesterly forty-six and four-tenths feet to a stake and rear corner of now or formerly Frederick Baldwin's house lot; thence binding on said now or formerly Baldwin's line of land northwesterly two hundred and fourteen feet to the aforesaid line of Orchard Street; thence along line of Orchard Street northeasterly forty-six feet to the place of beginning.

Being the same premises conveyed to Mildred P.

Marsh by deed of Elizabeth Lines and George B. Lines, her husband dated April 30, 1897 and recorded May 11th, 1897, in Book 321, of Deeds at Page 406.

2. On the 19th day of July, 1920, Karl Baumann by a certain Indenture of Agreement bearing date as aforesaid for and in consideration of the sum of Thirty-two Hundred ($3200.) Dollars agreed to convey to Herbert C. McVoy the lands above described on or before the 1st day of October, 1920, upon the terms and conditions therein set forth, a copy of which agreement is hereunto annexed and made a part hereof, and which agreement was duly executed and delivered, and in accordance with the terms thereto the said Herbert C. McVoy paid unto the said Karl Baumann the sum of Two Hundred ($200.) Dollars in cash specified to be paid upon the signing of the agreement.

3. After the delivery of the said agreement Herbert C. McVoy caused proper searches to be made against the premises so to be acquired, and on the 1st day of October, 1920, Herbert C. McVoy assigned his part of the said contract unto Mary E. McVoy, the complainant.

4. On the 1st day of October, 1920, Karl Baumann agreed with the complainant to adjourn the closing of the title of the aforesaid mentioned premises unto the 2nd day of October, 1920.

5. On the 2nd day of October, 1920, the complainant was ready and willing to complete the purchase of the premises described in accordance with the terms of the said contract, but the defendant, Karl Baumann, failed to attend the meeting as arranged between the parties thereto and it was thereafter ascertained that the said Karl Baumann did depart for New York on the said 2nd day of October, 1920, and did not return

to Westfield until on or about the 12th day of October, 1920.

6. Thereafter on the 13th day of October, 1920, the complainant called upon the said Karl Baumann and made a tender of Three Thousand ($3,000.) Dollars and requested that the defendant, Karl Baumann, deliver to the complainant the deed to the said premises in accordance with the terms and conditions of said contract. Thereupon the defendant, Karl Baumann, promised to deliver the deed to the complainant within a few days thereafter stating that he had left the same in New York and did not have it with him at that time.

7. Complainant in anticipation of becoming the owner in fee simple of the premises purchased by the agreement aforesaid, and relying upon the covenants and warranty therein contained and the good faith of said Karl Baumann to carry out the terms of the contract to be performed by him has made arrangements to dispose of the premises purchased as aforesaid and since the 1st day of October 1920, has asked in a friendly way the defendant to deliver a good and sufficient warranty deed as in the contract provided, unto the complainant, which reasonable request has been refused, and the defendant refuses and declines to execute the said deed, as in duty bound he ought to do, all which acts and refusal of the said defendant is contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of the complainant in the premises.

8. Thereafter the defendant knowing that the complainant was desirous of taking title to the aforesaid mentioned premises did by warranty deed bearing date of October 26th, 1920, convey his right, title, and interest to the aforesaid mentioned premises to Bertha Baumann, wife of the

said Karl Baumann, the defendant, and which deed was thereafter recorded in the Union County Register's Office on the 1st day of November, 1920, at 10:03 A. M. And your complainant expressly charges that the said Bertha Baumann accepted title to the aforesaid described land and premises with full knowledge that the complainant had a good and valid contract for purchase of the said land and premises and knew that the complainant was desirous of accepting title thereto. And your complainant further shows that the contract for purchase was made between the said Karl Baumann and Herbert C. McVoy was duly recorded in the Register's Office in the County of Union, on the 4th day of October, 1920, in Book 811 of deeds for said County on Pages 133 &c., and which said recording was prior to the making and recording of the deed of said Karl Baumann to Bertha Baumann, and that she accepted said deed with notice of said contract.

9. And your complainant further shows that by warranty deed dated on the 9th day of November 1920, Bertha Baumann and Karl Baumann conveyed the land and premises herein described unto Elihu H. Cooley which deed was recorded on the 12th day of November, 1920, in the Union County Register's Office under deed No. 21263. And your complainant expressly charges that the said Elihu H. Cooley accepted the said deed to the premises herein described with full knowledge that your complainant held a good and valid contract for the purchase of the aforesaid premises and was desirous of accepting title thereto, as the contract herein referred to was on record at the time as set forth in paragraph 8, and that the said Elihu H. Cooley accepted said warranty deed with such notice.

Complainant is desirous of taking title to the

property and is without adequate remedy in the court of law, and therefore prays:

1. That the defendants, Karl Baumann, Bertha Baumann, Elihu H. Cooley, and each of them may answer this bill of complaint without oath, and each statement therein made.

2. That it may be decreed by This Honorable Court that the defendants, Karl Baumann, Bertha Baumann, and Elihu H. Cooley in all things specifically perform the said articles of agreement and that said defendants by decree of this Honorable Court do make, execute and acknowledge in due form of law and deliver to complainant the good and sufficient warranty deed, for the said premises and that the said defendant deliver at the same time to the said complainant possession to the said premises and account to her for the rents, issues and profits to the same since the 1st day of October, 1920, and for such further relief as may seem equitable and just.

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

AUGUSTUS C. NASH,
Solicitor for and of Counsel with
Complainant.

Notice of Motion to Dismiss

Between MARY E. McVOY, *Complainant.* *and* KARL BAUMANN, *et als*, *Defendants.*	*On Bill, etc.* *Notice.*

TAKE NOTICE: that I shall move before the Chancellor, at Chancery Chambers, Newark, New Jersey, on Tuesday, January 18, 1921, at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard, that the bill filed in the above entitled cause be dismissed as to the defendants Karl Baumann and Bertha Baumann for want of jurisdiction, on the ground that they are not residents of this State and that they have not been personally served with process but that process has attempted to be served only by publication.

To MR. A. C. NASH,
Solicitor for Complainant

E. A. MERRILL,
Solicitor for Defendants, Karl Baumann and Bertha Baumann.

Between MARY E. McVOY, *Complainant.* *and* KARL BAUMANN, *et als*, *Defendants.*	*On Bill, etc.* *Notice.*

TAKE NOTICE: that I shall move before the Chancellor at Chancery Chambers, Newark, New Jersey, on Tuesday, February 1, 1921, at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard, for leave to enter a special appearance to object to the jurisdiction, and, leave being granted, I shall thereupon immediately move that the bill filed in the above entitled cause be dismissed as to the defendant Elihu H. Cooley for want of jurisdiction, on the ground that he is not a resident of this state and that he has not been personally served with process but that process has attempted to be served only by publication.

TO A. C. NASH,
Solicitor for Complainant.

E. A. MERRILL,
Solicitor for Defendant Elihu H. Cooley.

Order Denying Motion to Dismiss

Filed January 19, 1921.

Between MARY E. McVOY, *Complainant.* *and* KARL BAUMANN, *et als,* *Defendants.*	*On Bill, etc.* *Order.*

Application being made to dismiss the bill of complaint filed herein as to Karl Baumann and Bertha Baumann, his wife, for want of jurisdiction, and the court having heard E. A. Merrill, of counsel with the defendants Karl Baumann and Bertha Baumann, in favor of said application, and Augustus C. Nash, of counsel with the complainant in opposition thereto, and having duly considered the same and being of the opinion that the application should be denied at this time.

It is, on this eighteenth day of January, A. D. Nineteen Hundred and Twenty-one ORDERED that the motion to dismiss the complaint as to Karl Baumann and Bertha Baumann for want of jurisdiction be denied, but that said defendant may file an answer under their special appearance subject to the condition that if, on final hearing the motion to dismiss for want of jurisdiction is denied their answer shall stand as a general appearance.

Respectfully advised,

JOHN H. BACKES,

V. C.

Order Denying Motion to Dismiss

Filed February 1, 1921.

Between MARY E. McVOY, *Complainant,* *and* KARL BAUMANN, *et als,* *Defendants.*	*On Bill, etc.* *Order.*

The solicitor for the defendant Elihu H. Cooley having moved to dismiss the bill of complaint as to the said defendant for want of jurisdiction and counsel for complainant having been heard thereon, and having duly considered the matter and being of the opinion that the motion should be denied at this time, it is, on this first day of February, 1921 ORDERED that the motion to dismiss the complaint as to Elihu H. Cooley for want of jurisdiction be denied, but that said defendant may file an answer under his special appearance subject to the condition that if, on final hearing the motion to dismiss for want of jurisdiction is denied his answer shall stand as a general appearance.

Respectfully advised,

JOHN H. BACKES,
Vice-Chancellor.

Filed February 2, 1921.

Between
MARY E. McVOY,
Complainant,
and
KARL BAUMANN, *et als,*
Defendants.
On Bill, etc.

ANSWER OF DEFENDANT KARL BAUMANN.

The defendant Karl Baumann, residing at Cottekill, Ulster County, New York referring to the complainant's bill says that:

FIRST DEFENSE

1. He denies that this Honorable Court has jurisdiction. This action is one *in personam*, and he has not been served personally with process.

SECOND DEFENSE

1. He denies that the complainant is without an adequate remedy at law. In paragraph 7, the complainant alleges that she "has made arrangements to dispose of the premises," and therefore complainant can recover her damage, if any, in an action at law.

THIRD DEFENSE

1. He denies that there is mutuality of obligation between himself and complainant.

FOURTH DEFENSE

1. He admits paragraphs 1 and 2.

2. He has no knowledge as to paragraph 3, and leaves complainant to her proof.

3. He denies paragraphs 5 and 6.

4. He denies that his refusal to deliver a warranty deed to complainant after October 1, 1920, was wrongful, as charged in paragraph 7, and says that on or about October 4, 1920, the complainant having in the meantime made no tender of the purchase price, he agreed to convey, and afterward did convey, the lands described in the bill of complaint to another.

5. He admits the allegation in paragraph 8, that he conveyed his right, title and interest in the lands described in the bill of complaint to Bertha Baumann on October 26, 1920, which was prior to the filing of this bill, and that the deed of conveyance was recorded November 1st, 1920.

He is without knowledge concerning the allegation in paragraph 8, that the said contract of sale was record[illegible]d.

He denies the other allegations in said paragraph.

6. He admits the allegation in paragraph 9, that he joined with Bertha Baumann in a conveyance of the lands and premises described in the bill to Elihu H. Cooley by deed dated November 9, 1920, and recorder November 12th, 1920, which was prior to the filing of this bill, and he further says that since November 9, 1920, he has had no right, title or interest in or to said lands.

E. A. MERRILL,
Solicitor for Defendant.
Karl Baumann.

Filed March 2, 1921.

AMENDMENT TO THE ANSWER OF THE DEFENDANT, KARL BAUMANN.

This defendant amends the Fourth Defense in his answer as follows:

After paragraph 2, he adds paragraph 2-A, reading: 2-A. He denies paragraph 4 of the Complainant's bill.

He adds to paragraph 3 of his answer the following:

On October 1, 1920 defendant went to Westfield and tendered to Herbert C. McVoy and to Mary E. McVoy, a warranty deed to the lands and premises described in the contract of sale, but the said Herbert C. McVoy and Mary E. McVoy failed and refused to pay to defendant the consideration therefor.

Thereupon and at about 5 P. M., October 1, 1920, defendant notified said Herbert C. McVoy and Mary E. McVoy of his address until 8 o'clock of that evening, and said he would be ready to deliver his deed and receive the consideration therefor at any time prior to 8 o'clock on that evening.

On October 2, 1920, defendant returned to his home in Cottekill and remained there until October 12, 1920, when he went to Westfield for a short visit, and again returned to Cottekill on or about October 13, 1920.

So far as defendant knows neither Herbert C. McVoy nor Mary E. McVoy, nor any other person in their behalf, made any attempt until October 13, 1920 to communicate with him after their failure, on October 1, 1920, to pay the agreed consideration upon the tender of the said deed by defendant, and in the meantime this defendant had agreed to convey to another.

On October 13, 1920, Herbert C. McVoy met this defendant in Westfield and, taking a roll of bills from his pocket, said he was ready to take the deed.

Defendant denies that he promised to deliver said deed in a few days, or at any time, but, on the contrary alleges that he then and there told said Herbert C. McVoy that the deal was off.

E. A. MERRILL,
Solicitor for Defendant,
Karl Baumann.

Filed February 2, 1921.

Between
MARY E. McVOY,
Complainant,
and
KARL BAUMANN, *et als,*
Defendants.
On Bill, etc.

ANSWER OF THE DEFENDANT BERTHA BAUMANN.

The defendant Bertha Baumann, residing at Cottekill, Ulster County, New York, referring to the complainant's bill, says that:

FIRST DEFENSE

1. She denies that this Honorable Court has jurisdiction. This action is one *in personam* and she has not been served personally with process.

SECOND DEFENSE

1. She denies that the complainant is without an adequate remedy at law. In paragraph 7, the complainant alleges that she "has made arrangements to dispose of the premises," and therefore, she can recover her damages, if any, in an action at law.

THIRD DEFENSE

1. She denies that there is mutuality of obligation between herself and complainant.

FOURTH DEFENSE

1. This defendant neither executed nor acknowledged any agreement to sell to this complainant, or to complainant's alleged assignor, the lands described in the bill of complaint.

FIFTH DEFENSE

1. She admits paragraph 1.

2. She has no knowledge of the allegations made in paragraphs 2, 3, 4, 5 and 6.

3. She denies that complainant ever requested a deed from her, or that she wrongfully refused to execute a deed to complainant, if paragraph 7 is intended to be directed to her.

4. She admits that on October 26, 1920, Karl Baumann conveyed to her his right, title and interest in the lands described in the bill of complaint and that the deed was recorded November 1st, 1920, which was prior to the filing of this bill, but denies the other allegations in paragraph 8.

5. She admits that on November 9, 1920, she executed a deed to Elihu H. Cooley of the lands described in the bill, and that said deed was recorded November 12, 1920, (which was prior to the filing of this bill,) as alleged in paragraph 9.

E. A. MERRILL,

Solicitor for Defendant, Bertha Baumann.

Filed March 2, 1921.

AMENDMENT TO THE ANSWER OF THE DEFENDANT BERTHA BAUMANN.

This defendant amends the Fourth Defense in her answer by the substitution for paragraph 1 therein of the following paragraph:

1. This defendant alleges that she neither executed nor acknowledged any agreement to sell to this complainant, or to complainant's assignor, the lands described in the bill of complaint, and therefore the said bill of complaint should be dismissed as to her.

This defendant amends the Fifth Defense in her answer by adding to paragraph 4 therein the following:

This defendant denies that on October 26, 1920, when said lands were conveyed to this defendant, she knew that complainant had a good and valid contract for the purchase of said lands, or that complainant was desirous of accepting title thereto.

This defendant denies that she knew that a contract for the purchase of said lands by Herbert C. McVoy from Karl Baumann was recorded in the office of the Register of Union County; and further denies that she accepted her deed with actual or constructive notice of such contract.

E. A. MERRILL,
Solicitor for Defendants.

Filed February 2, 1921.

ANSWER OF ELIHU H. COOLEY

Between MARY E. McVOY, *Complainant,* *and* KARL BAUMANN, *et als,* *Defendants.*	*On Bill, etc.*

ANSWER OF THE DEFENDANT, ELIHU H. COOLEY.

The defendant Elihu H. Cooley, residing at Yonkers, Westchester County, New York, referring to complainant's bill says that:

FIRST DEFENSE

1. He denies that this Honorable Court has jurisdiction. This action is one *in personam* and he has not been served personally with process.

SECOND DEFENSE

1. He denies that the complainant is without an adequate remedy at law. In paragraph 7, the

complainant alleges that she "has made arrangements to dispose of the premises," and therefore complainant can recover her damages, if any, in an action at law.

THIRD DEFENSE

1. He denies that there is mutuality of obligation between himself and complainant.

FOURTH DEFENSE

1. He admits paragraph 1.

2. He has no knowledge as to paragraphs 2, 3, 4, 5, 6, 7 and 8, except that he admits the allegation in paragraph 8, that Karl Baumann conveyed his right, title and interest in the lands described in the bill of complaint to Bertha Baumann by deed dated October 26, 1920, which deed was recorded November 1st, 1920, and prior to the filing of this bill.

3. He admits that Karl Baumann and Bertha Baumann his wife conveyed to this defendant, on November 9th, 1920, the lands described in the bill of complaint, and that the deed of conveyance was recorded on November 12, 1920, as alleged in paragraph 9, (which was prior to the filing of this bill.)

4. He denies the allegation in paragraph 9, that said deed of said premises was accepted with knowledge, actual or constructive, that this complainant or her assignor held a good and valid contract for the purchase of the premises described in the bill of complaint or that complainant was desirous of accepting title thereto, or that said alleged contract of sale was on record when said Karl Baumann and Bertha Baumann, his wife agreed to convey said premises to this defendant.

E. A. MERRILL,
Solicitor for Defendant,
Elihu H. Cooley.

Replications

Filed March 26, 1921.

Between MARY E. McVOY, *Complainant,* *and* KARL BAUMANN, *et als,* *Defendants.*	*On Bill, etc.* *Replication.*

The replication of Mary E. McVoy, complainant, to the answer of Karl Baumann, defendant.

The complainant joins issue on the answer of the defendant.

AUGUSTUS C. NASH,
Solicitor for Complainant.

The replication of Mary E. McVoy, Complainant, to the answer of Bertha Baumann, defendant.

The complainant joins issue on the answer of the defendant.

AUGUSTUS C. NASH
Solicitor for Complainant.

The replication of Mary E. McVoy, complainant, to the answer of Elihu H. Cooley, defendant.

The complainant joins issue on the answer of the defendants.

AGUSTUS C. NASH,
Solicitor for Complainant.

Agreement

AGREEMENT

ARTICLES OF AGREEMENT, made the nineteenth day of July, in the year of our Lord, One Thousand Nine Hundred and Twenty, BETWEEN KARL BAUMANN, of the Town of Westfield, in the County of Union, and State of New Jersey, party of the first part; AND HERBERT C. MCVOY of the Town of Westfield, in the County of Union and State of New Jersey party of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of the sum of thirty-two hundred dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that he, the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty free from all encumbrance on or before the first day of October next ensuing the date hereof, all that lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the Town of Westfield, in the County of Union and State of New Jersey.

BEGINNING at a stake standing in the southeasterly line of Orchard Street, said stake being the most westerly corner of now or formerly Ann Hetfield's house lot; thence from said beginning and binding on said now or formerly Hetfield's line of land southeasterly two hundred and twenty feet to a stake in line of Presbyterian Burying Ground; thence along line of said Burying Ground southwesterly forty-six and four tenths feet to a stake and rear corner of now or formerly Frederick Baldwin's house lot; thence binding on said now or for-

merly Baldwin's line of land northwesterly two hundred and fourteen feet to the aforesaid line of Orchard Street thence along line of Orchard Street northeasterly forty-six feet to the place of beginning.

Being the same premises conveyed to Mildred P. Marsh by deed of Elizabeth Lines and George B. Lines, her husband, dated April 30, 1897, and recorded May 11th, 1897, in Book 321 of Deeds at Page 406.

AND the said party of the second part for himself his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that he, the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of thirty-two hundred dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: He will pay the sum of two hundred dollars in cash upon signing this contract, receipt whereof is hereby acknowledged. He will pay the balance of three thousand dollars upon the delivery of the deed as hereinafter specified, in cash. Taxes and insurance to be adjusted as of the date of closing.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the first day of October next ensuing the date hereof. AND IT IS FURTHER AGREED, by the parties hereto, that the said deed shall be delivered and received at the office of Herbert C. McVoy, North Avenue, Westfield, New Jersey, between the hours of two and five o'clock in the afternoon on the said first day of

October next ensuing the date hereof. AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators.

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

K. BAUMANN.
HERBERT C. McVOY.

Signed, Sealed and Delivered in
the presence of
A. C. FITCH.

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

BE IT RE.EMBERED, that on this 2nd day of October, in the year of our Lord one thousand nine hundred and twenty, before me the subscriber a Master in Chancery of New Jersey, personally appeared Herbert C. McVoy, who, I am satisfied is one of the grantors mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

AUGUSTUS C. NASH.
Master in Chancery of N. J.

Received October 4, 1920, at 10.34 A M. No. 20180.

Recorded at request of A. C. Nash.

Agreement

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

I, Edward Bauer, Register of the County of Union, do hereby certify that the foregoing is a true and correct copy of the record of a certain deed made by Karl Baumann, to Herbert C. McVoy and also of the certificate of acknowledgement thereto annexed, as the same may be found recorded in my office in Book 811 of Deeds for said County on pages 133 &c.

In Testimony Whereof, I have hereunto set my hand and official seal this 18th day of February, A. D., 1921.

EDWARD BAUER,
Register.

Designation

Filed April 5, 1921

Between MARY E. McVOY, *Complainant.* *and* KARL BAUMANN, *et als*, *Defendants.*	*On Bill.* *Designation.*

The above stated cause having been by order of the Chancellor on the fifth day of April. 1921, referred to the Honorable M. G. Buchanan, one of the Vice-Chancellors of this court, to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein, and an application having been made for an order designating the time and place for said hearing:

It is, on this day of April, 1921, on motion, of Augustus C. Nash, Solicitor for the Complainant, ordered, that Thursday, the seventh day of July, 1921, at the Chancery Chambers, in the City of Trenton, at 10.30 in the forenoon, be and the same hereby is, designated as a time and place for the hearing of the above stated cause.

We consent to the making and entering of the above order.

AUGUSTUS C. NASH,
Solicitor for Complainant.

E. A. MERRILL,
Solicitor for Defendants.

TESTIMONY

Testimony taken in the above-entitled cause, at the State House, Trenton, New Jersey, on Thursday, the eighth day of July, 1921, at 10:30 A. M.

Before Hon. Malcolm G. Buchanan, Vice-Chancellor.

Appearances:

Augustus C. Nash, Esquire, for Complainant.

E. A. Merrill, Esquire, for Defendants.

Mr. Merrill. I move to dismiss for want of jurisdiction.

The Court. These answers are filed subject to this motion?

Mr. Merrill. Yes, sir.

The Court. Is it admitted by the answering defendants that if the proceeding is one *in rem,* then jurisdiction has been acquired over them by publication.

Mr. Merrill. Yes, sir; there is no question raised as to the regularity of the publication.

The Court. I will allow the proofs to be put in, and dispose of the whole matter at one time.

Mr. Merrill. This action, also, should be an action at law under the pleadings.

The Court. I will dispose of that phase of the matter at the same time.

HERBERT C. McVOY, a witness produced on behalf of the complainant, being duly sworn, testifies as follows:

Direct examination by Mr. Nash.

Q Mr. McVoy, where do you live?

A In Westfield, N. J.

Q Do you know Mr. Baumann?

A I do.

Q In July, 1920, did you enter into a contract

with Mr. Baumann for the conveyance of real estate?

A I did.

Q I show you that paper, and ask you if that is the contract (handing witness paper)?

A It is.

Mr. Nash. I offer it in evidence.

Mr. Merrill. No objection.

Said contract between Karl Baumann and Herbert C. McVoy, dated July 19, 1920, is marked Exhibit C. 1.

Q In accordance with the terms of the contract were you at my office on the first day of October, 1920?

A I was.

Q Will you state what occurred—just what took place at that time?

Mr. Merrill. That is going to raise a rather difficult question. I am here under a special appearance for the purpose of objecting to the jurisdiction, and until that is settled these defendants are not in court; and while I have no objection to Mr. Nash putting in any evidence, I must object to anything in the way of evidence which will charge them with any liability.

The Court. I don't quite follow you.

Mr. Merrill. The defendants are not now in court, either actually or constructively, according to my contention, and consequently, evidence would not be subject to objection, which could not be given in a case where it was admitted that the parties had never been served and were not in court.

The Court. I directed that the case proceed upon the merits, and, of course, if the case be decided in your favor, nothing in this will bind you. If jurisdiction has been acquired,

of course all that is competent will bind you. Is there anything more to your present idea than that?

Mr. Merrill. No; only I am not sure how far I ought to consent to go, because it might make a difference with my procedure on behalf of the defendants.

The Court. In what way?

Mr. Merrill. I don't know that I would care to have evidence admitted of Mr. McVoy's as to what he might say the defendants said, when they are not in court either to explain or contradict. If Mr. Nash can go ahead with other evidence except of that character, I have no objection to going ahead and being bound by that result.

The Court. We will proceed.

Q Who was present at that hearing?

A Mr. Baumann, Mr. Clarence B. Smith, and your stenographer and you.

Q Do you recall the conversation with Mr. Baumann at that time?

A I do.

Q Will you tell the court the conversation you had with Mr. Baumann?

Mr. Merrill. Objected to. It doesn't seem to me that it is proper for him to state what Mr. Baumann said, in the absence of Mr. Baumann in this case.

The Court. Objection overruled.

A We waited there for a considerable time for the man who had agreed to be there under contract, whom I had resold the property to. We waited till five o'clock. In the meantime we telephoned to his lawyer, and around—

By the Court.

Q You waited for him?

A I waited for him, and as five o'clock approached I said to Mr. Baumann, "It looks as if we ought to postpone this matter till to morrow morning, or," I said, "if you don't want to be here, if you will deposit your deed either with Mr. Nash or any one of the banks in the town, or anyone you might choose, I will be very glad to take it up in the morning." He said, "I don't care to do anything of that kind; I have a friend here in Westfield, and I will stay all night with them, and I will meet you again to-morrow during the day in Mr. Nash's office. I will call Mr. Nash in the morning and let him know what time." And he left.

Q And did you come back in the morning?

A I did.

Q Who came back with you?

A Mr. Smith.

Q Was Mr. Baumann present at that time?

A He was not.

Q And when did you see Mr. Baumann the next time?

A I saw Mr. Baumann the next time on the eleventh in the afternoon, about four o'clock, coming from the train.

Q Did you have a conversation with him at that time?

A No; I expected him to stop in the office—and he didn't—on his way up town, and I waited in the office till seven o'clock, and he didn't show up, and there was a celebration there the next day, and I knew he was going to stay over for it, and I went home.

Q Did you see him the next day?

A The next morning I went to the bank and drew $3,000.00, and went to the house where Mr. Baumann had told me he would stop over the

celebration, and asked for him and met him, and there I demanded my deed, and offered him the $3,000.00 which I still owed, and he told me he didn't have the deed.

Mr. Merrill. Objected to.

The Court. Objection overruled.

Q Go on?

A He didn't have the deed with him, he didn't bring it with him, and he didn't know whether I would be ready on that day or not. I said. "When are you coming back?" He said, "I will be back tomorrow or next day." And he said, "I want to see my lawyer." And he said, "I will write you after I see him, after I see my lawyer, and let you know when I will be back to Westfield with the deed." I said, "Very well, Mr. Baumann, I hope it will be soon, because I want to get this matter cleaned up." He said, "Don't worry a bit about it; it will be cleaned up. We don't want any trouble about this thing." I said, "I didn't know there was any trouble." He said, "There isn't." I said, "I want this deed." He said, "I can't take the money because I haven't the deed. I will notify you when I will be in Westfield again." He was very nice, and he said he didn't want any trouble. I didn't know what he meant. He certainly was very gentlemanly to me and used me like a white man, and I wasn't suspicious till I came back to Mr. Nash's office. I said it seemed to me he was unduly alarmed—

Q On the first day of October had you requested the deed to be made out to Mary E. McVoy?

A I had.

Q And on that day did you recall what was done with Mr. Baumann's contract?

A His contract? Why he had his contract there—

Q Do you recall that Mr. Baumann requested the assignment of the contract to be made to Mrs.

McVoy because the deed was executed to Mrs. McVoy?

A I do.

Mr. Nash. I have served notice for the production by Mr. Baumann of his contract, and it has not been produced.

Mr. Merrill. I received yesterday a notice to produce certain documents, but at that time, and up to the present time, I have a special appearance, and I had no authority whatever to admit or accept service of any instrument predicated upon being in court, and it would have been impossible to get them anyway, because it was so late. I object to any secondary evidence.

The Court. Nothing has been offered yet.

Q Did you assign your contract to Mary E. McVoy?

A I did.

Q Was Mr. Baumann's copy signed by you?

The Court. Of what?

Mr. Nash. Of the contract.

Q Of the contract between you and Mr. Baumann—assigned on the first day of October?

A It was.

Q To whom?

A To Mary E. McVoy, my wife.

By the Court.

Q You mean the original contract of sale was executed in duplicate?

A Yes, sir.

Q And when you say that Mr. Baumann's copy was assigned you mean that you executed on Mr. Baumann's copy, that is, on Mr. Baumann's duplicate original, an assignment of that contract,

whereby you conveyed your interest in it, to Mary E. McVoy, your wife?

A Yes, sir.

Q She is your wife?

A Yes, sir.

Mr. Merrill. I suggest that should be put in evidence formally. I think the assignment itself should be put in evidence.

By the Court.

Q Was there an assignment written out and executed on your original duplicate of the contract?

A No, it was on Mr. Baumann's. He requested that.

Q Was your copy of the contract in the office at that time?

A It was.

Q It was?

A I am quite sure that it was. I don't just recall whether it was or not, but I know Mr. Baumann had his.

By the Court.

Q And after this duplicate original had had the assignment executed on it, what became of it?

A Mr. Baumann kept it.

Mr. Merrill. I would like to record my objection to that as evidence. In the first place, Mr. Baumann lives in New York State, and this matter has been up for months and months, and it was only yesterday that I received that notice, and under the circumstances I wasn't bound to anyway. It seems to me they should have foreseen this.

The Court. You say you would not have produced it if you had received the notice three months ago.

Mr. Merrill. He was bound to give me notice which I was bound to take notice of. I couldn't do it without some form of order which would relieve me of some responsibility.

The Court. The entire testimony is being taken subject to the determination of the issue of jurisdiction—subject to its determination in favor of the acquisition of jurisdiction by this court.

Mr. Merrill. That brings up this question, and that is, whether this was an assignment or not is a conclusion, and there is nothing for the court to determine, whether there was or not an assignment—

By the Court.

Q What was it that you wrote upon this duplicate original?

A It was dictated through Mr. Baumann's suggestion to Mr. Nash, and it was just the assignment—

Q Do you remember what it said?

A No, I don't.

Q I am speaking about how the language read.

A As near as I can recall it simply said, "I hereby assign my rights and titles in the enclosed property to Mary E. McVoy." That was the substance of it. Just whether that was the wording I don't recall.

Q And that you signed?

A Oh, yes; that I signed.

Q Between the nineteenth day of July, 1920, and the first day of October, had you arranged to convey a portion of this property?

A I had.

Q And have you been unable to convey?

A I certainly have.

Q And have you ever had any correspondence

with Mr. Baumann in reference to the closing of title, after the first day of October?

A I am not just sure between the first of October and the thirteenth when I saw him, but Mr. Baumann called on the first of October, and he told me that he would be there on the twelfth and thirteenth of the month, and when I found the next day that he hadn't showed up in any way, and also hearing that he left town early in the morning, I rather, in my own mind, felt —

Mr. Merrill. Objected to—

A I felt he had been called hurriedly home, and I naturally expected to hear from him in the next few days, and not hearing from him, and knowing he was coming on the twelfth, I didn't worry very much until the twelfth, although it might be possible that I wrote him. I'm not sure of that, but he had informed me that he would be in town again on the twelfth or thirteenth, he was coming to a celebration we had in town.

Cross examination by Mr. Merrill.

Q You had arranged to convey all of the land, had you not?

A Yes, in two parcels.

Q You are aware, are you not, Mr. McVoy, that Mr. Baumann claims that he gave you until eight o'clock on October first to close the deal?

A Absolutely no, absolutely.

Q I am not asking you whether you admit or deny the truth of it; I am asking you whether that it what Mr. Baumann claims.

A I don't know that.

Q Don't you know that he denies he ever agreed to come back?

A I know he did.

Q Don't you know that he denies that he had that agreement with you to come back later?

A No, sir.

By the Court.

Q On the first day of October, when you were all there in Mr. Nash's office, did Mr. Baumann have the deed with him?

A He did.

Q A deed already executed?

A Yes, sir.

Q And made out to whom?

A Made out to Mary E. McVoy.

Q Is Mr. Baumann a married man?

A He is.

Q And the defendant Bertha Baumann is his wife?

A Yes, sir.

Q And this deed to Mary E. McVoy, which was produced and in Mr. Baumann's possession on the first of October, was that executed by his wife as well as by himself?

A It was, sir.

Q She was not present at the conference?

A No, sir.

Q Why didn't you complete the transaction then?

A On that day?

Q Yes.

A I had—on account of the party that I had sold to had promised—and Mr. Baumann knew, in fact I had informed him, we expected him to be there, and he was to be there, and I went there with the expectation of having him there, and not showing up till five o'clock, and I using every effort to locate him, we adjourned till the next morning, giving me time to see him when he came home.

Q What had Mr. Baumann to do with your vendee?

A Nothing, only I was depending on his money that day.

Q If you were going to sell to this other man, why did you have the assignment of the contract made to Mrs. McVoy instead of to this new owner?

A I had it made to Mrs. McVoy, at the time I notified Mr. Baumann to do that I had expected Mrs. McVoy to take the property over, and not the new man, and I had never changed it, and I had Mr. Nash make up new deeds to Mr. Naugle ready to be turned over. All these deeds were on the desk.

Q You had had a deed executed by Mrs. McVoy and yourself for this same property?

A Yes, sir.

Q To the man you had agreed to sell to?

A Yes, they all laid there together.

Mr. Merrill. This was to be divided into two parts, and one was to be conveyed to one man and the other part to another man. It was not just a three-cornered transaction. Mr. Baumann had nothing whatever to do with the double transaction.

By the Court.

Q You had deeds executed by yourself and Mrs. McVoy to both of the parties to whom you were going to convey?

A Yes.

CLARENCE B. SMITH, a witness produced on behalf of the complainant, being duly sworn, testifies as follows:

Direct examination by Mr. Nash.

Q Mr. Smith, where do you live?

A Westfield.

Q What is your business?

A Real estate.

Q Were you in my office on the first day of October, 1920?

A I was.

Q And do you recall who was present at that time?

A Mr. Baumann, Mr. McVoy, yourself and the stenographer and myself.

Q Do you recall the conversation with Mr. Bauman and yourself and Mr. McVoy, at that time, and myself?

Mr. Merrill. I object with respect to the conversation with Mr. Baumann.

Mr. Court. Objection overruled.

Q We were in your office to close title. Mr. Baumann was there with his deed, and the man that I had sold the property to was there on appointment, or, at least, had made an appointment and didn't keep it. Mr. Baumann had his deed on the table, and we waited till almost six o'clock. We telephoned, and no one showed up, so he said, "We'll wait till to-morrow and possibly your man will come in by to-morrow. I will be in town to-morrow, and I am going to stay to Mr. Blank's." We agreed to meet him the next day.

Q On the thirteenth day of October did you have a conversation with Mr. Baumann?

A I did.

Q Where?

A At Mr. Blank's house—

Mr. Merrill. Objected to.

Q Will you state to the court what that conversation was?

A Mr. McVoy took me with him, and he made the tender to Mr. Baumann of $3,000.00 in currency. I counted it and saw he had $3,000.00 there,

and gave it back to him. He said he didn't have his deed with him; he didn't expect to pass title; he didn't want any further trouble; he would see his lawyer and try to get the matter closed up as soon as possible; he didn't have his deed with him.

Q Did Mr. McVoy request a deed at the time?

A He did.

Q Did he offer Mr. Baumann the money?

A He did.

Q Do you recall the denomination of the bills?

A Two $1,000.00 bills and two $500.00 bills.

Q Did Mr. Baumann at that time refuse to deliver the deed?

A He did not; he said he didn't have it with him, but he would go home and attend to it right away, but he would see his lawyer.

By the Court.

Q What did you do about the money?

A He wouldn't accept the money.

Q Did he say why?

A He said he didn't have his deed with him.

Mr. Merrill. No questions.

Mr. Nash. I offer at this time a certified copy of the *lis pendens.*

Said document is marked Exhibit C-2.

Mr. Nash. I offer a certified copy of the contract between Mr. McVoy and Mr. Baumann, for the purpose of showing the record in Union County Register's Office, in Book 811.

Said certified copy of contract is marked Exhibit C-3.

CATHERINE CHATTIN, a witness produced on behalf of the complainant, being duly sworn, testifies as follows:

Direct examination by Mr. Nash.

Q Mrs. Chattin, where do you live?

A Westfield, N. J.

Q And you are employed in my office.

A I am.

Q On the first day of October, 1920, were you with Mr. Baumann, Mr. McVoy, Mr. Smith and myself?

A I was.

Q At that time did you hear the conversation between Mr. Baumann and Mr. McVoy?

A I heard it, but I don't remember the conversation—not every part of it. I overheard part of it, but I don't remember it.

Q What portion of it do you remember?

Mr. Merrill. Objected to.

The Court. Objection overruled.

A The only part I remember is the telephoning to get Mr. Naugle there, and I remember they left the office with the understanding of coming back the next morning.

By the Court.

Q Who did?

A Mr. McVoy, Mr. Smith and Mr. Baumann.

Mr. Merrill. I ask that that be struck out, as merely an impression and nothing to base it on.

By the Court.

Q How do you know they had that understanding?

A Well, Mr. Baumann called up that evening after Mr. McVoy and Mr. Smith and himself had

left, and Mr. Nash wasn't at the office at the time. And I answered the telephone. He wanted to know if Mr. Naugle had arrived yet. I said no, and he wanted to know if Mr. Nash was in, and I said no, and—

Q You say that when they left—Mr. Baumann, Mr. McVoy and Mr. Smith—along about five o'clock or six o'clock, that they left with the understanding that they were to meet there again the next day. Now, I say, how do you know that they had that understanding—did you hear them say anything about it?

A Yes, but I don't remember just what was said.

Q Well, substantially what was said?

A Well, I remember that Mr. Baumann said something about staying at somebody's house in Westfield over night.

Q Did anybody say anything about coming back the next day?

A Why yes.

Q What was said about coming back the next day?

A Well, I remember Mr. McVoy saying he would be in the next morning.

Q What did Mr. Smith and Mr. Baumann say?

A I don't remember.

Q Did Mr. Baumann say he would be there the next morning, or that he would not be there the next morning?

A I don't remember.

The Court. I will deny your motion to strike out. I think there is sufficient to make it admissible.

Cross examination by Mr. Merrill.

Q Do you recall that Mr. Baumann gave the address and telephone number at Mr. Blank's house,

and said something to the effect that if they wanted to close they could find him there at eight o'clock that evening?

A No, I don't.

AUGUSTUS C. NASH, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Mr. Nash. Do you wish me to ask myself questions and give the answers?

Mr. Merrill. I wish you would ask yourself questions.

Direct examination by himself.

Q Mr. Nash, are you a practicing lawyer in Westfield?

A I am.

Q Did Mr. Baumann and Mr. Smith call at your office on the first day of October, 1920?

A They did.

Q Will you tell the substance of the conversation that took place at that time?

Mr. Merrill. I object to the conversation with Mr. Baumann.

The Court. Objection overruled.

A On October 1st, 1920, at about two p. m., in the afternoon, Mr. Karl Baumann, Mr. Herbert C. McVoy and Mr. Clarence B. Smith called at my office in reference to closing a title between Mr. McVoy and Mr. Baumann. Mr. Baumann produced to me a deed executed by himself and Bertha Bauman, made to Mary E. McVoy, for the property covered by the contract. Mr. Baumann requested me to examine the deed and pass upon the same, which I did. The deed was entirely typewritten, and Mr. Baumann then produced his copy of the contract and requested that as a deed had been

made out to Mary E. McVoy, that his lawyer desired the assignment endorsed upon the contract. In the interest of Mr. McVoy I requested Mr. McVoy to tell me if that was true, and he stated that it was, and I dictated an assignment to be endorsed on Mr. Baumann's copy. The substance of the endorsement was, "I hereby assign all my right, title and interest in the within contract to Mary E. McVoy." And there was a seal—scroll—put on same and Mr. McVoy signed it. Mr. Baumann then put the copy of the contract back in his pocket, and we were waiting for Mr. Naugle, who was to purchase a portion of the premises. The conversation was general.

By the Court.

Q A portion of the premises from Mr. McVoy and his wife? Baumann had nothing to do with it?

A No. We were waiting for Mr. Naugle, who was to purchase a portion from Mr. McVoy. At the request of Mr. McVoy I had deeds drawn and executed by Mary E. McVoy and Herbert C. McVoy to Mr. Naugle for the portion he was to purchase.

Q And to the other purchaser for the other portion?

A Yes, sir.

Q Was that done at that same time?

A That had been done in my office prior. The execution had taken place in the morning and the deeds were there. I was then requested to try and locate Mr. Naugle, by Mr. McVoy. After waiting till around five or six o'clock, I suggested to Mr. Baumann that if he desired, as we couldn't locate Mr. Naugle, he could either leave his executed deed with me or with anyone of the local banks, and when the title went through we would remit the money. Mr. Baumann said, "No, I intend

to stay at Mr. Blank's over night, and as it is so late we" would come back to-morrow, "and in the meantime Mr. McVoy can locate Mr. Naugle." The arrangements were apparently satisfactory, and they left my office with the intention of returning the next morning, and—

Mr. Merrill. I ask that that be struck out.

The Court. Yes. You may testify as to what was said.

A Mr. McVoy said, "Well, we will return to-morrow," and Mr. Baumann shook hands and said, "I will be at Mr. Blank's to-night, if you need me, I will be here to-morrow morning." And with that all parties left. The next morning McVoy and Mr. Smith called at my office and stated that they had been informed that Mr. Baumann had left town.

Mr. Nash. At this time I call for the production of the original letter from Mr. McVoy to Mr. Baumann under date of October 27th, 1920.

Mr. Merrill. I don't know anything about it, and this is the first notice I have had to produce any specific letter.

Mr. Nash. I served notice on you.

Mr. Merrill. I admit I received a notice to produce all letters connected with the transaction—simply in that broad language: that is all. There is no specific letter or date or substance to it—nothing by which I could identify it, and I know nothing about it.

I raise again that objection, that it seems to me that bringing in a notice to produce something that is out of the State, and that I could not have gotten if I had tried to, is rather pressing matters.

The Court. Is the letter referred to in the pleadings?

Mr. Nash. No sir, I think not. It is not specifically set forth in the pleadings.

The Court. I think I will permit the introduction of the secondary evidence, under the circumstances.

Mr. Nash. Under date of October 27, 1920, I wrote Mr. Karl Baumann at Cottekill, Ulster County, New York: "Dear Mr. Baumann—

By the Court.

Q Did you mail the letter?

A It was mailed from my office. I cannot—

Q Do you know it was mailed?

A Yes, I know it was received.

Q How do you know?

A I have the acknowledgment of Mr. Baumann that he received it.

Mr. Nash. I offer the copy of the letter.

Said copy of letter is marked Exhibit C-4.

Mr. Nash. In reply thereto I received a reply from Mr. Baumann under date of October 30, 1920.

I offer that letter in evidence.

Mr. Merrill. It is objected to.

The Court. Do you waive objection to the lack of proof of the signature?

Mr. Merrill. No, I don't think I ought to waive any objection.

By the Court.

Q Do you know it is his signature?

A. No. I have seen his signature, but I don't know that I want to go that far.

Q Have you seen him sign his signature?

A Yes, he has signed deeds in the office.

Q Are you familiar with his signature?
A Yes.
Q Do you believe that is his signature.
A Yes, sir.
Q And you received that in response to a letter you wrote to him?
A Yes, sir.

The Court. I will admit the letter.
Said letter is marked Exhibit C-5.
Mr. Nash. I also wrote Mr. Baumann a letter under date of November 3rd, a copy of which I will now offer.
Mr. Merrill. Objected to.

By the Court.

Q Is that a carbon copy?
A Yes, sir.
Q The original was mailed to Mr. Baumann?
A Yes, sir, at Cottekill, New York.

The Court. It will be received in evidence.
Said letter is marked Exhibit C-6.
Mr. Nash. I received a letter signed, "K. Baumann, bearing date November 7th, 1920, which I believe contains the signature of Mr. Baumann, and which I will now offer in evidence.
Said letter is marked Exhibit C-7.
Mr. Nash. Under date of November 9th, I directed a letter to Mr. Baumann—Mr. Karl Baumann, at Cottekill, New York, a copy of which I offer in evidence.
Mr. Merrill. I object to it.
The Court. I will admit it.
Said letter is marked Exhibit C-8.

By the Court.

Q The originals of these letters were called for in the notice to produce?

A Yes, sir.

Q Mr. Nash, at the request of Mr. McVoy did you examine the records in the Union County Register's office covering the premises situated on Orchard Street, in the name of Karl Baumann?

A I did.

By the Court.

Q The premises comprised in the contract?

A The premises comprised in the contract. I examined the indexes to the records in the Union County Register's office, and I found recorded therein a deed to Mr. Baumann—Karl Baumann—covering the premises described in the contract in this suit. In November, 1920, I examined the indexes, and found a deed covering the premises described in this contract, from Karl Baumann to Bertha Baumann. I also found a deed from Bertha Baumann and Karl Baumann to Ella and Elihu H. Cooley, covering the same premises.

Q Isn't that admitted in the pleadings?

A Yes, sir.

Mr. Merrill. No questions.

Mr. Baumann's lawyer has been referred to several times. I was not his lawyer at that time. I did not come in until October, after he had agreed to convey to another.

MARY E. McVOY, the above named complainant, being duly sworn in her own behalf, testifies as follows:

Direct examination by Mr. Nash.

Q Mrs. McVoy, you reside in Westfield?

A I do.

Q And Mr. Herbert C. McVoy is your husband?

A He is.

Q You are the complainant in this action?

A I am.

Q Did you authorize Mr. McVoy to act for you in this transaction?

A I did.

Q And was a tender of $3,000.00 made at your request?

A It was.

Mr. Merrill. No questions.

COMPLAINANT RESTS.

Mr. Merrill. I move to dismiss, on the ground that there is absolutely nothing, and has been absolutely nothing introduced to connect the defendant Cooley with this action; and admittedly, Mr. Cooley is the present owner of the legal title. The suit will not lie against Mr. Baumann, for he hasn't title, unless a suit will lie against the present owner, and he is holding it as a trustee.

I move to dismiss Mrs. Baumann on the ground that she did not sign or acknowledge the contract of sale.

The Court. I will dispose of that later.

Mr. Merrill. I further move to dismiss on the ground that there is shown no mutuality. An action will not lie against an assignee to compel the payment of the money by the assignee.

The Court. I will reserve that question also.

Mr. Merrill. I further move to dismiss because no property or interest was in Mr. or Mrs. Baumann at the time this action was brought. They had conveyed, and conveyed for value, and the suit should lie against Mr. Cooley.

The Court. I will deny that motion. There is no proof that they did convey for value.

Mr. Merrill. The defendants rest on the motions, and the evidence put in by the complainant.

EXHIBIT C-4.

October 27th, 1920.

Mr. Karl Bauman,
Cotte Kill,
Ulster County,
New York.

Dear Mr. Bauman:—

Mr. McVoy advises me that he has been ready to close the title to the premises on Orchard Street which he has agreed to purchase from you for some weeks past. He informs me that you were to let him know regarding the deed, but that he has not heard from you for over two weeks. As it is extremely necessary that Mr. McVoy take title immediately I would request that you advise me when you will be ready to deliver possession and deliver the deed in accordance with your contract.

Trusting I may hear from you by return mail, I remain,

Very sincerely yours,
AUGUSTUS C. NASH.

EXHIBIT C. 5.

Cottekill, N. Y.
Oct. 30, 1920.

Mr. Augustus C. Nash.

Dear Mr. Nash:—

I have your letter of October 27th relative to the Orchard St., property which Mr. McVoy contracted to purchase from me on October the first.

You will recall that the contract specified that the deed was to be delivered and the money paid to me October first. I was in Westfield at your office on October first, ready to close, but Mr. McVoy was not ready.

On account of Mr. McVoy's failure to fulfill his

contract I was unable to close a deal which I had on hand here and I have a claim against Mr. McVoy on that account.

So far as the contract to sell the Orchard St. property is concerned, that was broken by Mr. McVoy when he failed to make good and I told him so when I was in Westfield on Oct. 13th.

Yours very truly,

KARL BAUMANN.

EXHIBIT C-6

November 3rd, 1920.

Mr. K. Baumann,
Cottekill,
Ulster Co., N. Y.

Dear Sir:—

I desire to acknowledge receipt of your favor of the 30th inst., and in reply thereto beg to state that I am rather surprised that you refuse to go on with the McVoy deal. Perhaps you misunderstand that the law in this state covering real estate transfers does not make "time the essence"—of the contract and you cannot hold either party to the specific day mentioned in the contract. Under our laws a bill will lie to compell you to perform your contract. I trust you will not make it necessary for me to institute suit compelling you to deliver the deed as agreed. For your information I will inform you that I have filed the contract and unless I have an answer stating that you will fulfill your contract by next Monday I shall file a suit in Chancery to compell you to do so. This will add additional expense and make you also liable for damages for failing to fulfill. I am writing you this information in the belief that you do not understand the situation and perhaps have not taken advise from a New Jersey counsel.

I might also add that you were not in a position to deliver title of the premises on October 1st, owing to the fact that the premises were occupied by a tenant which was an encumbrance upon the premises and a violation of the contract in which you agreed to deliver free and clear of encumbrance.

Trusting I may hear from you by Monday next, I remain,

Yours very truly,

AUGUSTUS C. NASH.

EXHIBIT C-7.

Nov. 7", 1920.

Mr. Augustus C. Nash,

Dear Sir,

I have your letter dated 3d Now, Mr. Nash, I think I know something about contracts.

If time is not essential why do we put date and time into a contract?

I was ready on Oct first in accordance with the agreement with Mr. McVoy and he was not ready. I then had the right to regard the contract as at an end.

I also know that Mrs. Baumann did not sign the contract and she could not have been compelled to sign the deed.

You must know that Mr. McVoy has no ground for bringing a suit and the best thing for him to do is to settle with me for my claim for damages, because I could not carry through the deal I expected to carry through with the money I was to receive from him.

Yours very truly,

K. BAUMANN.

EXHIBIT C-8

November 9th, 1920.

Mr. Karl Bauman,
Cottekill,
New York.

Dear Sir:—

In reply to your favor of the 7th inst., permit me to state that I will proceed to file the papers for specific performance of the contract in the McVoy matter. It does not make any difference to me whether Mrs. Bauman signed the contract or not as I consider you are sufficiently responsable to collect money damages in the event that you refused to fullfil the contract. In this particular action damages will be heavy owing to the fact that we can show a loss of a sale through your failure to deliver.

Yours very truly,

AUGUSTUS C. NASH.

Between
MARY E. McVOY,
Complainant,
and
KARL BAUMANN, *et als,*
Defendants.

On Final hearing.

Conclusions.

MR. A. C. NASH, *for Complainant.*
MR. E. A. MERRILL, *for Defendants.*

BUCHANAN, *V. C.*

This is a bill for specific performance of a contract, for the sale of lands located in this state, between Karl Baumann, the owner, as vendor, and Herbert C. McVoy as vendee. The covenant was to convey to vendee, his heirs or assigns. Between the making of the contract and the date for consummation it was arranged (apparently verbally) among all the parties concerned that the deed should be made to the vendee's wife, the present complainant. On the date for consummation specified, in the contract the vendor attended, with a deed duly executed and acknowledged by himself and his wife (who was not a party to the written agreement,) which deed named complainant as grantee and the vendor at that time asked that a written assignment of the vendee's interest in the contract be executed by vendee to complainant, which was then and there done. A re-sale of the premises in two parcels, had been arranged by vendee and deeds duly executed by complainant and vendee had also been prepared. Complainant was expecting to put through the several transactions at the one time, and to pay the sum due to vendor out of the moneys to be received from the "sub-vendees." The latter however did not appear, and after waiting a long time Baumann and McVoy both left.

Baumann later refused to perform his contract, and complainant, after causing tender to be made of the sum due, filed her bill. In the meantime she had the contract recorded, although it was acknowledged only by the vendee and not by the vendor.

Prior to the filing of the bill, but after the recording of the contract, Baumann conveyed the premises in question to his wife, and then joined with her in a conveyance to Cooley, the third defendant.

All three defendants were non-residents of this state at the time of the filing of the bill, and the usual so-called "order of publication" was taken against them, requiring them to appear and answer on or before the date therein fixed, and providing that the statutory notice of such order be served personally on the defendants within ten days or be published and mailed (in the usual manner and form).

No proof was made or filed, either of service or of publication and mailing, but notice obviously reached the defendants, for prior to the expiration of the period of publication, application to this court was made by the solicitor for leave to appear specially for the said defendants to move the dismissal of the bill as against all of the defendants, on the ground of

> "lack of jurisdiction, the said defendants not being residents of this state and no personal service of process having been made, but service having been attempted to be made by publication."

Orders granting such leave were entered, and the motions for dismissal were made, but of course not granted. Instead an order was entered

> "that the motion to dismiss the complaint as to Karl Baumann and Bertha Baumann for

want of jurisdiction be denied, but that said defendants may file an answer under their special appearance subject to the condition that if on final hearing the motion to dismiss for want of jurisdiction is denied, their answer shall stand as a general appearance."

A similiar order was also entered as to the defendant Cooley, both orders being entered prior to the expiration of the time limited in the order of publication.

Answers were thereafter duly filed, and after replications, an order of reference was made, and an order of designation—both consented to by defendants' solicitor—and the case was brought on for final hearing pursuant to the designation.

At the hearing the motion to dismiss for lack of jurisdiction was renewed, and the objection thus interposed requires preliminary determination—for if this court be without jurisdiction it cannot pronounce a valid decree one way or the other upon the merits of the case.

It may not be amiss to point out here that defendants, in their original attempt to bring forward this objection, acted both prematurely and by improper motion. The ground of their objection is and was then, that the cause of action is one strictly *in personam,* and that jurisdiction has not been acquired over the persons of the defendants. (The difference is obvious between this situation and a contention that the court is without jurisdiction of the subject matter of the controversy.) Their original motion was to dismiss the bill, upon the ground stated, and it was made before the record showed the service of process or any substituted service.

Assuming the cause of action to be one strictly *in personam,* it is surely no ground for dismissal of the bill, that service has not been made,

(except perhaps where there has been such long continued delay as to constitute laches, *Dey* vs. *Hathaway,* 41 N. J. Eq., 419.) Not only is this true where there is nothing of record to indicate that service has been made, but also in a case where it appears by the record that service has duly been made, but defendant contends the contrary. In the former case there is nothing upon which defendant can take any action. After proof of service appears of record he may either move to set aside the service or the proof thereof, or, if he be a non-resident, he may raise the question by setting up in his answer a denial of the acquisition of jurisdiction over his person. *Chancery Rules* 52, 53. *Groel* vs. *United Electric Co.,* 69 Eq., 397; *Wilson* vs. *Am. Palace Car Co.,* 65 N. J. Eq., 730; *Ewald* vs. *Ortynsky,* 78 N. J. Eq., 527; *Brimberg* vs. *Hartenfeld Bag Co.,* 89 N. J. Eq., 427.

There would seem to be no difference in principle whether the contested service of process be of service of the ordinary subpoena, or substituted service under an order of publication. The latter is strictly a service of notice rather than of process, but is just as essential, under our statute, to the acquisition by the court of the right to proceed with the disposition of the cause. Until, therefore, there had been filed the proofs of service or publication of notice, pursuant to the order of publication, not only could the court not proceed with the cause, but there was nothing upon which the defendants could take any action. No objection could be made by them to the entry of the order of publication itself. *Kirkpatrick* vs. *Post,* 53 N. J. Eq., 591; aff'd. Id., 641.

Returning to the main issue, the question is whether or not this court can pronounce a valid decree in a specific performance suit by vendee

against vendor and vendor's grantee, where the defendants are non-residents of this state, not served with process in this state nor appearing voluntarily, but served pursuant to our statute under an order of publication.

Clearly, if the action be one strictly *in personam*, the question stated must be answered in the negative. *McGuinness* vs. *McGuinness*, 72 N. J., Eq. 381. It is equally clear that in former times such a suit for specific performance was an action strictly *in personam*. The prayer of the bill was for a decree that defendant convey the lands in question to complainant; the decree, if granted was that defendant convey; and it was only by defendant's obeying the decree, either with or without compulsion, that complainant could obtain the relief sought by his bill and awarded to him by the decree, namely the title to the lands. *Amparo Mining Co.*, vs. *Fidelity Trust Co.*, 74 N. J. Eq., 197 at 203.

Although equity acts, ordinarily, and unless empowered by legistative authority, only *in personam*, nevertheless this State as a sovereign state has jurisdiction and control over all property situate within its borders. As is said by Mr. Justice Brewer in *Arndt* vs. *Griggs*, 134 U. S., 316, at 320, "It (the state) has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing title thereto. It cannot bring the person of a non-resident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice."

This language is quoted with approval by the same court in the opinion of Mr. Justice Brown in *Roller* vs. *Holly*, 176 U. S. 398, at 405.

In *Arndt* vs. *Griggs* the question before the court was, as is said in the opinion, p. 320, "What jurisdiction has a State over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate." The determination by the court was that "a State has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication," and that where a State has so provided by proper statute, a decree quieting title entered in a suit conducted in accordance with such statute is not open to the objection by a non-resident defendant served only by publication, that it is an equity decree and can act only *in personam*, because the effect of such statutory provision is to make the proceedings and the decree substantially *in rem*. The same question, (*inter alia*) was before the court in *Roller* vs. *Holly, supra,* in regard to a proceeding to foreclose a vendor's lien on real estate, and the same determination was expressed.

These two cases being respectively on bill to quiet title and bill to foreclose vendor's lien, are not express and exact determinations of the question as affecting a bill for specific performance Nevertheless the language of the opinions is broad enough to comprehend the present proceeding, and the same conclusion, it seems to me, must needs be reached from the reasoning given.

The proceeding is one seeking to affect, by its ultimate result, the title to real estate in this state; to accomplish a transfer of the legal title thereto from defendant to complainant; to deprive defendant of such title and establish it in complainant.

The sovereign power of the State obviously extends to all questions of ownership, transfer, acquisition or deprivation of title to lands within its territorial limits, subject only to such limitations as arise under and by virtue of the Constitution of the United States. Cf. *United States* vs. *Fox*, 94 U. S., 315, at 320. Referring to the passage quoted *supra* from *Arndt* vs. *Griggs*, a non-resident owner of lands is subject to the State's rules concerning the holding of title thereto, the transfer of title thereto, and the liability thereof to obligations, private as well as public. The same opinion quotes with approval from the opinion in *Dillen* vs. *Heller*, 39 Kansas, 599, including the following:

> "Has the State any power, through the legislatures and the courts, or by any other means or instrumentalities, to dispose of or control property in the State belonging to non-resident owners out of the State, where such non-resident owners will not voluntarily surrender jurisdiction of their persons to the State or to the courts of the State, and where the most urgent public policy and justice require that the State should assume jurisdiction over such property? * * * We think a sovereign state has the power to do just such a thing. * * To obtain jurisdiction of everything within the State of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service."

In the same opinion is also quoted with approval an excerpt from the opinion of the same Court in *Pennoyer* vs. *Neff*, 95, U. S., 714, at 727, including the following:

> "Such service (by publication) may also be sufficient in cases where the object of the action is to reach and dispose of property in the

> State, or of some interest therein, by enforcing a contract or lien respecting the same, * * in other words such service may answer in all actions which are substantially proceedings *in rem* * * It is true that in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants; but in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them or some interest therein."

Arndt vs. *Griggs* also quotes with approval in support of its determination, from *Boswell* vs. *Otis*, 9 Howard (U. S.) 336, at 348:

> "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill of chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem*, in ordinary cases; but where such a procedure is authorized by statute on publication, without personal service of process, it is substantially of that character."

Morever, even in *Hart* vs. *Sansom*, 110 U. S., 151 (an opinion which has been frequently misconstrued, and which has been explained and expressly delimited in later opinions) it is said, p. 154:

> "Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, *unless otherwise expressly provided by statute,* (the italics are mine) is clearly not a judgment *in rem,* establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff."

I conclude then that it is within the power of this state to provide by statute that this court may hear and determine a suit for specific performance of a contract for the sale of lands in this state, brought by vendee against a non-resident vendor, notwithstanding jurisdiction be not had by the court over the person of the vendor, after due proceedings for notification to vendor of the pendency of such suit, and that the title to the lands shall pass to such vendee upon a determination in his favor; or to put it a little differently, a valid judgment or decree, transferring title to lands in the state from vendor to vendee may be entered in this court in a suit for specific performance where the vendor has been served only with notice and not with process, provided the suit be substantially *in rem;* and such suit is so substantially *in rem* where the state has by statute provided for the service of notice on such non-resident vendor in such cases and has also provided that upon such judgment or decree title shall pass irrespective of any action by the vendor.

That the requisite legislative enactments have been made by this state, I think there can be little doubt. The provisions for the acquisition of jurisdiction over absent defendants are to be found in Sections 12-18 of the Chancery Act (Rev. of 1912.) They do not in express and specific terms refer to a

suit for specific performance, nor to suits affecting lands, but their application is comprehensive and general and extends to all cases where under recognized principles of law suits might be instituted against non-resident defendants. *Roller* vs. *Holly, supra,* at 406; *Amparo Mining Co.* vs. *Fidelity Trust Co.,* 75 N. J., Eq. 555 at 560. By Section 45 of the Chancery Act (Rev. 1902) a decree of this court for the conveyance of lands or any interest therein, not complied with by the parties decreed to convey is made of the same force and effect as if the conveyance had been executed pursuant to the decree. The legislature had thus made the decree the actual instrumentality accomplishing the transfer of title in all cases except where there is an exact compliance with the decree. Cf. *Weehawken Ferry Co.* vs. *Sisson,* 17 N. J., Eq. 475. It may be noted that the *form* of the decree must be personal, for a conveyance, otherwise of course the statute is not operative. But it is equally obvious that the transfer of title is accomplished by the state through the decree of this court, and not by the act of the parties, unless they convey in absolute and exact compliance with the terms of the decree, and this is of course utterly irrespective of whether or not the defendants be non-residents. The effect of the statute, as it has been said, makes the decree self-executing. In the language of Vice Chancellor Pitney in *Fee* vs. *Sharkey,* 60 N. J., 292, (adopted by the Court of Errors and Appeals, Id. 61 N. J., Eq. 446, and again in *Goldstein* vs. *Curtis,* 65 N.J., Eq. 382.

> "The strength of the complainant's title does not rest in any deed of conveyance executed by the defendant, but in the declaration and decree of this court establishing his right in equity."

—this, in the course of holding that it was not necessary for a married women to acknowledge a conveyance which had been decreed in Chancery, nor indeed for her to make any conveyance at all.

It may also be noted that Section 44 of the Chancery Act gives to decrees in Chancery the same force and effect as judgments at law in the Supreme Court.

It seems to me, therefore, in view of the several statutory enactments referred to, that a suit in this court, by vendee against vendor for specific performance of a contract to convey lands in this state, is in this state a suit *quasi in rem*, or "substantially *in rem*." and that jurisdiction is acquired by this court even though the vendor be a non-resident and neither appears voluntarily nor is served with process in this state, if there be an order of publication in conformity with the statute and service or publication of notice pursuant to such order. Nor does the fact, that the defendant vendor conveyed the lands subsequent to this contract and before suit brought, and that one of the defendants is the grantee under such conveyance and also a non-resident, make any difference on this question of jurisdiction. It is still the question of the rights of complainant and the defendants in the lands in this state. The precise question, that is, in relation to a suit for the specific performance of a contract of sale of real estate, seems never to have been adjudicated in this state; and indeed to have arisen but rarely in other jurisdictions. The weight of authority is however in favor of the acquisition of jurisdiction by the constructive service Cf. *O'Sullivan* vs. *Overton*, 56 Conn. 103; *Mason* vs. *Benedict*, 43 La. Ann., 397; *Tutt* vs. *Davis*, 13 Cal. App. 715.

In Masschusetts it was held in *Spurr* vs. *Scoville*, 3 Cush., 578, that jurisdiction could not be acquired

by constructive service in such a case, there being then no statutory provisions such as have been heretofore referred to. Legislation was thereafter adopted under which a trustee could be appointed to convey the property in lieu of the non-resident defendant. In *Felch* vs. *Hooper,* 119 Mass. 52, subsequent to this legislation, jurisdiction was sustained of a bill by a purchaser of lands, who had paid or tendered the purchase price and been given possession of the lands, and prayed for legal title. The court expressly says that a bill for specific performance could not be sustained, but that the suit in question was a suit to enforce an implied trust. I confess it is difficult for me to see the distinction —for the equitable doctrine is and has always been that a vendor is a trustee of the lands for the vendee from the time of the making of the contract, Cf. *Hoagland* vs. *Latourette,* 2 N. J., Eq. 254, at 256, and the payment or tender of purchase price is of course a requisite demanded of a vendee suing for specific performance; and even though a trustee be appointed to convey the title, in the last analysis it is the statute which transfers the title, since otherwise the trustee would have no title to convey.

In this state the principles have been repeatedly discussed in such cases as *Hill* vs. *Henry.* 66 N. J., Eq. 150; *Andrews* vs. *Guayaquil & Co.,* 69 N. J., Eq. 211; (aff'd 71 N. J. 768;) *Sohege* vs. *Singer Mfg. Co.* 73 N. J., Eq. 567; *Amparo Mining Co.* vs. *Fidelity Trust Co.* 74 N. J., Eq. 198, aff'd 75 N. J., Eq. 555. In Hill vs. Henry the bill was one to quiet title against the unknown heirs, devisees or personal representatives of a decedent. Jurisdiction was denied on the ground that constructive service to be valid must be against named defendants, but the opinion clearly indicates that jurisdiction would have been upheld against a definite

and named defendant. The other three cases all upheld the jurisdiction, but involved personalty (shares of stock) instead of realty, so that they are not distinct authority in the present case; yet a reading of the opinions leaves no room for doubt that similiar decisions would have been rendered if the suits had been for specific performance of realty contracts. Particular reference may be made to the language of Vice Chancellor Howell in the Singer case, at p. 577; of Vice Chancellor Stevenson in the Amparo case at pp. 203, 204; and of Mr. Justice Swayze in the same case, at pp. 559, 560. Cf. also *Lister* vs. *Lister,* 86 N. J., Eq. 30, at 36.

The defendant argues that even if a suit *in rem* or *quasi in rem* might, under the circumstances of the present case, be brought and maintained by complainant on constructive service merely, nevertheless this is not such a case because there is no allegation that defendants are trustees, and the prayer of the bill is for a personal decree only, that defendants perform the contract, execute a conveyance of the lands, deliver possession and account for the rents, issues and profits. This contention is however, as it seems to me, without force, for a bill need not allege or charge the legal or equitable results of acts; it is sufficient to set forth, as the present bill does, the facts from which the legal or equitable sequences necessarily flow. The form of the prayer is the form sanctioned by immemorial usage, and morever it is strictly correct, since as I have already pointed out, it is necessary, under the wording of the statute, that the form of the decree be *in personam* in order that the statute shall execute it. Possibly some sort of a hybrid form of prayer might be devised, but to what good end? I take it that in these days, and especially since the amendment of 1915 to the Chancery Act.

neither the particular relief prayed for nor the form of the prayer is of much materiality, except upon a question of election of remedies, and on that point no question arises here for the present bill clearly shows that complainant asks for title to the lands, not for the consideration paid or agreed to be paid by the subsequent grantee.

It may well be essential in such a case as this, that the notice to the non-resident defendants should call their attention to the fact that a decree transferring their title might be rendered against them even if they did not appear. With that however I am not concerned. As I have already stated there are no proofs of publication or service of the notice on file in these proceedings. Presumably the publication was terminated by arrangement between the parties, on the making of the original motion, for it was expressly stated by defendants' counsel at the hearing, that if the present case was one substantially *in rem* in which jurisdiction could be acquired by publication, then such jurisdiction had in fact been acquired.

Passing, then to the merits, defendants contend that defendant Cooley (the subsequent grantee) is a purchaser for value without notice and hence the bill cannot be maintained against him and that it cannot be maintained against the other defendants, without Cooley, since they have not the title to convey.

This phase of the case is not quite as simple as defendants' argument would indicate. It will be recalled that after the date for consummation of the original contract of sale, and before the recording of that contract, a deed of conveyance from vendor to his wife (who had not joined in the contract to McVoy) was executed and recorded; and that after the recording of the contract of sale, the wife, with her husband joining, executed a convey-

ance to Cooley. (Prior to 1919, the wife, and therefore also Cooley, would have taken only an equitable title, *Sipley* vs. *Wass*, 49 N. J., Eq. 463; but P. L. 1919, c. 49, makes valid a direct conveyance from husband to wife, so that Cooley took the legal title by the deed to him.) It is, or may be, necessary, therefore, to make this inquiry, as to the purchase for value without notice, both in respect of Cooley and of the wife; although of course if the wife took for value and without notice it would be immaterial as to whether Cooley did or did not. *Rutgers* vs. *Kingsland*, 7 N. J., Eq. 178; *Holmes* vs. *Stout*, 10 N. J., Eq. 419, at 422 and 429.

When we come to make this inquiry however we are met by the unusual circumstance that there is not a particle of evidence in the case as to whether the wife took with notice or without (although a strong suspicion arises from her execution of the undelivered deed to complainant); and indeed the same thing is also true as regards Cooley, for it would surely seem that the contract of sale, though in fact recorded on the acknowledgment by vendee, cannot be constructive notice when not acknowledge by the vendor. *Brinton* vs. *Scull*, 35 Atl. 843; (reversed, but not on this point, 37 Atl. 740.) None of the defendants testified or even appeared at the hearing.

We are driven back therefore to the fundamental principle forming the basis of a vendee's right to relief against a subsequent grantee, and indeed to a determination as to precisely what that fundamental principle is. Must a vendee, in order to be entitled to a decree against a subsequent grantee, prove that the latter either had notice or was not a purchaser for value? Or will he prevail unless the grantee prove himself to be a purchaser for value without notice? Does the vendee by establishing his right as against the vendor thereby establish a

right in respect to the lands in whomsoever hands the legal title be found unless the holder of that legal title interpose a valid defence? Or would his bill against a subsequent holder of the legal title be subject to dismissal for failure to state a cause of action, if it contain no allegations showing defendant to be (as it is sometimes expressed) privy to complainant's equity? As to this there seems to be an unexpected dearth of authority. None is cited by counsel on either side and none precisely in point has been found by a search of some length.

The theory of the grantee's liability set up by equity jurisprudence is that of trusteeship, the grantee is said to become a trustee for vendee by operation of law, just as a trust is said to arise by operation of law between vendor and vendee. But even here, that is in the broad, general domain of trusts there is but little authority, and that in conflict (Cf. *Bogert, Trusts,* p. 514), as to whether a grantee from an express trustee becomes a trustee for the *cestui* unless he can excuse himself by the affirmative defence of an innocent purchaser for value, or whether he becomes a trustee only if he takes with notice or as a volunteer. It is curious that most of the text writers make absolutely no mention whatever of such a fundamental question. But the weight of authority in the adjudicated cases seems to be that the burden in on the defendant to show that he is entitled to the protection of a purchaser for value without notice.

In this state the question would appear to be settled to the same effect. In *Haughwaut* vs. *Murphy,* 22 N. J., Eq. 531. Mr. Justice Depue, delivering the opinion of the Court of Errors, says, (at p. 547)

> "It is upon the principle of the transmission by the contract of an actual equitable estate, and the impressing of a trust upon the legal

estate for the benefit of the vendee, that the doctrine of the specific performance of contracts for the sale and conveyance of lands mainly depends."

In *Reeves* vs. *Evans,* 34 Atl. 477, Vice Chancellor Reed says:

"The trust follows the legal estate wherever it goes except it comes into the hands of a purchaser for valuable consideration without notice."

Citing Lewin, Trusts, *823; (that reference being as follows:

"Where there was a trust, it should be considered in that court as the real estate between the *cestui que trust* and the trustee and all claiming by or under them."

The same author says, *p. 246:

"The universal rule, as trusts are now regulated, is, that all persons who take *through or under the trustee,* except purchasers for valuable consideration without notice, shall be liable to the trusts."

Finally, see the opinion of Vice Chancellor Backes in *Bridgewater* vs. *Ocean City Ass'n.,* 85 N. J., Eq. 379, at 384; affirmed on that opinion, 88 N. J., Eq. 351.

From the foregoing, then, it would appear that in the absence of statute, the subsequent grantee must bear the burden of proving that he paid value and was without notice. This burden however may be shifted by statute. *Bridgewater* vs. *Ocean City Ass'n., supra.* Has it been so shifted in the present case?

By Sections 54 and 21 of the "Act respecting conveyances," in effect at the time of the execution of the contract of sale to McVoy, it is provided that

every agreement for the sale of land in this state "shall, until duly recorded * * * be void and of no effect against subsequent judgment creditors without notice and against all subsequent *bona fide* purchasers and mortgagees for valuable consideration, not having notice thereof, whose deed or mortgage shall have been first duly recorded," but "shall be valid and operative, although not recorded, except as against such subsequent judgment creditors, purchasers and mortgagees." I confess that to my mind the language of the statute indicates no shifting of the burden of proof. The unrecorded instrument is not made invalid generally, it is made invalid only as to certain classes of persons, and is expressly declared valid except as to those classes of persons. Logically, therefore, it would seem that one in order successfully to claim the benefit of the statutory provision must bear the burden of proving himself to be within the classes of persons as to whom, only, the contract is declared invalid. However it has been repeatedly held, under statutes in all respects essentially similar in language, that the burden is on the holder of the unrecorded instrument to prove that the subsequent grantee had notice, *Coleman* vs. *Barklew*, 27 N. J. L., 357, at 359; *Vreeland* vs. *Claflin*, 24 N. J. 313; *Hodge* vs. *Amerman*, 40 N. J., Eq. 99; *Roll* vs. *Rea*, 50 N. J. L., 264 at 267; *Protection Bld'g & Loan Ass'n*, vs. *Knowles*, 54 N. J., Eq. 519 at 529; *Paul* vs. *Kerswell*, 60 N. J. L., 273 at 275; *McGrath* vs. *Norcross*, 78 N. J., Eq. 120 at 134; *Hendrickson* vs. *Wooley*, 39 N. J., Eq. 307 at 308; *Atlantic City* vs. *New Auditorium Pier Co.*, 67 N. J., Eq. 610 at 615; the two cases last mentioned being opinions of the Court of Errors and Appeals.

In none of these cases is there any discussion of the rationale of the conclusion. This is of course of no moment so far as the determination of the

present case on the question of *notice* is concerned, but it is unfortunate in regard to the question of valuable consideration; for the subsequent grantee, to be protected, must needs have paid value as well as having been without notice. Is the burden of proof on the holder of the unrecorded instrument to show that the subsequent grantee did not pay valuable consideration? To be consistent it must be so held, unless there be a distinction in the language of the statute as between the two factors. To my mind it is difficult to perceive such a valid distinction, by reference to the statute alone. Nevertheless, in *Coleman* vs. *Barklew, supra,* (which is apparently the ultimate basis of all the other authorities in the list above,) there is an indication that the Supreme Court there thought that persons having notice were made by the statute an exception to the class or classes as to which the unrecorded instrument was made invalid; that the words "not having notice" are to be construed "unless he have notice." A similiar indication is found in *McGrath* vs. *Norcross, supra,* at p. 134. If such is to be deemed the proper interpretation of the language of the act, (and I conclude from these two cases that it is), namely, that the unrecorded instrument is to be deemed void as to subsequent purchasers for valuable consideration, except such as have notice thereof; then it is logical enough to require the holder of the unrecorded deed to prove that the subsequent grantee had notice, while requiring the latter to prove himself to have paid value. The former would have the burden of bringing himself within the general classification of the statute, whereas the burden of proving that he also came within the exception out of that general class, would rest upon the latter.

I conclude, then, that defendants in the present case, have the burden of proving that Mrs. Baumann or Mr. Cooley paid value.

There may also be noted in support of this conclusion, in addition to what has been said earlier herein under the discussion as to notice, that the facts as to payment of consideration are peculiarly within the knowledge of defendants, it not being likely that complainant would have any knowledge thereof; also the language of this court in *Van Doren* vs. *Todd,* 3 N. J., Eq. 397, at 415, (the italics are mine)

> "Nor is there any one who claims that sum that *proves himself a bona fide purchaser,* paying his purchase money without notice;"

and of the Court of Errors in *Graves* vs. *Coutant,* 31 N. J. Eq. 763 at 778-9,

> "Upon the last point I agee with the master in his opinion, that her (defendant's) uncertain statement of the consideration paid by her for this conveyance and the small sum of $1000. in money which she says she has paid, *are insufficient evidence of a fair purchase for a good consideration* of the large and valuable property described in the deed to her * * * It is not only necessary that a defendant setting up a defence of a *bona fide* purchaser should clearly and unequivocally state in the answer that the purchase was for value, without notice, but he must also set forth all particulars of the purchase and must distinctly prove them. There has been a failure in this particularity both in the answer and in the proof, in this case."

These two cases were both on bills to enforce a vendor's lien and hence did not come under the scope of the recording statute. However that the statute makes no change in this behalf on the question of purchase for value is indicated by *Griffin* vs. *Griffin,* 18 N. J., Eq. 104, a case under the New

York recording act apparently similiar to ours, where Chancellor Zabriskie says, (page 107):

> "The complainant is not a purchaser for a valuable consideration. Her claim is as dowress and by releases from her children, which are for a nominal consideration; *she does not prove any consideration.*"

And in *Holmes* vs. *Stout*, 10 N. J., Eq. 419 at 426, 427, the Court of Errors and Appeals explicitly points out that our statute, like that of New York, makes the unrecorded deed void only as against a subsequent *bona fide* purchaser for valuable consideration.

Again, the defence of the statute is a purely legal one, as to which it is said by the Court of Errors in *Page* vs. *Martin*, 46 N. J., Eq. 585, at 589, that it must be clearly made out by him who sets it up. Cf. also *Crandall* vs. *Graham*, 115 Atl., 178, at 180.

I am unable to find anything in the case to sustain that burden on behalf of defendants. There was, as has been said, no evidence or testimony offered by defendants, and there is nothing in the complainant's proofs upon which they can rely. The fact that the deeds of conveyance were made to Mrs. Baumann and Cooley was alleged in the bill and admitted in the answers, but the payment of consideration is not admitted by complainants' pleadings and neither the deeds themselves or the record thereof were offered in evidence. Hence the rule that where the deed itself purports to be for valuable consideration it will be taken as sufficient proof thereof in the absence of any evidence to the contrary, *Holmes* vs. *Stout*, 10 N. J. Eq., 419 at 424; *Roll* vs. *Rea*, 50 N. J. L., 264 at 267; cannot be applied. Neither can it be said, as to the deed to Mrs. Baumann, that in such a case as this the rela-

tionship of husband and wife constitutes sufficient consideration. Cf. *Annin* vs. *Annin*, 24 N. J. Eq., 184.

Defendants' contention that specific performance will not be decreed because complainant has an adequate remedy at law is without merit. *Dobbins* vs. *Plager*, 111 Atl., 404. Moreover the argument made in this behalf, based on the fact that complainant had already contracted to sell the lands in question, tends to support rather than to negative specific performance, since without it the subsequent contract could not be performed.

Defendants next contend that complainant is barred because vendor attended and was ready and willing to perform at the time and place agreed on, and complainant was not then able to perform. The answer to this is, of course, that under the contract in question, time was not of the essence, and that complainant was, within a reasonable time ready and willing to perform and tendered such performance. Furthermore, I am entirely satisfied from the evidence that vendor agreed to postpone the consummation. Vendor not only had no right to rescind, but did not attempt to rescind, or at least gave no such notice to complainant, until after complainant's tender of performance.

The next contention of defendants, that complainant, as the assignee of the contract of sale, cannot have specific performance—is also without merit. *Pomeroy, Eq. Rem.*, 2d ed., Sec. 851; *Story*, 14th ed., Sec. 1024; 2 *Warvelle, Vendor & Purchaser*, 2d ed., 864; *Bateman* vs. *Riley*, 72 N. J. Eq., 316; *Smith* vs. *Anderson*, 84 N. J. Eq., 681. It is no objection that there is a want of mutuality of obligation prior to suit brought by vendee's assignee. The criterion is mutuality of remedy at the time of decree. The assignee (complainant) has brought suit and placed herself within the jurisdiction of the court, and can

be compelled to perform; *Richards* vs. *Green,* 23 N. J. Eq., 536. *Naugle* vs. *McVoy,* 115 Atl., 393, is of course, in no wise any adjudication to the contrary.

The final argument of defendants is that Mrs. Baumann was not a party to the contract of sale to McVoy and hence the suit will not lie against her. This is true in a sense; if she had not conveyed her inchoate dower interest to Cooley she could not be compelled to convey to complainant for she never contracted with complainant or complainant's assignor to convey; neither will there be made in this suit, under the circumstances that have actually happened, any decree that she convey. Nevertheless, she is of course a proper party to the suit, if not indeed a necessary party. But no conveyance, or decree for conveyance, from her is necessary; her dower interest was extinguished by merger in the fee conveyed to her, and any possible contingent curtesy of her husband was extinguished by the deed to Cooley, and the conveyance, or decree for conveyance, from him to complainant will carry the title free of any encumbrances of dower or curtesy. The case is very similar in this aspect, to *Saldutti* vs. *Flynn,* 72 N. J. Eq., 157, and the procedure therein outlined would be adopted here were it not for this distinct variation: in the present case there is the double conveyance (from Baumann to his wife and from her to Cooley) and there is no evidence as to what, if anything, was paid, or agreed to be paid, by the wife to Baumann, or by Cooley to either Baumann or Mrs. Baumann. There is nothing to show, therefore, that there are any equities which require adjustment as among the defendants, and so far as complainant is concerned, then, there are not; and if, as among defendants themselves, there be in fact, such equities, complainant should not be delayed thereby—they having seen fit to introduce

no evidence thereof at the hearing. I think the decree should provide for the payment to Baumann by complainant of the unpaid balance of purchase price —although if defendants desire, the payment can be made into court and the several interests of defendants therein as amongst themselves thereupon be determined.

Complainant is entitled to costs as against all the defendants. Of course, if the jurisdiction of this court in the case rested solely on constructive service, no personal decree, even for costs, could be made against any of the defendants. But by reason of the condition imposed in the orders for leave to answer, and the subsequent acts of the defendants, and the final determination against them of their original objection to the jurisdiction, they are now before the court on voluntary general appearance in the suit.

IN CHANCERY OF NEW JERSEY.

Filed February 25, 1922.

Between
MARY E. McVOY,
Complainant,
and
KARL BAUMANN, *et als,*
Defendants.

On Bill, etc.
Final Decree.

This cause coming on to be heard upon the bill, answer, replication, and proofs in the presence of Augustus C. Nash, solicitor for and of counsel with the complainant, and E. A. Merrill, solicitor for and of counsel with the defendants, Karl Baumann, Bertha Baumann, and Elihu Cooley, and the pleadings and proofs having been read and the arguments of counsel having been heard and considered, and it satisfactorily appearing to the Court that by virtue of an agreement in writing duly made and executed between the defendant Karl Baumann, and Herbert C. McVoy, on the 19th day of July, 1920, the said Herbert C. McVoy agreed to purchase from the said defendant Karl Baumann the lands and premises situated in the town of Westfield, County of Union and State of New Jersey, and more particularly described as follows:

BEGINNING at a stake standing in the southeasterly line of Orchard street, said stake being the same westerly corner of now or formerly Ann Hetfield's house lot; thence from said beginning and binding on said now or formerly Hetfield's line of land southeasterly two hundred and twenty feet to a stake in line of Presbyterian Burying Ground; thence along line of said Burying Ground southwesterly forty-six and four-tenths feet to a stake and rear corner of now or formerly Frederick Bald-

win's house lot; thence binding on said now or formerly Baldwin's line of land northwesterly two hundred and fourteen feet to the aforesaid line of Orchard street; thence along line of Orchard street northeasterly forty-six feet to the place of beginning. Being the same land and premises conveyed to Mildred P. Marsh by deed of Elizabeth Lines and George B. Lines, her husband, dated April 30, 1897, and recorded May 11th, 1897, in Book 321 of Deeds at page 406;

and to pay to the said defendant Karl Baumann, or his heirs or assigns, therefor the sum of $3,200 in the following manner; that is to say, $200.00 in cash upon the signing of the agreement, which said sum was duly paid and the further sum of $3,000.00 in cash to be paid upon October 1st, 1920, when the said defendant Karl Baumann was to cause to be delivered to said McVoy, his heirs and assigns, a good and sufficient deed of conveyance for the said premises, with general warranty and also possession of the said premises.

And it further appearing that time was not of the essence of the said contract, and that on said October 1st, 1920, the said McVoy assigned to complainant the said contract and all his right, title and interest therein and thereunder and that the said defendant Karl Baumann had then due notice thereof; and that thereafter and within a reasonable time from the said October 1st, 1920, the said complainant tendered to the said defendant Karl Baumann the said sum of $3,000.00, and demanded and was refused the delivery of said deed as aforesaid.

And it further appearing that thereafter and before the commencement of this suit, the said defendant conveyed the said premises to his wife the defendant Bertha Baumann, and that she together with her said husband, conveyed the said premises

and their interest therein, to the defendant Elihu H. Cooley, and that neither said Bertha Baumann nor said Elihu H. Cooley was a *bona fide* purchaser for valuable consideration and without notice of the said contract of sale and the rights of the said complainant thereunder;

And it further appearing that the said complainant Mary E. McVoy has always been since the tender and demand aforesaid, and is still ready in all things to comply with the stipulations of the said articles of agreement on her part to be performed, and has prayed the order or decree of this court directing the defendants to comply with and fulfill the same in all things on their part to be performed, and the Chancellor being satisfied that the complainant is entitled to the specific performance of the said articles of agreement, on the part of the said defendant Elihu H. Cooley as in said bill prayed.

And it further appearing that the said defendants by their said solicitor did in open court request that in the event that specific performance of the said contract should be decreed, the said decree should direct the payment into court by said complainant of said balance of consideration, to await the determination of the several interests of the said defendants therein as among themselves;

It is Thereupon this twenty-fourth day of February, 1922, by His Honor Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed, that the said articles of agreement be in all things specifically performed by the said complainant and the said defendant Elihu H. Cooley, respectively, and that the said defendant Elihu H. Cooley, do within ten days from the date of this decree, make conveyance of the said premises to the said complainant, by good and sufficient deed of conveyance, and that he de-

liver at the same time to the said complainant possession of the said premises and account to her for the rents, issues and profits of the same since the ninth day of October, 1920, and that thereupon the said complainant do pay or cause to be paid to the Clerk in Chancery, pursuant to the said request of the said defendants, the sum of $3,000 00, with interest from the first day of October, 1920, less the taxed costs and counsel fee hereinafter allowed complainant; and that the interests of the defendants, Karl Baumann, Bertha Baumann, and Elihu H. Cooley, in said fund as amongst themselves may be hereafter determined on proper application being made therefor.

And it is further ordered that the defendant Elihu H. Cooley do pay to the complainant or her solicitor, her costs of this suit to be taxed together with a counsel fee of one hundred dollars, hereby fixed and allowed as a reasonable sum in that behalf, and to be taxed in the said costs; and that such payment be made by deduction from the sum to be paid by complainant to the Clerk in Chancery as hereinbefore provided.

It is further ordered that the complainant is to serve a copy of this decree upon the defendants, or their solicitor, within ten days from the date thereof, and that either party is to be at liberty to apply to this Court for further directions or relief in the premises if occasion should require.

E. R. WALKER,
C.

Respectfully advised,

MALCOLM G. BUCHANNAN,
V. C.

IN CHANCERY OF NEW JERSEY.

Filed February 27, 1922.

MARY E. McVOY, *Complainant,* *vs.* KARL BAUMANN, *et al,* *Defendants.*	*On Bill, Etc.* *Notice of Appeal.*

The defendants hereby appeal from the whole and every part of the final decree made in this court, in the above entitled cause, to the Court of Errors and Appeals in the last resort in all causes.

E. A. MERRILL,
Solicitor of Defendants.

ARCHIBALD F. SLINGERLAND,
Of Counsel.

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

ARCHIBALD F. SLINGERLAND,
Of Counsel with Defendants.

Court of Errors and Appeals

Filed February 27, 1922.

MARY E. McVOY, *Complainant-Respondent, vs.* KARL BAUMANN, *et al, Defendants-Appellant.*	*On Bill, Etc. Petition of Appeal.*

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

The petition of Karl Baumann, Bertha Baumann, and Elihu H. Cooley, the appellants in the above entitled cause, respectfully shows that your petitioners find themselves aggrieved by the final decree made in the Court of Chancery by his Honor, Edwin R. Walker, Chancellor of New Jersey, bearing date the 24th day of February, 1922, wherein the said Mary E. McVoy was complainant, and the said Karl Baumann, Bertha Baumann and Elihu H. Cooley were defendants, in this respect, to wit:

1. The court erroneously denied defendants' motions to dismiss for want of jurisdiction, process not having been personally served, and adjudged the action to be one *in rem*, or *quasi in rem*, wherefore the court acquired jurisdiction by publication under the statute.

2. The court erred in denying defendants' motions to dismiss the bill because of want of equity, and because complainant had an adequate remedy at law.

3. The court erred in denying the defendants' motions to dismiss because it appeared from the pleadings and proof that the defendants Bertha

Baumann and Elihu H. Cooley were purchasers for value, and without notice.

4. The court erred in denying defendants' motions to dismiss for want of mutuality.

5. The court erred in denying the motion of Bertha Baumann that the bill be dismissed as to her because she neither signed nor acknowledged the contract of sale.

6. The court erred in holding that time was not of the essence of the contract, notwithstanding the refusal to pay the purchase price upon the tender of the deed.

7. The court erred in holding that tender of the purchase price was made within a reasonable time.

8. The court erred in not dismissing the bill upon the whole case as made.

Your petitioners, therefore, humbly appeal from the entire decree for the reasons aforesaid, and pray that the said decree may be reversed, set aside, and for nothing holden; and that your petitioners may have such relief in the premises as to this honorable court shall seem meet.

E. A. MERRILL,
Solicitor of Appellants.

ARCHIBALD F. SLINGERLAND,
Of Counsel with Appellants.

Notice of Agreement

COURT OF ERRORS AND APPEALS.

Filed February 27, 1922.

MARY E. McVOY,
Complainant-Respondent,
vs.
KARL BAUMANN, *et al,*
Defendants-Appellants.

Notice of Argument.

TAKE NOTICE, that I shall move the argument of the above entitled cause before the Court of Errors and Appeals of New Jersey, at the State House, Trenton, New Jersey, at 11 A. M. on Tuesday, March 7, 1922, or as soon thereafter as counsel may be heard.

E. A. MERRILL,
Solicitor of Defendants.

To Mr. A. C. Nash,
Solicitor of Complainant-Respondent.

Consent

IN CHANCERY OF NEW JERSEY.

Filed February 25, 1922.

MARY E. McVOY,
Complainant,
vs.
KARL BAUMANN, *et al,*
Defendants.

On Bill, Etc.
Consent.

The complainant consents that an appeal to the Court of Errors and Appeals, in this cause, may be prosecuted at the March term of said court, and waives all rules relating to the time of service of notices, state of case, brief, etc., and agrees that service shall be acknowledged as in time, *provided,* however, that the state of case is served within ten days after service of a copy of the decree upon the defendants, and the defendants' brief is served within ten days after service of the state of case.

AUGUSTUS C. NASH,
Solicitor of Complainant.

The New Jersey Court of Errors and Appeals

Between MARY E. McVOY, Complainant-Respondent, and KARL BAUMANN, et als., Defendant-Appellants.	On Bill, etc. On Appeal.

BRIEF FOR COMPLAINANT-RESPONDENT.

This appeal is from a decree for specific performance for the conveyance of certain lands.

THE PLEADINGS.

The bill is in the usual form of a bill for specific performance, and sets out that Herbert C. McVoy, the vendee, assigned the agreement to his wife, the complainant, and that the defendant, Karl Baumann, the vendor, had conveyed the lands to his wife, the defendant, Bertha Baumann, and that she and her husband had conveyed to the defendant, Elihu H. Cooley, in whose name the title was on the filing of the bill.

Case, Bill of Complaint, pp. 1-5.

Service was made by publication, as the three defendants, Baumann, his wife, and Cooley, were non-residents. There is no question raised as to that service.

Case, Testimony, p. 23, lines 18-23.

Prior to answering, the defendants Baumann and his wife moved to dismiss for want of jurisdiction, and an order was made denying the motion but allowing them to "file an answer under their special appearance subject to the condition that if, on final hearing the motion to dismiss for want of jurisdiction is denied, their answer shall stand as a general appearance."

Later a similar application was made by defendant Cooley, and a similar order was made.

Case, Notices of Motions to Dismiss, pp. 6, 7.

Case, Orders on Motions to Dismiss, pp. 8, 9.

The three defendants answered separately by the same solicitor.

Case, Answers, pp. 10-16.

General replications were filed.

Case, Replications, p. 17.

The defendants did not offer any testimony to sustain their answers, but their solicitor was present at the hearing and cross-examined complainant's witnesses.

Case, Appearances, p. 23, lines 10-12.

The plaintiff's witnesses in support of her bill were herself, her husband, their lawyer, the lawyer's stenographer, and the real estate agent.

The plaintiff's exhibits were—(1) the agreement, (2) Lis pendens, (3) certified copy of agreement (showing record), (4) letter from complainant's lawyer to Baumann dated Oct. 27, 1920, (5) answer from Baumann dated Oct. 30, 1920, (6) another letter from com-

plainant's lawyer to Baumann dated Nov. 3, 1920, (7) answer from Baumann dated Nov. 7, 1920, and (8) a third letter from complainant's lawyer to Baumann dated Nov. 9, 1920.

Case, p. 10, lines 11-13 (C1, Agreement, offered; printed, pp. 18-21).

Case, p. 35, lines 26-28 (C2, Lis Pendens, offered; not printed).

Case, p. 35, lines 29-35 (C3, Certified Copy of Agreement, offered; printed, pp. 18-21).

Case, p. 41, line 24; p. 42, lines 11, 23, 29, 37, (C4-C8, Letters and Answers, offered; printed, pp. 45-48).

STATEMENT OF FACTS.

Defendant Karl Baumann made a contract to convey certain lands in Westfield to Herbert C. McVoy on or before Oct. 1, 1920.

Case, Agreement, pp. 18-21.

On Oct. 1 the parties met, according to agreement, at the law office of Augustus C. Nash, in Westfield; the agreement was assigned by McVoy to his wife, the complainant; and there was an adjournment of the passing of title to the following day, because a man (Naugle) to whom McVoy had contracted to sell a portion of the property did not show up. The next day Baumann left town without keeping the appointment made. As McVoy knew that Baumann was coming back to Westfield for a local celebration on Oct. 12 and 13 he waited until then for him. At that time he drew from the bank $3,000, the balance to be paid

under the agreement, and went with his agent, Smith, to the house where Baumann had told him he was going to stay and tendered him the money and demanded his deed; but Baumann said that he could not take the money as he did not have the deed with him but would let him know when he would be back in Westfield with the deed. After waiting two weeks and hearing nothing, complainant's lawyer wrote Baumann on Oct. 27 (Exhibit P 4) asking when he would be ready to deliver the deed. To this letter Baumann replied in a side-stepping fashion on Oct. 30 (Exhibit P 5), and complainant's lawyer again wrote him asking him to comply with his agreement (Exhibit P 6). To this second letter Baumann replied on Nov. 7 (Exhibit P 7) again side-stepping, evidently hoping that complainant would give up his efforts to get Baumann to carry out the agreement, and complainant's lawyer wrote a third letter on Nov. 9 (Exhibit P 8) saying that he would file papers for specific performance. The filing of the bill of complaint followed on Nov. 23.

Case, McVoy's Testimony, p. 24, lines 14-17; p. 25, lines 21-40; pp. 26, 27; p. 28, lines 1-3.

Case, Smith's Testimony, pp. 34, 35.

Case, Mrs. Chattin's Testimony, p. 36, lines 10-28.

Case, Nash's Testimony, p. 38, lines 20-40; p. 39; p. 40, lines 1-20.

Case, Exhibits, pp. 45-48.

Case, Bill of Complaint, p. 1, line 3

After the tender of the money by McVoy to Baumann and the demand for the deed on Oct. 12-13, Baumann conveyed the premises to his wife, the de-

fendant Bertha Baumann, on Oct. 26, which deed was recorded on Nov. 1; and on Nov. 9, the defendants Bertha Baumann and Karl Baumann conveyed the premises to the defendant Cooley, which deed was recorded on Nov. 12. Prior to all of which times and on Oct. 4 Baumann's agreement with McVoy was recorded. The statement in appellant's Brief (p. 1, lines 37-39) that Baumann "in good faith accepted another offer on or about October 4th," has nothing in the testimony to back it up. It is merely so alleged in Baumann's answer, but no proof was offered to substantiate the allegation.

Case, Bill of Complaint, Paragraphs, 8, 9; p. 3, lines 35-40; p. 4, lines 1-30.

Case, Baumann's Answer, Paragraphs 4, 5, 6; p. 11, lines 10-28.

Case, Bertha Baumann's Answer, Paragraphs 4, 5; p. 14, lines 11-21.

Case, Cooley's Answer, Paragraphs 2, 3; lines 13-26.

Case, Agreement, p. 20, line 34.

In this connection the admission by Baumann in his answer "that since November 9, 1920, he has had no right, title or interest in or to said lands" is significant.

Case, Baumann's Answer, p. 11, lines 26-28.

THE DECREE.

The decree is that complainant and defendant Cooley perform the agreement, that Cooley convey the premises to complainant and account for rents, that complainant pay purchase price with interest less costs into

New Jersey State Library

Court, (the interests of the defendants to this fund as between themselves to be determined on application), that defendant Cooley pay costs to be deducted from purchase price, and that a copy of the decree be served within ten days.

OBJECTIONS TO DECREE.

The objections to the decree as set forth in the petition of appeal are eight in number, but none of them attack the decree directly, as according to the practice should be done. The first five are directed to denial of various motions made at the trial. The sixth and seventh are in reality exceptions to rulings made at the trial. The eighth is directed to an alleged error in not dismissing the bill on the whole case.

The first is discussed in appellants' Brief under Points I and II, the second under Point VI, the third under Point III, the fourth under Point IV, the fifth under Point V, and the sixth, seventh and eighth are not argued, and, therefore, under the practice need not be considered.

The real objection urged to the decree and on which appellants rely and evidently intended to rely from the beginning is that the defendants being personally outside the jurisdiction of the Court no decree for specific performance could be made and that the agreement to convey could therefore be broken with impunity. In other words their defense is a polite contempt of Court. This is shown by the defendants putting in answers but not being personally present at the trial nor offering the slightest testimony in support of their answers, not even the deeds under which two of the defendants claim to be bona fide purchasers for value without notice. Their solicitor, however, was present to urge at every opportunity a lack of jurisdiction and to cross-examine complainant's witnesses. The lack of any attempt at an affirmative defense was most conspicuous, when such defense could easily have been put in if the

defendants' answers were at all true. There can be but one conclusion drawn in an equity proceeding from such conduct, namely, that the answers could not be sustained by proof and were sham.

I. AS TO JURISDICTION.

The Court had jurisdiction to make the decree.

1. The defendants submitted themselves to the jurisdiction of the Court by acting under the orders made on their motions to dismiss and filing answers in accordance therewith.

The condition of those orders was that "if, on final hearing the motion to dismiss for want of jurisdiction is denied their answer shall stand as a general appearance."

Case, Orders on Motions to Dismiss, pp. 8, 9.

Case, Answers, pp. 10-16.

Case, Testimony, p. 23, lines 13-30.

Case, Conclusions, p. 59, lines 10-38; p. 62, lines 20-24.

2. The defendants submitted themselves to the jurisdiction of the Court by filing answers independently of the condition imposed by the orders, notwithstanding the defense of lack of jurisdiction severally set forth in the answers.

Justice Collins, in giving the opinion of this Court in Polhemus vs. Holland Trust Co., 61 N. J. Eq. 654, 657, said:

> "On the question of jurisdiction we think that by answering in full on the merits, although attempting to reserve the objection pleaded, the

> defendant submitted itself to the Court. Such, undoubtedly, is the general rule."

3. But, even if the defendants have not submitted themselves to the jurisdiction of the Court, the proceedings can be sustained as one quasi in rem. The appellants juggle legal phraseology on this point in their Brief; but, after all, the matter is a very simple one. Justice Swayze in one sentence, and not a long one at that, states the test in the opinion of this Court in Amparo Mining Co. vs. Fidelity Trust Co., 75 N. J. Eq. 555, 556, in which he says:

> "The question whether the proceeding can be sustained as a proceeding quasi in rem depends, of course, upon whether there is a res in this state upon which the decree can operate."

The statute says the rest by making the decree the deed for the property.

> Chancery Act (Revision of 1902), Sec. 45, P. L. 1902, pp. 510, 525; 1 C. S. 426, Sec. 45.

The section referred to reads as follows:

> "Where a decree of the Court of Chancery shall be made for a conveyance, release or acquittance of lands or any interest therein, and the party against whom the said decree shall pass, shall not comply therewith by the time appointed, then such decree shall be considered and taken, in all courts of law and equity, to have the same operation and effect, and be as available as if the conveyance, release or acquittance had been executed conformably to such decree and this, notwithstanding any disability of such party by infancy, lunacy, coverture or otherwise."

Vice Chancellor Pitney said in Fee vs. Sharkey, 59 N. J. Eq. 284, 292:

> "The strength of the complainant's title does not rest in any deed of conveyance executed by the defendant, but in the declaration and decree of this Court establishing his right in equity."

This case was affirmed by this Court on the opinion of the Vice Chancellor, 60 N. J. Eq. 446; and the language quoted was specifically approved by this Court in the per curiam opinion in Goldstein vs. Curtis, 65 N. J. Eq. 382, 383.

The conclusion would seem to be unescapable that the Court had jurisdiction either (1) by force of the conditions in the orders accepted and acted upon by the defendants, or (2) by the defendants filing answers to the merits, or (3) by the proceeding being one quasi in rem. The combination of all three makes the decision of the Court of Chancery as to jurisdiction absolutely impregnable and answers the first objection to the decree and Points I and II in appellants' Brief.

Case, Petition of Appeal, p. 78, lines 27-32.

Appellants' Brief, Points I and II, pp. 3-11.

II. AS TO THE MERITS.

As there was no testimony submitted on behalf of the defendants, and as the cross-examination did not break the force of the direct examination of complainant's witnesses, no question as to the facts arises. The only question that can remain is as to the law arising on those facts.

The second objection to the decree is lack of equity and an adequate remedy at law and is treated by the appellants under Point VI of their Brief. That this

kind of suit is not subject to any such objections need not at this late day be discussed.

Case, Petition of Appeal, p. 78, lines 34-37.

Appellants' Brief, Point VI, p. 21.

The third objection to the decree is that defendants Bertha Baumann and Elihu H. Cooley were purchasers for value and without notice and is argued under Point III in appellants' Brief.

Case, Petition of Appeal, p. 78, lines 38-40; p. 79, lines 1, 2.

Appellants' Brief, Point III, pp. 11-14.

No proof was submitted by the defendants Bertha Baumann and Elihu H. Cooley that they were bona fide purchasers for value. They did not so claim in their answers.

Case, Answers, pp. 10-16.

They did not even submit their deeds at the hearing. The mere fact that a conveyance had been made to them does not show that they were bona fide purchasers for value. As affirmative proof of such fact must be within their knowledge rather than within that of the complainant, it is incumbent upon them to produce such proof or suffer the consequences of a failure to do so.

As to notice, Mrs. Baumann of course had notice, as she had already signed a deed to complainant.

Case, McVoy's Testimony, p. 32, lines 19-23.

Case, Nash's Testimony, p. 38, lines 33-36.

The Vice Chancellor in his conclusions calls this

merely "a strong suspicion." But, having joined with her husband in executing a deed to complainant, is she not estopped from saying that she had no notice of her husband's dealings in the matter?

Case, Conclusions, p. 63, lines 16-21.

The contract was recorded Oct. 4 on the acknowledgment of the vendee alone.

Case, Agreement, p. 20, line 24.

But it is on the record and until it is expunged from the record is it not constructive notice to all having dealings with the property that there were interests involved other than those of the title holder? At all events this Court has never decided to the contrary. And does not such recording at least put defendants on their defense to show affirmatively that they did not have notice? The case quoted by the Vice Chancellor in his Conclusions is not to the contrary.

Case, Conclusions, p. 63, lines 22-29.

Brinton vs. Scull, 55 N. J. Eq. 747, 756.
(Chancery, 1897, Grey, V. C.)

S. C. (Reversed), 55 N. J. Eq. 487.
(Errors and Appeals, 1897, Magie, Ch. J.)

In that case the contract was not offered to prove constructive notice, and any statement regarding constructive notice was clearly obiter. But the recording was clearly without authority for the Vice Chancellor said:

> "* * * but, as the complainant's memorandum was neither acknowledged nor proved there was no authority to record it, and the record of it, when made, was wholly ineffectual as constructive notice."

The reason given by the Vice Chancellor for saying the record "was wholly ineffectual as constructive notice" was "there was no authority to record it."

In this case, the vendee acknowledged the agreement and that gave the recording officer authority to pass upon it as being in recordable shape. The recording officer in recording papers acts in a quasi-judicial capacity, and, if there is anything on which to predicate a right to record and such right is exercised, the recording must be considered as good for all purposes until set aside by some appropriate proceeding. Otherwise any defect, however trivial, in the acknowledgment or proof of instruments would invalidate the recording and lead to inextricable confusion. The difference between no acknowledgment or proof and some asknowledgment or proof is clear. In the first instance there is no color of right to act and any action taken would clearly be void; in the second the right to act depends upon the exercise of judgment and the result arrived at is reviewable by appropriate action, but until set aside must be held to be valid, the same as would be the exercise of judgment by other judicial or quasi-judicial affairs or officers acting in a judicial or a quasi-judicial manner.

The wording of P. L. 1907, Chap. 200, p. 454 (2 C. S. p. 1573, Sec. 16) would seem to indicate this. That act says:

> "Every agreement for the sale or purchase of any lands or real estate in this State which hereafter shall be recorded, shall be absolutely void as against subsequent judgment creditors of the vendor or vendors and as against subsequent purchasers and mortgagees for value of said lands or real estate, unless the vendee or vendees, his or their heirs, executors, administrators or assigns, within three months after the date fixed in such agreement for its consummation or if no date shall be fixed in such agreement for its consummation, then within three months after the

> date of such agreement * * * * * shall commence suit for specific performance of said contract. * * * * * ''

Proof of the actual payment of the whole purchase money is necessary to the defense of a bona fide holder for value without notice.

> Houghwont vs. Murphy, 21 N. J. Eq. 118.
> (Chancery, 1870, Zabriskie, Ch.)
>
> S. C. (Affirmed), 22 N. J. Eq. 531
> (Errors and Appeals, 1871, Depue, J.)
>
> Leonard vs. Leonia Heights Land Co., 81 N. J. Eq. 489, 491.
>
> (Errors and Appeals, 1913, Swayze, J.)

Vice Chancellor Van Fleet in Chancellor vs. Gummere, 39 N. J. Eq. 582, 587, which case was affirmed on the opinion of the Vice Chancellor (39 N. J. Eq. 582, Errors and Appeals, 1885), said:

> ''* * * the lands, in equity, are the property of the vendee, and no sale will be effectual against his rights until they reach the hands of a bona fide purchaser who actually pays value for them.''

This language indicates that the defense of a bona fide purchaser for value without notice is an affirmative defense and must be both pleaded and proved. Such defense is neither pleaded nor attempted to be proved in this case. The argument in appellants' Brief on this point is wholly beside the mark.

> Appellants' Brief, p. 13 (second paragraph).

The fourth objection to the decree for want of mutuality, argued by appellants under Point IV in

their Brief, is answered very clearly by the Vice Chancellor in his Conclusions, wherein he says:

> "The criterion is mutuality of remedy at the time of decree. The assignee (complainant) has brought suit and submitted herself within the jurisdiction of the Court, and can be compelled to perform; Richards vs. Green, 23 N. J. Eq. 53."

The case named has been frequently cited as authority for the proposition stated; and Justice Dixon, in giving the opinion of the Court of Errors and Appeals in Carskaddon vs. Kennedy, 40 N. J. Eq. 259, 277, summed the matter up in one short sentence by saying:

> "The filing of the bill made the contract and the right to specific performance mutual."

Case, Petition of Appeal, p. 79, lines 3, 4.

Appellants' Brief, Point IV, p. 14-18.

Case, Conclusions, p. 70, lines 37-40; p. 71, lines 1-12.

The fifth objection to the decree that the bill should be discussed as against the defendant Bertha Baumann, argued under Point V in appellants' Brief under the head "No decree can be made against the defendant Bertha Baumann," is easily disposed of when a simple reading of the decree will show that no decree was made against her.

Case, Petition of Appeal, p. 79, lines 5-10.

Appellants' Brief, Point V, p. 19, 20.

Case, Decree, p. 75, lines 30-40; p. 76.

The only question under this objection there can be,

was she a proper party? The question whether she was a necessary party need not, under the circumstances, be considered. That she was a proper party must be clearly apparent, when it is remembered that she signed the deed which Baumann showed to McVoy on Oct. 1, and knowing that she had so signed, as it must be assumed she did, she later, on Oct. 26, accepted a deed from her husband, and still later, on Nov. 9, joined with her husband in a deed to the defendant Cooley. In any suit to straighten out these various transactions it would not only be proper but also, it would seem, necessary to include as parties defendant every one having a hand in the mix-up.

The sixth and seventh objections to the decree relate to the questions of time not being of the essence of the contract and tender of the purchase price being made within a reasonable time. The questions are not specifically argued in appellants' Brief.

Case, Petition of Appeal, p. 79, lines 11-16.

As at the meeting to pass title on Oct. 1, the date set in the contract an adjournment was agreed to by Baumann, the seller, until the next day, and as he did not show up then but left town, and as, on his next appearance in town on Oct. 12-13, he was sought out and a tender of the balance of the consideration was then made by McVoy and a demand for the deed made, it follows conclusively that the tender and demand were made within time, even if time had been expressed in the contract as of its essence, which it was not. There was no refusal to pay the purchase price on Oct. 1. The tender of the purchase price must be considered as made within a reasonable time, as it was the first opportunity that it could be made after Baumann ducked the adjourned date of Oct. 2 and left town. It was made within two weeks of the original date for closing.

The eighth and last objection to the decree that the Court erred in not dismissing the bill upon the whole

case as made is not specifically argued in appellants' Brief and need not, therefore, be considered other than as already considered under the specific objections noted.

Case, Petition of Appeal, p. 79, lines 18, 19.

OTHER MATTERS.

1. The respondent filed within time an Answer to the Petition of Appeal which was not included in the State of the Case as printed. Appellants' counsel promised, however, to print and insert it in the State of the Case when submitted.

2. Appellants persistently in their Brief state matters as facts which have not been proved nor attempted to be proved. For instance:

(a) "Baumann * * * in good faith accepted another offer on or about October 4th." (p. 1).

There is no proof whatever of the making or acceptance of such an offer on or about Oct. 4. It is merely alleged in Baumann's Answer, but no attempt was made to prove it.

(b) "* * * It appears that he did change his position by agreeing to sell the property to another before tender was made, or is alleged to have been made, by the complainant. (Case, p. 11, 1, 5)." (p. 21).

The reference is to Baumann's Answer, which is clearly not evidential for the appellants.

(c) "That the vendor had changed his position some ten days before the alleged tender was made by complainant appears in his answer (Case, p. 11, 1, 5). and is not denied." (p. 18).

As replications were filed to the answers, and no proof was presented as to the truth of the allegations in the answers, it is difficult to see why appellants should not contend in their Brief that the "vendor had changed his position some ten days before the alleged

tender,'' when the tender was proven to have been made on Oct. 12-13 and there was no proof of any change up to that time in vendor's position.

(d) ''* * * the clear weight of evidence is against any such agreement.'' (p. 16), (the agreement to adjourn from Oct. 1 to Oct. 2).

As there was no testimony whatever to contradict the testimony of McVoy, Smith, Nash, and Mrs. Chattin that there was such an agreement to adjourn from Oct. 1 to Oct. 2, it is rather difficult to see where there is any evidence against such an agreement, not to speak of the clear weight of evidence against it.

(e) '' * * * Baumann's written complaints are far more persuasive than recollections more than nine months after the event,'' (p. 17).

Baumann's letters are not evidential for but are evidential against him. The so-called ''written complaints'' are not sworn nor could there be any cross-examination (which is a substantial right) of them; while the ''recollections more than nine months after the event'' were sworn to by several people, who were all cross-examined.

Further instances are not necessary to show that the agreement in appellants' Brief is not founded on the testimony as adduced, but on the testimony as appellants would have the Court believe was adduced. No sound argument can be based on such an hypothesis. This is not a case of contradictory testimony or of the application of the law to contradictory testimony, but it is a case of the application of the law to uncontradicted testimony, and there can be no good reason for misstating the facts to which the law is to be applied.

The most significant thing about the case is really the fact that not one of the three defendants, while filing answers and amendments to answers, did not produce the slightest testimony to substantiate the allegations made in their pleadings and did not appear at the trial and defend their actions. If everything they did was so right and proper, why did they absent them-

selves when interests vital to them were at stake. If inferences are to be indulged in, the inferences to be deduced from the defendants' unexplained absence from the trial would decide the case against them.

It is most respectfully submitted that the decree should be affirmed.

March Term, 1922.

AUGUSTUS C. NASH,
Attorney and Counsel for Complainant.

W. L. ANGLEMAN,
Of Counsel.

New Jersey Court of Errors and Appeals

Between MARY E. McVOY, *Complainant-Respondent,* *and* KARL BAUMANN, *et als,* *Defendants-Appellants.*	*On Bill, Etc.*

BRIEF OF DEFENDANTS-APPELLANTS.

STATEMENT.

On July 19, 1920, Karl Baumann, a resident of the State of New York, entered into a written agreement to convey to Herbert C. McVoy, on October 1st, 1920, certain lands in Westfield, N. J. The execution of the agreement was not acknowledged by said Karl Baumann, and was neither executed nor acknowledged by his wife, Bertha Baumann. The agreement was recorded October 4th, 1920.

On October 1st, 1920, said Herbert C. McVoy assigned his interest in said contract to Mary E. McVoy, the complainant.

On October 1st, 1920, in accordance with the terms of the agreement, Karl Baumann tendered his deed to said Herbert C. McVoy, and also to said assignee, Mary E. McVoy, but each refused and failed to pay the purchase price and the deed was not delivered.

Mr. Baumann thereupon returned to his home in New York, in good faith accepted another offer on or about October 4th, and thereafter the lands were conveyed by two conveyances. The first con-

veyance was made by Karl Baumann to his wife Bertha Baumann by deed dated October 26, 1920, and the second conveyance was made by Bertha Baumann and Karl Baumann her husband, to the defendant Elihu H. Cooley by deed dated November 9th, 1920. Both deeds were immediately recorded.

The bill of complaint was filed November 23, 1920, by the vendee's assignee, to enforce the specific performance of the contract between Karl Baumann and Herbert C. McVoy, the defendants being Karl Baumann, his wife Bertha Baumann, and their grantee Elihu H. Cooley.

All the defendants are residents of the State of New York, and there has been no personal service of process.

The defendants moved for the dismissal of the bill on the ground that the action was one *in personam* and process had not been personally served. The motion was denied, but permission was given to answer specially and to renew the motion on final hearing, with the understanding that if the motion was then denied the answers should stand as a general appearance.

Upon the final hearing the defense was that the bill should be dismissed as against all the defendants for the following reasons:

a. The action is *in personam* and there has been no personal service of process.

b. Want of mutuality.

c. Complainant has an adequate remedy at law.

d. The defendant Elihu H. Cooley had no notice, actual or constructive of the contract of sale or of its assignment.

The Vice-Chancellor holds that the action is *quasi in rem*, and therefore service by publication

is good, that there was mutuality, and that the court is not obliged to bar the complainant from her equitable remedy merely because she has an adequate remedy at law.

The Vice-Chancellor finds for the defendants upon the question of notice, but, of his own motion, raises an issue not raised in the pleadings or proofs as to the status of the defendants Bertha Baumann and Elihu H. Cooley as purchasers for value, which he resolves adversely to the defendants.

The defendant Bertha Baumann also asked that the bill be dismissed as to her because she had not signed or acknowledged the contract of sale, but the court holds that her dower right was merged and extinguished by her husband's conveyance to her.

POINT I.

IF THE BILL IS ONE *IN PERSONAM* THE BILL MUST BE DISMISSED.

Upon the authority of the opinion of the Court of Errors and Appeals in *Wilson* vs. *Am. Palace Car Co.*, 65 N. J. Eq., 730, and in *Ewald* vs. *Ortynsky*, 78 N. J. Eq., 527, it would appear to be the settled law in this state that a bill, in an action *in personam* against non-resident defendants not personally served, will be dismissed upon motion.

POINT II.

THE ACTION IS *IN PERSONAM*.

In view of the extended discussion of this point in the Conclusions of the Vice-Chancellor it may clarify the issue if certain preliminary admissions and denials are set out.

a. It is admitted that, upon the execution of a contract to convey land, the vendee ac-

quires an equitable title in the land, and the vendor becomes the trustee of the legal title.

b. It is admitted that, by statute and in a proper case, pleadings which are *in personam* in form may be given the effect of pleadings *quasi in rem*, or *in rem*.

c. It is admitted that there is, in this state, a statute which provides in general terms for service by publication against absent defendants. 1 C. S. 414.

d. It is admitted that a state has jurisdiction over property situate in the state, and may provide by statute for actions affecting such property, irrespective of the residence of the owner.

e. It is denied that there is any statute of this state providing that an action for the specific performance of a contract to convey land, when the pleadings and the prayer for relief are *in personam*, shall be, nevertheless, regarded as an action *quasi in rem*, or *in rem*.

f. It is denied that the existing statute, providing in general terms for service upon absent defendants by publication, has, or can have, any application to an action for the specific performance of a contract to convey land, where the pleadings and prayer for relief are strictly *in personam*.

g. It is denied that a state may make or enforce a statute giving a right of action against a non-resident with respect to property within the state, if the action is one strictly *in personam*.

h. It is admitted that one who is a *cestui-que-trust* may individually assign his personal rights and liabilities, and that, in a proper case, the assignee may enforce those rights in a personal action for specific per-

formance against the person who is the trustee.

i. It is denied that an assignment by a *cestui-que-trust* carries the trust relationship.

j. It is contended that only the vendee has a right of election to bring either a personal action against the vendor personally for the specific performance of the *contract*, or an action *quasi in rem* as a beneficiary under the trust to enforce the specific performance of the *trust* against the vendor in his representative capacity as trustee of the legal title. The former is an action strictly *in personam*, while the latter is an action *quasi in rem*.

k. It is further contended—and this is the real crux of the matter—that, as a *cestui-que-trust* can assign only his personal rights and liabilities, the sole action which his assignee can bring, in the absence of a new and independent contract between the vendor and the assignee, is an action on the contract, to enforce the personal rights and liabilities of the parties in their individual capacities, and such action, from its nature, can only be an action *in personam*.

A suit for the specific performance of a contract to convey land, without more, is an action strictly *in personam*, and cannot be maintained against a non-resident owner unless such owner appear voluntarily, or is personally served with process within the state. The fact that the purpose of the suit is to effect a transfer of title to land within the state, and therefore within the jurisdiction of the court, does not make the action the less an action *in personam*.

This suit is of that character; the allegation is that "the complainant was ready and willing to complete the purchase of the premises described in

accordance with the terms of said contract." (Case, p. 2, l. 32.) There is no allegation of any claim or lien against the land.

The prayer is that the defendants "specifically perform the said articles of agreement," and that they "do make, execute and acknowledge in due form of law and deliver to complainant the good and sufficient warranty deed for the said premises," and possession thereof. (Case, p. 5, l. 15.)

Even assuming, but not admitting, that the complainant has a status to bring an action *quasi in rem* by a different form of pleading—alleging a trust, or a vendee's lien for the purchase money paid, for example—the pleadings in the record will not support a decree *in rem,* for the action is, in fact, *in personam.* The complainant does not ask for an adjudication of title, but asks for an adjudication of contractural rights. As well might one attempt to escape the dilemma following an action on contract against a minor by asking a judgment in tort, or ask for a decree of divorce for desertion in a maintenance action for abandonment.

The theory supporting an action for the specific performance of a contract to convey land as an action *quasi in rem,* is the theory that the contract creates a trust, or lien, in favor of the vendee which is enforceable against the land in an action against the vendor as trustee. But the vendee does not necessarily bring his action in this form; he may bring it, and often does, as a personal action, and if brought as a personal action it may be maintained only against a defendant voluntarily appearing or served with process within the state; an action *in personam* in form and effect can become an action *quasi in rem* only by virtue of a statute directing that such action shall be regarded as an action to enforce a claim or lien against the land, and therefore *quasi in rem,* notwithstanding

the form of the pleading—and there is no such statute in this state.

But the theory of a trust is applicable only as between the parties to the contract, or to those in privity with them under the same relationship of trustee and *cestui-que-trust;* the theory cannot be extended to include, on the one hand, Cooley, the grantee of the vendor for value and without notice (this is argued under Point III), or, on the other hand, to include the complainant, the assignee of the vendee. As heretofore remarked, the theory underlying the right to bring an action for specific performance against a non-resident vendor not personally served with process, is the theory that, upon the execution of the contract of sale, the vendor has become a trustee, and the vendee a *cestui-que-trust.* Doubtless one who is a *cestui-que-trust* may, as an individual, assign his individual right to a conveyance under such contract, and doubtless the assignee may enforce such right, upon tender of the purchase price, in a suit for specific pereformance, if he can reach the vendor But a *cestui-que-trust* cannot, as such, by a mere naked assignment of rights, transfer the trust relationship, or establish or create a new trust relationship; the rights assigned are purely personal, contract rights, and can only be enforced as such

There is a real and substantial distinction between an action to enforce a right to compel the execution of a deed, and an action to enforce a right to compel the merger of the equitable with the legal title, notwithstanding the ultimate result is the same in both cases—the former is an action *in personam* and the relationship of the parties is unimportant, but the latter is an action *quasi in rem,* and the relationship of the parties may be, and here is, the foundation of the action.

Nor is the situation changed by the fact that the

vendor agreed to convey to "the said party of the second part, his heirs *and* assigns" (Case, p. 18, l. 22). In his "Conclusions" the Vice-Chancellor states that "the covenant was to convey to vendee, his heirs *or assigns* (Case, p. 49, l. 19), but this is an error; to the same effect is the erroneous statement in the decree that the vendee agreed "to pay to the said Karl Baumann, *or* his heirs *or* assigns, therefor the sum of $3,200" (Case. p. 74, l. 13)—the Agreement recites only that the vendee is to pay "unto the said *party of the first part,* the said sum of thirty-two hundred dollars" (Case, p. 19, l .19); likewise possession is to be given the vendee "his heirs *and* assigns" (Case, p. 19, l. 32). An agreement to convey "to 'A' his heirs *and* assigns," is not an agreement to convey "to 'A' *or* to his heirs, *or* to his assignees," but is an agreement to convey to "A" only, in the customary form of a grant of the absolute title; it is an agreement to use the term "to 'A' his heirs and assigns" in the granting clause of the deed; the expression "to the party of the second part, his heirs and assigns" connotes merely the grantee and those upon whom the title would devolve by operation of law; the term "heirs and assigns" is by way of purchase and not by way of limitation.

The assignment, then, does not substitute the complainant as a *cestui-que-trust* in the place and stead of the vendee, nor does it convey the equitable title to the complainant, nor is this claimed by the complainant. The assignment itself is not in evidence, but the allegation in the bill is that "on the 1st day of October, 1920, Herbert C. McVoy, assigned *his part of the said contract* unto Mary E. McVoy, the complainant" (Case, p. 2, l. 23), he having, prior to that date, directed the vendor to make the deed to said Mary E. McVoy as a purchaser (Case, p. 33, l. 8). This is not sufficient to

set up a new and independent agreement between Karl Baumann as trustee and the complainant as *cestui-que-trust;* it does not establish any of the elements of a trust; it does not charge the land, or create a lien, in favor of the complainant. The tender of the deed to the complainant is insufficient to establish the trust relation; nor could the vendor bring his action against the complainant for specific performance or damages upon her refusal and failure to accept his tender; nor could such assignment prevent an action by the vendor against his vendee for specific performance, or for damages, following the failure of the complainant to accept tender.

As, under the circumstances, there could be no cause of action as between vendor and assignee as trustee and *cestui-que-trust,* so there could be no cause of action in a representative capacity between the assignee and the vendor's grantee, whether he is or is not a purchaser for value and without notice —a matter that is argued further under Point IV.

To bring an action against a non-resident for the specific performance of a contract to convey land within the present statutory provision relating to service by publication there must be present three conditions. The first condition is that there shall be property of the defendant within the jurisdiction of the court; the second condition is that the relationship between the complainant and the defendant shall be that of *cestui-que-trust* and trustee, in order that the form of the action may be *quasi in rem*, the relief being directed in the first instance to the land itself or some interest therein; the third condition is that the decree shall require some action to be taken directly affecting the land, or some interest therein, to which the conveyance is an adjunct or corollary. Only the first condition is here present.

In *Boswell's Lessee* vs. *Otis,* 9 How., 336-347, cited with approval in *Pennoyer* vs. *Neff,* 95 U. S. 714-724, the court say: "Jurisdiction is acquired in one of two modes; first as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceedings against the property be by an attachment or bill in Chancery. *It must be substantially a proceeding in rem.* A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem,* in ordinary cases; but where such a proceeding is authorized by statute on publication, without personal service of process, it is substantially of that character." But such proceeding must be authorized in terms by the statute; a general statutory provision, such as we have in this state, is not enough. *Roller* vs. *Holley,* 176 U. S., 398-406.

The distinction in the form of action is substantial and vital. A judgment in an action *in personam* is general; a judgment in an action *in rem,* or *quasi in rem,* is a judgment limited to the particular *res* to be affected, and jurisdiction over the *res* must precede the adjudication. *Wilson* vs. *Am. Palace Car Co.,* 65 N. J. Eq., 730. The judgment operates upon the property, and the property is the foundation of the jurisdiction; the order to convey is an adjunct, or corollary, of the judgment affecting the property.

How a difference in the form of the action will affect the right to reach absent defendants by publication is illustrated by two New Jersey divorce cases. One was decided by this court, and the opinion in the other was approved here, although

the court had no occasion to pass specifically upon the point now in question.

In *McGuinness* vs. *McGuinness*, 72 N. J. Eq., 381, an award for maintenance was made as an incident to a decree of divorce, the non-resident defendant being served only by publication. Thereafter property of the defendant was sequestered in order to enforce the order of the court. This court, however, set the order aside on the ground that it was a judgment *in personam* and void for want of personal service, and that no legislation in this state could validate it.

In *Wood* vs. *Price*, 79 N. J. Eq., 1, Chancellor Pitney held that a sequestration of property of the non-resident defendant made at the *beginning* of the suit, under section 26 of the Divorce Act, for the purpose of subjecting the property to the subsequent decree of the court, changed the action from one *in personam* to one *in rem* or *quasi in rem*, and was good. The Chancellor distinguished this case from the McGuinness case.

The court being without jurisdiction over the defendants the bill should have been dismissed.

POINT III.

THE DEFENDANT ELIHU H. COOLEY IS A *BONA FIDE* PURCHASER FOR VALUE AND WITHOUT NOTICE

If the defendant Cooley, the grantee of the defendants Bertha Baumann and Karl Baumann, is a purchaser for value and without notice, the form of action and the relationship between the vendor and the complainant at once become immaterial, for, in that event, the defendant cannot be charged as a trustee, and the complainant's only remedy if any, is an action at law against the vendor for damages.

The bill contains two allegations relating to this point.

Upon the question of notice it is alleged "that the said Elihu H. Cooley accepted the said deed to the premises herein described with full knowledge that your complainant held a good and valid contract for the purchase of the aforesaid premises" (Case, p. 4, l. 30). This allegation was met with a specific denial of either actual or constructive notice (Case, p. 16, l. 27).

The Vice-Chancellor properly holds that the burden of proof as to notice was upon the complainant, and has not been met. *Atlantic City* vs. *New Auditorium Pier Co.*, 67 N. J. Eq., 610-615. There was no testimony whatsoever as to actual notice.

The question of constructive notice presents two aspects. In the first place, as the vendor did not acknowledge the contract of sale its recording was not constructive notice for any purpose to his grantee. *Brinton* vs. *Scull*, 55 N. J. Eq., 747; *People, ex rel., Oaklawn Corp.* vs. *Donegan*, 226 N. Y., 84.

In the second place, notice of an interest must be of an outstanding interest, and as the vendee had parted with his interest on October 1st, which was prior to the recording of his contract on October 4th, and as the complainant brings her action in her sole name without joining the vendee as a party in interest, the recording of the contract was ineffective as notice of the vendee's prior interest as supporting the complainant's present interest; for, after the complainant acquired her interest by the assignment, the vendor's grantee could only be charged by her with notice of her interest, and of the condition of the record as to prior interests, by actual or constructive notice of that assignment as a part of the chain of title. But actual notice

is neither alleged nor proved, and the assignment was neither acknowledged nor recorded.

The question of value was not raised, in terms, in the complaint, nor in any form at the hearing, and in the absence of any allegation in the complaint denying value there was nothing for the defendant to answer; furthermore, if there had been such allegation the burden of proof would not have rested upon the defendant unless the allegation were such as to require an affirmative defense, or one by way of avoidance. Nevertheless, the Vice-Chancellor, of his own motion and only in his "Conclusions," advances the proposition that the burden was upon the defendant grantee to come forward and prove that he paid value, notwithstanding there was no allegation that he did *not* pay value, and that no issue of value was raised either in pleadings or proof.

On this point the only allegation going to the question of value is that the vendor conveyed to Cooley by deed duly recorded (Case, p. 4, l. 23), and the answers admit such to be the fact (Case, p. 16, l. 21). This allegation and admission left nothing to be proved as to the fact of conveyance, or as to the form of the instrument of conveyance, and made it unnecessary to offer the deed in evidence. But to be a deed the instrument must have been under seal, and, being under seal, a consideration is presumed. (2 C. S. 2040, Sec. 66.) Furthermore, in order to be recorded the instrument must have been acknowledged, and the recital in an acknowledgment is, that the instrument was "signed, *sealed,* and delivered." The legal effect of this allegation and admission, then, is that the complainant not only admits but establishes the defendant's *prima facie* case of a valuable consideration.

In this situation the court should have found that Cooley was a purchaser for value, as well as

without notice, and therefore the absolute owner of the property. As the specific performance of a contract to convey land cannot be enforced, and therefore will not be decreed, against one not an owner, the bill failing as against Cooley, it likewise fails as against Karl and Bertha Baumann, and should have been dismissed.

POINT IV.

THE ACTION MUST FAIL FOR WANT OF MUTUALITY.

The assignment of the contract of sale by the vendee to the complainant gave the complainant a right of action at law against the vendor, on the contract, *provided* she first tendered the purchase price (3 C. S. 4056), and it permitted the vendor to deal with the complainant without liability to the vendee by raising an estoppel against any claim by the vendee. It may have given the complainant, *after tender first made,* a right of action for the specific performance of the personal obligations of the vendor. But the assignment did not convey to the complainant the equitable title to the land, nor did it create any relationship of trust between herself and the vendor. There could be no reciprocal rights of any kind until she accepted the burdens as well as the benefits of the assignment, and tendered performance; the assignment itself was not sufficient to charge the complainant with the vendee's liabilities, and if the complainant were so charged she could answer that she had acquired the *right* to tender the purchase price and accept the deed, but she had never *undertaken* so to do.

Instead of tendering performance on her part, by which act only could the assignment raise an enforceable contract between herself and the vendor,

the complainant refused to perform when tender was made by the vendor, and by her repudiation of the assignment released the vendor from any obligation to thereafter recognize it.

In *Vickers* vs. *Electrozone Co.*, 67 N. J. L., 655-671, this court remarked that "a party injured by the repudiation of a contract by the other party also bound by it has an election of remedies he may pursue, one of which is that he may treat the repudiation as putting an end to the contract for all purposes of performance." The tender to the vendee having also been refused, the vendor could, and did, treat the repudiation as putting an end to the contract as between himself and the vendee—a fact which is admitted by the vendee's failure to bring his own action, or to join in the complainant's action. But there never was a contract between the vendor and the complainant, and her repudiation of the assignment, through her refusal of the vendor's tender, estopped her from thereafter claiming any rights under that assignment, and as she had a right to repudiate the assignment the vendor has no cause of action against her.

It follows that, as there was no mutuality as between the vendor and complainant, so there can be none as between vendor's grantee and the complainant, irrespective of whether the grantee was, or was not, a purchaser for value and without notice, and irrespective of whether the court did, or did not, acquire jurisdiction over him. "It is a well established rule in equity that no contract will be specifically enforced unless there is in the contract such mutuality of obligation that either party may enforce it against the other." *Public Service Corp. of New Jersey* vs. *Hackensack Meadows Co.*, 72 N. J. Eq., 285.

In *Wadick* vs. *Mace*, 191 N. Y., 1, 83 N. E., 571, which was a suit by a vendee to compel the specific

performance of a contract to convey land, the court says, citing numerous cases and other authorities: "In the various text books and innumerable cases which deal with the subject of specific performance no rule is more clearly or positively stated than the rule that a contract must be mutual in order to warrant a decree for the specific performance thereof."

Upon this subject Warvelle, in his work on Vendors and Purchasers, 2nd Ed. vol. 2, page 864, says that "while the assignee of a contract (to convey lands) will have the *right* or *option* of completing the same, and thereupon to insist upon a conveyance to himself, yet the vendor cannot compel him to perform, for the reason that there is no contract between them. The vendor in such case must enforce the contract against the original vendee."

There was a question raised as to an implied waiver of the refusal of tender by an agreement to adjourn the closing to October 2nd (Case, p. 26, l. 4), but the clear weight of evidence is against any such agreement.

Admittedly Baumann went to Westfield for the purpose of delivering his deed and getting the money. In his letter to Mr. Nash of October 30, 1920, he says: "You will recall that the contract specified that the deed was to be delivered and the money paid to me October 1st. I was in Westfield at your office on October 1st. ready to close but Mr McVoy was not ready. On account of Mr. McVoy's failure to fulfill his contract I was unable to close a deal which I had on hand here and I have a claim against Mr. McVoy on that account" (Case, p. 45, l. 40). And in hi s letter to Mr. Nash of November 7th, he says: "You must know that Mr. McVoy has no ground for bringing a suit and the best thing he can do is to settle with me for my claim for damages because I could not carry through

the deal I expected to carry through with the money I was to receive from him" (Case, p. 47, l. 31).

Now, if there had been a definite agreement that Baumann was to get his money on October 2nd, it is altogether improbable that he would have left Westfield on that very day without the money, and complaining that his failure to get it had lost him a "deal" which he had expected to close with that money.

It is also significant that there is no reference in the correspondence to any failure on the part of Mr. Baumann to meet his engagements. Baumann speaks only of McVoy's failure to pay on October 1st, and Mr. Nash nowhere asserts that Baumann would have received his money had he made a further tender of the deed on October 2nd. The fact that Mr. Baumann returned home without being paid the purchase price, the omission to refer to any such engagement in letters written when everything was fresh in the minds of the parties, the failure of the vendee and the complainant to make a further tender, or any demand upon the vendor, until October 13th, and Baumann's written complaints are far more persuasive than recollections more than nine months after the event.

It is alleged that the complainant made a tender of the balance of the purchase price on October 13th, 1920 (Case, p. 26, l. 38), and it is urged and the decree so states (Case, p. 74, l. 30), that this tender was good because time was not of the essence of the contract of sale, and tender was made within a reasonable time, from which it would follow that this tender, followed by the complainant's submission to the jurisdiction of the court by suit brought, established a mutuality of obligation sufficient to sustain the action.

Putting aside other objections to this argument the defendants contend that the question whether

time was, or was not, of the essence of the original contract became irrelevant and immaterial when the refusal to accept tender of the deed was followed by the vendor's change of position, as he had a right to do. *Vickers* vs. *Electrozone Co.*, 67 N. J. L., 655-671.

When the parties simply fail to perform on the date agreed, and time has not been made of the essence in fact or by implication, and there has been no affirmative act of repudiation or disclaimer by the party claiming to be aggrieved, and the complainant's delay has not made performance by the defendant inequitable, the rule is good. But it has never been held that a party to the original contract may deny his obligation, permit the other party to change his position, wait until an innocent third party has acquired the property in question, and then, by a belated tender of performance, re-establish the contract in all its original vigor on the ground that time was not of the essence of the contract. Still less has it been held that a mere assignee who has not accepted the obligations of the assignor, may, under like circumstances, rest a claim upon that rule. That the vendor had changed his position some ten days before the alleged tender was made by complainant appears in his answer (Case, p. 11, l. 5), and is not denied.

As there was no mutuality of obligation as between the vendor and complainant, so there could be none between the vendor's grantee and the complainant, and the bill should have been dismissed for want of mutuality.

POINT V.

NO DECREE CAN BE MADE AGAINST THE DEFENDANT BERTHA BAUMANN.

Bertha Baumann, the wife of Karl Baumann, neither signed nor acknowledged the contract of sale executed by her husband and Herbert C. McVoy, and therefore an action for specific performance of the contract will not lie against her. *Corby* vs. *Drew,* 55 N. J. Eq., 387; *Bateman* vs. *Riley,* 72 N. J. Eq., 316; *Chassman* vs. *Wiese,* 90 N. J. Eq., 108.

Nor does her execution and acknowledgment of the undelivered deed to the complainant bind her, as it was not a part of, and does not take the place of, the unacknowledged contract of sale. *Ten Eyck* vs. *Sayrille,* 64 N. J. Eq., 611.

The Vice-Chancellor distinguished this case on the ground that the dower right of Bertha Baumann "was extinguished by merger in the fee conveyed to her" by her husband Karl Baumann (Case, p. 71, l. 19), and that, therefore, the rule is not applicable to this particular case.

The defendants question the soundness of this reasoning.

The only theory upon which any right to relief can be rested, is the theory that this is an action *quasi in rem* because Karl Baumann held the legal title as trustee, that he conveyed as trustee, and that the rights of the *cestui-que-trust* followed the title first into the hands of Karl Baumann's grantee, Bertha Baumann, as trustee, and then into the hands of Cooley, as trustee.

It necessarily follows, under this theory, that Bertha Baumann took title as trustee solely, and not as a wife, and that her dower right was not extinguished, merged, or otherwise affected by the conveyance to her.

Having taken title as trustee, and it being claimed that Cooley took only as trustee, it further follows that Bertha Baumann could, and did, convey only as trustee, and still retains her inchoate right of dower.

Under these circumstances the only effect of the execution by Mr. Baumann of Mrs. Baumann's deed to Cooley was to confirm in Cooley Mr. Baumann's obligations as a trustee holding the bare legal title.

Upon the question of the merger of Mrs. Baumann's dower right the Vice-Chancellor cites the case of *Saldutti* vs. *Flynn,* 72 N. J. Eq., 157 (Case, p. 71, l. 26). But the case is clearly not in point. There Mr. and Mrs. Flynn agreed to convey to Saldutti, but Mrs. Flynn did not acknowledge the contract and thereafter refused to execute a deed unless paid a consideration for the release of her dower right. Saldutti refused to accept a deed executed by the husband alone, and thereupon Mr. and Mrs. Flynn joined in a deed to another, from whom Mrs. Flynn received a separate consideration for her dower right. Thereafter Saldutti sued for specific performance, and the court held that Mrs. Flynn's dower right was extinguished when she joined in the conveyance to her husband's grantee, and that therefore, the husband's grantee could convey a title free of dower—circumstances that are not here present. It is specifically pointed out that Mrs. Flynn's dower right was not affected by the unacknowledged contract with Saldutti.

In the instant case, following the trust theory, Mrs. Baumann was a mere conduit of the legal title between her husband and Cooley, she derived no personal benefit from the transaction, and her dower right was in nowise involved or affected.

The bill should, therefore, have been dismissed on this ground as to Bertha Baumann.

POINT VI.

THE COMPLAINANT HAS AN ADEQUATE REMEDY AT LAW.

As a general rule specific performance is not decreed where the equities are doubtful and the complainant may be indemnified in damages.

It appears in paragraph seven of the bill (Case, p. 3, l. 17), that the complainant did not desire this particular piece of property for herself, but had made arrangements, prior to the contract date for its acquisition by her, to dispose of it.

Not only, then, may the complainant be indemnified in damages, but the damages are a liquidated sum, for her damages was the difference between buying and selling prices already agreed upon.

Furthermore the equities are against the complainant. Mr. Baumann came from his home in Cottekill, New York, for the express purpose of delivering his deed and receiving the purchase price in accordance with the contract of sale. Admittedly he tendered the deed, but neither his vendee nor the complainant had the purchase price. From that moment he was no longer bound by the agreement if he declined to be longer bound, and he was under no obligation to further withhold his property from the market; nor did the complainant have any right to expect or insist that he should, and it appears that he did change his position by agreeing to sell the property to another before tender was made, or is alleged to have been made, by the complainant (Case, p. 11, l. 5).

On this ground, also, the bill should have been dismissed, and the complainant left to her remedy at law.

Respectfully submitted.

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