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ORDER TO SHOW CAUSE.

Filed January 3, 1924.

In Chancery of New Jersey

In the matter of ELIHU H. COOLEY, REGINALD B. NAUGLE, RUTH C. NAUGLE, and EARLE A. MERRILL,
Charged with Contempt.

Order to Show Cause.

It appearing to the Court that in and by the terms of the final decree heretofore made and entered in this Court in a certain cause then herein depending wherein Mary E. McVoy was complainant and Karl Baumann, Bertha Baumann and Elihu H. Cooley were defendants, bearing date the twenty-fourth day of February, nineteen hundred and twenty-two, it was decreed that the said Elihu H. Cooley make conveyance by good and sufficient deed of conveyance, and deliver possession to the said complainant of certain lands and premises in said decree more particularly mentioned and described; and that the said Elihu H. Cooley thereafter, notwithstanding that the said decree remained unmodified and in full force and effect, did not make conveyance and deliver possession of said premises to said complainant, but on the contrary made conveyance of said premises to Ruth C. Naugle and delivered possession of said premises to Ruth C. Naugle and Reginald Naugle, or one of them; and that the said Ruth C. Naugle and Reginald Naugle, notwithstanding knowledge by or notice to them

of the fact of said final decree and the provisions thereof, accepted said deed and possession of said premises, and thereafter refused to deliver possession thereof to the said complainant and resisted in this Court and in the Court of Errors and Appeals further proceedings thereafter had in said cause by said complainant for the purpose of obtaining possession of the said premises pursuant to said decree; and that Earle A. Merrill, one of the solicitors of this Court, represented the said Elihu H. Cooley in the proceedings in this Court aforesaid, and also represented the said Ruth C. Naugle and Reginald Naugle in the Court of Errors and Appeals aforesaid; and that the said acts and doings of the said Elihu H. Cooley, Reginald B. Naugle, Ruth C. Naugle, and Earle A. Merrill, and each of them, constitute a contempt of the power, authority and dignity of this Court;

It Is on the third day of January, nineteen hundred and twenty-four, on the Court's own motion, Ordered: that the said Elihu H. Cooley, Reginald B. Naugle, Ruth C. Naugle, and Earle A. Merrill, and each of them, do appear and show cause before the Chancellor at the Chancery Chambers at the State House in Trenton, on Tuesday, the fifteenth day of January, instant, at half-past ten o'clock in the forenoon of said day, why they and each of them should not be adjudged guilty of a contempt of the power, authority and dignity of this Court on the premises, and punished accordingly.

And It Is Further Ordered, that Augustus C. Nash be and he is hereby appointed solicitor to prosecute these proceedings on behalf of this Court; and that a certified copy of this order be served upon each of the said respondents hereto

at least five days prior to the return date aforesaid; and that upon the hearing on the return of this order testimony and evidence be taken in open court.

E. R. WALKER,
C.

Respectfully advised,

Malcolm G. Buchanan,
V.-C.

TESTIMONY.

Testimony taken at the State House, Trenton, New Jersey, on Tuesday, the 15th day of January, 1924, at 2:30 P. M.

Appearances:

Augustus C. Nash, Esq., for the prosecution.

Smith & Slingerland, by Archibald F. Slingerland, Esq., for respondents Reginald B. Naugle and Ruth C. Naugle.

McCarter & English, by Conover English, Esq., for respondent Earle A. Merrill.

Mr. Nash: I offer in evidence the record in the suit in this court between Mary E. McVoy, complainant, and Karl Baumann, *et al.*, defendants, with special reference to the final decree therein entered, and the decree upon remittitur.

Said record is designated Exhibit P. 1.

Mr. Nash: I also offer in evidence the record in the proceedings in the application for a writ of assistance, in which Mr. Merrill appeared.

Said record is designated Exhibit P. 2.

Mr. Nash: There is a notice of appeal filed here by Mr. Merrill.

The Court: It would be probably more convenient for counsel to stipulate in regard to it.

Mr. English: I will ask to obtain the record.

The Court: What?

Mr. English: I am asking him what record he was putting in; he tells me he is putting in the Chancery record.

The Court: And he is now about to offer the record in the Court of Errors and Appeals, on the appeal of the Naugles from the order for possession.

Mr. English: What do you want me to do?

The Court: Do you desire to have the actual record of the Court of Errors and Appeals produced here?

Mr. English: No, I have no desire to go to that trouble.

The Court: It is stipulated, then, that the copy of the printed book may be offered in evidence in the place of the clerk's record in the Court of Errors and Appeals?

Mr. English: Yes, sir.

Said record is marked Exhibit P. 3.

Mr. Nash: I offer in evidence the original deed from Elihu H. Cooley to Ruth C. Naugle, dated August 29, 1922, and acknowledged August 29, 1922, and recorded in the Register's office of the County of Union on September 30, 1922, in Book 876, page 34.

Said deed is marked Exhibit P. 4.

Mr. Nash: I also offer the brief filed by Mr. Merrill in the same case.

Said brief is marked Exhibit P. 5.

Mr. Nash: Is it admitted that this is the original deed?

Mr. Slingerland: Yes, sir.

Mr. English: Yes.

Mr. Nash: I think that covers the entire charges made by this Court upon which these defendants are charged with contempt.

PROSECUTION RESTS.

Mr. English: I would like to move for a dismissal of the charges against the respondent Merrill. The order recites, and this is the equiva-

lent of an indictment, because we are here on a criminal contempt—

The Court: A quasi criminal contempt.

ARGUMENT.

Mr. Slingerland: I would like to make a similar motion on behalf of Mr. and Mrs. Naugle.

The Court: I will deny both applications at the present time. The practice here is to make those motions at the conclusion of the entire hearing and not, as in a law court, at the end of the complainant's case where a non-suit or a dismissal may be asked when the complainant's case is closed.

The denial is made without prejudice to renew the motion at the end of the case.

EARLE A. MERRILL, one of the respondents in this cause, being duly sworn in his own behalf, testified as follows:

Direct examination by Mr. English.

Q Mr. Merrill, where do you live? A Westfield, New Jersey.

Q You have a family? A Yes, sir.

Q Of whom does your family consist? A My wife and one child.

Q You are a member of the Bar? A I am.

Q Admitted when? A 1914 as an attorney and 1917 as counselor.

Q Were you counsel in any proceedings in this Court for Elihu H. Cooley, proceedings which have been referred to here as dispossess proceedings? A No.

Q Were you counsel in the so-called dispossess proceedings for Ruth C. Naugle or Reginald

Naugle in this Court, or the Court of Appeals? A Not in this Court; I prepared an argument on appeal in the Appellate Court.

Q Did they have counsel in this Court? A I believe they did.

Q Did you represent Mr. Cooley in the Court of Appeals? A The dispossess proceedings you refer to were not directed to Mr. Cooley; they were only directed to Mr. and Mrs. Naugle.

Q They are in the printed book in the Court of Errors and Appeals, Ruth C. Naugle and Reginald B. Naugle, appellants. That is what I call the dispossess proceedings. A Mr. Cooley was not a party in any court to those proceedings.

Q Do you know when the decree in the specific performance suit of McVoy against Naugle was entered? A February 24th—

The Court: That is a matter of record.

Q 1922? A Yes.

Q And then, I think, there is no dispute that that decree was appealed and the affirmance came down when, if you remember? A June 19, 1922.

Q Now, following the affirmance of that decree, do you know whether the defendants in that suit made any effort to comply with the decree? A The decree was directed to Cooley alone. I prepared the deed for Cooley, which, in my judgment was in consonance with the decree.

Q Had you represented Cooley in that specific performance? A I had.

Q Go ahead. A The deed was executed and acknowledged and was tendered by me on June 23, 1923.

Q Tendered to whom? A To Mr. Nash, as representing the complainant, Mrs. McVoy.

Q That was a deed from whom to whom? A Mr. Elihu H. Cooley to Mary E. McVoy; the deed has already been put in evidence.

Q I think you are mistaken about that? A Pardon me; I am wrong.

Q Whom did you say you tendered the deed to? A To Mr. Nash, the solicitor for Mrs. McVoy.

Q By letter or in person? A In person.

Q You tendered it in person? A Yes.

Q I show you herewith a deed from Elihu H. Cooley to Mary E. McVoy, dated June 23, 1922, and acknowledged June 23, 1922; is that the deed which you tendered? A That is the identical deed.

Q Tendered to Mr. Nash in his office in Westfield? A I think it was in his office.

Mr. English: I offer that deed for identification.

Said deed is marked Exhibit M. 1 for identification.

Q Now, was that deed accepted? A It was not.

Q You are aware that the Court required the complainant, who was Mrs. McVoy, to make payment? A Yes.

Q At the time of the tender of this deed, was payment made—payment of money; the complainant was required to make a payment of money? A Yes.

Q Now, at the time of the tender of this deed was that payment of money made?

Mr. Nash: That is objected to; the money has already been paid into court, which is a

matter of record. I can't see that it makes any difference whether the money was tendered at that time.

Mr. English: It is material; we have to get down to the question of good faith. It is material as bearing on the judgment which he had a right to form, whether there was ground for the pressing of the claim.

The Court: I will admit it, but not as to the question of the actual contempt, if contempt be found, but upon the question of the flagrance of the intent.

Q Was it? A It was not.

Q Following the tender of the deed, did you have any correspondence with Mr. Nash on behalf of his client, Mrs. McVoy?

Mr. Nash: I object to that, that is not material. This is an action for contempt for an act which Mr. Merrill has done. Anything he might have done with me is not part of this record in the contempt proceedings.

The Court: I will permit it.

Mr. English: Will you produce the letter of Mr. Merrill to you, dated—

Mr. Nash: You didn't ask for it and I don't have it.

Q Did you keep a carbon copy of your letter? A I did.

Q Of this letter in question? A I did.

Q I show you a carbon copy of a letter dated June 24, 1922—

Mr. Nash: I object to that.

The Court: You have not laid any foundation for the introduction of secondary evidence.

Mr. English: Have you any doubt that that is a copy of the letter?

Mr. Nash: As far as I can tell—I have had so much correspondence in the matter—as far as I know, that is a copy of it.

The Court: Are you satisfied that the copy shall be used, Mr. Nash?

Mr. Nash: I am quite satisfied.

Q That is a copy of the letter which you sent Mr. Nash? A Yes.

Q A carbon copy? A That is a carbon copy.

Mr. English: I offer in evidence the letter, in lieu of the original, from Mr. Merrill to Mr. Nash, dated June 24, 1922, and I call the Court's attention—

The Court: I will read it.

Said letter is marked Exhibit M. 2.

Q That letter held open the opportunity to the defendant to accept this deed for a specified time, didn't it?

The Court: It speaks for itself.

Q Did you keep the tender of that deed open until Saturday, July 8th, as this letter stated? A I did.

Q It was held open until that time? A Yes.

Q Up to that time was the tender accepted? A It was not.

Q They didn't accept it? A No.

Q Did you, after that, have any other correspondence with Mr. Nash? A Yes, sir.

Q I show you a copy of a letter, and I ask you whether it is a true carbon copy from you to Mr. Nash, dated July 14, 1922? A That is.

Q It is dated July 14, 1922? A Yes; that is a true carbon copy of the original, and that letter has been in evidence in this cause.

Mr. English: I offer that in evidence.

Said letter is marked Exhibit M. 3.

Q Did the defendant Cooley, as stated in this last letter through you, hold himself in readiness to comply with the terms of the decree until July 19, 1922? A He did.

Q During that time? A Yes.

Q Was the offer accepted? A It was not.

Q Did you get a reply under date of July 18, 1922, from Mr. Nash? A I did.

Q Have you that? A Yes; you have it there.

Q Is this the original which I show you? A Yes.

Q Mr. Nash's original letter? A Yes, sir.

Mr. English: I offer it in evidence.

Said letter is marked Exhibit M. 4.

Q And did you write a reply to that letter under date of July 19th? A Yes.

Q 1922? A Yes, sir.

Q I show you a carbon copy of the letter; is that a true copy of the original? A That is a true copy of the original, and this letter also was put in evidence in a proceeding in this Court.

Mr. English: I offer it in evidence.

Mr. Nash: My objection stands for all these letters: I don't think they are material at all.

The Court: I will admit it.

Said letter is marked Exhibit M. 5.

Q I observe in this letter, that you inquired of Mr. Nash whether Mrs. Naugle would refuse to accept a conveyance from Cooley, subject to the inchoate right of dower of Mrs. Baumann, but otherwise free from all encumbrances? A Yes.

Q Did you get a reply to that inquiry? A I did not.

Q Do you know whether, up to this time, the complainant in the specific performance suit, had made a payment into court? A The record shows that payment was made into court on March 15, 1923.

Q That was long after this date? A Yes.

Q I show you a letter from Mr. Nash to you, dated September 12, 1922. A I received it.

Q Did you receive that letter? A Yes, I did.

Q And made a reply under date of September 15th? A Yes.

Q The carbon copy of which I show you? A Yes, sir.

Mr. English: I offer in evidence the letter of September 12th.

Said letter is marked Exhibit M. 6.

Mr. English: I now offer the letter of Mr. Merrill to Mr. Nash, dated September 15, 1922. This is a carbon copy of it.

Said letter is marked Exhibit M. 7.

Q I observe in this last letter of September 15th that you make reference to the previous rejections of the tenders of deeds by you, and you say that notwithstanding this situation, the defendant Cooley was prepared to deliver the deed formerly tendered and to immediately comply with the other terms of the decree? A Yes.

Q Provided that delivery of the deed is accepted and that they also comply with the other terms of the decree? A Yes.

Q Did the complainant accept delivery of the tender of the deed on September 20th? A No; there was no reply to that letter.

Q And she didn't, on her part, comply with the terms of the decree? A No.

By the Court.

Q The deed to which you refer in that letter was the draft of deed, or the executed deed already offered in evidence? A Yes, sir.

Q The same deed? A The same deed.

Q There was never any other tender of any other deed except this one? A No.

Mr. English: I suppose because the record in the specific performance suit is here, the contract of sale to Baumann may be said to be here.

The Court: It may depend upon what you want to go into—

Mr. English: The agreement was dated back in 1920, and I would like the date to appear on the record.

The Court: That may be done.

Q Do you remember the date of the original agreement? A Between Mr. Baumann and Mr. McVoy?

Q Yes. A That was July, 1920.

Mr. English: Can it appear on the record on when the bill for specific performance was filed?

The Court: November 23, 1920.

Q Now, between the date of the making of the agreement of sale between McVoy and Baumann, and the date of the filing of the bill in November, 1920, did Mr. Baumann convey the property then subject to the agreement, to Mrs. Baumann, did he? A He did.

Q By the deed dated October 26, 1920?

The Court: It seems to me that is far afield; that is a question of fact that antedated the decree.

Mr. English: The reason I refer to it is that the Court of Appeals has held that each successive grantee becomes the legal owner of the title, in trust, and out of that there grows a question of law and fact with relation to the dower right of Mrs. Baumann, which I think is material as bearing on the good faith of counsel who is now charged with contempt; it goes to the good faith of a member of the Bar.

The Court: Perhaps this matter may be shortened in this wise: there is not in the mind of the Court any idea that there was a flagrant intent to contemn or avoid the power or authority of this Court in the acts which were committed, so far as he is concerned, at any rate, assuming that they be adjudicated as acts of actual contempt, and I think that there is no proposal on the part

of the prosecutor to prove any such situation; is there, Mr. Nash?

Mr. Nash: No. I think that is so.

The Court: I think you may, therefore, rest on that statement, that your client is acquitted of any actual flagrant intent to contemn, insofar as that is akin to the criminal intent involved in the quasi-criminal proceedings. I think the question may be limited as to whether or not an actual contempt irrespective of contumacious contempt, has been committed.

Mr. English: Does your Honor think there could be any contempt except with actual intent?

The Court: Possibly I have not made myself clear as to what I meant by "intent." If a decree is made by this Court which provides that a defendant shall do a certain thing, and the defendant does something else and refuses to do that thing, doing something which prevents the doing of the thing decreed, he intends to do the particular thing which he does do, and he has intent in that respect. And upon the suppositious case which I mention, he would be guilty of contempt of the power and authority of this Court. But he might well have done that and committed that contempt without any flagrant intent to contemn the dignity of the Court, if you want to put it that way. The distinction is as to the question of good faith.

Mr. English: Could I give the dates of these deeds on the record, that Karl Baumann conveyed to Catherine Baumann?

The Court: No; that antedated the decree.

Mr. English: Will your Honor permit me to make an offer of proof?

The Court: Surely.

Mr. English: I offer to introduce in evidence, in lieu of the originals, copies certified by the County Register of Union County, which I understand makes them evidence, in particular the following deeds: From Karl Baumann to Bertha Baumann, dated October 26, 1920, and recorded in Book 814 of Deeds for Union County, page 71.

The Court: I will deny the offer.

Mr. English: Also deed from Bertha Baumann to Elihu H. Cooley, dated November 9, 1920.

The Court: I will deny your offer.

Mr. English: And articles of agreement between Herbert C. McVoy and Reginald B. Naugle, dated July 28, 1920.

The Court: That will be denied.

Mr. English: Under this agreement adopting the doctrine of this Court and the Court of Appeals, McVoy, the vendor, became the trustee for Naugle, the vendee, and not only was the property impressed with a trust in that respect, but he permitted the vendee to go into possession, and this same Reginald Naugle is one of the parties now before your Honor; and we want to show this because he was represented by the respondent Merrill.

The Court: The difficulty with your argument is that you are carrying over a factor which was present in the McVoy *v.* Baumann suit, namely, an adjudication and final decree, into the other McVoy-Naugle contract; as to the latter contract there is no proof, no

adjudication and no decree that these things were so as between the parties to this controversy.

Mr. English: That is true, but Mr. Merrill is brought before the Court on the allegation that he argued as counsel the cause of a party who had resisted possession, namely, the argument in the Court of Appeals for Mr. and Mrs. Naugle, their effort to resist the possession of somebody else in the property which they occupied.

Now, coming to his good faith in the matter, there was present in his mind, in addition to whatever else there might have been, the fact that there were articles of agreement between McVoy and Naugle, in which McVoy, under the doctrine of the courts, became trustee.

The Court: If it is a question of good faith, I will deny your offer, because that is not involved.

Q Now, Mr. Merrill, before I made this offer of proof, we had progressed in the chronology of the matter up to September, 1920? A Yes.

Q You say that the last date which you fixed, September 20, 1922, was not— A September 30th.

Q September 30, 1922, was not acted upon by the complainant McVoy? A Are you speaking of the letter?

Q Yes. A That letter was September 15th.

Q September 15th? A Yes.

Q In your letter of September 15th, you fixed September 20th as the time within which Mrs. McVoy could accept delivery of the deed? A Yes, I did.

Q And I have asked you this: That acceptance was not availed of? A It was not.

Q The delivery was not accepted? A No.

Q That having been the situation, was it after that that Cooley transferred the property to Naugle? A Yes.

Q After that? A After that.

Q And when was it after that that the complainant McVoy undertook to assert the right to the possession of the property? A I am speaking in a measure from hearsay, because I didn't represent them in that action; but the record will show that the demand was served on **June 14,** 1923.

Q And how long was that after the compliance by McVoy with the requirement of the Court that a payment of money be made to the Court?

The Court: That is a matter of arithmetical computation.

Q It is about three months, isn't it? A Yes.

Q In the meantime, the deed from Cooley to Naugle had been put on record? A Yes.

Q And Mr. Naugle was in possession of the property? A Yes.

Q Now, when what we call the dispossess proceedings came up, were Cooley and Mr. and Mrs. Naugle made parties? A Cooley was not made a party.

Q He was not a party? A No.

Q So that you didn't prosecute, so to speak, the defendant; you didn't assist Cooley to resist any possession sought by Mrs. McVoy of the property in suit? A No.

Q And did Cooley, in fact, make any resistance of that attempted possession? A He did

not; and I would like to make clear, if I may, one point, because Mr. Nash seems to think the difference between the occupation of the property and the possession of the property was, that something—

The Court: There is no such distinction. There has no such distinction been made here, that I recall. It may have been made in the other case.

A I don't want to make that distinction with any refinement here. There were two distinct lines of thought, one was Mrs. Naugle's possession under her deed, if her title there was good, and the other was Mr. Naugle's possession under the agreement if Mrs. Naugle's title were not good. It was the use of those terms in view of those two lines of thought.

Q Had Mr. Cooley ever occupied the property? A No.

Q He never had? A No.

Q His part in the transaction consisted of executing a deed to Naugles? A Yes.

Q So, then, coming back to the specific charge against you, or one of them, did you as a matter of fact assist Cooley to resist any attempt at possession of this property on the part of Mrs. McVoy?

Mr. Nash: That is objected to.

The Court: The objection is overruled.

A No.

Q Now, with respect to Mr. and Mrs. Naugle, they were made parties to the so-called dispossess proceedings? A Yes.

Q They were brought in? A Yes.

Q On petition? A Yes.

Q Filed in the original suit?

The Court: The record shows that.

Q You say that they were represented by counsel other than yourself? A Yes, sir.

Q Messrs. Smith & Slingerland? A Yes.

Q Did you have any part in the proceedings before this Court in that matter? A I didn't appear here.

Q You were not here? A No.

Q When did you first come into the matter?

The Court: Mr. Merrill, I want you to answers the questions specifically.

Q (Stenographer repeats the question as follows:) "Did you have any part in the proceedings before this Court on that matter?" "On that matter" relates to the dispossess proceedings instituted by McVoy against Cooley and Naugle. A I had no part in that proceeding.

Q Did you have anything to do with it at all? A I furnished information from my files for Smith & Slingerland.

Q When did you actually come into the matter on behalf of Mr. and Mrs. Naugle? A On the appeal.

Q You argued the case in the Court of Errors and Appeals? A I did.

Q What facts or elements were there in the matter which, to your mind as solicitor of this Court, warranted you in championing the cause of Mr. and Mrs. Naugle in the Court of Appeals in resistance—

Mr. Nash: That is objected to.

The Court: I cannot see any reason for it in view of the fact that the question of bad faith has been eliminated.

Mr. English: Of course, there is no doubt of the fact that he was there. I am frank to say that I don't follow your Honor in your apparent thought that while he was there in one situation, and that he was there in good faith is another situation. It seems to me the whole thing was the attitude of mind on his part as to why he was there.

The Court: That is a very important thing but by no means the whole thing.

Mr. English: Is there anything else?

The Court: I may limit your right to introduce evidence on bad faith.

Mr. English: Because your Honor has in mind that it was done in good faith?

The Court: I have already said so.

Q Now, Mr. Merrill, this dispossess proceeding came up in June, I think, of 1923, which was how long after the affirmance of the decree?

Mr. Nash: That is objected to; the record speaks for itself.

The Court: Objection sustained.

Q It was some nine months after the affirmance of the decree before the dispossess proceedings—

The Court: Strike it out. You may use that on the argument. I will not permit it to be placed in evidence again.

Q When you appeared before the Court of Appeals on behalf of the Naugles to argue their appeal, was that fact on your part influenced in any respect by the fact that some nine months had gone by between the affirmance of the decree and the performance on the complainant's part of the decree, and the further fact that within that interval you had made a tender of deeds and offered to perform the terms of the decree, and that following all those situations, the Naugles had received their deed and were in possession of their property?

Mr. Nash: That is objected to.

The Court: The objection is sustained for the reason I have given before; it simply goes to the question of good faith.

Cross examination by Mr. Nash.

Q Mr. Merrill, you represented Mr. Baumann, Mrs. Baumann and Mr. Cooley in the specific performance suit; is that correct? A It is.

Q And between the time of the filing of the decree in this Court, or the making of the decree in this Court, have you as their counsel ever made application to modify the decree in any way? A No.

Q And have you moved to have the decree set aside? A No. May I state why?

Q No; I think not. Did you represent Mr. and Mrs. Naugle in proceedings in this Court? A When?

Q In the application for the right of possession? A No.

Q You did not? A No.

Q And is Mr. Naugle a client of yours? A Why, he has been in a way.

Q Is he a client of yours at the present time?
A No.

Q Was he a client of your office in July, 1920?

Mr. English: That is objected to, because your Honor has already ruled out my questions.

Mr. Nash: I want to show that he has really been the solicitor of Mr. Naugle right straight through, and that he was solicitor of record part of the time, and part of the time it has been transferred to Smith & Slingerland, which I think should be brought to the attention of the Court.

The Court: The objection is sustained.

By the Court.

Q You said, Mr. Merrill, that in the proceedings in this Court on the application for an order for possession, you did not represent the Naugles as solicitor of record. The record shows that to be the fact—that they were represented by Smith & Slingerland. But did you or did you not, in fact, represent them, although not of record? A I did not. When they came to me with reference to that matter, I told them I thought they ought to have independent counsel who could look at the whole matter from a different point of view; from every standpoint it would be better for someone who was fresh to take it up with them, and for that reason it would not be for their best interests.

Q Did you or did you not participate in the preparation of the defense on matters which they submitted to the Court in this proceeding? A I assisted; I had practically the whole history of the case in my files, and Messrs. Smith and

Slingerland asked me, and I gave Smith & Slingerland whatever data was requested for that purpose.

Q Were any of the papers or affidavits drawn in your office? A Some of them were; yes.

Q The deed from Cooley to the Naugles, as I understand you to say, was delivered on the 30th or the 29th of August, 1922? A The deed from Cooley to Naugle was delivered on September 30th. It had been prepared and signed and dated earlier, but I felt it was a matter that should not be hastened, and that instead of making a delivery at that time I advised waiting and giving them one more chance to complete their side of the decree.

Q You advised whom? A Cooley.

Q You were representing Cooley, then, in and about the making of this deed to Naugle? A Yes. That represented my opinion as to the rights of the parties. I might add to that that it was my judgment that when I made a tender of the deed, and that when I made a tender of full compliance with the decree and kept that tender good and repeated it, that that was a fulfilling and complying with the decree, and that when—

Q By that, you refer to the undelivered deed which has been introduced in evidence—the deed made subject to the right of dower? A Yes; and I thought that offer of compliance with the decree was a compliance with the decree and it discharged the force and effect of the decree; and the defendant having complied with that decree as far as he could, that was the same as if he did comply with it; the other side having refused, not only to accept the compliance but to do anything on their part to carry out their side of the decree.

Q You knew that the decree did not provide for the reservation of any dower interest? A I knew that the decree did not provide in terms for reservation; I also knew that the decree did not rule out dower interest, and it was my judgment that in the history of the case there was a dower interest outstanding; and I did not feel that Mr. Cooley could be compelled to expose himself to litigation by putting on record a deed which would seem to convey a greater title than he actually had. And, on the other hand, I placed no obstacle in the way of the other party paying the money into court and getting their deed by way of the court under the statute, in which case they would have had exactly what the decree gave them, irrespective of my opinion in the matter.

Q Therefore, if I understand your situation correctly, you, knowing that there was, at any rate, a difference of opinion, a question as to whether or not the deed by Cooley reserving, or attempting to reserve, a dower interest, was a compliance with the decree, you assumed to conclude that it was advisable for you or your client, upon your advice, to make a determination to that effect without having the matter brought to the attention of the Court for adjudication? A I felt this way as to the decree: that it was not an injunctive or mandatory decree, it was declaratory of the rights of the parties, and it put the Court behind the carrying out of those rights if either party sought to assert them.

Q You say that decree was not a mandatory decree? A Not in my judgment. I mean a decree that something must be done in any event. The parties, after that decree was made, had a perfect right to agree as between themselves

upon any modification of it if they desired to make one. One party had the right to suggest that the decree should not be carried out, and if the other party assented to it, there was no one to complain. Now, in my judgment, when this tender was made and when the complainant failed to take advantage of the statute, when she failed to deposit the money, when she failed to answer my letters, when she failed to take any action in the matter, in my judgment, the decree had been complied with by all the defendants as far as they were bound to or could comply with it.

Q And you had no hesitation in assuming the burden of the responsibility of arriving at that conclusion, and so advised your client? A No; I felt I was perfectly right in it. I felt, if there was any extension of time required after that tender and when it was in the hands of the complainant herself to determine whether she would take a deed or not under the statute, that it was for the complainant to come to court and ask for an extension of time in which she might perform; and it still seems to me that if there was any contempt of court by anybody, it was contempt of court on the part of the complainant in paying no attention to the decree until it was suggested nine and a half months after the decree by your Honor, that she should comply with it and deposit the purchase money.

Q That is not a concurrent provision in the decree; the decree is mandatory. It is a mandatory decree which requires this conveyance to be made, and thereupon this money is to be deposited? A I construed the decree to be this: that the original agreement should be carried out.

Q You assumed to construe the decree other than according to its plain language? A What

is plain under the decree is, that the articles of agreement be performed, and the articles of agreement which were to be performed and were commanded to be performed were that the tender of the deed and the payment of the money were to be concurrent.

Q I understand, then, that it was upon your procurement and advice that Cooley executed and delivered this deed on the 30th of September to the Naugles? A I prefer not to use the word "procurement." My advice was this: that the agreement was, "he will pay the balance of $3,000 upon the delivery of the deed"; that being the terms of the agreement and the decree requiring that the agreement should be performed in accordance with its terms, it was my judgment that that required the $3,000 should be deposited in court within ten days; and it not being deposited in court within ten days, and there having been a tender on the part of the defendant, the decree had been complied with.

Q But of what you thought might be a proper deed, but of which you admitted there might be some question? A There has never been any question in my mind. My argument through—

Q I don't want to hear that. A What was in my mind respecting that, in advising that the deed could be given was, that it didn't make any difference whether I tendered the deed or did not, because the statute provides that upon the failure to deliver a deed, and upon the compliance of the requirements with respect to the payment, the decree transfers the title; and if there was any difference of opinion between myself and counsel on the other side, I was not obliged either to tender another deed or to execute any deed that he might tender, which he did not, when he

could take advantage of the decree and get all that the decree was intended to give him.

Q But the particular thing I am asking you about is, as to why you advised Cooley or permitted him, or participated in any way in the making and execution and delivery of this deed from him to the Naugles in the face of the unperformed final decree? A Because I considered, that so far as the defendants were concerned, the decree had been complied with, and if it had been complied with, its force and effect were gone.

Q Did you also advise Mr. Naugle to accept the deed, or Mrs. Naugle? A Why, I don't recall using the word "advise;" I told them both to that effect, that the deed was good and that Cooley had a right to give it and Mrs. Naugle had a right to take it.

Q You told them that? A Yes.

Q And you advised them that the deed was good, knowing that there was a lis pendens filed in the Union County courts against this property? A Yes.

Q And you recorded the deed for Mrs. Naugle? A Probably.

Q Don't you know whether you did or not? A Yes, I will say I did.

Q And where did the transfer take place, Mr. Merrill, between Mr. Cooley and Mrs. Naugle? A It took place in my office.

Q In Westfield or Newark? A That I don't recall now.

Q You do recall it took place in your office?

Mr. English: That is objected to as not cross examination.

The Court: It does seem a little far afield.

Q Did Smith & Slingerland join with you in the appeal from this Court to the Court of Errors and Appeals in the case of McVoy against Baumann; did they sign as counsel with you? A The specific performance suit?

Q Yes.

The Court: That is not this case.

A Mr. Slingerland, I believe, signed it.

Q He joined with you as counsel in that case? A He signed it you might say as a formal matter.

Q As a formal matter? A Yes.

Q Did you communicate with Mr. Slingerland, or Mr. Slingerland's office, regarding the retainment of Mr. Slingerland for the Naugles in the proceedings for possession? A I recommended them.

Q Did you go over to see them? A Oh, yes; I discussed the matter.

The Court: I don't know that this is of any materiality; he has already admitted he participated in it.

By Mr. English.

Q After your tender of the deed, which you did tender to Mr. Nash, did Mr. Nash tender you any form of deed which he wanted to use, embodying his idea?

Mr. Nash: Objected to.

The Court: Objection sustained.

REGINALD B. NAUGLE, one of the respondents in this cause, being duly sworn in his own behalf, testified as follows:

Direct examination by Mr. Slingerland.

Q Mr. Naugle, you are the Reginald Naugle mentioned in this order to show cause which was served on you? A Yes, sir.

Q And are you the Reginald Naugle who was served with a demand for possession in the possessory proceedings referred to here? A Yes.

Q And you are in possession and have been in possession of this property concerned in this litigation? A Yes.

Q When did you go into possession of that property? A September 1, 1920.

Q And under what authority? A My contract with Mr. McVoy.

Q Is that the contract that has been offered in evidence between Mr. McVoy and you, dated July 28, 1920? A Sir?

Q I show you what purports to be an agreement between Herbert C. McVoy and Reginald B. Naugle; is that the paper you just referred to as your contract? That is a certified copy. A That is part of it; that is not all of it.

Q What do you mean? A There has been a supplemental agreement.

Q But is this all of the agreement of July 28, 1920? A Yes.

Mr. Slingerland: I offer it in evidence.

The Court: I will receive it.

Said contract is marked Exhibit N. 1.

Q You have referred to a supplemental agreement, and I ask you if that is the paper to which

you refer? (Showing witness paper.) A Yes, sir.

Mr. Slingerland: I offer this supplemental agreement.

Said agreement is marked Exhibit N. 2.

Q You went into possession September 1, 1920? A Yes.

Q Have you been in possession ever since, of these premises? A Yes, sir.

Q Ever since that? A Yes.

Q And Mr. and Mrs. McVoy have, of course, known that you were occupying the premises, have they not? A Yes.

Q Who has been paying the taxes and carrying charges on the property?

The Court: That is aside from this issue.

Q Did you know of the decree that was entered in the specific performance suit brought by Mrs. McVoy against Mr. Baumann and Mrs. Baumann and Mr. Cooley? A Through hearsay, yes.

Q Who told you? A Counsel.

Q Who was your counsel? A Mr. Merrill.

Q Do you recall a deed having been made by Mr. Cooley to Mrs. Naugle? A Yes.

Q When was that; do you remember?

The Court: That appears.

Q September 20, 1922, about, wasn't it? A Yes.

Q Upon whose advice was that deed made and accepted by Mrs. Naugle and yourself? A Mr. Merrill's advice.

Q Throughout all of these proceedings, Mr. Naugle, you have been acting, I suppose upon the advice of Mr. Merrill? A Yes.

Q Solely? A Yes.

Q And he has conveyed to you the situation throughout? A Yes.

Q And has given you advice as to what he thought should be done? A Yes.

Q You have instructed him to use his judgment; is that correct? A Yes.

Q In other words, you have left it entirely with him as to how the situation should be handled? A That is right.

Q And, of course, you had no intention of violating any decree of this Court, did you?

Mr. Nash: That is objected to; his acts speak for themselves.

The Court: It is objectionable because it is leading.

Q What was your intention with reference to the acts that you did throughout this transaction?

Mr. Nash: Objected to.

The Court: You can ask him as to his knowledge or comprehension.

Q Did you understand the legal effect or legal purport of the proceedings that had been taken and of the decree that had been entered? A My interpretation, as far as my knowledge of the legal effect was concerned, was conveyed to me by Mr. Merrill.

By the Court.

Q I suppose what counsel desires to ask you is, whether or not you had any intent to contemn the authority of the Court as you did the acts which you did do. A My answer is no.

Q This deed which was executed to you and your wife, did she act in that personally for herself or for you? A For herself.

Q Or for both of you? A For herself, under the advice of counsel.

Q Under the advice of Mr. Merrill? A Yes, sir.

Q That is, it was his advice, and because of his advice, that the deed was made to her instead of you? A Yes, sir.

Q Because of the fact that the previous contract between the McVoys and you had been made with you? A Yes.

By Mr. Slingerland.

Q Did Mr. Merrill tell you that, Mr. Naugle? A What is that?

Q That that was the reason why the deed was made to Mrs. Naugle? A That wasn't the reason why the deed was made to Mrs. Naugle at all.

Q That was the question. A The reason was, that she had a right under his interpretation, under the performance of the decree, to accept that deed.

Q It had nothing to do, had it, with the original contract you had with Mr. McVoy? A No.

By the Court.

Q Well, why was it, then, that the deed was made to your wife instead of to you? A That was Mr. Merrill's idea about it.

Q It was done because it was Mr. Merrill's idea? A Yes.

Q What was your idea about it? A My idea of it was that Mrs. Naugle was to take title.

Q Do you mean that under your original contract with the McVoys, you would have had that made to Mrs. Naugle? A I couldn't take the deed from Cooley.

Q That is precisely what I asked you five minutes ago, whether the deed was made to your wife instead of yourself because of this outstanding agreement? A She had a right to take it under Mr. Merrill's idea of the performance of the decree.

By Mr. Slingerland.

Q As a matter of fact, Mr. Naugle, you didn't know anything about the legal situation at all? A No.

Q You were following Mr. Merrill's advice entirely? A That is right.

Q And why certain things were done and why certain methods were used was because Mr. Merrill told you that was the proper way; is that correct? A That is right.

Cross examination by Mr. Nash.

Q Mr. Cooley is a friend of yours, isn't he? A He was.

Q He works in the same office with you? A No, sir.

Q Did he? A Five years ago, yes.

Q Did he work in the same office with you in 1920? A Yes.

Q And did you ever call at the office of Smith & Slingerland? A No.

Q You didn't? A No.

Q Never been to their office? A No, sir.

Q Did you go to their office when they appeared for you on the right of possession? A No, sir.

The Court: In view of the situation as it has appeared in this testimony in chief, is it worth while to go any further?

Mr. Nash: I don't want to take time to go any further.

RUTH C. NAUGLE, one of the respondents in this cause, being duly sworn in her own behalf, testified as follows:

Direct examination by Mr. Slingerland.

Q Mrs. Naugle, what do you know about this transaction between Mr. and Mrs. McVoy, Mr. and Mrs. Baumann and Mr. Cooley, your husband and yourself? A Only what I have heard, through hearsay.

Q What do you mean by "hearsay," from whom? A Well, from most everybody that knew more about it than I did, and what I have heard from Mr. Merrill.

Q Was he advising you on this transaction? A Yes.

Q Were you following his advice? A Yes.

Q You don't pretend to know what the legal effect of orders and decrees of court may be? A No, sir, I don't understand them or know anything about it.

Q Do you know why title was taken in your name by deed from Mr. Cooley? A No, sir.

Q You don't know that? A No.

Q You simply know that it was done? A Yes; I simply know I signed the deed.

Q Who asked you to do that? A Mr. Merrill.

By the Court.

Q You signed the deed? A Yes.

By Mr. Slingerland.

Q Did you sign the deed? A Yes.

Q You mean you accepted it? A Yes, sir.

Q You mean the deed Mr. Cooley gave to you? A Yes, that is the deed I meant.

By the Court.

Q Do you say you signed a deed? A I meant to say I accepted the deed.

Q You know the difference between accepting and signing, do you not? A Yes, I do.

Q Well, what did you have in mind when you said that? A I wasn't thinking what I said.

Q Did you sign anything? A I signed some things, yes.

Q What were they? A I don't know.

Q Did you sign anything at the time the deed was made to you by Mr. Cooley? A Did I sign anything?

Q At that time, yes. A I don't remember.

Mr. Nash: No questions.

EARLE A. MERRILL, being recalled, testified as follows:

Direct examination by Mr. Slingerland.

Q Mr. Merrill, you have heard Mr. and Mrs. Naugle testify that it was upon your advice that they acted as they have acted in these proceedings. Will you tell us, please, what was, in your opinion, the status of the various persons interested in these lands, from the affirmance of the decree?

The Court: I won't permit that.

Q What, Mr. Merrill, were the rights and liabilities of the interested parties?

Mr. Nash: That is objected to.

The Court: The objection is sustained. I think they have been fairly well established by the several decrees of this Court.

Mr. Merrill: I offer in evidence the deed M. 1 for identification.

The Court: It may be received in evidence.

Said deed is marked Exhibit M. 1.

CASE CLOSED.

Mr. English: I renew my motion to dismiss the charges against Mr. Merrill. Some of the testimony went somewhat outside of what I understand we are here to meet, which is, that Mr. Merrill, as solicitor, represented Cooley in this dispossess proceeding and represented the Naugles in their effort to resist possession by this complainant of the property in question.

The Court: I apprehend what you are about to say. But after all, does not leave the situation in this wise? Assuming that you are correct and that your client is entitled to a strict interpretation of the specifications of charges in the order to show cause, that nevertheless, there has developed at this time the fact that he has done acts which we will say are not included strictly within the specifications of these charges, but which would make him amenable to discipline as for contempt, if it had been included in this charge, or if it were made the basis of another charge.

Mr. English: No, I don't think they would.

The Court: I don't think you should commit your client, but isn't that the situation?

Mr. English: Those facts are here brought out by your Honor.

The Court: Brought out by the statements of Mr. Merrill on the stand prior to my interrogation.

Mr. English: It doesn't seem to me that they make him amenable.

The Court: The thing I want to call upon you to do, is to make your election as to whether you stand upon your position that they are not included within the scope of the pleadings, or whether you are willing to concede they are included and discuss them on the merits.

Mr. English: May I consult my client?

The Court: Yes, you may.

Mr. English: (After consulting with Mr. Merrill.) Mr. Merrill does not want to avoid any issues. I would like a statement as to what now we are called upon to meet, with a reservation

on my part, that if it seems to require further proof I may make an offer of further proof.

The Court: The only additional proposition is that which arises from Merrill's testimony—which is the fact that he advised and participated in the giving of this deed by Cooley, and that that act was a direct contravention of the provisions of the final decree.

Mr. English: May I call him to explain it?

The Court: He has explained it. The question is whether you want it considered in this present contempt proceeding, or whether you insist that the only things which can be considered are the things which come strictly within the language of the order to show cause as actually entered in the present case.

Mr. English: We consent to that.

The Court: Then an amendment to the order to show cause may be made, if necessary, in that behalf.

Mr. English: We are called upon to meet what is in this order to show cause, and the addition is that we advised or participated in the making of the deed from Cooley to Mrs. Naugle. About the last question that I think involves the position of Mr. Merrill as counsel, do I still have to deal with the question of good faith?

The Court: No, you will be in the same position as stated before.

Mr. English: Then the only thing is whether he should be disciplined for having advised or permitted Cooley, who was the subject of the decree, unduly to make the conveyance to Mrs. Naugle, as I understand it?

The Court: You do not have to argue on permission. The situation is whether he advised or participated.

Mr. English: I mean that he advised the thing and his client followed his advice. The question, as I look at it, must be viewed in the light of the history of the transaction up to that time.

The Court: Not unless you are going into the question of good faith.

Mr. English: It is very difficult for me to deal with it.

The Court: The question is simply this: was it or was it not a contravention of the decree of this Court for the defendant Cooley to make a deed to someone other than the person to whom he had been directed by the decree to make a deed.

Mr. English: That depends upon whether or not the complainant, who had the original decree, had abandoned her decree. Suppose they had sat down and agreed to just let this go? Would your Honor say that they would have had to come back to the Court to ratify that consent. I would hardly think so. Don't you think that a decree having been made, and the complainant had elected not to take the benefit of it, and the other party had acted on that election and agreement, it would not have been a contempt of the Court's order to let the thing go? As far as Mr. Merrill was concerned, that was in effect what happened, not by actual agreement, but by what had gone before, because the decree had been affirmed, and then this series of correspondence ensued between him and Mr. Nash. He tenders the deed and Mr. Nash won't take it. Then he writes a letter without any restrictions; then he wouldn't take it. He says, "You complainant pay your money." Mr. Nash says, "Is the costs taxed?" Then they get the costs taxed, and they come to the proposition, "Are you ready to

take the money for the deed?" A silence; nothing happens.

It seems to me that there is a very excellent ground for the position which Mr. Merrill said was his attitude. The decree is that the contract between them be performed.

The Court: Admitting that, this act put it out of his power to perform the decree if and when the contract, as he viewed it, should be granted by the other side.

Mr. English: Yes, but wasn't Cooley justified in putting it out of his power? Wasn't it effective as though the power should be abandoned?

The Court: Assuming what you have said, for the sake of argument—although it does violence to my notion of the force and effect of the decree—that it must rest on the attitude of mind of the other side; but assuming that to be so, you have not shown any such situation; you have shown, at most, that the defendant Cooley sought to find out whether or not the complainant would not assent to a vacation of the decree or an abandonment of its terms. He received no such intimation, and thereupon he assumed that the silence gave consent.

Mr. English: What Cooley did was to tender a deed. Then he said, "Now, if you don't like that kind of a deed, tell me what kind of a deed you do want. I want you to come and pay your money into Court and take my deed. I can't wait forever in this ruling. We'll fix a final time. I can't wait forever."

The Court: Take that to be so, and upon what you have said, of course, your client or Cooley might have been entitled to some equitable relief; we will assume that he was, but he

was not entitled to take the law into his own hands and assume for himself what he was going to do. His right, at most, was to apply to the Court for relief under the circumstances he says obtained in this case.

Mr. English: If the complainant was not satisfied with the deed tendered he could have done one of two things—

The Court: There is no doubt about that. You are getting away from the fact that Cooley made a deed to somebody else, and by that fact put it out of his power to comply with the decree, and put it out of the power of the complainant to obtain the fruits of the decree.

Mr. English: I don't try to escape those facts; they are here, but Mr. Merrill, a member of the Bar, is brought before the Bar of this Court, and charged that in advising Cooley to make that deed he contemned the authority of the Court.

It seems to me his position is justified from one or two situations: first, he had made a tender, and whatever the effect of the statute is, if the complainant wants to take the benefit of the decree without any specific conveyance, she can put her decree on record, which was not done, which, if it had been done, would have allowed her to have reaped the fruits of the decree. When the complainant didn't see fit to put her decree on record, didn't he have a right to think she intended not to take the benefit of a decree, or she would have tendered him a deed herself, a deed satisfactory to him.

The Court: Assuming that to be so, that is not the situation here. The situation here is not that of a charge of contempt for a failure

to execute a deed, as provided by the decree. The charge here is for an act which put it out of his power to do what the Court told him to do.

Mr. English: Yes, but he didn't put it out of his power, until the situation was such that counsel had a right to say they had abandoned the decree.

The Court: Do you seriously advance that as a right in which counsel is justified; do you mean to tell the Court that you would, in that situation, presume to advise a client to execute a deed of this kind without applying to this Court?

Mr. English: I would rather not answer that—but I am representing Mr. Merrill—

The Court: The question of good faith is eliminated. However ill-advised his act might have been, the Court is giving him credit for acting in a way which he thought he was justified in. The question is, was he justified?

Mr. English: I think he was, because he had—

The Court: Do you actually think that counsel for a man who has been decreed to give a deed to one man is justified, because of things which have happened as testified to in this case, in advising and participating with a client in the giving of the deed to another man and thus putting it out of his power to perform the decree?

Mr. English: If, in his mind, such a long time has elapsed that in his mind he is justified.

The Court: It is a question of whether he is justified in fact.

Mr. English: He was advising his client.

The Court: And in a case of this kind, in a situation of this kind, he was doing it at his peril?

Mr. English: Yes, he was. I think there was a reason to think that the complainant had abandoned the decree, and, therefore, it was not—

The Court: You think he had a right to presume to decide it for himself?

Mr. English: There is no question that he thought he had.

The Court: Yes, he did, but did he have the right?

Mr. English: I think he did; he may have been mistaken.

The Court: The sole issue I am putting before you is this: I assume he thought he had that right. I want to know whether you think he had that right. You are called upon, as I see it, under the issue here, to say to this Court whether or not you think he had a right to decide that for himself without applying to this Court. If you do, it is your duty to say so and show me where any such right accrued to him. If you do not think he had a right, I don't think there is anything further in the case.

Mr. English: I think it would have been wiser on a question of policy—

The Court: I am not asking you concerning a question of policy or wisdom; I want to know whether he had that right. I think it is the sole question.

Mr. English: I think it all, depends upon whether, in the first place, the parties could agree without coming to the court, and I think they could. If your Honor asked me that question, whether the people could sit down—

The Court: I am not asking you that question.

Mr. English: If you asked me that question, I would say I think they could. If they had agreed

between themselves to let the decree go, I wouldn't think they would have to ask permission of the Court to let it go. Now, this is only one step further. Was the situation such, that the defendant Cooley, acting on the advice of his counsel, had reason to think the decree had been abandoned, and the implied agreement to abandon it, in the face of all this correspondence they went through and this setting a time, and the fact that no money had ever been paid into court and no record in the County Clerk's office and no deed, how long is a party to wait?

The Court: Until he makes an application to the Court.

Mr. English: Then in five years he would have to come to court with it?

The Court: That is the way it appears to me; he would not have to wait five years, but unless and until he took that step, I am frank to say, in my present view, he is bound to avoid any act which would put him in contempt for a violation of the decree.

Mr. English: It seems to me, that would be an extreme case and you would have to wait forever in the situation.

The Court: He would not have to wait forever. It is in his own hands; he would not have to wait. The application could be made at any time.

Mr. English: That applies to Cooley, but Merrill, there wasn't anything in his hands. Let us say he exercised bad judgment, the charge against him is, that he contemned the authority of the Court, which, it does not seem to me is correct. He had no intention—

The Court: He did intend to do what he did do?

Mr. English: Yes, but he wouldn't have done it if he had thought it was wrong. It wasn't done with malice aforethought.

The Court: Well, he advised his client to do this thing, and he did it in the face of this decree.

Mr. English: Assuming that strictly he ought to have come back to the Court on behalf of Cooley, and Cooley did what he told him to do, and he advised him to do it, acting on his best judgment and belief; and he though that the decree had now been abandoned by the complainant, is that a thing for which your Honor ought to punish a solicitor of the court? It is conceded it was not with malice aforethought. Let us say an application should have been made, but here was a fixed situation. If you want to make an analogy of another kind of case of reasonable or probable cause, there was no reasonable or probable cause that that decree should be revived. It seemed to be dead as a doornail. Nothing had been done, and here was this man who wanted to convey his property.

Mr. Slingerland: On behalf of the respondents, Mr. and Mrs. Naugle, I move for a dismissal of the proceedings as to them, upon the ground, first, that they were not parties to the decree, and next, there is no evidence of any connivance or conspiracy to violate the terms of that decree or evade the order of the Court:

Then I want to call your Honor's attention to the fact that they were acting solely under the advice of counsel and had no intention whatever of violating a decree of this Court, and I ask

that the proceedings may be dismissed as against them.

The Court: I will take the matter up for consideration and advise counsel later, as I have some final hearings to take up now.

CONCLUSIONS OF THE COURT.

BUCHANAN, *V.-C.*

By the final decree of this Court entered February 24, 1922, the respondent Elihu H. Cooley was directed to make conveyance of certain lands and premises to Mary E. McVoy, by good and sufficient deed of conveyance. From this decree Cooley appealed, but unsuccessfully, and decree of affirmance was entered in the Court of Errors and Appeals on June 19, 1922, and remittitur was filed in this Court on July 24, 1922.

Shortly thereafter Cooley executed and tendered to Mrs. McVoy a deed which purported to convey the premises subject to an inchoate right of dower of Bertha Baumann. (The decree was by way of specific enforcement of a contract of sale made by Karl Baumann alone—his wife Bertha not having joined therein—and the premises having thereafter been conveyed by Baumann to his wife and by her to Cooley, with no reservation of any inchoate right of dower.) (See *McVoy* v. *Baumann,* 93 N. J. Eq. 360; *Id.* 638.) This deed Mrs. McVoy refused to accept.

On August 29, 1922, Cooley executed and acknowledged a deed for the premises in question to Ruth Naugle (another of the present respondents), notwithstanding the decree aforesaid. Mrs. Naugle, notwithstanding she knew of the de-

cree (having been informed thereof by her counsel, M—), accepted the deed and thereafter asserted ownership thereunder and resisted the efforts of Mrs. McVoy to obtain possession.

Naugle's counsel, M—, was the same individual who had been solicitor and counsel for Cooley in the specific performance suit. He advised, and participated in, the drafting, execution and delivery of the deed of August 29, 1922, by Cooley and the acceptance thereof by Mrs. Naugle. This course of action, it will be observed, was more than a non-performance of the command of the decree—more than a negative disobedience—it was a positive disobedience and by it Cooley put it out of his power to comply with the decree.

That this conduct in fact constituted a contempt is, it seems to me, so clear as practically to admit of no argument. The contention which was put forward on the hearing was that by reason of certain facts (hereinafter mentioned) there had been an abandonment by Mrs. McVoy of her rights under the decree and that hence disobedience to, and active disregard and violation of the directions of that decree would not constitute contempt.

Assuming—but by no means deciding—that acquiescence or consent by Mrs. McVoy to the doing of the acts in question would constitute a valid excuse and defense in a punitive proceeding for contempt (as the present proceeding is), the evidence utterly fails to show any such consent or acquiescence. There had in fact been no abandonment by Mrs. McVoy of her rights under the decree. It has heretofore been adjudicated upon substantially the same evidence that there had been no such abandonment even

as long thereafter as September, 1923. See *McVoy* v. *Baumann,* 1 N. J. Adv. 1529; (the opinion in this Court has not yet been reported). The most that can be said is that M— and his clients believed that there had been an abandonment, and even so, it must be observed that they arrived at such belief upon very scanty grounds; apparently the wish was father to the thought. It is pointed out in *Kempson* v. *Kempson,* 61 N. J. Eq. 303 at 326, that assuming that acquiescence or consent by complainant may excuse disobedience of a decree, it is at least requisite that such acquiescence or consent be very clearly and positively proven. M— assumes responsibility in the matter. He says, as do the Naugles, that they acted on his advice and had no thought that their conduct was a contempt. (Cooley has at all times been a non-resident and did not appear.) That respondents acted on the advice of counsel is no defense to contempt proceedings (*West Jersey Traction Co.* v. *Camden,* 58 N. J. L. 536); neither is the fact that they had no disrespectful intent necessarily a defense; although both of these factors may well be considered in extenuation and mitigation of punishment. That the act done was a violation of the Court's decree, and that respondents intended to do that act, are facts sufficient to establish a contempt; the other factors may influence the determination of the decree or character of the contempt.

The evidence shows that Mr. and Mrs. Naugle were acting together in the matter; that they intended to, and did, accept the deed in question and refuse delivery of the premises to Mrs. McVoy; that they knew of the decree, and hence that they knew that they were participating in an act which was an active violation of the decree

and a contempt—even though they did not realize or comprehend the legal significance of their conduct in that behalf. I am satisfied that they had no such realization or comprehension; that they were guilty of no intentional disrespect to the Court; that they acted on the advice of their counsel, and believed that Mrs. McVoy had abandoned her rights under the decree. I find them guilty of contempt, but entitled to lenience in the matter of punishment.

As to the respondent Cooley, jurisdiction not having been acquired over his person in this proceeding, no adjudication of contempt can now be made as to him.

With regard to the respondent M—, it is evident from what has been said, that he was the prime mover in this violation of the decree, both as to the making of the deed by Cooley and the acceptance by the Naugles. His explanation of his conduct is most singular. He says that he thought there had been an abandonment by Mrs. McVoy of her rights under the decree and that therefore the decree was at an end. He knew of course that there had been no express or explicit abandonment by Mrs. McVoy; he knew that at most his idea that there had been such abandonment by her was a judgment or conclusion of his own as to the result or effect of the intermediate circumstances. Those circumstances, as he explained them, were that Mrs. McVoy's solicitor had refused to accept the deed tendered by him on June 23, 1922; that he thereafter notified her solicitor that the tender of that deed would be kept open until some time in July but no longer; that the deed was not accepted within this time, nor was there any payment into court by Mrs. McVoy of the balance of the purchase price as required by the decree; that inasmuch as the decree directed performance by both parties within ten days from its date, he felt justified in deciding and declaring that Mrs. McVoy had no further rights, and in acting upon that assumption as he thereafter did in the matter of conveying to the Naugles. He disavows any intentional disrespect toward the Court, and earnestly contends that there was no violation of the decree and hence no contempt.

He offered in evidence the correspondence between himself and Mrs. McVoy's solicitor, covering a period from June 24, 1922, to September 15, 1922. By these letters it appears as explicitly as can possibly be imagined that M— was insisting that Mrs. McVoy should accept the deed subject to the dower incumbrance, and do so promptly, otherwise Cooley would consider her rights as ended, and that on the other hand Mrs. McVoy's solicitor was rejecting that deed as improper and demanding a deed in accordance with the decree. He knew therefore that there was no intentional abandonment by Mrs. McVoy; and no matter how strong was his own belief that she had lost her rights, he knew she did not believe she had lost them; he knew that he was assuming to act, not on a thing he knew as a *fact,* but on his *opinion* as to a matter of law. Indeed in his last letter (September 15, 1922), he says, after speaking of the tender of the deed and its refusal, "This, in my *opinion,* constitutes a rejection of the terms of the decree by complainant, and leaves the title to and ownership of the lands in Cooley." (The italics are mine.)

Now in the face of the facts as he knew them, and of the judicial opinions in the case, and the terms of the decree, how could any competent solicitor arrive at the opinion that a deed subject to a dower right in Mrs. Baumann was a deed in compliance with the decree? She and her husband had both conveyed to Cooley, without reserving any such dower right. Her equitable right, if any she had, to a portion of the purchase price had been provided for, by her own request and consent, under the clause of the decree that the purchase money be paid into court so that she might have opportunity to prove how much if any of it should be paid to her as compensation for her dower right. However, I cannot doubt but that M— in fact had this opinion, and that he also had the opinion that Mrs. McVoy, by refusing this deed, had lost her rights.

But even so, he knew, as I have said, that these were only his opinions, and that he was matching his opinion against that of Mrs. McVoy's solicitor. It had just been demonstrated to him in the result of the suit, that in that instance the latter's opinion as to matters of law had been better than his own. How could he dare to advise and instruct his clients to act in disobedience to a decree upon the strength of what he knew was only his own opinion. He knew, or as a lawyer ought to have known—especially since he was assuming to give his clients legal advice upon this point—that in so doing, they would act at their peril; and that he in advising them so to do, was acting likewise at his own peril. An attorney may advise his client that *in his opinion* an order is invalid, or has become ineffective, or that rights under it

have been lost, or that a certain act will not be a disobedience or a contempt. This is both his privilege and his duty as a lawyer to his client. But when he goes further and advises the client to do the act, he goes beyond his privilege, and if the act is a disobedience and contempt he is equally guilty with his client. *Cf. In re Noyes,* 121 Fed. 209; *Anderson* v. *Comptois,* 109 Fed. 971.

A decree for specific performance is of course operative and binding upon both parties; the decree is that complainant perform as well as defendant. Where either party desires to avoid the effect of the decree because of matters arising subsequent to the decree (such as settlement between the parties, refusal or neglect of the other party to perform, or inequitable conduct of the other party) the proper course is to apply in the cause for a permanent stay of all proceedings. *Rosenstein* v. *Burr,* 83 N. J. Eq. 491. *Cf. also, Hudson Trust Co.* v. *Boyd,* 80 N. J. Eq. 267; *Smith* v. *Smith,* 84 N. J. Eq. 13; *Barnett Foundry Co.* v. *Iron Works Co.,* 85 N. J. Eq. 359. That is the course which M— should have advised his clients to pursue in the present instance, instead of assuming himself the right to determine the legal result of the conduct of the parties subsequent to the decree

M—'s explanation therefore is not a valid excuse for his conduct. I believe, however, his explanation in fact is true, and I acquit him of intentional disrespect or flagrant contempt. He is nevertheless guilty of an actual contempt.

This disposes of the findings as against all the respondents. The determination of the punishment which should be imposed may await somewhat further consideration.

FINAL DECREE.

Filed December 20, 1927.

IN CHANCERY OF NEW JERSEY.

In the matter of ELIHU H. COOLEY, REGINALD B. NAUGLE, RUTH C. NAUGLE and EARLE A. MERRILL, Charged with Contempt.	*Final Decree, as to the Defendant Earle A. Merrill.*

This matter coming on to be heard in the presence of Mr. Augustus C. Nash, representing the Court, and Mr. Conover English, solicitor of the defendant Earle A. Merrill, and it appearing that by a rule made in this cause, on the Court's own motion, on the 3rd day of January, 1924, it was ORDERED that said defendant Earle A. Merrill show cause before the Chancellor, at the Chancery Chambers, in the City of Trenton, on the 15th day of January, 1924, why he should not be adjudged guilty of contempt of this Court in the premises, and punished therefor; and the Court having heard and considered the proofs, and the arguments of counsel, and being satisfied that the said defendant Earle A. Merrill is guilty of the contempt charged, and that he has violated and disobeyed the decree of this Court mentioned in said rule:

It is, on this 20th day of December, 1927, ORDERED, ADJUDGED and DECREED that the said defendant Earle A. Merrill is guilty of contempt of this Court in violating and disobeying the said decree of this Court made on the 24th day of February, 1922;

Final Decree.

And it is further ORDERED that the said defendant Earle A. Merrill pay to the Clerk of this Court a fine of $25 for the use of the State of New Jersey, and further pay the costs of these proceedings to be taxed, to the solicitor prosecuting, in which shall be included a counsel fee of $25.

E. R. WALKER,
C.

Respectfully advised,

MALCOLM G. BUCHANAN,
V.-C.

NOTICE OF APPEAL.

Filed January 21, 1928.

IN CHANCERY OF NEW JERSEY.

49/136

In the matter of ELIHU H. COOLEY and others, Charged with Contempt.	*Notice of Appeal.*

The defendant Earle A. Merrill hereby appeals from the final decree made in the above-entitled cause on December 20, 1927, by the Chancellor on the advice of Hon. Malcolm G. Buchanan, Vice-Chancellor, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

E. A. MERRILL,
Solicitor for and of Counsel
with Defendant-Appellant.

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

E. A. MERRILL,
Of Counsel with Defendant Earle A. Merrill.

PETITION OF APPEAL.

Filed January 30, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the matter of ELIHU H. COOLEY and others, Charged with Contempt.	*Petition of Appeal of Earle A. Merrill.*

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

The petition of Earle A. Merrill, the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 20th day of December, 1927, wherein the said Court of Chancery was complainant, and the said Earle A. Merrill was one of the defendants, in this respect, to wit: that the said decree adjudges that the said defendant Earle A. Merrill was guilty of a contempt of the power, authority and dignity of said Court of Chancery.

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous in that petitioner is not guilty of the contempt charged, or of any contempt.

Petitioner, therefore, prays that the said decree of the said Chancellor may be wholly re-

Petition of Appeal.

versed, set aside and for nothing holden, and that the petitioner may have such other relief in the premises as to this Court shall seem just.

EARLE A. MERRILL,
Petitioner.

ANSWER TO PETITION OF APPEAL.

Filed February 25, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the matter of ELIHU H. COOLEY and others, Charged with Contempt.	*On Appeal.* *Answer to Petition of Appeal of Earle A. Merrill.*

The answer of the Court of Chancery, appellee to the petition of appeal of Earle A. Merrill, the above-named appellant.

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, in answer thereto nevertheless admits that a final decree was on the 20th day of December, 1927, made and entered in the Court of Chancery of New Jersey in the above-entitled matter for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity and prays that the same may be affirmed with costs.

HARRY LANE,
Solicitor for and of Counsel with Appellee.

NOTICE OF ARGUMENT.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the matter of ELIHU H. COOLEY and others, Charged with Contempt.	*On Appeal.* *Notice of Argument.*

TAKE NOTICE that the argument of the appeal in the above-entitled cause will be brought on at the May term of the Court of Errors and Appeals, to be held at the State House, at Trenton, on Tuesday, May 15, 1928, at the hour of eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard.

E. A. MERRILL,
Solicitor of the Appellant and of
Counsel with Appellant.

To Mr. Harry Lane, solicitor of the respondent and of counsel with respondent.

Exhibit P. 1.

Exhibit P. 1.

Record in the case of McVoy *vs.* Baumann.

In this suit bill was filed for specific performance of contract for sale of lands in question between Karl Baumann the owner as vendor, and Herbert C. McVoy as vendee, and assigned to Mary E. McVoy. The defendants were Karl Baumann and Bertha Baumann, his wife, and Elihu H. Cooley, their grantee. Answers were filed for all the defendants by their solicitor, E. A. Merrill. Replications duly filed. The case was heard before Vice-Chancellor Buchanan, resulting in the entry of a final decree, dated February 24, 1922, copy of which is here printed as Exhibit b, directing specific performance of said contract.

The opinion of Vice-Chancellor Buchanan in the case is reported in 93 N. J. Eq. 360.

Appeal from said decree was taken to the Court of Errors and Appeals and argued by E. A. Merrill, as counsel for the defendants-appellants, resulting in an affirmance on June 19, 1922. Opinion of the Court of Errors and Appeals is reported in 93 N. J. Eq. 638.

a.

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:

Exhibit P. 1.

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 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

Exhibit P. 1.

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.

Exhibit P. 1.

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.

b.

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

Exhibit P. 1.

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 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 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 deliver 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

Exhibit P. 1.

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. BUCHANAN,
V.-C.

Exhibit P. 1.

C.

The opinion of the Court was delivered by Minturn, *J:*

A valid contract in writing, was entered into by the defendant on July 19, 1920, with Herbert C. McVoy, the husband of the complainant, to convey to him certain lands in Westfield, the deed to be delivered on October 1st, 1920. Prior to the latter date McVoy with the consent of Baumann, assigned the contract to the complainant. The original contract of purchase was duly recorded in the Registers office of Union County, on October 4, 1920, and thereby operated as constructive notice to all subsequent purchasers, of the legal and equitable status of the parties to the contract, and their respective rights under it, as trustees and *cestui qui trustent.*

Hoagland v. *Latourette,* 2 Eq. 254.

Upon the day fixed for the passing of title, Baumann was present with a deed duly executed to the complainant, in conformity with the terms of the contract; but an arrangement was then entered into between him and the complainant by which the delivery of the deed was postponed until the next day. Upon that day the complainant attended, ready to complete the purchase, but Baumann failed to appear. The complainant on October 3rd, called upon him and tendered the balance of the purchase money, according to the contract. Baumann promised to deliver the deed within a few days but failed so to do. Instead of complying with his contract, he on October 26th conveyed the premises to his wife, and on the 9th of November 1920, his wife conveyed the same to the defendant

Cooley. The complainant now seeks by this bill for specific performance to compel Baumann, his wife and Cooley, to convey the premises to her, in accordance with the terms of the original contract. No defence upon the merits was interposed, but the case went to trial upon proof of these facts, and the learned Vice Chancellor advised a decree adjudging *inter alia* that Cooley specifically perform the contract, by executing a conveyance of the premises to the complainant. The main contention upon which the defence is constructed, is that the action is one *in personam,* and that since the defendants are non-residents, and were only constructively served with process under our statute regarding publication against absent defendants, the Court of Chancery was without jurisdiction. When this contention was urged below, the learned Vice Chancellor refused to dismiss the bill, but ordered that the defendants might file answers, upon the merits, "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." Answers being filed, the case was tried upon the merits, counsel for the defendants actively participated in the trial, and renewed his motion to dismiss at the close of the case.

We deem it manifest, in this situation, that the special appearance of the defendants was tantamount to a general appearance; and that they cannot now after the doors of equity have been thrown open to them, for the express purpose of enabling them to exploit the merits of the controversy, challenge the jurisdiction of the tribunal whose portals they thus voluntarily entered. *Bank of Jasper* v. *First Natl. Bk.* 10 U. S. Sup. Ct. Ad. Op. 254, April 1/1922. But aside

from the factual consideration, the cause is manifestly not one *in personam,* but is entirely *in rem.* The question thus presented is not *res nova* in this jurisdiction, nor has it been such in the Federal Courts since the definitive adjudication in *Pennoyer* v. *Neff,* 95 U. S. 714, wherein it was declared: "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 titles 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 of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose mortgage or enforce a lien. As far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned."

The rule thus laid down has not been since questioned or qualified in the United States Supreme Court, but has been followed and elucidated in numerous cases, in the State and Federal jurisdictions. Exemplary of these in this State are *Amparo Mining Co.* v. *Fidelity Trust Co.* 74 Eq. 198, and *Lister* v. *Lister,* 86 Eq. 351; while in other jurisdictions the cases to the same effect are collected and discussed in 20 R. C. L. 203. Manifestly the purpose and rationale underlying the distinctions thus enunciated, result from the Federal constitutional provisions, which are designed to ensure compliance with the constitutional mandate requiring "due process of law," as necessary *modus operandi* to the deprivation of an existing legal

right. But when as in this instance a hearing has been accorded, and the parties have availed themselves of every recognized avenue of procedure incident to a trial upon the merits, the reason for the invocation of these constitutional differentiations in procedure, *ex necessitate* disappears.

Western Life Ins. Co. v. *Rupp,* 235 U. S. 261.

6 H. C. L. 447 and cases cited.

12 C. J. 1193 and cases cited.

It may also be observed, that the resulting decree in a cause of this nature, under our legislation, operates *ipso facto* to convey the *locus in quo,* regardless of the situs of the parties, and their failure to comply with the mandate of the final decree.

1 C. S. "Chancery" sect. 45.

Weehawken Ferry Co. v. *Sisson,* 17 Eq. 476.

The remaining objections to this decree are based upon the theory that both Mrs. Baumann and Cooley are innocent purchasers, for value, of the premises; and are therefore not bound by the covenant of Baumann in his written contract. Under our statute the filing of the contract operated as constructive notice to every one dealing with the property, of the existing rights of the parties thereto. From the filing of the contract each constructively held his portion of the subject matter of the contract as trustee for the other. Mrs. Baumann was a party to the deed to the complainant under that contract, and she was therefore charged with actual knowledge regardless of the constructive notice imparted to her by the filing of the contract.

If she were actually innocent as a purchaser, for value, the burden was upon her to establish that fact, and not remain mute when she was afforded the opportunity to speak. The same argument becomes dispositive of the claim of Cooley. In the absence of proof by either of these parties, indicating a bona fide purchase for value, the counter burden of negation was not cast upon the complainant. It is only where the defendant has sustained by proof, his claim as a *bona fide* purchaser for value, that the burden is shifted to the complainant to establish the contrary status. Such was the effect of our determination in *Commonwealth Co.* v. *Schmit,* decided at the recent November term.

Nor is there any force in the contention that the contract lacks mutuality as between the parties to the suit. The answer to this contention is furnished by the contract itself, which provides that the vendor would convey the *locus in quo* to the vendee, "his heirs and assigns." The assignment of the contract to the complainant therefore in no wise destroyed the existing status of the vendor and his assignee, as constructive trustee of the *res,* for the purpose of legally effectuating compliance with his covenant.

Saldutti v. *Flynn,* 72 Eq. 157.

And so it is the acknowledged rule, that when specific performance would be decreed between the original parties to a contract, it will be decreed between all claiming under them, if there are no intervening equities otherwise controlling the case.

Hays v. *Hall,* 4 Porter, 81.

Willards Eq. Jurisprudence 269.

Exhibit P. 2.

Mrs. Baumann is not directly affected by this decree, since its provisions are directed entirely against Cooley, her vendee. It is finally urged that the bill will not lie, because the remedy at law is complete. The doctrine of specific performance is based upon the equitable conception that the vendee desires the land in specie as *sine qua non* of his contract. The contention of the defendants is based upon the fallacy involved in the argument that the suit is *in personam,* and not *in rem,* and that therefore plaintiff's redress must be at law for damages. But since we have determined the character of the action to be *in rem,* the rationale underlying the rule of equity applies, that "The jurisdiction to enforce performance is universal, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a peculiar and special value."

Willard Eq. 279.
Madd Ch. Pr. 288.
25 R. C. L. 202 and cases.

The decree will be affirmed.

Exhibit P. 2.

Record on application for Writ of Assistance.

This was an application by Mary E. McVoy, the complainant in the specific performance suit (Exhibit P. 1) against Ruth C. Naugle and Reginald B. Naugle, for a writ of assistance in aid of the decree for specific performance entered in said suit. Smith & Slingerland appeared representing the respondents. The case was heard on

Exhibit P. 3.

the petition and affidavits filed, before Vice-Chancellor Buchanan, resulting in the granting of an order for possession, and, upon default of surrender of possession, the awarding of a writ of assistance.

The facts are fully stated in the opinion of Vice-Chancellor Buchanan, which opinion is reported in full in the affirmance by the Court of Errors and Appeals at 95 N. J. Eq. page 335.

Exhibit P. 3.

Record of Court of Errors and Appeals on appeal of Ruth C. Naugle and Reginald B. Naugle, from the order for possession and writ of assistance granted by Vice-Chancellor Buchanan.

An appeal from the order for possession and writ of assistance granted by Vice-Chancellor Buchanan was taken to the Court of Errors and Appeals by Ruth C. Naugle and Reginald B. Naugle, respondents, represented by E. A. Merrill. The case was argued before the Court of Errors and Appeals by E. A. Merrill on behalf of the appellants, resulting in an affirmance on the opinion below. The case was decided by the Court of Errors and Appeals on December 4, 1923, and the affirmance by the Court of Errors and Appeals on the opinion of Vice-Chancellor Buchanan is reported in 95 N. J. Equity, page 335.

Exhibit P. 4.

Deed of Elihu H. Cooley to Ruth C. Naugle, dated August 29th, 1922.

Elihu H. Cooley	B & S Deed.
(unmarried)	Dated August 29, 1922.
to	Ack. " 29, 1922.
Ruth C. Naugle.	Rec'd. Sept. 30, 1922.
	File No. 37689.

Conveys the lands the subject of the suit for specific performance, and described in the deed of Bertha Baumann and Karl Baumann, to Elihu H. Cooley. Supplemental Exhibit A.

Recites: "Subject to a certain mortgage dated Nov. 9, 1920, in the principal sum of $2700 made by Elihu H. Cooley to Bertha Baumann, and about to be recorded, which mortgage the said Ruth C. Naugle assumes and agrees to pay as a part of the purchase price for the lands herein conveyed."

Exhibit P. 5.

Brief of E. A. Merrill on appeal from Order of Possession.

This is the brief filed by E. A. Merrill as Solicitor and Counsel for Appellants, in the Court of Errors and Appeals, on the appeal of Ruth C. Naugle and Reginald B. Naugle from the Order for Possession (See Exhibits P. 2 and P. 3) granted by Vice-Chancellor Buchanan.

The grounds of appeal argued in said Brief were the following, to wit:—

1. Your petitioners were not parties named in the bill of complaint, or in any of the proceedings in said cause; they acquired their rights subsequent to the decree and are not bound by the decree or liable to be dispossessed by any process for the enforcement of said decree; and therefore the court had no jurisdiction over them in this proceeding.

2. Parties necessary to a full determination of the rights involvel are absent, and therefore the court had no jurisdiction to make the order complained of.

3. The court erred in summarily deciding controverted issues of fact.

4. The court erred in allowing the order when it should have dismissed the complainant's petition for want of necessary allegations.

5. The court erred in allowing the order when it should have dismissed the complainant's petition upon the merits.

6. The said order deprives your petitioners of property without due process of law.

7. The order is, in other respects, erroneous, contrary to equity, unlawful, and void.

Exhibit M—1.

THIS INDENTURE, Made the Twenty-third day of June in the year of Our Lord One Thousand Nine Hundred twenty-two, Between Elihu H. Cooley of the City of New York in the County of New York and State of New York, of the First Part;

And Mary E. McVoy of the Town of Westfield in the County of Union and State of New Jersey, of the Second Part;

Exhibit M. 1.

WITNESSETH, That the said party of the first part, in consideration of the sum of Three Thousand Two Hundred ($3200) lawful money of the United States of America, to him in hand paid, by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, remise, release, convey and confirm, unto the said party of the second part, and to her heirs and assigns forever, ALL that certain 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 formerly Ann Hetfield's house lot; thence (1) from said beginning and binding on said Hetfield's line of land southeasterly 220 feet to a stake in line of the Presbyterian Church burying ground; thence (2) along the line of said burying ground southwesterly 46.4 feet to a stake and rear corner of formerly Frederick Baldwin's house lot; thence (3) binding on said Baldwin's line of land northwesterly 214 feet to the aforesaid line of Orchard Street; thence (4) northeasterly along the southeasterly line of Orchard Street, 46 feet to the place of BEGINNING.

BEING the same lands conveyed to Elihu H. Cooley by deed dated Nov. 9, 1920, and recorded Nov. 12, 1920.

This deed is executed and delivered by said Elihu H. Cooley under the terms of a certain

Exhibit M. 1.

agreement made by and between Karl Baumann and Herbert C. McVoy, dated July 19, 1920, and recorded in the office of the Register of Union County in Book 811 of Deeds at page 133, and is intended to convey a title free and clear of incumbrances, subject only to the inchoate right of dower of Bertha Baumann, wife of said Karl Baumann, the said Karl Baumann having conveyed said lands to one Bertha Baumann, and the said Bertha Baumann having conveyed said lands to said Elihu H. Cooley, as trustees of the legal title for said Herbert C. McVoy, and the said Herbert C. McVoy having assigned his rights under said Agreement to said Mary E. McVoy.

TOGETHER with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of said party of the first part, of, in, or to the above described premises and every part and parcel thereof, with the appurtenances, TO HAVE AND TO HOLD, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, her heirs, and assigns forever, to the only proper use, benefit and behoof of the said party of the second part, her heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

ELIHU H. COOLEY (SEAL)

Exhibit N. 1.

Signed, Sealed and Delivered
in the presence of

E. A. MERRILL

Exhibits M—2-7.

Exhibits M. 2, 3, 4, 5, 6 and 7 are letters exchanged between counsel—A. C. Nash and E. A. Merrill—and are not printed.

Exhibit N—1.

AGREEMENT

ARTICLES OF AGREEMENT, made the Twenty-eighth day of July, in the year of Our Lord, One Thousand Nine Hundred and Twenty, BETWEEN

HERBERT C. McVOY

of the Town of Westfield, in the County of Union and the State of New Jersey, party of the first part,

AND

REGINALD B. NAUGLE

of the City of New York, in the County of New York and State of New York, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Four Thousand Two Hundred and Fifty ($4,250) Dollars, to be paid and satisfied as hereinafter mentioned and also in consideration of the covenants and agreements herein-

Exhibit N. 1.

after 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 September 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 William Hetfield's Home lot; thence from said beginning and binding on said now or formerly Hetfield's line of land southeasterly one hundred and seventy (170) feet to a stake; thence southwesterly forty-six and four-tenths (46.4) feet to a stake; thence binding on now or formerly Baldwin's House line of land northwesterly one hundred and sixty-four (164) feet to the aforesaid line of Orchard Street; thence along line of Orchard Street northeasterly forty-six (46) feet to the place of beginning.

And the said Reginald B. Naugle, for 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 sum of Four Thousand Two

Exhibit N. 1.

Hundred and Fifty ($4,250) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

The sum of Four Hundred ($400) Dollars in cash on the signing of this agreement, the receipt whereof is hereby acknowledged.

The premises to be conveyed subject to a mortgage of Two Thousand ($2,000) Dollars with interest at the rate of six per cent. which said mortgage the party of the second part agrees to sign, seal and deliver at the time of closing title. The said party of the first part agrees to secure a party who is willing to loan the sum of Two Thousand ($2,000) Dollars upon said first mortgage, the sum to be secured, however at the expense of the party of the second part who agrees to pay all charges for the drawing of papers, searching, and commission in obtaining said loan.

The party of the second part to sign, seal and deliver a second mortgage for the sum of One Thousand Fifty ($1,050) Dollars with interest at the rate of six per cent payable in installments of Fifty ($50) Dollars per month together with interest on the unpaid balance. Said mortgage to contain the usual thirty (30) and sixty (60) day tax and interest default clauses, on this or any prior mortgage.

The sum of Eight Hundred ($800) Dollars, in cash, upon the delivery of the deed of Warranty from the party of the first part to the party of the second part.

Taxes, interest, and insurance to be adjusted as of the date of closing title.

The party of the second part to have the option of securing a first mortgage for a greater

Exhibit N. 1.

sum than Two Thousand ($2,000) Dollars thereby reducing the amount of the second mortgage herein named; and the party of the first part agrees that if the said second mortgage is reduced that the same shall be payable in the sum of Forty ($40) Dollars per month together with interest on the unpaid balance instead of the sum of Fifty ($50) Dollars per month as herein mentioned.

AND IT IS FURTHER AGREED, by the parties to these presents that the party of the said second part, his heirs and assigns, may enter into and upon the said land and premises on the First day of September next ensuing the date hereof, and from thence take the rents, issues, and profits to his and their use.

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of Warranty shall be delivered and received at the Office of Augustus C. Nash, 102 Elm Street, Westfield, New Jersey, between the hours of ten in the forenoon and four o'clock in the afternoon on the said first day of September next ensuing the date hereof.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of
which they hereby fix and settle as liquidated damages therefor.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands

Exhibit N. 2.

and seals the day and year first above mentioned.

HERBERT C. McVOY, (L. S.)
REGINALD B. NAUGLE, (L. S.)

Signed, Sealed and Delivered
in the presence of

CLARENCE B. SMITH,
WILLIAM J. MORGAN, JR.

Exhibit N—2.

SUPPLEMENTAL AGREEMENT

Westfield, N. J., Aug. 25, 1920.

In consideration of one dollar paid to the party of the first part, H. C. McVoy, it is hereby mutually agreed between both parties that agreement made under date of July 28, 1920, for the purchase of property known as Baumann property, Orchard Street, in the Town of Westfield, County of Union, and State of New Jersey. Closing for title to pass Sept. 1, 1920, is extended to or before Oct. 1, 1920.

Said Naugle to pay September rent.

HERBERT C. McVOY, (L. S.)
R. B. NAUGLE, (L. S.)

Witnessed by

CLARENCE B. SMITH,
R. B. NAUGLE.

Supplemental Exhibit A.

Supplemental Exhibit A.

BERTHA BAUMANN *et al*
to
ELIHU H. COOLEY

THIS INDENTURE made the ninth day of November in the year of our Lord one thousand nine hundred and twenty, between Bertha Baumann and Karl Baumann her husband, of the Village of Cottekill in the County of Ulster and State of New York of *of* the first part; AND Elihu H. Cooley of the City of Yonkers in the County of Westchester and State of New York of the second part.

WITNESSETH, that the said party of the first part, for and in consideration of one dollar and other valuable consideration, money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged and the said party of the first part, therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to his heirs and assigns, forever

ALL that certain 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 formerly

Anna Hetfield's house lot; thence (1) from said beginning and binding on said Hetfield's line of land southeasterly 220 feet to a stake in line of the Presbyterian Church burying ground; thence (2) along the line of said Burying ground southwesterly 46.4 feet to a stake and rear corner of formerly Frederick Baldwin's house lot; thence (3) binding on said Baldwin's line of land northwesterly 214 feet to the aforesaid line of Orchard Street; thence (4) northeasterly 46 feet to the place of beginning.

TOGETHER with all and singular the houses, buildings, trees, ways waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining.

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever of the said party of the first part of, in and to the same, and of, in and to every part and parcel thereof.

TO HAVE AND TO HOLD all and singular the above described land and premises, with the appurtenances, unto the said party of the second part his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part his heirs and assigns forever

AND the said Bertha Baumann and Karl Baumann her husband do for themselves, their heirs, executors and administrators covenant and grant to and with the said party of the second part, his heirs and assigns, that they, the said Bertha Baumann, and Karl Baumann are the true lawful and right owners of all and singular the above described land and premises and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises or any part thereof, at the

time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever.

AND ALSO, that the said party of the first part now has good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid;

AND ALSO, that said Bertha Baumann and Karl Baumann will WARRANT, secure and forever defend the said land and premises unto the said Elihu H. Cooley his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

IN WITNESS WHEREOF the said party of the first part have hereunto set their hands and seals the day and year first above written.

KARL BAUMANN (L. S.)
BERTHA BAUMANN (L. S.)

Signed, sealed and delivered
in the presence of

V. B. VAN WAGONEN

Supplemental Exhibit B.

Filed September 19, 1923.

IN CHANCERY OF NEW JERSEY.

Between

MARY E. McVOY, *Complainant,*

and

KARL BAUMANN, *et als., Defendants.*

On Bill, etc.

On Motion for Order of Possession.

RESPONDENT'S AFFIDAVIT.

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

RUTH C. NAUGLE, being duly sworn, deposes and says:

(1) I was never made a party in the above entitled cause, nor did I appear therein, nor was I apprised of the result thereof except as to such information as has come to me through hearsay.

(2) I acquired from Elihu H. Cooley the premises referred to by deed delivered and recorded September 30, 1922, and I paid value therefor.

(3) As a part of the consideration I assumed the payment of a bond and mortgage in the principal sum of $2,700. made by my grantor, Elihu H. Cooley, to Bertha Baumann. Said mortgage is still a lien upon the property.

(4) I am now in possession of said premises, and have been continuously in possession thereof since September 30, 1922.

(5) Since my acquisition of the premises I have paid the taxes, fire insurance premium, and mortgage interest, and I have made repairs and substantial improvements.

(6) From the time I took possession of said premises until June 14, 1923, no demand of any kind was made upon me by the complainant, nor was any communication received from her.

(7) No objection was made to me upon the recording of my deed and the mortgage assumed by me, and there was no claim of ownership in the complainant prior to her demand for possession.

(8) Complainant has made no offer to compensate me for expenditures made for taxes, insurance, mortgage interest, repairs, improvements, or otherwise.

(9) The property is carried in my name on the tax assessor's books, and is so designated on the tax map.

(10) At the time of the conveyance to me the time limited by the decree had long since expired, no deed or decree divesting the defendant Cooley of his record title had been recorded, and no deposit of the purchase price had been made with the Court.

RUTH C. NAUGLE.

Subscribed and sworn to before me
this 15th day of September, 1923.

E. W. WITTKE,
Notary Public.

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

New Jersey Court of Errors and Appeals

In the Matter of ELIHU H. COOLEY, REGINALD B. NAUGLE, RUTH C. NAUGLE, and EARLE A. MERRILL, charged with contempt.	*On Appeal.*

BRIEF OF THE APPELLANT EARLE A. MERRILL.

Statement.

This is an appeal from a conviction for an alleged criminal, or quasi-criminal, contempt of the Chancery Court (Case, p. 6, l. 6). The proceeding was "a punitive proceeding for contempt" (Case, p. 48, l. 33).

The acts charged, and the persons implicated, are sufficiently disclosed in the Order to Show Cause which issued "on the Court's own motion":

ORDER TO SHOW CAUSE.

> "It appearing to the court that in and by the terms of the final decree heretofore made and entered in this court in a certain cause therein depending, wherein Mary E. McVoy was complainant and Karl Baumann, Bertha Baumann, and Elihu H. Cooley were defendants, bearing date the twenty-fourth day of February, nineteen hundred and twenty-two, it was decreed that the said Elihu H. Cooley make conveyance, by good and sufficient deed of conveyance, and deliver possession to the said complainant of certain lands and premises in said decree more particularly mentioned and described; and that the said Elihu H. Cooley thereafter, notwithstanding that

the said decree remained unmodified and in full force and effect, did not make conveyance and deliver possession of said premises to said complainant, but on the contrary made conveyance of said premises to Ruth C. Naugle and delivered possession of said premises to Ruth C. Naugle and Reginald Naugle, or one of them; and that the said Ruth C. Naugle and Reginald Naugle, notwithstanding knowledge by or notice to them of the fact of said final decree and the provisions thereof, accepted said deed and possession of said premises, and thereafter refused to deliver possession thereof to the said complainant and resisted in this court, and in the Court of Errors and Appeals, further proceedings thereafter had in said cause by said complainant for the purpose of obtaining possession of said premises pursuant to said decree; and that Earle A. Merrill, one of the solicitors of this court, represented the said Elihu H. Cooley in the proceedings in this court aforesaid, and also represented the said Ruth C. Naugle and Reginald Naugle in the proceedings in the Court of Errors and Appeals aforesaid; and that the said acts and doings of the said Elihu H. Cooley, Reginald B. Naugle, Ruth C. Naugle, and Earle A. Merrill, and each of them, constitute a contempt of the power, authority, and dignity of this court;

"*IT IS,* on this third day of January, nineteen hundred, and twenty-four, on the court's own motion, *ORDERED* that the said Elihu H. Cooley, Reginald B. Naugle, Ruth C. Naugle, and Earle A. Merrill, and each of them, do appear and show cause before the Chancellor at the Chancery Chambers at the State House in Trenton, on Tuesday, the fifteenth day of January, instant, at half past ten o'clock in the forenoon of said day, why they and each of them should not be adjudged guilty of a contempt of the power, authority and dignity of this court in the premises, and punished accordingly.

"*AND IT IS FURTHER ORDERED,* that Augustus C. Nash be and he is hereby appointed solicitor to prosecute these proceedings on behalf of this court; and that a certified copy of this order be served upon each of the said respondents hereto at least five days prior to the return date aforesaid; and that upon the hearing on the return of this order testimony and evidence may be taken in open court" (Case, p. 1).

Cooley, a non-resident, was not served and did not appear. The three others were tried and found guilty. (*In re Cooley,* 95 N. J. E. 485, Jan. 24, 1924.) A decree was entered December 20, 1927, as to the solicitor only (Case, p. 54).

It will be observed that in the Rule the charge was, as against the solicitor, merely that he "*represented* the said Elihu H. Cooley, in the proceedings in this court aforesaid (being the suit for specific performance), and also *represented* the said Ruth C. Naugle and Reginald B. Naugle in the proceedings in the Court of Errors and Appeals aforesaid" (being an action for possession brought by the complainant against Mr. and Mrs. Naugle).

At the trial it was suggested to the court that to *represent* parties defendant as their solicitor and counsel seemed an insufficient foundation for a charge of criminal contempt, and the charge was thereupon amended by adding the further charge that he, the said solicitor, "advised or participated in the making of the deed from Cooley to Mrs. Naugle."

That the charge as amended was true was admitted, and the solicitor, in open court, assumed entire responsibility for the acts of his clients.

> The Court: The only additional proposition is that which arises from Merrill's testimony—which is the fact that he advised and participated in the giving of this deed by Cooley, and that that act was a direct contravention of the provisions of the final decree.
>
> Mr. English: May I call him to explain it?
>
> The Court: He has explained it. The question is whether you want it considered in this present contempt proceeding, or whether you insist that the only things which can be considered are the things which come within the purview of the order to show cause as actually entered in the present case.
>
> Mr. English: We consent to that.
>
> The Court: Then an amendment to the order to show cause may be made, if necessary, in that behalf.
>
> Mr. English: We are called upon to meet what is in this order to show cause, and the addition is that we advised or participated in the making of the deed from Cooley to Mrs. Naugle (Case, p. 39, l. 24).

The defenses pressed by the solicitor are three:

First: Said solicitor had a right to advise Cooley and Mrs. Naugle as he did, and to participate in the making, execution and delivery of the deed from Cooley to Mrs. Naugle.

Second: Cooley had a right to make, execute and deliver his deed to Mrs. Naugle.

Third: If the acts of the said solicitor were legally wrong, the questions involved were so far arguable that, prior to, and in the absence

of, their legal determination, said acts could not be held to indicate a design to contemn the authority of the court, or to be wrong beyond a reasonable doubt.

The reasons supporting these defenses will be argued hereinafter.

The chronology of the events which led to the execution and delivery of the deed from Cooley to Mrs. Naugle, in brief, were as follows:

On July 19, 1920, Karl Baumann entered into a written contract to convey certain lands to Herbert C. McVoy on October 1, 1920. Mrs. Baumann was not a party to that contract (Case, p. 61, l. 30). This contract, or agreement, was assigned, on October 1, 1920, by McVoy to his wife, Mary E. McVoy.

Shortly after the making of the Baumann-McVoy contract McVoy entered into a written agreement to convey this property, except a strip at the rear, to Reginald B. Naugle on September 1, 1920, at which time Naugle was to go into possession (Case, p. 80, l. 20). By a Supplemental Agreement the date for the transfer to Naugle was extended to October 1, 1920, (Case, p. 84, l. 18), but Naugle went into possession about September 1, 1920, under a temporary arrangement with the then tenant, and with the consent of McVoy.

On October 1, 1920, Mr. Baumann tendered his deed to Mrs. McVoy, but she did not then have the balance of the purchase price, and the deed was not delivered.

On November 9, 1920, Mr. and Mrs. Baumann, believing the McVoy contract to have been discharged by the failure of Mrs. McVoy to take title on October 1, 1920, conveyed to Elihu H. Cooley.

On November 29, 1920, Mrs. McVoy instituted an action for the specific performance of the Baumann contract, and made Mr. and Mrs. Baumann and Mr. Cooley parties defendant.

Mr. and Mrs. Naugle were not made parties, but remained in possession of the premises under their agreement with McVoy. Cooley never went into possession.

A decree for specific performance was filed February 24, 1922 (*McVoy* v. *Baumann,* 93 N. J. E. 360), and the decree was affirmed at the June term (*McVoy* v. *Baumann,* 93 N. J. E. 638).

At this point it will be desirable to state the contentions of court and counsel as to the then status of the title. The first and second defenses urged by appellant have their origin and support in the situation then presented.

The decree for specific performance (Case, p. 64):

> "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 deliver 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, with interest from the first day of October, 1920, less the taxed costs and counsel fee hereinafter allowed complainant;"

It is to be noted that, by the terms of the decree, title was to pass "within ten days from the date of this decree." *The decree made time of the essence.* Did title pass at the expiration of the ten days by force of the statute, acting upon the decree (1 C. S. 426, Sec. 45) or, as appellant contends, was Mrs. McVoy disqualified from invoking the statute because, by failing to pay the balance of the purchase price as required by the decree, she breached the contract and made the decree and statute inoperative?

The pertinent portion of the statute is as follows:

> "Where a decree of the court of chancery shall be made for a conveyance * * * of lands * * *, and the party against whom 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 * * * had been executed conformably to such decree."

In *Baumann* v. *Naugle,* 97 N. J. E. 110, referring to this case and situation, the court said: "I think it is evident that the decree conveyed the title to Mrs. McVoy by force of the statute"; and "the decree did become operative under the statute as a conveyance from Cooley to Mrs. McVoy" upon the expiration of the time appointed. And, further: "True it is that in the meantime an appeal from the decree was pending, but the statute referred to contains no exception in that behalf, and it has heretofore been determined in this court that the pendency of such appeal does not prevent or delay the operation of the statute."

If the legal title passed from Cooley to Mrs. McVoy, by force of the statute, it passed at the expiration of the "time appointed" by the decree, *and at no other time.* And, conversely, if the legal title *did not* then pass to Mrs. McVoy by force of the statute, it never did, and never could, pass to her, but passed to Mrs. Naugle by virtue of her subsequent deed from Cooley.

Appellant contends that, because of her refusal and failure to pay the balance of the purchase price before the expiration of the "time appointed," the statute could not be invoked by Mrs. McVoy, and that, therefore, she never acquired the legal title.

Appellant's contention that the legal title did not then, or thereafter, pass to Mrs. McVoy under the statute is further supported by the very terms of the Baumann-McVoy contract. Mr. Baumann was not a party to the assignment of that contract by Mr. McVoy to his wife. All that the assignment vested in Mrs. McVoy was the right to a transfer of title upon a compliance with the terms of payment. Mr. Baumann had agreed only to "*convey* to the said party of the second part his heirs, and assigns" (Case, p. 62, l. 13); he had not agreed to look to an assignee for payment; as to payment the agreement was that "*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 * * * upon the delivery of the deed" (Case, p. 63, l. 12). Baumann, therefore, had the right to look to Mr. McVoy, and to Mr. McVoy alone, for payment in accordance with the terms of the contract.

By the clear and explicit terms of the contract itself title was to pass *only* upon payment of the consideration. The Court could not, by its decree, make a new contract between the parties, or so mold the decree as to cause title to pass under the statute in violation of the terms of the contract.

These points will be argued later, and the chronology of events will be continued from the point at which it was interrupted by this digression.

Immediately upon the affirmance of the decree Cooley tendered a deed to Mrs. McVoy (Case, p. 77, l. 30). The form of the deed and the purpose and effect of this tender will be commented upon later.

The tender was refused.

Cooley waited three months after the affirmance for some indication of a purpose, on the part of Mrs. McVoy, to herself comply with the decree. The decree not having been then recorded, there having been no deposit of the balance of the purchase price, no service of taxed costs, and no demand having been made on Mr. Naugle for rent, or notice to him of any alleged change in title, on September 30, 1922, Cooley conveyed the lands to Mrs. Naugle (Case, p. 76).

Counsel for Mrs. McVoy was aware of the conveyance but made no protest. Mrs. McVoy made no demand on the Naugles for rent, did not pay the taxes, took out no insurance, and gave no external evidence of any further interest in the property (Case, p. 89, l. 7).

On March 15, 1923, more than a year after the filing of the decree, Mrs. McVoy deposited the balance of the purchase price in court, and on March 19, 1923, recorded her decree, but did nothing further until June 14, 1923, when a formal demand was made on the Naugles for pos-

session. This demand was the first notice that the Naugles had of any intention, on the part of Mrs. McVoy, to claim ownership—a year after the affirmation of the decree, and eight and one-half months after the conveyance by Cooley to Mrs. Naugle.

There was a decree for possession and the decree was affirmed on the opinion below (95 N. J. E. 335). It is significant that, in his reasons for allowing an order for possession, the Vice-Chancellor expressly states that "this application involves no question of title which respondents are entitled to have tried out at law * * * this application is not made to determine title. It is to determine *possession,* only; to put complainant into possession by way of effectuating the decree heretofore made." The question of title never has been adjudicated. In the action for possession the Naugles had other counsel in the court below, but the solicitor now charged with contempt argued the appeal, and that he represented the Naugles on their appeal was one of the counts against him for criminal contempt.

On January 3, 1924, this appellant was cited, together with Mr. Cooley, and Mr. and Mrs. Naugle, on the court's own motion, to show cause why they, and each of them, "should not be adjudged guilty of a contempt of the power, authority and dignity" of the Chancery Court, "and punished accordingly," for the reasons stated in the rule to show cause set forth in full in the first part of this brief.

The conclusions of the Vice-Chancellor were filed January 29, 1924 (*In re Cooley,* 95 N. J. E. 485).

The final decree against this appellant was filed December 20, 1927 (Case, p. 54).

One further point should be made clear before the issues are argued.

From a reading of the conclusions of the Vice-Chancellor it might be inferred that appellant relies solely upon the sufficiency of the deed tendered by Cooley to Mrs. McVoy on June 23, 1922 (Case, p. 77, l. 30), her refusal to accept such tender, and upon laches. Such is not the case, as will appear from the points hereinafter argued, and from the following excerpt from the opinion in *Baumann* v. *Naugle,* 97 N. J. E. 110, at page 113:

> "It is further argued by complainant that the decree in the original suit did not operate to divest the legal title from Cooley and vest it in Mrs. McVoy, under the forty-fifth section of the Chancery act, for the reason that that statute, by its express terms, operates only if 'the party against whom the decree shall pass *shall not comply therewith* by the time appointed,' and that in the present case Cooley did comply with the decree and hence the statute could not operate to make the decree a conveyance."

POINT I.

The statute, 1 C. S. 426, Sec. 45, will not pass title from a vendor to a vendee where the vendee fails to pay in compliance with the terms of the decree.

In this *Point* we have the crucial issue between court and counsel upon the question as to the *right* of counsel to "advise or participate in the making of the deed from Cooley to Mrs. Naugle."

The vendee was required by his contract to "pay and satisfy, or cause to be paid and satisfied," the balance of the purchase price "upon the delivery of the deed" (Case, p. 63, l. 12).

The decree was "that the said articles of agreement be in all things specifically performed" by both parties. In fact, the court could make no other decree, so far as the agreement itself was concerned, for the sufficient reason that to do so would be to make a new contract between the parties. In *Unger* v. *Newlin Haines Co.,* 94 N. J. E. 458, this court was also dealing with contract rights, and gave as its reason for reversing the court below that "the effect of the decision below is to make an agreement for the parties different from the one they made for themselves. This the Court of Chancery cannot do. Contractual rights cannot be disturbed."

The vendee, then, was required, by the decree, to comply with his contractual agreement, and pay, or cause to be paid, the balance of the purchase price upon the delivery of the deed, and within ten days from the date of the decree.

This the vendee, and his assignee, wholly failed to do, and payment was not made until over a year later (Case, p. 12, l. 21), and then it was too late.

The statute, by making the decree for the specific performance of a contract to convey land self-executing, deprives the court of any further control over the decree subsequent to the expiration of the time limited by the decree, or, as the statute has it, of the "time appointed," unless, of course, the decree is reversed on appeal. As the decree in question was affirmed the effect of a reversal need not be considered.

A decree fixing a "time appointed" makes that time of the essence of the contract. At the expiration of the "time appointed" by the decree the statute either transfers title, or it does not. If the vendee pays, the vendor cannot delay or

prevent the transfer of title. If the vendee has performed by paying, and the statute operates at all, it operates positively and irrevocably to vest the legal title in the vendee at the expiration of the "time appointed." But if the vendee *fails* to pay there is a breach of the contract and no transfer of title. Payment is a condition precedent; if the condition is not met the vendee cannot invoke the statute, and there is no transfer of title.

Cooley was not required to actually execute and deliver a deed. A transfer of title under the statute was the exact equivalent of a deed, and Cooley had a right to permit the statute to effect the transfer (*Fee* v. *Sharkey,* 59 N. J. E. 284-292; affirmed on opinion below, 60 N. J. E. 446; *Compagnie Universelle, etc.* v. *U. S. Service Corp.,* 84 N. J. E. 604-614, affirmed on opinion below, 85 N. J. E. 601). The title transferred depended upon the terms of the decree, and not upon the recitals in a deed of the vendor (*Fee* v. *Sharkey, supra; Goldstein* v. *Curtis,* 65 N. J. E. 382; *Weehawken Ferry Co.* v. *Sisson,* 17 N. J. E. 475).

The court below was of the opinion that, notwithstanding the failure of the vendee to pay as agreed in the contract of sale, and as ordered by the decree, the legal title passed to the vendee's assignee *by force of the statute.* (See citation *supra* from *Baumann* v. *Naugle,* 97 N. J. E. 110.)

Appellant insists that the statute could not be invoked, and that no right, title, or interest was, or could be, acquired by the vendee's assignee after the expiration of the time limited by the decree, and without having made the payment called for by the contract.

Two recent cases, decided in this court subsequent to the hearing in the instant case, seem to lend strong support to the insistment of appellant.

In *Baker* v. *Baker,* 97 N. J. E. 306, the complainant in a former suit had been decreed the right to a conveyance of certain lands upon the payment of the consideration therefor. The complainant failed to pay but brought a partition suit to have the lands in question set aside, on the theory that, notwithstanding his failure to pay, title had vested under the statute. But this court held that payment was a condition precedent, and that failure to pay barred complainant from invoking the statute, saying: "The appellant was in no condition to invoke section 45, *supra,* to his aid, for the reason that the decree for a conveyance was not to go into effect until he performed the condition precedent."

As affecting the right to invoke the statute there is no difference between a condition precedent and a condition concurrent, as in the instant case; it is the failure to comply with the condition which bars the operation of the statute.

In the specific performance suit of *Hannan* v. *Wilson,* there was a decree for specific performance of the same tenor as the decree in the instant case. The defendant failed to pay in accordance with the terms of the contract and the direction of the decree. In an action under the Declaratory Judgments Act, *Hannan* v. *Wilson,* 139 Atl. 165 (not officially reported), the complainant subsequently insisted that, nevertheless, title had passed under the statute and that she had a vendor's lien for the balance of the purchase price. But this court held that the statute effects

a transfer of title only when the *vendor* fails to perform, and has no application to the situation which arises when the *vendee* fails to perform.

That is exactly the situation here. The *vendor* kept his tender good during the time appointed by the decree, but the *vendee* neither paid nor tendered payment. The statute, therefore, did not, and could not, operate to vest the legal title in the vendee, and vendee's failure to comply gave the vendor the choice of proceeding against the vendee under one of the alternative remedies, or of accepting such failure as such breach of the contract as discharged him from all further obligation. The court could neither influence that choice, nor prescribe the terms upon which it should be exercised.

Granted the applicability of the reasoning in the Baker and Hannan cases to the instant case the appellant is clearly right in his contention that the complainant-assignee of the McVoy contract never acquired the legal title. The decree was not a deed, nor could it, unaided effect a transfer of title. The time appointed having been settled by the decree, and the time appointed having run its course, the decree had shot its bolt and thereupon the statute irrevocably fixed the rights of both vendor and vendee.

The statute, in effect, tendered to Mrs. McVoy the very title to which she was entitled under her decree. Her failure and refusal to pay the balance of the purchase price upon such tender, as ordered by the decree, was a refusal to accept that title. Having breached the contract by such refusal she lost her rights under the decree, and was unable then, or thereafter, to invoke the statute in her behalf (*Baker* v. *Baker, supra*). Having, by her own act, breached the contract,

she could no more call upon Cooley to thereafter make conveyance than she could have if time had been made of the essence of the contract by the agreement, and she had then breached it by a refusal or failure to pay (*Doctorman* v. *Schroeder,* 92 N. J. E. 676; *Thommessen* v. *Absecon Land Co.,* 98 N. J. E. 696). Bearing in mind that the deposit of the balance of the purchase price was made more than a year after the time appointed by the decree it will be realized how unsubstantial is Mrs. McVoy's assertion that, nevertheless, title passed to her by force of the statute. Cooley, as vendor, could not, after such breach, be compelled to himself perform the agreement, nor could the statute be re-instated as a transfer agency, nor could the court make a new contract for the parties by setting a new, and different, time for the transfer of title. The breach was of a concurrent condition which the agreement of sale, the decree, and the statute made an essential term of the agreement, and operated to *discharge* the contract.

The decree established only the right of Mrs. McVoy to acquire title upon the payment of the balance of the purchase price *if paid within ten days.* The decree gave Mrs. McVoy *no right* to acquire title and to then defer payment to suit her convenience, whim, or caprice. Still less did it give *Mr. McVoy,* the original vendor, the right to avoid his contractual obligation to pay, or cause to be paid, the balance of the purchase price concurrently with the transfer of title.

The Baumann-McVoy contract having been discharged by its breach by Mrs. McVoy, Cooley thereafter had a right to deal with the property in any way he chose, so far as Mrs. McVoy was concerned. For such subsequent dealing he was responsible only to Mr. and Mrs. Baumann, and

neither Cooley nor his counsel can be held in contempt for such dealing. Insofar as there was any disobedience of the order in the decree, and any contempt of the court, it was the disobedience and the contempt of Mrs. McVoy by *her* counsel. Cooley could do nothing, and attempted nothing, to affect the operation of the decree and the statute, or the transfer of title; the statute took the matter out of his hands, and out of the hands of the court as well. Upon the breach of the contract by Mrs. McVoy, and the expiration of the time appointed, *the decree and the statute became wholly ineffective to vest any right or title in Mrs. McVoy.*

Perhaps an explanatory reference ought to be here made to that part of the decree for specific performance which required Cooley to deliver "possession of the said premises and account to her (complainant) for the rents, issues and profits since the ninth day of October, 1920" (Case, p. 67, l. 30).

At the final hearing the question at issue was as to the right of the complainant to enforce the specific performance of the Baumann-McVoy contract. The conditions brought into being by the McVoy-*Naugle* contract had no bearing upon *that* issue. But those conditions *did* limit the effect of the final decree.

Cooley never was in possession of the premises, and did not put the Naugles into possession. At no time during the period in which he held the legal title as trustee was Cooley in privity with the Naugles. Long prior to the conveyance by Baumann to Cooley they had gone into possession under the McVoy-*Naugle* contract (Case, p. 80), and their possession was, therefore, the possession of Mrs. McVoy. With that possession Cooley never interfered.

It follows, therefore, that the only part of the decree which affected Cooley was the *direction to convey,* and he fully complied with that direction by standing aside in order to permit the statute to effectuate the transfer of title by making the decree effective as a conveyance.

Cooley never having been in possession, and not being responsible for possession by the Naugles, but the Naugles having been put in possession by Mr. McVoy, Mrs. McVoy could bring her action for possession only against the Naugles—and that is what she, later, did. She never made any demand on Cooley for possession, and Cooley was not a party to the proceedings for possession.

Likewise as to the accounting. As Mrs. McVoy had the equitable title, as she had possession through the possession of her prospective vendee, Naugle, and as Cooley never interfered with that possession, Mrs. McVoy could look only to the Naugles for an accounting. The fact that Cooley voluntarily accounted for the period of his trusteeship does not alter the fact that legally he was not bound so to do. Properly the accounting was between Mrs. McVoy and the Naugles, with a right of action by the Naugles against Cooley if Cooley failed to pay back to the Naugles, or to pay over to Mrs. McVoy, what he may have received from the Naugles, during that period, by way of rental.

This court, therefore, should find that the legal title never was acquired by Mrs. McVoy, that there was no disobedience of the order of the court by any of the defendants, and, therefore, no contempt of court.

With the *equities,* as between the parties, this proceeding is not concerned. That Mrs. McVoy has equitable rights in the property has never been denied or questioned, and it is further true that Mr. and Mrs. Naugle also have substantial equitable rights which are still undetermined.

POINT II.

Because of the failure of Herbert C. McVoy, the vendee named in the Baumann-McVoy Agreement, to pay or deposit, or to cause to be paid or deposited, the unpaid balance of the purchase price, said Herbert C. McVoy could not invoke the statute.

The pertinent part of the Baumann-McVoy agreement relating to the terms of payment is as follows:

> "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 of which is hereby acknowledged. *He* will pay the balance of three thousand dollars *upon the delivery of the deed* as hereinafter specified, in cash" (Case, p. 63, l. 6).

Doubtless a vendor is bound to accept payment from an assignee of the vendee's right to a conveyance *if payment is tendered;* but the vendor *does not lose his right* to look to the *vendee* for payment, if the assignee fails to pay.

Mr. McVoy could not, by his assignment, relieve himself from his contractual liability to Mr.

Baumann. If Mrs. McVoy, the assignee, failed to pay, Mr. McVoy, the assignor, was bound to pay in accordance with the terms of his contract. Furthermore, if Mr. McVoy failed to "pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part (Baumann) the said sum of thirty-two hundred dollars," such default on the part of the assignor was a good defense against an assignee also in default.

Because of the statute a vendor is *necessarily* "ready, able and willing" (in contemplation of the law) to fulfil his contract for the sale and conveyance of real property when required so to do by the terms of a decree in a suit for the specific performance of his contract. The vendor being "ready, able and willing" to fulfil *his* contract it is incumbent upon the vendee to likewise comply, and if the vendee fails to comply there is a breach of the contract.

Mr. H. C. Black, in his work on the Rescission and Cancellation of Contracts, in section 202 at page 525, states the rule applying to contracts for the sale of real property to be that

> "where a vendor is ready, able and willing to fulfill the contract on his part, and tenders performance, but the vendee refuses to buy, the vendor may rescind the contract, and may, if he chooses, then sell the land to another without incurring any responsibility."

Mr. Black, at page 528, also states the rule to be that when one party

> "refuses to comply with his part of the contract, and the other declines to proceed with it on the ground of such refusal, the contract is *definitely terminated,* and any subsequent acts or conduct by the party first refusing, in the line of performance of the contract, will not reinstate it or renew its obligation, unless concurred in by the other, although, of course,

> the contract may be resumed and continued, even after such a rescission, by the mutual consent of the parties."

During the entire ten-day period the statute was making a continuous tender of the very title which the decree called for. Nothing could prevent its vesting in Mrs. McVoy if either she or Mr. McVoy paid the balance of the purchase price into court. Perhaps it would have vested if Mr. McVoy had made payment, or tender of payment, directly to Baumann or to Cooley rather than into court. But he did nothing. He did not then, or thereafter, make payment, or tender of payment, to anyone. And if he *caused* the payment to be made by Mrs. McVoy over a year after the decree was entered it was then too late. Nor was Cooley's tender of a deed a waiver of his rights. The original contract had been definitely breached and discharged and he had a right to make a tender *on condition.* Such tender was an entirely new and independent negotiation for a new contract. He then spoke, as between himself and Mrs. McVoy, as an individual, and not as a trustee.

Points I and II seem to dispose of Mrs. McVoy's contention that she could acquire title and go into exclusive possession while withholding the payment of the balance of the purchase price, in open disregard of the terms of the agreement of sale, of the direction of the decree, and of the equities.

If there were any matters affecting the time of performance which she wished modified or adjusted it was her duty to make application to the court for such modification or adjustment of the decree *before* the expiration of the "time appointed." She could not stand idly by, with the intention of allowing the statute to vest title

in her, and then, at a subsequent time of her own choosing, elect to herself perform.

Cooley had neither wish nor purpose to "avoid the effect of the decree"; it was only Mrs. McVoy who attempted to modify its terms, and the terms of the agreement of sale, by failing to pay the balance of the purchase price, as required by the agreement and by the decree.

As pointed out under Point I, time having been made of the essence of the agreement by the terms of the decree, and the vendee having failed to pay the balance of the purchase price, or to cause it to be paid, as required by the terms of the agreement, and the time limited having expired, neither the vendee nor the assignee, under the rules laid down in *Baker* v. *Baker* and *Hannan* v. *Wilson, supra,* could invoke the statute, and the legal title remained in Cooley.

POINT III.

The statute is a statute of limitations where the decree makes time of the essence by limiting the time for performance.

The rule is well settled that, where the parties have placed a definite limitation upon the time within which an agreement must be performed, the courts are powerless to relieve from the effects of a default. *Doctorman* v. *Schroeder,* 92 N. J. E. 676; *Thomessen* v. *Absecon,* 98 N. J. E. 696.

It is equally well settled that the principle underlying this rule is applicable to the legislature.

> "It thus, then, appears to be settled by numerous decisions in civil causes, that when a right of action is barred by a statute of limitations, it cannot be revived by act of the legislature, and that when such a right is so barred in favor of one having possession of property (if there be no conflicting jurisdiction), the possessor becomes the owner of the property, with all the incidents of ownership, and his title cannot be impaired by subsequent legislation." *Moore* v. *State,* 43 N. J. L. 203-208.

> "The decisions of the courts, so far as my research has extended, are wholly in accord on this subject, and, with one voice, they declare that when a right of action has become barred under existing laws the right to rely upon the statutory defense is a vested right, that cannot be rescinded or disturbed by subsequent legislation." *Ryder* v. *Wilson's Executors,* 41 N. J. L. 9.

By parity of reasoning it must also be the rule that where a decree, by specifying a "time appointed," is brought within the purview of the statute, the parties to the decree have a vested right to the statutory limitation as a defense which may be set up as a bar against any right of action given by the decree to the party in default, and that such bar cannot be removed or disturbed by any subsequent action of the court.

If this be true not only was the complainant, by her default in making payment, barred from invoking the statute and from any right of action to enforce the terms of the decree, but the court was equally powerless to remove the bar or to demand of the defendant that he abandon his vested right to rely upon such bar as a defense.

POINT IV.

Even if the legal title was transferred to Mrs. McVoy by the statute the advice of counsel to Cooley, and the participation of counsel in Cooley's attemped conveyance to Mrs. Naugle, were not in contempt of the Court.

At the conclusion of the suit for specific performance Cooley wished to be relieved of all further interest in, or responsibility for, the property. What course of action should counsel advise in order that Cooley might transfer all his interest without personal liability?

If, because of her default, the legal title *had not* vested in Mrs. McVoy, then Cooley had a clear right to make any tender he chose, or no tender at all. In that event Mrs. McVoy had no claim other than for an adjustment of her equity, if any, arising out of the payment of a portion of the purchase price.

If, on the other hand, the legal title *had* vested in Mrs. McVoy, under the decree and the statute, Cooley was not required to tender any deed whatsoever, and any tender made by him was gratuitous and a matter of grace on his part. And, further, if such title as Cooley could convey *had* passed to Mrs. McVoy there was, nevertheless, still an unadjudicated claim of Mrs. Baumann to dower because of the fact that she was not a party to the Baumann-McVoy agreement of sale, and the decree made no provision for dower.

The only safe course for Cooley, therefore (if he chose to tender any deed whatsoever), was to tender a deed to Mrs. McVoy reserving Mrs. Baumann's dower right, and this was done on advice of counsel.

Because of the statute a defendant vendor, in a suit for the specific performance of a contract to convey land, is not required to himself execute a deed, but may permit the statute to effect the transfer of title (*Fee* v. *Sharkey,* 59 N. J. E. 284, affirmed on opinion below, 60 N. J. E. 446; *Compagnie Universelle, etc.* v. *U. S. Service Corp.,* 84 N. J. E. 604, affirmed on opinion below, 85 N. J. E. 601). The effect of the statute is to transfer *the* title, and the *whole* title, required to be transferred by the terms of the decree (*Weehawken Ferry Co.* v. *Sisson,* 17 N. J. E. 475). A deed executed and delivered by the vendor, even if it fail to conform with the terms of the decree, cannot affect the title transferred by force of the statute. To complete the record all that Mrs. McVoy needed to do was to record her *decree.* She did not need to record such deed as might be gratuitously delivered to her by Cooley, and such deed could neither add to nor detract from the extent of her title. If title was in Mrs. McVoy the only effect of any deed tendered by Cooley was to effectually estop *him* from thereafter claiming any right, title or interest in the property on any ground whatsoever. The reservation of dower left nothing in him, and detracted in nowise from the force and effect of the decree. If dower *was* outstanding the deed tendered stated what was the fact; if dower *was not* outstanding no harm could result; the decree and the statute having already settled the title a declaration of an outstanding dower right could not possibly establish such right if it did not, in fact, exist. The recital as to dower was proper if true, and was merely surplusage if not true.

On the other hand, if Cooley had gratuitously tendered a deed without such reservation he might have become involved in a controversy with Mrs. Baumann over his right to omit the

reservation. "An inchoate estate of dower is a valuable, subsisting and separate and distinct interest." *Central Sav. Bank* v. *Barber,* 92 N. J. L. 31. It would seem, therefore, that neither Cooley nor his counsel can properly be criticised for the tender or its form.

The tender was refused by Mrs. McVoy, and undoubtedly she had a right to refuse it. The significance of the refusal lies in her subsequent conduct.

The decree was filed February 24, 1922. Title vested, if at all, not later than March 6, 1922, and it became Mrs. McVoy's duty, as assignee, to then pay the balance of the purchase price. She not only failed to pay, but, for over a year, she failed to record her decree, to demand possession, to demand rent, to pay the taxes, or otherwise to evidence any ownership interest whatsoever in the property. Upon Mrs. McVoy's failure to pay it became the duty of Mr. McVoy, as vendee, "to pay, or cause to be paid," the purchase price, but he, likewise, did nothing.

Believing that Mrs. McVoy has discharged the Baumann-McVoy contract by breach, and further believing that, if the contract had not been discharged by breach it had become unenforceable because of laches, in that Mrs. McVoy had not paid the balance of the purchase price into court, had not recorded her decree, had not demanded rent or possession, and had assumed none of the duties or obligations incident to ownership or claim of ownership, Cooley, on September 30, 1922, delivered his deed to Mrs. Naugle, and the deed was recorded on the same date.

Counsel for Mrs. McVoy was aware of the recording of the deed, but made no protest, and paid no attention to it. No demand was made

on the Naugles for rent or possession, Mrs. McVoy still failed to record her decree or pay the balance of the purchase price into court, made no offer to pay the taxes, and neither asked for nor tendered an accounting (Case, p. 88).

Under these circumstances, and in the light of such conduct, what inference could counsel for Cooley draw, or to what conclusion could he possibly come, other than that counsel for Mrs. McVoy was either satisfied that Mrs. McVoy had, in fact, lost her rights under the decree because of breach of the contract, or because of laches, or that she had concluded to abandon her claim rather than contest the issue of an outstanding dower right in Mrs. Baumann?

> "Criminal contempts * * *, as the term implies, are offenses against organized society which, although they may arise in the course of private litigation, are not a part thereof, but, like other criminal offenses, raise an issue between the public and the accused." *Staley* v. *South Jersey Realty Co.,* 83 N. J. E. 300.
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> "To justify punishment for contempt it must appear that the disobedience was of such a nature as to indicate a design to contemn the authority of the court—an intention to disregard its process and authority." *Dodd* v. *Una,* 40 N. J. E. 672-719.
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> "In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt, and the defendant may not be compelled to be a witness against himself." *Michaelson* v. *U. S., ex rel. C. St. Paul, M. & O. R. Co.,* 266 U. S. 42, 69 L. Ed. 162.
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> "It is a well known principle in contempt proceedings that a respondent shall not be adjudged guilty of contempt if there is a reasonable doubt on the facts and on the law

as to his guilt." *Barrett Foundry Co.* v. *Crowe,* 80 N. J. E. 109. Cited with approval in *In re Verdon,* 91 N. J. L. 491-495.

In *Balk Co-op. Co.* v. *Int. Fur Workers,* 95 N. J. E. 691, this court reversed a conviction for contempt "on the ground that the evidence doesn't satisfy us that Perry Goldenburg *intentionally* violated the injunction order of that court (the Chancery Court) *beyond a reasonable doubt.*" (Italics mine.)

Having in mind that there had not then been, and never has been, an adjudication as to the situs of the legal title, that there had been no adjudication as to the existence of a dower right in Mrs. Baumann, and noting, as well, the conduct of Mrs. McVoy, where can there be found, in the advice or conduct of appellant, any "offence against organized society" or any proof that the acts of the appellant were "of such a nature as to indicate a design to contemn the authority of the court—an intention to disregard its process and authority"? Where can there be found proof "beyond a reasonable doubt on the facts and on the law as to his guilt"?

A conviction for a criminal contempt of court is a very serious matter for any person. It is particularly and peculiarly serious in the case of a member of the bar. The public, properly, expect persons to bear an unsullied reputation whose admission to the profession is supposed to certify their qualifications as recipients of trust and confidence. Such a conviction is a stigma upon both the personal and profession reputation of a lawyer. Its effects are subtle and devastating.

Appellant fully realizes the untoward possibilities of an affirmation. Nevertheless, firm in the belief that the conviction was justified

neither on the facts nor on the law, the issue is presented for review to the end that, so far as is possible, the record may be cleared, and appellant restored to his former standing.

Respectfully submitted,

E. A. MERRILL,
Pro se.

New Jersey Court of Errors and Appeals

In the Matter of ELIHU H. COOLEY, REGINALD B. NAUGLE, RUTH C. NAUGLE and EARLE A. MERRILL, Charged with Contempt.	On Appeal.

BRIEF OF RESPONDENT.

Statement.

This is an appeal taken by Earle A. Merrill, from a decree of the Court of Chancery, adjudging the said Earle A. Merrill guilty of contempt of Court, for violating and disobeying a decree of the Court of Chancery made on the 24th day of February, 1922. The decree imposed a fine of $25.00 and taxed costs, including a counsel fee of $25.00 (p. 54).

Facts.

The facts in this case are practically undisputed. On the 24th day of February, 1922, a final decree of specific performance was entered upon advice of Vice-Chancellor BUCHANAN, in a suit regularly heard before him, in which Mary E. McVoy was the complainant, and Karl Baumann, Bertha Bauman and Elihu H. Cooley were the defendants (p. 64). In this suit the appellant here appeared as the solicitor for all of the defendants. The decree directed the contract for sale to be in all things specifically performed and directed the de-

fendant, Elihu H. Cooley, to "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 deliver 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 9th 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 defendant, the sum of $3,000.00 with interest from the first day of October, 1920, less the taxed costs, and counsel fees hereinafter allowed complainant; and that the interests of the defendants, Karl Baumann, Bertha Baumann and Elihu H. Cooley, in said fund, as among themselves, may be hereafter determined on proper application being made therefor."

At the foot of the decree there was a further provision "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."

The opinion of Vice-Chancellor BUCHANAN in this suit is reported in 93 N. J. Eq. 360.

An appeal was taken to the Court of Errors and Appeals from the aforesaid final decree, the appellant here, Earle A. Merrill, representing the appellants in that case, resulting in an affirmance by this Court. The opinion of this Court on the appeal is reported in 93 N. J. Eq. 638, and is printed in the State of Case at page 69.

After entering into the contract for sale and before the institution of the specific performance suit, Karl Baumann conveyed the premises in question to his wife, Bertha Baumann, and then joined with her in a conveyance to Cooley. After the affirmance by this Court of the decree in the specific performance suit, Mr. Merrill, representing Cooley, delivered to the complainant, or her attor-

ney, a deed by Cooley, which purported to convey the premises, *subject to an inchoate right of dower of Bertha Baumann.* The deed was refused by the complainant in the specific performance suit. It will be noted that in the specific performance suit, Mrs. Baumann was a party and the question as to her dower right was considered by the Court (see Opinion, 93 N. J. Eq. 378), and it was specifically held that Mrs. Baumann's inchoate right of dower was extinguished by merger in the fee conveyed to her and this finally disposed of the question as to her dower right. Her only remedy in respect thereto was by the taking of an appeal, which she did, together with the other defendants, and which resulted in an affirmance of the decree by this Court. Upon the affirmance by this Court of the decree, the rights of the respective defendants were finally determined. It is conceded that the deed to Cooley, reserving the inchoate right of dower of Mrs. Baumann, was not a compliance with the decree in the specific performance suit. A copy of this deed is printed in the record at page 77.

The decree of affirmance was entered in this Court on June 19th, 1922, and remittitur was filed in the Court of Chancery on July 24th, 1922. After making the tender aforesaid, and on August 29th, 1922, Cooley, upon the advice of Mr. Merrill, executed and acknowledged a deed for the premises to Ruth Naugle, who was likewise represented by Mr. Merrill. Mr. Merrill takes full responsibility for the preparation, execution and delivery of this deed, advised the carrying out of the entire transaction, and actively participated in it. Subsequently an application was made by Mrs. McVoy for an order of possession followed by a writ of assistance, if necessary, in aid of the specific performance decree. This matter was heard before

Vice-Chancellor BUCHANAN, and an order was advised granting the relief prayed for. In the proceedings in this suit in the Court of Chancery, the respondents were represented by another solicitor. An appeal was taken from this order to this Court, on which appeal the respondents were again represented by Mr. Merrill. The appeal resulted in an affirmance by this Court on the opinion filed by Vice-Chancellor BUCHANAN. The opinion is reported in 95 N. J. Eq. 335.

The actions of the parties having thus come to the Court's knowledge, the order to show cause in this case was entered on January 3, 1924, on the Court's own motion. The respondents named in said order to show cause were Elihu H. Cooley, Reginald B. Naugle, Ruth C. Naugle and Earle A. Merrill. The respondents, Mr. and Mrs. Naugle and Mr. Merrill appeared in response to said order to show cause. Cooley, a non-resident, did not appear and jurisdiction not having been obtained over his person, no adjudication of contempt was made as to him. The case was fully heard before Vice-Chancellor BUCHANAN resulting in the decree appealed from. The opinion is reported in 95 N. J. Eq. 485 and is printed on page 47 of the State of Case.

ARGUMENT.

The decree appealed from should be affirmed.

POINT I.

This Court will not consider questions which have heretofore been finally determined.

This appeal is apparently another attempt to reargue matters which have been previously adjudicated by this Court. The litigation started with the filing of the bill for specific performance of an ordinary contract for sale. The matter was fully heard in the Court of Chancery resulting in the entry of the final decree. This Court, upon appeal, affirmed the final decree. The matter was again presented to the Court of Chancery, on the application for writ of assistance, resulting in another appeal to this Court. In one or the other suit, all of the questions raised by the appellant were determined, except the question as to the right of the Court of Chancery to adjudge an officer of the Court violating the terms of a final decree, in contempt.

Therefore, the appellant must be precluded from going in back of the final decrees of the Court of Chancery affirmed by this Court and from presenting the same matters on this appeal or else there will never be any end of litigation. It would seem that there has been too much litigation already over this simple contract for sale. There is certainly nothing in the contract which should require this Court to deal with it on three successive appeals.

We therefore start out with the premise that as to the rights of the respective parties to the

specific performance suit, their rights were finally determined by the decree entered in that case. I have therefore not considered any of the questions raised by the appellant, which go in back of the entry of the final decree.

As to the contentions of appellant respecting the dower right of Mrs. Baumann, that question was finally determined by the Court of Chancery and by this Court in the specific performance suit. As stated by Vice-Chancellor BUCHANAN in the suit of *Baumann* v. *Naugle,* 97 N. J. Eq. 110, at page 115, it was determined in the specific performance suit that there was no outstanding dower right remaining in Mrs. Baumann and that it would seem "that this question of outstanding dower right is *res adjudicata.*" In this case it should be noted that Mr. Merrill also appeared as solicitor for Mrs. Baumann.

I do not consider it necessary to comment upon appellant's argument respecting the effect of the statute, 1 Comp. Stat. 426, Sec. 45, as that has finally been determined in the last mentioned case.

Suffice it to say that as to all of the contentions of appellant relating to the rights of the respective parties in the premises, the question of waiver or estoppel and the effect of the decree of specific performance, have all been considered and determined, both by this Court and the Court of Chancery in the various suits referred to, as will appear from the reported opinions, and the answers to all of appellant's contentions therein are set forth in great detail. There is nothing new contained in appellant's brief that does not appear to have been considered in the opinions in the various cases.

POINT II.

Appellant was guilty of violating the final decree of the Court of Chancery affirmed by this Court, and his conviction for contempt was justified.

As stated by Vice-Chancellor BUCHANAN in his opinion and throughout the hearing, it is hard to conceive how a solicitor of the Court of Chancery could dare to advise and instruct his clients to act in disobedience of a decree upon the strength of what he knew was only his own opinion.

The situation presented amounts to simply this: A decree of the Court of Chancery is entered directing a defendant to execute and deliver a conveyance of real estate by good and sufficient deed of conveyance. Irrespective of the decree of the Court he caused a deed to be executed and tendered, which did not comply with the terms of the decree. He prepared this deed reserving the inchoate right of dower of Mrs. Baumann, irrespective of the fact that the decree made no such reservation and that provision was made in the decree for the full purchase price of the property to be paid into court so that the interests of Mrs. Baumann, if any, could be protected. Then, because he conceived that the complainant for some reason or other had waived a compliance with the decree by refusing the tender of this deed, he actively advised and participated in the conveyance of the property to a third party. He did this, without making any application to the Court of Chancery for a vacation or a modification of the decree, and this in face of the fact that the decree itself provided that either party would be at liberty to apply to the Court for further relief or directions in the premises if occasion should require. It would be hard to figure out a more

flagrant violation of the terms of a decree than appears in the case at bar. This flagrant violation is aggravated by the fact that it is committed by an officer of the Court. I can conceive of no excuse. As stated by the Vice-Chancellor, appellant's explanation is *most singular*. The Vice-Chancellor said in his opinion (p. 50) "his explanation of his conduct is most singular." He says that he thought there had been an abandonment by Mrs. McVoy of her rights under the decree and that therefore the decree was at an end. He knew, of course, that there had been no express or explicit abandonment by Mrs. McVoy; he knew that at the most, his idea that there had been such abandonment by her was a judgment or conclusion of his own as to the result or effect of the intermediate circumstances." And on page 51: "He knew, therefore, that there was no intentional abandonment by Mrs. McVoy; and no matter how strong was his own belief that she had lost her rights, he knew that she did not believe she had lost them; he knew that he was assuming to act, not on a thing he knew as a *fact,* but on his opinion as to a matter of law." And on page 52: "Now, in the face of the facts as he knew them, and of the judicial opinions in the case, and the terms of the decree, how could any competent solicitor arrive at the opinion that a deed subject to a dower right in Mrs. Baumann was a deed in compliance with the decree?"

The law is correctly stated by the Vice-Chancellor in his conclusion at the foot of page 52: "An attorney may advise his client that *in his opinion* an order is invalid, or has become ineffective, or that the rights under it have been lost, or that a certain act will not be a disobedience or a contempt. This is both his privilege and his duty as a lawyer to his client. But when he goes further and advises his client to do the act, he goes beyond

his privilege and if the act is a disobedience and a contempt, he is equally guilty with his client. Cf. *In Re Noyes,* 121 Fed. 209; *Anderson* v. *Comptois,* 109 Fed. 971.

As I read appellant's brief, his defense is in the nature of a confession and avoidance. He says that he should not be convicted because he acted in good faith and did not intentionally violate the terms of the decree and that therefore he cannot be convicted of contempt. There is no doubt that he *intended* to do the act which the Court has held was in violation of the terms of the decree, to wit, the execution and delivery of the deed by Cooley to a third party. There is no doubt that he *deliberately* did so. If the decrees of the Court of Chancery can be violated by the parties to the decrees, with the advice and active participation of the solicitor of the parties and the solicitor avoid conviction of contempt by simply stating that there was no wilful intent to violate the decree, then the Court of Chancery might as well shut up shop and stop making injunctive decrees.

POINT III.

The Court of Chancery has power to punish for contempt any one violating the terms of its decrees.

Appellant, under Point IV, has cited a number of cases in an attempt to show that there must be a wilful intent to violate the terms of a decree before there can be a conviction for contempt.

I respectfully submit that the cases cited do not go this far.

There is cited in the brief an excerpt from the opinion of this Court in the case of *Dodd* v. *Una,* 40 N. J. Eq. 672 at 719, where the Court says that there must be an intent to disregard its process and authority.

It cannot be said that in the case at bar there was not an intent on the part of appellant to disregard the terms of the final decree. Whatever his reasons may have been, he did intend to commit the act that was actually in violation of the terms of the decree.

Appellant also cites the case of *Staley* v. *South Jersey Real Estate Co.*, 83 N. J. Eq. 300, but an examination of the opinion in that case shows this Court reversed the Court of Chancery because the facts were not established by the oaths of witnesses subject to cross examination and impeachment under the ordinary rules of evidence, and that there was no waiver on the part of the accused.

The case of *Barrel Foundry Co.* v. *Crowe,* 80 N. J. Eq. 109, has no application to the case at bar, for in that case Vice-Chancellor HOWELL held that it was extremely doubtful whether the act that was being done by the respondent was by strict construction included in the restraint and hence he would not be held guilty of contempt.

That the Court of Chancery has power to punish for contempt anyone violating the terms of its decrees has been recognized by this Court.

Staley v. *South Jersey Real Estate Co.*, 83 N. J. Eq. 300;
Bijur &c., Co. v. *Inter. Asso. Machinists,* 92 N. J. Eq. 644.

CONCLUSION.

It is respectfully submitted that the facts in this case show a clear and unquestioned violation of the terms of a final decree of the Court of Chancery by an officer of the court, and that the decree appealed from should be affirmed.

No. 36, May Term, 1928.

HARRY LANE,
Of Counsel with Respondent.