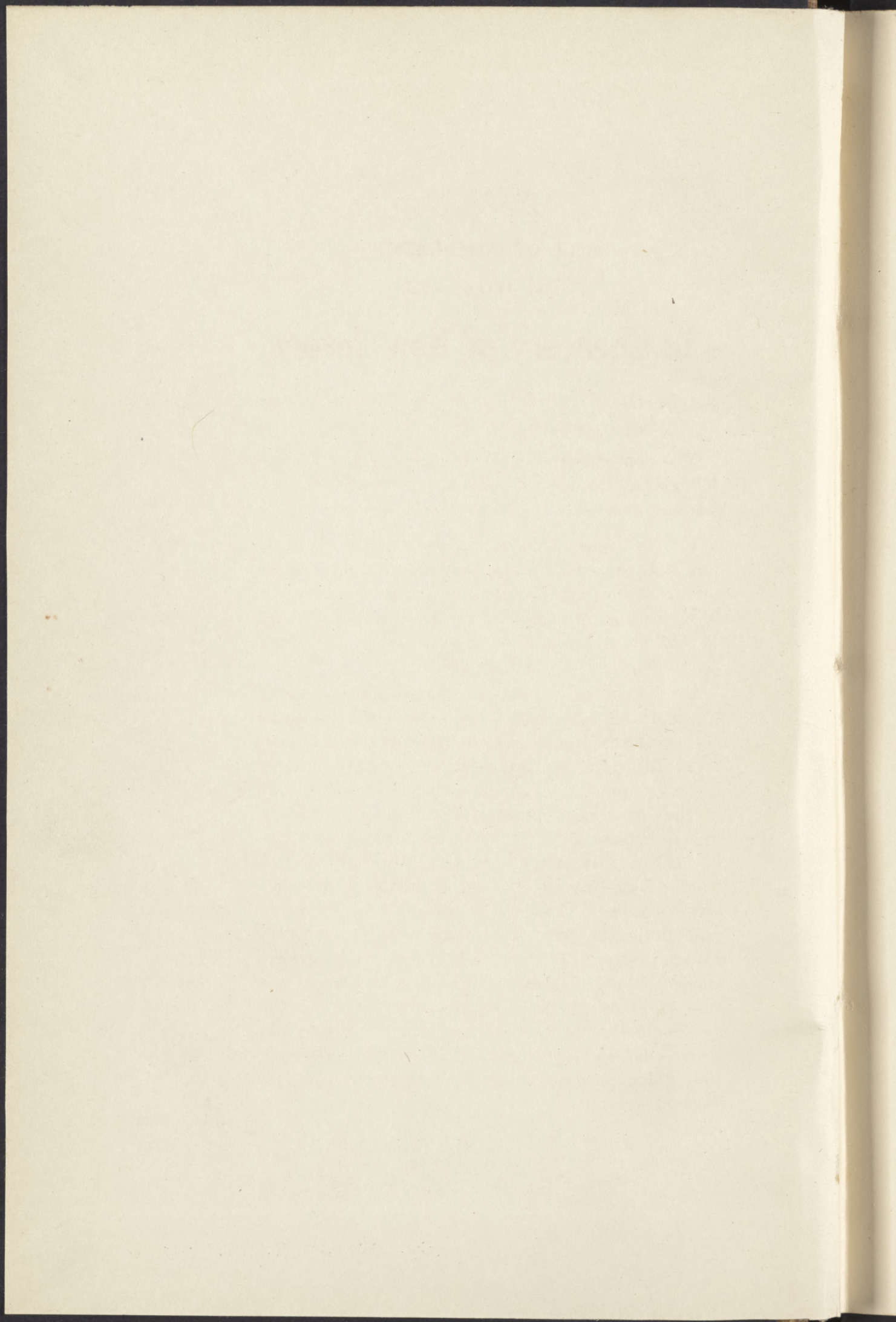


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*Complaint.*

**BILL OF COMPLAINT.**

Filed July 9, 1926.

**In Chancery of New Jersey**

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

10

The complainant, Kate Hannan, of the City of Elizabeth, County of Union and State of New Jersey, respectfully shows that:

1. On June 24, 1926, complainant Kate Hannan was seized in fee simple of all that certain lot, tract or parcel of land and premises situate, lying and being in the Town of Westfield, County of Union and State of New Jersey, and more particularly described as follows:

20

BEGINNING at a point in the southerly line of Cumberland street, distant southwesterly along the southerly line of Cumberland street 322 feet from the point of intersection of the southerly line of Cumberland street and the westerly side of Palsted street, formerly Union avenue; thence (1) in a southerly direction and along the line of now or formerly Georgianna Vines 142.5 feet to the rear line of the lots fronting on Downer street; thence (2) in a southwesterly direction and along the rear line of the lots fronting on Downer street 75 feet to a point and corner; thence (3) in a northerly direction and along the line of lands of Nora Hannan 142.5 feet to the southerly line of Cumberland street; thence (4) in an easterly direction and along the southerly line of Cumberland street 75 feet to the place of beginning.

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40

*Complaint.*

Being all of lot 14 and the westerly one-half of lot 16, as laid down and designated on a certain map entitled, "Plots of Building Lots for Sale by Harris and Osborn at Westfield on the line of the Central Railroad of New Jersey," which said map is filed in the office of the Register of Union County.

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2. On the date last mentioned complainant entered into a certain agreement in writing with Margaret E. Wilson wherein and whereby complainant agreed to convey said lands and premises by deed of warranty on or before July 1, 1926, to the said Margaret E. Wilson in consideration of the payment by said Margaret E. Wilson of the sum of \$750.00, and the said Margaret E. Wilson agreed to pay complainant said purchase price of \$750.00 by the payment of \$250 on or before June 24, 1926, which said payment was duly made, and the balance of said purchase price in cash upon the delivery of said deed to said Margaret E. Wilson by complainant. A true copy of said written agreement is hereto annexed and made a part hereof.

20

3. On said July 1, 1926, complainant tendered a deed, in accordance with said written agreement, to said Margaret E. Wilson, but the tender was refused on the sole ground that complainant was unable to give a good title to the lands described in said written agreement because in a certain deed made by Martha Harris, a married woman whose husband, Samuel Harris, was then living, to Joseph Moffett, dated July 6, 1870, and recorded in Book 54 of Deeds for Union County at page 331, Samuel Harris, the husband of Martha Harris, does not appear as a grantor, and in and by which deed it was

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*Complaint.*

intended to convey a portion of the lands included in said written agreement.

4. The said Martha Harris was the owner of said lands described in her deed to Joseph Moffett, having a title in fee simple, and Samuel Harris, her husband, joined in the execution of said deed and also acknowledged said deed together with his wife, Martha Harris. 10

5. The said Martha Harris and Samuel Harris are now deceased.

6. Complainant avers that the said deed from Martha Harris to Joseph Moffett was good and sufficient to convey all her estate in said lands described in said deed to Joseph Moffett, subject only to the curtesy right, if any, of her said husband, Samuel Harris, and that said curtesy right, if any, was subsequently extinguished by the death of the said Samuel Harris. 20

7. Complainant has always been ready and willing, and now tenders herself ready and willing, to perform her part of said agreement, on being paid the remainder of said purchase money, to convey said lands and premises to said Margaret E. Wilson by a warranty deed duly executed by complainant. 30

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That Margaret E. Wilson, who is the defendant to this suit, may answer this complaint and each statement therein made.

2. That the said Margaret E. Wilson may be compelled by the decree of this Court specifically to perform the said agreement with complainant and to pay to complainant the remainder of said 40

*Agreement of Sale.*

purchase money, as in and by said agreement provided, on the delivery by the complainant to the said Margaret E. Wilson of a deed executed and acknowledged by complainant as in said agreement provided.

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

E. A. MERRILL,  
Solicitor for and of Counsel with Complainant.

**Agreement of Sale.**

20 THIS AGREEMENT made the 24th day of June, in the year of our Lord one thousand nine hundred and twenty-six, between Kate Hannan, (widow) of the Borough of Roselle, in the County of Union and State of New Jersey, party of the first part; and Margaret E. Wilson (unmarried) of the City of Montclair, in the County of Essex and State of New Jersey, party of second part;

30 WITNESSETH, That the said party of the first part, for and in consideration of the sum of seven hundred and fifty 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 she the said party of the first part, will well and sufficiently convey to the said party of the second part, her heirs and assigns, by Deed of Warranty free of all encumbrances on or before the  
40 1st day of July, next ensuing the date hereof,

*Agreement of Sale.*

all that certain 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.

All of lot number 14 and the northwesterly one-half of lot number 16, as laid down and designated on a certain map entitled, "Plot of Building Lots for sale by Harris and Osborn, at Westfield on the line of the Central Railroad of New Jersey," which said map is filed in the office of the Register of Union County as Map No. 115-C. 10

Being a lot having a frontage of 75 feet on the southerly side of Cumberland street and a depth of 142.5 feet.

And the said Margaret E. Wilson, for herself, her heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, her heirs, executors, administrators and assigns that she 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 seven hundred and fifty dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: 20

Previously paid in cash.....	\$ 50.00
On execution of this agreement for which this is also a receipt.....	200.00
On delivery of deed, cash.....	500.00
	<hr/>
	\$750.00

This contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and 40

*Agreement of Sale.*

not on any representations made as to character or quality.

10 AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, her heirs and assigns, may enter into and upon the said land and premises on the 1st day of July next ensuing the date hereof, and from thence take the rents, issues and profits to her and their use.

AND IT IS FURTHER AGREED, by the parties hereto, that the said deed shall be delivered and received at office of E. A. Merrill, Post Office Building, Westfield, N. J., between the hours of 10 o'clock in the forenoon and 4 o'clock in the afternoon on the said first day of July next ensuing the date hereof.

20 AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators.

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

KATE HANNAN. (SEAL)

MARGARET E. WILSON. (SEAL)

30 Signed, sealed and delivered  
in the presence of

E. A. MERRILL,  
as to K. H.

WALTER A. GUDE,  
as to MEW.

*Notice of Motion to Dismiss.*

**NOTICE OF MOTION TO DISMISS.**

Filed September 7, 1926.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>KATE HANNAN, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>MARGARET E. WILSON, <i>Defendant.</i></p>	}	<p>10</p> <p><i>On Bill, Etc.</i></p> <p><i>Notice of</i></p> <p><i>Motion.</i></p>
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To E. A. Merrill, solicitor of the complainant,  
Kate Hannan:

TAKE NOTICE that on Tuesday, September 7, 1926, at 10:30 o'clock in the forenoon, daylight saving time, or as soon thereafter as counsel may be heard, I shall apply to the Chancellor, at the Chancery Chambers in the City of Newark, for an order striking out the bill of complaint filed in this cause for the following reason:

The said bill of complaint discloses no cause of action in that the complainant has no title to a portion of the lands described in the agreement between complainant and the defendant, and described in the deed tendered by the complainant to the defendant. In the chain of title of the lands described in said agreement is the deed of one Martha Harris, who was a married woman and whose husband, Samuel Harris, was then living, to Joseph Moffett, which deed is dated July 6, 1870, and recorded in Book 54 of Deeds for Union County at page 331, but the said Samuel Harris is not named as a grantor in the

*Deed of Harris to Moffett.*

body of said deed and not joining in the deed the instrument intended to be a conveyance was void and of no effect to vest in Joseph Moffett the right, title and interest of Martha Harris. A copy of said deed is annexed hereto.

10

WILLIAM M. BEARD,  
Solicitor of Defendant.

July 12, 1926.

**Deed.**

MARTHA HARRIS & hus'd

to

20 JOSEPH MOFFETT.

THIS INDENTURE, made the 6th day of July in the year of our Lord, one thousand eight hundred and seventy, between Martha Harris, wife of Samuel Harris, of the Township of Westfield, in the County of Union, and State of New Jersey, of the first part, and Joseph Moffett, of the Township of Westfield, in the County of Union, and State of New Jersey, of the second part,

30 WITNESSETH, that the said party of the first part, for and in consideration of two hundred dollars, lawful money of the United States of America, to her 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, has given, granted, bargained, sold, aliened, released enfeoffed conveyed and confirmed and by these presents, does give,  
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*Deed of Harris to Moffett.*

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 those two tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Township of Westfield, in the County of Union, and State of New Jersey, and known and distinguished on a certain map entitled Plot of Building Lots, for sale by Harris & Osborn at Westfield on the line of Central Railroad of New Jersey one-eighth mile from depot, surveyed by John M. C. Marsh, surveyor, January, 1869, and filed in the office of the Clerk of the County of Union, April 13, 1869. The said lots being described and bounded as follows:

Beginning at a corner on Cumberland street, distant from the corner of Union avenue, three hundred and forty-seven feet, thence binding on the line of lot No. (16) sixteen, one hundred and forty-two and one-half feet to the center of the block being a corner, thence binding on the center line of the block twenty-five feet to the middle of lot No. (14) fourteen, in block 4, to a corner, thence through the center of said lot to the southerly side of Cumberland street, one hundred and forty-two and one-half feet to the place of beginning, it being the northwesterly half of lot (14) fourteen in block "4," also lot (13) thirteen in block (4) four distant three hundred and forty-seven feet from the corner of Union avenue, and on Downer street, to a corner, thence on Downer street, fifty feet to a corner; thence along and binding on the line of lot eleven to the center of the block, thence along the center of the block fifty feet to a corner, thence parallel with Union avenue one hundred and forty-five and a half

*Deed of Harris to Moffett.*

feet to the northerly side of Downer street to a corner, thence binding on Downer street, fifty feet to the beginning.

10 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

20 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.

30 And the said Martha Harris, wife of Samuel Harris, doth for herself, her heirs, executors and administrators covenant and grant to and with the said party of the second part, his heirs and assigns, that she, the said Martha Harris, wife of Samuel Harris is the true, lawful and right owner of all and singular the above-described land and premises, and of every part, and parcel hereof, 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.

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*Deed of Harris to Moffett.*

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 Martha Harris, wife of Samuel Harris, will warrant, secure and forever defend the said land and premises, unto the said Joseph Moffett, 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 encumbrances whatsoever. 10

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

MARTHA HARRIS. (L. s.)  
SAMUEL HARRIS. (L. s.) 20

Signed, sealed and delivered in  
the presence of

L. H. K. SMALLEY.

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

BE IT REMEMBERED, that on this thirtieth day of July in the year of Our Lord, one thousand eight hundred and seventy, before me, L. H. K. Smalley, a commissioner for taking the acknowledgment and proof of deeds, personally appeared Samuel Harris and Martha Harris, his wife, who I am satisfied, are the grantors in the within deed of conveyance named and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act 30  
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*Deed of Harris to Moffett.*

and deed for the uses and purposes therein expressed:

And the said Martha Harris being by me privately examined separate and apart from her said husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, Freely, without any fear, threats or compulsion of her said husband.

L. H. K. SMALLEY,  
Commissioner.

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*Final Decree.***FINAL DECREE.**

Filed September 7, 1926.

IN CHANCERY OF NEW JERSEY.

61/275.

*Between*

KATE HANNAN,

*Complainant,**and*

MARGARET E. WILSON,

*Defendant.**On Bill, Etc.**Final Decree.*

10

A motion having been made by William M. Beard, solicitor of the defendant, Margaret E. Wilson, to strike out the bill of complaint filed herein, on the ground that it appears upon the face of the bill that it discloses no cause of action for the reason that a certain deed from Martha Harris to Joseph Moffett, dated July 6, 1870, and recorded March 10, 1871, in Book 55 of Deeds for Union County at page 331, referred to in paragraph three of the complaint, is void, and conveyed to said Joseph Moffett no title to the lands described in said deed; and the matter coming on to be heard in the presence of E. A. Merrill, solicitor of the complainant, Kate Hannan, and of William M. Beard, solicitor of the defendant, Margaret E. Wilson; and it appearing that by a written instrument dated June 24, 1926, copy of which is attached to the bill of complaint, complainant and defendant entered into an agreement for the sale and purchase of the lands described therein, of which

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*Final Decree.*

10 said agreement complainant prays the specific performance; and the Court having heard the arguments of said solicitors, and having examined the bill of complaint and defendant's notice of motion filed herein, and the exhibits annexed thereto; and the solicitor of the defendant having admitted in open court the truth of the allegations of fact in complainant's bill, and that the only defense to be urged against granting the relief prayed is the omission of the name of Samuel Harris, husband of Martha Harris, as a grantor with Martha Harris, in said above-mentioned deed made by Martha Harris to Joseph Moffett, a copy of which is annexed to the notice of the motion to dismiss; and the Court being of the opinion that said deed from Martha Harris to Joseph Moffett was good and sufficient to convey to said Joseph Moffett all the right, title and interest of said Martha Harris in said lands, subject only to the curtesy right, if any, of her said husband, Samuel Harris, which said curtesy right, if any, was extinguished by the subsequent death of said Samuel Harris; and that the omission of the name of Samuel Harris as a grantor in said deed is not a valid defense against the specific performance of said agreement of sale entered into by and between complainant and defendant; and William M. Beard, solicitor of said defendant, Margaret E. Wilson, having consented in open court that if defendant's motion is denied a decree may be entered as upon a final hearing of said cause;

40 It is, therefore, on this 7th day of September, 1926, ORDERED, ADJUDGED and DECREED that defendant's motion to dismiss said bill of complaint be and the same is hereby denied.

*Final Decree.*

And it is further ORDERED, ADJUDGED and DECREED that the said articles of agreement be in all things specifically performed by said complainant, Kate Hannan, and by said defendant, Margaret E. Wilson, respectively; that said complainant keep her tender good by depositing with her solicitor in escrow a deed to defendant, duly executed and acknowledged, and otherwise in accordance with the terms of said written agreement made by and between complainant and defendant; that a true copy of this decree be served upon defendant's solicitor within two days from the date hereof; and that within ten days from date of this decree said defendant pay over to complainant's solicitor the said unpaid balance of \$500 on account of the purchase price; and it is further ORDERED that the defendant pay to the complainant her costs in this suit, to be taxed.

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E. R. WALKER,  
C.

Respectfully advised,

ALONZO CHURCH,  
*Vice-Chancellor.*

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*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed September 9, 1926.

IN CHANCERY OF NEW JERSEY.

61/275.

10	<p><i>Between</i></p> <p style="margin-left: 40px;">KATE HANNAN,</p> <p style="margin-left: 100px;"><i>Complainant,</i></p> <p style="margin-left: 100px;"><i>and</i></p> <p style="margin-left: 40px;">MARGARET E. WILSON,</p> <p style="margin-left: 100px;"><i>Defendant.</i></p>	} <i>On Bill, Etc.</i> <i>Notice of Appeal.</i>
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20 The defendant, Margaret E. Wilson, hereby appeals from the final decree made by the Chancellor on the advice of Vice-Chancellor Church in the above-entitled cause on September 7, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, September 8, 1926.

30 WILLIAM M. BEARD,  
Solicitor for and of Counsel with Defendant.

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

WILLIAM M. BEARD,  
Of Counsel with Defendant.

*Petition of Appeal.*

**PETITION OF APPEAL.**

Filed September 10, 1926.

**New Jersey Court of Errors and Appeals**

*Between*

KATE HANNAN,  
*Complainant-Respondent,*

*and*

MARGARET E. WILSON,  
*Defendant-Appellant.*

*On Appeal* 10  
*from the*  
*Court of*  
*Chancery.*

*Petition of*  
*Appeal.*

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

The petition of Margaret E. Wilson, the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds herself 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 September 7, 1926, in a certain cause in said Court of Chancery, wherein the said Kate Hannan was complainant and the said Margaret E. Wilson was defendant, in this respect, to wit, that the said decree adjudges that said deed from Martha Harris to Joseph Moffett was good and sufficient to convey to said Joseph Moffett all the right, title and interest of said Martha Harris in said lands, subject only to the curtesy right, if any, of her said husband, Samuel Harris, which said curtesy right, if any, was extinguished by the subsequent death of said Samuel Harris; that said articles of agreement be in

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*Petition of Appeal.*

all things specifically performed by said complainant, Kate Hannan, and by said defendant, Margaret E. Wilson, respectively; that said complainant keep her tender good by depositing with her solicitor in escrow a deed to defendant, duly executed and acknowledged, and otherwise  
10 in accordance with the terms of said written agreement made by and between complainant and defendant; that a true copy of this decree be served upon defendant's solicitor within two days from the date hereof; and that within ten days from date of this decree said defendant pay over to complainant's solicitor the said unpaid balance of \$500 on account of the purchase price.

And petitioner appeals from the decree of the  
20 Chancellor which decrees as aforesaid upon the ground that the same is erroneous in that:

1. The Chancellor erred in refusing to dismiss the bill of complaint when moved so to do by defendant.

2. The Chancellor erred in decreeing the articles of agreement entered into by and between complainant and defendant be specifically performed by the complainant and defendant respectively.  
30

3. The Chancellor erred in adjudging the deed of Martha Harris to Joseph Moffett to be valid as a conveyance of all her right, title and interest in the lands described therein, notwithstanding her said husband, Samuel Harris, was not named as a grantor in the body of the instrument.

4. The Chancellor erred in ordering that said  
40 articles of agreement be performed by said

*Petition of Appeal.*

complainant and defendant respectively by a day certain, to wit, within ten days from the date of said decree.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed and set aside and for nothing holden, and that the petitioner may have such other relief in the premises as to this Court shall seem proper. 10

WILLIAM M. BEARD,  
Solicitor for and of Counsel with Appellant.

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*Answer to Petition of Appeal.*

**ANSWER TO PETITION OF APPEAL.**

Filed September 11, 1926.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10	<p><i>Between</i></p> <p>KATE HANNAN, <i>Complainant-Respondent,</i></p> <p style="text-align: center;"><i>and</i></p> <p>MARGARET E. WILSON, <i>Defendant-Appellant.</i></p>	<p><i>On Appeal, Etc.</i></p> <p><i>Answer to Petition of Appeal.</i></p>
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20 The answer of Kate Hannan, the above-named respondent, to the petition of appeal of Margaret E. Wilson, the above-named appellant.

This respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto admits that a decree was on September 7, 1926, made and entered in the Court of Chancery of New Jersey in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree 30 this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that said decree is agreeable to equity, and she prays that the same may be affirmed with costs to be taxed in favor of this respondent.

E. A. MERRILL,  
Solicitor of and of Counsel with Respondent.

*Notice of Argument.*

**NOTICE OF ARGUMENT.**

Filed September 16, 1926.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

*Between*

KATE HANNAN,  
*Complainant-Respondent,*

*and*

MARGARET E. WILSON,  
*Defendant-Appellant.*

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*On Bill, Etc.*

*On Appeal.*

*Notice of  
Argument.*

To the Respondent, Kate Hannan:

TAKE NOTICE that the argument of the appeal  
in the above-entitled cause will be brought on at  
the next term of the Court of Errors and Ap-  
peals, to be held at the State House, at Trenton,  
on Tuesday, October 19, 1926, at the hour of 11  
o'clock in the forenoon, or as soon thereafter as  
counsel can be heard.

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WILLIAM M. BEARD,  
Solicitor for and of Counsel with Appellant.

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## New Jersey Court of Errors and Appeals

BETWEEN

KATE HANNAN,  
*Complainant-Respondent,*

*and*

MARGARET E. WILSON,  
*Defendant-Appellant.*

*On Bill, Etc.*

*On Appeal.*

### BRIEF OF THE DEFENDANT-APPELLANT.

#### Statement.

On June 24, 1926, appellant entered into a written contract with the complainant-respondent for the purchase of certain lands in Westfield (Case, p. 4, *et seq.*).

An examination of the title disclosed the fact that on July 6, 1870, Martha Harris, the then owner of a portion of the lands agreed to be purchased by appellant, attempted to convey said lands to one Joseph Moffett. Martha Harris was a married woman, and her husband, Samuel Harris, was then living.

In the body of the deed it is recited that Martha Harris is the wife of Samuel Harris, but nowhere does Samuel Harris appear as grantor or covenantor. He did, however, execute the deed with his wife, and his execution, together with that of his wife, was duly acknowledged in the statutory form (Case, p. 8, *et seq.*).

Such being the condition of the record the appellant refused to accept title, when tendered by the respondent vendor, on the ground that the deed of Martha Harris to Joseph Moffett was *void* and conveyed no title whatsoever, and there-

upon the vendor filed her bill for the specific performance of the agreement to purchase.

The defendant vendee then gave notice of a motion to dismiss the bill on the ground that it disclosed no cause of action, in that the bill itself set forth, as a part of complainant's chain of title, the said void deed of Martha Harris (Case, p. 8).

The Court, however, held the deed in question to be good as a conveyance of the right, title and interest of Martha Harris, and, it being admitted that as Samuel Harris is dead his curtesy right, if any, was now extinguished, the Court further held title to the fee to be in the complainant vendor.

The defendant vendee—appellant herein—urging no other objection to the title a decree was entered for the specific performance of the Articles of Agreement, as upon final hearing (Case, p. 13, *et seq.*).

The defendant vendee appeals from the whole of the decree upon the following grounds:

1. The Chancellor erred in refusing to dismiss the bill of complainant when moved so to do by defendant.
2. The Chancellor erred in decreeing the Articles of Agreement entered into by and between complainant and defendant be specifically performed by the complainant and defendant respectively.
3. The Chancellor erred in adjudging the deed of Martha Harris to Joseph Moffett to be valid as a conveyance of all her right, title and interest in the lands described therein, notwithstanding her said husband, Samuel Harris, was not named as a grantor in the body of the instrument.

4. The Chancellor erred in ordering that said Articles of Agreement be performed by said complainant and defendant respectively by a day certain, to wit, within ten days from the date of said decree.

### POINT I.

**The deed of a married woman, in which the husband does not join, is void.**

The substantial issue between appellant and respondent, under this point, is as to the scope of the term "join." It is appellant's contention that the term connotes a "joining" throughout the instrument, and that such has always been the understanding of bench and bar. The case of *Bell v. Union County Park Commission* (decided in June, 1925, but unreported and no opinion filed), upon which respondent relies for a precedent, is the only case found in which this precise point has been passed upon, is an innovation in the practice, and was also incorrectly decided.

That the deed of a married woman is void if her husband does not join in its "execution" is abundantly supported by authority (*Armstrong v. Ross*, 20 N. J. E. 109; *Phelps v. Morrison*, 24 N. J. E. 195, affirmed 25 N. J. E. 538; *Moore v. Rake*, 26 N. J. L. 574; *Perrine v. Newell*, 49 N. J. E. 57), and it can hardly be doubted that the prevalent view is that "execution" by a husband presupposes his being "joined" with his wife in the body of the instrument which he "executes."

This view squares with the opinion of Vice-Chancellor Stevens in *Wright v. Pell*, 90 N. J. E. 11, where it was held that Emily J. Smith conveyed to her grantee only an equitable interest in her lands, for the reason that her husband,

Thomas C. Smith, was not made a party grantor, although he signed and acknowledged the instrument.

If such deed is *void* title remains in the grantor, or her heirs or devisees, and cannot be divested by legislative fiat, as has been attempted in Chapter 150 of the Laws of 1924, and Chapters 154 and 295 of the Laws of 1926.

#### POINT II.

**If the deed of Martha Harris was good the decree, nevertheless, has not necessarily vested title in appellant, under the statute.**

Of course, if the deed of Martha Harris was void the respondent vendor has no legal title to that portion of her lands derived through the Harris deed, and the bill must fail.

And if the deed of Martha Harris is adjudged to be good, title, nevertheless, has not necessarily vested in appellant under the statute, and appellant may, notwithstanding said decree, refuse to accept the vendor's further tender if, in fact, the vendor's title was not clear at the expiration of the time limited in and by the decree.

The decree required that "said Articles of Agreement be in all things specifically performed by said complainant Kate Hannan, and by said defendant Margaret E. Wilson, respectively; and that said complainant keep her tender good by depositing with her solicitor in escrow a deed to defendant \* \* \* and that within ten days from date of this decree said defendant pay over to complainant's solicitor the said unpaid balance of \$500 on account of the purchase price."

Under the above-recited terms of the decree there was a time certain fixed for the perform-

ance of the contract of sale; time was made of the essence; and there was a "time appointed" for the passing of title which might bring the contract within Section 45 of the Chancery Act (1 C. S. 426).

Section 45 provides that: Where a decree of the Court of Chancery shall be made for a conveyance, release or acquittance of lands or any interest therein, and the party against whom the said decree shall pass, shall not comply therewith by the time appointed, then such decree shall be considered and taken, in all courts of law and equity, to have the same operation and effect, and be as available as if the conveyance, release or acquittance had been executed conformably to such decree, and this, notwithstanding any disability of such party by infancy, lunacy, coverture or otherwise.

As appellant reads this section it means no more than this—that where the action is brought by the *vendee*, and the vendee has performed and has paid the purchase price in conformity with the terms of the decree, or has tendered the price and keeps the tender good, but the vendor, although able, fails or refuses to tender a good and sufficient deed at or before "the time appointed," the decree itself becomes self-executing and title passes from vendor to vendee upon the expiration of the time fixed by the decree, and the recording of the decree makes the decree itself a valid and sufficient muniment of the vendee's title, notwithstanding no deed was executed or delivered by the vendor. Or, conversely, if the *vendor* has a decree for specific performance, and elects to enforce the decree by tendering a good and sufficient deed within the time limited, but the tender is refused, title, will, nevertheless, vest in the vendee upon the expiration of the time

limited by the decree; moneys paid on account may thereupon be appropriated as part of the purchase price, and the vendor will have a vendor's lien upon the lands for any unpaid balance of the purchase price.

*If* title vests in the vendee such vesting is, nevertheless, subject to the outcome of an appeal, but the vesting does not await that event. Title vests by virtue of the self-executing quality of the decree under the statute, but subject to being divested.

But the divesting of the vendor's title, and the vesting of title in the vendee, is conditioned upon compliance, by the successful party, with the terms of the decree. If its terms are not complied with by the party in whose favor the decree is made the decree will, at the expiration of the time limited, become impotent and unenforceable.

In the instant case, if the Harris deed is good, the effect of the decree—assuming appellant's construction of Section 45 of the Chancery Act to be correct—is not affected by this appeal.

Title did or did not pass "ten days from the date of the decree" depending upon whether, *at that time*, as a fact which may yet have to be determined, the vendor's title was or was not good and sufficient to meet the requirements of the Articles of Agreement. If the Harris deed was good, and if the vendor's title was *also* good *at the time fixed by the decree*, this action being at the suit of the vendor, doubtless title passed to the vendee under the statute, subject to a vendor's lien for any unpaid balance of the purchase price.

But if the vendor failed or was unable, within "the time appointed," to tender a deed which

complied with the terms of the Articles of Agreement—as, for example, if the title was encumbered—the decree thereupon became inoperative, and no title passed. The decree, being for the benefit of the vendor, presupposes the vendor to be ready, willing, and able to comply with his part of the Articles of Agreement at all times within “the time appointed” by the decree, and the statute will not impose upon the vendee such title as the vendor then had, if encumbered, as such title was not within the terms of the agreement between the parties. Where a decree in favor of a vendor-complainant orders the contract to be performed within a time limited such time is so limited for the benefit of the vendor, and is thereby made just as much an integral and vital part of the contract as if it had originally been included in the contract by the vendor; and if, at “the time appointed” by the decree and thereby made of the essence of the contract, the vendor cannot or does not deliver such title as the Articles of Agreement call for he thereby breaches the agreement, the decree thereafter is inoperative and unenforceable by him, and the vendee may, at his option, rescind the agreement to purchase because of such breach.

As stated above, if the Harris deed is void this point need not be considered, but if the Harris deed is held to be good the issue here raised becomes important in view of the language of this Court in *McVoy v. Baumann*, reported in 117 Atl. 725, and in 93 N. J. E. 638.

In the opinion of the Court in 117 Atlantic this paragraph will be found at page 727: “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

*action or inaction in complying* with the mandate of the final decree.”

But in the opinion of the Court as reported in 93 Equity the corresponding paragraph, at page 642—the two opinions being otherwise identical—reads as follows: “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.”

Just what is the difference in meaning between the phrase “*their action or inaction in complying*,” and the phrase “*their failure to comply*,” if not intended to be synonymous, is not explained; but certain it is that, in any event, the latter expression, being found in the Official Reporter, must be reconciled with the statute; it cannot be assumed to contradict or overrule the statute.

The decree being erroneous for the reason that the deed of Martha Harris to Joseph Moffett was void, and therefore no legal title was acquired by his successors in the paper title, the decree should be set aside and for nothing holden.

WILLIAM M. BEARD,  
Solicitor for and of counsel  
with Defendant-Appellant.

## New Jersey Court of Errors and Appeals

*Between,*

KATE HANNAN,  
*Complainant-Respondent,*

*and*

MARGARET E. WILSON,  
*Defendant-Appellant.*

*On Bill, etc.*  
*On Appeal.*

### BRIEF OF THE COMPLAINANT-RESPONDENT.

#### Statement.

The complainant, Kate Hannan (a widow), claiming to be the owner in fee of certain lands in the Town of Westfield, Union County, New Jersey, entered into a written agreement for the sale of the lands described therein to the defendant, Margaret E. Wilson. (Case, p. 4, *et seq.*)

The title to a portion of the lands agreed to be purchased by defendant rests upon a certain deed made by one Martha Harris to Joseph Moffett, dated July 6, 1870, in which it is recited that the indenture was made "between Martha Harris the wife of Samuel Harris, \* \* \* and Joseph Moffet," that "Martha Harris wife of Samuel Harris \* \* \* covenants \* \* \* that she, the said Martha Harris wife of Samuel Harris is the true, lawful and right owner"; and that "Martha Harris wife of Samuel Harris will warrant, secure and forever defend the said lands and premises" etc. (Case, p. 8, *et seq.*)

The instrument, however, was executed, and was acknowledged in the statutory form, by

both Martha Harris and Samuel Harris. (Case, p. 11.)

It is admitted that both Martha Harris and her husband Samuel Harris are dead.

Tender of a deed properly executed was refused by the defendant on the ground that a deed made by a married woman whose husband is living is *void* unless the husband "joins" therein, and that the term "join" is not satisfied by the execution of the instrument by the husband, and his acknowledgment, but requires as well that the husband appear as a grantor in the body of the instrument.

The complainant insists that to validate the conveyance by a married woman, whose husband is living, of her estate in lands it is only necessary that the husband "consent to" or "concur in" such sale and conveyance, and that such consent or concurrence is sufficiently attested by the joining of the husband with the wife in the *execution* and *acknowledgment* of the instrument, as was done in the instant case.

This precise question was before the Chancery Court in the case of *Bell v. Union County Park Commission*, (June, 1925), and it was there held that such deed is good.

In that case one Mary Ann Taylor, whose husband, George Taylor, was then living, made a conveyance of her lands to one James H. Taylor. In the body of the instrument the only reference to the husband was in the recital of the parties, where the grantor was named as "Mary Ann Taylor the wife of George Taylor," but George Taylor joined in the execution and acknowledgment of the deed.

The case was not officially reported, and no opinion was filed, but it was orally argued and fully briefed. The decree adjudged the deed to be "a good and valid deed of conveyance of all the right, title and interest of said Mary Ann Taylor in and to the lands therein described."

This complainant, without resting thereon her claim to specific performance, desires to call the attention of the Court to Chapter 150 of the Laws of 1924, and to Chapters 154 and 295 of the Laws of 1926.

The 1924 act provides that:

Where in any deed of conveyance of real property heretofore made by husband and wife both the husband and wife have signed the said deed of conveyance and where their signatures have been duly witnessed and acknowledged as required by law, but where in the recital or the body of the deed of conveyance the name of one of the parties has been omitted, the said deed of conveyance shall be good and valid; PROVIDED HOWEVER, that the said deed is good and valid in all other respects.

Chapter 154 of the Laws of 1926 is substantially to the same effect as the 1924 Act, but broader in its terms, and provides that:

Where in any deed of conveyance of real property heretofore made by husband and wife, both the husband and wife have signed the said deed of conveyance and where their signatures have been duly acknowledged as required by law, but where in the premises, stating part or body of the deed of conveyance the name of the husband or wife, who signs and acknowledges to bar curtesy or dower, has been omitted, or where the husband and wife convey by separate deeds, such deed or deeds shall be as good and valid and shall vest all estate of the husband and wife signing and acknowledging such deed or

deeds in the grantee or grantees in such deed or deeds to the same effect as if they had conveyed by both joining in the same deed; PROVIDED, HOWEVER, that such deed or deeds are good and valid in all other respects.

If Chapter 150 of the Laws of 1924, and Chapter 154 of the Laws of 1926, or either of them, are good then the deed in question needs no further defense, but the alleged defect, if a defect, is thereby cured.

Chapter 295 of the Laws of 1926 provides that:

Any deed heretofore made, executed and delivered by a married woman, conveying lands in this State owned by her in fee-simple, which deed the husband of the said married woman has not signed, joined in, or executed, shall as to the grantee or grantees, and all persons claiming under him or them be as valid and effectual in law as if the said husband had signed, joined in and executed the said deed; PROVIDED, the said husband is now deceased; and PROVIDED FURTHER, the said deed has been of record in the office of the county clerk or register of deeds of the county wherein the said lands are situate for a period of at least fifteen years last past; and PROVIDED FURTHER, that this act shall not affect the title of any person or persons in possession of such lands who do not claim under the said grantee or grantees, his or their heirs or assigns.

The deed in question was recorded more than fifteen years ago, the husband of the grantor is dead, and the party in possession claims through said deed. If this act is effective to validate the deed of a married woman alone, where the curtesy right of the husband, if any, has been extinguished by his death, it would seem to be effective for that purpose when the husband

did, in fact, execute and acknowledge the instrument, if such execution and acknowledgment was nugatory, on the theory that, being nugatory, such execution and acknowledgment may be disregarded, and the instrument be taken as one neither executed nor acknowledged by the husband, and therefore within the spirit and intent of the statute.

### POINT I.

To validate the wife's duly acknowledged deed of conveyance of her interest in real estate it is only necessary that her husband shall join in the **EXECUTION** and **ACKNOWLEDGMENT** thereof.

By the common law the legal existence of a married woman is so far merged in that of her husband that, with certain exceptions not here material, she cannot make a legal conveyance of her realty, or any interest therein, without his *consent* or *concurrence*. *Phelps v. Morrison*, 24 N. J. E. 195—aff. 25 N. J. E. 538; *Tunison v. Bradford*, 49 N. J. E. 210. "By the common law the legal existence of a married woman is merged in that of her husband, so that, as a general rule, she can make no contract without his *consent*." *Rake v. Lawshee*, 24 N. J. L. 613-616.

The question to be determined is, therefore—what constitutes such consent and how is it to be manifested.

The mode by which such consent may be given and manifested is by the husband's joining with the wife in the *execution* and *acknowledgment* of the instrument of conveyance. Because the husband usually concurrently releases

his inchoate curtesy right it is customary for him to join in the conveyance as a party grantor therein, but, so far as his *consent* to a conveyance of *her* interest is concerned, and if he wishes to retain his inchoate right of curtesy, or any other right or interest he may have, he need only join in the *execution* and *acknowledgment* of the instrument conveying his wife's *separate* estate. The effect of joining in the *execution* of the instrument is to validate, by his *consent* thereto, the conveyance of the wife's interest without thereby affecting his rights or interests.

I have found no New Jersey case which holds that to validate a wife's conveyance of her interest in lands the husband must be named in the body of the instrument as a grantor. An examination of the deed itself, and of the prior litigation, in *Wright v Pell*, 90 N. J. E. 11, cited by appellant, shows that case not to be in point. There one Emily J. Smith executed and delivered to one James N. Wright an instrument in form a deed which, by written agreement of the parties made at the time, was to be regarded as a collateral security for a loan, and not as an absolute transfer of ownership. Wright, therefore, never had anything but an equitable interest in the lands conveyed. In the body of the instrument there is no mention of a husband, or of any interest other than that of Emily J. Smith, but the instrument is executed thus:

Emily J. Smith L. S.

Thos. C. Smith L. S.

and the acknowledgment reads: "personally appeared Emily J. Smith and husband," but the husband is not named.

Vice-Chancellor Stevens, in the course of his opinion, says of the husband: "not being a party to it, the deed did not convey his right of curtesy (*Jason v. Johnson*, 74 N. J. L. 529), and did not vest in the grantee more than an equitable interest." As curtesy cannot be "conveyed" the reference to *Jason v. Johnson* is not in point on that issue. See *Capital Circle Co. v. Schmitt*, 84 N. J. E. 95. Doubtless what Vice-Chancellor Stevens intended to say was that the husband's right of curtesy, he not being a party grantor, was not extinguished. But, irrespective of the manner of execution, the grantee acquired only an equitable interest by virtue of the agreement that the instrument was an equitable mortgage. The instrument being, admittedly and by agreement, an equitable mortgage, and conveying and intended to convey only an equitable interest, and there being no issue as to whether the instrument was, or was not, void as a *deed*, the case is not a precedent, or controlling, upon the issue here presented.

In *Jason v. Johnson*, 74 N. J. L. 529, this Court said that: "It is established that the signing of a deed of conveyance by one who is not mentioned or described in the body of the instrument as a grantor is of no effect at law to convey such party's estate in the lands described therein." But no issue as to a grant by the husband is here present. We are only interested in the sufficiency of the husband's execution and acknowledgment of the deed to validate it as a conveyance of his *wife's interest*. If the deed in question left outstanding a curtesy interest in Samuel Harris it was extinguished by his subsequent death. There is not only nothing in the language of the cases to cast doubt upon the sufficiency of execution by the husband

to signify his assent to the execution of the conveyance by the wife, but the uniform use of the term "execution" suggests, if it does not prove, that nothing further has heretofore been thought to be required.

In *Armstrong v. Ross*, 20 N. J. E. 109, the syllabus recites that: "A married woman \* \* \* can only convey or charge it (her separate estate) by deed *executed* with her husband, and duly acknowledged," etc.

In *Phelps v. Morrison, et als.*, 24 N. J. E. 195, Mrs. Morrison, her husband being alive, had attempted to convey her lands by a deed in the execution of which her husband did not join. The Court held the deed to be void because the deed was "*executed* by her without her husband." In affirming the decree this Court, in 25 N. J. E. 538, said: "The groundwork of this contention is \* \* \* that the legal title is still in the wife, her deed being invalid on account of the non-joinder of her husband *in its execution*," etc., and "The present statutory law of this State does not permit, under ordinary circumstances, a married woman to *execute* a conveyance of her lands, unless *such act* (*i. e.* the act of execution) be done with the co-operation of her husband."

In the frequently cited case of *Moore v. Rake*, 26 N. J. L. 574, Chancellor Williamson puts the question in this form: Was the deed of Eve Godown valid, "her husband not having joined with her in its *execution*?" (page 578). Referring to the act of December 3, 1743, which provides, that "all deeds or conveyances made, or to be made, by a man and his wife, of the estate of the wife" shall be good to convey the lands intended to be conveyed, he concludes that the deed, by implication, must be the joint deed of

the man and wife, and that the legislative act of 1799 did not change the rule. He then goes on to amplify the meaning of the term "join," and says: "If this were a question of construction, for the first time to be put upon the statute, my opinion would be that it was requisite for the husband to join with his wife in the *execution* of the deed. But I believe such has been the construction given to the statute by our courts, and by the profession at large, whenever the question has received consideration" (page 579). He then quotes from Griffith's Law Register as follows: "The general opinion has always been, that the husband must join in the *execution* of the conveyance" of the wife, etc. (page 579).

In his concurring opinion Mr. Justice Vredenburg says: "What was the effect of Eve's *execution* of the deed? She was at the time a married woman, and her husband has not joined in the conveyance. \* \* \* Eve's *execution* of this deed without the *consent* of her husband was a void act," etc. (page 586).

In *Perrin v. Newell*, 49 N. J. E. 57-62, the Chancellor remarked that: "It is established that the *execution* of such an instrument by a married woman without her husband is a nullity."

In *Corby v. Drew*, 55 N. J. E. 387-391, Vice-Chancellor Stevens, referring to *Moore v. Rake*, *supra*, says that: "The decision was based \* \* \* upon the fact that the husband had not joined with the wife in *executing*" the deed in question.

In *Schickhaus v. Sanford*, 83 N. J. E. 454-459, the Court holds that "in the case of a married woman this conveyance or instrument must be *executed* with the husband as hertofore."

The language used in many of the provisions of the Married Women's Act, 3 C. S. 3222, *et seq.*, is significant. "In any deed hereafter made by any married woman of full age, who joins with her husband in *executing* said deed," etc. Sec. 7. Under certain conditions a wife may release an inchoate right of dower "without her husband joining with her in the *execution* thereof," etc. Sec. 8e. In lunacy cases a wife may convey "without the *concurrence* of her husband" etc. Secs. 8p. and 8u. And particularly, in Sec 8f, it is provided that a married woman's deed is good, without the husband joining therein, provided the husband has given "his *assent* in writing" to such conveyance. If, to validate his wife's deed, the husband's consent and concurrence is sufficiently manifested by a separately written "assent" to her execution of a mere *contract* to convey, and without requiring the husband to himself execute either his wife's contract or deed, it seems clear beyond peradventure that such consent and concurrence may equally be manifested by his "assent" expressed by executing her deed with his wife "for the uses and purposes therein contained." As executrix or administratrix a married woman may convey "without her husband joining with her in the *execution* of the conveyance," etc. 2 C. S. 2266, Sec. 23.

Nowhere is there to be found, either directly or by necessary implication, any suggestion that to "join" means or requires other than joinder in *execution*, and of course, the statutory acknowledgment.

Nor is there any consideration of law, logic, or public policy which calls for the extinguishment of a husband's curtesy right coincidently with, and as a necessary part of, the conveyance of a

wife's interest in realty, if the purchaser is willing to take the wife's estate thus burdened. There is no more reason for denying the right of the husband to reserve his curtesy right in the lands of his wife, than for denying the right of the wife to reserve her dower right in the lands of her husband.

The Married Women's Acts may also be cited for their positive bearing upon this issue. These acts enlarge the rights of married women, they are to be liberally construed to that end, and they deprive the husband of his freehold interest during the life of his wife—his curtesy initiate—the extinguishment of which interest was the substantial reason for his being named as a grantor in the body of the instrument of conveyance. *Hackensack Trust Co. v. Tracy*, 86 N. J. E. 301. The acts do not affect the requirement of the common law that the husband must *consent* to the conveyance of his wife's interest in lands, to make such conveyance valid, but, as their purpose is to place the wife upon terms of equality with the husband except for this limitation, the requirement should not be carried beyond the bounds of reason by making such consent further dependent upon the concurrent extinguishment of the husband's inchoate right of curtesy, or other interest.

In view of the manifest tendency of the times to give women greater freedom in the management and disposition of their property the subject should be approached in the spirit of Chief Justice Beasley, who in *Perkins v. Elliott*, 23 N. J. E. 526, speaking for this court, remarked that his examination of the subject had satisfied him that "the power of the *feme covert* over her separate estate has been the creation of the court of equity, and that the system has been, from time

to time, circumscribed or extended, not under the coercion of any inflexible rules or established principles, but in accordance with judicial opinion founded on very general considerations as to the propriety or policy of the particular circumscription or expansion."

A requirement that every interest of the husband must be aliened coincidentally with the alienation of the interest of his wife, and as a condition thereof, is especially unreasonable when the interest of the husband is present, vested, and substantial. To illustrate: Take the case of an unmarried man and woman owning real estate as joint tenants. They afterward intermarry. The marriage, however, does not affect the characteristics of the joint holding, or raise a dower right, and the subsequent birth of a child will not raise a curtesy right. Either the husband or the wife may sell and convey his or her estate and change the holding to one in common between the remaining tenant and the new tenant. As the husband may sell his interest without the consent of his wife she need not join in the execution of the deed, and having no dower interest to be extinguished her name need not, and should not, appear in the body of the instrument. That there is, in a chain of title, a conveyance by joint tenants whose wives have not joined is not a valid objection in a vendor's suit for specific performance. *Babbitt v. Dey*, 41 N. J. E. 392. By parity of reasoning the husband, having no curtesy right to be extinguished, need not and should not appear in the body of the instrument as a grantor if the estate of the wife only is to be conveyed; nevertheless he must, to evidence his consent to the conveyance of his wife's estate and thereby validate it, join in the *execution* of the instrument.

There is neither statute nor legal precedent for *compelling* a husband to transfer his interest in a joint estate to a third party in order to validate a conveyance of his wife's joint estate, and there is no reason in law, equity, or public policy why he should be put to the hazard incident to such conveyance and re-conveyance in order that he may retain in himself an undivided interest in common.

There are also instances where the joining of the husband as a grantor is absolutely useless for the reason that the husband has no interest, vested or unvested, present or contingent, to be cut off. Take the case of a married woman having merely a life estate in lands. Prior to the enactment of the state (3 C. S. 3232, Sec. 8k) her husband was required to "join" in order to validate her conveyance by consenting thereto; but there was no reason why he should "join" as a *grantor*, as he had neither interest to convey nor curtesy to extinguish. Nor does it appear, from the language of the act, that a joinder in the *grant* had theretofore been requisite. The act does not say that a married woman may *convey* a life estate without her husband joining in such *conveyance*, but says that she "may *execute* a conveyance" without her husband joining "*therein,*" *i. e.* in such *execution*.

And we may go further, by way of illustration, by assuming a childless married couple over 90 years of age, rendered respectively impotent and sterile by surgical operations. There can be, in such case, no inchoate right of curtesy, and the joinder of the husband in the body of the instrument as grantor can serve no end whatsoever. It would be an idle, nugatory act, ineffective for any purpose. It would add nothing to the grant, or to the effectiveness of the consent

evidenced by the husband's execution and acknowledgment of the instrument.

Will this court, under such circumstances and notwithstanding the express consent of the husband, say that the otherwise idle, meaningless presence of the husband's name in the body of the instrument is so vital to its validity that its absence will render the deed *void*?

If a conveyance of a joint interest or of a life estate is, under the conditions stated *valid*, then *any* deed so executed and acknowledged must be good to convey the interest of the wife.

And if, under the common law and with a freehold interest in the husband during the life of the wife, the rule did, in fact, contemplate the joinder of the husband as a grantor, the further rule should now be applied that when the reason for a rule fails the rule itself fails.

Comparatively few cases are available as precedents from other states as the practice is generally prescribed by statute, but at the time when the following cases were decided it was true in both New Hampshire and Pennsylvania, as in New Jersey, that the deed of a wife was *void* unless her husband "joined" therein. In *Elliott v. Sleeper*, 2 N. H. 525, a mortgage was given to secure a note, and the mortgage recited the wife only as the obligor and grantor, although the husband both executed and acknowledged the instrument. In the course of an opinion holding the mortgage to be good the court say:

It is not possible to shut our eyes upon the recital in the deed that Mary Brown was the wife of Nathaniel Brown, and hence that Nathaniel Brown must in law join with her in the conveyance to render it operative. For

this reason he executed and delivered the deed as his; and now to hold it not to be his would contradict both his acts and his manifest intent, as well as sound analogy derived from the principles and cases before mentioned.

This holding appears to have had the approval of this court in *Sisson v. Donnelly*, 36 N. J. L. 432, where it is cited in the opinion of Chief Justice Beasley at page 441. The Donnelly case may also be cited as an authority for the rule that where the *intention of the parties* "is, on the face of the instrument, clearly and satisfactorily ascertained, and found not to be contrary to any rule of law, the court is bound, if the words will admit of a construction conformable to the intention, to adopt that construction, however contrary it may be to technical meaning and inference."

In the later case of *Woodward v. Seaver*, 38 N. H. 29, the court again upheld the validity of the mortgage of a married woman as obligor and grantor, whose husband executed and acknowledged the instrument, saying, in its opinion:

"In this case Hannah I. Woodward owned the land, and in order to convey her right it was necessary that her husband should join with her in the conveyance; her separate deed would be void, and convey no title. The husband's name does not appear in the body of the deed \* \* \*. Her husband signed and sealed the deed. This would seem to bring the present case very distinctly within the authority of *Elliott v. Sleeper*, 2 N. H. 525."

The case of *Thompson v. Lovrein*, 82 Pa. St. 432, is another example, and the opinion of the court is given below in full:

"*Per Curiam*: This case differs in some particulars from *Jamison v. Jamison*, 3

Wharton 457, yet as the essential thought of a husband's joinder with his wife in her conveyance of her estate is his consent to her act, we think his sealing and signature to the deed, duly acknowledged as his act and deed, fully supply the evidence of this consent. True it is that the entire language of the deed is that of the wife alone even to the concluding words, 'In Testimony Whereof:' yet when the husband signed and sealed it with her, and solemnly declared it to be his deed for the purposes contained in it, he adopted all that was before his signature, The true purpose of the law is therefore answered."

The conclusion seems to necessarily follow that where the man joining in the execution of the deed is sufficiently identified as the husband of the woman who is conveying her interest, such execution, together with his acknowledgment, is a sufficient *consent* by or *concurrence* of the husband, and is such joining in the making and execution of the wife's deed as will validate it as a conveyance of the interest of the wife.

## POINT II.

**Every equitable consideration requires that the deed of Martha Harris be held to be good.**

From whatever angle the transaction is viewed the deed of Martha Harris to Joseph Moffett should be upheld as a valid conveyance of her right, title and interest in the lands described therein.

That she received the consideration, as recited in the deed, is not disputed, and, therefore, complainant, in any event, would have an equitable claim which would bar Martha Harris, or her heirs or devisees, from demanding a further consideration for another deed.

The rights of possession by grantees subsequent to Martha Harris has not been questioned by Martha Harris, or her heirs or her devisees, and delivery of possession by Martha Harris to her grantee, Joseph Moffett, must be presumed from the subsequent devolution of title and possession without objection.

No real or substantial right can be adversely affected by the construction here urged, and no precedent exists against it.

In the nature of the case, where such a situation occurs in an acute form it will be because the heirs or devisees have no real interest and cannot be found, and to hold such deed void will, inequitably and without advantage to anyone, defeat the intent of the original parties, cloud the title, inflict monetary loss, and cause a divesting of interests for which a valid consideration has been paid.

To illustrate: If the deed is *void* in law a grantee for value of the wife obtains only an equitable interest, and a subsequent judgment against the wife will be a valid and enforceable lien, subject only to the equitable rights of such grantee.

Furthermore, as the grantee of the wife acquires only an equitable right measured by the consideration paid, the value of such equitable right will not be enhanced by accretions to the value of the property, but such accretions will be added to the value of the *legal* title, and will be subject to the claims not only of judgment creditors of the wife, but of her heirs or devisees as well.

But it is the policy of the law, in the interest of a sound public policy, to make titles stable and certain, and not unstable and uncertain.

Some effect must be given the instrument, if possible, and, so far as possible, such effect should carry out the clear intent of the parties to it. The acknowledgment states that Samuel Harris, the husband of Martha Harris, acknowledged that he "signed, sealed and delivered" the instrument as his "voluntary act and deed for the uses and purposes therein expressed." Unquestionably Martha Harris intended to convey to Joseph Moffett all her right, title, and interest in the lands described, and equally beyond dispute Samuel Harris intended, at least, to validate his wife's conveyance. The instrument should not be declared void, but its execution and delivery by Samuel Harris, and his acknowledgment that such execution and delivery was to effectuate the purposes expressed therein, should be interpreted as expressing his assent to the deed as a valid conveyance of her interest by his wife.

When a husband signs the deed of his wife evidently intending to effectuate thereby the purposes expressed in the instrument, and evidences such intent by a written acknowledgment that the deed was "signed, sealed and *delivered*" by him "as his voluntary act and deed for the uses and purposes therein expressed," and a good and valid consideration has been paid and received, and all the parties suppose that by such execution and acknowledgment the conveyance has been made effectual, is it reasonable to say that the deed is nugatory to convey the estate of the wife merely because the husband was not made a party grantor when no claim is made that he has thereby granted or extinguished any right, title, or interest he then had in the property?

## POINT III.

Martha Harris' deed may be regarded as in the nature of an appointment of a use, ripened into a fee by the statute of uses upon the death of her husband.

In *Phelps v. Morrison*, 25 N. J. L. 538, one Mrs. Morrison, a married woman, whose husband was living, conveyed certain lands to one Allendorph for a good and valid consideration. As Mrs. Morrison's husband neither executed or acknowledged his wife's deed the conveyance was, at law, void, but this court held that Allendorph was, in equity, a *bona fide* purchaser for value of the entire equitable title to the fee. Mrs. Morrison continued to hold the legal title, subject, of course, to the right of curtesy of her husband.

In the instant case, therefore, the grantee of Martha Harris must also be regarded as the holder of the entire equitable title, subject only to the curtesy right, if any, of Martha Harris' husband, Samuel Harris.

Upon the death of her husband, and the extinguishment of his curtesy right, the naked legal title alone remained in Martha Harris, or in her heirs or devisees.

In practical effect, and by analogy, the conveyance was an appointment of a use in the grantee of Martha Harris, whose only function thereafter was to hold the legal title in order to preserve from extinction the curtesy right of her husband. Upon her death, if she predeceased her husband, her heirs or devisees held the legal title for the same purpose. Upon the death of the husband the use was executed, and there was outstanding only a naked legal title which was thereupon transferred, by the statute of uses, to the then holder of the equitable title.

And if it be urged that the appointment of a use by a married woman also requires the assent of the husband we have it in his execution and acknowledgment of the deed here in question.

#### POINT IV.

The legal title vested in the vendee, by force of the statute, at the expiration of the time appointed by the decree.

This appeal also raises an issue as to the vesting of title under the decree, and this is true irrespective of whether the decree be affirmed or reversed.

It is respondent's contention that, under the statute, 1 C. S. 426, Sec. 45, title vested in the vendee notwithstanding the vendee refused to accept vendor's tender of a deed, and failed and refused to pay or tender the balance of the purchase price.

The statute, section 45 of the Chancery Act, is as follows:

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

The decree is directed to both parties, like all decrees for specific performance, and is equally binding upon each. The decree is equally a decree to convey and a decree to accept a con-

veyance. If the complainant vendee performs, the vendor cannot fail to perform as the statute forces his hand and gives the decree the effect of a conveyance. Conversely, if the complainant vendor tenders performance the vendee cannot defeat such tender by refusing its acceptance, but the statute will, nevertheless, vest the title in the vendee.

The statute, if it acts at all, will act impartially, positively, and irrevocably, upon the expiration of "the time appointed," and may be invoked, in a proper case, by either the vendee or the vendor.

The reference in appellant's brief, to *McVoy v. Baumann*, 93 N. J. E. 638—117 Atl. 725, appears to be based upon a misconception of what that case holds, but, as the language of this court in the opinion filed in that case has been the subject of comment, and probably misunderstanding, by members of the bar, it may be considered proper to discuss somewhat fully the questions mooted in Point II of the Appellant's brief.

In the *Baumann* case, in the opinion of this court as originally filed, was the following paragraph:

"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 action or inaction in complying with the mandate of the final decree."

With that paragraph in that form the Opinion was published in the *Atlantic Reporter*, and so appears at the present time at page 727.

The Court, however, was evidently not satisfied with the term "action or inaction," and subsequently corrected the original draft to read as

follows, in which form it appeared in the Opinion as published in the official report at page 642:

“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.”

If these paragraphs are detached from the context, and also are read without reference to the cited case of *Weehawken Ferry Co. v. Sisson*, 17 N. J. E. 475, one may readily be confused as to the meaning of the paragraph, and, especially, as to the reason for changing the term “action or inaction” to the term “failure.” But a reference to the text and the cited cases will clear up any latent ambiguity.

The paragraph follows, and is parenthetical to, a paragraph holding that an action for the specific performance of a contract to convey land is an action *in rem*; it must, therefore, be identified with the preceding paragraph, as has been done in the syllabus, which, in the official report, reads as follows:

“A suit for specific performance of a contract to convey land situated within the jurisdiction of the court, the decree in which suit operates to convey the premises regardless of the action of the parties in complying with the decree, is a proceeding *in rem* within the rule that such proceeding may be maintained as to property within the jurisdiction of the court, though the defendants cannot be personally served within the jurisdiction.”

All that the syllabus holds is simply that, where the conditions are such that the decree for specific performance will be self-executing under the statute, the action is one *in rem* if the land is within the jurisdiction of the court, notwith-

standing that because the *defendant* is out of the jurisdiction he cannot be personally served.

Doubtless the syllabus was intended to reflect the text, and any ambiguity in the use of the term "failure" in the text is resolved by looking to the holding of this court in the cited case of *Weehawken Ferry Co. v. Sisson, supra*. There it was held, at page 483, that as the decree, under the statute, must "have the same 'operation and effect' as if the conveyance had been executed 'conformable' to such decree," the decree is to be looked to in order to ascertain what title, in fact, was transferred. That is to say, if and when the decree is self-executing because of the statute the complainant gets the title decreed to be conveyed notwithstanding the "failure" of the parties to make the instrument of conveyance exactly "conformable" with the decree, and a deficiency in the conveyance by deed will not deprive the complainant of his rights under the decree, but the decree will carry the entire title to the complainant *ex proprio vigore*.

Giving the term "failure" the meaning of "deficiency" there is nothing in the language of the opinion to justify the conclusion, which some have drawn, that this court intended to hold that in every successful suit for the specific performance of a contract to convey land "the resulting decree \* \* \* operates, *ipso facto*, to convey the *locus in quo*, regardless of the situs of the parties, and their 'failure' (in *any* manner or for *any* reason) to comply with the mandate of the final decree."

To illustrate:

1. If the parties, subsequent to the decree, mutually agree to rescind the contract to convey,

and to restore the *status quo ante*—in other words if *both* parties *intentionally* “fail” to comply with the decree—it seems certain that the decree would *not* operate “to convey the *locus in quo* regardless of \* \* \* their failure to comply with the mandate of the final decree.” The Court has no interest in compelling compliance with the terms of the decree if the successful party elects to forego its benefits. Such decrees do not purport to, and cannot, deprive the parties of their right to negotiate anew concerning their contract, or to make a new or different contract.

2. In a suit by a vendee a decree appointing a time for performance will not operate to convey title under the statute if the vendee fails to pay or tender the purchase price within “the time appointed.” The statute will not arbitrarily divest the vendor of his title, and leave him to recover on his vendor’s lien or by an action at law, notwithstanding the “*failure*” of the vendee to perform, but the vendor may treat such failure as a breach of the contract, and elect to thereupon himself rescind. The decree, by “appointing” a time, makes such time of the essence of the contract and performance *within that time* a condition precedent to the vesting of title. The statute can only be “invoked” by the vendee upon compliance with the condition. *Baker v. Baker*, 97 ~~98~~ N. J. E. 306. The failure of the vendee to comply with the condition within the time so appointed is a breach of the contract, and gives the vendor a right of rescission of which the statute can no more deprive him than can the court where the *contract itself*, or the acts of the parties, have made time of the essence. *Doctorman v. Schroeder*, 92 N. J. E. 676. “The terms of the decree by force of the act, must be construed precisely as the conveyance itself

would have been, if executed *within the time appointed* for its execution." *Weehawken Ferry v. Sisson*, 17 N. J. E. 475-483.

3. In a suit by a *vendor* a decree appointing a time for performance will not operate to convey title under the statute if the vendor fails to tender a deed within "the time appointed." The statute will not arbitrarily force title upon a vendee, and subject him to an action for the purchase price, when the successful vendor has 'failed' to perform, but the vendee may treat such failure as a breach of the contract. Neither the decree nor the statute affect the right of the vendee to rescind for non-performance on the part of the vendor. The decree does not change the terms of the contract, or inject a new term into the contract, but simply makes that certain, *and of the essence of the contract*, which either party had the right to make certain upon reasonable notice to the other party—*i. e.* the time of performance.

There is no discretionary power in the statute itself. It either operates or it does not operate to transfer the legal title at "the time appointed" by the decree. At such time its bolt is shot, and its authority can be thereafter invoked neither by the Court nor by the parties, in such manner as to change the decree, or to cause a divesting of interests. If either party desires a modification of the decree application must be made *before* the expiration of the time appointed—after is too late.

If the failure to comply with the decree be that of the *defendant*, whether vendor or vendee, the statute will, nevertheless, vest the *legal* title in the vendee at the time appointed and he will hold the entire title, as the defendant cannot, by

failing to comply, bar or delay the effect of the statute to give the complainant the enjoyment of the rights reserved to him by the decree.

But, if the failure to comply with the decree is that of the *complainant*, we have a different situation. The decree having made time of the essence of the contract the failure of the complainant, whether vendor or vendee, to comply within the time appointed is such breach of the contract as gives the defendant a right of rescission, and the complainant, because of his failure to comply with a condition precedent, is estopped to invoke the aid of the statute to transfer the *legal* title. *Baker v. Baker*, 97 N. J. E. 306. The result is that the defendant is relieved of his contract, the decree becomes ineffective, because, due to complainant's default, there is no longer an enforceable contract to which it may attach, and the *equitable* title *reverts* in the vendor. *Thommessen v. Absecon Land Co.*, 130 Atl. 518. (Not officially reported.)

Returning now to the instant case. Just as in a suit by a *vendee*, the failure of the defendant vendor to tender a deed exactly "conformable" with the decree (*Weehawken Ferry Co. v. Sisson*, 17 N. J. E. 475), or a failure or refusal to tender any deed (*Fee v. Sharkey*, 59 N. J. E. 284; aff. on opinion below, 60 N. J. E. 446. *Compagnie Universelle, etc. v. U. S. Service Corp.*, 84 N. J. E. 604; aff. on opinion below, 85 N. J. E. 601), will not prevent the vesting of title under the statute, so, in a suit by a *vendor*, the failure of the defendant vendee to pay or tender the purchase price will not prevent the vesting of title under the statute.

The bringing of a suit by the vendor is an election to consider the payment of the purchase

price, or unpaid balance thereof, a condition subsequent, rather than precedent or concurrent, and the failure of the vendee to make such payment by the time appointed will not prevent or delay the vesting of title.

The decree appealed from is unconditional and required the parties to perform within ten days from its date. It contains no saving clause or condition precedent, and the "time appointed" was thereby made an essential term of the agreement to convey. The vendor having kept her tender good title vested in the vendee, under the statute, at the "time appointed"; the initial payment has become a payment of a portion of the purchase price in fact and cannot be recovered back by the vendee; and the vendor has a lien for the unpaid balance of the purchase price, with interest from the date when such balance was payable under the terms of the contract, *subject only* to a divesting of such title and a restoration of the *status quo ante* by a reversal of the decree.

The decree should be affirmed, and the equities adjusted on the basis of a transfer of title ten days after the date of the decree.

Respectfully submitted,

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Solicitor of and of Counsel with Respondent.

