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Notice of Appeal.

(Filed July 31, 1928.)

Essex County Circuit Court

GEORGE MCINTYRE, *Plaintiff*, v. RICHARD DAVIS, ROSE DAVIS, GEORGE JOSEPH WHITEHOUSE and ALICE WHITEHOUSE, *Defendants.*	Action at Law.

To Messrs. CORN & SILVERMAN,
Attorneys of Plaintiff.

TAKE NOTICE that the defendants appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause, upon the following grounds:

1. The Essex County Circuit Court entered judgment in favor of the plaintiff and against the defendants, as requested by the plaintiff, whereas, on the admitted facts, judgment should have been entered in favor of the defendants and against the plaintiff, as requested by the defendants.

2. The said Court failed and refused to rule, on the admitted facts, as requested by the defendants, that the Robert Moran mentioned in the findings, after the foreclosure sale of the mortgages therein mentioned, was the sole owner of the premises in question and that, when he had

conveyed same to the grantee, presumably for a valuable consideration, and that grantee had conveyed to the defendants, for a valuable consideration, the premises in question, the defendants' title to said premises could not, in this action, be collaterally attacked, and that defendants' title to said premises was therefore not defective, whereas the said Court should have ruled to the contrary and in accordance with said request.

3. Said Court ruled that it was not necessary for it to decide the questions set forth in the preceding paragraph but only whether or not the title of the defendants was "such as to make it reasonably certain that it will not be called into question in the future, so as to subject the purchaser to the hazard of litigation with reference thereto" and that it may be possible that, even though the decree in the foreclosure suit involved in this cause may not be here collaterally attacked, the then infants in said foreclosure suit may yet make a direct attack upon that decree and apply to have their interests properly adjudicated, if they were not properly adjudicated in said foreclosure suit, and that the Court of Chancery might decide that such infants, upon reaching twenty-one years of age, took "reasonable" action to that end, and that, under the circumstances, the Court ruled that it was not satisfied that the condition of the title offered by defendants to plaintiff was such as to put Mr. McIntyre in reasonable security that no flaw or doubt would come to disturb his title to the property which he had agreed to purchase and that, therefore, plaintiff was justified in refusing to accept the title that defendants were able to give and that,

therefore, he is now entitled to recover from the defendants the amount paid by him upon signing of the contract, to wit, $1000.00, and search fees of $100.00, together with interest and taxed costs, whereas the said Court should have ruled to the contrary and that plaintiff was not justified in refusing to accept the title the defendants were able to give and that, therefore, the plaintiff was not entitled to recover from the defendants anything, but, on the contrary, that the defendants were entitled to recover judgment against the plaintiff, together with their taxed costs.

WILLIAM A. LORD,
Attorney of Appellants.

Complaint.

(Filed January 29, 1927.)

ESSEX COUNTY CIRCUIT COURT.

GEORGE MCINTYRE, *Plaintiff,* v. RICHARD DAVIS, ROSE DAVIS, GEORGE JOSEPH WHITEHOUSE and ALICE WHITEHOUSE, *Defendants.*	Action at Law.

Plaintiff residing in the City of Newark, Essex County, New Jersey, says that:

1. On November 18, 1925, plaintiff and defendants entered into an agreement wherein and whereby defendants agreed to well and sufficiently convey to plaintiff, on or before May 1, 1926, by

warranty deed, free from all encumbrances, premises in the Township of Livingston, Essex County, New Jersey, for the sum of Thirty-two Thousand ($32,000) Dollars, a true copy of which agreement is annexed hereto, marked "Exhibit A" and made part hereof.

2. On execution of said agreement plaintiff paid to defendants the sum of One Thousand ($1,000) Dollars.

3. Plaintiff was, on May 1, 1926, ready, willing and able to perform said agreement on like performance by defendants, and since that date has been ready, willing and able to perform as aforesaid.

4. On May 1, 1926, defendants were and still are unable to perform said agreement in that the title to said lands and premises is defective or unmarketable in one or more of the respects set out in "Exhibit B" annexed hereto and made part hereof.

5. For the reasons aforesaid plaintiff has elected to rescind said agreement.

6. Plaintiff caused the title to said lands and premises to be examined for which the reasonable fee and cost of the disbursements is Six Hundred and eighty-three ($683) Dollars.

7. Plaintiff has demanded return from defendants of the deposit of One Thousand ($1,000) Dollars paid under said agreement and defendants have failed and refused to return the same.

Plaintiff demands Two Thousand ($2,000) Dollars damages.

CORN & SILVERMAN,
Attorneys for Plaintiff.

COMPLAINT—EXHIBIT "A."

ARTICLES OF AGREEMENT made the Eighteenth day of November in the year of Our Lord One Thousand Nine Hundred and Twenty-five BETWEEN Richard Davis and Rose Davis, his wife and George Joseph Whitehouse and Alice Whitehouse, his wife, all of the Township of Livingston in the County of Essex and State of New Jersey of the First Part; AND George McIntyre of the City of Newark in the County of Essex and State of New Jersey of the Second Part; WITNESSETH that the said party of the first part, for and in consideration of the sum of THIRTY TWO THOUSAND 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 they 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 May, 1926 next ensuing the date hereof, all those lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Township of Livingston, in the County of Essex and State of New Jersey and more particularly described in the copies hereto attached and made a part hereof.

FIRST TRACT.—BEGINNING in the center of the road leading from Livingston corner to Caldwell at the center of a small bridge across the road southeast of the house of John Grannis; running thence (1) northerly along the center of the said road two

chains and eighty five links; thence (2) south sixty eight degrees and forty five minutes east through a stake and pile of stones on the East side of the road twelve chains and seventy links; thence (3) south twenty one degrees west three chains and seventeen links; thence (4) north sixty eight degrees forty five minutes west twelve chains and sixty five links more or less to the center of the road; thence (5) north nine degrees and fifty minutes east thirty five links to the center of a small bridge and the place of Beginning.

Containing about four acres more or less.

SECOND TRACT.—BEGINNING at a stake in the middle of the road leading from Springfield to Caldwell at the northwest corner of Moses Wright's land; thence along his line south seventy two degress fifty minutes east sixteen chains and twelve links to the line of Pell Teed's Estate; thence along his line north seventeen degrees thirty minutes east three chains nine links to a corner of Parker Teed's; thence along his line North seventy four degrees forty minutes west fifteen chains ninety links to the Caldwell Road; thence south twenty four degrees five minutes west two chains sixty links along said road to the place of Beginning.

Containing four and fifty five hundredths acres, more or less.

THIRD TRACT.—BEGINNING at a point in or near the center of the road leading from Livingston to Caldwell at the southwesterly corner of the house lot of Edward Moran (formerly the property of Elizabeth Pickett); running thence (1) with the southerly line of said lot south sixty eight degrees and forty five minutes east seven hundred and ninety two feet more or less to the southerly corner of said lot; thence (2) with the rear line of said

lot north twenty one degrees east two hundred and nine feet and twenty two hundredths of a foot to the easterly corner of said lot; thence (3) with the northerly line of said lot north sixty eight degrees and forty five minutes west eight hundred and thirty eight feet and two tenths of a foot to or near the center of the aforesaid road; thence (4) along the center of said road northeasterly sixteen feet more or less to the corner of Daniel Granniss' land; thence (5) with Granniss' southerly line south sixty eight degrees and forty five minutes east eight hundred and thirty nine and one half feet to Granniss' southerly corner; thence (6) with Granniss' rear line and the line of G. R. Collins and Edward Stephens' Jr., north twenty one degrees east six hundred and eighteen feet and eleven inches to the easterly corner of the land of Edward Stephens, Jr., thence (7) with the north line of Stephens' lot north sixty eight degrees and forty five minutes west eight hundred and seventy three feet more or less to his corner in the aforesaid road; thence (8) north twenty five degrees and thirty minutes east along said road one hundred and twenty feet to land of Mrs. Adelia M. Halsey; thence (9) south (with Mrs. Halsey's land) sixty eight degrees and forty five minutes east eleven hundred and forty eight feet and five inches more or less to her corner in the land of the estate of Caleb W. Edwards, deceased; thence (10) south twenty one degrees west with the line of the lands of the estate of C. W. Edwards and others nine hundred and seventy three feet more or less to the corner of land of Leonard Volk; thence (11) with the line of Volk's land north seventy one degrees and thirty minutes west ten hundred and sixty seven feet more or less to the road; thence (12) along the Caldwell Road northeasterly

ninety seven feet more or less to the place of Beginning.

FOURTH TRACT.—BEGINNING at an iron rod driven to the surface of the ground in or near the middle of the road leading from Livingston to Caldwell said rod, is distant twenty eight links northeasterly on said road from where the range of the northerly end of the extension of the house of John Granniss produced, would intersect said road; and runs thence (1) along said road north eight degrees east one chain and thirty six links to a point at a turn in said road opposite and twenty eight links to the right of a large maple tree in the line of lands of John Granniss and the estate of Moses Wright, deceased; thence (2) still on said road north eighteen degrees and fifteen minutes east one chain and seventy six links to an iron rod driven to the surface of the ground for the outside corner of the lot hereby conveyed; thence (3) with other lands of the said Halsey south sixty eight degrees and forty five minutes east thirteen chains and twenty eight links to a stake and stones for the corner; thence (4) at right angles to last line described and with lands of said Halsey south twenty one degrees and fifteen minutes west three chains and nine links to a stake and stones; thence (5) at right angles to the line last described and parallel with the third line herein described north sixty eight degrees and forty five minutes west twelve chains and seventy six links to the place of Beginning.

Containing four acres of land more or less.

This conveyance is intended to convey the land of which Edward Moran, deceased, died seized and being known as the Moran Farm.

Being the same premises conveyed to George Joseph Whitehouse and Richard E. Davis by Deed of the Thorvale Holdings Inc. by deed dated June 6th, 1923, and recorded June 26th, 1923, in the Office of the Register of Essex County, New Jersey in Book Y-68 of Deeds for said County on pages 76-78.

And the said George McIntyre for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their 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 THOUSAND DOLLARS as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

$1,000.00 One Thousand Dollars cash on the signing of this agreement the receipt whereof is hereby acknowledged.

$14,000.00 Cash on the date and day of the delivery of the aforesaid deed, May 1st, 1926.

$17,000.00 Seventeen thousand dollars by executing and delivering a certain purchase money mortgage in that amount for the period of three years at six percent interest to Richard Davis and George Joseph Whitehouse which bond and mortgage shall be prepared by H. Edward Wolf at the expense of the said party of the second part hereof and which mortgage shall contain a release clause in which the mortgagee agrees to release

to the mortgagor on the payment of $1,000.00 and interest any acre of said tract excepting the acre upon which the large dwelling stands which release clause shall be $3,000.00.

Taxes, water, insurance, interest &c. to be apportioned as of the date and day of the delivery of the aforesaid Deed.

And It Is Further Agreed, by the parties to these presents, that the said party of the second part, himself, his heirs and assigns, may enter into and upon the said land and premises on the First day of May, 1926, next ensuing the date hereof, and from thence take the rents, issues and profits to him 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 H. Edward Wolf, 790 Broad Street, Newark, N. J., between the hours of ten in the forenoon and three o'clock in the afternoon on the said First day of May, 1926, next ensuing.

Parties of the first part warrant that the acreage in the property herein described is not less than twenty-four (24) acres, and the total street frontage on Livingston Avenue of the premises herein described is not less than 817.05 feet.

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 One Thousand ($1,000) Dollars which they hereby fix and settle as liquidated

damages therefor. The right of specific performance is hereby waived by parties of the first part.

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

Signed, sealed and delivered
in the presence of

	RICHARD DAVIS	(LS)
CHARLES G. ZAHN	GEORGE JOSEPH WHITEHOUSE	(LS)
	ROSE DAVIS	(LS)
WILLIAM SANDMEYER	ALICE WHITEHOUSE	(LS)
as to GEORGE MCINTYRE.	GEORGE MCINTYRE	(LS)

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

BE IT REMEMBERED that on this 18th day of November, in the year of Our Lord One Thousand Nine Hundred and Twenty-five before me, A Notary Public of N. J. personally appeared Richard Davis and Rose Davis, his wife and George Joseph Whitehouse and Alice Whitehouse, his wife, who I am satisfied are the Grantors in the within Agreement named; and I having first made known to them the contents thereof, did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed: And the said Rose Davis wife of aforesaid Richard Davis and Alice Whitehouse wife of aforesaid George Joseph Whitehouse being by me privately examined, separate and apart from their husbands, did further acknowledge that

they signed, sealed and delivered the same as their voluntary act and deed, FREELY, without any fear, threats or compulsion of their said husbands.

CHARLES G. ZAHN
A Notary Public of N. J.
My Commission expires 6-12-29

COMPLAINT—EXHIBIT "B."

1.

(a) On March 9, 1903 one Edward Moran died intestate and seized of the premises described in the agreement marked "Exhibit A."

(b) On September 28, 1910 one Robert Moran filed his bill of complaint in the Court of Chancery of New Jersey for foreclosure of certain mortgages on said lands and premises made by the said Edward Moran, in his lifetime.

(c) Such procedure was had thereon that a final decree was therein entered by virtue of which a writ of Fieri Facias was issued to the Essex County Sheriff who sold said lands and premises.

(d) The title to said lands and premises was derived by defendants solely through conveyance by the purchaser at such foreclosure sale.

(e) Said Edward Moran left him surviving as his next of kin and heirs at law, among other persons, one Ralph Moran, an infant son of Peter Moran, who was a deceased son of said Edward Moran.

(f) Said Ralph Moran was not made a party defendant in said foreclosure suit.

(g) Said Ralph Moran still has an outstanding

right, title and interest in the said lands and premises.

2.

(a) Subsections a, b, c and d of aforesaid paragraph 1 are repeated and made part hereof.

(b) Said Edward Moran left him surviving as his next of kin and heirs at law, among other persons, one May Moran, an infant daughter of said Edward Moran.

(c) Said May Moran was not made a party defendant in said foreclosure suit.

(d) Said May Moran still has an outstanding right, title and interest in the said lands and premises.

3.

(a) Subsections a, b, c and d of aforesaid paragraph 1 are repeated and made part hereof.

(b) Said Edward Moran left him surviving as his next of kin and heirs at law, five sons, three daughters, a daughter of a deceased son and a deceased daughter's heirs.

(c) At the sale under the foreclosure as aforesaid one Edward Moran, one of the next of kin and heirs at law of said deceased Edward Moran, purchased the said premises and accepted the deed therefor.

(d) Said Edward Moran conveyed the said premises to the predecessors in title of defendants.

(e) By virtue of the purchase by said Edward Moran of the said premises aforesaid he became the trustee of and for the other owners in common

of said premises, to wit, other next of kin and heirs at law of said deceased Edward Moran.

(f) There is outstanding the rights, titles and interest of the other next of kin and heirs at law of said deceased Edward Moran in the said lands and premises.

4.

(a) Subsections a, b, c and d of aforesaid paragraph 1 are repeated and made part hereof.

(b) Among the defendants in said foreclosure suit were Jean Moran and Mary R. Moran who were, and the said bill of complaint recites as, infants.

(c) On December 14, 1910 an order was made in said foreclosure proceedings appointing the clerk of the Court of Chancery as guardian for said infant defendants.

(d) On December 14, 1910 said clerk as guardian entered an appearance for said infant defendants.

(e) On December 14, 1910 an interlocutory decree was entered in said cause against said infant defendants.

(f) The entry of said interlocutory decree was irregular as concerns said infant defendants.

(g) The rights, titles and interests of said infant defendants, as next of kin and heirs at law of said Edward Moran were not cut off in said foreclosure suit and are still outstanding.

5.

(a) Subsections a, b, c and d of aforesaid paragraph 1 are repeated and made part hereof.

(b) Subsections b, c, d and e of aforesaid paragraph 4 are repeated.

(c) In said foreclosure suit the master to whom the cause was referred issued no summons directed to the infants.

(d) The master's report on which the final decree in said cause was entered makes no report as to any right, title or interest of said infant defendants in the lands and premises.

(e) The entry of such final decree was irregular as concerns said infant defendants.

(f) The rights, titles and interests of said infant defendants, as next of kin and heirs at law of said Edward Moran were not cut off in said foreclosure suit and are still outstanding.

Answer.

(Filed March 25, 1927.)

ESSEX COUNTY CIRCUIT COURT.

GEORGE MCINTYRE, *Plaintiff*, *v.* RICHARD DAVIS, ROSE DAVIS, GEORGE JOSEPH WHITEHOUSE and ALICE WHITEHOUSE, *Defendants.*	Action at Law.

Defendants, residing in the Township of Livingston, County of Essex and State of New Jersey, say that:

Answer.

1. Paragraphs 1 and 2 are admitted.

2. Paragraphs 3, 4 and 5 are denied.

3. Defendants have no knowledge sufficient to form a belief as to the allegations in Paragraph 6.

SECOND DEFENSE.

1. Plaintiff failed to pay or tender to defendants the balance of the purchase money in accordance with the terms of said agreement either at the appointed time, May 1, 1926, or at any other time, and finally admitted his inability to do so because of lack of funds and for no other reason, and thereby breached said agreement, whereupon, under the terms of said agreement, defendants became and were entitled to retain the $1000.00 paid as aforesaid as liquidated damages for plaintiff's breach of said agreement in accordance with the express terms of said agreement.

THIRD DEFENSE.

1. Plaintiff did not call to the attention of the defendants or make any claim to them or any of them that there were any alleged defects or imperfections to defendants' title to the premises, either on or before May 1, 1926, or thereafter, before the commencement of this action, and, if he had done so, defendants would have cured any alleged defects or imperfections, if any, and would have conveyed a clear title to said premises to plaintiff if plaintiff had ever been prepared, ready, able and willing to carry out the terms of said agreement as aforesaid.

WILLIAM A. LORD,
Attorney of Defendants.

Reply.

(Filed April 8, 1927.)

ESSEX COUNTY CIRCUIT COURT.

GEORGE MCINTYRE, *Plaintiff*, v. RICHARD DAVIS, ROSE DAVIS, GEORGE JOSEPH WHITEHOUSE and ALICE WHITEHOUSE, *Defendants.*	Action at Law.

Plaintiff replying to the defendants' Answer, says that:

1. He joins issue on the answer.

2. He denies the matters contained in the "Second Defense."

3. He denies the matters contained in the "Third Defense."

CORN & SILVERMAN,
Attorneys of Plaintiff.

Findings of Trial Court.

(Filed July 23, 1928.)

ESSEX COUNTY CIRCUIT COURT.

GEORGE MCINTYRE,
Plaintiff,

v.

RICHARD DAVIS, ROSE DAVIS, GEORGE JOSEPH WHITEHOUSE and ALICE WHITEHOUSE,
Defendants.

} Action at Law.

This case was tried before Judge Nelson Y. Dungan and, by consent of the parties, upon certain stipulated facts and questions of law upon which the court's ruling was requested and upon which the court finds and rules as follows:

1. On November 18, 1925, defendants agreed to convey to the plaintiff certain premises located in Livingston, in the County of Essex, New Jersey, for the sum of $32,000, on or before May 1, 1926, which time was, by consent of the parties, extended to June 15, 1926, and upon the execution of that agreement plaintiff paid to defendants the sum of $1,000, the amount called for by the agreement to be paid at that time, and on June 15, 1926, it is admitted for the purposes of this action, plaintiff was ready, able and willing to perform his part of the contract and defendants were ready and willing to perform their part by conveying said premises to plaintiff but plaintiff refused to accept title from the defendants upon the ground that they could not at that time "well and sufficiently convey" to

plaintiff "by deed of warranty, free from all encumbrance," as provided in the agreement, and that therefore their title was not marketable because of these reasons: On March 9, 1903, one Edward Moran died intestate, seized of the premises in question which were then encumbered by three mortgages, aggregating $1800 principal, and the said Edward Moran left several children and grandchildren, and, in 1906, his son, Robert Moran, took assignments of these three mortgages and held them until 1910 when he filed his bill in the Court of Chancery for their foreclosure, naming as defendants therein all the other heirs (of whom two were minors), and John H. Palmer, who was in possession of the mortgaged premises, and, on December 14, 1910, the Clerk of the Court of Chancery was appointed guardian ad litem for the infants and on that day entered an appearance for them and on that day a decree *pro confesso* was taken against all the defendants and the matter was referred to a master, and the record in the Court of Chancery does not disclose any master's summons issued to the infants, nor does the master's report specifically mention the infants, and the master reported that there was due the complainant $2102, and final decree was entered on the master's report on January 16, 1911, and a *fi. fa.* was issued and the mortgaged premises sold in the early part of 1911 by the Sheriff of the County of Essex to the complainant, Robert Moran, the son of said Edward Moran, deceased, and who was a tenant in common of said premises with the other heirs at law of said Edward Moran, and said sale was confirmed and Sheriff's deed delivered to said Robert Moran, and title of the defend-

ants in this action is derived through mesne conveyances from the successors in title of said Robert Moran to said premises.

2. Plaintiff requested the Court to rule that Robert Moran, who purchased the three mortgages in 1906 and later purchased the premises in question at the foreclosure sale of said mortgages, must be regarded as a trustee of the other tenants in common and not as the sole owner of the premises in question and that, therefore, defendants' title, acquired through mesne conveyances from Robert Moran alone, is defective, and the defendants asked the Court to rule, on the contrary, that said Robert Moran, after the foreclosure sale of said mortgages, was the sole owner of said premises and that when he had conveyed same to the grantee, presumably for valuable consideration, and that grantee conveyed to the defendants, for a valuable consideration, the premises in question, their title to said premises could not be thus collaterally attacked and defendants' title to said premises was therefore not defective, and the Court ruled that it is not necessary for it to decide these questions but only whether or not the title of the defendants was "such as to make it reasonably certain that it will not be called into question in the future, so as to subject the purchaser to the hazard of litigation with reference thereto," and the Court rules that it may be possible that, even though the decree in the foreclosure suit involved in this cause may not be here collaterally attacked, the then infants in said foreclosure suit may yet, upon a direct attack upon that decree, apply to have their interests properly adjudicated, if they were not properly adjudged in said foreclosure suit, and

that the Court of Chancery might decide that such infants, upon reaching twenty-one years of age, took "reasonable" action to that end, and that, under the circumstances, the Court rules that it is not satisfied that the condition of the title offered by defendants to plaintiff was such as to put Mr. McIntyre in reasonable security that no flaw or doubt would come up to disturb his title to the property which he had agreed to purchase and that, therefore, he was justified in refusing to accept the title which the defendants were able to give, and that, therefore, he is now entitled to recover from the defendants the amount paid by him upon the signing of the contract, to wit, $1,000 and search fees of $100.00 together with interest from November 18, 1925, amounting to $161 making a total of $1,261, and taxed costs including costs on original judgment by default which was set aside on motion to reopen same, to which ruling defendants object as ground for appeal.

NELSON Y. DUNGAN,
Circuit Court Judge.

Judgment.

(Entered July 21, 1928.)

ESSEX COUNTY CIRCUIT COURT.

42295

GEORGE MCINTYRE, *Plaintiff*, v. RICHARD DAVIS, ROSE DAVIS, GEORGE JOSEPH WHITEHOUSE and ALICE WHITEHOUSE, *Defendants*.	Action at Law. Tried Without a Jury. Judgment entered July 21, 1928. Damages $1,261.00 Costs 104.91 Total $1,365.91

CORN & SILVERMAN,
Attorneys of Plaintiff.

Judgment tried without a Jury in the above entitled action was rendered on the Twenty-first day of July A. D. Nineteen Hundred and Twenty-eight, in favor of the plaintiff George McIntyre and against the defendants Richard Davis, Rose Davis, George Joseph Whitehouse and Alice Whitehouse for the sum of One Thousand Two Hundred and Sixty-one dollars ($1,261.00) damages and One Hundred Four Dollars and ninety-one cents costs of Suit.

Judgment entered and signed July 21, 1928.

WILLIAM S. GUMMERE,
Judge.

JOHN H. SCOTT,
Clerk.

Recorded in Book 105 Circuit Court Judgments, page 198.

Decision.

(Filed July 23, 1928.)

ESSEX COUNTY CIRCUIT COURT.

GEORGE MCINTYRE,
Plaintiff,

v.

RICHARD DAVIS, *et als.,*
Defendants.

DUNGAN, J.:

This case was submitted to the Court for trial without a jury upon an agreed stipulation of facts from which it appears that under date of November 18, 1925, the defendants agreed to convey to the plaintiff certain premises located in Livingston, Essex County, New Jersey, for the sum of $32,000.00, on or before May 1st, 1926, which time was, by consent of the parties extended to June 15th, 1926. Upon the execution of that agreement the plaintiff paid to the defendants the sum of $1,000.00, the amount called for by the agreement to be paid at that time; that on June 15th the plaintiff was ready, able and willing to perform his part of the contract and to pay and secure the balance of the purchase price, and the defendants were ready and willing to perform their part of the agreement by conveying the premises to the plaintiff, but the plaintiff refused to accept the title from the defendants upon the ground that they could not at that time "Well and sufficiently convey" to the plaintiff "By deed of warranty free from all encumbrance," as provided in the agree-

ment, because of other outstanding interests and that therefore the title was not marketable, for the reasons that on March 9, 1903, one Edward Moran died intestate seized of the premises in question, which were then encumbered by three mortgages aggregating $1,800.00 of principal. Edward Moran left several children and grandchildren. In 1906 his son Robert Moran took assignments of the three mortgages and held them until 1910, when he filed his bill in the Court of Chancery for their foreclosure, naming as defendants therein all of the other heirs (of whom two were minors) and John H. Palmer, who was in possession of the mortgaged premises. On December 14, 1910, the Clerk of the Court of Chancery was appointed guardian *ad litem* of the infants and on that day he entered an appearance for them, and on the same day a decree *pro confesso* was taken against all of the defendants and the matter was referred to a Master. The record does not disclose any master's summons issued to the infants nor does the master's report specifically mention the infants. The master reported that there was due to the complainant $2,102.00. Final decree was entered on the master's report January 16, 1911, and a *fi. fa.* was issued and the mortgage premises sold in the early part of 1911 by the Sheriff of the County of Essex to the complainant, Robert Moran, a son of Edward Moran, deceased, who was a tenant in common of the said premises with the other heirs at law of the said Edward Moran. The sale was confirmed and the deed delivered to Robert Moran. The title of the defendants in this action is derived through mesne conveyances from Robert Moran.

The plaintiff insists that the title is defective be-

cause the record does not show that any master's summons was issued to the infants and because it fails to mention the infant defendants, at all, but I think this contention is without merit, as the presumption should rather be in favor of the legality of the proceedings and that all the necessary requirements in the foreclosure suit were complied with, as "In accordance with general rules the judgment or decree in a foreclosure action is conclusive on all persons who were properly made parties to the action," 42 C. J. 164. As was stated by Van Fleet, V. C., in Shultz *v.* Sanders, 38 N. J. Eq. 154 at page 156 "It may be that the decree in this case was made as against the infant defendants, on insufficient proof, but, so long as the decree stands, it concludes both the subject matter of the suit and the parties to the suit."

However, the pertinent words in that statement are "So long as the decree stands," and it may be possible that even though the decree in the foreclosure suit involved in this case may not be here collaterally attacked, these infants may yet, by a direct attack upon that decree, apply to have their interests properly adjudicated, if they were not properly adjudged in the foreclosure suit; if the Court of Chancery shall decide that such infants, upon reaching twenty-one years of age, took "seasonable" action to that end.

It is also urged on behalf of the plaintiff that Robert Moran, who purchased the three mortgages in 1906 and later purchased the premises in question at the foreclosure sale of said mortgages, must be regarded as the trustee of the other tenants in common and not as the sole owner of the premises.

It is not necessary for the Court to decide that question, and to say, as insisted on behalf of the

defendants, that because the decree of the Court of Chancery is not open to collateral attack here, the plaintiff cannot recover; but, it is necessary for this Court to determine only whether or not the title of the defendants was "Such as to make it reasonably certain that it will not be called into question in the future, so as to subject the purchaser to the hazard of litigation with reference thereto (Bier *v.* Walbaum, 131 Atl. 888) either in this Court or in some other Court. It is a matter not only of how this Court would decide the questions involved, but also how some other Court might decide them. The same question arises in a case of this kind as in a suit for specific performance, and in a case for specific performance, Breitman *v.* Jaehnal, 132 Atl. p. 291 at p. 293, decided by V. C. Berry and affirmed by the Court of Errors and Appeals upon his opinion, 135 Atl. 915, he says "It has been uniformly held in this state that a Court will never compel a purchaser to take a title unless it be one which puts the purchaser in all reasonable security that no flaw or doubt will come up and disturb its marketable title; provided that the doubt be real and not fanciful."

That the doubt in this case is not fanciful, but real, appears by many decisions of the Court of Chancery of this State that a tenant in common in possession of common property occupies a confidential relation to his co-tenants, and because of this relation there is an implied obligation on his part to sustain and protect the common title. "Therefore, if a co-tenant in possession of common property purchase that property, either directly or indirectly, at a sale under foreclosure of a mortgage, the purchase will be deemed to have been made for the benefit of all of the co-tenants."

Breitman *v.* Jaehnal, *supra.* To the above quotation the V. C. adds "Provided however, the other co-tenants elect within a reasonable time so to consider the purchase and offer to contribute their respective proportions of the purchase price."

Usually, what is a "Reasonable time," is a question of fact for a jury in a law Court or for the Judge where the case is tried without a jury, but not so in this case, as any attack upon the action of Robert Moran by his co-tenants would undoubtedly be made to the Court of Chancery, and no finding of this Court upon the question of reasonable time, would be binding upon that Court.

Under these circumstances, as shown by the proofs I am not satisfied that the condition of the title was such as to put Mr. McIntyre in reasonable security that no flaw or doubt would come up to disturb his title to the property which he had agreed to purchase and that therefore he was justified in refusing to accept the title which the defendants were able to give, and that therefore, he is now entitled to recover back the amount paid by him upon the signing of the contract, $1,000.00 and interest from November 18, 1925, $161 and reasonable search fees, which it is stipulated shall be $100, are stated.

Judgment will be entered in favor of the plaintiff and against the defendant for one thousand two hundred and sixty-one dollars.

NELSON G. DUNGAN,
Circuit Court Judge.

New Jersey Court of Errors and Appeals

GEORGE MCINTYRE, *Plaintiff-Appellee,* *v.* RICHARD DAVIS, ROSE DAVIS, GEORGE JOSEPH WHITEHOUSE and ALICE WHITEHOUSE, *Defendants-Appellants.*	Action at Law. Appeal from Essex Circuit Court.

BRIEF OF DEFENDANTS-APPELLANTS.

This action was brought by plaintiff to recover the amount he paid defendants on account of the purchase price of certain property, together with search fees, and deed for which he refused to take because he says defendants were not able to deliver a good title to the property in question as they and their predecessors in title obtained title to same through a conveyance from Robert Moran who purchased same at a foreclosure sale in proceedings by him to foreclose certain mortgages on the property in question which he had acquired by assignment, said property having descended to him and the other children and grandchildren of his father, Edward Moran, it being alleged (1) that the said Robert Moran took as a trustee for the other heirs of Edward Moran and that their interests are still outstanding, and (2) that the master to whom the said cause was referred issued no summons directed to two infant defendants and made no report as to their interests in the premises, so far as the record in the

Court of Chancery discloses, and that, therefore, their interests were not cut off and are still outstanding (see pp. 14 and 15 of Case), other alleged defects mentioned in the complaint having been abandoned. The case was tried before Circuit Court Judge NELSON Y. DUNGAN upon certain stipulated facts set forth in the findings (p. 18) and the Court gave judgment in favor of plaintiff and against the defendants for the amount claimed (p. 22).

The alleged defects as to the irregularity of the foreclosure proceedings, secondly above set forth, were apparently decided by the Court below to be without merit (p. 25, line 4-line 21), but as to the other contention of plaintiff, firstly above set forth as to the purchaser at the Sheriff's sale holding title as trustee for the other tenants in common, it apparently decided in his favor (see p. 25, line 33-line 41; pp. 26 and 27, and findings pp. 20 and 21), which lead to the judgment in favor of plaintiff, from which adverse ruling and judgment the defendants appeal as set forth in the notice of appeal (pp. 1, 2 and 3).

The sole question at issue is as to whether or not the defendants were able to "well and sufficiently convey * * * by deed of warranty free from all encumbrance" (p. 5, line 25-line 27) to the plaintiff the premises in question, involving, of course, the transfer of a good title at law. We will discuss this subject under the following heads, to wit:

1. In order for the plaintiff to succeed in this action the burden was upon him to show a defect in the title of the defendants and this he did not do.

2. If there were any latent equities in the property in favor of others than the defendants and as against the original purchaser at the foreclosure sale, Robert Moran, they could not be enforced as against

these defendants who were bona fide purchasers for value without notice and whose title to the premises was therefore unassailable.

3. The defendants' title to the premises in question is not subject to attack collaterally as in this action, being founded upon a final decree of the Court of Chancery and sale pursuant to said decree, which was confirmed by the Court, and which foreclosed any of the alleged equities that the defendants in that suit might have.

I.

In order for the plaintiff to succeed in this action the burden was upon him to show a defect in the title of the defendants and this he did not do.

Conceding that, if a co-tenant in possession of common property either directly or indirectly purchases same at a sale under foreclosure of a mortgage, the purchase will be deemed to have been made for the benefit of all the co-tenants, provided the other co-tenants elect, within a reasonable time, so to consider the purchase and offer to contribute their respective portions of the purchase price, as stated by Vice-Chancellor BERRY in the case of *Breitman* v. *Jaehnal*, 99 N. J. Eq. 243, and affirmed by this Court in 100 N. J. Eq. 559; still there was no proof in this case that the other co-tenants of Robert Moran had ever elected to consider the purchase as one made for their benefit or intended so to do, nor was there any proof that they had offered to contribute their respective portions of the purchase price, within a reasonable time or otherwise, nor was there any proof that they had not participated in the distribution of surplus money in said foreclosure suit or had not acquiesced in the possession of the premises in

question by the said Robert Moran and his successors in title for a period of some seventeen years or more, or had not received their share of the money for which he afterwards sold the property or had not otherwise signified their acquiescence in the purchase of said property by Robert Moran in his own name and in his own right. The learned trial judge seems to have decided the case on the theory that proof on these points should have been submitted by the defendants instead of by the plaintiff.

In a suit brought by a vendor against a vendee for specific performance, the plaintiff or complainant must show that he has a good and marketable title, but in an action brought by a vendee for the return of his deposit money he must show that the title offered by the defendant is defective, and there was no proof in this case that the title offered by the defendants to the plaintiff was defective.

It is well settled that in an action based on the failure or defect of title the burden is upon plaintiff to show that defendant's title is not good or that the conveyance tendered would not pass a good title. 39 Cyc. 2099 and cases cited.

To entitle plaintiff to recover under the implied obligation inherent in the contract, such as the one in question (p. 5), that the vendor must make good title, or, under the express obligation in said contract "to well and sufficiently convey" the premises in question "by deed of warranty free from all encumbrance" (p. 5, line 25-line 28), plaintiff is bound to establish that the conveyance tendered by defendants would not pass to him a good title; see *Meyer* v. *Madreperla,* 68 N. J. L. 258, where the Court said (p. 267):

> "Whether a bill by defendants praying that plaintiffs should be decreed to specifically perform this contract would have been dismissed upon the conceded facts of this case is open

to question. The alleged flaw in the title consists in the possibility—it can hardly be called a probability—that Patrick may appear, or be shown to have been alive so as to have become interested in the share of Michael under the terms of the will. In respect to the doctrine that a purchaser will not be compelled to take a doubtful title, Lord Hardwicke observed that the 'court must govern itself by a moral certainty, for it is impossible, in the nature of things, that there should be a mathematical certainty of a good title.' Lyddall *v.* Weston, 2 Atk. 20. And Mr. Sugden declared that a purchaser would not be permitted to object to a title on account of a mere probability, 'because a court of equity, in carrying agreements into execution, governs itself by a moral certainty; it being impossible, in the nature of things, there should be a mathematical certainty of a good title.' Sugd. Vend. (1st ed.) 214. In all deductions of title there are possibilities of error. A conveyance in the chain of title and necessary to its completeness, though appearing to be properly witnessed and acknowledged, and therefore capable of being proved by its production, or by its record under the statute, may afterward be shown to have been a forgery. A marriage essential to the descent of the land in the chain of title may afterward be shown to have been a meretricious union and its issue illegitimate. Proof that Patrick embarked in 1879 on a vessel, which was wrecked on a dangerous coast, and had not appeared or been heard of since that time, would raise a presumption of death without the statute, yet there would be a possibility that he escaped and was yet alive. It may be well questioned whether any of such possibilities should deter a court of equity from enforcing the contract to purchase. Mr. Waterman, on a review of the cases cited by him, declared that when the title rests on a presumption, and if the question were before a court of law, it would be the duty of the judge to direct the jury to find in favor of it, specific performance will be enforced. Waterm. Spec.

Perf., Sec. 416. Whether specific performance would have been decreed upon the facts disclosed in the bill of exceptions need not be decided. In actions at law the implied agreement for title in such a contract will be satisfied by a title good at law, upon the proofs under the rules of evidence. To recover at law for a breach of such a contract it must be shown that the title tendered was not a title good at law. The discretionary power of a court of equity with respect to a title which is doubtful, though good, is not within the province of a court of law, or a jury therein * * * (p. 269). The case upon which we must act involves the propriety of the direction of a verdict on uncontroverted facts which established, by the presumption arising therefrom, that defendants had good title to the land plaintiffs had contracted to purchase. Whether the possibility that those presumptions might afterward appear to be erroneous would induce a court of equity, in its discretion, to deny specific performance or not, I think that the trial judge would have erred if he had submitted that question to the discretion of the jury. As the proofs made out a good title at law, the direction of a verdict for the defendants upon the issue made by the pleadings was proper."

There can be no question but that the defendants in this case had a good title at law to transmit to plaintiff.

The case of *Brant* v. *Nugent*, 100 N. J. Eq. 396, cited by my adversary in support of the doctrine that a relation of trust and confidence exists, as a matter of law, between co-tenants holding under the same conveyance or devolution of title, cites, at page 399, Freeman on Co-Tenancy and Partition (2nd Ed.), Section 155. By referring to this book you will find that the author says, in the following Section 156:

"The purchase made by a co-tenant of an outstanding title or incumbrance is not void,

nor does the interest so acquired by him, or any part of it, by operation of law, vest in his co-tenants. They may not wish to share in the benefits of his purchase, for, in their judgment, the title purchased by him may not be paramount to that before held in common. The law gives him a privilege which he may assert. This privilege consists in the right to obtain a conveyance of the title bought in, upon their paying their share of the price at which it was bought. The privilege may be waived by an express refusal to reimburse the co-tenant for his outlay, or by such a course of action as necessarily implies such a refusal. The right of a co-tenant to share in the benefit of a purchase of an outstanding claim is always dependent on his having, within a reasonable time, elected to bear his portion of the expense necessarily incurred in the acquisition of the claim. A most natural and material inquiry, then, is what is a reasonable time? To this inquiry no positive answer can be given. In this, as in all other questions in regard to reasonable time, no doubt each case must necessarily be determined upon its own peculiar circumstances. The co-tenant asking a court of equity to award him the benefit of a purchaser must show reasonable diligence in making his election. Whatever delay he may have occasioned must be entirely consistent with perfect fair dealing on his part, and in no wise attributable to an effort to retain the advantages while he shrinks the responsibilities of the new acquistion. If his delay in making his election known can be justly accounted for on the theory that he was waiting as 'a means of speculation for himself, by delaying until the rise of the land, or some event yet in the future, shall determine his course, he will be deemed to have repudiated the transaction and abandoned its benefits.' Therefore, when a co-tenant repudiated the purchase when made, and for more than a year afterward refused to contribute his ratio of price, he was, in equity, denied all right to participate in the benefit of the purchase.

> Hence a co-tenant cannot maintain ejectment by showing that the legal title has been acquired by his co-tenant. Laurence *v.* Webster, 44 Cal. 385."

That may be a good title at law, which a court of equity in the exercise of its discretion will not force on an unwilling purchaser. *Dobbs* v. *Norcross*, 34 N. J. Eq. 327. See also *Eisler* v. *Halperin*, 89 N. J. L. 278, 280; *Van Riper* v. *Wickersham*, 77 N. J. Eq. 232; *Saracino* v. *Kosower Construction Co.*, 6 N. J. Adv. R. 255, 258.

None of the cases which plaintiff-appellee cites in support of his contention is in point. If his argument were sound, no tenant in common under a title derived from the same fountain head as that of his co-tenants would be permitted to take an assignment of mortgages that were encumbrances upon the property in question and pay full value for same in order to protect such property and ever be at liberty (even if his co-tenants refused to pay their share thereof) to enforce the payment of the money he had so paid for such mortgages by a sale of the property in foreclosure proceedings and buy the property in at public foreclosure sale himself in case no one else would bid as much as he did, which, we respectfully urge, is a wholly untenable proposition.

Of course a mortgagee can purchase at the foreclosure of his mortgage, but subject to the close scrutiny of the Court into the fairness of the transaction and, in some jurisdictions, to an election by the mortgagor to affirm or disaffirm, in the absence of authority for such purchase conferred by the mortgage. 42 C. J. 206 and cases cited.

None of the cases cited by plaintiff is in point. The case of *Brant* v. *Nugent, supra,* was an action for an accounting for the proceeds of a sale made to a vendee for full value and without notice and it was held he was entitled to protection as such,

as are the defendants here, and the bill was filed promptly after hearing of sale, and even there the Court held a co-tenant might purchase the others' interest at a forced or partition sale. In the case of *United N. J. R. & C. Co.* v. *Consolidated Fruit Jar Co.*, 55 Atl. 46, Vice-Chancellor STEVENS held that a tenant in common will not be permitted to purchase a superior outstanding claim for his own benefit, and in *Kinkead* v. *Ryan*, 65 N. J. Eq. 728, this Court held that where a tenant in common pays off an encumbrance upon the common estate the Court will consider the encumbrance still existing in order to force contribution from the co-tenants or as extinguished according to the justice of the cause and the actual intention of the party making the payment. In *Holl* v. *Everett*, 73 N. J. Eq. 697, it was held that the act of a tenant in common acquiring a tax title inures to the benefit of the co-tenants upon their reimbursing him for their proportion of his outlay, and in 7 R. C. L. 857, it was stated that the purchasing tenant held in trust for the benefit of his co-tenants who contributed their shares of his necessary expenditures, and in *Ennis* v. *Hutchinson*, 30 N. J. Eq. 110, a yacht similarly purchased was held to be for the benefit of the other co-owners. To the same effect are *Van Horne* v. *Funda*, 5 Johns. Ch. (N. Y.) 388; *Deegan* v. *Capner*, 44 N. J. Eq. 339; *Staats* v. *Bergen*, 17 N. J. Eq. 554; Ludlow's Estate, 3 Misc. 568; *Swift* v. *Craighead*, 75 N. J. Eq. 102; *Bennett* v. *Shumaker*, 46 N. J. Eq. 538, and *Blauvelt* v. *Ackerman*, 20 N. J. Eq. 141.

In the case of *Mutual Life Ins. Co.* v. *Goddard*, 43 N. J. Eq. 462, it was held that a person whose property has been sold at a judicial sale to his injury may always, if he applies promptly and is without fault, have the sale set aside upon showing that he was prevented from attending the sale by fraud, mistake or accident, and, in *Campbell* v.

Gardner, 11 N. J. Eq. 423, a re-sale was ordered because the premises were sold at the foreclosure sale greatly below their value.

All of these cases were direct proceedings in equity to impress trusts on property in favor of those who did not hold the legal title, but who were ready to contribute within a reasonable time to the expense of acquiring that title, or were proceedings of similar import. We do not question the soundness of these decisions, but they are not in point. There is no proof here that anyone has attempted or will attempt to impress a trust on the property in question within a reasonable time or at any time; or, if they ever had a right to do so, that they have not lost that right by any one or more acts of omission or commission during the past seventeen years. All the probabilities are against the possibility of producing such proof. And it is not necessary for us to speculate on what this Court or any other court would construe to be "a reasonable time" within which to bring such proceedings; for, as before pointed out, it was up to the plaintiff to prove that our title is not "*a title good at law*" in accordance with the decision of this Court in the case of *Meyer* v. *Madreperla, supra,* and this he did not do.

II.

If there were any latent equities in the property in favor of others than the defendants and as against the original purchaser at the foreclosure sale, Robert Moran, they could not be enforced as against these defendants who were bona fide purchasers for value without notice and whose title to the premises was therefore unassailable.

Assuming, for the sake of argument, that the other heirs of Edward Moran still have a right of action against Robert Moran, their co-tenant, as

a trustee for all of them in the purchase of the property in question at this foreclose sale, and in spite of the lapse of seventeen years and the absence of proof that they have not relinquished such right, still, we respectfully submit, they have no right to now follow the property in question after it has come into the hands of these defendants through intermediate grantees of Robert Moran. It is not asserted that these defendants are not *bona fide* purchasers for value and it is certainly clear that they were without notice of any claims of title or interest in the property in question on the part of the heirs of Edward Moran. Merely because the foreclosure proceedings revealed the fact that one Robert Moran, the owner of the mortgages in question, and presumably the same Robert Moran who was therein described as one of the children of Edward Moran, had bought the property at the foreclosure sale, did not charge these defendants with notice that the other heirs, after the lapse of seventeen years, would seek to contribute to the purchase price at the foreclosure sale and seek to impress a trust on the property in their favor and do this within "*a reasonable time*" (*sic!*) after such foreclosure sale. Of course not! The presumption was that this "reasonable time" had expired the same as it was held in *Abraham* v. *Wechsler*, 120 Misc. 811, 200 N. Y. S. 471, that the statutory time to sue had expired when there was nothing to show it had not expired. Surely there was no notice of *lis pendens* on file to give notice of any such action or contemplated action on the part of the Edward Moran heirs.

The purchaser is chargeable with notice of such facts only as belong to the subject of the inquiry, and where the existence and nature of the trust would not be discovered or only partially discovered by the inquiry which he is put to by the facts existing at the time of the purchase, he is not

chargeable with constructive notice of the trust; nor is he chargeable with such notice where the facts are not sufficient to put a prudent man upon inquiry as to the existence of the trust. 39 Cyc. 564.

These defendants knew that:

> "Unless some fraud can be shown to have been perpetrated or some superior knowledge taken advantage of there is no doubt that a co-tenant may purchase at an execution or judicial sale the moiety of any of his companions in interest and he may retain and assert the title thereby acquired as fully as though he were a stranger defendant."
>
> Freeman on Co-Tenancy and Partition (2nd Ed.), Sec. 165.

The defendants, therefore, were *bona fide* purchasers for value without notice.

> "The right to follow trust property into the hands of a third party, and impress the trust thereon, ceases when the property comes into the hands of one who stands in the position of a *bona fide* purchaser for value without notice, as where the legal title to the property comes into the hands of one who acquires it for a valuable consideration without notice of its trust character, including a purchaser without notice from a purchaser with notice; or where, although he has notice of the trust, he acquires it from one without notice."
>
> 39 Cyc. 559.

> "It is well settled that a *cestui que trust* has the right in equity to follow and recover or impress the trust upon the trust fund or property which has been wrongfully diverted, into whatsoever form or hands it may come, so long as it may be distinctly traced and identified, *until it comes into the hands of a bona fide purchaser* for value without notice, or the rights of innocent third parties have intervened."
>
> 39 Cyc. 528.

"Where a trust upon property in the hands of a third person holding the legal title is sought to be established and enforced, the burden of proof is upon the party asserting the trust to establish its existence and, ordinarily, to show that such person is not a *bona fide* purchaser for value without notice, or as against a purchaser who has paid a valuable consideration, that he had notice of the trust, and indefinite and uncertain admissions will not overcome positive denials of the answer in this regard."

39 Cyc. 569.

III.

The defendants' title to the premises in question is not subject to attack collaterally as in this action, being founded upon a final decree of the Court of Chancery and sale pursuant to said decree which was confirmed by the Court, and which foreclosed any of the alleged equities that the defendants in that suit might have.

In accordance with general rules the judgment or decree in a foreclosure action is conclusive on all persons who were properly made parties to the action. 42 C. J. 164 and cases cited.

Consequently none of the heirs of Edward Moran, all of whom were made parties to the foreclosure suit, can now, after this lapse of time, attack the validity of the final decree in the foreclosure suit; nor can the plaintiff herein, who does not even stand in their shoes.

In the case of *Schultz* v. *Sanders*, 38 N. J. Eq. 154, it was held that a purchaser at a judicial sale runs no risk in respect to the correctness of the legal principles on which the judgment under which he purchases is founded, and that a reversal of the judgment under which a sale has been made sub-

sequent to the passage of title, will not nullify or disturb the pruchaser's title, and that a purchaser at a judicial sale cannot be heard, on an application to be discharged from his cotnract, to impeach the decree under which he purchased, and Vice-Chancellor VAN FLEET said (at p. 156) :

> "It is undoubtedly true, as a general rule, that a suitor who seeks relief against an infant defendant must prove his whole case, and that nothing can be taken as admitted against him, either by his default or on the answer of his guardian *ad litem*. Mills *v.* Dennis, 3 Johns. Ch. 367; Holden *v.* Hearn, 1 Beav. 445. It may be that the decree in this case was made, as against the infant defendants, on insufficient proof, but, so long as the decree stands, it concludes both the subject matter of the suit and the parties to the suit. A court of general jurisdiction may misconstrue, misapply or plainly disobey the law, in pronouncing judgment, yet, so long as its judgment remains unreversed, it unalterably binds the parties and pronounces the law which defines and determines their rights in that particular case. A purchaser of land sold pursuant to the decree of a court of general jurisdiction, assumes no responsibility for the correctness of the legal principles on which the decree is founded. All he need do is to see that the court had jurisdiction of the parties and of the subject-matter of the suit, and that a decree pronounced was within the scope of the pleadings. A record showing these facts must be accepted by every domestic tribunal as an indisputable verity. Even a subsequent reversal of the decree will not affect him, for it is a principle of manifest justice, as well as of established law, that the rights acquired by a third person, in the enforcement of a decree of a court of general jurisdiction, shall endure, though the decree be afterwards reversed. Rorer on Jud. Sales, Sec. 431."

"A final decree in foreclosure proceedings to foreclose the equity of redemption of own-

ers of lands sold under the Tax act, cannot be collaterally attacked in a specific performance suit because it does not fix the amount due, and allow time for payment as is the practice in strict foreclosure."

Silver v. *Gattel,* 89 N. J. L. 402, where cases are reviewed.

"A decree quieting the title to land protects an innocent purchaser for value, though later it be set aside or reversed on appeal on proceedings taken after the purchase."

Ostrom v. *Ferris,* 99 N. J. Eq. 551.

"A sale under a decree obtained in this court cannot be attacked collaterally by setting up that the solicitor who acknowledged service of the subpoena for the party affected by it in the suit in which the decree was made had no authority to do so, nor that the ticket accompanying the subpoena did not apprise such party of the ground on which he was made a defendant to the suit."

Dickinson v. *City of Trenton,* 33 N. J. Eq. 63.

"A purchaser under a foreclosure sale will not be relieved from his bid on the ground that the title offered him is defective, such supposed defect arising from an alleged irregularity in the publication of the notice to a non-resident of the pendency of the suit. The general principle is, that the judgment of a superior court cannot be impeached collaterally for want of jurisdiction over the parties to it."

McCahill v. *Equitable Life Assurance Society,* 26 N. J. Eq. 531.

"The judgment of foreclosure, like other judgments, is open to collateral attack for a jurisdictional defect, but not, as a general rule, if such defect is not apparent on the face

of the record; and the judgment is presumed to be valid until it is otherwise shown by clear and convincing proof. Other defects or irregularities in the proceedings for the foreclosure of a mortgage or for the sale of the premises than those going to the court's jurisdiction do not render the judgment subject to collateral attack."

42 C. J. 172.

"Furthermore, the confirmation of the sale cures all defects of jurisdiction."

42 C. J. 227.

"In a judicial sale if the court had jurisdiction of the parties and subject matter, the title of a *bona fide* purchaser is good notwithstanding that there may have been errors or irregularities in the proceedings leading up to the decree which render it irregular and in consequence of which it might have been set aside or reversed, and the purchaser is not bound to look beyond the decree to ascertain its necessity but need only inquire if, upon the face of the record, the court apparently had jurisdiction of the parties and subject matter in order to be protected, provided he buys in good faith and without notice of any defect. He cannot question the regularity of the proceedings had before the decree was entered or dispute the truth of the record."

35 C. J. 81.

"Where the sale is by order of the court and it is shown that the court had jurisdiction of the subject matter, the decree and sale are not subject to collateral attack, and are binding on all the parties who were properly before the court and persons whose interests were represented, together with the purchaser. *Unless their right to object* is lost by reason of their being parties to sale, *by their acquiescence* for a long period of time, or by their acceptance of the proceeds, or other estoppel,

beneficiaries may attack the validity of the sale and conveyance, but they are generally the only persons so entitled, third persons having no such right."

39 Cyc. 362 and cases cited.

The Moran heirs were foreclosed in the foreclosure proceedings, the sale was confirmed by the Court and neither they nor anyone else can question the title of these defendants acquired through mesne conveyances from the purchaser at that sale.

The judgment below should be reversed.

WILLIAM A. LORD,
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New Jersey Court of Errors and Appeals

GEORGE MCINTYRE, *Plaintiff-Respondent,* *vs.* RICHARD DAVIS, ROSE DAVIS, GEORGE J. WHITEHOUSE and ALICE WHITEHOUSE, *Defendants-Appellants.*	*On Appeal from Essex Circuit Court.*

RESPONDENT'S BRIEF.

Appellants, in their brief, have omitted to state that in the foreclosure suit instituted by Robert Moran (through which is derived the title of appellants to the premises in question), on December 14, 1910, the Clerk of our Chancery Court was appointed guardian *ad litem* for the infant defendants in that action and on the same day he entered an appearance for the infants and on the same day an order of reference was taken against the infants as well as the other defendants; that the matter was referred to a master, and the record does not disclose any master's summonses issued to the infants, nor does the report mention the infants. In their brief appellants seem to believe that the trial court considered these facts as offering no objections to the title, yet the decision (State of Case, pp. 23 to 27, at p. 23, ll. 1 to 32) appears to consider the title doubtful for those reasons; or, construing the language of the trial court in the light most favorable to appellants, this alleged defect was not passed upon, as the title was found to be bad for other reasons.

In this era of endurance records, the grounds of appeal (State of Case, pp. 1 to 3), especially the third, could well capture the prize. Appellants do not rely on these grounds in their brief, but having so considerately stated the reasons for reversal in their brief in short paragraphs, respondent is content.

Respondent contends that (1) he has sustained the burden of proof, (2) appellants are not bona fide purchasers, (3) their title is subject to attack in this action, and (if these reasons for affirmance are not considered sufficient), (4) the title was defective because the rights of infant defendants in the foreclosure action were not properly cut off.

POINT 1. Respondent has sustained the burden of proof.

The sales agreement provided that appellants "will well and sufficiently convey" to respondent "by deed of warranty free and clear of all encumbrance" (State of Case, p. 5, ll. 25 to 28). This calls for a marketable title.

If the contract had been silent as to the kind of title to be conveyed, a marketable one would have been implied.

> Vendee in an executory contract to convey lands may rescind the contract for the failure of vendor to tender a marketable title, where it is agreed to convey a good title, or where, by implication, the intention to so convey is presumed.
>
> *Grunt* v. *Olsan* (Chanc. Ct. 1927), 5 A. R. 1624, 139 Atl. Rep. 163 (not yet officially reported).
>
> In the absence of an express provision indicating the character of title provided for a contract of sale of real property, the implication is that a good or marketable title

in fee simple is intended in all executory contracts.

39 Cyc. 1442.

A purchaser of lands, before he is required to pay the purchase price, is entitled, unless stipulated to the contrary, to receive a marketable title.

Thompson on Real Property, Sec. 4296.

An agreement to "well and sufficiently convey" requires a good title;

If vendor agrees to "well and sufficiently" convey, he is bound to make a good title.

Brisbane v. *Sullivan* (Chanc. Ct. 1914), 83 N. J. Eq. 182,

and "good" is synonymous with "marketable" as applied to titles (*Grunt* v. *Olsan, supra*).

Where the vendor is under obligation to make a good title, the purchaser is entitled to demand what is termed a marketable title.

27 R. C. L. 482.

The terms "good" and "marketable" as applied to the character of the title are regarded as of the same import.

27 R. C. L. 483.

A good title means not merely a title valid in fact, but a marketable title.

Thompson on Real Property, Sec. 4296a.

A conveyance by "deed of warranty" also necessitates a "good" title.

The words, "a good and sufficient deed with covenants of warranty," in an agreement for the sale of land, will be held to mean "a good and sufficient title" if it appear in the agreement or its attendant circumstances, that such was the intention of the parties.

Tindall v. *Conover* (Sup. Ct. 1843), 20 N. J. L. 214.

The conveyance of a good title by the vendor is required where a contract for the

sale of land provides for—"a warranty deed."

39 Cyc. 1445.

And again, as the conveyance was to be "free and clear of all encumbrance" the title offered should have been marketable.

In an agreement to convey free and clear of incumbrances, vendee is entitled to demand a marketable title.

Van Keuren v. *Siedler* (Chanc. Ct. 1907), 73 N. J. Eq. 239.

This court, in *Eisler* v. *Halperin* (89 N. J. L. 278), held that in the absence of any qualifying conditions in the contract (and in the instant case there were none), the purchaser is entitled to a good title; and where it sufficiently appears that for plaintiff to accept the title proffered would lay him open to a fair probability of vexatious litigation, with the possibility of serious loss, he is justified in refusing to accept it because such title is plainly unmarketable. It should then seem as if a marketable title is the one bargained for in all cases where the contract does not call for a limited title.

In the case of *Meyer* v. *Madreperla* (68 N. J. L. 258) cited by appellant, this court held that there may be titles good at law, which equity would not force on an unwilling purchaser. The Eisler case, *supra,* decided fourteen years later, practically holds that a title unenforceable in equity is not marketable in courts of law, for it excuses a purchaser from accepting a title which is fairly open to litigation, without requiring him to submit proof that it is actually defective. The latter case expressly allows courts of law to receive and consider, where the question of the sufficiency of a real estate title is raised, evidence that the title is vulnerable in

equity. For what purpose could such evidence be received and considered, except to reject the title if equity will not enforce it and to approve the title if equity will enforce it?

The requirements of the title which a purchaser is bound to accept are set out by this court in *Bier* v. *Walboum* (102 N. J. L. 368):

> "The title must be such as to make it reasonably certain, that it will not be called into question in the future, so as to subject the purchaser to the hazard of litigation with reference thereto."

This is in harmony with the kind of title which our Court of Chancery has held a vendor may force on a vendee, and if not in conformity with those requirements equity will not decree specific performance.

However, respondent maintains that he has proved that appellants' title was not only such as equity would not order specificially performed, but that the title was defective even considering the decision of *Meyer* v. *Madreperla, supra,* in full force.

Here appellants' title comes through the purchase at sheriff sale of the premises in question by Robert Moran under foreclosure of mortgages assigned to him after the death of his father, Edward Moran, who died intestate seized of the property and leaving surviving several children and grandchildren. The facts in this case are as similar as can be to those in *Breitman* v. *Jaehnal* (99 N. J. Eq. 243), where specific performance was refused and this refusal sustained by this Court (same case, 100 N. J. Eq. 559); and the title there was also declared unmarketable.

Co-tenants are of two classes, according to the manner in which their estate are created. In the first class are those who hold under the same creation of title—as under one deed, or one will or (as in the instant case) as heirs of a common intestate; these are known as co-parceners. In the second class are those who hold otherwise—as under separate conveyances from a common grantor, or purchase of a part interest from the owner of the fee, or as devisee or heir of a deceased co-parcener.

The distinguishing feature between the two classes is that co-parceners are trustees of the common property by virtue of their being co-parceners, whereas other co-tenants may or may not be considered trustees depending on their actions.

> A relation of trust and confidence exists, as a matter of law, between co-tenants holding under the same conveyance or devolution of title. (In that case the co-tenants did not derive their estate thus, but defendant, because of his acts, was chargeable as trustee *ex delicto* of the property for his co-tenant.)
>
> *Brant* v. *Nugent* (Chanc. Ct. 1927), 100 N. J. Eq. 396.

A co-tenant cannot buy any outstanding claim or interest for his own use; his purchase is for the benefit of all the tenants-in-common alike.

> It is well settled, as a general rule, one tenant in common will not be permitted to purchase a superior outstanding claim for his own exclusive benefit.
>
> *United N. J., etc. Co.* v. *Consolidated Fruit Jar Co.* (Chanc. Ct. 1903), 55 Atl. 46 (not officially reported).

> There can be no doubt that, when the widow paid the amount due upon the bond and mortgage, she was entitled to acquire the

right of an equitable holder of those instruments, in order to compel the estate of her co-tenants to bear a just share of the incumbrance.

Kinkead v. *Ryan* (E. & A. Ct. 1903), 65 N. J. Eq. 726.

Where one tenant in common acquires a tax title or redeems land from a tax sale, his act inures to the benefit of his co-tenants upon their reimbursing him for their proportionate share of the amount paid by him. The acquisition of the tax title amounts to nothing more than a redemption of the purchaser's own land from a lien. The right of a tenant in common who discharges a lien upon the common property is to contribution from his co-tenant, and as security he is entitled to a lien upon his co-tenants' share of the property.

Roll v. *Everett* (E. & A. Ct. 1908), 73 N. J. Eq. 697.

It must therefore follow that when Robert Moran bought the mortgages, he held the same in trust for all the heirs of his father.

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

7 R. C. L. 857.

In that position he could do no more than have contribution from the others.

The utmost that can be demanded by one who purchases an outstanding title or lien

> is contribution from others toward the expense of any purchase which releases the common interest from embarrassment.
> 7 R. C. L. 859.

He could enforce contribution by partition proceedings (as in *Roll* v. *Everett, supra*), or by an action for accounting, or by a bill in equity to declare his lien and, after his co-tenants are given an opportunity and refuse to contribute, to enforce his lien.

Nor did the foreclosure proceedings foreclose the heirs. All of the co-tenants were entitled to the benefit of the mortgages, and, on foreclosure, should have been joined as complainants. Suppose a stranger had bought in at the sale, the title so derived would obviously not have been complete for the complainant was also one of the holders of the equity of redemption and, as such, his rights were not cut off in the proceedings. If it be imagined the proceedings were to cut off the equity of redemption of the defendant heirs, it resolves itself into a trustee cutting off the *cestius que trustent* in the trust property through the medium of a trust mortgage—which is unheard of; or that complainants brought action against themselves as defendants to cut themselves off from their own estate—which is likewise absurd.

The record is silent as to why the proceedings were brought; they were in the common foreclosure form. A suspicious person may suggest that complainant coveted the estate and took the means of acquiring the mortgages to wipe out the heirs, all of whom were non-residents of this State and two of whom were infants—which though simple is unlawful. Taking the more charitable view of believing that complainant

intended to take no illegal advantage of his co-tenants, we can well consider the purpose of the proceedings was to dispose of the remaining defendant, John H. Palmer, the person in possession, by cutting off his tenancy; the non-resident heirs may have been properly made defendants because they should have been party-complainants, yet perhaps declined to join or could not be located so as to be requested to join.

Passing over the question as to the foreclosure of the mortgages, what title did Robert Moran acquire as purchaser at sheriff sale? Nothing more than as trustee for his co-tenants with right to contribution from them for the purchase price paid by him.

> Where some of the co-owners of a yacht purchased the same from the sheriff under execution on their claims and on the claim of another, the purchasers hold same in trust for all of the yacht owners, and the yacht will be sold under the direction of the Court in order that a partition with due adjustment and allowances of claims of the owners may be made among them.
>
> *Ennis* v. *Hutchinson* (Chanc. Ct. 1878), 30 N. J. Eq. 110.

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

Breitman v. *Jaehnal* (99 N. J. Eq. 243; 100 N. J. Eq. 559), *supra.*

The Ennis case resembles the one on hand, for there the defendant—co-tenants bought in on a sale held under their own claims.

The leading case on this subject is that of *Van Horne* v. *Fonda,* 5 Johns Ch. (N. Y.) 388, decided by Chancellor Kent in 1821. There a co-tenant, in 1800, bought up a mortgage against the common estate, and purchased at the sale thereunder. It was held that the other co-tenants were entitled to redeem the mortgaged lands. The Chancellor stated:

> "There is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance or an adverse title to disseize and expel his tenant. It cannot be tolerated when applied to a common subject in which the parties had equal concern and which created a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interests. Whatever his intentions on this subject might have been, the purchase under the sale was, in judgment of law, in trust for the plaintiffs (co-tenants)."

It should be remembered that Robert Moran was as much obligated as his co-parceners to pay the principal and interest on the mortgages. He had no more right to demand that the others pay than they had that he do so. The sum of $2,102 found by the Master to be due would be the principal of $1,800 plus interest thereon for about three years, which brings it well within the time when the co-tenancy was in existence.

> The rule is well settled in most jurisdictions that where property owned in common is sold pursuant to a power contained in a trust deed, or at a judicial sale, to satisfy

an obligation which rests alike upon all of the tenants in common, one co-tenant cannot purchase the lands and cut off the right of his co-proprietors to contribute to the purchase price and participate in the benefits of the purchase; and, based on the same principal, it is also a rule that the purchase of lands by one tenant at a foreclosure sale of a mortgage given by the common ancestor accrues to the benefit of the tenants in common, unless this right is lost by acquiescense in the title acquired by the purchaser.

7 R. C. L. 866.

Inasmuch as Robert Moran was a trustee, he could not buy at the mortgage sale.

Executors, administrators, guardians or trustees entrusted with the selling of real estate, can never sell it to themselves. Every man is partial to his own interest, and this is a maxim not required to be proved, for the law will not allow it to be controverted. An administrator, etc., appointed to sell real estate, becomes the only person in the world who cannot purchase it, either directly and openly, or secretly and covertly through another person whom he employs for the purpose. It is not enough for a trustee in such a case, to say, the sale was a public one, and you can show no fraud, for it is in his power to conceal it. Every such sale must be considered absolutely void in a court of common law.

Obert v. *Hammel* (Sup. Ct. 1840), 18 N. J. Law 73.

An executor foreclosed a mortgage and bought the premises in at a sale thereunder. Held—the Court will not inquire into the fairness of the transaction; the *cestius que trustent* will not be put to the proof of fraud, and may have the property resold, or, at their election acquiesce in sale, even though the sale may have been had at public auction, in good faith, and for a fair price.

Deegan v. *Capner* (Chanc. Ct. 1888), 44 N. J. Eq. 339.

> A purchaser of land at a sheriff's sale, by a trustee, on a bill on a mortgage held by him in trust, his bid not being sufficient to pay off such mortgage, will be declared to enure to the benefit of the *cestui que trust.*
> *Staats* v. *Bergen* (E. & A. Ct. 1867), 17 N. J. Eq. 554.

> A sale by a trustee to himself of the trust property is uniformly held to be voidable at the option of the *cestui que trust*, even though the trustee may have given an adequate price and gained no advantage.
> *Swift* v. *Craighead* (Chanc. Ct. 1909), 75 N. J. Eq. 102, affirmed (E. & A. Ct. 1909), 76 N. J. Eq. 339.

If he desired to buy in at his sale he should have made application therefor.

> If the wife of the trustee desires to buy at the trustee's sale, she should apply to the Court for leave, and have the sale conducted by and under the supervision of a Master to be appointed by the Court.
> *Bassett* v. *Shoemaker* (E. & A. Ct. 1890), 46 N. J. Eq. 538.

The title was therefore defective, for the other heirs of Edward Moran had the right to redeem from the foreclosure sale.

Appellants complain that respondent did not prove that these co-tenants have elected to consider the purchase by Robert Moran as having been made for their benefit, nor that they offered to contribute, nor that they shared in the surplus (there is nothing in the record to show any surplus; in fact there was a deficiency on the sale), nor that they acquiesced, etc. This is as much as stating that plaintiff must not only prove the defect, but must also prove affirmatively that there is no defense.

In the case of *Meyer* v. *Madreperla, supra,* this court upheld a title based on a statutory presumption of death where the opposite side produced no proof to overcome the presumption, for this made the presumption conclusive proof. So here plaintiff has proved facts of record raising the legal presumption that Robert Moran purchased the premises in trust for all the heirs; to overcome this presumption defendants should have proven (but did not as much as intimate) that the heirs were barred or estopped or otherwise lost their right to redeem from the foreclosure sale. Hence the presumption is conclusive against defendants and in favor of the existence of the co-tenants' privilege to redeem; and hence the title is fatally defective.

The quotation from Freeman on Co-tenancy, cited by appellants (their Brief, pp. 6-8), does not run contrary to the adjudicated cases in this State, for Freeman says the law gives the co-tenants a privilege which they may assert in the purchase made by one of their number, which privilege may be waived. So here plaintiff was required to show (which he did) that the heirs had a privilege in the purchase by Edward Moran, and defendants, to refute this, were obliged to show (which they did not) that the privilege was waived. Surely the burden was not on plaintiff to prove both the affirmative privilege and the negative absence of waiver.

The financial inducement for the heirs redeeming or attempting to redeem is provided in the fact that the mortgages totaled $1,800 whereas the purchase price in the agreement in this suit is $32,000.

Nor are the heirs, especially the infants, guilty of laches or barred by statute in presenting their claims. The record does not disclose the ages

of the infants, so we must assume they were barely born in 1903, when Edward Moran died. This would make them of the age of about 23 when the title was to be consummated per the agreement between the parties to this suit. While they were infants they were not delinquent, and surely two years cannot be considered laches in this case.

In *Smith* v. *Drake* (23 N. J. Eq. 302), our Chancery Court set aside a sale made by an administrator to himself of his intestate's property in a suit commenced eighteen and a half years after the deed, and seventeen years after one heir became of age. In this case fifteen years (from 1911 to 1926) elapsed between the sheriff's deed and the time of performance of the agreement. This court, in *Obert* v. *Obert* (12 N. J. Eq. 423), held that twenty-two years between a partition sale and a bill to set same aside did not constitute laches, the reasoning there applying directly to the facts here:

> "The material facts in the case are clearly established by document evidence or by the testimony of living witnesses. No serious doubt rests upon any part of the case. The controversy is not seriously embarrassed by the claims of third parties or by conflicting interests. Under such circumstances, lapse of time constitutes no ground for refusing relief in equity."

That the property has passed into other hands is no ground for refusing relief, if the heirs should ask for it, for our Chancery Court has declared in *Brant* v. *Nugent* (100 N. J. Eq. 396 *supra*), that it has power to set aside the sale after delivery of deed to the purchaser, and even after conveyance to a bona fide grantee of the purchaser.

The heirs are not barred by statute. It seems that the only applicable provisions are Sections 16 and 17 of the Statute of Limitations (3 C. S. 3169), but each contain the period of twenty years and also provide that the time does not run during infancy.

POINT 2. Appellants are not bona fide purchasers.

They undoubtedly are not purchasers without notice, for all the defects and questions mentioned or raised by respondent in the title are matters of record in defendants' chain of title.

> Purchasers are affected with constructive notice of all that is apparent upon the face of the title deeds under which they claim.
>
> *Hance* v. *McKnight* (Sup. Ct. 1830), 11 N. J. L. 385.

> Every purchaser takes title subject to any defects, reservations and exceptions that are referred to in his deed, or that may be ascertained by reference to his chain of title as spread forth upon the public records.
>
> *Mitchell* v. *D'Olier* (E. & A. Ct. 1902), 68 N. J. L. 375.

> A purchaser of real estate is chargeable with notice of such facts affecting the title as may be ascertained by reference to the chain of title of such property as spread forth upon the public records. *Breitman* v. *Jaehnal, supra.*

It was defendants' duty when purchasing the property, as well as plaintiff's duty before accepting the title, to examine the record.

> In a jurisdiction such as this, where titles to real estate are of record, it is the duty of a purchaser, in the absence of any special agreement, to search the public records for himself, and to make a complete examination of such records, for such information as

> they may contain regarding the validity of the title of the real estate he would purchase.
> *Bock* v. *Koch* (E. & A. Ct. 1926), 99 N. J. Eq. 359.

An examination of the records discloses that Robert Moran took assignments of the mortgages while he was a co-tenant; that Robert Moran, while co-tenant, purchased the property in his own name. These facts the defendants could have discovered as easily as plaintiff did, for they are all spread on the public records.

The facts in the instant case are as nearly as can be similar to those in *Breitman* v. *Jaehnal* (previously cited). Although that case was in specific performance the same rule applies in rescission.

> A valid reason for refusing specific performance, such as a defect in title, warrants a rescission of the contract.
> *Goldstein* v. *Ehrlick* (Chanc. Ct. 1924), 96 N. J. Eq. 52.

The constructive notice of the facts in the title operate as effectively as if the notice was actual. Can appellants be heard to say to respondent "You must take this title, which we claim is good, but we do not know how the title is derived"?

When the Davis' and Whitehouses' bought the property they were chargeable with record notice that the other heirs of Edward Moran had the privilege of redeeming. If appellants then did not see fit to satisfy themselves that such privilege had been waived or otherwise released, they cannot now blame respondent for refusing to accept their title without proof of such waiver or release; for if the co-tenants (of whom there were ten) should then come in and pay their proportionate part of $1,800, interest and foreclosure

costs they would receive proportionate shares in the fee, which would leave respondent with one-tenth of the fee on payment of $32,000 less nine-tenths of $1,800, interest and costs.

Of course, if this had been a trust which did not appear of record, appellants' contention might have been sound, but they had as much legal notice of the rights of the co-tenants as of the contents of any deed or other instrument in the chain of title to the property.

POINT 3. Appellants' title is subject to attack in this action.

This action does not attack the final decree in the Chancery Court in any manner. The point is what is the status of the title, a link in the chain of which is the foreclosure proceedings.

While it may possibly be true that none of the heirs of Edward Moran could have attacked the title if the property had been bought in at the sale by a stranger, still the fact remains that a co-tenant bought it in. Surely the sale followed, and did not precede, the final decree. As in the *Breitman* v. *Jaehnal* case, *supra,* there was a foreclosure, a final decree and a sheriff sale to a co-tenant.

As pointed out by the trial court, in commenting on the case of *Shultz* v. *Sanders* (38 N. J. Eq. 154), the pertinent words are "so long as the decree stands." Suppose the heirs should now come in, what defense could be interposed against them? Laches, the Statute of Limitations, purchaser without notice—none of these are tenable, as we have shown. As stated in the excerpt from 35 C. J. 81, set forth in appellants' brief (p. 16), the purchaser need only inquire if, upon the face of the record, the Court apparently had

jurisdiction of the parties and subject matter in order to be protected, provided he buys in good faith and without notice of any defect. But here, on the face of the record, it appears that a trustee is attempting to foreclose a trust mortgage against the *cestuis,* in a common foreclosure action, and there is clear notice of record of the defects in the mode of proceeding to cut off the *cestuis,* and of the rights of the heirs to participate in the mortgage sale. Suppose the foreclosure bill and sale included more land than described in the mortgage, would the purchaser have it all? Robert Moran's co-heirs could well assume, from the foreclosure bill, that there was no partition or accounting or similar procedure to cause them to redeem, and so put in no defense; and likewise when Robert Moran bought in, which no doubt would strengthen their belief that their rights were not being cut off, they could stay satisfied that he and his assigns were and still are holding the property for all of cotenants, until (no proof of which has been submitted) they were called upon to elect to contribute their share or relinquish their rights. Appellants are in no better position to dispute the claims of the co-tenants than is Robert Moran, for the record provides all the necessary notice.

At the most the final decree may possibly have disposed of the heirs' rights in the property up to the date of its entry, but had no effect on the rights in the property acquired by them after the decree, that is, at the sale as tenants-in-common with Robert Moran in his purchase. In *Obert* v. *Hammel, supra,* our Supreme Court went so far as to declare a sale of trust property by a trustee to himself, whether directly or indirectly, is absolutely void at law; if this is still the rule, the sale

to Robert Moran was void, and title in the property is still in the heirs subject only to the $1,800 mortgages, and appellants hold but the undivided tenth share of Robert Moran.

POINT 4. Appellants' title is defective because the rights of the infant defendants in the foreclosure action were not properly cut off.

In the foreclosure action the infants were not summoned, nor does the master's report mention them. It is the usual inspection report, without depositions. The infant defendants may, for that reason, still come in and have the decree opened.

> There is, however, a radical defect in the proceedings in the cause, one which requires that the *ex parte* decree against the infant shall be opened to permit her guardian to interpose a defense. It is this: The complainant should have adduced proofs to substantiate and prove the allegations of her bill by taking depositions before a master of the court, who would have been obliged to summon the guardian of the infant before him. The testimony and exhibits offered, if any, would then have had to be submitted to the court to pass upon. Instead of doing this, the complainant filed two *ex parte* affidavits to prove her cause of action, and the advisory master recommended the making of a decree and such was accordingly made and filed. *Bunting* v. *Bunting* (Chanc. Ct. 1917), 87 N. J. Eq. 20.

The infants are not chargeable or affected by their default or the acts of their guardian *ad litem.*

> Nothing can be taken as admitted against an infant either by his default or on the answer of his guardian *ad litem. Caruso* v. *Caruso,* (Chanc. Ct. 1927) 5 A. R. 1805, 139 Atl. 812 (not yet officially reported).

What assurance has respondent that the decree will not be re-opened in this case as in *Bunting* v. *Bunting, supra?* The defects here, that on the same day a guardian was appointed, appearance entered and decree *pro confesso* entered, as well as the failure to summon the infants or mention them in the report, are all apparent on the record of the foreclosure proceedings. Could respondent, if he accepted the title and the decree was opened for the infants, escape the consequences? No doubt the decree would be conclusive if the record of the proceedings was in due form, and its reopening would not affect the title if the reasons for such action were fraud or mistake not ascertainable by a mere inspection of the proceedings, but this is not the case here.

The title offered by appellants is so defective, so vulnerable, as clearly to fall within that class which one, who bargains for a good title, should refuse to accept.

Respondent therefore contends that the judgment under review should be affirmed with costs.

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