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New Jersey State Library

BILL OF COMPLAINT.

In Chancery of New Jersey

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

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The complainants, Samuel H. Pashkow, Samuel E. Danzig and Herman Benjamin, all residing in the City of Newark, County of Essex and State of New Jersey, respectfully show that:

1. On or about March 25, 1927, the defendant Morris Frankel was the owner of the lands and premises situated in the Town of West Orange, County of Essex and State of New Jersey, more particularly described as follows:

BEGINNING at the intersection of the Northernly line of Park Drive South with the present westerly line of Main Street (formerly Eagle Rock Avenue); thence running north sixty-eight degrees forty minutes west along the said line of Park Drive south one hundred twenty two feet and seventy hundredths of a foot; thence north twenty-one degrees twenty minutes east forty seven feet and eleven hundredths of a foot; thence south sixty-eight degrees forty minutes east one hundred ten feet to the said line of Main Street; and thence southerly along the same forty-nine feet and fifty hundredths of a foot to the point of BEGINNING.

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2. On the said date the said defendant, Morris Frankel, did in writing enter into an agreement to sell and convey the said lands and premises to one Isaac D. Miller on April 15, 1927, by warranty deed free and clear of all liens and en-

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Bill of Complaint.

cumbrances, a copy of which agreement is hereto annexed and made a part hereof.

3. The said contract provided that said deed was to be delivered and purchase price paid at the office of Charles S. Gansler, 60 Park Place, Newark, New Jersey, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of said date.

4. In accordance with the terms of said agreement as aforesaid, the said Isaac D. Miller paid to the said defendant Morris Frankel on account of the purchase price and as a deposit, the sum of two hundred dollars (\$200.00).

5. By assignment in writing dated March 31, 1927, the said Isaac D. Miller did assign all his right, title and interest in said agreement to complainant, Samuel H. Pashkow, which assignment is endorsed upon the contract and by subsequent assignment the said Samuel H. Pashkow did assign to the complainants, Samuel E. Danzig and Herman Benjamin, respectively, each a one-third interest in said agreement.

6. The said contract was recorded in the Register's Office of Essex County on April 20, 1927, in Book C 76 of Deeds for said county, pages 319-320.

7. By deed dated May 9, 1927, the said Morris Frankel, single, did convey said lands and premises to Louis Kohn, which deed was recorded in the Register's Office of Essex County on May 9, 1927, in Book H 76 of Deeds for said county, page 159. Complainants say that the said Louis Kohn took title to said premises with actual and constructive notice of complainants' rights and interest in said premises.

Bill of Complaint.

8. Complainants say that the said premises were formerly owned by Susan Randall, wife of one John Randall; that she acquired title thereto by deed from Mary L. Crane, single, dated November 22, 1915, and recorded in the Register's office of Essex County, in Book X 56 of Deeds for said county, page 149.

9. That the said Susan Randall died February 2, 1918, leaving a will dated August 24, 1907, which will was duly probated in the office of the Surrogate of the County of Essex on March 22, 1918, and recorded in Book V 5 of Wills in said office, page 334.

10. That in and by the said will, the said Susan Randall did give her entire estate, both real and personal, to her said husband, the said John Randall, absolutely and in fee and did appoint her said husband, the said John Randall, executor of said will with full power and authority to sell and convey all of decedent's real estate, a copy of said will is hereto annexed and made a part hereof.

11. At the time of her death, the said Susan Randall left her surviving her said husband, John Randall, and the following children: Susan M. Randall, Earl H. Randall and Harvey S. Randall; the said Earl H. Randall and Harvey S. Randall were born after the making of their mother's will.

12. That the said Earl H. Randall and Harvey S. Randall not having been expressly disinherited by the will of their mother and no provision being made for them, by virtue of the statute in such cases made and provided, the said Earl H. Randall and Harvey S. Randall became en-

Bill of Complaint.

titled to an equal undivided one-third part in said real estate, subject to the curtesy right of their father, John Randall.

10 13. The defendants derived title to said premises through a deed made by John Randall, executor under the last will and testament of Susan Randall, deceased, and the said John Randall and Jean L. Randall, his wife, to Pauline Traunstein and William Ehrich, dated April 23, 1926, and recorded in the Register's office of Essex County in Book C 74 of Deeds for said county, page 495, and which premises were conveyed by William Ehrich and Herman Traunstein and their wives to defendant Morris Frankel, by deed dated April 13, 1927, and recorded in the Register's office of Essex County on April 13, 1927.

20 14. Complainants charge that the said defendant Morris Frankel was not, nor is the defendant Louis Kohn, now seized of an absolute estate in fee simple of the lands and premises hereinabove described, but there is an outstanding interest therein in the two after-born children of the said Susan Randall, deceased, and that the said defendants, nor are either of them, able to convey to the complainants the absolute and all of the undivided fee to said premises, free and clear of all liens and encumbrances as set forth in said agreement.

30 15. Complainants did notify the defendants that they rescinded said contract and did demand the return of their deposit of two hundred dollars (\$200.00), together with search fees and survey expenses, including the examination of the title of said lands and premises.

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Bill of Complaint.

16. Complainants say that the said defendants have refused to return said deposit and search fees.

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

10 1. That the said defendants may answer this bill of complaint, but without oath, and each statement herein made.

20 2. That a decree be made directing the said defendants to repay to these complainants the sum of two hundred dollars (\$200.00) paid on account of the purchase price of said property, together with the costs of the examination of the title to said premises and that the said sum of two hundred dollars (\$200.00) and search fees be declared and impressed as a lien upon the land and premises hereinabove described and that in the event that the said defendants do not pay same to the complainants within the time to be fixed by your Honor, that the said property may be sold to raise and satisfy the said sum due complainants.

30 3. That the said defendants also be compelled to return and pay to these complainants the reasonable fees of their attorney in examining the title to said property, and a counsel fee in connection with these proceedings and that they may have such other relief in the premises as may be agreeable to equity.

40 4. That in the meantime the defendants be enjoined and restrained from disposing of or encumbering in any way said lands and premises and that a receiver be appointed to take care of said lands and premises and to collect the rents, issues and profits thereof.

Bill of Complaint—Agreement.

5. That a writ of subpoena may issue to the said defendants, Morris Frankel and Louis Kohn, to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

10 JACOB LUBETKIN,
Solicitor of Complainants.

THIS AGREEMENT, made the twenty fifth day of March, in the year of our Lord One Thousand Nine Hundred and Twenty seven

BETWEEN Morris Frankel, of the City of Newark, in the County of Essex and State of New Jersey party of the first part;

20 AND Isaac Miller, of the City of Newark in the County of Essex and State of New Jersey, party of the second part;

30 WITNESSETH, That the said party of the first part, for and in consideration of the sum of Thirty Five Hundred (\$3500.) 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 the 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 of all encumbrances except as hereinafter stated, on or before the fifteenth day of April next ensuing the date hereof, All that lot tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the Town of West Orange, in the County of Essex and State of New Jersey.

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Bill of Complaint—Agreement.

BEGINNING at the intersection of the Northerly line of Park Drive South with the present westerly line of Main Street (formerly Eagle Rock Rock Avenue); thence running north sixty-eight degrees forty minutes west along the said line of Park Drive South One Hundred twenty two feet and seventy hundredths of a foot; thence north 10 twenty-one degrees twenty minutes east forty seven feet and eleven hundredths of a foot; thence south sixty-eight degrees forty minutes East One Hundred ten feet to the said line of Main Street; and thence Southerly along the same forty-nine feet and fifty hundredths of a foot to the point of BEGINNING.

Being the same premises conveyed to the said Pauline Traunstein and William Ehrich by John Randall, Exr. under the L. W. & T. of Susan Randall, deceased, and the said John Randall and Jean L. Randall, his wife, by deed dated April 23rd, 1926, and recorded in the Register's Office of Essex County in Book. C 74 of Deed, Page 495.

The within conveyance is to be made expressly subject to the facts shown on the survey made by Henry C. Warnick under date of March 13, 1926 which said survey the party of the second part acknowledges was submitted to it before the execution of the within agreement.

The within conveyance is also to be made expressly subject to a mortgage in the nominal sum of Seven Hundred and Fifty Dollars which said mortgage the party of the second part hereby agrees to assume and pay. The parties of the first part represent that the said mortgage contains a clause giving the mortgagors, their heirs, executors, administrators or assigns the

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Bill of Complaint—Agreement.

right to repay same at any time before maturity with interest to date of payment.

The parties of the first part represent that the zoning ordinances of the Town of West Orange, do not prohibit the erection of stores on the within described premises.

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It is understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land for non-payment of municipal taxes or assessments nor through adverse possession.

AND the said Isaac Miller for himself, his heirs and assigns, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that 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 Five Hundred (\$3500.) Dollars. as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

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\$200.00 in cash upon the execution and delivery of the within agreement, receipt whereof is hereby acknowledged

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750.00 by assuming the mortgage aforesaid
2550.00 in cash on the execution and delivery of the deed—as herein provided and closing title.

\$3500.00

The assessments now levied against said premises may be paid out for the proceeds of the within sale or in the alternative credit for same may be

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Bill of Complaint—Agreement.

given to the said party of the second part on account of the cash payment herein provided for at the time of passing title.

Taxes for the year 1927 and interest on the mortgage shall be apportioned and allowed as of the date of closing title.

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This Contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

And the said party of the part hereby agrees to pay to the licensed and authorized agent a commission of % on the purchase price aforesaid.

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

AND IT IS FURTHER AGREED, by the parties hereto, that the said deed of warranty shall be delivered and received at office of Charles S. Gansler, 60 Park Place, Newark, N. J. between the hours of ten o'clock in the forenoon and four o'clock in the noon on the said fifteenth day of April next ensuing the date hereof.

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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

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Bill of Complaint—Agreement.

same, the sum of _____ which they hereby
fix and settle as liquidated damages therefor.

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

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Morris Frankel

Signed, Sealed and Delivered
in the presence of

George Kasselhaut.

In consideration of mutual promises and agree-
ments herein stated, we hereby agree to extend
the date for the delivery of deed and execution of
this contract to _____ at same hour and
place

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Witness hand and seal this
day of _____, A. D. 19

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss:

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BE IT REMEMBERED, that on this twenty eighth
day of March in the year of our Lord One Thou-
sand Nine Hundred and twenty seven, before
me, the subscriber, an Attorney-at-Law of New
Jersey personally appeared Morris Frankel who,
I am satisfied, is the grantor mentioned in the
within Instrument to whom I first made known
the contents thereof, and thereupon he acknowl-
edged that he signed sealed and delivered the
same as his voluntary act and deed, for the uses
and purposes therein expressed.

George Kesselhaut
An Atty. at Law of N. J.

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Bill of Complaint—Agreement.

In consideration of Two Hundred (\$) dol-
lars to me in hand paid I hereby assign to Sam-
uel H. Pashkow this contract and all my rights
thereunder.

WITNESS our hands and seals this 31st day of
March A. D. 1927.

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Isaac D. Miller.

Witness: Morris Resnick

For the consideration of One Dollar (1.00)
and other valuable consideration, I hereby assign
two thirds of all my right, title and interest in
the attached contract, one third to Samuel E.
Danzig and one third to Herman Benjamin.

Samuel H. Pashkow.

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Witness:

Samuel Hailperin.

CONTRACT

For Sale of Property

Morris Frankel

To

Isaac Miller

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Dated 1927

Received in the Register's Office of
the County of Essex, N. J. on the 20th
day of April A. D. 1927 at 9:06 o'clock
in the forenoon, and Recorded in Book C
76 of Deeds for said County, on pages
319-320.

Howard S. Dodd

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Bill of Complaint—Will of Susan Randall.

WILL.

I, Susan Randall, wife of John Randall, of the City of Orange, in the County of Essex and State of New Jersey, do make publish this my Last will and Testament in manner and form following, that is to say:

- 10 First: I order all my just debts to be paid.
- Second: All the residue of my estate, both real and personal and whersoever situate, I give, devise and bequeath unto my husband John Randall, to have and to hold unto him, his heirs and assigns forever.

20 Lastly: I nominate and appoint my said husband, John Randall as and to be the executor hereof, with full power and authority to sell and convey the whole or any part or parts of my real estate, at such time, in such manner and upon such terms, as to him shall seem expedient; and I direct that he shall not be required to give any bond or other security in any place where-soever for the faithful performance of the duties hereby improved.

In Witness Whereof &c. Aug. 24, 1907.

30 Susan Randall, wife of
John Randall (L. s.)

**NOTICE OF MOTION TO STRIKE OUT
BILL OF COMPLAINT.**

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>SAMUEL H. PASHKOW, <i>et als.</i>, Complainants,</p> <p style="text-align: center;"><i>and</i></p> <p>MORRIS FRANKEL, <i>et als.</i>, Defendants.</p>	}	<p><i>On Bill, etc.</i></p> <p><i>Notice of Motion to Strike out Bill of Complaint.</i></p>	<p>10</p>
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To Jacob Lubetkin, Esq., solicitor of complainants, 60 Park Place, Newark, N. J.

SIR: 20

TAKE NOTICE that we shall appear before one of the Vice-Chancellors at Chancery Chambers, 1060 Broad street, Newark, N. J., on the twelfth day of July, 1927, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, to move to strike out the bill of complaint filed by you in this cause upon the ground that it discloses no cause of action, in that:

(a) No defect exists in the title as alleged in the bill of complaint. 30

(b) The executor conveyed said premises through the power and authority vested in him under the terms of the last will and testament of Susan Randall.

(c) Complainants improperly and contrary to equity and good conscience refused to accept title to said premises.

PRECKER & PRECKER,
Solicitors of Defendants. 40

Opinion.

This question has been settled so far as this Court is concerned by Vice-Chancellor Pitney in the case of *Van Winkle v. Van Winkle*, 59 New Jersey Equity, 317. The learned Vice-Chancellor says at page 320:

10 "Then as to the continued existence of the power of sale the well settled rule in New Jersey seems to be that in such a case the will is only disturbed so far as is necessary to give the post-humous child its full share of the estate. The very section which gives him his right assumes that the testamentary disposition will not be disturbed in any of its provisions except to the extent necessary to provide for the after-born child."

20 There is another point to be considered which I think is of importance. The property is now owned by innocent purchasers. In the case of *Hartman v. Hartle*, 95 New Jersey Equity, 123, it appeared that property of a testator was sold by the executors to the wife of one of them under a power of sale contained in the will, but without the authority of the Court.

30 Vice-Chancellor Foster said at page 125, "In view of the fact that the property is now owned by innocent purchasers, a resale cannot be ordered, but as an alternative Mrs. Dieker and the executors will be held to account for complainants one-fifth share of the profits made on the resale of the property under the authority of *Marshall v. Carson*, 38 New Jersey Equity, 250."

40 It therefore appears to me that the title to this land is absolutely good in the defendants and if the after-born children have a remedy, it is against the executor for an accounting.

Opinion.

In *Lippincott, et al. v. Wikoff*, 54 New Jersey Equity, 107, Vice-Chancellor Emery said, syllabus Section 6: "In an action for specific performance of a contract for the purchase of land from the executors, the defense of unmerchant- 10 ableness of title in that under the statute, the will is void and no power of sale conferred in the executors cannot prevail where the statute is so clear as to leave no doubt of its construction in favor of the validity of the will and of the power."

For these reasons I will advise a decree dismissing the bill.

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DECREE STRIKING OUT BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> SAMUEL H. PASHKOW, <i>et als.</i> , <i>Complainants,</i> <i>and</i> MORRIS FRANKEL, <i>et als.</i> , <i>Defendants.</i>	<i>On Bill, etc.</i> <i>Decree Striking Out Bill of Complaint.</i>
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This cause coming on to be heard in the presence of Jacob Lubetkin, Esq., solicitor for complainants, and Precker & Precker appearing for defendants, and the Court having heard counsel herein and having examined and considered the briefs submitted by said counsel, and it appearing to the satisfaction of the Court that title to the premises in question was formerly in the name of Susan Randall, deceased, that she had good title to the said premises, that she died testate and that her executor was given a power of sale under her will to convey the said premises and that he did convey the same to one of the defendants by virtue of the said power of sale, and the Court being satisfied that the said power of sale was valid, and that the executor conveyed good title as aforesaid, and that the after-born children of said decedent have no claim against the said property of defendants, who are innocent purchasers, and that complainants' allegation as to the unmerchantableness of defendants' title cannot prevail because the statute here involved is so clear as to leave no doubt of its

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Decree Striking Out Bill of Complaint.

construction in favor of the validity of the aforesaid will and power of sale, it is therefore on this 1st day of November, 1927, on motion of Precker & Precker,

ORDERED, ADJUDGED AND DECREED that the complainants' bill filed in this cause be, and the same is, hereby struck out with costs to be taxed, in which said costs there shall be included the sum of One Hundred Dollars for counsel fees of defendants and it is further

ORDERED that execution issue for the said counsel fees and taxed costs at the end of Ten days.

E. R. WALKER,
V.-C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

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NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>SAMUEL H. PASHKOW, SAMUEL E. DANZIG and HERMAN BENJAMIN, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>MORRIS FRANKEL and LOUIS KOHN, <i>Defendants.</i></p>	<p><i>On Bill, etc.</i></p> <p><i>Notice of</i></p> <p><i>Appeal.</i></p>
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20 The complainants, Samuel H. Paskow, Samuel E. Danzig and Herman Benjamin, hereby appeal from the whole and every part of the final decree made in this Court by the Chancellor, on the advice of Vice-Chancellor Alonzo Church, in the above-entitled cause, bearing date November 1, 1927, to the Court of Errors and Appeals, in the last resort in all causes.

30 JACOB LUBETKIN,
Solicitor for the Complainants.

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

JACOB LUBETKIN,
Of Counsel with the Complainants.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	<p><i>Between</i></p> <p>SAMUEL H. PASHKOW, SAMUEL E. DANZIG and HERMAN BENJAMIN, <i>Complainants-Appellants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>MORRIS FRANKEL and LOUIS KOHN, <i>Defendants-Respondents.</i></p>	<p><i>On Appeal</i></p> <p><i>from the</i></p> <p><i>Court of</i></p> <p><i>Chancery.</i></p> <p><i>Petition</i></p> <p><i>of Appeal.</i></p>	10
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20 To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Samuel H. Pashklow, Samuel E. Danzig and Herman Benjamin, the complainants in the above-entitled cause, respectfully show:

30 That your petitioners find themselves aggrieved by a final decree made in the said cause by his Honor, Edwin Robert Walker, Chancellor of New Jersey, on the advice of Vice-Chancellor Alonzo Church, bearing date November 1, 1927, in and by which said decree, it was adjudged and decreed that the complainants' bill filed in this cause be struck out.

Your petitioners humbly appeal from the said final decree and allege that the said decree is erroneous for the following reasons:

40 1. Because the complainants' bill disclosed a good cause of action or ground of complaint and they were entitled to the relief therein prayed for.

Petition of Appeal.

2. Because the defendants' title was defective and complainants were warranted to rescind said contract and impress their deposit as a lien upon the lands and premises described in the complaint.

10 3. Because the executor of Susan Randall had no power to convey the lands and premises described in the bill of complaint and cut off the interest of the after-born children of Susan Randall in the land described in the bill of complaint.

4. Because John Randall, executor of the said Susan Randall, being the sole devisee and legatee under the will of the said Susan Randall and having conveyed said premises also as an individual, had lost his power of sale as executor as against the after-born children of the said Susan Randall.

5. Because the said decree is in other respects erroneous and should be reversed.

Your petitioners, therefore, pray that the said final decree may be reversed, set aside and for nothing holden and that your petitioners may have such relief in the premises as to this Honorable Court shall seem just.

30 JACOB LUBETKIN,
Solicitor for and of Counsel
with Complainants-Appellants.

Service of a true copy of the within petition of appeal is hereby acknowledged this 23rd day of November, 1927.

PRECKER & PRECKER,
Sol. for Defendants-Respondents.

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ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

SAMUEL H. PASHKOW, SAMUEL
E. DANZIG and HERMAN
BENJAMIN,
Complainants-Appellants,

and

MORRIS FRANKEL and LOUIS
KOHN,
Defendants-Respondents.

*On Appeal
from
Chancery.**Answer to
Petition of
Appeal.*

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The answer of Morris Frankel and Louis Kohn, the above-named respondents, to the petition of appeal of Samuel H. Pashkow, Samuel E. Danzig and Herman Benjamin, the above appellants:

These respondents, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless, admit that a decree was on November 1, 1927, made and entered in the Court of Chancery of New Jersey in the above-entitled cause, for the purpose in said petition mentioned, and as therein set forth; but as to the substance and form of said decree these respondents beg leave to refer thereto when the same shall be produced.

These respondents are advised and believe that the said decree is agreeable to equity; and they pray that same may be affirmed with costs to be taxed in their favor.

PRECKER & PRECKER,
Solicitors for Respondents.

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71 FEB.T.1928

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

New Jersey Court of Errors and Appeals

Between

SAMUEL H. PASHKOW, *et als.*,
Complainants-Appellants,

and

MORRIS FRANKEL, *et als.*,
Defendants-Respondents.

*On Bill, etc.,
On Appeal
from the
Court of
Chancery.*

BRIEF FOR COMPLAINANTS-APPELLANTS.

Facts.

In March, 1927, the defendant, Morris Frankel, who was the owner of a tract of land in the Town of West Orange, Essex County, New Jersey, described in the complaint, agreed to sell the same to Isaac D. Miller by warranty deed free from all liens and encumbrances and received a deposit on account of the purchase price of Two Hundred Dollars (\$200.00). Isaac D. Miller assigned his interest in the contract to the complainant, Samuel H. Pashkow, who later assigned interests therein to the co-complainants, Samuel E. Danzig and Herman Benjamin. The contract was recorded in the Register's Office on April 20, 1927. By deed dated May 9, 1927, and recorded on the same day, Morris Frankel conveyed the premises to the defendant, Louis Kohn, who consequently took with notice of the complainants' rights.

The premises were formerly owned by one Susan Randall who acquired title thereto in 1915. Susan Randall died February 2, 1918, leaving a will dated August 24, 1907, in which she devised her entire estate both real and personal to her husband, John Randall, and appointed

him executor with full power and authority to sell and convey all of the decedent's real estate. At the time of her death, the said Susan Randall left her surviving her said husband, John Randall, and the following children: Susan M. Randall, Earl H. Randall and Harvey S. Randall. The said Earl H. Randall and Harvey S. Randall were born after the making of their mother's will. No provision is made in the will for the after-born children nor are they expressly disinherited. A complete copy of the will is annexed to the complaint and made part of the state of the case. By deed dated April 23, 1926, John Randall, as executor under the last will and testament of Susan Randall, deceased, and John Randall as an individual, and Jean L. Randall, his wife (he having remarried), conveyed the premises to Pauline Trautstein, *et als.*, and the said Pauline Trautstein, *et als.*, subsequently conveyed the premises to Morris Frankel. The complaint alleges that as the after-born children of Susan Randall were not expressly disinherited and no provision made for them in the will, they became entitled to an equal undivided one-third part of the real estate of their mother, subject to the curtesy right of their father, John Randall, by virtue of Section 21 of the Wills Act, Compiled Statute 1910, pages 58-65. Complainants refused to take title and filed a bill for rescission of the contract and for the return of their deposit and search fees. The defendants moved to strike out the bill of complaint alleging that there was no defect in the title and that the executor conveyed said premises by virtue of the power of authority conferred upon him in the will of Susan Randall and a decree was entered striking out the bill of complaint from which the complainants-ap-

pellants appeal. The case involves two questions of law. First, did the executor of Susan Randall, notwithstanding the birth of after-born children, still retain his power to dispose of and convey that part of the decedent's estate which the after-born children of Susan Randall would inherit. Second, if the executor did not retain such power, whether the fact that defendants were innocent purchasers give them title to the whole of the property.

POINT 1.

The power of sale conferred by Susan Randall in her will upon her husband, John Randall, as executor, was void as against the after-born children of the said Susan Randall.

It may be stated here, that if the complainants' title is defective, there does not seem to be any question of their right to rescind and impress a lien upon the land. The law seems to be that the complainants are entitled to rescind and are entitled to a return of their money in a case where specific performance would not be decreed against them if sued for specific performance. While the search fees cannot be impressed as a lien upon the lands, equity will award them as incidental to other relief. This is the rule laid down by Vice-Chancellor Backes, 96 N. J. E., page 52, and never seems to have been questioned. The motion to strike out the bill admits the truth of all of the allegations therein contained. Is the complainants' title defective or at least is the question of law involved so doubtful as to justify rescission and the return of their money and search fees?

Section 21 of the "Wills Act" Compiled Statutes 1910, page 5865, reads as follows:

"That if a testator having a child or children born at the time of making and publishing his last will and testament, shall at his death, leave a child or children born after the making and publishing of his said last will and testament, or any descendant or descendants of such after-born child or children, the child or children so after-born, or their descendant or descendants respectively, if neither provided for by settlement nor disinherited by the said testator shall succeed to the same portion of the father's estate, as such child or children or descendants as aforesaid would have been entitled to, if the father had died intestate; towards raising which portion or portions, the devisees and legatees or their representatives, shall contribute proportionably out of the part devised and bequeathed to them by the same will and testament."

The motion to strike out admits the allegations of the bill of complaint. It appears that the property was owned by one, Susan Randall, a married woman who died seized thereof February 2, 1918, leaving a will dated August 24, 1907, and that she devised her property outright to her husband and appointed him executor with a power of sale. She left her surviving three children: Susan M. Randall, Earl H. Randall and Harvey S. Randall. The last two were admittedly born after the making of her will. No provision was made in her will for after-born children, nor were they expressly disinherited. The defendants acquired title through a deed made by the husband as executor and individually. The sole question in the case appears to be whether the executor, notwithstanding the birth of the after-born children, still retains his power to dispose of and convey that part of the decedent's estate

which the after-born children would inherit. The statute says that said children "Shall succeed to the same portion of the father's estate, as such child or children or descendants as aforesaid would have been entitled to, if the father had died intestate."

It seems to me that this indicates that the children would be entitled, not to the proceeds of any sale or disposition of any property, but the property in kind, as if the father had died intestate. If the executor retains his power of sale and disposes of the decedent's assets converting it into money, the children do not get the same property they would have received had the parent died intestate. In the case of *Walker v. Hyland*, 70 N. J. L. 69, it was held that this section applied to a married woman.

The defendants rely upon the case of *Van Wickle v. Van Wickle*, 59 N. J. E. 317—44 Atl. 877. In the first place the after-born child in that case was born after the testator's death and it seems to me that the act would not apply because the reading of the act is "shall at his death leave a child or children born, etc." In the *Van Wickle* case the child was not born before the death of the testator but was born after the testator's decease. Secondly, in the *Van Wickle* case, there was not merely a naked power of sale but an outright devise to trustees. Thirdly, the specific point was not decided. Vice-Chancellor Pitney in writing his opinion says:

"It is apparent at once that this case is not within the strict terms of that section, if by the words, 'leave a child or children born after the making,' etc., is intended that the child shall be born before the death of the testator. If the words 'leave a child' are satisfied by the existence of the child *en ventre sa mere*, then the case is within the

Statute. The very case was before this court and dealt with by Chancellor Runyon, in *Wilson v. Fritts*, 32 N. J. Eq. 59, and the Chancellor held that the case was within the nineteenth section, above recited. He does not, in his opinion, take notice of the language to which I have just called attention, and give any reasons for holding that the words 'leave a child' were satisfied by a child *en ventre sa mere*. But I adopt the conclusion of the chancellor, and heartily concur in it. The present case, as well as that before the chancellor, is within the equity of the statute, and, unless the construction he gives to it is adopted by the court, it would seem that the common law would prevail, and the after-born issue lose all rights under the will. *The aspect of the case was not argued before me, and counsel who presented the case did not contend that it was possible to cut off the after-born child.*"

It will be observed in that case that the Chancellor provided for the protection of the infant's share. It seems to me, therefore, because of the dissimilarity between this case and the Van Wickle case that the complainants should not be required to take the title. Here admittedly the two after-born children were entitled to a substantial share in the estate and for over a period of eight years there does not seem to be any provision made for them. To permit the executor, who in this case is the father, to dispose of the entire estate would be putting it in his power as such executor to sell the property of these infants without giving them any protection to preserve it until they arrive of age. Instead of becoming seized of specific shares in specific property, which could not be sold except under the protection of this Court or the Orphans' Court in a proceeding for that purpose, under which the Court would require a bond, they merely

would have an unsecured claim against the executor. Would they inherit a claim against their father as executor if the mother died intestate? It seems to me that such a construction of the statute would defeat its very purpose and not protect the infant child against the improvidence or thoughtlessness of the parents which the statute intended to provide against.

The Van Wickle case and the case cited seem to be the only two reported cases in this State. It would seem to me that the rights of after-born children in the mother's estate should be controlled by the statute of descent and not by the will.

In 18 Corpus Juris 842, the author says:

"The right of a pretermitted child born in the testator's lifetime accrues on the testator's death, while the right of a pretermitted posthumous child accrues at the time of its birth, and it is immaterial that the posthumous child died shortly after its birth. The benefit of the statute may be waived or renounced by a pretermitted child. But where a child has once secured the right under a statute for the benefit of pretermitted children, he will not lose such right because he does not bring an action within the statutory period. Neither can he be deprived of his right in the testator's land, or be compelled to resort to the proceeds of a sale, by the exercise of an express or implied power of sale contained in the will, or by a sale by the devisee as such."

Was there a valid exercise of the power of sale by the executor?

The power in this case was given to the person to whom the land was devised, and in reality added nothing to the power of the devisee except only as it may have conferred upon him, as executor, the right to convert the property for

the purposes of administration, and thus free the property of claims of creditors of the estate. There was no trust created, no purpose expressed by the testatrix to which the sale of the property would be a corollary. It is a clear naked power.

In *Hatt v. Rich*, 59 N. J. E. 498, Vice-Chancellor Grey had before him the question of the right of executors to exercise a power given to them in widest terms, the contention being that there was no purpose to be subserved by the exercise of the power and that therefore the devisees took the land freed of the power. The Court in that case held that the power might be validly exercised; that more delay in its exercise did not cause it to lose its efficiency. He said (p. 498)—

“The nature of the power is apparent. There is no direction to sell, but there is the fullest authority to do so, at the discretion of the donees. In such cases the land retains its character as land, until it is actually sold. Meanwhile by the testator’s residuary devise, the title to the lands vested in his children, subject to be divested by the execution of the power by the executors * * * Each of the numerous other cases cited against the exercise of the power stands upon the expressions of the will in the particular case, and if they were ambiguous, then upon the circumstances of the testator’s property and his family, &c. or beneficiaries. They afford but little aid as precedents because each case varies in essential particulars of its facts from that under consideration.”

The Vice-Chancellor then goes on and considers the will and holds that it is not certain that no purpose of the testator is to be subserved by the exercise of the power and for that reason the power may be validly exercised. And he says (p. 504)—

“The contestants insist that the satisfaction of the debts and legacies has nullified

the power. The decisions, in cases where a showing of objects for the execution of general powers has been required, have not limited the execution of such powers to the payments of debts and legacies. On the contrary, such general powers appear to have been held valid wherever the court has been able to ascribe to a testator any purpose consistent with the circumstances of his estate and his relations to his beneficiaries.”

The effect of the Vice-Chancellor’s decision, as I read it, is that if it can be conceived that any purpose of the testator may be achieved by the exercise of the power, the power subsists. Otherwise those to whom the lands descend or are devised have an election to take the land in question, and this is ever so where the direction is to sell and divide.

Huber v. Donoghue, 49 N. J. E. 125;
Christine v. Baldwin, 95 N. J. E. 83.

The last case upon the subject is the decision of Vice-Chancellor Buchanan in *Foley v. Devine*, 95 Eq. 473, decided January 9, 1924. The Vice-Chancellor considers the cases and summarizes what he finds to be the law. He says:

“The fact that the legal title to the lands in question is devised to another, does not itself operate as such implied limitation. (On the exercise of the power.)” *Bacot v. Wetmore*, 17 N. J. E. 250; *Wetmore v. Midmer*, 21 N. J. E. 242; *Hatt v. Rich*, 59 N. J. E. 492; *Randolph v. Rafferty* (Court of Errors and Appeals, 92 N. J. E. 428. In such a case the devisee’s title is subject to the power of sale, and will be divested (even from subsequent grantees) by the valid exercise of the power. *Hatt v. Rich*, *supra*. So, also, where the title is in an heir instead of a devisee. *Moore v. Hackensack Savings Bank*, 47 N. J. E. 279 * * * “It would seem clear that a testamentary gift of power of sale must stand upon pre-

cisely the same footing as any other testamentary gift; that the ascertainment and determination of its nature and extent is, as it would be in the case of gift of anything else, a matter of the ascertainment and determination is to be gained as in all other cases from a consideration of the entire will and the surrounding circumstances (Cf. *Torrey v. Toreey*, 70 N. J. L. 673; *Coyle v. Donaldson*, 91 N. J. E. 138), and as well, therefore, by *implication* as by express words.

“Where the power is not given to the donee for his individual benefit, but is given to a fiduciary, an executor or trustee, *it is obviously given to him for the purpose of enabling him or assisting him to carry out the duties imposed upon him by the will, and for no other purpose.* It is so difficult to conceive, as to be impossible of belief, that any testator should intend that an executor or trustee, after the termination of his duties—after the entire completion of the administration of the estate and of all testamentary trusts should still continue to hold, and to be able validly to exercise, indefinitely, a power of sale—no matter how broad and unlimited the words of its creation. To what end? For what purpose? For whose benefit, since it may not be for his own benefit? * * * The devisee of the land his subsequent grantees take, subject to the exercise of the power of sale, as hereinbefore shown. An outstanding power of sale therefore would, as a practical matter, prevent the devisee from selling—for who would buy? Common sense indicates that a testator who devises lands to a beneficiary intends the latter to have the beneficial interest in those lands, except to the extent that it is impaired by a power of sale given for what the testator deemed paramount purposes. The power of sale is to be deemed paramount therefore to the extent of the purposes, but not further, *to the extent, and the extent only, that there appear testamentary objects and purposes*

*in aid of which the testator intended that power might be used.” * * **

* * * “I take it as undoubtedly the law, therefore that a power of sale, in trust, without limitation by express words as to the time of its exercise, is in all cases deemed to be limited in that regard by the objects and purposes in aid of which it was given—*it is to be deemed that testator intends it to exist no longer than there remains unfulfilled any object or purpose for the furtherance of which it was created.*”

I think the statement of the Vice-Chancellor not only expresses the law but is also in accord with common sense.

Applying that law to the situation in the case before us we find that the power was given to the same person to whom the entire estate was devised. It could not have been given to him for his own benefit for, by the absolute gift, he was clothed with complete dominion over the estate. There could have been but one purpose in the testatrix's mind at the time of the execution of the will and that was to permit the executor as such to convert the real estate so that debts might be paid and the estate properly administered. The gift of the power to the executor conferred upon him, in addition to the right which he had individually, only the power of disposing of the property free from the debts of the testatrix.

The power was not exercised until eight years after the death of the testatrix. In the ordinary course of events her estate should have been fully administered. He signed it not only as executor but individually. The two signatures are quite inconsistent. If he was exercising the power under the will as executor he had no individual rights to convey. The conveyance of his individual rights, by this deed, indicated that

he was not, in fact, conveying as executor but individually.

The circumstances were such as that it seems to me that a purchaser was fully put upon inquiry, and there is sufficient, I think, disclosed in the record to put subsequent purchasers upon inquiry, and if that be so, subsequent purchasers are bound by what the inquiry would have developed.

The way in which this matter should have been handled is indicated by what was done *in re Miner*, 76 N. J. E. 116. The same situation was there created and as the Vice-Chancellor says at p. 117—"on the application of the infant's general guardian, his interest in a tract of land in Newark had been sold, in connection with a sale by the executors under the will." In other words, it was in that case considered that for a valid disposition of the property there would have to be not only an exercise of the power by the executors but a joining of the infants by their guardian and appropriate proceedings in the court for that purpose. From this case it would appear that counsel concluded that the power could not be exercised and divest the interest of the after-born children and that the opinion of Vice-Chancellor Pitney in *Van Wickle v. Van Wickle* did not express the law.

POINT 2.

As the power of sale was void as to the after-born children of Susan Randall, a bona fide purchaser did not acquire title to the interest of said infants in the decedent's real estate. The Vice-Chancellor in his opinion in this case says: "There is another point to be considered which I think is of importance. The property is now

owned by innocent purchasers. In case of *Hartman v. Hartle*, 95 N. J. E. 123, it appeared that property of a testator was sold by the executors to the wife of one of them, under a power of sale contained in the will, but without the authority of the Court." There is nothing in the record to show that the defendants were innocent purchasers as no testimony was taken on that point. The fact remains that the will of Susan Randall appears of record and upon an issue of fact it might also appear that the defendants or their attorney representing them when they purchased the property, knew of the after-born children of Susan Randall. In the case last cited, it will be observed that the executors had a power of sale under the will but indirectly purchased the property. It seems to be well established law that such a sale would not be *void* but merely *voidable* that a bona fide purchaser for value acquired title and that the case *sub judice* and that case are not alike. A proposed purchaser searching the property must take notice of the record. If the title vested in the children by operation of law, no act of any third party could divest them of it as the land would descend to them not by virtue of the terms of the will but by virtue of the statute under consideration.

I therefore respectfully submit that the final decree in the above-entitled matter should be reversed.

JACOB LUBETKIN,
Solicitor for and Counsel
with Complainants-Appellants.

71 FEB.T.1928

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

New Jersey Court of Errors and Appeals

Between

SAMUEL H. PASHKOW, *et als.*,
Complainants-Appellants,

and

MORRIS FRANKEL, *et als.*,
Defendants-Respondents.

On Bill, Etc.

*On Appeal
from the
Court of
Chancery.*

BRIEF FOR DEFENDANTS-RESPONDENTS.

Statement of the Case.

Complainants filed a bill of complaint to rescind an agreement for the sale of lands and to obtain the return of a deposit paid thereunder, together with certain expenses incidental thereto. Their refusal to accept a deed was based on an alleged defect in defendants' title, as follows: The premises in question were at one time owned by one, Susan Randall, the sufficiency and validity of whose title are not questioned by complainants. The said Susan Randall died on February 2, 1918, leaving the following will:

I, Susan Randall, wife of John Randall, of the City of Orange, in the County of Essex and State of New Jersey, do make, publish this my Last Will and Testament in manner and form following, that is to say:

FIRST: I order all my just debts to be paid.

SECOND: All the residue of my estate, both real and personal and wheresoever situate, I give, devise and bequeath unto my husband John Randall, to have and to hold unto him, his heirs and assigns forever.

LASTLY: I nominate and appoint my said husband, John Randall as and to be the executor hereof, with full power and authority to sell and convey the whole or any part or parts of my real estate, at such time, in such manner and upon such terms, as to him shall seem expedient; and I direct that he shall not be required to give any bond or other security in any place wheresoever for the faithful performance of the duties hereby improved.

In Witness Whereof, &c. Aug. 24, 1907.

Susan Randall, wife of
John Randall (L. s.)

At the time of her death there survived the decedent her husband and three children, one of whom was born before and two after the making of the will. Complainants allege that inasmuch as no mention of after-born children was made in the will, each of them became entitled to a part of the real estate left by the decedent in accordance with terms of the statute. Complainants go farther and charge that the said real estate, which was subsequently conveyed by John Randall, as executor and individually, was and still is subject to the outstanding interest of the said after-born children. This interest, complainants allege, throws a cloud upon the title and renders same defective.

Defendants made a motion to strike out the bill of complaint upon the ground that it disclosed no cause of action, in that:

1. The facts recited in the bill of complaint prove that the deed given by the executor passed good title, unencumbered by any outstanding interest of the after-born children.

2. In view of the fact that the premises in question are now owned by innocent purchasers, the only remedy of the after-born children, if any, is to hold the executor to account for their interest.

3. The rule as to matters of doubt of facts or law involved in specific performance and rescission cases is applicable only where the doubt is real, probable or debatable and no such doubt exists in the case *sub judice*.

The said bill of complaint was thereupon by decree of the Court struck out.

POINT 1.

The facts recited in the bill of complaint prove that the deed given by the executor passed good title, unencumbered by any outstanding interest of the after-born children.

The provision of the statute relative to this question is Section 21 of An Act concerning Wills (Revision 1877, page 1243):

“That if a testator *having a child or children born at the time of making and publishing his last will* and testament, shall at his death, leave a child or children born after the making and publishing of his said last will and testament * * * the child or children so after-born * * * if neither provided for by settlement nor disinherited by the said testator, shall succeed to the same portion of his father's estate, as such child or children * * * would have been entitled to, if the father had died intestate. * * *”

The effect of the after-birth of children upon the validity of a power of sale under the will was clearly enunciated by Vice-Chancellor Pitney in

the leading case of *Van Wickle v. Van Wickle*, 59 N. J. Eq. 317:

"Then as to the continued existence of the power of sale, the well stated rule in New Jersey seems to be that in such a case the will is only disturbed so far as is necessary to give the posthumous child its full share of the estate. The very section which gives him his right assumes that the testamentary disposition will not be disturbed in any of its provisions except to the extent necessary to provide for the after-born child.

This conclusion leaves the power of sale undisturbed and in full force. The result would have been different had the case fallen within the 18th (now 20th) section of the statute * * *. I will advise a decree against the posthumous child, that the executors in this case have full power of sale."

Acting upon the strength of this rule of law, which is so soundly entrenched in the jurisprudence of our state as not to countenance any question, defendants accepted a deed from the executor and contracted to give a deed to complainants. Upon the strength of this rule thousands of other deeds have been similarly given and accepted. To deny the efficacy of this rule now would be to unsettle titles to real estate throughout this state. Yet it is this very thing that complainants propose to do.

The rule of law pronounced by the learned Vice-Chancellor is clear cut, the language unequivocal. There it is. So direct and positive is the statement that it baffles all attempt to lessen its strength or to twist its meaning. Examine, analyze, paraphrase, interpret or do what we will with it, we cannot deprive it of its purport. It admits of only one interpretation: provision must be made for after-born children, but as to the power of sale and all other provisions the will must not be disturbed.

As to any attempt to distinguish between the case *sub judice* and the *Van Wickle* case on the ground that the latter involved a "posthumous" child, a cursory reading of the opinion is sufficient to show that the Vice-Chancellor expressly stated that no distinction could be made on that ground, but that the effects of "posthumous" and "after-born" were identical.

It is evident therefore that the deed of John Randall in the case *sub judice* was given by virtue of an efficient power of sale and passed good title.

POINT 2.

In view of the fact that the premises in question are now owned by innocent purchasers, the only remedy of the after-born children, if any, is to hold the executor to account for their interest.

The genesis of the above view may be found in the opinion of Vice-Chancellor Foster in the recent case of *Hartman v. Hartle*, 95 N. J. Eq. 123. In the latter case the property of the testator was sold by the executors to the wife of one of them under a power of sale contained in the will, but without a court order. The complainant, a beneficiary under the will, prayed to have the sale set aside because of its fraudulent nature. The learned Vice-Chancellor ruled that:

"In view of the fact that the property is now owned by innocent purchasers a resale cannot be ordered but as an alternative Mrs. Dieker (purchaser) and the executors will be held to account for complainant's one-fifth share of the profits made on the resale of the property, under the authority of *Marshall v. Carson*, 38 N. J. Eq. 250, and a decree will be advised to that effect."

The significance of the above case lies in the attitude of the Court towards innocent purchasers and in its anxiety to protect the interests of such innocent parties from the effect of another's fraud. It is in fact one of the most soundly established doctrines of our Court of Equity that the interests of innocent parties should not suffer from the fraud or mistakes of others.

In the case *sub judice* complainants allege that the executor failed properly to cut off the interest of the after-born children in the property. While we do not for one moment admit that such an interest ever existed, yet we do not see how it could affect the title of defendants if it did exist and was not properly cut off, as alleged. As a matter of fact no fraud on the part of the executor is alleged by complainants. There is no showing of facts to prove that the interests of the children were not satisfied by the executor. The children do not come into this court to attack the conveyance, and under the decision quoted above they could not prevail against the defendants, if they did attack, because of defendants' standing as innocent purchasers. How then can the complainants successfully attack the conveyance of the executor? Surely the complainants, not being in privity with the after-born children, have even less right to attack the executor's conveyance than the children have. And if the children could not succeed, *a fortiori* the complainants must assuredly fail.

POINT 3.

The rule as to matters of doubt of facts or law involved in specific performance and rescission cases is applicable only where the doubt is real, probable or debatable and no such doubt exists in the case sub judice.

Complainants have invoked in their behalf the rule customarily applied to specific performance suits, viz: that where a doubt exists as to the facts or the points of law at issue the courts have followed the practice of denying the discretionary relief of specific performance. It is not denied by defendants that such practice obtains in this state. But the interpretation of this rule by our courts favors defendants' case, not that of complainants.

In the first place it is to be noted that all the cases, as well as the authorities on equity jurisprudence, emphasize the point that the doubt which is relied upon must be real, not fanciful; it must be debatable, not on a point where the law is settled; and it must be substantial, such as to make it probable that the subsequent vendee may be exposed to the hazards of litigation. The rule cannot be invoked where the facts are clear or the law is settled, where for example the court has only to apply a canon of real property law. The application of this doctrine finds its way into the opinions of our courts very frequently. A recent example is the enunciation of Vice-Chancellor Backes in the case of *Salter v. Beatty*, 5 Adv. R. 1059:

"The remote possibility of an idle and vain suit is not within the category of being 'exposed to the hazard of litigation,' a defense sometimes accorded to vendees in suits for specific performance. *Smith v. Reidy, supra.*"

In the instant case this rule also finds application. The validity of the power of sale of the executor is so patent as to admit of no debatable doubt. In this posture the rule of doubt is not apposite in the case *sub judice*.

In *Lippincott v. Wikoff*, 54 N. J. Eq. 107, Vice-Chancellor Emery said, syllabus Section 6:

“In an action for specific performance of a contract for the purchase of land from the executors, the defense of unmerchantableness of title in that, under the statute, the will was void, and no power of sale conferred on the executors, cannot prevail where the statute is so clear as to leave no doubt of its construction in favor of the validity of the will and of the power.”

We therefore submit that for the reasons herein stated the judgment of the Court below should be affirmed, with costs.

Respectfully submitted,

CHARLES S. GANSLER and
PRECKER & PRECKER,
Solicitors for Defendants-Respondents.

MICHAEL S. PRECKER,
Of Counsel with Defendants-Respondents.