INDEX.

	Page
Bill of Complaint	1
Schedule A	6
Schedule B	8
Schedule C	9
Schedule D	10
Notice of Motion to Dismiss Bill	13
Order Denying Motion to Dismiss Bill	14
Opinion of Vice-Chancellor on Motion to Dismiss	15
Opinion of Vice-Chancellor on Motion for Injunction	16
Notice of Appeal	23
Petition of Appeal	24
Answer to Petition of Appeal	25

BILL OF COMPLAINT.

Filed May 31, 1919.

In Chancery of New Jersey

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

The complainant, Lehigh Valley Railroad Company, a body corporate of the State of Pennsylvania, respectfully shows that:

1. On June 5, 1889, John E. Andrus, of Yonkers, Westchester County, New York, of the first part, and F. Joseph Sheehan, of the second part, entered into an indenture of lease under seal with covenants by the respective parties thereto, wherein and whereby the said John E. Andrus did grant, demise and to farm let unto the said F. Joseph Sheehan certain land, land under water and rights in the City of Bayonne, in the County of Hudson and State of New Jersey, whereof said John E. Andrus was in possession seized in his own right as of fee and in said indenture described as follows, namely: "All that certain piece or parcel of land, land under water and rights, situate, lying and being at Constable's Hook, Bayonne, New Jersey, being the same land, lands under water and rights conveyed to the party hereto of the first part by Peter C. Cornell and others, trustees, by deed dated November 1, 1881, and recorded in the Hudson County Register's Office January 27, 1883, in Liber 375 of Deeds, page 354, etc., with all the appurtenances, for the term of sixty years from the fifth day of June, 1889;" the rental to be payable in quarterly payments in advance, the amount for the first 20 years to be $4,250 per year, the first payment of $1,062.50 to be made on the execution and delivery of said lease, and the rental for the next 20 years to be determined by arbitration as therein provided, and for the remaining 20 years in like manner. And therein and thereby the said party of the first part did covenant that the said party of the second part, on paying the said yearly rent and performing the covenants in said indenture contained to be performed on his part, should and might peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid. And the said party of the second part did covenant to pay to the said party of the first part the

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said yearly rent as specified, namely, $4,250 per annum, in equal quarterly payments in advance during the first 20 years of the term, and thereafter to pay in like manner the rent which should be fixed by arbitration as thereinafter provided, and also as part of the consideration of that lease annually thereafter to pay the taxes, assessments, water rents, and other municipal, state or governmental charges and impositions whatsoever charges upon said premises. And it was further in said indenture agreed by the parties thereto that during the first half of the twentieth year of the term aforesaid said parties should each appoint one arbitrator, and the arbitrators so appointed should fix the annual rental to be paid by the complainant during the succeeding 20 years, and that in case the arbitrators could not agree then they should select an umpire to act with them, and the award of any two of them, signed and delivered to the said parties on or before the expiration of the first half of the twentieth year of said term should be binding upon both of said parties, and the rental so fixed should be payable in equal quarterly payments in manner aforesaid. And it was further in said indenture agreed by the parties thereto that during the first half of the fortieth year of the term a like arbitration should be had with like effect for the determination of the rental for the last 20 years of said term, and that in fixing the said rental the arbitrators should consider the rental value of the premises excluding the cribbing, piers and structures or buildings on the piers. And it was further in said indenture agreed by the parties thereto that during the first half of the sixtieth year of said term the value of the improvements placed upon said lands by the tenant should be ascertained by arbitrators selected in manner aforesaid and that their award, or the award of any two of them, signed and delivered to the parties at or before the expiration of the first half of the sixtieth year of said term, should be binding upon said parties, and at the expiration of said term the landlord on retaking the premises should pay to the tenant the value of said improvements so ascertained, and that said improvements should be construed to include only cribbing, piers and structures or buildings on the piers to the height of one story only, and that if any buildings thereon should have a greater height than one story they should be valued as if they were one story in height. And it was further in said indenture agreed by the parties thereto that if

for any cause a valid award fixing rentals should not be made and delivered at or within the time limited, then the landlord might recover by action from time to time at law or in equity a fair quarterly compensation for the use and occupation of the demised premises, and that if for any cause a valid award fixing the value of the improvements as provided should not be made and delivered at or within the time limited for that purpose, then the tenant might recover by action at law or in equity the value of the said improvements as so defined. It was further in said indenture agreed by the parties thereto that that instrument should bind the heirs, executors and administrators and assigns of the respective parties thereto. A true copy of said indenture is hereto annexed, made part hereof and marked "Schedule A." Said indenture was duly acknowledged by the parties thereto, and was recorded in Book 514 of Deeds for the County of Hudson on pages 90, etc.

2. On September 8, 1890, the said F. Joseph Sheehan, by writing under his hand and seal, assigned the said indenture and all his rights thereunder to Robert H. Sayre, his executors, administrators and assigns, for the rest, residue and remainder of the term thereby demised from and after the date of said assignment, subject, nevertheless, to the rents, covenants, conditions and provisions of said indenture. A true copy of said assignment is hereto annexed, made part hereof and marked "Schedule B." Said assignment was duly acknowledged by said Sheehan and was recorded in Book 514 of Deeds for the County of Hudson on pages, 93, etc.

3. On September 8, 1890, the said Robert H. Sayre, by writing under his hand and seal, assigned the said indenture and all his rights thereunder to complainant, its successors and assigns, for the rest, residue and remainder of the term thereby demised, from and after the date of said assignment, subject, nevertheless, to the rents, covenants, conditions and provisions of said indenture. A true copy of said assignment is hereto annexed, made part hereof, and marked "Schedule C." Said assignment was duly acknowledged by said Sayre and was recorded in Book 755 of Deeds for the County of Hudson on page 394.

4. Ever since September 8, 1890, complainant has been in possession of the said demised premises, and has performed

all the covenants therein contained to be performed by the party of the second part thereto.

5. When it became time to fix the rental under said indenture for the second period of 20 years of the term demised, said Andrus and complainant mutually desiring to modify the pro-
10 visions of said indenture so as to have the rent fixed for periods of 10 years instead of 20 years, and in other particulars, appointed Edlow W. Harrison and Charles W. Fuller arbitrators to fix the annual rental for the period of ten years from June 5, 1909, and said arbitrators reported that they had agreed upon the sum of $7,500 as the annual rental to be paid for said period, and on March 22, 1909, said Andrus and complainant, by written agreement under their seals reciting the said indenture and two assignments above mentioned and the appointment and action of said arbitrators, mutually agreed as follows, namely,
20 that the terms of said lease upon which the rental fixed by arbitrators would be payable for the term of 20 years should be modified so that said rental so fixed by arbitrators should be payable for the next term of ten years, to wit, from June 5, 1909, until June 5, 1919—all the other terms, covenants and conditions of said lease, except as therein modified, to remain unchanged. And it was further mutually agreed that the rate to be paid by complainant as rental for said premises from June 5, 1919, to June 5, 1929, should be fixed and determined by arbitrators appointed in the last half of the year 1918 in the manner provided
30 by said lease, and that thereafter the rental should be in like manner so fixed from time to time for ten-year periods in the last half of the years 1928 and 1938 respectively, until the termination thereof on June 5, 1949, instead of the twenty-year period fixed in said lease. A true copy of said agreement is hereto annexed, made part hereof, and marked "Schedule D." Said agreement was duly acknowledged by said Andrus and duly proved as to complainant, and was recorded in Book 1025 of Deeds for Hudson County at page 621.

6. Prior to September 26, 1918, said Andrus appointed
40 William M. Greve, of the Borough of Brooklyn, City and State of New York, and complainant appointed Thomas A. Ryer, of Jersey City, Hudson County, New Jersey, as arbitrators to fix and determine the annual rental to be paid for said demised premises for the term of 10 years, beginning June 5, 1919, and

said arbitrators inspected the demised premises and had several conferences, but could not agree upon such rental. On November 25, 1918, when it became evident that the said arbitrators could not agree on a rental, said Thomas A. Ryer, the arbitrator appointed by complainant, proposed the selection of an umpire in accordance with the provisions of said indenture of lease. To this proposal said William M. Greve, the arbitrator appointed by said John E. Andrus, acceded, and each of said arbitrators suggested various persons for umpire, but none named by either arbitrator was satisfactory to the other, and before December 5, 1918, it became evident that it was impossible for the arbitrators to select an umpire. Since that date and up to the exhibiting of this bill of complaint it has been impossible for said arbitrators either to agree upon a rental or to select an umpire. Such failure to agree or to select an umpire has not been due to any fault on the part of the complainant or of the arbitrator appointed by it.

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

1. That said John E. Andrus, who is the defendant to this suit, may, without oath, answer this bill of complaint and each statement therein made.

2. That this Court will, by reference to a Master, or in such other way as to the Court shall seem equitable and just, fix and determine the amount of annual rental which complainant must pay for the period of 10 years beginning June 5, 1919, of the term demised by said lease.

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

COLLINS & CORBIN, (SEAL.)
Solicitors for and of Counsel with Complainant.

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SCHEDULE "A."

Lease, John E. Andrus to F. Joseph Sheehan, dated June 5, 1889.

THIS INDENTURE, made the 5th day of June, 1889, between JOHN E. ANDRUS, of Yonkers, Westchester County, New York, of the first part, and F. JOSEPH SHEEHAN, of the second part.

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WITNESSETH: That the said party of the first part has letten and by these presents does grant, demise and to farm let, unto the said party of the second part, ALL that certain piece or parcel of land, land under water and rights, situate, lying and being at Constable's Hook, Bayonne, New Jersey, being the same land, lands under water and rights conveyed to the party hereto of the first part, by PETER C. CORNELL and others, trustees, by deed dated November first, 1881, and recorded in Hudson County Register's Office, January 27th, 1883, in Liber 375 of Deeds, page 354, &c., with all the appurtenances, for the term of sixty years from the fifth day of June, 1889, the rental to be payable in equal quarterly payments in advance, the amount for the first twenty years to be Four Thousand Two Hundred and Fifty Dollars, per yr., the first payment of $1,062.50 to be made on the execution and delivery of this lease. The rental for the next twenty years shall be determined by arbitration as hereinafter provided, and for the remaining twenty years in like manner.

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And it is agreed that if any rent shall be due and unpaid or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and to remove all persons therefrom.

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And the said party of the second part doth covenant to pay to the said party of the first part the said yearly rental as herein specified, $4,250 per annum in equal quarterly payments in advance during the first twenty years of the term, and thereafter to pay in like manner the rentals which shall be fixed by arbitration as hereinafter provided; and also as part of the consideration of this lease annually hereafter to pay all taxes, assessments, water rents and other municipal, state or governmental charges and impositions whatsoever charges upon said premises; and in default of the payment thereof within ninety days from the time when the same severally become due, the landlord may, if he so elect, pay the same and recover the amount so paid from the tenant as rent in arrears.

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And it is agreed that during the first half of the twentieth year of the term aforesaid, the parties to this lease shall each appoint one arbitrator and the two arbitrators so appointed shall fix the annual rental to be paid by the tenant during the succeeding twenty years; in case the arbitrators cannot agree, then they shall select an umpire to act with them, and the award of any two of them, signed and delivered to the parties on or before the expiration of the first half of the twentieth year of the term, shall be binding upon both parties, and the rentals so fixed shall be payable in equal quarterly payments in manner aforesaid. 10

And it is agreed that during the first half of the fortieth year of the term a like arbitration shall be had with like effect for the determination of the rentals for the last twenty years of the term.

In fixing said rentals the arbitrators shall consider the rental value of the premises excluding the cribbing, piers and structures or buildings on the pier. 20

And it is agreed that during the first half of the sixtieth year of said term, the value of the improvements placed upon said lands by the tenant shall be ascertained by arbitrators selected in manner aforesaid, and their award or the award of any two of them, signed and delivered to the parties at or before the expiration of the first half of the sixtieth year of the term, shall be binding upon the parties, and at the expiration of the term, the landlord, on retaking the premises, shall pay to the tenant the value of said improvements so ascertained. 30

Said improvements shall be construed to include only cribbing, piers and structures and buildings on the piers to the height of one story only; if any buildings are thereon which have a greater height than one story, they shall be valued as if they were one story in height.

And that at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. 40

And the said party of the first part doth covenant that the said party of the second part, on paying the said yearly rent and performing the covenants aforesaid shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

If for any cause a valid award fixing rentals shall not be made and delivered at or within the times above limited then the landlord may recover by action from time to time at law or in equity a fair quarterly compensation for the use and occupation of the demised premises.

10 If for any cause a valid award fixing the value of the improvements as above provided shall not be made and delivered at or within the time above limited for that purpose, then the tenant may recover by action at law or in equity the value of the said improvements as above defined.

And it is further agreed that this instrument shall bind the heirs, executors and administrators and assigns of the respective parties hereto.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

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(Signed) J. E. ANDRUS. (Seal)
(Signed) F. JOSEPH SHEEHAN. (Seal)

Schedule "B."

Assignment of lease, F. Joseph Sheehan to Robert H. Sayre, dated Sept. 8, 1890.

30 Know all men by these presents, that I, F. Joseph Sheehan, of the City, County and State of New York, in consideration of One Dollar, lawful money of the United States, to me duly paid by Robert H. Sayre, of South Bethlehem, Northampton County, Pennsylvania, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto the said Robert H. Sayre, his executors, administrators and assigns, a certain Indenture of Lease, bearing date the Fifth of June, in the year Eighteen Hundred Eighty-nine, made by John E. Andrus to me, the said F. Joseph Sheehan, leasing certain lands, lands under 40 water and rights at Constable's Hook, Bayonne, New Jersey, for the term of sixty years from the said fifth day of June, 1889, with all and singular the premises therein mentioned and described, and the buildings thereon, water and all other rights thereon, together with the appurtenances. To have and to hold

the same unto the said Robert H. Sayre, his executors, administrators and assigns, from the eighth day of September, in the year Eighteen Hundred and Ninety, for and during all the rest, residue and remainder of the term of Sixty years mentioned in the said Indenture of Lease, subject nevertheless to the rents, covenants, conditions and provisions therein also mentioned, AND I do hereby covenant and agree with the said Robert H. Sayre that the said assigned premises now are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, assessments, and incumbrances whatsoever. 10

IN WITNESS WHEREOF, I have hereunto set my hand and seal this eighth day of September, one thousand eight hundred and ninety.

F. JOSEPH SHEEHAN. (SEAL)

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Signed, sealed and delivered
in the presence of

CHAS. B. HUGHES.

SCHEDULE "C."

Assignment of lease, Robert H. Sayre to Lehigh Valley Railroad Company, dated Sept. 8, 1890.

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KNOW ALL MEN BY THESE PRESENTS, that I, ROBERT H. SAYRE, of South Bethlehem, Northampton County and State of Pennsylvania, in consideration of One Dollar ($1), lawful money of the United States, to me duly paid by the Lehigh Valley Railroad Company, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto the said Lehigh Valley Railroad Company, its successors and assigns, a certain INDENTURE OF LEASE, bearing date the fifth day of June, in the year eighteen hundred and eighty-nine, made by JOHN E. ANDRUS to F. JOSEPH SHEEHAN, leasing certain lands, lands under water and rights at Constable's Hook, Bayonne, New Jersey, for the term of sixty (60) years from the said fifth day of June, eighteen hundred and eighty-nine, and which said indenture of lease, and all the rest, residue and remainder yet to come of and in the term thereof, 40

the said F. Joseph Sheehan, by deed poll of assignment, bearing date the eighth day of September, eighteen hundred and ninety, sold, assigned, transferred and set over unto me, the said Robert H. Sayre (all of which said indenture of lease and the assignment thereof, it is intended to forthwith record), with all and singular the premises therein mentioned and described and the buildings thereon together with the appurtenances.

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To have and to hold the same unto the said Lehigh Valley Railroad Company, its successors and assigns, from the eighth day of September, in the year eighteen hundred and ninety, for and during all the rest, residue and remainder of the term of sixty (60) years mentioned in the said indenture of lease, subject nevertheless to the rents, covenants, conditions and provisions therein also mentioned.

In witness whereof, I have hereunto set my hand and seal this eighth day of September, A. D. one thousand eight hundred and ninety (1890).

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ROBT. H. SAYRE. (Seal)

Signed, sealed and delivered
in the presence of

E. T. Parker.

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Schedule "D."

Agreement dated March 22, 1909.

This agreement, made this twenty-second day of March, nineteen hundred and nine, between John E. Andrus, of Yonkers, Westchester County, New York, of the first part, and The Lehigh Valley Railroad Company, a corporation, of the second part.

Whereas, the said John E. Andrus, by Indenture of Lease, dated the fifth day of June, eighteen hundred and eighty-nine, did demise and to farm let, until F. Joseph Sheehan, certain lands at Constable Hook, in the City of Bayonne, New Jersey, for the term of sixty years, which said lease was subsequently recorded in Book 514 of Deeds for the County of Hudson, on page 90, &c., and among other things did provide for an adjustment during the first half of the twentieth year of said term of the

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rentals to be paid for the occupancy of said premises during the second twenty years of said term, by arbitrators to be appointed by the parties; and

Whereas, the said lease and the rights to the lands and premises therein described were duly assigned by the said F. Joseph Sheehan to Robert H. Sayre, by assignment dated September 8th, 1890, recorded in Book No. 514 of Deeds, on page 93, and by a further assignment, bearing date September 8th, 1890, recorded in Book No. 755 of Deeds, on page 394, the said lease and the rights to the lands and premises therein described were assigned by the said Robert H. Sayre to the Lehigh Valley Railroad Company, which said Company is in possession of said premises described in the said lease, and has assumed the burdens thereof; and

Whereas, the party of the first part hereto hath appointed Charles W. Fuller, and the party of the second part hereto, hath appointed Edlow W. Harrison, as the arbitrators to fix the annual rent to be paid by the party of the second part during the succeeding ten years of said term, to wit: from the fifth day of June, nineteen hundred and nine, onwards until the fifth day of June, nineteen hundred and nineteen; and

Whereas, said arbitrators have agreed and have determined, in writing, that the cash rentals to be paid for said premises for the ensuing ten years aforesaid, from June fifth, nineteen hundred and nine, shall be at the rate of seven thousand and five hundred dollars ($7,500) per annum;

Now this agreement witnesseth: That it is mutually agreed as follows:

That the terms of said lease upon which the said rental so fixed by said arbitrators would be payable for the term of twenty years, shall be modified so that said rental so fixed by said arbitrators shall be payable for the next term of ten years, to wit: from June fifth, nineteen hundred and nine, until the fifth day of June, nineteen hundred and nineteen. All the other terms, covenants and conditions of said lease, except as herein modified, to remain unchanged. And it is further

Mutually agreed, that the rate to be paid by the party of the second part, as rental for said premises, from June fifth, nineteen hundred and nineteen, to June fifth, nineteen hundred and twenty-nine, shall be fixed and determined by arbitrators appointed in the last half of the year nineteen hundred and eighteen, in the

manner provided by said lease, and thereafter the rental shall be in like manner so fixed from time to time for ten-year periods and in the last half of the years nineteen hundred and twenty-eight and nineteen hundred and thirty-eight, respectively, until the termination thereof, on June fifth, nineteen hundred and forty-nine, instead of the twenty-year periods fixed in said lease.

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In witness whereof, the party of the first part hath hereunto set his hand and seal and the party of the second part hath caused its corporate seal to be hereto affixed, and these presents signed by its President, attested by its Secretary, the day and year first above written.

Lehigh Valley Form Approved, J. F. S.

In presence of: (Sig.) Jas. P. Northrop. (Seal) as to J. E. Andrus.

(Sig.) John E. Andrus. (Seal.)

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Description Approved W. W. A.

Lehigh Valley Railroad Company.
By
(Sig.) E. B. Thomas,
President.

Terms and Conditions Approved J. F. M. J. A. M.

Attest:
(Sig.)
D. G. Baird,
Secretary.

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Certificates of acknowledgment by John E. Andrus and of proof by Lehigh Valley Railroad Company attached.

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NOTICE OF MOTION TO DISMISS BILL.

Filed February 26, 1920.

Sirs:

PLEASE TAKE NOTICE that we shall move before the Chancellor (or such Vice-Chancellor as shall sit for him) on Thursday, the 26th day of February, Nineteen hundred and twenty, at the Chancery Chambers, Prudential Building, Newark, New Jersey, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order to dismiss the bill of complaint in this cause upon the following grounds: 10

(1) That the same discloses no cause of action.

(2) That the bill of complaint fails to state facts sufficient to constitute any cause of action. 20

(3) That the bill of complaint does not entitle complainant to the relief prayed for therein or any other relief in the premises.

Yours, etc.,

PITNEY, HARDIN & SKINNER,
Solicitors for Defendant.

Dated February 26, 1920.

To COLLINS & CORBIN,
243 Washington St.,
Jersey City, N. J. 30

Service of the within Notice is hereby acknowledged this 26th day of February, 1920, as of time.

COLLINS & CORBIN,
Solicitors for Complainant.

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ORDER DENYING MOTION TO DISMISS BILL.

Filed February 26, 1920.

The defendant having moved to dismiss the bill of complaint on the ground that the said bill discloses no cause of action, and
10 fails to state facts sufficient to constitute any cause of action, or to entitle complainant to the relief prayed for therein, or to any other relief in the premises.

And the said motion having been brought on before the Court of Chancery, and the Court having read the bill of complaint and considered the arguments of counsel and being of opinion that the motion to dismiss the bill of complaint should be denied.

It is, on this 26th day of February, Nineteen hundred and twenty, on motion of Collins & Corbin, Solicitors of complainant, in the presence of Pitney, Hardin & Skinner, Solicitors of de-
20 fendant, ordered, that the motion of the defendant, John E. Andrus, to dismiss the bill of complaint, be and the same is hereby denied, and that the defendant do answer the bill of complaint within twenty days from the entry of this order.

E. R. WALKER,
C.

Respectfully advised,

John H. Backes,
V. C.

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OPINION OF BACKES, V. C., ON MOTION TO DISMISS.

Filed March 2, 1920.

On motion to dismiss bill.

For complainant, Messrs. Collins & Corbin.

For defendant, Mr. Edward O. Stanley, Jr. (Messrs. Pitney, Hardin & Skinner, solicitors).

Backes, *V. C.*

This motion is to strike out the bill for want of equity. The motion has not been argued. Counsel assuming, and correctly, that I regard the bill as maintainable for the reasons given and upon the authorities cited in my conclusions on the motion herein for a preliminary injunction, suggested that I advise an order denying the motion so as to expedite an appeal; and I have complied.

Mr. Stanley's conception of the contract, as presently stated, is that, arbitration having failed, the substitute for the recovery of rent for the current ten-year period is, "by action from time to time at law or in equity (for) a fair quarterly compensation for the use and occupancy of the demised premises"; and that this is exclusive—but that arbitration is again to be resorted to for the ensuing ten-year term, at the time fixed in the lease.

The former motion involved only the single suit commenced before this bill was filed, and it was held to have been properly brought. But what was there said plainly indicated the view that the right of action at law ceased upon the institution of an equitable suit in substitution of the arbitration; and further, that upon an award in equity there would be an adjustment of the recovery and award in the final decree by crediting the amount on the sum of the award, either as a whole or proportionately, depending upon the true construction of the contract.

OPINION OF BACKES, V. C., ON MOTION FOR INJUNCTION.

Filed February 19, 1920.

10 Submitted December 1, 1919; decided February 1, 1920.

On motion for Preliminary Injunction and Counter Motion to set aside process.

For complainant, Messrs. Collins & Corbin.

For defendant, Mr. Edward O. Stanley, Jr. (Messrs. Pitney, Hardin & Skinner, solicitors).

BACKES, *V. C.*

The complainant is the tenant of lands on the water front at 20 Bayonne, under a lease made June 5, 1889, for the term of sixty years, at a rental of $4,250 per annum for the first twenty years, payable quarter-yearly in advance, and for each ten-year period thereafter at a rental to be fixed by arbitrators, the landlord and tenant each to select one, and the arbitrators to select an umpire in case they could not agree, and

"If for any cause a valid award fixing rentals shall not be made and delivered at or within the times above limited, then the landlord may recover by action from time to time at law or in equity a fair quarterly compensation for the use and occupa- 30 tion of the demised premises."

The complainant and defendant duly appointed arbitrators to appraise the rental of the ten-year period beginning June 5, 1919. The arbitrators were unable to agree upon an award or an umpire, and this without fault on the part of either complainant or defendant. The complainant asks this Court to determine the rental.

On June 6, 1919, after the bill was filed, the defendant sued the complainant in the Supreme Court of New York for use and occupation for the first quarter year—June 5 to September 40 5, 1919—laying the damages at $17,067.75. The case was at issue and on the trial list when the defendant here was ordered to show cause why he should not be restrained from further prosecuting his action. Whether this order should be made absolute or discharged is one of the questions to be decided.

The bill presents a cause for equitable relief. It is not to be likened unto a bill for specific performance of a contract for the sale of land at a price to be fixed by arbitrators. There the contract is executory. The award is of the essence of the contract, and equity will not appoint arbitrators to complete the contract for the purpose of enforcement. This is well settled. McKibbin *v.* Brown, 14 N. J. Eq., 13; Woodruff *v.* Woodruff, 44 N. J. Eq., 349; Davila *v.* United Fruit Co., 88 N. J Eq., 602. Here the substance of the contract is the demise and the covenant to pay rent; and the tenant has been in possession. The method set up for ascertaining the rental is subsidiary and incidental, of form and not of substance; and having proved abortive the Court will substitute itself for the arbitrators. Dinham *v.* Bradford, 5 L. R. Ch. App. (1869) 519, is an illustration. There "It was agreed that one partner should purchase, at the close of the partnership, the share of the other, at a valuation by two persons. Trouble arising between the partners, no arbitrators were appointed, and a bill was filed for a valuation. The defendant relied on the doctrine that an agreement for sale, price to be fixed by arbitrators, with nothing more, cannot be carried into effect by the Court. Lord Hatherly, *L. C.,* said: 'This case is not like that of the sale of an estate, the price of which is to be settled by arbitration, but is a case in which the whole scope and object of the deed would be entirely frustrated if the Court were to apply the well-known doctrine to the present circumstances. In cases of specific performance the matter is very plain and simple. One person agrees to sell his estate in a given way, and no rights are changed by the circumstance of that method of selling the estate having failed. The estate remains where it was and the money where it was. But here * * * it is much more like the case of an estate sold and the timber on a part to be taken at a valuation, the adjusting of matters of that sort forming part of the arrangement, but being by no means the substance of the agreement. In such cases the Court has found no difficulty. If the valuation cannot be made *modo et forma,* the Court will substitute itself for the arbitrators. It is not the very essence and substance of the contract, so that no contract can be made out except through the medium of arbitrators. Here the property has been had and enjoyed, and the only question now is, what is right and proper to be done with regard to settling the price?' " Other cases adduced

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in which the doctrine was applied, some of which in circumstances are peculiarly like the one under consideration are Grosvenor *v.* Flint, 20 R. I. 21, 37 Atl. Rep. 304; Cooke *v.* Miller, 25 R. I. 92, 54 Atl. Rep. 927; Insurance Co. *v.* Stephens, 214 N. Y. 488, 108 N. E. 856; Kaufman *v.* Liggett, 209 Pa. 87, 58 Atl. Rep. 129; Springer *v.* Bowden, 154 Ill. 668, 39 N. E. 603, affd. 210 Ill. 518, 71 N. E. 345; Lowe *v.* Browne, 22 Ohio St. 463; Tobey Furniture Co. *v.* Rowe, 18 Ill. App. 293; Kelso *v.* Kelly, 1 Daly (N. Y.) 419.

Nor is the above-quoted provision reserving to the landlord the right to sue quarter-yearly for use and occupation, in default of an award, a thing part from the main covenant for a rental based upon a ten-year appraisal. It furnishes no distinct and independent *cause* of action for use and occupation, but simply gives a *right* of action in a contingency for a "fair quarterly compensation." In other words, it is only a facility for an emergency recovery of a fair quarter-yearly installment of a ten-year valuation, pending substituted proceedings in equity. The breaking down of the arbitration scheme in no wise impairs the overriding contract of rental at a ten-year term rate, and a recovery at law, upon a miscarriage of arbitration, would simply be taken into account as a credit, upon the appraisal when made, as it is to be made, in this suit. That seems to me to be the single function of the provision, and my view is borne out, to some extent, by the practical construction given it by the landlord by his suit to recover for a quarter year's use and occupation in advance of such use, an impossible thing *extra* the contract.

The power of the Court to enjoin the prosecution of a foreign suit is unquestionable and conceded. Margerum *v.* Moon, 63 N. J. Eq. 586. The point elaborately argued in the briefs is whether the case is one in which the power ought to be exercised. The admonition running through the authorities is to exercise it sparingly. Where the Court of a sister state has jurisdiction of the subject matter and the parties, equity will not interfere unless upon a clear showing that the process is being used in an unconscionable manner—oppressively—as instanced in Standard Roller Bearing Co. *v.* Crucible Steel Co., 71 N. J. Eq. 61, or, as was there said, "Unless the case involves some equitable element which it cannot apply." See Shaw *v.* Frey, 69 N. J. Eq. 321. Chancellor Pitney, in Bigelow *v.* Old Dominion Copper

Mining and Smelting Co., 74 N. J. Eq. 457, said, "On general principles, equity will not interfere with the right of any person to bring an action for the redress of grievances—the right preservative of all rights—except for grave reasons, and on grounds of comity the power of one state to interfere with a litigant who is in due course pursuing his rights and remedies in the courts of another state ought to be sparingly exercised. The courts of New Jersey ought not to assume, directly or by indirection, any appellate jurisdiction over the courts of Massachusetts, nor proceed in giving judgment here upon the idea that the courts of that commonwealth are in the least degree incompetent or unwilling to do full and complete justice in all cases that are fairly within their jurisdiction."

I cannot find in the circumstances of the case any equitable ground for enjoining the suit. That the Supreme Court of New York has complete jurisdiction of the issues raised before it, and of the parties, is undeniable. The issues there and those of this bill are not identical. Though the controversies involve the same subject matter and a decree in this suit would settle the rights of the parties conclusively, there is no conceivable legal theory upon which the defendant can be enjoined to forego the determination of his claim for a quarter year's rent (either as an integral part, or independent, of the ten-year covenant) in the court of his choice, for the more comprehensive remedy of this bill. The selection of that forum by the defendant for the decision of the questions there involved was entirely permissible under the terms of the lease, and although the complainant be put to additional trouble and expense in defending that action—and the judgment be *res adjudicata, pro tanto,* on the final hearing of this cause, the difficulty and dilemma afford no reason for intervention. Whether the views of the New York Court will accord with those I entertain as to the construction to be given the contract, and whether it will measure the damages accordingly, or regard the sueable period as distinct from the ten-year period and determine the value regardless, we are not concerned with on this motion. Federal Trust Co. *v.* Conklin, 87 N. J. Eq. 185. The complications induced by the suit at law can be adjusted on the final hearing.

Moreover, the defendant's action was begun first. The bill here was filed before his suit was started, but process was not served, and jurisdiction of the subject matter and the parties

was not acquired until long afterwards—approximately three months. The defendant is a non-resident. The filing of a bill and the issuing of process, not served, in an action *in personam* against a non-resident, do not commence a suit in equity. Service is essential. Commencement is marked by the issuance of subpoena after bill filed, provided the subpoena is instrumental, directly or indirectly, in bringing the defendant within the jurisdiction of the Court. See Crowell *v.* Botsford, 16 N. J. Eq. 458; Haughwout *v.* Murphy, 22 N. J. Eq. 531; Hermann *v.* Mexican Petroleum Corp., 85 N. J. Eq. 367; Haupt Co. *v.* Bd. of Education of Edgewater, 87 N. J. Eq. 362; Delaware River Q. & C. Co. *v.* Mercer Freeholders, 88 N. J. Eq. 506. Being prior in point of time the New York suit has preference. This is generally recognized, and the authorities are numerous. I need only quote from Peck *v.* Jenness, 7 How. 624: "It is a doctrine of law too long established to require a citation of authorities, that where a Court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other Court; and that where the jurisdiction of a Court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another Court. These rules have their foundation, not merely in comity, but in necessity. For, if the one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable for a process for contempt in one if they dare to proceed in the other." An *ad interim* injunction will be denied and the restraining order will be dissolved.

The other question is whether this Court has acquired jurisdiction over the person of the defendant.

The bill was filed May 31, 1919, and the subpoena, attested on that day, was returned *non est inventus*. The defendant being a resident of New York, substituted service was made, returnable August 25, 1919. On that day the defendant, upon a conditional appearance, obtained a stay of proceedings and an order that the complainant show cause why the order for substituted service should not be vacated. In the meanwhile a second subpoena issued and was served personally on the defendant, in this state, on August 27, 1919, and motion is made to set aside.

the writ and service on the ground that a second subpoena cannot go forth without the order of the Court.

The order for substituted service was improvidently entered. The suit is in no sense *in rem* or *quasi in rem*. Kempson *v.* Kempson, 63 N. J. Eq. 783; Andrews *v.* Guayaquil & Quito Ry. Co., 69 N. J. Eq. 211, 71 N. J. Eq. 768; Amparo Mining Co. *v.* Fidelity Trust Co., 74 N. J. Eq. 197. The leasehold is in this state, but the yield and not the land constitutes the *res*. The cause of action is transitory—cognizable in any jurisdiction where the defendant may be found. Equity acts *in personam* and service, other than personal, is nugatory. Statutory or substituted process is a nullity, and a decree based upon it would be without effect and void. Pennoyer *v.* Neff, 95 U. S. 714; Stang *v.* Redden, 28 Fed. 11. The order for substituted service will be set aside.

The order for service by publication being vain—no more, in legal effect, than a piece of blank paper—there was then nothing but a subpoena returned "not found" at the time the second one was issued and served. There is no rule of procedure in Chancery requiring a court order for a second subpoena after the first one has been mis-spent. The writ, although issued out of and under the seal of the Court, is but a notice to the defendant to appear. It is not a mandate to one of the court's officers, and until 1880 P.L. page 74 ~~the revision of 1902, C. S. 408,~~ could be served by any person. West *v.* Smith, 2 N. J. Eq. 309. Sec. 3 of the Chancery Act, which has been in our statutes since 1799 (Pat. Laws 429) empowers the solicitor in a cause to issue it, and the fair implication is that he may do so *toties quoties* until service; viz. until legal notice of the suit be given the defendant. Whatever the procedure may be in other jurisdictions, the practice has grown up in this court, if not by virtue of the statute under its influence, which has been uniformly followed and is now firmly established, that subpoena may issue as often as necessary to bring the defendant into court, and that without an order. Ewald *v.* Ortynsky, 78 N. J. Eq. 527, is cited as an authority in denial of this view. In that case the sheriff's return, regular upon its face, was, that service had been made upon the defendant corporation by delivery to one Barna, its president and agent. The corporation, instead of moving to quash the writ and service, filed a plea *in bar* to the jurisdiction, setting up that Barna was not its president and agent. The complainant joined issue

and went to trial on the question of fact, which was found against him. Under the old practice, then prevailing but shortly afterwards changed, a plea found to be true, however deficient in point of law, brought the suit to an end. To prevent a collapse Vice-Chancellor Garrison granted leave to withdraw the replication, struck out the plea as insufficient in law, and added to the order "That the complainant may issue and have served a new subpoena upon the said defendant." The appeal challenged the Vice-Chancellor's course, permitting the withdrawal of the replication after a hearing on the issue of fact and then determining the sufficiency of the plea as a matter of law, and the Appellate Court ruled that it was approved by authority, and affirmed, 78 Eq. 527. The requirement of an order for a new writ was not dealt with. That the taking out a new writ was formally authorized in an already all-sufficient order, and, thus sanctioned, was approved by the upper court, simply testifies its propriety, not its necessity.

The text in 32 Cyc, 446, that "The Court has inherent power to award such further process (alias writ), but the clerk has no such authority to issue it without an order of the Court, in the absence of statute," manifestly, is not applicable. It is based upon, and finds its limitations in, the codes of the states represented by the cases cited in the foot notes.

The motion to quash the writ and service will be denied. No costs.

NOTICE OF APPEAL.

Filed February 27, 1920.

The defendant, John E. Andrus, hereby appeals from the order denying the motion to dismiss the Bill of Complaint made in this cause, on the twenty-sixth day of February, Nineteen hundred and twenty, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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PITNEY, HARDIN & SKINNER,
Solicitors of Defendant-Appellant.

JOHN R. HARDIN,
Of Counsel.

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

JOHN R. HARDIN,
Of Counsel with Defendant-Appellant.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 27th day of February, 1920.

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COLLINS & CORBIN,
Solicitors of Complainant.

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PETITION OF APPEAL.

Filed March 1, 1920.

New Jersey Court of Errors and Appeals

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Between Lehigh Valley Railroad Company, a corporation, *Complainant-Respondent,* *and* John E. Andrus, *Defendant-Appellant.*	*On Bill, etc.* *On Appeal from Chancery.*

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

The petition of John E. Andrus, the appellant in the above-stated case, respectfully shows:

That your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the Twenty-
30 sixth day of February, Nineteen hundred and twenty, in a cause wherein the Lehigh Valley Railroad Company was complainant and John E. Andrus was defendant, in this respect, to wit:

That the said order directs that the motion of the defendant, John E. Andrus, to dimiss the bill of complaint as in said order recited, be and the same thereby was denied, and that the said order further directed the defendant to answer the bill of complaint.

And your petitioner humbly appeals from that part of the said
40 order of the said Chancellor, which reads as aforesaid, upon the ground that the same is erroneous for that the motion of the defendant, John E. Andrus, ought not to have been denied.

Your petitioner, therefore, prays that the said order of the said Chancellor may in the particulars aforesaid be reversed,

set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

PITNEY, HARDIN & SKINNER,
Solicitors for and of Counsel with Defendant-Appellant.

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Service of a copy of the within Petition is hereby acknowledged this 1st day of March, 1920.

COLLINS & CORBIN,
Solicitors for Complainant-Respondent.

ANSWER TO PETITION OF APPEAL.

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Filed March 4, 1920.

The answer of the above-named respondent to the petition of appeal of the above-named appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that an order was on the 26th day of February, 1920, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

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And this respondent is advised and believes, that the said order is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

COLLINS & CORBIN,
Solicitors for and of Counsel with said Respondent.

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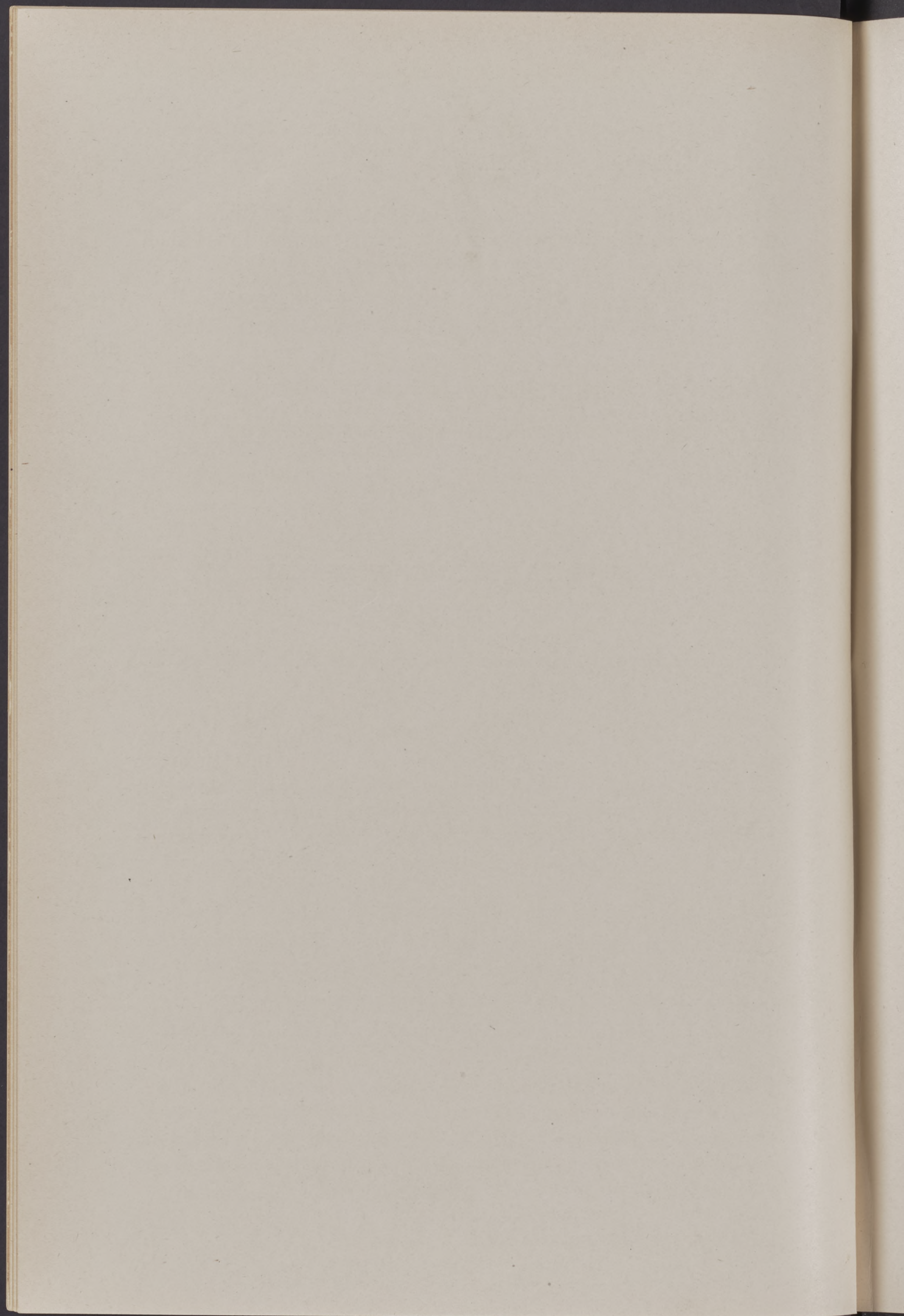

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

LEHIGH VALLEY RAILROAD COMPANY,
Complainant-Respondent,

and

JOHN E. ANDRUS,
Defendant-Appellant.

On Appeal from Chancery.

BRIEF FOR COMPLAINANT-RESPONDENT.

This is an appeal from an order advised by Vice-Chancellor Backes denying a motion to dismiss the bill of complaint in the above-entitled cause for want of equity.

Statement of the Case.

It is averred in the bill that defendant by lease under seal, dated June 5, 1889, leased to F. Joseph Sheehan certain premises in Bayonne, New Jersey, for a term of sixty years from that date at a rental of $4,250 a year for the first twenty years of the term, payable quarterly in advance, the rental for the next twenty years to be determined by arbitration and the rental for the last twenty years to be likewise determined, which rentals the lessee covenanted to pay; that the lease was assigned to complainant by mesne assignments and that complainant has been in possession of the premises since September 8, 1890; that the lease provided that during the first half of the twentieth year of the term the parties thereto should each appoint one arbitrator and the arbitrators so appointed should fix the annual rental to be paid during the succeeding twenty years and in case the arbitrators could not agree that they should select an umpire to act with them, and that the award of any two of them should be binding; that the rental for the last twenty years of the term should be fixed in like manner; that by agreement in writing between defendant and complainant, dated March 22, 1909, the provision in the lease regarding arbitration of rental was modified so that the rental fixed by arbitration should be for periods of ten years each instead of twenty years as originally provided, all other terms, covenants and conditions of the lease remaining unchanged; that prior to September 26, 1918, defendant and complainant each appointed an appraiser for the

purpose of fixing and determining the annual rental to be paid for the period of ten years beginning on June 5, 1919; that the arbitrators so appointed could not agree upon such rental and could not agree upon an umpire and that their failure to agree upon the rental, and to select an umpire was not due to any fault on the part of complainant, or of the arbitrator appointed by it. The prayer of the bill is that the Court will fix and determine the annual rental which complainant shall pay for the period of ten years beginning on June 5, 1919.

BRIEF OF THE ARGUMENT.

I.

There is no agreement between the parties as to the effect of the failure of arbitration upon the rights of the respective parties.

The substance of the lease in this case is a demise of certain premises for a term of sixty years from June 5, 1889, and a covenant to pay a rental therefor. The annual rental to be paid during the first twenty years of the term was fixed by the lease, the annual rental to be paid during the next ten years of the term was fixed by arbitrators and confirmed by subsequent agreement of the parties, and the annual rental to be paid during each succeeding period of ten years is to be determined by arbitration, according to the provisions of the lease as modified by the agreement of March 22, 1909.

The lease provides for the fixing of a rental in advance for each successive period of ten years after June 5, 1919, by arbitration, but contains no express provision for the fixing of such rental in the event of a failure of arbitration.

There is a clause in the lease which provides that:

> "If for any cause a valid award fixing rentals shall not "be made and delivered at or within the times above "limited then the landlord may recover by action from "time to time at law or in equity a fair quarterly com-"pensation for the use and occupation of the demised "premises."

That clause does not expressly state that actions for use and occupation shall take the place of a fixed rental for any of the periods of years mentioned in lease, in case of the failure of arbitration, nor can it be construed as a substitute for a fixed rental.

There is a material difference between an annual rental, payable quarterly, determined in advance, for a period of years, and quarterly actions for use and occupation. In the first in-

stance the rental is definite and fixed for a certain period, while in the latter it is indefinite and fluctuates according to prevailing conditions. The covenant in the lease is to pay an annual rental, in quarterly installments, fixed in advance, for periods of twenty years under the lease as originally made, and for periods of ten years under the lease as modified. The clause which provides for actions for use and occupation, as the learned Vice-Chancellor well said, gives no *cause* of action separate and distinct from the covenant, but merely gives a *right* of action for an emergency recovery of a quarter-yearly installment of an annual rental for a ten-year period, pending the fixing of the rental for the whole period in case the rental is not fixed within the time provided by the lease.

The intention of the parties as expressed by the covenant to pay rent is plain, but if there is any doubt about the matter, the doubt should be resolved in favor of complainant. A lease, like other contracts, should be most strongly construed against the grantor, and if there is any doubt and uncertainty as to the meaning of a lease, it should be construed most strongly in favor of the grantee. 24 *Cyc.*, p. 915.

II.

The failure of arbitration is ground for equitable relief in this case.

This is not a bill to enforce specific performance of an executory contract of which arbitration is the essence, but is for equitable relief in a case where the contract has been partly performed, and there has been a failure of arbitration under an incidental provision of the contract. The distinction between the two classes of cases was correctly noted by the learned Vice-Chancellor in his conclusions (p. 16, *et seq.*). Equity will not grant relief in the class of cases first mentioned but will in the other.

The precise question whether equity will grant relief in a case of the present character had not been determined by our Courts, but Vice-Chancellor Green said (*obiter*) in the case of *McKibbon* v. *Brown*, 14 N. J. Eq. 13, that:

> "In Gregory *v.* Mighell, 18 Vesey 328, the court inter-
> "fered on the ground that the agreement was in part
> "performed. The lease was for twenty-one years; the
> "rent was to be ascertained by indifferent persons, to be
> "chosen by the parties. The tenant occupied the prem-
> "ises, but the rent was not ascertained—some rent, there-

"fore, must be paid. The amount must of necessity, be "fixed, and the court therefore directed that it should be "ascertained by a master. When the arbitrators are not "named, but it is simply agreed that the property shall "be taken at an appraisement or at a fair valuation, the "court will appoint appraisers, or direct the value to be "ascertained by a master. In such case the persons by "whom the valuation is to be made is not of the essence "of the agreement, and the action of the court is in strict "accordance with the agreement. Gaskarth *v.* Lowther, "12 Vesey 106; Weeks *v.* Davis, 3 Mer. 507; City of Prov-"idence *v.* St. John's Lodge, 2 Rhode Island 46; Dyke "*v.* Green, 4 Rhode Island 285."

The decree in that case was affirmed by the Court of Errors and Appeals without opinon; 15 N. J. Eq. 498.

The right to equitable relief in cases where a tenant is in possession under a lease which provides for the fixing of a rental by arbitration, and arbitration has failed, was apparently considered in the case last cited.

There are cases in other states as well as in England in which the right to equitable relief in such cases has been recognized and granted.

Justice Potter, who wrote the opinion of the Supreme Court of Pennsylvania in the case of *Kaufmann, et al.* v. *Liggett, et al.,* 58 Atl. 129, said that:

"After a careful consideration of all the cases bearing "upon the subject which have been brought to our atten-"tion, or which we have found, we are satisfied that the "authorities will agree that equity will not compel an ar-"bitration, and this upon the very good ground that the "courts remain open to the parties, with better provisions "for securing justice than are possessed by arbitrators, "but that in cases of renewal leases the weight of author-"ity clearly favors the view that the tenant in such a "case has a quasi proprietorship—a right, lacking merely "a valuation and that the grossest inequity would be "worked, should he lose his right through a failure upon "the part of the arbitrators to fix a valuation. While, "therefore, a court of equity will not undertake to compel "an arbitration, which it cannot control, it will in such "case make an appraisement itself, or direct it to be done "by its own officer, and will therefore enforce specific "performance of the contract upon the terms so found."

In the case of *Springer* v. *Borden,* 154 Ill. 668, 39 N. E. 603, a lease provided that after a certain time the rent should be five per cent. of the value of the demised premises, the value to be determined by appraisers, one chosen by each of the parties,

and a third chosen by the other two. The appraisers chosen by the parties could not agree on a third appraiser. It was held that a court of equity had jurisdiction to determine the value of the property.

It was said in the case of *Mutual Life Insurance Co.* v. *Stephens, et al.,* 214 N. Y. 488; 108 N. E. 856:

> "There have been numerous cases in which the courts "have decreed specific performance of agreements in "leases to renew at a rental value to be fixed by ap- "praisers chosen by the parties or to convey the prem- "ises at its value to be fixed in like manner. But in such "cases the provision for an appraisal has been regarded "as incidental and subsidiary to the substantive part of "the agreement, and so the party refusing to name an "appraiser has not been heard to complain of not having "the appraisal made in the way agreed upon; but treating "the method as a matter of form rather than substance, "the courts have, by a reference or otherwise, determined "the value for the purpose of enforcing the contract ac- "cording to its real spirit and purpose."

See also *Grosvenor* v. *Flint,* 20 R. I. 21, 37 Atl. 304;
Cooke v. *Miller,* 25 R. I. 92, 54 Atl. 927;
Lowe v. *Browne,* 22 Ohio St. 463;
Tobey Furniture Co. v. *Rowe,* 18 Ill. App. 293;
Kelso v. *Kelly,* 1 Daly (N. Y.) 419;
Gregory v. *Mighell,* 18 Vesey 328;
Dunham v. *Bradford,* 5 L. R. Ch. App. 519.

The cases cited support the conclusions of the learned Vice-Chancellor that the substance of the contract in the present case is the demise and the covenant to pay rent; that the method of fixing the rental, provided by the lease is incidental, a matter of form and not of substance; and therefore, arbitration having proved abortive, the Court will substitute itself for the arbitrators. Counsel for defendant endeavor to distinguish the cases cited from the present case but overlook their support of the pertinent principle here involved.

Counsel for defendant argue that failure of arbitration alone is not a ground for equitable relief. Lord Hatherly discussed that matter in his opinion in the case of *Dunham* v. *Bradford, supra,* a quotation from which appears in the opinion of the learned Vice-Chancellor in the present case. Failure of arbitration alone is not a ground for equitable relief in cases where arbitration is of the essence of the contract and there can be no contract without arbitration, but in cases such as the present,

where the contract has been partly performed and continues notwithstanding arbitration has failed, the failure of arbitration is ground for equitable relief, for the parties are not put in *statu quo,* and only a court of equity can protect the right which has suffered by the failure of arbitration.

The demise and the covenant to pay rent in this case continues notwithstanding the failure of arbitration. The contract requires a determination in advance of the annual rental to be paid, during a period of ten years from June 5, 1919, but it cannot be determined *modo et forma.* Complainant has a right to have that rental determined and the Court of Chancery alone can give the necessary relief.

The cases cited by counsel for defendant, so far as they are in point, indicate that in such a case the failure of arbitration is ground for equitable relief.

III.

There are sufficient grounds for equitable relief.

Whether the failure of arbitration in this case deprives complainant of its right to have the rental fixed in advance for the ten-year period beginning June 5, 1919, is an equitable question and the amount of the rental can only be fixed in a court of equity. It cannot be fixed in a court of law by suits for use and occupation for they will not fix the rental in advance nor is it probable the sums complainant would be compelled to pay thereby will be uniform. Under the circumstances the Court of Chancery has power to declare rights. Section 7 of The Chancery Act (1915) provides as follows (P. L. 1915, p. 184):

> "Subject to rules, any person claiming a right cogniz-
> "able in a court of equity, under a deed, will, or other
> "written instrument, may apply for the determination
> "of any question of construction thereof, in so far as the
> "same affects such right, and for a declaration of the
> "rights of the persons interested."

In the case of *Renwick* v. *Hay,* 106 Atl. 547, a bill was filed for a determination of the rights of the parties in certain private ways or roads. Vice-Chancellor Lane, construing the section of the Chancery Act above quoted, said:

> "This section of the statute was considered by the
> "Chancellor in Re Ungaro's Will, 88 N. J. Eq. 25; 102
> "Atl. 244. The Chancellor drew attention to the fact that
> "it should be liberally construed, and that what the Legis-
> "lature meant by 'a right cognizable in a court of equity'

> "in his judgment was a right over which, in and of itself, "the court had jurisdiction, and that it was intended that "the jurisdiction should be exercisable where the right "was present, although an accompanying circumstance, "the presence of which theretofore alone permitted the "right to be declared, was absent."

Defendant contends that arbitration of the rental having failed, he may bring forty suits for quarterly use and occupation. The avoidance of a multiplicity of suits is not an independent ground of equitable jurisdiction, but is a ground for invoking such jurisdiction when coupled with a prior existing cause of action, either equitable or legal.

Professor Pomeroy in his treatise on equity jurisprudence says that (Vol. 1, 4th Ed., sec. 250):

> "A court of equity cannot exercise its jurisdiction for "the purpose of preventing a multiplicity of suits in "cases where the plaintiff invoking such jurisdiction has "not any prior existing cause of action, either equitable "or legal; has not any prior existing right to some relief, "either equitable or legal. The very object of prevent-"ing a multiplicity of suits assumes that there are rela-"tions between the parties out of which other litigations "of some form might arise."

Among the possible conditions under which equity jurisdiction can be invoked to prevent a multiplicity of suits, Professor Pomeroy cites of the following (*Id.,* sec. 245):

> "Where the dispute is between two individuals, A and "B, and B institutes or is about to institute a number of "actions either successively or simultaneously against A, "all depending upon the same legal questions and similar "issues of fact, and A by a single equitable suit seeks to "bring them all within the scope and effect of one judicial "determination."

Complainant in the present case has an equitable cause of action to determine in advance the rental to be paid during the ten-year period beginning on June 5, 1919. Defendant has started suit against complainant in the State of New York to recover for one quarter's use and occupation, and claims the right to start other similar suits under the lease. Therefore the prevention of a multiplicity of suits is ground for equity jurisdiction.

Conclusion.

We respectfully submit that the bill discloses a cause of action and that complainant is entitled to equitable relief. Therefore the motion to dismiss the bill was properly denied and the order denying the motion should be affirmed.

ROBERT J. BAIN,
DAVID A. NEWTON,
Of Counsel with Complainant-Respondent.

COLLINS & CORBIN,
Solicitors for Complainant-Respondent.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

LEHIGH VALLEY RAILROAD COMPANY,
Complainant-Respondent,

and

JOHN E. ANDRUS,
Defendant-Appellant.

On Appeal from Chancery.

BRIEF OF DEFENDANT-APPELLANT.

Statement of Facts.

The appeal in this case is taken from an order advised by Vice-Chancellor Backes denying a motion to dismiss the bill of complaint for want of equity. The opinion of the Vice-Chancellor on the motion is found on page 15 of the record, and there is also printed, beginning on page 16 of the record, the opinion of the same Vice-Chancellor on the former motion referred to in the present opinion.

The bill shows that the Lehigh Valley Railroad Company is a tenant of certain property in Bayonne, in the County of Hudson in this State, under a written lease dated June 5, 1889, between John E. Andrus, the defendant, and one Sheehan, copy of which is attached to the bill as Exhibit A (Case, p. 6). Sheehan assigned the lease to Sayre and Sayre assigned to the complainant shortly after the making of the lease. (See assignments schedules B and C attached to bill of complaint, Case, pp. 8 and 9.)

The term of the lease is sixty years from June 5, 1889, and the rental is made payable in quarterly payments in advance, the amount for the first twenty years of the term being fixed in the lease at four thousand two hundred fifty dollars ($4,250.00) a year. The annual rental for the succeeding twenty years, by the terms of the original lease, was to be fixed by arbitration, each party naming one arbitrator, and in case the arbitrators failed to agree an umpire was to be selected by them, "and the award of any two of them, *signed and delivered to the parties on or before the expiration of the first half of the twentieth year of*

the term," was made binding upon both parties and the rentals so fixed were payable in equal quarterly payments in advance.

It further appears by the bill (paragraph 5, Case, p. 4) that when the time came to fix the rental for the second twenty years of the term, the annual rental was fixed by arbitration between the parties at seventy-five hundred dollars ($7,500.00) per annum, and that the original agreement was modified (by supplementary agreement dated March 22, 1909, Case, p. 10, Schedule D), so that the rental fixed by the arbitrators was to be payable only during the next ten years instead of twenty years as originally provided, and it was further agreed that thereafter the rental to be paid should be fixed by arbitrators in the manner provided by the lease for ten-year periods instead of twenty-year periods. In all respects, except as specifically modified, the original lease remained unchanged.

The lease contains covenants for re-entry upon default in the payment of rent, for quiet enjoyment, for payment of the rental in advance in equal quarterly payments, both the sum as originally fixed and as fixed by arbitration as therein provided and for surrender on the expiration of the term.

The lease further contains this language, which has become very important in view of the recent developments alleged in the bill of complaint; "*If for any cause a valid award fixing rentals shall not be made and delivered at or within the times above limited, then the landlord may recover by action from time to time at law or in equity a fair quarterly compensation for the use and occupation of the demised premises.*"

The bill alleges (paragraph 6, Case, p. 6) that in September, 1918, the parties appointed arbitrators to fix the annual rental to be paid under the lease for the term of ten years, beginning June 5, 1919, but that the arbitrators could not agree upon the rental; that the arbitrators also could not agree upon an umpire, although each arbitrator suggested various persons, and that it was impossible for the arbitrators to select an umpire prior to December 5, 1918. The bill further alleges in the same paragraph that since that date and up to the filing of the bill (May 31, 1919) "it has been impossible for said arbitrators either to agree upon a rental or to select an umpire," and that "such failure to agree or to select an umpire has not been due to any fault on the part of the complainant or of the arbitrator appointed by it."

The sole prayer of the bill (Case, p. 5), in addition to the formal prayers for answer and subpoena, is that the Court will fix the amount of annual rental which complainant must pay for the period of ten years, beginning June 5, 1919, of the term demised by said lease.

I.

The parties have made their own agreement as to the effect on their respective rights of the failure of arbitration.

The bill shows that no valid award was made in accordance with the terms of the lease prior to December 5, 1918, and on that ground alone invokes the jurisdiction of the Court of Chancery, asking that court to fix the rental for the ten-year term.

This is asking the Court to attend to a matter completely covered by the contract of the parties.

The parties have themselves anticipated the possibility of the failure of arbitration and have themselves provided a substitute, not only with reference to the arbitration in the matter of rental, but also as to arbitration in the matter of fixing the value of the improvements during the first half of the sixtieth year of the term.

As to the rights of the landlord:

> "If for any cause a valid award fixing rentals shall not be made and delivered at or within the times above limited, then the landlord may recover by action from time to time at law or in equity a fair quarterly compensation for the use and occupation of the demised premises" (Case, p. 8, ll. 1-5).

As to the rights of the tenant:

> "If for any cause a valid award fixing the value of the improvements as above provided shall not be made and delivered at or within the time above limited for that purpose, then the tenant may recover by action at law or in equity the value of the said improvements as above defined" (Case, p. 8, ll. 10-15).

The first quoted paragraph, as to the rights of the landlord, relates exclusively to rental and is the clause directly in point in considering the bill of complaint, which is addressed only to the matter of rental. The presence in the lease, however, of the second paragraph is indicative of the care of the parties to themselves provide for all contingencies, including the failure of arbitration in the two instances in which arbitration is provided.

It is true that as to the second clause, relating to the fixing of the value of the improvements, the rights of the tenant thereunder may be accomplished by action in equity as well as in law, and the language is, therefore, accurate in referring to recovery by action at law or in equity.

The language used by the parties, in referring, in the clause first quoted, to the substitution provided on failure of arbitration as to the rental, prescribing that the "landlord may recover by action from time to time at law or in equity a fair quarterly compensation for the use and occupation of the demised premises," is satisfied by recovery in a court of competent jurisdiction over the parties and the subject matter. If the only remedy for obtaining a fair quarterly compensation for use and occupation is, under our system of jurisprudence, in a court of law, the language used cannot confer jurisdiction on the Court of Chancery. Consent of parties, even when before the Court, cannot confer jurisdiction over subject matter; much less can agreement between parties out of court confer such jurisdiction.

Moreover, the bill of complaint in this case does not ask that the Court of Chancery fix "a fair quarterly compensation for the use and occupation of the demised premises." On the contrary, it asks that the Court shall fix the rental for a full term of ten years. It is quite consonant with experience that a "fair quarterly compensation for use and occupation, from time to time" might vary, and that "quarterly compensation, from time to time," might not be quarterly compensation over a period of ten years in equal amounts for every quarter. The recurrent character of the remedy "from time to time" is a fundamental feature.

If the Court of Chancery takes jurisdiction to determine the rental for the full period of ten years it clearly violates the expressed intention of the parties. A court of equity will be substituted for the arbitration which the parties thought material and for which they covenanted, and upon the failure of which they themselves provided a substituted pocedure, recurrent in operation.

The Court of Chancery has heretofore refused to take jurisdiction, as will appear from cases cited later in the brief, where the effect of so doing is to substitute itself for arbitrators, even where the contract is silent as to the effect on the parties of failure of arbitration.

The contract in the present instance clearly provides, upon failure of arbitration, a remedy enforceable only in a court of law.

The Vice-Chancellor, conceding the remedy at law, is of the opinion that "the right of action at law ceases upon the institution of an equitable suit in substitution of the arbitration" (Case, p. 15, l. 33).

Even conceding equitable jurisdiction to ascertain from time to time fair quarterly compensation, the contract confers the right to recover fair quarterly compensation upon the landlord and, assuming jurisdiction both in the courts of law and equity, it is for the landlord to say where he will bring his action and not for the tenant to bring him against his will into a court of equity. The Vice-Chancellor would not only deprive the landlord of an election of remedies, but would terminate for every quarter of the ten-year term all right to an action at law immediately upon the institution by the tenant of an equitable action to fix the rental for the ten-year term.

The Vice-Chancellor was not unmindful of the language in the clause of the contract referring to the right of recovery by the landlord for *use and occupation from time to time*, but he construed this paragraph as "a facility for an emergency recovery of a fair quarter yearly installment of a ten-year valuation pending substituted proceedings in equity" (Case, p. 18, l. 20). It is submitted that there is nothing in the paragraph which indicates that it was of the emergency character adopted by the Vice-Chancellor. "Use and occupation" and "rental" are not identical terms. It is quite evident that the draftsman was providing for the protection of the landlord, a complete substitutional remedy measured by "quarterly compensation" from "time to time," in the event of the failure of arbitration, and not an emergency substitute pending the determination, under a bill in Chancery filed by the tenant, of a rental measured on the basis of a ten-year unit.

The Vice-Chancellor's view, that the Court of Chancery would have exclusive jurisdiction, has already been acted upon by the tenant, by moving for an injunction against the prosecution of an action at law in the courts of New York, which he failed to secure only because the Vice-Chancellor found that the action at law was begun first and no final hearing in the Chancery case had been reached (Case, p. 19).

It is clear that, if a court of equity takes jurisdiction at all, the arbitration agreed upon by the parties will not be accomplished in manner and form as they agreed, that the substitute, agreed upon by the parties in case of failure of arbitration, will be rejected, and that the judgment of the Court of Chancery will be substituted for the agreement of the parties.

II.

Failure of arbitration alone is not a ground for equitable relief.

The only basis alleged in the bill of complaint as a ground for a court of equity to take jurisdiction is the fact that the arbitration provided in the lease has failed. No other relief is asked of the Court than that it shall fix the amount of rental, that it shall substitute itself for the arbitrators.

The Court of Chancery in this State has heretofore refused to take jurisdiction on that ground alone.

> *Stout* v. *Phoenix Assurance Co. of London,* 65 N. J. Eq. 566.

In this case upon a bill filed to set aside an appraisement under an insurance policy made by appraisers representing the insurer and insured, a decree was advised setting aside the award. At the trial both parties desired that the Court should deal with the whole case and finally fix the liability or non-liability of the company upon the policy and the amount of money which it should pay, and witnesses were heard upon these facts. But Vice-Chancellor Reed was of opinion that his judgment should be confined to the validity of the award. He says (p. 573):

> "A court of equity in this state can deal with legal questions only so far as their decision is incidental or essential to the determination of some equitable question. Merely because a court of equity has acquired jurisdiction for one purpose it is not empowered to retain the case for complete relief."

This language was quoted and approved by the Court of Errors and Appeals in the recent case of *Shaw* v. *Beaumont Co.,* 88 N. J. Eq., 333, at 336.

This was a bill brought for an accounting, and this Court said, speaking by Mr. Justice Black, that the sole ground or special equity there which gave the Court of Chancery jurisdiction was

the equitable lien upon the real estate. It sustained a refusal by the lower court to take jurisdiction of other phases of the controversy which involved merely legal questions. See also the cases of *Red Jacket Tribe* v. *Hoff,* 33 N. J. Eq. 441, and *Loder* v. *McGovern,* 48 N. J. Eq. 275.

There are many other cases in the reports of our own State where a court of equity has taken jurisdiction to set aside an award which was the result of arbitration, but in no such case has it substituted itself for the arbitrators. The case of *Dennis* v. *Standard Fire Ins. Co.,* 90 N. J. Eq. 419, is not an exception to the statement, as in that case the award was merely corrected by the addition of an amount already found by the arbitrators.

The refusal of a court of equity to take jurisdiction and substitute itself for arbitrators when that is the sole relief asked is sound upon principle. The parties to an arbitration agreement are not bound thereby until after submission and award. Prior to that time the award or arbitration is revocable by either party; 5 C. J. 53, *Anderson* v. *Odd Fellows' Hall,* 86 N. J. Law 271, at 273.

This Court there decided that where the contract contains an agreement for arbitration such a provision alone does not make arbitration a condition precedent to a recovery at law. If either party to an arbitration agreement may withdraw therefrom prior to an award, it is submitted that either party may with greater right dissent from the submission of the same controversy to a court of equity, which merely undertakes to substitute itself for the arbitrators without giving any further or other relief.

In *Pomeroy's Equity Jurisprudence* failure of arbitration is not mentioned as a ground of equity jurisdiction, and in *Pomeroy's Equitable Remedies,* volume II, at section 758, it is said that,

> "an agreement to submit a matter to arbitration, or to sell at a price to be fixed by valuers if the mode of fixing the price is an essential part of the contract, will not be specifically enforced, since it is beyond the power of the court to compel arbitrators to agree; *nor will the court itself fix the price, since that would be to make a new agreement for the parties.*"

This Court has recently had occasion to apply the same rule, *Davila* v. *United Fruit Co.,* 88 N. J. Eq. 602.

In this case specific performance of a contract of sale was asked, and it appearing that the price was to be fixed by arbitration for some of the land and that no arbitration had taken place, the Court refused to take jurisdiction, holding that the price was a material element of the contract and that the Court should not remake the contract for the parties if the method they had chosen failed.

> See also *McKibbin* v. *Brown,* 14 N. J. Eq. 13; affd. 15 N. J. Eq. 498;
> *Woodruff* v. *Woodruff,* 44 N. J. Eq. 349.

Professor Pomeroy criticises a case like the present, where a court of equity had taken jurisdiction to appraise the value of improvements and fix the yearly rental in substitution for an arbitration which had failed. *Pomeroy's Equity Jurisprudence,* section 252, note, p. 384.

The cases in this State where the Court of Chancery has taken jurisdiction upon failure of arbitration to determine the value of improvements made upon land by a tenant, which improvements were to be taken by the landlord at the expiration of the term at a value to be fixed by arbitration between the parties, can be distinguished on the ground that in those cases, as in the case of *Shaw* v. *Beaumont Co., supra,* the tenant had an equitable lien upon the land for the unpaid price of the improvements, which lien could not be enforced or recognized in a proceeding at law.

See

> *Copper* v. *Wells,* 1 N. J. Eq. 10;
> *Berry* v. *Van Winkle,* 2 N. J. Eq. 269;
> *Spielmann* v. *Kliest,* 36 N. J. Eq. 199;
> *Conover* v. *Smith,* 17 N. J. Eq. 51.

In the first of these cases Chancellor Vroom was very reluctant to assert the jurisdiction of the Court, doubting its jurisdiction to act in place of arbitrators. In the later cases above cited this decision was said to be as far as the Court should ever go.

III.

No other ground of equitable relief is alleged.

The bill concludes with the formal allegation that the complainant is without adequate remedy at law, but the only relief asked is that the Court will fix and determine the amount which one party is to pay and the other receive during a future period of ten years.

No other relief is asked, equitable or otherwise. It is unnecessary to enumerate all the heads of equity, but it must be obvious that neither discovery, reformation, injunction, specific performance or account is sought. The bill of complaint, moreover, does not set forth any facts which would justify any such relief as a matter of complete remedy under Rule 60 without a prayer therefor. As Vice-Chancellor Grey said in *Miller* v. *Willett,* 70 N. J. Eq. 396, at 404 (affirmed 71 N. J. Eq. 741):

> "Suits in equity in this state are maintained, not because they are effectual or convenient remedies to complainants, but because the relations of the complainants to the defendants are such that they have as against them, equitable grounds for relief."

Where no equitable question is presented the Court will not merely declare rights.

Palmer v. *Sinnickson,* 59 N. J. Eq. 530.

Nothing of the kind is alleged in the bill of complaint, but it may be suggested that equity should take jurisdiction to avoid multiplicity of actions by reason of recoveries from time to time for a quarterly compensation. We know of no equitable principle looking to the restraint of actions however numerous which the parties themselves have by contract expressly recognized as the consequence of possible conditions anticipated and mentioned in their contract. The rights here involved are purely legal, and the mere fact that successive actions, involving independent elements of value, may be required to enforce the rights, is no basis for denial of jurisdiction in the courts of law and for the assumption of exclusive jurisdiction by a court of equity.

IV.

Cases in other jurisdictions.

Complainant has not adduced any decisions in this state authorizing the maintenance of the present or a similar action and counsel for defendant have been unable to find any cases in this state upon this precise proposition. Complainant's counsel have cited numerous cases from other jurisdictions which, it is insisted, sustain such an action as this. Upon examination they will be found distinguishable.

Grosvenor v. *Flint,* 20 R. I. 21, 37 At. 304, was a case where the bill was brought by the *lessors* and charged that defendant's appraiser refused without good cause to agree in selecting an umpire, insisting upon a man of defendant's choice and that acting in behalf of and under the direction of defendants he had been endeavoring to prevent the selection of a disinterested and suitable appraiser as umpire and to procure the selection of some unsuitable person with a view to an unfair appraisal of the rent. The Court upon the trial found that these allegations were sustained. This fraudulent conduct in an endeavor to defeat the agreement of the parties would have been sufficient ground on which to base jurisdiction.

Cooke v. *Miller,* 25 R. I. 92, 54 At. 927, was a case where under the terms of the lease, the lessor was to take the buildings upon the land at the expiration of the term at a price to be fixed by arbitration. Jurisdiction has been taken on similar facts in our own State. The complainant has an equitable lien. No question of rental payable in advance was involved.

Insurance Co. v. *Stephens,* 214 N. Y. 488, 108 N. E. 856, arose upon a bill brought for specific performance by the lessor for an appraisement of the *value of the demised premises* so that lessee might have the option to purchase the same. *Relief was denied.* Reference was made in argument in the opinion of the Court to cases involving agreements to renew leases at a rental value to be fixed by appraisers.

Kaufman v. *Liggett,* 209 Pa. St. 87, 58 At. 129, 67 L. R. A. 353. In this case a decree was entered restraining the landlord from interfering with the possession of the tenants by proceedings taken under the landlord and tenant acts. The tenants had a right to renew for five years at a rental to be fixed by arbitra-

tion. No provision was made for failure of arbitration and upon failure of arbitration the landlord took statutory proceedings to dispossess the tenant.

This equitable jurisdiction has recently been denied by own Court of Errors and Appeals in *McGann* v. *La Brecque Co.,* 109 At. 501, upon substantially the same facts. In the Pennsylvania case no substitute for arbitration having been provided it was necessary for the Court to fix the rental if the operation of its injunction was not to be inequitable. The possible loss of his term by the lessee seemed to be the prevailing consideration.

In the instant case no such condition could arise as the term is to run for thirty years more without any act by the parties and the landlord could not take any action for forfeiture or eviction for non-payment of rent if no rent has been fixed.

Springer v. *Borden,* 154 Ill. 668, 39 N. E. 603. This was a bill filed by the *owner-lessor* against the lessees to have the Court ascertain and fix the *cash value of the demised premises* on a certain day, the lease providing that after the first ten years of the term the tenant should pay five per cent. of the cash value of the premises, such cash value to be ascertained by arbitration. The lease further provided that upon failure of arbitration either party might apply to any court of record to have said cash value fixed. It was held that the right of the lessor to bring an action at law quarterly for ten years was an inadequate remedy. The Court said that the bill was of the nature of a bill for specific performance and therefore the Court had jurisdiction. Our Courts have denied jurisdiction upon that very ground and it is to be noted that in this case the lessor and not the lessee brought the action and that the Court merely had to determine a single present fact, viz., the present cash value of the premises.

In the case of *Springer* v. *Borden,* 210 Ill. 518, 71 N. E. 345, the same method was adopted upon the authority of the case above, arbitration having failed.

Lowe v. *Browne,* 22 Oh. St. 463 (1872).

In a lease for 99 years, renewable forever, rent was fixed for the first 20 years, and at the expiration of that period the value of the ground was to be fixed by arbitration, the lessee to pay as rent eight per cent. thereof annually. Arbitration failed by the refusal of one party to abide by a majority award. This

action was brought to set aside such award and the Court said that once having jurisdiction it would go on and afford a complete remedy by fixing the value. In the present case, as we have pointed out, there is no especial ground of equity jurisdiction and in many cases in New Jersey a court of equity having taken jurisdiction to set aside an award will not proceed to substitute itself for the arbitrators.

Tobey Furniture Co. v. *Rowe,* 18 Ill. App. 293 (1885).

In this case rent for the last fifteen years of a twenty year term was to be six per cent. of the value of the ground as fixed by arbitration. Arbitration failing without the fault of *the lessor* she brought her bill alleging fraudulent conduct upon the part of lessee's representative. The reasoning of the Court is unsatisfactory but seems to be that as complainant was without fault and a miscarriage of the arbitration was not within the contemplation of the parties her right to receive rent was absolute and should be enforced by the Court.

Kelso v. *Kelly,* 1 Daly (N. Y. Com. Pleas 1860) 419.

The lessee refused to arbitrate the rent for the renewal term and plaintiffs-*lessors* brought their action to have the Court fix the amount of rental. Holding that the lessors were bound to give and lessees to take a new lease and that this could not be done until the amount of rent was fixed, the Court enforced specific performance by fixing the amount of rental. In this case the Court also sought to prevent the possibility of the tenant remaining at the old rent by its own default. In our case no renewal is involved.

Gregory v. *Mighell,* 18 Ves. Jr., 328, 34 Eng. Repr. 341, is cited in *McKibbin* v. *Brown, supra,* as authority for the Court to ascertain the amount of rental by reference to a master. In that case it appeared that plaintiff had been in possession for eight years with defendant's permission, without any rent being paid, having entered upon the promise of a lease for twenty-one years at a fair and just annual rent to be fixed by arbitration. The owner had brought an ejectment suit against plaintiff claiming a right to retake the lands, which plaintiff sought to enjoin. The owner had acquiesced in possession by the plaintiff even after he knew that arbitration had failed. The Court found partial performance and granted specific performance of the agreement to give a lease and fixed the amount of rent to be paid by reference to a master.

The case differs from the present in that there were two grounds of equitable relief present apart from any question of fixing rent. Plaintiff sought an injunction against defendant's ejectment suit and prayed for a specific performance of the agreement to lease which defendant had repudiated. Moreover the agreement of the parties provided no other method of fixing the rent. In the present case no specific performance and no injunction are necessary or asked and the agreement contains a mode for fixing the rent.

Dinham v. *Bradford*, 5 L. R. Ch. App. (1869) 519, which the learned Vice-Chancellor cites in his opinion below (case, p. 17) is apparently a case analogous to those in this State where an equitable lien is enforced by the Court's ascertaining the amount of the lien. It was a partnership transaction and so far as we may judge from the facts of the case falls within the class of cases where the seller has an equitable lien for the sale price as in *Copper* v. *Wells; Berry* v. *Van Winkle, supra,* and the cases following them. Being a partnership matter it also was peculiarly within the province of a court of equity. A similar situation was present in this court in *Flint* v. *Flint,* 87 N. J. Eq. 560, aff'd per. cur., 88 N. J. E. 346, where the rights of the partners were held to be in the nature of a lien against the property.

V.

The decree of the Court of Chancery should be reversed and decree directed for the dismissal of the bill of complaint.

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June 3, 1920.