the court is not reviewable. The first error we cannot consider, because the judge made no special findings of fact, and, as far as this record discloses, committed no error in the admission or rejection of testimony, and the pleadings are sufficient to support the judgment. City of Key West v. Baer, 30 U. S. App. 140, 13 C. C. A. 572, and 66 Fed. 440. The plaintiffs in error insist that the bill of exceptions which is brought up in this record is substantially a statement of the special findings of fact made by the trial judge. We do not so construe it. It purports to be a bill of exceptions. Its opening words are:

"Be it remembered that upon the trial of the above-entitled cause, the following facts being established by the testimony, to wit."

And its concluding words are:

"And thereupon the court rendered judgment against the plaintiffs, and thereafter the plaintiffs moved the court, on the grounds stated in their motion, for a new trial, which motion the court overruled, as appears by record herein, to which judgment the plaintiffs in open court excepted, and now tender this their bill of exceptions hereinbefore fully stated, and ask that the same be allowed by the court, and filed as a part of the record in this cause.

"W. M. Merchant,
"Attorney for Plaintiffs [naming them].

"Signed this 18th day of October, 1894. T. S. Maxey, Judge."

Between this opening and closing of the bill of exceptions there appears an extended statement of the evidence submitted on the trial, embracing over 50 pages of the printed record; but no note of any exception occurs, nor does it appear that the evidence detailed was all the evidence submitted on the trial. It is manifest upon the face of the paper that it was not the intention of the trial judge to pronounce special findings of fact in the terms which make up this bill of exceptions. It is clear to us that it was not his intention to make any special findings of fact, and that he did not in fact make any. Under the settled rule of this court, and of the supreme court of the United States, construing the statute providing for trials before the judge without a jury when a jury is waived by a stipulation in writing signed by the parties, the record in this case shows nothing that may form a basis for review by this court of the judgment of the circuit court. That judgment is therefore affirmed.

MORRISON et al. v. KUHN.

(Circuit Court of Appeals, Fifth Circuit. April 20, 1897.)

APPEAL—DECISION ON APPEAL BY OTHER PARTNERS.

Where the record shows that the questions presented were necessarily involved and were decided on a previous appeal by another party from the same decree, and in accordance with such decision the judgment below was modified, the court will simply direct an affirmance of the modified decree.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

M. H. Clift, for appellants.

Foster V. Brown and Mark Spurlock, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge. This was a suit brought by William S. Kuhn, in his own right and as trustee for the American Waterworks & Guaranty Company, against Robert Morrison, Carrie P. Morrison, Samuel E. Green, Edward Scott, Moses H. Clift, J. T. Williams, John X. Dickert, and W. T. Page, for the foreclosure of a mortgage upon two tracts of land in Catoosa county, state of Georgia. On final hearing in the circuit court a decree was rendered foreclosing the mortgage on both tracts, but subject to a prior lien held by Samuel E. Green. In the proceedings Robert Morrison and Edward Scott, two of the parties who executed the mortgage, made no appearance, and a decree pro confesso was entered against them. Moses H. Clift, who was the other party who executed the mortgage, and J. T. Williams, who claimed an interest in the mortgaged premises, appeared and contested the right of Kuhn to a foreclosure. Kuhn, not being satisfied with the measure of relief granted by the circuit court, immediately appealed, and on September 14, 1896, perfected his appeal against all the defendants in the case; and citations were duly served on Robert Morrison on the 21st day of September, 1896, and upon Moses H. Clift and J. T. Williams on September 28, 1896. The transcript was duly filed in this court, and the cause assigned for hearing November 24, 1896, on which day it was regularly heard and submitted. No appearance was made for any appellee, except for Samuel E. Green. On December 15th this court rendered its decision (Kuhn v. Morrison, 23 C. C. A. 619, 78 Fed. 16), on which a mandate issued in due course. Subsequent to the filing of the transcript of appeal and the assignment of the cause for hearing, Moses H. Clift, Robert Morrison, and J. T. Williams, original defendants in the circuit court, filed a petition in the circuit court for an appeal, which was allowed. None of the other defendants joined in said appeal, nor was there any severance. This appeal was perfected by a bond conditioned that said Moses H. Clift and J. T. Williams should prosecute their appeal to effect, and by service of citation upon W. S. Kuhn, in his own right and as trustee, through his counsel; and the transcript was filed in this court on the 21st day of November, 1896, but no appearance for appellants was then, or has since been, entered. An inspection of the record shows that substantially the same questions are sought to be raised on the appeal of Clift and Williams as were necessarily passed upon by the court on the appeal of Kuhn. On this state of facts, the appeal of Clift and Williams might well be dismissed for the reason that all the parties defendant who are interested in the decree of the circuit court did not join in the appeal, nor was there any summons and severance in order to allow of the prosecution of the appeal by any less than the whole number of the defendants against whom the decree was entered (Estis v. Trabue, 128 U. S. 225, 230, 9 Sup. Ct. 58), or for the reason that the appeal being a cross appeal, it was not diligently prosecuted (see The S. S. Osborne, 105 U. S. 447; Hilton v. Dickinson, 108 U. S. 165, 168, 2 Sup. Ct. 424; The Tornado, 109 U. S. 110, 117, 3 Sup. Ct. 78; Grigsby v. Purcell, 99 U. S. 505; U. S. v. Burchard, 125 U. S. 176, 8 Sup. Ct. 832). As, however, the record shows that the questions now presented were necessarily involved,

and have been settled adversely to the appellants, in our previous decision on the appeal of Kuhn, the affirmance of the decree as modified by this court in Kuhn v. Morrison will be proper, and subserve all the ends of justice; and it is so ordered.

ADAMS et al. v. HECKSCHER.

(Circuit Court, W. D. Missouri, C. D. May 15, 1897.)

1. PROCESS—SERVICE OUTSIDE STATE.
   Service of summons outside the state, under Rev. St. Mo. 1889, § 2022, is not valid if the summons is not served on the defendant in person.
2. SAME—AFFIDAVIT OF SERVICE.
   An affidavit of service of a summons under Rev. St. Mo. 1889, § 2022, made before a deputy clerk, instead of a clerk of court, is insufficient.
3. SAME—SUBSTITUTED SERVICE.
   Substituted service of summons, under Rev. St. Mo. 1889, § 2022, is not authorized if it does not appear by the petition or by affidavit that the defendant is a nonresident.
4. SAME—NATURE OF SUIT.
   A suit which seeks to require the defendant to perfect his title to certain land, furnish the plaintiff an abstract thereof, convey the land to the plaintiff, and pay him damages, under a contract for the sale of the land, is not one in which the decree can be executed by the court, under Rev. St. Mo. 1889, §§ 2225–2227, without requiring any personal act by the defendant, and accordingly is not so far a suit in rem as to authorize substituted service on a nonresident defendant.
5. SAME—AMENDMENT OF PLEADINGS.
   When the nature of a suit as originally brought is not such as to give the court jurisdiction over a nonresident defendant brought in by substituted service, the court has no power to amend the pleadings so as to give jurisdiction over such a defendant.

Thos. M. Jones, for plaintiffs.
Noble & Shields and J. B. Harrison, for defendant.

PHILIPS, District Judge. The case has been submitted to the court upon the motion to dismiss the suit. The action was instituted in the state court of Phelps county, and, on petition of defendant, was removed into this court. In the state court, and prior to the petition for removal, the defendant appeared specially, for the purpose of the motion only, and moved the court to dismiss the suit, for the reason—First, that the court had no jurisdiction of the person of the defendant; second, for the reason that there was no proper service of summons made on the defendant; and, third, for the reason that the defendant, at the time of the institution of the suit, was a nonresident of the state, and attempt was made to bring him in by substituted service by personal summons made upon him in the state of Pennsylvania, and that, the suit being in effect a proceeding in personam, and not in rem, it was not within the provisions of the statute authorizing such substituted service.

The attempted service of summons on defendant in the state of Pennsylvania is clearly bad, for the reasons that process in that state was not served upon the defendant in person, as required by

section 2022, Rev. St. Mo. 1889; and, second, because the affidavit of such service made by the sheriff was not made before the clerk of the court, as required by the statute, but was made before a deputy. Murdock v. Hillyer, 45 Mo. App. 287. No such substituted service of process was authorized in this case, for the reason that it neither appears by the petition nor in any affidavit thereto that the defendant was a nonresident of the state, or out of the jurisdiction of the state circuit court, where the suit was instituted.

After the removal of the cause into this court, the case must proceed just as this court finds it when it is removed from the state court. Tallman v. Railroad Co., 45 Fed. 156. Nor is it apparent that on the petition, as it stands, this court could have any jurisdiction to afford the relief sought therein. To give the state court jurisdiction to proceed against the nonresident defendant upon substituted service, without the appearance of the defendant to the merits of the suit, the proceeding must be one essentially in rem. It may be conceded to the plaintiffs that in view of sections 2225–2227, Rev. St. Mo. 1889, an action for specific performance of a contract for the sale and conveyance of real estate may be so maintained, under the state statute, as a judgment therein may be enforced by directing the conveyance of the property, without requiring of the defendant the performance of any personal act. But for this statute, a suit for specific performance would partake essentially of the nature of a proceeding in personam. Olney v. Eaton, 66 Mo. 563–567; Bennett v. Fenton, 41 Fed. 283. What is the nature and object of this suit? It is predicated on a contract for the sale and purchase of real estate. By the terms of the contract, the defendant was to furnish to the plaintiffs a complete abstract of the title, and to convey to them a perfect title to the land. While the petition in this case is somewhat ambiguous, the gravamen of the complaint is that the deed to the land tendered by the defendant to the plaintiffs was imperfect in its title; that it did not describe the proper land; that the defendant has failed to furnish the abstract as provided in the contract; and that the plaintiffs were damaged in the sum of $1,000 by reason of having held in readiness the sum of $10,000 to be paid to the defendant upon his compliance with the contract; and the prayer of the petition is that defendant be decreed "to perfect title to said lands, and furnish an abstract, according to said contract, and to convey, by good and proper warranty deed, the said premises to plaintiffs, and that he pay plaintiffs damages in the sum of one thousand dollars, for the loss of the use of the purchase money of ten thousand dollars from the 24th day of January, 1896." It cannot be controverted that a decree or order of court directing the defendant to perfect title to the land, and to furnish an abstract of title thereto, as also an award of damages, as prayed for, would have to be executed personally against the defendant; and, while a decree of conveyance of title could be executed in rem, it is apparent from the whole body of the petition and the prayer thereof that plaintiffs do not seek to have this done except upon the condition that defendant first furnish the required abstract, and perfect his title to the land.