INDEX

BILL OF COMPLAINT.

Filed February 11, 1926.

In Chancery of New Jersey

Between

FRANCES D. MAIORAN,
Complainant-Appellant,

and

FRANK CALABRESE, SAM MONISTERE, DOMENCIA CALABRESE, JOSEPHINE MONISTERE and COLUMBIA REALTY CO.,
Defendants-Respondents.

On Bill, &c.

Bill of Complaint.

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

The complainant, Frances D. Maioran, of the Borough of Madison, in the County of Morris and State of New Jersey, respectfully shows that:

1. On the 4th day of June, 1925, complainant was seized in fee simple of all that certain lot, tract or parcel of land and premises, situate, lying and being in the Borough of Madison, aforesaid, more particularly described as follows:

BEGINNING at a monument set at the point of intersection of the easterly side line of Park avenue with the northerly side line of Loveland street, which point is the most southwesterly corner of Lot No. 1 in Block A as shown on the above-mentioned map (and from said beginning

point running (1) along the northerly side line of Loveland street north 82 degrees and 47 minutes east 134 feet and 68/100 of a foot to the most southwesterly corner of Lot No. 6 in Block A on said map; thence (2) along the westerly line of Lot No. 6 in Block A on said map north 10 degrees and 46 minutes west 52 feet and 15/100 of a foot to the most southeasterly corner of Lot No. 2 in Block A on said map; thence (3) along the southerly line of Lot No. 2 in Block A on said map south 82 degrees and 47 minutes west 136 feet and 89/100 of a foot to the easterly side line of Park avenue and the most southwesterly corner of Lot No. 2 in Block A on said map; thence (4) along the easterly side line of Park avenue south 13 degrees 11 minutes east 52 feet and 33/100 of a foot to the point or place of beginning.

Known and designated at Lot number 1 in Block A on a certain map or plan entitled "St. Michael's Building Lots, Madison, Morris County, N. J., Plot No. 2," made by George W. Gardner, Surveyor, and dated July, 1922, and filed in the office of the Clerk of the County of Morris on June 3, 1924.

2. On the date last mentioned complainant, with her husband Pasquale Maioran, entered into a certain agreement in writing with Frank Calabrese and Domenica Calabrese, his wife; Sam Monistere and Josephine Monistere, his wife, wherein and whereby complainant agreed to convey the said land and premises, by deed of warranty, on or before the 15th day of July, 1925, at the express request and statement in said contract, to the Columbia Realty Co., recited therein to be a corporation of the State of New Jersey.

Bill of Complaint.

In consideration of the conveyance by said complainant unto the said Columbia Realty Co. the said Frank Calabrese and Domenica Calabrese, his wife; Sam Monistere and Josephine Monistere, his wife, agreed to transfer, or cause to be transferred, unto the said complainant, three certain properties described in said contracts as parcels A, B and C, with a cash payment of three thousand dollars or thereabouts.

That of the premises so agreed to be conveyed, parcel A was a tract of land situate, lying and being in the Borough of Garwood, Union County, New Jersey; parcel B was a tract of land situate, lying and being in the Borough of Garwood, Union County, New Jersey, and parcel C was a tract of land situate, lying and being in the Township of Cranford, Union County, New Jersey, and described as follows:

Known and designated as lots Nos. 155 and 160 incl. and 239 to 242 incl. and 330 and 331 on map of 480 lots of Rankin Park Land Co., Cranford, N. J., by J. R. Bowe, C. E. 11/10/06, etc.

That afterwards, to wit, on the said 15th day of July, 1925, said complainant, with her husband, made, executed and delivered unto the said Columbia Realty Co. a deed for the premises hereinabove described, subject to the encumbrances as set forth in the contract of sale hereinbefore referred to.

That the said Frank Calabrese and Sam Monistere, with their wives, did convey, or cause to be conveyed, by three certain conveyances, unto the said complainant, as follows:

Parcel A, by deed from Frank Calabrese and Domenica Calabrese, his wife; Sam Monistere

and Josephine Monistere, his wife, dated June 5, 1925, recorded July 23, 1925, in the Register's Office of the County of Union in Book 1004 of Deeds, on pages 366, &c.

Parcel B, by deed from Joseph Andaioro and Fannie Andaioro, his wife, dated June 5, 1925, recorded July 23, 1925, in the Register's Office of the County of Union in Book 1004 of Deeds, on pages 364, &c.

Parcel C, by deed from Frank Calabrese and Domenica Calabrese, his wife; Sam Monistere and Josephine Monistere, his wife, dated July 15, 1925, recorded July 23, 1925, in the Register's Office of the County of Union in Book 1004 of Deeds, on pages 362, &c., and therein described as follows:

Being known and designated as lots Nos. 239, 240, 241, 242, 253, 254, 330, 331, on a certain map or plan of lots called "Map of 480 lots of the Rankin Park Land Company, Cranford, N. J., surveyed by J. L. Bauer, Civil Engineer, November 10, 1906," and filed in the office of the Register of the County of Union, March 12, 1910, subject to restrictions of record, and lots known and designated as lot Nos. 155, 156, 157, 158, 159, 160 on a certain map or plan of lots called "Map of 480 lots of the Rankin Park Land Company, Cranford, N. J., surveyed for George Spector and Tille Spector, his wife, by J. L. Bauer, Civil Engineer, November 10, 1906, and filed in the Office of the Register of the County of Union, March 12, 1910, and subject to the encumbrances set forth in the aforesaid contract.

3. Before entering into the above stated contract the said Frank Calabrese and Sam Monistere with complainant, or her agent, examined

the premises supposed to have been described as Parcel C and were shown lots on Burnside Avenue, described on said map above referred to as lots Nos. 245, 246, 322 to 329, inclusive, 253, 254, 330 and 331, which said lots are of great value, being improved with water, gas, sidewalks, etc., and the value of said lots as set forth in said contract of $9,500 with an encumbrance of $5,000, leaving a net value of $4,500 was a fair price for the same, while the lots actually conveyed, with a mortgage of $5,000 thereon, are not worth the value of the mortgage, and that there is no equity therein to the complainant.

4. Complainant was never shown the lots as described in Parcel C in the contract and in the deed to her, and discovered that the lots in the deed were not the lots which she had purchased when she attempted to sell them, which was on or about the 20th day of August, 1925.

5. Complainant, on discovering the wrongful conveyance to her of the property which she had not purchased, made demand upon the said Frank Calabrese and Sam Monistere and the Columbia Realty Co. for the return of her purchase price of said lots as set forth in said contract, namely $4,500 and did tender and offer to re-convey the premises unto the said Columbia Realty Co. or its nominee, and that they have refused to pay said portion of consideration still due complainant.

6. Complainant charges and alleges that the said Frank Calabrese and Sam Monistere, fraudulently and with intent to deceive said complainant and induce her to part with her said property, did show unto her, or her agent, the valuable property which they did not own, of which fact they were fully aware.

7. Complainant says that the Columbia Realty Co. is composed of the said Frank Calabrese and Sam Monistere and their wives, Domenica Calabrese and Josephine Monistere, and that the acts of the said Frank Calabrese and Sam Monistere, Domenica Calabrese and Josephine Monistere were fully known to the Columbia Realty Co. and that the Columbia Realty Co. had knowledge of the sale of the land and of the misrepresentation made by the said Frank Calabrese and Sam Monistere, and that the taking of the deed by the Columbia Realty Co. was an artful device whereby the said Frank Calabrese and Sam Monistere sought to avoid the consequences of their acts.

8. Complainant says that she has not received the part of the consideration money due her, to wit, the sum of $4,500 and has parted with her property without the consideration being paid or secured to her.

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

1. That the said Frank Calabrese and Domenica Calabrese, his wife; Sam Monistere and Josephine Monistere, his wife, and the Columbia Realty Co. may answer this bill or complaint and each statement therein made.

2. That the said Frank Calabrese, Sam Monistere and the Columbia Realty Co. be decreed to secure unto the said complainant the said sum of $4,500 by a mortgage or other security on the premises as aforesaid conveyed by the complainant to the Columbia Realty Co. and that the complainant have, upon said premises, a lien for the amount of $4,500 or such other sum as it shall

be ascertained to be due of the consideration money agreed to be paid under the contract hereinbefore mentioned, and that in default of the payment and satisfaction of such lien that the said premises may be sold under the direction of this Court for the satisfaction of such lien so impressed upon said lands and premises; and in case a deficiency should arise from said sale, that the defendants may be ordered by this Court to pay said deficiency, together with interest and costs to this complainant.

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

DAVID F. BARKMAN,
and Counsel
Solicitor of Complainant.

Notice.

NOTICE.

IN CHANCERY OF NEW JERSEY.

Between

FRANCES D. MAIORAN,
Complainant,

and

FRANK CALABRESE, SAM MONISTERE, DOMENCIA CALABRESE, JOSEPHINE MONISTERE and COLUMBIA REALTY CO.,
Defendants.

On Bill, &c.

Notice.

To David F. Barkman, Esquire, Solicitor for Complainant, Babbitt Building, Morristown, N. J.

DEAR SIR:

TAKE NOTICE that on Tuesday, March 2, 1926, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall appear before the Chancellor at the Chancery Chambers in the Prudential Building, Newark, New Jersey, for an order to strike out the bill of complaint filed in this cause as against the defendants, Frank Calabrese, Domenica Calabrese, Sam Monistere and Josephine Monistere and Columbia Realty Company, on the following grounds:

1. Want of equity.
2. No cause of action.
3. Remedy, if any, in the courts of law.

Yours respectfully,

EGIDIO W. MASCIA,

Dated February 23, 1926.

DECREE OF DISMISSAL.

IN CHANCERY OF NEW JERSEY.

Between FRANCES D. MAIORAN, *Complainant,* *and* FRANK CALABRESE, *et als.*, *Defendants.*	*On Bill, &c.* *Order Striking Out Bill of Complaint.*

This matter coming on to be heard in the presence of David F. Barkman, Esq., Solicitor for the Complainant, and Egidio W. Mascia, Esq., Solicitor of the Defendants, and the Court having heard argument and having considered the matter;

IT IS on this 10th day of March, 1926, ORDERED, that the bill of complaint be and the same is hereby dismissed with costs to be taxed.

EDWIN ROBERT WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
Vice-Chancellor.

MEMORANDUM OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

	Between	
10	FRANCES D. MAIORAN, *Complainant,*	*Memorandum.*
	and	
	FRANK CALABRESE, *et als.*, *Defendants.*	

This memorandum is not to be published in the official or unofficial reports.

David F. Barkman for complainant.

20 Anthony R. Finelli for defendants.

CHURCH, *V.-C.*

This is a motion to strike out a bill. The bill was filed to enforce a vendor's lien upon lands situated in Madison, New Jersey, conveyed by complainant to defendants in exchange for lands of the defendants in Garwood. The complainant desires to rescind part of the contract but also desires to keep a portion of defendants' property and impress a claim for damages for deceit and fraud on balance. He does not desire to rescind in full. He must either rescind in full or not at all, in my opinion. In other words if he desires recision, he must put the vendor in the *statu quo*. See *Kvedar* v. *Shapiro*, 98 N. J. L. 225.

It would appear from the bill that exchange of property was made and that the complainant, after deeds were passed, decided that the property he received was not as valuable as he was

40

led to believe it to be and states that he was not shown the real property conveyed but other property.

It seems to me that the doctrine of *caveat emptor* would apply here and that the case of *Schweitzer* v. *National House and Farms Association,* 117 Atl. 701, is in point.

I shall therefore advise a decree dismissing the bill.

NOTICE OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

FRANCES D. MAIORAN,
Complainant,

and

FRANK CALABRESE, SAM MONISTERE, DOMENCIA CALABRESE, JOSEPHINE MONISTERE and COLUMBIA REALTY CO.,
Defendants.

On Bill, &c.

Notice of Appeal.

The complainant, Frances D. Maioran, hereby appeals from the decree bearing date March 9, 1926, in the above entitled cause, wherein it is ORDERED, ADJUDGED AND DECREED that the bill of complaint of the complainant be struck out, to the Court of Errors and Appeals, in the last resort in all cases.

Dated at Morristown, N. J., March 11, 1926.

DAVID F. BARKMAN,
Solicitor and of Counsel with
the Complainant.

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

DAVID F. BARKMAN,
Of Counsel with Complainant.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

FRANCES D. MAIORAN,
Complainant-Appellant,

and

FRANK CALABRESE, SAM MONISTERE, DOMENCIA CALABRESE, JOSEPHINE MONISTERE and COLUMBIA REALTY CO.,
Defendants-Appellees.

On Bill, &c.

Petition of Appeal.

To the New Jersey Court of Errors and Appeals:

The petition of Frances D. Maioran respectfully shows:

1. That she appeals from the order of the Court of Chancery entered in the above entitled matter wherein it was ordered, adjudged and decreed that the bill of complaint be dismissed, because the Court erred in dismissing said cause as the complaint set forth an equitable cause of action against the defendants.

D. F. BARKMAN,
Solicitor for and of Counsel
with the Complainant-Appellant.

Due and legal service of the within petition is hereby acknowledged.

EGIDIO W. MASCIA,
Solicitor of Defendants-Appellees.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

FRANCES D. MAIORAN,
Complainant-Appellant,

and

FRANK CALABRESE and DOMENICA CALABRESE, his wife, SAM MONISTERE and DOMENICA MONISTERE, his wife, and COLUMBIA REALTY COMPANY,
Defendants-Respondents.

On Appeal, &c.

Answer to Petition of Appeal.

The answer of the above-named defendants to the petition of appeal of the above-named appellant:

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit that a decree was on the ninth day of March last past, 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, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents.

EGIDIO W. MASCIA,
Solicitor for Defendants.

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

New Jersey Court of Errors and Appeals

Between

FRANCES D. MAIORAN,
Complainant-Appellant,

and

FRANK CALABRESE, SAM MONISTERE, DOMENICA CALABRESE, JOSEPHINE MONISTERE AND COLUMBIA REALTY CO.,
Defendants-Respondents.

On Bill, &c.

On Appeal from Decree in Chancery.

BRIEF OF COMPLAINANT-APPELLANT.

Facts.

This bill was filed for the purpose of establishing a vendor's lien upon premises conveyed by the complainant, Frances D. Maioran, to the Columbia Realty Co., a New Jersey corporation.

The bill sets forth in paragraph 1 a description of the property which was conveyed by the said Frances D. Maioran and her husband to the Columbia Realty Co. in exchange for premises conveyed by the said Columbia Realty Co. to the complainant. This was in accordance with a contract made by the said Frances D. Maioran with Frank Calabrese and Sam Monistere with their respective wives. The contract was peculiar in one respect. The property to be conveyed by Calabrese and Monistere was not all in their names and the contract was divided into three parts, designated in said contract as parcels A, B and C. Parcel A was a tract in Garwood, Union County, New Jersey; parcel B was a tract in Garwood, Union County, New Jersey,

and parcel C was a tract in Cranford, Union County, New Jersey. Parcel B of the premises was owned by Joseph Andaioro and Fannie, his wife, and the title was not in Calabrese or Monistere, although they agreed to convey it. The amount, as set forth in the contract, by Calabrese and Monistere, upon parcel C was the sum of $9,500 (paragraph 3 of the complaint, P. C. page 4) with an encumbrance thereon of $5,000 leaving a net value of $4,500. Prior to the execution of the contract the complainant and defendants, Calabrese and Monistere, examined the ground supposed to be set forth and designated in the contract as parcel C. The defendants Calabrese and Monistere showed unto complainant building lots situated on Burnside avenue and represented that they were the owners of the property and set the price. Complainant relied upon the representations made as to the situation of the property, duly executed a deed, and received from the said Calabrese and Monistere deeds for parcels A and C, and a deed for parcel B from Joseph Andaioro and wife, so that there were really three contracts in one, and separate deeds made for the same to carry out this theory.

Afterwards, on or about August 20, 1925 (paragraphs 4 and 5 of the complaint, P. C. page 5), complainant endeavored to sell parcel C and then discovered that the lots in parcel C were not the lots which she had purchased from the said Calabrese and Monistere. The lots designated in the deed were inferior and of no value over and above the $5,000 mortgage thereon. She immediately offered to reconvey to the said defendants parcel C and demanded the amount of the purchase money unpaid, which request was refused.

I.

Defendant admit the facts as set forth in the bill by their motion to strike out the complaint.

The defendants, by moving to strike out the bill of complaint, have admitted every material allegation therein.

In *Londenslager* v. *Pacific Improvement Co.*, the Court of Errors and Appeals, without dissenting vote, confirmed the opinion of the Vice-Chancellor. 93 N. J. E. 218; 115 Atl. 752.

The Vice-Chancellor says in his opinion as to the effect of a motion to strike out as follows:

> "I am satisfied that the several motions made herein to strike the bill from the files must be denied. On these motions counsel for defendants have measureably overlooked the requirement that the averments of the bill can alone be considered and that all such averments must be accepted as true."

In *Board of Com'rs of Borough of Vineland* v. *Maretti*, 93 N. J. E. 513; 117 Atl. 483, Walker, Chancellor, held:

> "A motion to strike out a bill of complaint on the ground that it discloses no cause of action is substituted by rule 67 for a demurrer under the former practice; and like a demurrer admits every allegation in the bill which is well pleaded."

The defendants then admit that they exhibited to complainant land which they said they owned and then substituted other land for it. They admit the separate valuation of the land designated as parcel C in the contract and its value, they admit the offer to return the property not purchased by the complainant and the refusal to pay to complainant the amount agreed upon as the value of the land pointed out to complainant and which they did not own. In other words they fully and completely admit the fraud.

II.

A Court of Equity is the proper court to determine causes of action of this character.

Under the decisions rendered in our courts there can be no question that this action is clearly an equitable one and that the case was properly brought in the Court of Chancery.

The following cases hold that actions for fraud are properly brought therein.

> *Straus* v. *Norris, et al.*, 75 Atl. 980; 77 N. J. E. 33, Stevens, *V.-C.* "It is conceded by demurrant's counsel that this court has general jurisdiction in cases of fraud. The rule is thus stated by Justice Dixon in Eggers *v.* Anderson, 63 N. J. Eq. 265, 49 Atl. 579, 55 L. R. A. 570, in delivering the judgment of the Court of Errors and Appeals. 'The Court of Chancery possesses a general jurisdiction in cases of fraud, as well in cases where the remedy at law is plain, adequate, and complete as in other cases; but where the remedy at law is plain, adequate, and complete, the Court of Chancery is reluctant to exercise its jurisdiction, and will not do so unless the administration of justice will thereby evidently be facilitated.' In the case in hand it appears to me that the administration of justice will be facilitated if this court takes jurisdiction. In the first place, if the complainant should sue at law and should be able to show that the representation was material and false in fact, but should be unable to show that it was false to the knowledge of the person making it, he would fail; while here he would succeed. It would be an evident hardship to send him to law and then, if he failed, give him a remedy in this court, when this court is fully competent to pass upon the whole question. If, as the bill alleges in the alternative, there was mutual mistake, this court alone would be competent to deal with it."

III.

Relief can be given by imposing a vendor's lien on the premises conveyed to defendants.

This is a most proper case to exercise the powers of the court in substaining a vendor's lien on the premises conveyed by complainant to defendant, Columbia Realty Company. This company received from complainant valuable property which has been paid for only in part. The part unpaid is readily ascertainable. The consideration moving to complainant was in three separate parcels two of these parcels (A & B) are not subject to question. The third parcel (C) is a definite part of the consideration and is clearly set by the defendant at $9,500 subject to a mortgage of $5,000 leaving an amount due complainant of $4,500. How can complainant's rights be preserved except by vendor's lien? It seems that the very nature of the case is one particularly within the scope of the protection of a vendor's lien. If this is granted, defendants are not out anything. They have received what they bought and they have not given more than they agreed to pay.

The law relating is clearly set forth in the following cases:

> *Bliss* v. *Linden Cemetery Ass'n*, 90 N. J. Eq. 404; 107 Atl. 594, Backes, *V.-C.* "It is not questioned that in the ordinary case of sales of land where the purchase money is unpaid the vendor has a lien. 'It is well established in this court that where land is conveyed and the purchase-money for it is not paid, and no distinct security for the payment of that money is taken in its stead, a constructive trust arises, and the vendee is considered as the trustee of the land for the vendor until the purchase money is paid. The vendor thus obtains an equi-

table lien upon the land for the purchase money, which is good against the vendee and his heirs and all persons taking from them as volunteers, and also against purchasers from them for value with notice that the purchase money is unpaid, and is unenforceable only against purchasers for value in good faith without such notice'." *Action* v. *Waddington,* 46 N. J. Eq. 16, 18 Atl. 356.

Knickerbocker Trust Co. v. *Carteret Steel Co.,* 79 N. J. Eq. 501; 82 Atl. 146, Howell, *V.-C.* "The doctrines concerning vendor's liens are firmly established in our jurisprudence. They give to the grantor or vendor who has parted with the title to his property an equitable lien on the property conveyed, to secure the payment of the purchase money. It is not a right which necessarily arises out of contract; it is rather an equity raised out of the circumstances, on the ground of a constructive trust, to protect the vendor to such extent as may be necessary; and it is difficult to see how, as between the parties, the force or effect of the lien could be enhanced by a mere agreement that a vendor's lien should be reserved. Graves *v.* Coutant, 31 N. J. Eq. 763; Stickle *v.* High Standard Steel Company, 78 N. J. Eq. 549; 80 Atl. 500. This lien, however, may be lost by a distinct waiver of it, or by a transfer of the title by the grantee to a purchaser for value and without notice. A grantee or mortgagee from the vendee who has notice, or is in such circumstances as that he is put upon inquiry, would take title to or a lien upon the premises, subject to the lien of the vendor. These principles are very clear and plain. Vandoren *v.* Todd, 3 N. J. Eq. 397; Butterfield *v.* Okie, 36 N. J. Eq. 482."

Applying the doctrine above set forth complainant is clearly entitled to her lien upon the premises parted with under the circumstances hereinbefore set forth.

IV.

It makes no difference to complainant's right for a lien because the consideration was in part exchange of lands.

The sale was in part an exchange of land. The complainant conveying her property for other property in exchange therefor and a cash consideration.

The rule in such case is set forth in 39 *Cyc.* 1801, Sec. 11.

> Vendor and Purchaser, 39 *Cyc.* 1801, Section 11. Exchange of Land. "The mere fact that a sale of land has taken the form of an exchange, that is to say, that the buyer pays the purchase-price or part thereof in other lands, does not necessarily prevent the vendor from having a lien upon the land conveyed by him. And where persons exchange land, and the land of one of them is encumbered by a mortgage, and a lien for indemnity is reserved on the land exchanged for the encumbered land, such lien is in effect a purchase-money lien and an execution sale should be made subject thereto. Where a purchaser of land who gives other land or property in payment or exchange fraudulently makes a false representation as to the quality, quantity, or value of such other land or property, which forms a material inducement to the sale, the vendor has an equitable lien for the difference between the value of such other land or property, as represented, and the actual value."

In the case under discussion, defendants falsely represented themselves to be the owners of valuable property which they pointed out to complainant, whereas they did not own such land, consequently there was an entire failure of consideration to the extent of $4,500.

Bennett v. *Shipley,* 82 Mo., p. 448. "Exchange of Lands; Deed of Trust, transfer of: Equity: Vendor's Lien; Homestead; Dower.

Where B & D exchanged lands, D promising to transfer deed of trust, in which his wife had not joined, from the land traded B to that received from B, but deed insolvent without making the transfer, and B lost the land obtained from D by sale under the trust deed, equity will give B a lien on the land traded to D for the purchase price thereof, and the homestead and dower right of D's widow will be subject to such lien. But B having quitclaimed to the cestui que trust for $500 after the trust sale, for the purpose of divesting the widow of her dower, his vendor's lien will be reduced that amount."

Auburn v. *Settle,* N. Y. Sup. Ct. Reports, 3 Thomson, p. 258. "Plaintiff exchanged his farm for defendant's hotel under an agreement whereby $500 was to be paid by defendant in procuring a discharge of a mortgage which one H held upon the hotel, and the substitution of a new mortgage to H on his farm. After the exchange defendant was unable to induce H to make the substitution; held that plaintiff had a vendor's lien upon the farm to the extent of the $500; and that a mortgagee or vendee from defendant, with knowledge of the facts, had no rights which would prevent plaintiff from having full equitable relief."

Smith, *J.,* on p. 259, relative to vendor's liens says as follows: "It is an old and well settled doctrine of the courts of equity that when the vendor of land conveys the estate and delivers possession without receiving the purchase-money, he retains a lien upon the land for the unpaid purchase-money. 2 Sugden on Vendors (14th Ed.) 671; 2 Story's Eq. Juris. (11th Ed.), Sec. 1217-1218-1219-1224; 4 Kent's Com. 152. The lien of the vendor remains until payment of the consideration for the land not only as between Vendor and Vendee, but as against

voluntary creditors or purchasers under the vendee with notice of the vendor's rights of equity. 2 Story's Eq. Juris., Sec. 1225-1228; Mackreth *v.* Symmons, 15 Ves. 330, 4 Kent's Com. 152."

Continuing *Auburn* v. *Settle*, page 260. "All the cases hold that the lien remains until discharged by payment of the consideration or waiver of the same, and the burden of proof is on the purchaser to establish such waiver. 2 Story's Eq., Sec. 1224. There is in this case no waiver—no new or other security was taken for this $500.00. The plaintiff executed his deed of said farm and took his conveyance of the hotel property upon the express assurance of the defendant and his friend Little, and understanding that this $500.00 would be transferred from the hotel property by Heir to the farm immediately.

If the plaintiff cannot retain and enforce this lien he is in effect defrauded of the $500.00 *part of the price of his own land*, the amount of the Heir mortgage remaining a lien on the property purchased by him. It is the province of the courts of equity to prevent such wrongs. Equity powers are conferred upon the courts and exist for just such cases."

V.

Complainant not required to rescind contract, she seeking to enforce its consummation by a vendor's lien for the unpaid balance.

It is undoubtedly the law that where a party seeks to recover back the property which has been conveyed to another party that a rescission must be offered, but where party seeks only to have what has been agreed to be paid this is not the rule.

In *Tobey* v. *McAlister*, 9 Wis., p. 463, this very point is ably discussed, the Court saying (p. 469):

> "It was suggested that the respondent, by retaining that portion of the consideration money received, while he proceeds to confine his right to a vendor's lien for the remainder, was seeking to affirm a contract in part, and disaffirm it in part which it was insisted he could not do; and in support of this position we were referred to the case of Weed, et als., *v.* Page, &c., 7 Wis. 503, and other cases to the same effect cited upon the brief of the counsel for the appellant. We do not think the principle of those cases is in conflict with anything decided in the one under consideration.
>
> In those cases a party sought to rescind a contract on the ground of fraud and recover the property sold without restoring or offering to restore, what he had received upon the sale; in the present case, the respondent by proceeding to enforce his lien, affirms the original contract. All he asks is the consideration agreed to be paid for the land. He is willing the appellants should keep the land if they will only pay the purchase money. Having got a conveyance to the estate, and never having paid the full consideration money, the court will enforce the implied lien for the amount unpaid."

In our own State, *Straus* v. *Norris*, 75 Atl. 980, 77 N. J. E. 33, closely resembles the present case in principle:

> STEVENS, *V.-C.* "The bill alleges that complainant entered into a contract with defendant Norris on July 22, 1908, whereby Norris sold and agreed to convey to Straus certain farm lands 'containing 82 acres, more or less, bounded on the north by the Chapel Hill road and lands of Corcoran, and east by lands of Parmly, and on the south by Navesink road, and on the west by the New Jersey Southern R. R.' for the price of

> $37,500. The agreement was carried into effect by a conveyance and the payment of all the purchase money. The bill alleges that it was orally represented by Norris that the premises contained an area of 82 acres, and were part of a larger tract containing 115 acres, and that, although the purchase price was fixed at a gross sum, nevertheless, in agreeing upon it, Straus relied upon said representation and said price was fixed at the rate of approximately $450 per acre. The bill further alleges that Straus entered upon the land, and had spent several thousand dollars in the improvement of it, before he discovered that the representation was false in fact, and that the premises contained only 69.71 acres. He sues to recover back so much of the consideration paid as would represent the difference in value between a tract of 82 acres and one of 69.71 acres."

There was no rescission in this case or offer to return all the acreage and demand for all the money back, yet the Court gave relief.

VI.

The doctrine of Caveat Emptor does not apply in this case.

The rule of *caveat emptor* on the sale of real property is stated as follows:

> 39 *Cyc.*, page 1278, d. "The doctrine of *caveat emptor* applies to contracts for the sale of real property or some interest therein, as well as to contracts for the sale of personal property. But the rule of *caveat emptor* only requires the exercise of such care and attention as is exercised by ordinarily prudent men in like business affairs, and only applies to defects which are open and patent to the senses. And the *doctrine does not apply in cases of positive fraud or misrepresentation by the vendor as to a ma-*

terial fact, where the purchaser, acting with reasonable prudence, had a right to rely and did rely upon the representation."

In *Turner* v. *Houpt, et ux.*, 53 N. J. E. 526, the Court held:

"1. False representations, knowingly made by a vendor to a vendee previous to the sale, as to the character, condition and value of the property, are presumed to have influenced the mind of the purchaser, even though he had full opportunity to observe and know the actual truth, and the burden is on the vendor to prove clearly that such false representation did not influence the vendee in making the sale."

VII.

Conclusions.

The defendants in this cause moved to strike out the bill of complaint because of:

a. Want of equity.

b. No cause of action.

c. Remedy, if any, in the courts of law.

The Vice-Chancellor granted the motion, but it is respectfully submitted that the Vice-Chancellor erred in his decision, and that the defendants have rested their case on the said motion to strike out, and it appearing that all the material facts in the bill have been admitted, the decision of the Vice-Chancellor should be overruled, and complainant asks that a decree be entered establishing said vendor's lien for the amount called for in said bill.

Respectfully submitted,

D. F. BARKMAN,
Solicitor and of Counsel with
the Complainant.

120

New Jersey

Court of Errors and Appeals

Between

FRANCES D. MAIORAN,
Complainant-Appellant,

and

FRANK CALABRESE, *et als.*,
Defendants-Respondents.

} On Bill to Enforce Vendor's Lien.

BRIEF OF THE RESPONDENTS.

The complainant desires to rescind that part of the contract relating to the land described as Parcel C, but desires to keep the other lands called Parcels A and B, and she never offered to return the sum of $3,000 which these defendants paid to him on account of the exchange of properties. The learned Vice Chancellor held that if the complainant would rescind, he must do so in full and put the defendants in *statu quo*. The complainant might have maintained an action for deceit against the person guilty of fraud; or he might have waived the fraud and proceeded for a breach of the original contract; or, having legally rescinded the contract, he may, in an action of assumpsit, recover back whatever he had paid upon it.

It is established law in our state that when the suit is on the ground of rescission of the

contract, the complainant must show that the contract on which the money was paid, has, in legal effect, ceased to exist, and that a party seeking to rescind a contract, must put the opposite party in *statu quo*, so far as he is able to do it, and as soon as practicable after discovery of the fraud. As long as a party retains anything received, under the contract, and which he might have returned, there can be no rescission, and the rescission must be before suit brought. To retain the whole, or part only of what was received upon the contract, is incompatible with its rescission, and hence the necessity of restoring what had been received upon it.

Byard v. Holmes, 33 N. J. Law (4 Vroom) 119;
Kvedar v. Shapiro (Court of Errors), 98 N. J. L. 225. Opinion by Mr. Justice Katzenbach.

The respondents contend that if a complainant brings a suit in equity, that suit is not founded upon a rescission, but is maintained for a rescission, and the complainant must offer in his complaint to return what he has received. If he did retain what he has received, his remedy is to bring an action at law to recover the damages sustained. Therefore, adopting the facts stated in the complaint, the remedy, if any, is in the courts of law. Nor can it be said in this case that the legal relief claimed in this suit is purely incidental and tributary to the equitable relief.

If rescission is not decreed, there can be no judgment for money for that legal relief necessarily follows the equitable relief.

The Vendor's Lien was Waived.

The bill sets forth (p. 3, l. 35) that the defendants did convey to complainant lands described as Parcels A, B and C, and it is the rule that where the complainant takes distinct and independent security or pledge of things or personal responsibility of third persons, and the like, the lien is considered waived.

The bill of complaint in this cause was filed February 11th, 1926, and it is stated in paragraph 2 (State of Case, p. 5, l. 20) that the complainant discovered that the lots in the deed described as Parcel C were not the lots which he had purchased when he attempted to sell them, which was on or about August 20th, 1925. In *Reid* v. *Benzine-Atet Soap Co., et als.* (Court of Errors and Appeals), 81 N. J. Equity 182, Mr. Justice Parker said:

> "It is well settled in this court that where a party has an election to rescind, he must elect promptly, and, having elected, must abide by his decision; and that failure to rescind within a reasonable time is plenary evidence of his election not to do so."

Dennis v. *Jones,* 44 N. J. Eq. 513; 14 Atl. 913; 6 Am. St. Rep. 899; *Clampitt* v. *Doyle,* 73 N. J. Eq. 675, 70 Atl. 129; *Faulkner* v. *Wassmer,* 77 N. J. Eq. 537; 77 Atl. 341; 30 L. R. A. (N. S.) 872, where Mr. Justice Garrison, in the Court of Errors, says:

> "We agree with the learned Vice Chancellor that Mrs. Faulkner purchased the lot in question upon an untrue representation of such a nature that, upon the discovery

of its untruth, she was entitled to elect to rescind the sale. We do not, however, agree that such election was still open to her four months later, when the present bill of complaint was filed, declaring for the first time her election to rescind. At this time, viz., November 28, 1909, her right to elect, which arose on or about July 10, 1908, no longer existed, not upon the doctrine of laches, discussed in the conclusions filed in the court below, but upon the ground that the lapse of such a length of time under the circumstances afforded plenary proof of an election by her not to rescind, to which conclusive effect should have been given."

Dennis v. *Jones,* 44 N. J. Eq. 513, 6 Am. Rep. 899, was decided not upon the *quasi* estoppel that is involved in the doctrine of laches, but upon a totally different ground, viz., that of conduct evidence.

Authorities cited by Chancellor McGill had settled the law "that the defrauded party to a contract has but one election to rescind, that he must exercise that election with reasonable promptitude after the discovery of the fraud, and that when once he elects, he must abide by his decision." Other cases cited in the opinion had held that "delay in the rescission of the contract is evidence of a waiver of the fraud and an election to treat the contract as valid." The approval and adoption of both of these lines of decision by this court resulted in *Dennis* v. *Jones* in our holding "that, after the appellants had knowledge of all the substantial features of the alleged fraud and were fully aware of the deceit which had been

practiced upon them, they so acted as to afford plenary evidence of an election to abide by their contract," and that "their election, thus made, was irrevocable."

To the same effect is the case of *Clampitt* v. *Doyle*, 73 N. J. Eq. 678, 70 Atl. 129. The rule of *Dennis* v. *Jones* is so clearly stated by Chancellor McGill that in actual practice the only question likely to arise is whether or not the delay was such as to warrant its application; *i. e.*, whether the vendee's failure to act extended beyond the period within which one would naturally act who knew that to act effectively he must act promptly. The question in itself is not peculiar to this class of cases. It is present in all cases involving a reasonable time, concerning which it is admitted that no hard and fast rule obtains, and also that the difficulty that exists in cases that lie close to the line disappears with the lapse of time that has been permitted to intervene. Thus the question whether a landowner who is under a duty to make repairs upon notice is in default on the very day he had notice or the day after may present difficulties that entirely disappear if he has suffered weeks and months to elapse. The case before us is of this latter character, in that an election that could in reason have been made within a few days or at most a few weeks after the right to make it arose was without any adequate excuse that was consistent with promptitude of action delayed for months. It is precisely this conduct that "as we decided (in *Dennis* v. *Jones* and *Clampitt* v. *Doyle*) affords plenary proof of an election to abide by the contract which is irrevocable. For this reason, the bill of complaint should have been dismissed by the Court of Chancery."

The authorities are therefore to the effect that over five months' delay in the rescission of the contract is evidence of a waiver of the fraud and an election to treat the contract as valid.

This distinction was well put by Circuit Judge Sanborn in the case of *Wilson* v. *United States Cattle Ranch Co.*, 73 Fed. 994, 20 C. C. A. 241, in these words:

> "When a vendee ascertains that he has been induced to make a contract of purchase by the fraudulent misrepresentations of his vendor, he has a choice of remedies. He may rescind the contract, restore what he has received, and recover back what he has paid, or he may affirm the contract, and recover the damages he has sustained by the fraud. He cannot, however, do both. It is as difficult a feat to maintain a cause of action for the consideration paid for the purchase on the ground of rescission and one for damages for the fraud which induced it, and for a breach of the contract of purchase itself, in the same action, as it is to ride at the same time two horses that are traveling in opposite directions. Upon a rescission of a contract of purchase, the measure of damages is the consideration paid and the moneys naturally expended on account of the purchase before the fraud was discovered. Upon an action for damages for the deceit and fraud which induced the purchase, the measure of damages is what the vendee has lost. It is the differ-

> ence between that which he had before, and that which he had after, the contract of purchase was made."

These are all cases of rescission by act of the defrauded party, but the rule is equally applicable where rescission is tendered or offered by one party to the other, and an election thus given to accept or refuse it. Such was the case here. The learned Vice Chancellor followed the precedents, and he was correct in his ruling dismissing the bill.

Thiel v. *Perkins*, 92 N. J. Equity, page 79, was a suit by Thiel against Perkins to effect the rescission of a conveyance of a corner lot and brick building thereon, on the ground that the parties were under a mutual mistake in supposing that the building rested wholly on the lot, whereas it encroached upon adjacent property belonging to third parties. Alternative relief of reformation was prayed for and Vice Chancellor Stevenson said:

> "I find that the complainants are not entitled to reformation of the contract of October 2nd, 1913. If they are entitled to a rescission of that contract upon discovery of the encroachment in November or December, 1913, and remained entitled to such rescission until they commenced this suit in November, 1914, I think it is clear that by suing solely for reformation they abandon their claim to rescission, and were not equitably entitled to such rescission when they amended their bill and changed their whole ground of their suit in November, 1915, because, on account of the ruinous

condition of the bill, they were unable to convey back in the condition it was in when they commenced this suit solely for reformation."

In *Schweitzer* v. *National House and Farms Ass'n,* 93 N. J. Equity, page 644; 117 Atl. 701, this Court, in affirming Vice Chancellor Griffin, struck out a bill founded upon a contract for the sale of a plot of land. In addition to the sale of the land, the contract provided for the completion of a bungalow then being erected, similar to another which the purchaser had inspected. The prayer of the bill was (1) that the defendant specifically perform the contract; (2) that the contract be rescinded; (3) that the contract be reformed; (4) that the true value of the lot be ascertained and the sum of money representing the difference between the real value thus ascertained and the contract price be refunded to the complainant. The opinion is by Mr. Justice Black. The conclusion being that for a breach of contract and nothing more, the law courts have exclusive jurisdiction.

THE VALUE OF REAL PROPERTY IS A MATTER OF OPINION, AND CANNOT BE A SUBJECT OF FRAUDULENT MISREPRESENTATIONS IN THE ABSENCE OF RELATIONS OF TRUST AND CONFIDENCE.

This Court held, in *Industrial Savings and Loan Co.* v. *Grace Frances Plummer,* 84 N. J. Equity, page 184; 92 Atl. 583, opinion by Mr. Justice Minturn:

> "While that case was heard on the pleadings and the proofs, nevertheless, the opinion is instructive. For months the defend-

ants had been negotiating with the agents of the Columbia Company. No relation of confidence existed between them, so that, during the interval between their negotiations and the execution and delivery of the deed, the defendants were free to verify any representations or statements as to value which the agent had made. They examined the property and its entire environment, and no effort, artifice or subterfuge seems to have been employed to pervert their judgment or beground their sense of observation and discernment. It will be observed that in the instant case, the complainant charges fraud with intent to deceive her and induce her to part with her said property. *DID SHOW UNTO HER, OR HER AGENT,* the valuable property which they did not own, of which fact they were fully aware (Par. 6 of Complaint; State of the Case, p. 5, l. 35). The courts of equity, like the courts of law, do not aid parties who will not use their sense and discretion and the doctrine of *caveat emptor* is equally applicable at law and equity. The application of these fundamental principles is illustrated by the following cases in our jurisdiction:

Miller v. Gregory, 16 N. J. Eq. 275;
Wise v. Fuller, 29 N. J. Eq. 258;
Conlon v. Roemer, 52 N. J. Law 53;
Hallinger v. Zimmerman, 59 N. J. Eq. 644."

The case of *Turner* v. *Haupt, et ux.*, 53 N. J. Equity, 526, quoted on the appellant's brief is to be distinguished because that was a case where

the complainant, at a time when his mental faculties were weakened by disease, was induced by false and fraudulent representations made by defendant, to convey to defendant a piece of land. Shortly afterwards, and after complainant had become mentally unfit to attend to business, his wife discovered what she supposed to be evidence of false and fraudulent misrepresentations made by defendant to her husband, and commenced suit in Chancery in his name to recover the land so conveyed, on the ground of fraud, specifying the matter which she discovered. A would-be purchaser from the fraudulent grantee of the land so conveyed, having notice of the suit, inquired into these specifications of fraud contained in the bill, and satisfied himself that they were untrue, and, among others, inquired of the wife, and learned from her only what was contained in the bill, and also of the incapacity of her husband, and purchased the land. Subsequently, the wife discovered among her husband's papers, evidence of other fraudulent representations and caused the bill to be amended accordingly and finally succeeded in setting aside the conveyance upon proof of specifications of fraud contained in the amendment. It was held by Vice Chancellor Pitney, following a very exhaustive research, that the complainant was not estopped by the answers made by the wife to the inquiries made by the expectant purchaser. Of course, under such circumstances, the burden was on the vendor to prove clearly that such false representations did not influence the vendee in making the sale.

We respectfully submit that the implied lien of a vendor is unique and *sui generis*. Indeed, the distinction taken both as to the creation of the

lien and those circumstances which are held to be a waiver of it, are so purely arbitrary that the mind is often puzzled to find the reason of them. The origin and rationale of the lien are so variously declared, but it is in all essentials the creature of equity and is as long or short as the Chancellor's foot—it is in force only so far as it is recognized by courts of equity. In general, it is viewed with much disfavor as having arisen in times whose peculiar conditions and institutions were alien to our own and as fostering secret interest in real property, intending to defeat the registry system and nullify titles open to the world on the public records. Therefore, in order that the lien may arise, it is fundamental that there should be and ascertained, fixed consideration, in money or its equivalent, whereby there arises a certain absolute debt. The consideration cannot be extended to cover collateral obligations, or where it is of such a nature as not to be susceptible of accurate ascertainment as to the amount of the charge to be impressed upon the land. The impracticability of their performance operates the withholding of equitable relief. So, likewise, where the agreement is complicated and the vendee promises to do other things besides paying the purchase price, and the sum total of all his promises represents the consideration of the conveyance, there is a blending or confusion so that it is difficult to separate the purchase money and the lien will not exist. See 39 Enc. of Law, 2nd Ed., page 745; citing *Vam Doren* v. *Todd*, 3 N. J. Eq. 397.

In conclusion the bill of complaint does not set forth the sum at which each of the respective parties to the exchange were valuing their sepa-

rate properties, and we submit that a party should not be permitted to come in a court of conscience and litigate without exposing his hands to the scrutiny of the Chancellor.

We respectfully submit that the decision below is correct and ask for an affirmance of the decree dismissing the bill.

EGIDIO W. MASCIA,
Solicitor.

ANTHONY R. FINELLI,
Of Counsel with Defendants-Respondents.

The Otsego Press, Cooperstown, N. Y.