INDEX.

Bill of Complaint.

IN CHANCERY OF NEW JERSEY

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

Complainant, Jerome Richeimer, of the City of East Orange, County of Essex and State of New Jersey, respectfully shows that:

1. On September 6, 1929, complainant entered into an agreement in writing with Leonora Fischbein and Louis J. Fischbein, her husband, wherein and whereby said Leonora Fischbein and Louis J. Fischbein, her husband, agreed to convey to complainant by a warranty deed the lands hereinafter described on or before October 7, 1929, in consideration of the payment by complainant to said Leonora Fischbein and Louis J. Fischbein, her husband, of the sum of $34,500 in the manner set forth in said contract, a true copy of which is hereunto annexed and made a part hereof and marked "Schedule A".

2. Said lands are described as follows:

All that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

BEGINNING in the westerly line of High Street at a point therein distant northerly twelve feet and ninety hundredths of a foot from the northwesterly corner of the same and Stirling Street; thence running along High Street North 30 degrees 33 minutes East seventeen feet and ten hundredths of a foot to a point directly opposite

the center line of the party wall; thence along the said center line of a party wall and extension thereof North 59 degrees 27 minutes West seventy-nine feet and sixty-three hundredths of a foot; thence south 31 degrees 10 minutes West seventeen feet and ten hundredths of a foot; thence South 59 degrees 27 minutes East and along the center line of a party wall, and extension thereof seventy-nine feet and eighty-two hundredths of a foot to High Street and place of BEGINNING.

3. Pursuant to the terms of said contract, complainant paid the sum of $500 to said Leonora Fischbein and Louis J. Fischbein, her husband, upon the execution and delivery of said contract.

4. Said contract provides:

> "It is further expressly understood that time is to be the essence of this agreement but in the event party of the second part desires a further extension to consummate this agreement, he may have an extension of thirty days from October 7, 1929 provided that on or before October 7, 1929 he pays to party of the first part an additional deposit of Fifteen Hundred Dollars in cash or certified check at which time this agreement is automatically to be extended to November 7, 1929, at which time time is to be of the essence of this agreement."

5. Pursuant to said terms of said contract, complainant paid the sum of $1,500 to said Leonora Fischbein and Louis J. Fischbein, her husband, on or before October 7, 1929, and thereby said agreement was automatically extended to November 7, 1929, according to the terms of said contract.

6. Complainant caused the title to said lands to be examined and a survey of said lands to be

made and paid therefor the sum of $115.00, which was the reasonable expense of examining said title and making said survey.

7. Said contract further provides:

> "It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor and that there are no encroachments thereon."

8. On or about November 2, 1929, complainant learned that the building upon said lands is not all within the boundary lines of the property as described in said contract, contrary to the terms of said agreement, in that the steps in front of said building extend over the boundary line of said lands and encroach upon High Street, a public street of the City of Newark, 5.60 feet; that the bay window in the front of said building extends over the boundary line of said lands and encroaches upon said High Street one foot; that the railing in front of said building extends over the boundary line of said lands and encroaches upon said High Street 4.50 feet; the trim and ornamental brick work in front of said building projects from 1 to 3 inches beyond aforesaid bay window, being beyond the boundary line of said lands and encroaching upon said High Street; the window sills and leaders in front of said building project from 1 to 4 inches beyond the aforesaid bay window, being beyond the boundary line of said lands and encroaching upon said High Street; the front wall of said building extends over the boundary line of said lands and encroaches upon said High Street one foot; and that the northerly side wall of said building extends over the boundary line of said lands and encroaches upon said High Street 1 foot.

9. On or about November 2, 1929, complainant learned that contrary to the terms of said contract there were encroachments upon said lands, the brick wall of the building on the lands adjoining said lands on the south extending over the boundary line of said lands and encroaching upon said lands 7 inches north of the center line of the southerly party wall; the wall and the extension of the building on the lands adjoining said lands on the south extending over the boundary line of said lands and encroaching upon said lands 8 inches north of the center line of said southerly party wall; and the fences maintained by the owner of the lands adjoining said lands on the north and on the south each encroaches upon said lands.

10. Said encroachments and said extensions of the building beyond the boundary lines of said lands as set forth in paragraphs 8 and 9 are of such nature that they could not be remedied nor removed by said Leonora Fischbein and Louis J. Fischbein, her husband, by November 7, 1929, nor for a length of time thereafter, and most of said encroachments and said extensions of said building beyond the boundary line of said lands it is altogether impossible to remedy or remove.

11. On November 2, 1929, complainant notified said Leonora Fischbein and Louis J. Fischbein, her husband, that because of said encroachments and said extensions of said building beyond the boundary lines of said lands as set forth in paragraphs 8 and 9, contrary to the terms of the contract, complainant would not accept the title, and demanded of said Leonora Fischbein and Louis J. Fischbein, her husband, that they return to him said sum of $2,000 paid as aforesaid on account

of said contract, together with the sum expended by him for said examination of title and said survey.

12. Said Leonora Fischbein and Louis J. Fischbein, her husband, have refused to return said sums or any part thereof to complainant, although repeatedly requested to do so.

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

1. That Leonora Fischbein and Louis J. Fischbein, her husband, who are the defendants to this suit may answer this bill and each statement therein made.

2. That said Leonora Fischbein and Louis J. Fischbein, her husband, or one of them, may be compelled by the decree of this court to pay unto complainant by a short day to be appointed by this court, said sum of $2,000 paid by complainant unto said defendants as aforesaid, together with interest thereon and the costs of this suit or whatever sum this court may find due from said defendants to complainant, which sum or sums may be declared by this court to be a lien on said lands; and in the event that said defendants Leonora Fischbein and Louis J. Fischbein fail to pay to complainant said sum or sums within the time limited by this court, that said lands may be sold under the direction of this court for the satisfaction of such lien so impressed on said lands and premises.

3. That said Leonora Fischbein and Louis J. Fischbein, her husband, or one of them, may be compelled by the decree of this court to pay unto complainant by a short day to be appointed by this court, said sum of $115.00 paid by complain-

ant for said survey and examination of title, together with interest thereon.

4. That said contract be delivered up by said defendants Leonora Fischbein and Louis J. Fischbein, her husband, to this court for cancellation.

5. That a writ of subpoena may issue, commanding said defendants to answer this bill and to abide by such decree as this court may make in the premises.

ARTHUR T. VANDERBILT,
Solicitor for and of Counsel
with Complainant.

"Schedule A."

THIS AGREEMENT, made the sixth day of September, in the year of our Lord One Thousand Nine Hundred and Twenty-Nine, Between LEONORA FISCHBEIN and LOUIS J. FISCHBEIN, her husband, of the City of Newark, in the County of Essex and State of New Jersey, party of the first part; And JEROME RICHEIMER, of the City of Newark in the County of Essex and State of New Jersey, party of the second part;

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Thirty-four Thousand Five Hundred ($34,500.00) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the

said party of the second part, his heirs and assigns, by Deed of Warranty free of all encumbrances except as hereinafter stated on or before the 7th day of October next ensuing the date hereof, All that certain lot, tract, or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey.

BEGINNING in the westerly line of High Street at a point therein distant northerly twelve feet and ninety hundredths of a foot from the northwesterly corner of the same and Stirling Street; thence running along High Street North 30 degrees 33 minutes East seventeen feet and ten hundredths of a foot to a point directly opposite the center line of the party wall; thence along the said center line of a party wall and extension thereof North 59 degrees 27 minutes West seventy-nine feet and sixty-three hundredths of a foot; thence South 31 degrees 10 minutes West seventeen feet and ten hundredths of a foot; thence South 59 degrees 27 minutes East and along the center line of a party wall, and extension thereof seventy-nine feet and eighty two hundredths of a foot to High Street and place of BEGINNING.

Being known as 393 High Street, Newark, N. J. Being the same premises conveyed to Louis J. Fischbein by Max Mendl and wife by deed dated Mar. 1, 1920. Together with a three story brick building now on said curtilage.

And the said Jerome Reicheimer, for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he the said party of the second part, will pay and satisfy, or cause to be

paid and satisfied, unto the said party of the first part, the said sum of Thirty-four Thousand Five Hundred ($34,500.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

$500. upon execution and delivery of this agreement, receipt of which is hereby acknowledged.

$10,000. on delivery of deed, cash

$16,000. by assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof, which mortgage is held by the Peace Building & Loan Association.

The balance, together with whatever is paid in the Building and Loan Association which is credited as back shares by executing and delivering to party of the first part his bond in double said amount together with a purchase money mortgage which is to be a second lien on said premises, conditioned for the principal to be paid in two years from the date hereof with interest at the rate of six percent, per annum payable semi-annually, Said bond and mortgage to contain in addition to the usual tax, interest and insurance default clauses the following clauses:—

That in case default is made in the payment of principal and interest on the mortgage held by the Peace Building and Loan Association which is a first lien on the said premises for a period of one month, then and in that event the principal herein secured shall become due and payable immediately thereafter notwithstanding anything therein to the contrary, but that party of the first part therein shall have the privilege of paying off the principal sum therein secured at any time prior to the expiration of said mortgage, provided interest is paid to the date of payment.

This conveyance is made subject to existing monthly tenancy Dr. Lippe.

"Schedule A" Annexed to Complaint.

It is further expressly understood that time is to be the essence of this agreement but in the event party of the second part desires a further extension to consummate this agreement, he may have an extension of thirty days from October 7, 1929, provided that on or before October 7, 1929, he pays to party of the first part an additional deposit of Fifteen Hundred Dollars in cash or certified check at which time this agreement is automatically to be extended to November 7, 1929, at which time time is to be the essence of this agreement.

It is expressly understood between the parties hereto that the price of Thirty four thousand Five hundred dollars is net and that there is to be no commission whatsoever paid.

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor and that there are no encroachments thereon.

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

And it is further agreed by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the 7th day of October next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

And it is further agreed by the parties hereto, that the said deed shall be delivered and received at office of Philip J. Schotland, 9 Clinton St., Newark, N. J. between the hours of ten o'clock in

the forenoon and four o'clock in the afternoon on the said 7th day of October next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes and interest on mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any proceedings or any act for the sale of land for non-payment of the municipal taxes or assessments, or by adverse possession.

The premises above described are sold subject to restrictions appearing of record, and zoning ordinances, if any.

If at any time before the delivery of the deed the premises or any part thereof shall be or shall have been affected by any assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of

this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed.

And it is hereby agreed by and between the parties hereto that in case any street improvements are made, or have been made, upon which the property mentioned herein is located, up to the time of the delivery of deed, but not assessed, such assessment shall be borne by the party of the first part, their heirs, executors, administrators and assigns.

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

LOUIS J. FISCHBEIN (L. S.)
LEONORA FISCHBEIN (L. S.)
JEROME RICHEIMER (L. S.)

Signed, Sealed and Delivered
in the presence of:

HELEN JEDELL

"Schedule A" Annexed to Complaint.

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

BE IT REMEMBERED, That on this 6th day of September, in the year of our Lord One Thousand Nine Hundred and twenty-nine, before me the subscriber, a Notary Public of the State of New Jersey, personally appeared Leonora Fischbein and Louis J. Fischbein, her husband, who I am satisfied are the grantors mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

And the said Leonora Fischbein, wife as aforementioned, being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband.

HELEN JEDELL,
A Notary Public of New Jersey.

Answer and Counterclaim.

IN CHANCERY OF NEW JERSEY.

Between JEROME RICHEIMER, Complainant, *and* LEONORA FISCHBEIN and LOUIS J. FISCHBEIN, her husband, Defendants.	On Bill &c. Answer and Counterclaim.

The answer of the defendants, Leonora Fischbein and Louis J. Fischbein, her husband, and the counterclaim of Leonora Fischbein and Louis J. Fischbein, her husband against the complainant Jerome Richeimer.

These defendants, Leonora Fischbein and Louis J. Fischbein, her husband, answering the bill of complaint, say that:

1. Paragraphs 1 to 5, inclusive, are admitted.

2. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraph 6 and leave complainant to his proof.

3. Paragraph 7 is admitted.

4. Paragraphs 8 to 10, inclusive, are denied.

5. Paragraphs 11 and 12 are admitted.

By way of counterclaim against complainant, these defendants, Leonora Fischbein and Louis J. Fischbein, her husband, say that:

1. On September 6, 1929, defendant Leonora Fischbein was seized in fee simple of all that certain lot, tract or parcel of lands and premises, situate, lying and being in the City of Newark, County of Essex and State of New Jersey, described as follows:—

BEGINNING in the westerly line of High St. at a point therein distant northerly 12.90 feet from the northwesterly corner of the same and Stirling St; thence running along High St. North 30 degrees 33 minutes East 17.10 feet to a point directly opposite the center line of the party wall; thence along the said center line of a party wall and extension thereof North 59 degrees 27 minutes West 79.63 feet; thence South 31 degrees 10 minutes West 17.10 feet; thence South 59 degrees 27 minutes East and along the center line of a party wall, and extension thereof 79.82 feet to High St. and place of BEGINNING.

BEING known as 493 High Street, Newark, N. J. Being the same premises conveyed to Louis J. Fischbein by Max Mendl and wife by deed March 1, 1920. Together with a three story brick building now on said curtilage.

2. On the date last mentioned defendants entered into a certain agreement in writing with complainant, wherein and whereby defendants agreed to convey the said lands and premises, by deed of warranty, on or before October 7, 1929, to the said complainant in consideration of the payment by the said complainant of the sum of $34,500.00, and the said complainant agreed to pay to these defendants said purchase price of $34,500.00 by the payment of $500.00 on the execution of the said agreement, and by the payment

of $10,000.00 in cash upon the delivery by these defendants of said deed to the said complainant, and by complainant assuming a mortgage of $16,000.00 held by the Peace Building and Loan Association, which mortgage was a lien on said premises, and by the execution by the said complainant to these defendants of a purchase money mortgage on said lands and premises for the balance of the said purchase price together with such sums as may be paid into the said Peace Building and Loan Association and credited as back shares to said mortgage, and by the execution of a bond in double the sum of said mortgage, payable in two years from Sept. 6, 1929, with interest at the rate of 6% per annum, payable semi-annually; the said deed to be delivered at the office of Philip J. Schotland, 9 Clinton St., Newark, N. J., on October 7, 1929, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon.

3. The said complainant paid to these defendants the aforesaid sum of $500.00 at the time of the execution and delivery of the agreement in writing.

4. Said agreement also provides:

> "It is further expressly understood that time is to be the essence of this agreement but in the event party of the second part desires a further extension to consummate this agreement, he may have an extension of thirty days from Oct. 7, 1929, provided that on or before Oct. 7, 1929, he pays to party of the first part an additional deposit of Fifteen Hundred Dollars in cash or certified check at which time this agreement is automatically to be extended to Nov. 7, 1929, at which time, time is to be the essence of this agreement."

5. In accordance with said provision complainant paid the sum of $1,500.00 to these defendants on or before October 7, 1929, thereby extending the time for the delivery of the deed until November 7, 1929.

6. On November 2, 1929, complainant notified these defendants that he would not accept the title to the aforesaid premises in accordance with the terms of the said contract, and demanded of these defendants the return of the aforesaid $2,000.00 paid as a deposit and a certain sum which complainant claimed to have expended for search and survey fees.

7. These defendants were ready, willing and able on November 7, 1929, to perform their part of the said agreement.

8. These defendants have always been ready, willing and able and now tender themselves ready, willing and able to perform their part of the said agreement, and to convey the said land and premises to complainant by a warranty deed, executed by these defendants upon being paid the remainder of said purchase price in the manner provided by the said agreement.

These defendants, therefore, pray:

1. That Jerome Richeimer, who is the complainant in this cause, may answer this counter-claim and each statement herein made.

2. That the said complainant may be compelled by the decree of this court specifically to perform the said agreement with these defendants, and to pay to these defendants, the remainder of the said purchase money, as in and by said agreement provided, with interest from the time said purchase

money should have been paid, on the delivery by these defendants to said complainant of a deed executed by these defendants, as in said agreement provided.

3. That in case the said complainant should, within the time limited by this court for such performance of said contract, fail and neglect, upon the tender of said deed, to pay the said remainder of said purchase money as aforesaid, that then and in that event the said sum, together with interest and costs, may be and become a lien upon the said lands and premises in favor of these defendants, and that the said lands and premises may be sold under the direction of this Court for the satisfaction of such lien so impressed on said lands and premises; and in case a deficiency should arise upon said sale, that the said complainant may be ordered by this Court to pay said deficiency, together with interest and costs to these defendants.

PHILIP J. SCHOTLAND
Solicitor for and of Counsel with
Defendants.

(At the hearing of the cause, and before moving to dismiss complainant's bill, defendants-respondents withdrew their counterclaim.)

Replication and Answer to Counterclaim.

IN CHANCERY OF NEW JERSEY.

76-203

Between

JEROME RICHEIMER,
Complainant,

and

LEONORA FISCHBEIN and LOUIS J. FISCHBEIN, her husband,
Defendants.

On Bill, &c.

Replication and Answer to Counterclaim.

The replication of the complainant, Jerome Richeimer, to the answer of defendants, Leonora Fischbein and Louis J. Fischbein, her husband; and the answer of complainant, Jerome Richeimer, to the counterclaim of defendants, Leonora Fischbein and Louis J. Fischbein, her husband.

Complainant, Jerome Richeimer, replying to the answer of defendants, Leonora Fischbein and Louis J. Fischbein, her husband, says that:

1. He joins issue upon the answer of defendants.

By way of answer to the counterclaim of said defendants, complainant says that:

1. He has no knowledge or information sufficient to enable him to form a belief as to the allegations of paragraph 1 of the counterclaim.

2. He admits the making of the agreement mentioned in paragraph 2 of the counterclaim, but as to the terms and conditions thereof begs leave to refer to said agreement.

Replication and Answer to Counterclaim.

3. He admits the allegations of paragraphs 3, 4, 5 and 6 of the counterclaim.

4. He denies the allegations of paragraphs 7 and 8 of the counterclaim.

5. Said contract mentioned in paragraph 2 of the counterclaim provides:

> "It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor and that there are no encroachments thereon."

6. The building upon the lands described in said contract is not all within the boundary lines of the property as described in said contract, contrary to the terms of said agreement, in that the steps in front of said building extend over the boundary line of said lands and encroach upon High Street, a public street of the City of Newark, 5.60 feet; that the bay window in the front of said building extends over the boundary line of said lands and encroaches upon said High Street one foot; that the railing in front of said building extends over the boundary line of said lands and encroaches upon said High Street 4.50 feet; the trim and ornamental brick work in front of said building projects from 1 to 3 inches beyond aforesaid bay window, being beyond the boundary line of said lands and encroaching upon said High Street; the window sills and leaders in front of said building project from 1 to 4 inches beyond the aforesaid bay window, being beyond the boundary line of said lands and encroaching upon said High Street; the front wall of said building extends over the boundary line of said lands and encroaches upon said High Street one

foot; and that the northerly side wall of said building extends over the boundary line of said lands and encroaches upon said High Street 1 foot.

7. There are encraochments upon the lands described in said contract, the brick wall of the building on the lands adjoining said lands on the south extending over the boundary line of said lands and encroaching upon said lands 7 inches north of the center line of the southerly party wall; the wall and the extension of the building on the lands adjoining said lands on the south extending over the boundary line of said lands and encroaching upon said lands 8 inches north of the center line of said southerly party wall; and the fences maintained by the owner of the lands adjoining said lands on the north and on the south each encroaches upon said lands.

8. Said encroachments and said extensions of the building beyond the boundary lines of said lands as set forth in paragraphs 6 and 7 are of such nature that they cannot be remedied nor removed for a long time, if at all, and none of them have as yet been remedied or removed.

By reason whereof, defendants are not entitled to maintain their counterclaim.

ARTHUR T. VANDERBILT,
Solicitor for Complainant.

Final Decree.

IN CHANCERY OF NEW JERSEY.

Between

JEROME RICHEIMER,
Complainant,

and

LEONORA FISCHBEIN and LOUIS J. FISCHBEIN, her husband,
Defendants.

On Bill, &c.
Final Decree.

This cause coming on to be heard before the Honorable Alonzo Church, the Vice Chancellor to whom it was referred, at Chancery Chambers, in the City of Newark, County of Essex and State of New Jersey, in the presence of Arthur T. Vanderbilt, Esq., solicitor for and of counsel with the complainant, and Philip J. Schotland, Solicitor for and of counsel with the defendants, and the pleadings having been read, and the argument of the respective counsel having been heard and considered, and the Court having duly considered said pleadings, and arguments, and it appearing to the Court that the complainant is not entitled to the relief sought and prayed for by him in his bill of complaint;

It is on this 6th day of March, one thousand nine hundred thirty, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED that the complainant's bill be and the same is hereby dismissed with costs and a counsel fee of $250.00 dollars to be paid to the solicitor for the defendants and to be taxed with and as part of the taxed costs;

And it is further ORDERED AND DECREED that the complainant pay to the defendants the costs of

this suit to be taxed and that execution issue therefor according to the practice of this Court.

E. R. WALKER,
Chancellor.

Respectfully advised,

ALONZO CHURCH,
Vice Chancellor.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between

JEROME RICHEIMER,
Complainant,

and

LEONORA FISCHBEIN and LOUIS J. FISCHBEIN, her husband,
Defendants.

On Bill, &c.
Notice of Appeal.

Complainant, Jerome Richeimer, hereby appeals from the final decree made by the Chancellor on the advice of Vice Chancellor Church in the above entitled cause on March 6, 1930, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

ARTHUR T. VANDERBILT,
Solicitor of Complainant,
Jerome Richeimer.

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

ARTHUR T. VANDERBILT,
Of Counsel with Complainant,
Jerome Richeimer.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JEROME RICHEIMER, Complainant-Appellant, *and* LEONORA FISCHBEIN and LOUIS J. FISCHBEIN, her husband, Defendants-Respondents.	On Appeal from the Court of Chancery. Petition of Appeal.

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Jerome Richeimer, appellant in the above entitled cause, respectfully shows that:

Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the sixth day of March, 1930, in a certain cause in said Court of Chancery wherein said Jerome Richeimer was complainant and Leonora Fischbein and Louis J. Fischbein, her husband, were defendants, in these respects, to wit, that said decree adjudges that upon the pleadings complainant is not entitled to the relief sought and prayed for by him in his bill of complaint; that said decree adjudges that complainant is not entitled to the relief sought and prayed for by him in his bill of complaint; that said decree adjudges that complainant pay to defendants or their solicitor the costs of said suit to be taxed, including a counsel fee of $250.

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in the following respects:

(a) The court below erred in finding that upon the pleadings complainant is not entitled to the relief sought and prayed for by him in his bill of complaint.

(b) The court below erred in finding that complainant is not entitled to the relief sought and prayed for by him in his bill of complaint.

(c) The court below erred in dismissing complainant's bill.

(d) The court below erred in finding that complainant pay to defendants or their solicitor the costs of this suit to be taxed, including a counsel fee of $250.

Your petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden and that the petitioner may have such other relief in the premises as to this court shall seem proper.

ARTHUR T. VANDERBILT,
Solicitor for and of Counsel with
Complainant-Appellant.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JEROME RICHEIMER, Complainant-Appellant, *vs.* LEONORA FISCHBEIN and LOUIS J. FISCHBEIN, her husband, Defendants-Respondents.	On Appeal from the Court of Chancery. Answer to Petition of Appeal.

The answer of Leonora Fischbein and Louis J. Fischbein, her husband, the above named defendants-respondents, to the petition of appeal of Jerome Richeimer, the above named complainant-appellant.

These defendants-respondents not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was on the 6th day of March, 1930, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned, and as therein set forth, but as to the substance and form of said decree, these defendants-respondents beg leave to refer thereto when the same shall be produced.

These defendants-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 taxed in favor of these defendants-respondents.

PHILIP J. SCHOTLAND,
Solicitor for and of Counsel with
Defendants-Respondents.

Opinion.

IN CHANCERY OF NEW JERSEY.

Between
JEROME RICHEIMER,
Complainant,
and
LEONORA FISCHBEIN, *et als.*,
Defendants.

Opinion.

CHURCH, V. C.

Complainant, vendee, entered into a contract with defendants, vendors, for the purchase of certain land, and pursuant to the terms of that contract paid defendants $2,000 of the purchase price. The defendants being unable to perform, complainant brings his bill in this court to impress a lien upon said lands for the $2,000 paid.

Defendants moved at final hearing, without previous notice, to dismiss the bill on the ground that equity had no jurisdiction, basing their contention on *Grunt* v. *Olsan,* 7 A. R. 415, 144 Atl. 870, and *Bailey* v. *B. Holding Company,* 7 A. R. 414, 144 Atl. 870, both of which cases were decided on the same day.

The only question before the Court is whether on the facts above stated there is an equitable lien in favor of a purchaser to secure the return of his deposit where there is a default by the vendor, in this case specifically a defect of title. If there is such an equitable lien, Chancery has jurisdiction; if there is not, the action is at law.

The doctrine that a purchaser has a lien in equity on the premises covered by the agreement

of sale for the return of his purchase price in the event that the vendor defaults was established long before the American Revoluiton in the leading cases of *Burgess* v. *Wheate,* 1 Eldon 177, 211, 1 Black 123, 96 Eng. Rep. 67, 79 (1759), by a distinguished court composed of Lord Keeper Henley (later Lord Northington), Lord Mansfield, Chief Justice of the King's Bench, and Sir Thomas Clarke, Master of the Rolls, wherein the eminent Master of the Rolls said:

> "So where the money was paid prematurely the money would be considered as a lien on the estate in the hands of the vendor."

This doctrine, which prevailed before the establishment of our Court of Chancery, became, on its establishment, a part of the jurisdiction of that court, protected by the constitutional inhibitions against the encroachments of other courts or the legislature. *Flanigan* v. *The Guggenheim Smelting Company,* 63 N. J. L. 647.

Sugden (later Lord St. Leonards) in the first edition of his celebrated work on Vendors and Purchasers, published in 1805 (p. 671), recognized the validity of the proposition and cited *Burgess* v. *Wheate* as his authority.

Three years later, Lord Eldon in *Mackreth* v. *Symmons,* 15 Ves. Jr. 338, 33 Eng. Rep. 778, 784 (1808), referred with approbation to the rule that a vendee has a lien for his deposit money, as follows:

> "In Burgess *v.* Wheate (1 Black, 123) Sir Thomas Clarke lays down the rule both as to a vendor and a vendee thus: 'Where conveyance is made prematurely before money paid the money is considered as a lien on the estate in the hands of the vendee; so where money was paid prematurely the money would be considered as a lien on the estate

> in the hands of the vendor for the personal representative of the purchaser; Tardiff *v.* Scrugham (cited Amb. 725, 6; 1 Bro. C. C. 423; before Lord Camden in Chancery Dec. 8th, 1769) is very material upon this point; as it is represented (1 Bro. C. C. 423, Blackburn *v.* Gregson) as a case in which the lien is held to attach upon the two moieties of the estate * * *."

In *Oxenham* v. *Esdale,* 3 Younge & J. 262, 148 Eng. Rep. 1177 (1829), Lord Chief Baron Alexander said:

> "If there exists anything which may be called a lien upon the instruments, it is vested in the purchaser as security for the money which he has paid."

In *Dinn* v. *Grant,* 5 DeG. & Sm. 450, 64 Eng. Rep. 1194 (1852), Sir James Parker, Vice Chancellor, said:

> "He would have been entitled to a lien if the contract had failed in consequence of the vendor's default."

In *Wythes* v. *Lee,* 3 Drew 395, 61 Eng. Rep. 954 (1855); on appeal 25 L. J. Ch. 389, 2 Jur. N. 8, 130, W. R. 316, Sir R. T. Kindersley, Vice Chancellor, held that both upon authority and reason the vendee has a lien for his deposit. He stated that he viewed the question from three angles, one, natural justice, two, equity and justice; and three, upon authority. He says at page 403, *et seq.*:

> "It does appear to me that it is consistent with natural justice that if a purchaser on the faith of the contract being completed and the estate becoming his, has advanced money in payment or part payment for the purchase, he has advanced it under circumstances which entitled him to say 'If you

> cannot complete not only are you bound to give me back my money but I have a right to a lien on the estate * * *.' It appears to me that on principles of equity and justice the purchaser when the contract goes off has a lien * * *. Then the third point of view is with reference to the authorities, and it appears to me that they are in favor of the lien. Besides, some two or thre dicta which have been referred to the leaning of which is to some extent to support the doctrine of lien, we have in *Burgess* v. *Wheate* a clear enunciation of the proposition that such an equity does exist."

In *Rose* v. *Watson*, 10 H. L. Cas. 672, 11 Eng. Rep. 1187, 1192 (1864), the House of Lords, speaking through Lord Chancellor Westbury and Lord Cranworth, definitely reaffirmed the doctrine of *Burgess* v. *Wheate* that a vendee has a lien for his deposit or purchase money paid, in the event of default by the vendor.

In *Westmacott* v. *Robins*, 4 De.G. F. & J. 389, 45 Eng. Rep. 1234 (1862), the Court of Appeals in Chancery held:

> "Whatever difficulty there might have been in making an order in the original suit for repayment of the purchase money which has been paid there is not as it seems to me, any difficulty in making such an order in the supplemental suit accompanied with the usual directions for enforcing the lien which as I apprehend the purchaser has upon the estate for the purchase money which they have paid."

In *Aberamain Ironworks* v. *Wickens* (1868), 4 C. H. 10, 109, 20 L. T. 89, 17 W. R. 221, the Court said:

> "According to the decisions which were referred to—the case of *Wythes* v. *Lee* and the case of *Rose* v. *Watson*, Wickens in the event of the purchase going off would have a lien * * *."

Opinion.

In *Mycock* v. *Beatson* (1879), 13 Ch. Div. 384, the Court held that a partner who was induced to enter a partnership by fraud could rescind and is entitled to a lien on the surplus assets of the partnership. Fry, J. (author of Fry on Specific Performance) said:

> "I hold that plaintiff is entitled to the lien which he claims. I come to that conclusion on the authority of *Rose* v. *Watson* and *Aberamain Ironworks* v. *Wickens.*"

In *Levy* v. *Stoyden* (1898), 1 Ch. 478 (affirmed in 1899) 1 Ch. 5, Sterling, J., said:

> "If the vendor fails to perform a contract on his part the latter (purchaser) may in the absence of a stipulation to the contrary recover the deposit from the vendor. And further than that he is entitled to a lien on the subject matter of the contract. That was settled by the case of *Rose* v. *Watson.*"

In *Cornwall* v. *Henson* (1899), 2 Ch. 710 (reversed on other grounds in 1900), 2 Ch. 298, Cozens Hardy, J., said:

> "It is settled law that where a purchase goes off by reason of some default on the part of the vendor the purchaser has a lien upon the property for any part of his purchase money which has been paid: See *Rose* v. *Watson.*"

In *Whitbread Co.* v. *Watt* (1902), 1 Ch. 835, 71 L. J. Ch. 424; 86 L. T. 395, 50 W. R. 442, 18 T. L. R. 465, Cozens Hardy, J., said:

> "I think the lien for the deposit exists so long as and in every case in which the right to recover the deposit has not been lost by reason of the misconduct of the purchaser. In other words, when the contract goes off, either by reason of the default of the vendor or without any default on the part of the purchaser, the lien becomes operative."

In the Whitbread case, the court upheld the purchaser's lien even though the contract was terminated without any fault of the vendor, purchaser taking advantage of a provision permitting him to rescind upon the happening of a certain contingency.

In *Ridout* v. *Fowler* (1904), 1 Ch. 658, 653, the court said:

> "It is necessary to consider a purchaser's rights in respect of the deposit which he has paid. He has a right to a lien for the repayment of his deposit which, according to *Rose* v. *Watson*—a case I recently followed in *Whitbread & Co.* v. *Watt,* affirmed by the Court of Appeals, attached from the moment of payment conditional on this, that the purchase does not go off through his own fault."

These cases all definitely affirm the doctrine of *Burgess* v. *Wheate.* They prove beyond any shadow of doubt that the English Court of Chancery, so far back as the days preceding the American Revolution and the establishment of our Court of Chancery, had jurisdiction to impress an equitable lien on the premises under contract of sale in favor of the purchaser to secure the return to him of his deposit in the event of the vendor's default.

I know of no American jurisdiction which denies the vendee's right to this equitable lien. Judge Vann in *Elterman* v. *Hyman,* 192 N. Y. 113, 84 N. E. 937, 127 Am. St. Rep. 862, 15 Ann. Cas. 819, said:

> "We find no well considered case in any state that denies a lien to the vendee even if payment is the only ground therefor, except such as withhold a lien from the vendor also."

A note to *Larson* v. *Metcalf,* 207 N. W. 382, in 45 A. L. R. at 358, lists many cases from twenty-

three American jurisdictions affirming the vendee's right to such equitable lien and none denying it, including a decision by the U. S. Supreme Court in *Townsend* v. *Vanderworker* (1895), 160 U. S. 171.

The view of the American courts on this head of equity jurisdiction is summarized in the case of *Elterman* v. *Hyman,* 192 N. Y. 113, 84 N. E. 937, in which Judge Vann, speaking for the Court of Appeals of New York, said:

> "The question remains whether a vendee, not in possession and with no special equity, has a lien for the amount paid on a contract for the purchase of land that can be foreclosed upon the default of the vendor. * * *."
>
> "In some cases in this state, and generally in other states which give a lien to the vendor, a lien has been decreed, although there was no equity except that arising from payment on the land, pursuant to a contract for the land, provided the vendor made default. *Occidental Realty Co.* v. *Palmer, supra; Stevenson* v. *Spratt,* 3 Jones & S. 496, 503; *Clarke* v. *Jacobs,* 56 How. Prac. 519; *Craft* v. *Latourette,* 62 N. J. Eq. 206; 49 Atl. 711; *Bulitt* v. *Eastern Ky. Land Co.,* 99 Ky. 324, 327, 36 S. W. 16; *Shirley* v. *Shirley,* 7 Blackf. (Ind.) 452; *Coleman* v. *Floyd,* 131 Ind. 330, 335, 31 N. E. 75; *Galbraith* v. *Reeves,* 82 Tex. 357, 18 S. W. 696; *Newman* v. *Maclin,* 5 Hayw. (Tenn.) 241; *Sautelle* v. *Carlisle,* 13 Lea (Tenn.) 391, 397; *Wickman* v. *Robinson,* 14 Wis. 493, 496, 80 Am. Dec. 789. The question does not appear to have been before the Supreme Court of the United States, although it has declared that "the vendor is a trustee of the legal title for the vendee to the extent of his payments." *Jennison* v. *Leonard,* 21 Wall. (U. S.) 302, 309, 22 L. Ed. 539.
>
> "We find no well-considered case in any state that denies a lien to the vendee, even if payment is the only ground therefor, except such as withhold a lien from the vendor also. *Ahrend* v. *Odiorne,* 118 Mass. 261, 19 Am. Rep. 449; *Philbrook* v. *Delano,* 29 Me.

410. The doctrine is well established in England, where it is sometimes said to have originated as recently as 1855, but it was clearly announced nearly 20 years before the Revolutionary War by a court of which Lord Mansfield was a member. *Burgess* v. *Wheat,* 1 Blacks 123, 150. It was recognized by Lord St. Leonards in the first edition of his great work on Vendors and Purchasers, published in 1805 (page 671) and three years later by *Lord Eldon in Mackreth* v. *Symmons,* 15 Vesey, Jr. 329, 344. In 1855, however, the question arose directly, and, although the vendee was not in possession and there was no special equity in his favor, he was held to have a lien both upon principle and authority. *Wythes* v. *Lee,* 3 Drew. 396, 403. In 1864 the question was fully discussed in the House of Lords, and it was adjudged without dissent that the vendee has a lien, because every payment by him is *pro tanto* performance of the contract on his part and in equity transfers to him a corresponding portion of the estate. *Rose* v. *Watson,* 10 H. L. Cas. 672. * * *

"Lord Cranworth, who delivered the other opinion, concurred with the Lord Chancellor, and added: 'There can be no doubt, I apprehend, that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is in equity considered as the owner of the estate. When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow as a necessary corollary that, to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien exactly in the same way as if upon the payment of part of the purchase money the vendor had executed a mortgage to him of the estate to that extent.' "

After citing as in support *Whitbred & Co.* v. *Watt,* L. R. 1902 (L. Ch. Div. 835); *Sugden's Vendors & Purchasers* (1st Ed.) 671; *Id.* (13th Ed.), 672; *2 Story's Eq. Jur.* (8th Am. Ed.), sec. 789, 1217, note; *3 Pom. Eq. Jur.* (3rd Ed.), sec.

1263; *1 Perry on Trusts* (5th Ed.), sec. 231; *2 Jones on Liens,* sec. 1105; 29 Am. & Eng. Encyc. Law (2d Ed.) 730; *Fetter on Equity,* sec. 156; *Fry on Specific Performance,* sec. 1479, 1482; *2 Washburn* (6th Ed.), sec. 1039; *2 Warvelle on Vendors,* sec. 30; *Snell's Principles of Equity,* 146; *Beach on Trusts,* sec. 246; *Reeves on Real Property,* sec. 449; *Thomas on Mortgages,* sec. 63; *2 Williams on Vendor and Purchaser,* 948, 950, the Court goes on to say:

> "As the vendor has a lien because he owned the land but conveyed prematurely, and the vendee ought not to keep it without paying for it, so, as it seems to me, the vendee has a lien because he has paid for the land pursuant to contract, and, as he cannot get the land, he has a right to get out what he put in on the faith of the land. The lien springs from the trust under which the vendor, as the legal owner, holds the land for the vendee, the equitable owner. Part payment creates partial ownership, and the vendee has an interest in the land itself to the extent of the payments made thereon. The contract and payment in full make him the equitable owner of all the land. The contract and payment in part make him the equitable owner *pro tanto.* When the vendor cannot convey, the equitable owner, wholly or in part, may assert his rights in a court of equity to get out of the land what he paid on it. * * *
>
> "The right is correlative to that of the vendor conveying without payment. In either case, the *res,* or the subject of the contract, is the land, and whatever is paid on the land without corresponding conveyance, or conveyed without corresponding payment, is a lien on the land by virtue of parting with money on the faith of the land, or with land on the faith of the promise to pay for it. Payment is not made on the credit of the vendor, but on the credit of the land, and the purchaser's money, in equity is converted into land, or attached to it as a lien. The equitable ownership, when specific performance cannot be had, is converted into money by a judicial

sale of the vendor's interest, which in effect is the foreclosure of an equitable mortgage."

The view is also well established in New Jersey to the effect that a vendee has a lien in equity for purchase money paid in event of default by the vendor. As early as 1831 the existence of the vendee's lien was recognized here. Chancellor Vroom in *Crawford* v. *Bertholf,* 1 N. J. Eq. 458, 469, said:

"It is a rule in equity, that when a contract is made for the sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor. As a consequence of this, it is admitted that a purchaser may sell or charge the estate before the conveyance is executed; he may come into this court claiming a specific performance, and compel the execution of a title. If he has paid any part of the purchase money, he will be considered as having a lien on the property for the amount thus paid, and a court of equity will not compel him to surrender possession until he shall have been fully satisfied."

A leading case is *Craft* v. *Latourette,* 62 N. J. Eq. 206. Vice Chancellor Stevens said:

"The question argued in the briefs is whether the court will, under the circumstances detailed, give to the vendee a lien for the money paid by him upon so much of the property agreed to be conveyed as the vendor or her devisees have title to. The precise question does not appear to have been decided in any reported decision of this court, but I have no doubt that the lien exists. The leading case is *Rose* v. *Watson,* 10 H. L. 672. Lord Cranworth there uses the following language: 'There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is in equity considered the owner

of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien exactly in the same way as if, upon the payment of part of the purchase-money, the vendor had executed a mortgage to him of the estate to that extent.' The same view, annunciated as far back as *32 Geo. II* (*1758*), by the master of the rolls, in *Burgess* v. *Wheate,* 1 W. Bl. 123, 150, is adopted by the text-writers. *2 Washb. Real Prop. 93, 94* (*4th ed.*); *Pom. Eq. Jur. sec. 1263; 2 Jones Liens sec. 1105, 1106.* So far as the New Jersey cases go, they tend to support this view. In *Copper* v. *Wells,* Sax. 10, it was held that where a specific performance has become impossible, the party aggrieved has a lien for the value of beneficial or lasting improvements made on the faith of an agreement which could not be executed because of a default in the opposite party. To the same effect is *Berry* v. *Van Winkle,* 1 Gr. Ch. 269.

"The complainant is entitled to a decree adjudging that he has a lien upon the lot covered by the agreement to convey, to the extent of the money paid by him, and that the lot be sold to satisfy that lien."

Vice Chancellor Pitney, in *Cleveland* v. *Bergen Building and Improvement Co.,* 55 Atl. 117 (not officially reported) said:

"Now, upon these facts, the first question is: Could the defendant at any time have compelled the complainant to specifically perform the contract by accepting the conveyance of the premises and paying therefor? I think there can be but one answer to that question. The court would not compel the complainant to accept the title and pay therefor, and that disposes of the defendants' cross-bill, which prays specific performance. No offer was made at any time before suit commenced, nor was any made by the defendants' cross-bill or at the

hearing, to apply to the matter of those lots fronting on Cleveland Avenue a clause in the contract which provides that, in case either party shall fail or be unable to convey a good title to any lot or lots, then the amount of the consideration to be paid for said premises shall abate in proportion to the value that said portion shall compare to the whole property, and the contract shall not be deemed to be an entire contract but severable for that purpose only. And I am of the opinion that such clause does not apply to the defect set up.

"If, then, the land company could not in equity compel the complainant to complete the contract, does it not follow that the complainant may have relief for the money which she has already paid? And this seems to follow naturally from the other proposition, unless the complainant is for some reason estopped by reason of the defendants' having changed their position irretrievably. I find nothing of that kind in the case. * * *"

"The authorities on this interesting subject are quite in point. Professor Pomeroy, 3 Pomeroy's Equity Jur. sec. 1263, is clear and explicit, and the authorities he cites are quite in point."

Section 1263 of Pomeroy's Equity Jurisprudence, cited by Vice Chancellor Pitney in *Cleveland* v. *Bergen Building and Improvement Co.*, 55 Atl. 117, *supra*, is as follows:

"The lien of the vendee under a contract for purchase of land for the purchase-money paid by him before a conveyance is the exact counterpart of the grantor's—or, as it is commonly called, the vendor's—lien, described in the last section but one. In the latter case, the legal title has been conveyed to the grantee, and yet the grantor retains an equitable lien upon the land as security for the purchase price agreed to be paid. In the former case, the legal title remains in the vendor, who has simply agreed to convey, while the vendee, although having as yet acquired no legal interest in the land by virtue of the contract, does obtain a lien upon it as security

for the purchase-money he has paid, and for the performance of the vendor's obligation to convey. In England, therefore, and in the American states where the grantor's lien has been adopted, the vendee's lien upon the lands contracted to be sold as a security for so much of the purchase price as he has paid prior to a conveyance, and for the performance by the vendor of his obligation, exists to the same extent against the same classes of persons, and governed by the same rules, as the corresponding lien of the grantor. The lien only arises, of course, when the vendor is in some default for not completing the contract according to its terms, and the vendee is not in default so as to prevent him from recovering the purchase-money paid."

In *Goldstein* v. *Ehrlick,* 96 N. J. Eq. 52, Vice Chancellor Backes, and in *Isserman* v. *Welt,* 101 N. J. Eq. 634, Vice Chancellor Berry recognized the existence of the vendee's lien.

In *Kohoot* v. *Gurbisz,* 101 Eq. 757, 139 Atl. 223 the Court of Errors and Appeals affirmed a decree enforcing a vendee's lien.

It is therefore apparent that until the decisions of *Grunt* v. *Olsan,* 7 A. R. 415, 144 Atl. 870, and *Bailey* v. *B. Holding Co.,* 7 A. R. 414, 144 Atl. 870, both decided on the same day, the existence of the vendee's lien had never been questioned in this State. The opinion in each case is brief.

In neither case is the existence of a vendee's lien questioned. In neither case is it said that a vendee has no lien in equity for the repayment of the purchase price. In fact, the subject of a vendee's equitable lien is not mentioned. It is unbelievable that the Court of Last Resort intended to wipe out an ancient head of equity jurisdiction *sub silentio* without the slightest discussion.

It is evident from the two opinions in the Court of Errors and Appeals, I think, that the Court

regarded the cases merely as involving suits to recover a deposit and search fees without any reference to a vendee's lien. The Court in these two cases did not express itself as making new law, but merely as following precedent. In each the Court bases its decision on *San Giacomo* v. *Oraton Investment Co.,* 143 A. 329, 6 N. J. A. R. 1365, where the Court said:

> "The system of courts set up in New Jersey under the Constitution, art. 6 sec. 1; the jurisdiction of the equity and common-law courts is separate and distinct. The common-law courts have exclusive jurisdiction to hear and determine controversies resting upon a purely legal basis and determined by the principles of the common law, such as a money claim or a simple debt and the like, whether due or not. The jurisdiction of the equity courts cannot be conferred over this class of subjects, by consent of counsel or acquiescence of a vice chancellor. *The Court of Chancery was not competent to adjudicate the claim. The first requisite to constitute jurisdiction is, the court must have cognizance of the class of cases to which the one to be adjudged belongs. This principle is elementary and needs no citation of cases.*"

The *San Giocomo* case did not involve any question of equitable lien. It merely stated a well recognized general principle that the Court of Chancery cannot acquire jurisdiction over purely legal controversies by the consent of counsel or the acquiescence of the Trial Court, and that the jurisdiction of a particular case depends on that case belonging to a class over which Chancery has exercised jurisdiction. In other words, Chancery jurisdiction is not a matter of consent; it is largely historical. But the *San Giacomo* case does not attempt to adjudicate that a vendee does not have an equitable lien for the return of his money on default of the vendor's title.

In *Bailey* v. *B. Holding Co.,* no lien was in fact prayed for. The nearest approach to it is the fourth prayer of the bill of complaint:

> "4. That a decree may be made for the sale of said premises to raise and satisfy to complainant the amount so found due with interests and costs."

This falls far short of praying an equitable lien.

In *Grunt* v. *Olsen,* there was a prayer for an equitable lien for both the purchase price and search fees and expenses. It is well established that there is no equitable lien for search fees and expenses, and hence the prayer was too broad. The *Grunt* case followed the *Bailey* case on the theory that it involved the same judicial problem for decision.

It may be well to contrast with these prayers for relief the prayers in the bill in the case at bar:

> "2. That said Leonora Fischbein and Louis J. Fischbein, her husband, or one of them, may be compelled by the decree of this court to pay unto complainant by a short day to be appointed by this court, said sum of $2000. paid by complainant unto said defendants as aforesaid, together with interest thereon and the costs of this suit or whatever sum this court may find due from said defendants to complainant, which sum or sums may be declared by this court to be a lien on said lands; and in the event that said defendants Leonora Fischbein and Louis J. Fischbein fail to pay to complainant said sum or sums within the time limited by this court, that said lands may be sold under the direction of this court for the satisfaction of such lien so impressed on said lands and premises.

> "3. That said Leonora Fischbein and Louis J. Fischbein, her husband, or one of them, may be compelled by a decree of this court to pay unto complainant by a short day to be appointed by this

court, said sum of $115. paid by complainant for said survey and examination of title, together with interest thereon ''

I have examined the briefs of complainants in both the *Bailey* and *Grunt* cases. The briefs in the *Bailey* case are entirely silent on the question of the existence of the vendee's lien. In the *Grunt* case, the case was submitted without oral argument. Complainant's brief is silent on the subject and defendant's brief contains only the following:

''This case is in reality nothing but an action for the recovery of a deposit. Its solution depends solely upon legal, not equitable principles. The action should have been at law, but even if properly in equity, because of the right of appellants to follow the deposit into the land, it must be determined by legal and not equitable principles, and *Meyer* v. *Madreperla,* 68 N. J. L. 258, applies.''

The Court of Errors and Appeals, in the *Bailey* case used the following language:

''The case is clearly distinguished from such cases as Goldstein *v.* Ehrlick, 96 N. J. Eq. 52.''

In *Goldstein* v. *Ehrlick,* Vice Chancellor Backes allowed an equitable lien, saying:

''The complainant is entitled to rescind and a return of his money. He is not obliged to take the title with the encroachments. They are slight, but, nevertheless, substantial, and specific performance would not be decreed against him. *Doutney* v. *Lambie,* 78 N. J. Eq. 277; *Herring* v. *Esposito,* 119 Atl. Rep. 765. The padlock proceedings are a cloud upon the title sufficient to prevent the enforcement of the contract. *Dobbs* v. *Norcross,* 24 N. J. Eq. 327; *Van Riper* v. *Rickersham,* 77 N. J. Eq. 232; *Kohlrepp* v. *Ram,* 79 N. J. Eq. 386. A valid reason for refusing

specific performance, such as a defect in the title, warrants a rescission of the contract.

"The complainant is entitled to a decree for $1,030, and a lien upon the premises for $1,000. The act of 1915 (*P. L. p. 316; 1st Supp. Comp. Stat. p. 472*) gives a right of recovery for search fees in actions for breach of contract against the vendor upon failure of title, but not a specific lien therefor on the lands. Ordinarily, the fees would have to be recovered at law, but equity will award them as incidental to other equitable relief."

It appears from the last quotation from the *Bailey* case that the existence of the vendee's lien has been recognized in both the Court of Chancery and the Court of Errors and Appeals as late as February and March, 1929. The *Grunt* case says expressly, "the case in its legal aspect is identical with *Bailey* v. *B. Holding Co.,* 144 A. 870, No. 41 of the present October Term, 1928", and in this connection it should be borne in mind that the *Bailey* case did not pray for a lien and the Court in its opinion distinguished it from the *Goldstein* case, treating the *Bailey* case as a suit for the recovery of deposit money.

With such recognition of the vendee's lien by the Court of Errors and Appeals in the cases relied on by defendants, it is difficult to see how those decisions have wiped out the vendee's right to such lien where he properly pleads his cause.

Without the sentence in the *Bailey* opinion,

"The case is clearly distinguished from such cases as *Goldstein* v. *Ehrlick,* 96 N. J. Eq. 52."

that decision might erroneously be taken as authority for abolishing the vendee's right to specific performance and as wiping out the right to an accounting in equity. I am sure that such a course

was not contemplated by the Court of Errors and Appeals.

It cannot be contended that either the *Bailey* or *Grunt* cases, which the court treated as embodying a common legal question, can be taken to annihilate a head of equity jurisdiction which has existed unquestioned in England since long prior to the American Revolution and the establishment of our Court of Chancery, as well as in every American jurisdiction, including New Jersey.

Since preparing this opinion my attention has been called to the case of *Clark* v. *Badgley,* New Jersey Advance Reports, Vol. 8, No. 6, page 534. If the theory upon which this case was decided be correct, then it may be urged that the underlying doctrine of equitable conversion upon which rests the right of a court of equity to decree specific performance and grant other equitable relief, has been set aside. The Court of Errors and Appeals in *The Delafield Construction Company* vs. *Sayre,* 60 N. J. Law 449, recognized as a head of equity jurisdiction the enforcement of a lien or the payment out of a particular fund, and for that reason held that, although the statute was silent upon the subject, a suit to enforce a municipal lien could properly be brought only in a court of chancery.

The Clark case cites only *Bailey* v. *B. Holding Company.* However, in spite of what I have said above, I am constrained to advise a decree dismissing the bill.

68

New Jersey Court of Errors and Appeals

Between

JEROME RICHEIMER,
Complainant-Appellant,

and

LEONORA FISCHBEIN and LOUIS J. FISCHBEIN, her husband,
Defendants-Respondents.

On Appeal from Chancery.

BRIEF OF COMPLAINANT-APPELLANT.

The Facts.

Appellant, vendee, entered into a contract with respondents, vendors, for the purchase of certain lands and pursuant to the terms of that contract paid defendants $2,000 of the purchase price. By reason of a defect in title, defendants were unable to perform, and complainant filed his bill, to impress a lien upon said lands for the $2,000 paid.

Feeling bound by *Clark* v. *Badgely,* 105 Eq. 534, the Court below (notwithstanding the wealth of authority to the contrary cited in its opinion), held that the bill did not set forth a cause of action cognizable in equity and therefore dismissed it. The vendee appeals from this decision.

The Issue.

There is but one issue in this case: does a vendee under an executory contract for the sale of lands, if the vendor's title proves defective, have an equitable lien upon the lands for the installments of purchase price paid by him?

POINT I.

The vendee's lien is an ancient head of equity jurisdiction, supported by all the authorities.

A. From *Burgess* v. *Wheate,* decided in 1759, before the American Revolution, to *Ridout* v. *Fowler,* the English cases consistently affirm the vendee's right to an equitable lien for his deposit money upon failure of the vendor's title. These authorities are fully set forth in the opinion of the Court below (S. C., p. 26, l. 39 to p. 31, l. 30), and it would serve no good purpose to repeat them here.

B. Every American jurisdiction recognizing the vendor's right to specific performance, also recognizes the vendee's lien. These authorities are collated in the opinion of the Court below (S. C., p. 31, l. 40 to p. 35, l. 3). Of especial significance are the leading case of *Elterman* v. *Hyman* (S. C., pp. 32-33), and the collection of the cases from 23 American jurisdictions cited in the note to *Larson* v. *Metcalf,* 45 A. L. R. 358. The research of counsel has failed to disclose any authority controverting the decisions cited by the Court below.

C. The earlier New Jersey decisions by such distinguished equity judges as Chancellor Vroom, and Vice-Chancellors Stevenson, Pitney, Griffin, Backes and Berry, all recognize and enforce the vendee's lien, as did this Court in *Kohoot* v. *Gurbisz,* 101 Eq. 757 (decided October 17, 1927). See opinion of the Court below (S. C., p. 35, l. 3 to p. 38, l. 25).

D. The text writers all concur in the reasoning of the cases above referred to. See S. C., p. 27,

ll. 25-30, referring to *Sugden on Vendors and Purchasers,* and p. 37, l. 25, to page 38, l. 18, quoting from *Pomeroy on Equity Jurisprudence,* section 1263.

E. *Bailey* v. *B. Holding Co.,* 7 A. R. 414, and *Grunt* v. *Olsan,* 7 A. R. 415 (both decided February 3, 1929), are thoroughly discussed and ably analyzed in the Vice-Chancellor's opinion (S. C., p. 38, l. 25, to p. 43, l. 14). The *Grunt* case is based expressly on the *Bailey* case (S. C., p. 42, ll. 20-22), and the *Bailey* case refers expressly to *Goldstein* v. *Ehrlich* (S. C., p. 41, ll. 25-28), where Vice-Chancellor Backes upheld an equitable lien (S. C., p. 41, l. 29, to p. 42, l. 15).

Clark v. *Badgely,* 105 Eq. 534 (decided February 3, 1930), relies on the *Bailey* decision, but expressly repudiates (p. 535) the distinction drawn there by reference to *Goldstein* v. *Ehrlich* between the cases where an equitable lien is prayed and those in which such a prayer is omitted.

I have examined the briefs of counsel in these three cases and find no reference to the question of the jurisdiction to enforce a vendee's lien in any of them except the specious comment of counsel for defendant in the *Grunt* case (quoted in the Court's opinion; S. C., p. 41, ll. 15-22). I am advised, moreover, by counsel in each of these three cases that the question of the jurisdiction of the Court of Chancery was not argued at bar on either side.

It is significant that the opinions in these three cases do not discuss the authorities (either cases or authors) which have stood like sentinels protecting the doctrine of the vendee's lien since 1759. It is unbelievable, as the Vice-Chancellor remarked, that this Court, which has always been most jealous in affirming the constitutional powers of the several courts of this state, should

have intended to deprive equity of an ancient head of jurisdiction which antedated the American Revolution, as well as the adoption of our state constitution, without any discussion of the English and American authorities and without expressly overruling the earlier opinions in Chancery and in this Court.

POINT II.

The vendee's lien is not only supported by all the authorities, but it is an integral part of the doctrine of equitable conversion.

If the Bailey, Grunt and Clark cases stand, not only must the entire doctrine of equitable conversion fall, but several other sources of equitable jurisdiction.

The doctrine of equitable conversion, whereby when A contracts to sell real property to B, B (in addition to his rights at law) forthwith becomes equitable owner of the property, is too well recognized in this state and elsewhere to require extensive citation of authority. *Haughwout* v. *Murphy,* 22 N. J. Eq. 531 (E. & A., 1871) at 546, summarizes the rationale of the doctrine and some of the important incidents resulting from it:

> "In equity, upon an agreement for the sale of lands, the contract is regarded, for most purposes, as if specifically executed. The purchaser becomes the equitable owner of the lands, and the vendor of the purchase money. After the contract, the vendor is the trustee of the legal estate for the vendee. *Crawford* v. *Bertholf,* Saxton 460; *Hoagland* v. *Latourette,* 1 Green's Ch. 254; *Huffman* v. *Hummer,* 2 C. E. Green 264; *King* v. *Ruckman,* 6 C. E. Green 599. Before the contract is executed by conveyance, the lands are devisable by the vendee, and descendible to his heirs as real estate; and the personal representatives of

> the vendor are entitled to the purchase money. 1 Story's Eq., par. 789; 2 *Ibid.*, par. 1213. If the vendor should again sell the estate of which, by reason of the first contract, he is only seized in trust, he will be considered as selling it for the benefit of the person for whom, by the first contract, he became trustee, and therefore liable to account. 2 Spence's Eq. Jur. 310. Or the second purchaser, if he have notice at the time of the purchase of the previous contract, will be compelled to convey the property to the first purchaser. *Hoagland* v. *Latourette,* 1 Green's Ch. 254; *Downing* v. *Risley,* 2 McCarter 94. A purchaser from a trustee, with notice of the trust, stands in the place of his vendor, and is as much a trustee as he was. 1 Eq. Cas. Abr. 384; *Story* v. *Lord Windsor,* 2 Atk. 631. The *cestui que* trust may follow the trust property in the hands of the purchaser, or may resort to the purchase money as a substituted fund. *Murray* v. *Ballou,* 1 Johns. Ch. 566, 581. It is upon the principle of the transmission by the contract of an actual equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee, that the doctrine of the specific performance of contracts for the sale and conveyance of lands mainly depends.''

From this doctrine of equitable conversion, creating an equitable estate in the vendee, many consequences flow. One of the necessary consequences of equitable conversion is the vendor's lien, which has consistently been enforced in this state:

> *Graves* v. *Coutant,* 31 N. J. Eq. 763 (E. & A., 1875);
>
> *Morgan* v. *Dalrymple,* 60 N. J. Eq. 466 (E. & A., 1900);
>
> *Knickerbocker Trust Company* v. *Carteret Steel Company,* 79 N. J. Eq. 501 (Ch., 1911);

Thatelbaum v. *Neidorf,* 100 N. J. Eq. 236 (Ch., 1926);
Veeder v. *Bayshore Development,* 143 Atl. 74 (Ch., 1928).

The reasons for the existence of a vendor's lien apply with equal force to a vendee's lien.

In *Graves* v. *Coutant, supra,* Mr. Justice Scudder, for the entire Court, said (31 N. J. Eq. 763, at 779):

> "The claim of a vendor's lien for purchase-money is one of peculiar equitable cognizance, and is only maintainable in a court of equity. There is a constructive trust when lands are conveyed and no security is taken for the purchase-money, that the purchaser shall be a trustee of the land for the vendor, until the purchase-money is paid. An equitable lien is given on the land for this unpaid purchase-money, not only against the vendee, but against all subsequent purchasers who take *mala fide,* or with notice that the purchase-money remains unpaid. This is the established law of our state, where our court of equity has followed the leading case of *Mackreth* v. *Symmons,* 15 Ves. 329; S. C., 1 Lead. Cas. in Eq. 336, &c.; *Van Doren* v. *Todd,* 2 Gr. Ch. 397; *Brinkerhoff* v. *Van Sciven,* 2 Gr. Ch. 251; *Herbert* v. *Scofield,* 1 Stock. 492; *Dudley* v. *Dickson,* 1 McCart. 252; *Armstrong* v. *Ross,* 5 C. E. Gr. 109; *Corlies* v. *Howland,* 11 C. E. Gr. 311."

"The leading case of *Mackreth* v. *Symmons*" relied on by this Court *supra* in *Graves* v. *Coutant* is cited by the Vice Chancellor in his opinion (S. C., p. 27, l. 30). This decision of Lord Eldon demonstrates that both the vendor's lien and the vendee's lien have their common origin in the doctrine of equitable conversion. Abolish one, and the other necessarily falls. Abolish both, and the entire doctrine of equitable conversion (which

has been skillfully elaborated by the greatest equity judges and which has for generations not only worked justice between individuals but given satisfaction to the business world as the basis of dealings with respect to real property) is sent into oblivion.

It is worthy of comment that this Court in *Graves* v. *Coutant, supra,* saw no difficulty in maintaining a vendor's lien, even after the vendor had taken a judgment at law.

> "In some of the states this doctrine is rejected. In *Gilman* v. *Brown,* 1 Mason 191, Justice Story says that 'Massachusetts has no court of chancery to recognize and enforce such a lien, and the peculiar principles and doctrines of courts of equity have never been adopted into its jurisprudence.' This has been recently affirmed in that state in *Ahrend* v. *Odiorne,* 118 Mass. 261 (1875), where the court says that no such lien exists in that commonwealth, in any case, without agreement in writing. The opinion of Chief Justice Gray, in that case, is an able defence of the law as there maintained. An elaborate note, collecting the cases and different holdings of the courts in all the states, will be found in 1 *Perry on Trusts,* par. 232, note 2.
>
> "Chancellor Green states the law, as held in our state, in *Dudley* v. *Dickson,* thus: 'The well-settled rule of equity, that the vendor of real estate has a lien upon the land sold for the purchase-money, is recognized and adopted in this state. The taking of the note or bond of the purchaser for the unpaid purchase-money will not impair the lien.'
>
> "It is settled, also, that the recovery of a judgment on such a note or bond, or for the purchase-money where no note or bond is taken, will not affect the vendor's lien as a merger, for until there is payment, or some legal equivalent or bar to the recovery, the lien and the equitable right to have the purchase-money, remain" (31 N. J. Eq. at 780).

This Court clearly recognized that both parties to a contract relating to real property had not only rights at law, but, equally and independently, rights in equity.

The reason against equitable jurisdiction given by Mr. Justice Black in *Clark* v. *Badgley* (namely, that the vendee would have a lien on the land after he obtains a judgment at law) applies equally to a vendor's lien. The serious consequences of the adoption of such a doctrine may be readily demonstrated by applying it to various situations which have come before our courts in the past:

(1) In *Graves* v. *Coutant, supra,* for example, the vendor would have had no rights against the vendee who obtained a discharge in bankruptcy.

(2) Similar unfortunate and unjust consequences would follow the application of the doctrine to *Thatelbaum* v. *Neidorf, supra,* where the vendee suffered a judgment to go against him. If *Clark* v. *Badgley* governed, an unpaid vendor would merely obtain a judgment subordinate to the lien of the judgment creditor despite his knowledge of the facts.

(3) Similarly in the case *sub judice,* suppose respondents had executed a mortgage to X, who had knowledge of appellant's contract to purchase. Under the earlier decisions in this state appellant's vendee's lien would, on respondent's inability to convey good title, have been prior to the lien of X's mortgage. Under *Clark* v. *Badgley,* since appellant has merely a chose in action against respondents, his judgment at law will, if the vendors are then still the owners of the property, be subsequent to the lien of X's mortgage.

(4) Moreover, the reasoning of *Clark* v. *Badgley* sounds the death knell of another class of cases

where equity has long afforded relief, namely, where a person advances money to a woman on the security of a mortgage which is void because she is married and her husband has not joined in the execution of the mortgage. *Wilson* v. *Brown,* 13 N. J. Eq. 277; *Harrison* v. *Stewart,* 18 N. J. Eq. 451; *Armstrong* v. *Ross,* 20 N. J. Eq. 109; *Perkins* v. *Elliott,* 23 N. J. Eq. 526; *Adams* v. *Schmitt,* 68 N. J. Eq. 168. According to the rationale of the Clark case, the lender will be protected by obtaining, ultimately, a judgment against the defrauding woman, which would be a lien on her land. It does not require a hardy imagination to picture what she would do with her property in the meantime or what the judgment would be worth when recovered. But if *Clark* v. *Badgley* is sound, the lender would be held to have adequate relief at law.

(5) *Clark* v. *Badgley* likewise destroys the jurisdiction of equity in the cases in which constructive trusts have been imposed on real property where defendant has invested complainant's funds in such real property. *Shaler* v. *Trowbridge,* 28 N. J. Eq. 595 (E. & A.).

(6) Similarly, it would eradicate the doctrine that where money is paid by mistake in satisfaction of a mortgage, the payor has an equitable lien. *Hagarty* v. *McCann,* 25 N. J. Eq. 48 (Ch., 1874).

(7) As well as the doctrine that where a joint owner expends money in benefiting property he has a lien on the entire estate.

These instances of the unsettling effect of *Clark* v. *Badgley* on fields of equity jurisdiction heretofore unquestioned could be multiplied *ad infinitum.* They suffice to show the startling consequences of the case if logically applied to analogous situations, and to demonstrate its fallacy.

For centuries men have contracted to purchase real property and have paid deposits thereon, relying, by virtue of the doctrine of equitable conversion, not on the credit of the seller, but on the credit of the land. The change in the law worked by *Clark* v. *Badgley*, far from satisfying any business need, has a distinctly disturbing effect, for no one can now say to what situations the rationale of the case may be extended. Moreover, its reasoning is in conflict with the equitable rights conferred on vendor and vendee alike. It is unsound in principle, as well as contrary to all the decisions and secondary authorities. It can be supported neither by the authority of reason nor by reason of the authorities. It was decided without argument and apparently without consideration either of the decisions it was silently and unintentionally overruling, or the analogous and related doctrines it was overturning.

POINT III.

Conclusion.

It is therefore respectfully submitted that the decree advised by the Vice Chancellor should be reversed for the reasons stated in the opinion of the Vice Chancellor and argued here.

Respectfully submitted,

ARTHUR T. VANDERBILT,
Solicitor for and of Counsel with
Complainant-Appellant.

New Jersey Court of Errors and Appeals

Between JEROME RICHEIMER, Complainant-Appellant, and LEONORA FISCHBEIN and LOUIS J. FISCHBEIN, her husband, Defendants-Respondents.	On Appeal from the Court of Chancery.

BRIEF OF DEFENDANTS-RESPONDENTS.

Facts.

On September 6, 1929, a contract was entered into between the parties to this suit, whereby the Fischbeins were to convey and Richeimer was to buy a certain tract of land known as number 393 High Street, Newark, New Jersey. The purchase price was $34,500.00; $500.00 was paid as a deposit at the execution of the contract. Title was to pass on October 7, 1929, which time was made of the essence. By further provision of the contract Richeimer could procure an extension of time for the taking of title until November 7, 1929, upon the payment of $1,500.00 as additional deposit. This sum was paid and the passing of title was put over to the last mentioned date.

Richeimer filed a Bill in the Court of Chancery alleging the aforementioned facts, and further that the building on the premises was not all within the boundary lines and that there were encroachments upon the premises by adjoining structures,

and therefore he refused to take title. He prayed for the return of his deposit and his search and survey fees, and that the deposit might be declared to be a lien upon the premises, in satisfaction of which they might be sold.

Counsel for defendants-respondents moved at final hearing for dismissal on the ground that the Bill did not set forth a cause of action cognizable in equity. The Bill was dismissed by the Court of Chancery and complainant's appeal is from the final decree of dismissal entered in that Court.

Argument.

The issue in this case: Has the Court of Chancery jurisdiction over a suit by a vendee who rejects the vendor's title, to recover the deposit and search and survey fees from the vendor, and to grant its relief in the form of the creation of a lien for the deposit and the foreclosure of this lien?

This Court has unanimously held three times

> Bailey v. B. Holding Company, 7 A. R. 414, 144 Atl. 870,
> Grunt v. Olson, 7 A. R. 415, 144 Atl. 870,
> Clark v. Bladgley, 105 N. J. Eq., 534, 148 Atl. 736,

that the Court of Chancery had no such jurisdiction. In the Clark case, Mr. Justice Black says:

> "In the case of Bailey v. B. Holding Co., 144 Atl. 870, this court held a suit to recover the deposit and search fees made by the buyer against the seller, under a written contract to sell land, is not cognizable by the Court of Chancery. The Court of Chancery is without jurisdiction to hear and determine the controversy. The question litigated is a

pure legal question, viz: the breach of a contract cognizable by the common law courts. That case controls this controversy.

The learned Vice Chancellor, who heard the case and advised the decree appealed from, points out that the prayer in the bill of complaint for a lien on land marks a legal distinction between that case and the case under discussion. But this is not so. It is a distinction without a legal or substantial difference. The fact, that the Court of Chancery is asked to declare a lien on the land does not differentiate the case in a legal aspect from the cited case. The judgments of the common-law courts are liens upon lands. The Court of Chancery could be given jurisdiction in any contract case by simply praying for a lien. This is manifestly unsound."

There can be no misunderstanding of such a clear exposition of what the law of this State is, and respondents do not understand the complainant-appellant to argue that the learned Vice Chancellor who decided the instant case had any choice but to dismiss the bill, under that decision. Appellant's argument is that that decision, and the two previous ones in the Bailey case and the Grunt case, are erroneous and should be overruled.

I.

The first argument presented by appellant is that the vendee's lien is an ancient head of equity jurisdiction. The brief refers to the authorities cited in the opinion of the learned Vice Chancellor. The English authorities are the first set forth, and the first of these is Burgess v. Wheate, 1 Eldon 177, 211, 1 Wm. Blackstone 123, 96 English Reports 67, 79 (1759). A dicta by Sir Thomas Clarke, Master of the Rolls, is quoted as the source of the doctrine.

> "So where the money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor."

It may very well be that from this dicta the doctrine grew, but if that be so, then its foundations are of the flimsiest sort. The case involved the very ancient land law of England; The Master of the Rolls was directing himself to an argument made by the Attorney-General, in behalf of the Crown, which sought to take certain lands by Escheat. The Attorney-General had put certain cases where he contended an escheat would occur as analogous, to support his contention in the case at bar. One of these analogies was that there would be an escheat of the land if a purchaser died after paying the purchase price, but before conveyance, *and left no heir,* for it was argued, if there is no escheat then the vendor could keep both the land and the money. The answer to this seemingly overwhelming argument was made by the Master of the Rolls: (at page 150, in 1 Wm. Blackstone)

> "And as to the Vendor's keeping both the

> Estate and the Money, 'tis analogous to what Equity does in another case; as where Conveyance is made prematurely, before Money paid; the Money is considered as a Lien on that Estate in the Hands of the Vendee. So where Money was paid prematurely, the Money would be considered as a Lien on the Estate in the Hands of the Vendor, *for the personal Representatives of the Purchaser;* which would leave Things in statu quo."

Not a case of a mere deposit but of the whole purchase price; not a case before the Court, but an answer to a supposititious case put in argument; not a judgment of a Court, but a remark by one judge; not a lien for a vendee, but for a vendee's personal representatives to prevent the unjust enrichment of a vendor in a case where the vendee left no heir to take the land.

It seems to be going a little far to say that on this authority the doctrine of the vendee's lien stands clearly established as prevailing in England before the Revolution. And even if such were the fact, the Constitution prohibits any encroachments upon the Court of Chancery by the Legislature or other Courts, and is not concerned with a divergence of opinion in the Court of Chancery of New Jersey and that of England as to the subjects of jurisdiction. This Court established its position, since it is the Court of Appeal from the Court of Chancery, as the final arbiter as to the equity law of New Jersey, in

> Penn R. R. Co. v. Natl. Docks Ry. Co.,
> 54 N. J. Eq. 647, 35 Atl. 433.

Tracing the doctrine through the English decisions, we find that Lord Eldon quoted the dicta of the Burgess case, in Mackreth v. Symmons, 15 Ves. Jr. 338, 33 Eng. Rep. 778, 784 (1808). But

that was a case of a vendor's lien for the unpaid purchase price. It is stated that the case of Wythes v. Lee, 3 Drewry 396, 61 Eng. Rep. 954 (1855); on appeal 25 L. J. Ch. 389, squarely decided the question. The bill prayed a lien for deposit paid and for interest paid on mortgages, for insurance and other expenses all paid by the buyer. The bill was demurred to. Sir R. T. Kindersley, Vice Chancellor, overruled the demurrer. He did say there was a vendee's lien, but he also stated, speaking of the other items: (at page 958 in 61 Eng. Rep.)

> "those it is urged, constitute also an equity for a lien; *and it may perhaps be said that they stand on a better footing as to lien than the deposit.*"

The House of Lords is cited as having definitely established the doctrine of vendee's lien, in Rose v. Watson, 10 H. L. Cas. 672 (1864). But there was one important distinction in that case. At page 679 in the long opinion, that by The Lord Chancellor (Lord Westbury):

> "It only gives, in point of fact, an additional ground of complaint to the purchaser, that he cannot obtain the estate he contracted for, and that being unable to obtain it by reason of the failure of the vendor, the loss to him is attempted to be aggravated by its being sought to deprive him of the *only means of acquiring the repayment of his money (the vendor having become bankrupt)*," * * * *

That element lends an independent equity not existing in the instant case. The later English cases cited have disregarded this distinction.

The American authorities, outside of New Jersey, it is contended, all allow the vendee's lien.

The case of Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937, is quoted from at length, as establishing this. This case relies upon Rose v. Watson, 10 H. L. Cas. 672; Wythes v. Lee, 3 Drew. 396; Mackreth v. Symmons, 15 Ves. Jr. 329, and Burgess v. Wheate, 1 Wm. Blackstone, 123, as establishing the doctrine in England. The peculiarity of this decision, in which the opinion was written by Judge Vann, is that in a case decided on the very same day, May 19, 1909, and reported immediately after the Elterman case, and in which Judge Vann also wrote the opinion, it was decided that there can be no vendee's lien if the vendor was fraudulent in inducing the making of the contract and the vendee seeks rescission as well as the lien. That case is Davis v. Rosenzweig Realty Operating Co., 192 N. Y. 128, 84 N. E. 943.

> "We held in the Elterman case that the vendee's lien was created by the contract and payment thereunder, and that, upon default by the vendor without fault of the vendee, the latter could foreclose his lien. If we reasoned correctly in that case, there can be no lien without a contract. Payment on the contract pursuant to its requirements gives a lien by operation of law. The contract is the essential basis of the lien, for payment is simply an observance by the vendee of one of the express terms thereof. Rescission, therefore, destroys the contract *ab initio,* and leaves the parties in the same situation as if no contract had ever been made. Under these circumstances there can be no lien."

This decision refuses the lien remedy where there is an independent ground for equitable relief; namely, fraud; it places the lien on the contract, which is directly opposed to the reasoning

used by Lord Cranworth, in Rose v. Watson, 10 H. L. Cas. 672, at page 683,

> "There can be no doubt, I apprehend, that when a purchaser has paid his purchase money, though he has got no conveyance, *the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as owner of the estate.*"

and it puts the Court of Equity in that peculiar position of denying relief to a complainant because of the fraud of the defendant. A doctrine that leads to such absurd results, may well be examined with care. The Supreme Court of Michigan, in denying the right of lien, has followed the New York Court of Appeals in the result reached in the Davis case.

> Von Hoeme v. Barber, 215 Mich. 538, 184 N. W. 526,
> Mulheron v. Henry S. Koppin Co., 221 Mich. 187, 190 N. W. 674.

The cases cited in favor of the vendee's lien in New Jersey really start with Craft v. Latourette, 62 N. J. Eq. 206. The early decision by Chancellor Vroom in Crawford v. Bertholf, 1 N. J. Eq. 458, is only to the effect that:

> "If he has paid any part of the purchase money, he will be considered as having a lien on the property for the amount thus paid, *and a court of equity will not compel him to surrender possession until he shall have been fully satisfied.*"

Vice Chancellor Stevens relied solely on Rose v. Watson, 10 H. L. Cas. 672, and, it is submitted, with greater justification than most other cases. For on page 5 of the original bill of complaint in that case, (Respondent examined the bill in the

official files), is found an allegation throwing doubt upon the solvency of the defendant estate. The other decisions in the Court of Chancery all rely on Craft v. Latourette as establishing the rule for this State.

It is stated that this Court recognized the vendee's lien in Kohoot v. Gurbisz, 101 N. J. Eq. 757, 139 Atl. 223. That is a Per Curiam affirmance of a decision by Vice Chancellor Griffin on his opinion. The special facts of that case gave the Court of Chancery jurisdiction over the controversy and the question of vendee's lien was not specifically raised, considered or discussed in the opinion. The case as stated by the learned Vice Chancellor, was:

> "The bill in this cause is filed to obtain a decree impressing a lien upon the lands in question for the sum of $1,500.00, *which the defendants agreed to pay the complainants as the purchase price of their store* in case the contract of sale fell through by reason of defect of title, etc."

The state of the authorities being as indicated above, it is submitted that this Court is not bound to a decision contrary to that made in the three cases—

> Bailey v. B. Holding Co., 7 A. R. 414, 144 Atl. 870,
> Grunt v. Olsan, 7 A. R. 415, 144 Atl. 870,
> Clark v. Badgley, 105 N. J. Eq. 534, 148 Atl. 736,

and followed by the learned Vice Chancellor in the case under review.

II.

The Complainant-Appellant next argues that to refuse the vendee a lien is to overthrow the whole doctrine of equitable conversion. It is submitted that this is not so. The doctrine is, in short—

> "In equity, upon an agreement for the sale of lands, the contract is regarded for most purposes, as if specifically executed. The purchaser becomes the equitable owner of the lands and the vendor of the purchase money." (Per Justice Depue, in Haughwont v. Murphy, 22 N. J. Eq. 531, at 546).

This statement is open, of course, to the criticism so often made, that surely the purchaser is not the trustee of the purchase money, as in many cases he has not, not only not specified it as yet, but may not have even borrowed it as yet. But it states what is the usual result of a contract for the sale of land. If the doctrine of equitable conversion be limited in application solely to the relationship between the vendor and his heirs and representatives, and the vendee and his heirs and representatives, that is, to the law of descent, it has a real significance and accurately tells all the consequences of the contract, but has nothing to do with a vendee's lien. This was the view taken by Mr. Langdell in his "Brief Survey of Equity Jurisdiction" in 1 Harvard Law Review, 355, at 378-380. The English authorities, too, have expressed doubt as to the correctness of the language they were the first to use. Brett, L. J., in Rayner v. Preston, 18 Ch. Div. 1, 11 (1880-1881) says:

> "Therefore, I venture to say that I doubt whether it is a true description of the rela-

> tion between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase of which a Court of Equity will, under certain circumstances, decree specific performance."

But no matter in what language the doctrine is put, if equity considers the vendee as owner upon the execution of the contract, the doctrine of the vendee's lien would be a lien on the land held by its owner, whereas in logic the part is always included in the whole. Then, too, if equity considers that the contract is to be regarded as if specifically executed from the making of it, and the vendee is the owner, and that the vendor holds the land in trust for him, how can the vendee's lien be a product of equitable conversion when as reasoned by Lord Cranworth, in Rose v. Watson, 10 H. L. Cas. 672, at 683,

> "When instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that, *to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him;* * * *"

This reasoning has been used wherever the vendee's lien is adopted. Vice Chancellor Stevens quoted it in Craft v. Latourette, 62 N. J. Eq. 206. If he owns all on the execution of the contract because of the equitable conversion, any doctrine that he only owns that proportion that the amount paid bears to the whole purchase price, is opposed to the theory of equitable conversion.

But the real difficulty with basing the vendee's lien on the doctrine of equitable conversion is, that unless the contract is specifically enforceable by either side, there is no equitable conversion at

all. But it is always in the cases where there are defects in title that the vendee seeks a lien, and it is settled law that if the title should prove defective, so that the vendor cannot get specific performance against the vendee, there is no equitable conversion at all.

Broome v. Monck, 10 Ves. Jr. 597, 32 Eng. Rep. 976 (1805), Lord Eldon decided in this case that a devisee or heir of the vendee of land could not make the executor pay for the land or buy them other land if the vendor's title proved defective.

> "Therefore, if no title can be made, the devisees are not entitled to take this estate without a good title, or to have another estate bought for them."

This decision was made after three arguments, March 19, March 25, April 8, 1805. Surely careful consideration by a great Chancellor.

Lysaght v. Edwards, 2 Ch. Div. 499 (1876),

Master of the Rolls Jessel, at page 515:

> "If on the other hand, the title being bad, and not having been accepted, was in such a state at the time of his death that the purchaser was entitled to refuse the estate, then there was not a valid contract to sell; there was nothing which could have been binding upon the testator's heir under the doctrine of constructive conversion."

Cornwall v. Henson, 2 Ch. 710 (1899), reversed on other grounds in 2 Ch. 298 (1900).

Cozens Hardy, *J.*, says, at page 714:

> "It is often stated that the effect of a contract for the sale of land is to make the purchaser from that moment, in equity, owner

of the land. I think, however, that this statement is too wide. The doctrine is subject to one obvious qualification—namely, that the contract is one of which the Court, under the circumstances, will decree specific performance. For instance, *if the vendor is not in a position to obtain a decree for specific performance whether by reason of some defect in title or by reason of some collateral misrepresentation, the purchaser never was, in the view of the Court, owner in equity of the property.*"

Keep v. Miller, 42 N. J. Eq., 100, 6 Atl. 495,

Chancellor Runyon, at page 105, says:

"A valid and binding contract of sale, such as a court of equity will specifically enforce against an unwilling purchaser, operates as a conversion. *The cases in which the court has refused to decree that a contract for sale works equitable conversion, are those in which the contract was such as equity would not enforce.*"

It seems, therefore, that the vendee's lien cannot stand on the theory of equitable conversion as it opposes it at every point.

Some authorities support it as the equivalent of the vendor's lien and as existing wherever the vendor's lien is recognized.

Elterman v. Hyman, 192 N. Y. 113, 84 N. E., 937.

That, too, has been judicially denied.

Larson v. Metcalf, 201 Ia. 1208, 207 N. W. 382.

In this case a vendee's lien was enforced, although the legislature had abolished vendor's liens.

> "The vendee's lien upon the land for a return of the money that he has invested in it when the vendor refuses to perform, is not a corollary of the vendor's lien upon the land for the purchase money. * * * The destruction of one by the Statute does not result in the destruction of the other merely because they have the same parentage. They may be twins, but they are not Siamese twins." (Per Morling, *J.*)

On analysis the vendee's lien is far different from the vendor's. In enforcing the latter, the promise of the vendee to pay the purchase price is being specifically enforced. But the vendee's lien can find no support in the contract, there was no promise to pay back the few dollars deposit or to surrender the whole tract of land in lieu thereof. The vendor's lien merely takes away from the vendee the land which he has not paid for and works no injustice. There is, it is submitted, no support for the vendee's lien in any of the reasons advanced by the complainant-appellant, or quoted by him from the authorities. The English Courts have finally seen this, and placed the whole doctrine on this basis:

> "And, if we look at that which is really the foundation of the doctrine, namely, *the desire to do justice as between vendor and purchaser.*" (Per Stirling, L. J. in Whitbread Co. v. Watt, 1 Ch. 835, [1902]).

If that is the basis, there is no need for this State to adopt that doctrine which leads to such unjust results, and fits so poorly into the logic of the law. The remedy at law in New Jersey does complete and adequate justice between vendor and purchaser; it adequately eliminates the serious consequences pictured for this state if a vendee's

lien is not granted (brief of complainant-appellant, page 8); and it is fairer to all parties. That remedy is Chapter 200 of the Laws of 1907:

> "Every agreement for the sale or purchase of any lands or real estate in this State which hereafter shall be recorded, shall be absolutely void as against subsequent judgment creditors of the vendor or vendors and as against subsequent purchasers and mortgagees for value, of said land or real estate, unless the vendee or vendees, his or their heirs, executors, administrators, or assigns, within three months after the date fixed in such agreement for the consummation, * * * shall commence suit for the specific performance of said agreement, or for its rescission, or for the violation of any of the covenants therein contained, and shall file a notice of the pendency of such suit in the office of the Clerk of the Court of Common Pleas, * * *; provided in case the complainant or plaintiff in any such suit does not take steps to prosecute his suit diligently within six months after the filing of such notice, then the Chancellor or Court in which such suit is brought may, * * * declare the filing of such notice to be null and void and of no effect, and that the lands and real estate mentioned in the said notice shall be and remain discharged of all equities or claims founded on such agreement." (Comp. Stat. 1910 Ed., Vol. 2, page 1573, Sec. 116).

The negative form in which the statute is put is similar to the form of the general recording act:

> "That every deed, etc., * * * shall be void and of no effect against subsequent judgment creditors, etc., * * * unless such deed, etc. shall be acknowledged or proved and recorded, * * *" (Comp. Stat. 1910 Ed., Vol. 2, page 1553, Sec. 54)

and of the mortgage act:

> "That every deed of mortgage, etc., * * * shall be void and of no effect against a subsequent judgment creditor, etc., * * * unless such mortgage shall be acknowledged or proved according to law, and recorded." (Comp. Stat. 1910 Ed., Vol. 3, page 3414, Sec. 22).

Just as both these acts have always been taken to mean that recorded instruments are valid against subsequent judgment creditors, purchasers and mortgagees, so the contract statute means, a recorded contract is valid against such persons. But this statute provides further, how and when suit must be brought on the contract, and how diligently this suit must be prosecuted. It is not only suits for specific performance or rescission that are contemplated, but suits

> "for the violation of any of the covenants therein contained."

It is not only suits in equity but also actions at law that are contemplated for the words used are "the complainant or plaintiff" and "the Chancellor or Court". This language clearly includes a suit for the return of the deposit and search and survey fees for failure to convey a good title as contracted. If the suit is properly started and prosecuted, the lien of the contract is fully preserved; if not, it is lost.

Gerba v. Mitruske, 84 N. J. Eq. 141, 94 Atl. 434, The facts of this case were: Complainant sued for specific performance of a contract dated September 27, 1911. The defense was a defect in title arising out of a contract between complainant and one Kish, dated September 11, 1911 and recorded October 17, 1911 which it was claimed was still enforceable. This court affirmed a decree for spe-

cific performance entered in the Court of Chancery, and speaking through Chief Justice Gummere, said:

> "By force of this statutory provision the agreement between the complainant and Kish became void on the 24th day of January, 1912, so far as subsequent purchasers were concerned, unless Kish on or before that day commenced suit as required by the Statute. This he did not then do, or at any time thereafter; and, so, although his agreement was in force at the time of the bill, it had become null and void as to the defendant before the filing of the latter's answer."

The effect of this statute is to afford in a Court of law a remedy far more adequate than any a court of equity can give. The vendee's lien in equity is restricted to the land under the contract:

> "He is not entitled to a lien upon any other land belonging to the vendor at the time of her death." Craft v. Latourette, 62 N. J. Eq. 206, 49 Atl. 711.

but at law a general judgment against the vendor will be a lien on all his land throughout the county or state if properly docketed, in addition to being a lien upon the land under contract from the date of the recording of the contract. Vendee may also, by levy, acquire a lien upon the personal property of the vendor, and satisfy his judgment out of that too.

This statute provides the proper relief in this suit which is solely for money damages resulting from the breach of a contract. It does not lead to any distortion of the doctrine of equitable conversion, or of any other principle. It does full and complete justice between vendor and vendee in the proper tribunal. It is thus clear that the vendee, seeking to recover the deposit and search and sur-

vey fees, not only has an adequate remedy at law, and therefore equity has no jurisdiction, but that the remedy at law is much more adequate than the remedy in equity to impress a lien for the deposit paid, if allowed.

The Statute is a complete answer to the second and third imaginary "serious consequences of the adoption of such a doctrine" that there is no equitable vendee's lien in New Jersey. (Brief of Complainant-Appellant, page 8). For neither the judgment nor the mortgage supposed to intervene between the contract and the judgment for the return of the deposit, can take priority if the vendee pursues his statutory remedy. As to the other imaginary "serious consequences": in case of bankruptcy—if the vendee or vendor goes into bankruptcy, whether equity or a statute give a lien, the Bankruptcy Court will not upset it, because all bona fide liens for an immediate present consideration, like the payment of a deposit upon the execution of a contract procured under the State law, are preserved.

> "Liens given or accepted in good faith and not in contemplation of or in fraud upon the provisions of this title, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by anything herein." (Sec. 67d, Bankruptcy Act).

It is clear, therefore, that no advantage exists in allowing a vendee a lien in equity over the statutory lien; but on the contrary, the only protection is under the Statute and not by an equitable lien.

The other cases put as being affected adversely by the decision in Clark v. Badgley, 105 N. J. Eq.,

534, have no connection with a vendee's lien. The whole law of a married woman's separate estate, and her contracts, has been changed by the emancipation statutes, so that the situations pictured, no longer arise. The case put of a constructive trust being imposed to follow misappropriated funds, stands squarely on equity's jurisdiction over fraud. The cases of mortgages paid by mistake and money paid out by a joint owner, both are supported by the equitable principle of subrogation.

> Bennett v. Finnegan, (not officially reported) 33 Atl. 401;
> Roll v. Everitt, 73 N. J. Eq. 697, 71 Atl. 263,

and have absolutely no connection with the allowance or denial of a vendee's lien in equity.

The complainant-appellant states, on page 8 of his brief, that the reason given by Mr. Justice Black in the Clark case, for denying a vendee a lien in equity, was that he would have a lien on the land as the result of a judgment at law. What Mr. Justice Black said was:

> "The fact that the Court of Chancery is asked to declare a lien on the land does not differentiate the case in a legal aspect from the cited case." (Clark v. Badgely, 105 N. J. Eq. 534).

Respondent understands this to mean that a case cannot be made equitable by merely praying for equitable relief, that a prayer for specific performance does not bring into equity a suit for failure to deliver any ordinary chattel; that the facts contained in the bill must show a case within the jurisdiction of equity, before a prayer for equitable relief has any meaning, and that the bill in the

Clark case, and the one in the instant case, show no facts, but the breach of a contract and the money damages resulting, to give the Court any jurisdiction to entertain a prayer for equitable relief.

Summary.

The decree under review is, as admitted by complainant-appellant, in strict accordance with the decisions of this Court in the Bailey, Grunt, and Clark cases. The doctrine of these cases is a denial of the existence of any equitable vendee's lien in New Jersey. Complainant-appellant contends that these cases should be overruled, as contrary to the doctrine of equitable conversion, and of vendor's lien. Respondents have, it is submitted, demonstrated that these cases are correct in principle, because the doctrine of vendee's lien in equity is inconsistent with the rule of equitable conversion, is unsupported by the existence of a vendor's lien, and has no equitable justification; and that the vendee's remedy at law is even more adequate than any equity can afford him.

It is respectfully submitted, therefore, that the decree under review should be affirmed.

Respectfully submitted,

PHILIP J. SCHOTLAND,
Solicitor for and of Counsel
with Defendants-Respondents.

New Jersey Court of Errors and Appeals

Between

JEROME RICHEIMER,
Complainant-Appellant,

and

LEONORA FISCHBEIN and LOUIS J. FISCHBEIN, her husband,
Defendants-Respondents.

On Appeal from Chancery.

REPLY BRIEF FOR COMPLAINANT-APPELLANT.

I.

(1) Respondents in their brief (p. 6) recognize that the English cases have consistently affirmed the vendee's right to an equitable lien for his deposit. May we not disregard their criticism that its original enunciation was merely a *dictum* of Sir Thomas Clarke, M. R., in *Burgess* v. *Wheate,* 1 Eldon 177, 211, 1 Black 123, 96 Eng. Rep. 67, 69 (1759), which was approved by Sugden, later Lord St. Leonard, in 1805 (*Sugden, Vendor & Purchasers* (1st Ed., p. 671); by Lord Eldon in 1808 (*Mackreth* v. *Symmons,* 15 Ves. Jr. 338, 33 Eng. Rep. 778, 784); by Lord Chief Baron Alexander in 1829 (*Oxendale* v. *Esdale,* 3 Yonge & J. 262, 148 Eng. Rep. 1177); by Sir James Parker, in 1852 (*Dinn* v. *Grant,* 5 DeG. & Sm. 450, 64 Eng. Rep. 1194); by Sir R. T. Kindersley in 1855 (*Wythe* v. *Lee,* 3 Drew. 395, 61 Eng. Rep. 954); by Lord Justice Turner and Lord Justice Knight

Bruce in 1862 (*Westmacott* v. *Robins,* 4 DeG. F. & J. 389, 45 Eng. Rep. 1234); by the House of Lords in 1864 speaking through Lord Chancellor Westbury, and Lord Cranworth (*Rose* v. *Watson,* 10 H. L. Cas. 672, 11 Eng. Rep. 1187, 1192); by Fry, J., in 1879 (*Mycock* v. *Beatson,* 13 Ch. Div. 384); by Sterling, J., in 1898 (*Levy* v. *Stoyden,* 1 Ch. 478), and by Cozens Hardy, J., in 1899 and 1902 (*Cornwall* v. *Heuson* (1899), 2 Ch. 710; *Whitehead Co.* v. *Watt* (1902), 1 Ch. 835), among others?

(2) Respondents in their brief (pp. 6-8) admit that the American authorities have consistently followed the view of the English cases. The innumerable cases in the American Courts recognizing the doctrine of vendees' liens are collected in a note to *Larson* v. *Metcalf,* 207 N. W. 382, in *45 A. L. R. 358,* and it is significant that respondents are unable to cite a single authority to the contrary.

(3) Finally respondents in their brief (pp. 8, 9) admit that until the *Bailey, Grunt* and *Clark* cases the Courts of New Jersey consistently followed the view of the English cases. Chancellor Vroom (in *Crawford* v. *Bertholf,* 1 N. J. Eq. 458, 469); Vice Chancellor Stevens (in *Craft* v. *Latourette,* 62 N. J. Eq. 206); Vice Chancellor Pitney (in *Cleveland* v. *Bergen Building and Improvement Co.,* 55 Atl. 117); Vice Chancellor Backes (in *Goldstein* v. *Ehrlich,* 96 N. J. Eq. 52); Vice Chancellor Berry (in *Isserman* v. *Welt,* 101 N. J. Eq. 634); and this Court in *Kohoot* v. *Gurbisz,* 101 N. J. Eq. 757, all recognized and reaffirmed the doctrine of the vendee's lien.

II.

Not only is all authority in favor of the vendee's lien but it is submitted that all reason calls for its recognition.

(1) The doctrine of equitable conversion (the reasons for the doctrine are too well accepted to warrant their discussion here) calls for the recognition of the vendee's lien. Admittedly the vendee, in our case, could have brought specific performance and would be considered the owner as of the date of the contract. The vendor could not set forth his default as a bar to the vendee's right to specific performance. If, because of the vendor's default the vendee declines the entire equitable estate as such, but wishes to retain a sufficient equity to secure the repayment of the purchase price, what doctrine of the law or what reason should prevent his so doing? It seems to come with bad grace for the vendor to say, "because of my default, you have no equities whatever."

(2) Secondly, the same reasons which called for the recognition of the grantor's and vendor's lien (the existence of which is well established in this state (*Graves* v. *Coutant,* 31 N. J. Eq. 763 (E. & A., 1875); *Morgan* v. *Dalrymple,* 60 N. J. Eq. 466 (E. & A., 1900); *Knickerbocker Trust Company* v. *Carteret Steel Company,* 79 N. J. Eq. 501 (Ch., 1911)) require a recognition of the doctrine of the vendee's lien. This is so ably stated in *Pomeroy, Equity Jurisprudence* (4th Ed., 1918), Sec. 1263, that we could scarcely hope to improve thereon.

> "The lien of the vendee under a contract for purchase of land for the purchase money paid by him before a conveyance is the exact counterpart of the grantor's—or, as it is

commonly called, the vendor's—lien, described in the last section but one. In the latter case, the legal title has been conveyed to the grantee, and yet the grantor retains an equitable lien upon the land as security for the purchase price agreed to be paid. In the former case, the legal title remains in the vendor, who has simply agreed to convey, while the vendee, although having as yet acquired no legal interest in the land by virtue of the contract, does obtain a lien upon it as security for the purchase money he has paid, and for the performance of the vendor's obligation to convey. In England, therefore, and in the American states where the grantor's lien has been adopted, the vendee's lien upon the lands contracted to be sold as a security for so much of the purchase price as he has paid prior to a conveyance, and for the performance by the vendor of his obligation, exists to the same extent against the same classes of persons, and governed by the same rules, as the corresponding lien of the grantor. The lien only arises, of course, when the vendor is in some default for not completing the contract according to its terms, and the vendee is not in default so as to prevent him from recovering the purchase money paid."

(3) Respondents in their brief suggest that the doctrine of vendee's lien must be based on the desire of the Court to do justice. We have no doubt that along with the considerations already discussed the courts have recognized that all considerations of fairness demand that a vendee be given a lien to secure the repayment of his purchase price in the event of the vendor's default.

Respondents then contend that the recording statutes of this state have given the vendee an adequate remedy, and, accordingly, the doctrine of the vendee's lien does not exist. Even if our law courts were now capable of giving a remedy which is equivalent in effect to a vendee's lien,

that would not remove the jurisdiction of equity in such cases.

> *Pomeroy, Equity Jurisprudence* (4th Ed., 1918), Sec. 276 *et seq.*;
> *Sweeney* v. *Williams,* 36 N. J. Eq. 627 (E. & A., 1883).

An understanding of our recording acts, referred to in respondent's brief, necessarily displays that a judgment at law does not have the effect of an equitable lien.

It is everywhere conceded that the sole purpose of recording is to charge subsequent persons in interest with notice (*Pomeroy Equity Jurisprudence,* §649; *Glorieux* v. *Lightpipe,* 88 N. J. L. 199, 96 Atl. 194 (E. & A., 1915)), and serves solely to determine the priority of estates, legal and equitable, in land. *Pomeroy Equity Jurisprudence,* §681.

Under our recording act a vendee may record his contract and thereby preserve whatever equities he has in the land. Under Section *116* of our conveyancing act referred to on page 15 of respondent's brief as, *P. L. 1907 C200,* the effect of recording is limited so as to protect the vendee's equities only if he bring suit within three months. But neither *Section 116* nor any other section of our recording statute attempts to *create* equities for the vendee; they merely seek to *preserve* his equities if the act is complied with, and *extinguish* them if not complied with. This was recognized in *Storch* v. *Tepperman,* 99 N. J. Eq. 48, 52 (Ch., 1925), where Vice Chancellor Backes said:

> "Section 116 of the act (Comp. Stat., p. 1573) provides for the voiding of recorded agreement for the sale of land as to subsequent purchasers for value, unless the vendee sues for specific performance within three months, and does not apply to unrecorded

> agreements. That provision is a limitation upon the right of action against subsequent purchasers with or without notice by vendees who choose to *protect their equities* by recording their contract. *Gerba* v. *Mitruske,* 84 N. J. Eq. 141."

If, as respondents contend, the vendee who seeks to recover his deposit has no equity the recording act certainly gives him none and he will be left to his remedy at law. In a law action his lien will attach as of the date of the entry of judgment, *3 C. S., p. 2956, Sec. 2.*

> "That no judgment shall affect or bind any lands, tenements, hereditaments or real estate but from the time of the actual entry of such judgment on the minutes or records of the court."

In view of the unequivocal language of the statute and in view of the obvious and well recognized purpose of our recording act to either extinguish or preserve equities but never to create them it is difficult to justify respondent's conclusion that a vendee who sues at law may secure a lien as of the date of the contract.

And it is difficult to see how the serious consequences we mentioned in our original brief are avoided by a judgment at law. Under the express terms of the statute, above mentioned, the judgment is a lien only from the date of its entry.

Although under the recording act subsequent purchasers might have notice of a prior equity or legal estate, if the vendee has no legal or equitable estate, as respondent contends, of what materiality is notice, even actual notice, of the contract. Notice of a contract giving the vendee only a general claim at law is no different from notice to a purchaser that the vendor has general creditors. We assume respondents will concede, that if these

general creditors subsequently obtain judgments they are nevertheless subsequent to the intervening purchaser. Under respondent's contention that the vendee has no equity in the land, we fail to see how he can be differentiated from the general creditors of whom the purchaser has actual notice.

It is significant that although in most American jurisdictions and in England there are recording acts and in most jurisdictions judgments are liens at law, in no adjudicated case is the contention made that the recording acts and acts making judgments liens at law replace the doctrine of the vendee's lien in equity.

Although, under the express terms of our statute (*2 C. S., p. 2956, Sec. 2*) a judgment at law is a lien only from the date of the entry respondents nevertheless contend that intervening persons do not prevail. They do not, however, advise us as to what proceeding will be necessary to render the judgment which on the record is subsequent, prior in effect. Surely there is no procedure at law for that purpose; will the holder of the judgment be required to seek equitable relief after all?

It is respectfully submitted that in view of the fact that the doctrine of the vendee's lien has been (1) firmly embedded as one of the heads of Chancery jurisdiction in England since 1759; (2) has been adopted in every state in the United States that has had occasion to pass upon the question; (3) has been recognized in New Jersey since 1831; and (4) is supported by all reason it should be reaffirmed by this Court and the decree advised by the Vice Chancellor reversed.

Respectfully submitted,

Arthur T. Vanderbilt,
Solicitor for and of Counsel with
Complainant-Appellant.