(Filed August 29, 1944.)

In Chancery of New Jersey.

Between:

ALBERT F. REITEMEYER AND JULIA A. REITEMEYER, HIS WIFE,
Complainants,

AND

NICHOLAS MARCALUS AND MILDRED M. MARCALUS, HIS WIFE,
Defendants.

BILL OF COMPLAINT.

To the Honorable Luther A. Campbell, Chancellor of the State of New Jersey:

Complainants, Albert F. Reitemeyer and Julia A. Reitemeyer, his wife, of the City of Elizabeth, County of Union, and State of New Jersey, respectfully show that:

(1) On and before the 26th day of May, 1944, the defendant, Nicholas Marcalus, was the owner in fee simple of all that certain lot, tract and parcel of land and premises, situated, lying and being in the City of Elizabeth, County of Union, and State of New Jersey, described as follows:

> Beginning at a point in the easterly line of Riverside Drive as laid out on a map of Section 1 Riverside Park made by Grassman & Kreh, Surveyors, May 10, 1926, said point being distant two hundred ninety-five and eighty-three one-hundredths (295.83) feet northerly along the said easterly line of Riverside Drive from its intersection with the northerly line of Parker Road as laid out on aforesaid map; thence easterly and at right angles to Riverside Drive one hundred thirty (130) feet to a point; thence northerly and parallel with Riverside Drive fifty (50) feet to a point;

thence westerly and parallel with the first course one hundred thirty (130) feet to the easterly line of Riverside Drive; thence southerly along the said line of Riverside Drive fifty (50) feet to the point or place of Beginning.

Said premises being also known as Lot Eight (8) on Block A of the aforesaid map.

(2) The said Nicholas Marcalus and Mildred M. Marcalus, his wife, being desirous and willing of disposing and selling of said lands and premises and the complainants being desirous, willing and able to purchase said premises did together on said 26th day of May, 1944 enter into a contract in writing in and by which the complainants agreed to purchase and the defendants, Nicholas Marcalus and Mildred M. Marcalus, his wife, did agree to sell to complainants the above described lands and premises by full covenant warranty deed, free of all encumbrances, except restrictive covenants of record and the present tenancy of said premises, for the sum of Nine Thousand Four Hundred and Fifty Dollars ($9,450.00). A full, true and complete copy of said contract being hereto annexed and made a part hereof as though fully repeated herein and being marked exhibit "A".

(3) That complainants have paid or caused to be paid to the defendants on account of said purchase price the sum of Nineteen Hundred Dollars ($1,900.00) and that at the time fixed for closing title were ready, willing and able to pay the balance of said purchase price upon defendants performing and carrying out said contract, exhibit "A", upon their part to be performed.

(4) Defendants have failed and refused to execute and deliver to complainants a full covenant warranty deed for said premises, free of all encumbrances except subject to present tenancy and subject to restrictive covenants of record affecting said premises.

(5) Notwithstanding the provisions of said contract it was mutually agreed between the attorneys of complainants and defendants that title to said premises should be closed at the office of Samuel Koestler, Elizabeth, New Jersey, on Monday, July 3, 1944 at 11 o'clock in the forenoon of said day. At that time complainants were ready, willing and able to consummate said transaction, pay the balance of the purchase price and accept a deed for said premises in accordance with the terms of said contract.

(6) Search and examination of the title to said premises above described disclosed that under certain proceedings brought in the United States District Court for the District of New Jersey, known as Civil Action File Number 2826, one, Automatic Paper Machinery Company, Inc., on the 7th day of February, 1944 recovered a judgment against Marcalus Manufacturing Company, Inc. and the defendant, Nicholas Marcalus, for costs of suit, costs of an accounting and other sums of money then undetermined but which complainants are informed will undoubtedly run into a very substantial sum.

(7) Notwithstanding that the Statute law of the United States of America and the State of New Jersey provide a method by which the above described premises may be released and relieved from the lien and cloud of said judgment, the said defendants have absolutely refused to take any proceedings or to perform any act to relieve said premises from the lien and cloud of said judgment or to execute and deliver a warranty deed of conveyance in conformity with said contract, exhibit "A".

(8) Complainants are now and at all times have been ready, willing and able on their part to perform and carry out said contract and to pay the full consideration price therein mentioned and now tender themselves ready and willing so to do.

(9) That the judgment mentioned in paragraph 6 hereof is a lien and cloud as against the title to said lands and premises and notwithstanding demand therefor the defendants refuse to discharge said lands from the lien and cloud of said judgment and have also unequivocally refused to execute and deliver a deed of conveyance to complainants for said land in accordance with the terms of said contract, but on the contrary, have been attempting to make sale of said lands and premises to others in disregard of complainants' rights under said contract, exhibit "A".

(10) Complainants are without adequate relief in the Courts of law and can only obtain full and complete relief in this Honorable Court. Complainants, therefore, pray:

(1) That Nicholas Marcalus and Mildred M. Marcalus, his wife, who are the defendants to this suit, may answer this bill of complaint and each and every allegation thereof.

(2) That this Court may decree that said defendants specifically perform said contract, exhibit "A" and convey by full covenant warranty deed to complainants the lands and premises mentioned and described in said contract, free and clear of all encumbrances, but subject to the rights of the present tenant and also subject to restrictive covenants of record.

(3) That the moneys paid by complainants may be decreed as a lien against said land.

(4) That a writ of subpœna may issue commanding that the defendants answer this bill of complaint and to abide by such decree that this Court may make in the premises.

SAMUEL KOESTLER,
Solicitor for and of Counsel with Complainants.

EXHIBIT "A".

THIS AGREEMENT, made this 26th day of May, 1944, Between NICHOLAS MARCALUS and MILDRED M. MARCALUS, his wife, of the City of Englewood, in the County of Bergen, and State of New Jersey, hereinafter described as the seller, and ALBERT F. REITEMEYER and JULIA A. REITEMEYER, his wife, of the City of Elizabeth, in the County of Union, and State of New Jersey, hereinafter described as the purchaser.

WITNESSETH, That the seller agrees to sell and convey, and the purchaser agrees to purchase all that lot of land, with the buildings and improvements thereon, situate in the City of Elizabeth, County of Union, State of New Jersey, described as follows:

Beginning at a point in the easterly line of Riverside Drive as laid out on a map of Section 1 Riverside Park made by Grassman & Kreh, Surveyors, May 10, 1926, said point being distant two hundred ninety-five and eighty-three one-hundredths (295.83) feet northerly along the said easterly line of Riverside Drive from its intersection with the northerly line of Parker Road as laid out on aforesaid map; thence easterly and at right angles to Riverside Drive one hundred thirty (130) feet to a point; thence northerly and parallel with Riverside Drive fifty (50) feet to a point; thence westerly and parallel with the first course one hundred thirty (130) feet to the easterly line of Riverside Drive; thence southerly along the said line of Riverside Drive fifty (50) feet to the point or place of Beginning.

Said premises being also known as Lot Eight (8) on Block A of the aforesaid map.

Being the same premises conveyed to said Nicholas Marcalus by Harry J. Sievers and Frances Sievers, his wife, by deed dated September 14, 1933, and recorded October 3, 1933, in the Register's Office

of the County of Union in Book 1276 of Deeds, on page 251 &c.

Said premises being also known and designated as 527 Riverside Drive, Elizabeth, New Jersey.

Subject to the present tenancy.

Subject to restrictive covenants of record affecting said premises, if any.

The price is Nine Thousand Four Hundred Fifty (9,450.00) Dollars Payable as follows:

Five Hundred (500.00) Dollars on the Signing of this contract, the receipt of which is hereby acknowledged.

Eight Thousand Nine Hundred Fifty (8,950.00) Dollars in cash on the delivery of the deed, as hereinafter provided.

All fixtures and personal property, such as shades, chandeliers, electrical fixtures, gas ranges, etc., appurtenant to or used in connection with said premises are included in this sale.

This sale covers all right, title and interest of the seller of, in and to any land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining said premises, to the center line thereof, and all right, title and interest of seller in and to any award made or to be made in lieu thereof; and in any award for damage to said premises by reason of change of grade of any street; and the seller will execute and deliver to the purchaser, on closing of title, or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of any such award.

Said premises are sold subject to the provisions of Zoning Ordinances or restrictions and regulations affecting the construction and use of buildings, adopted or imposed by the State of New Jersey or municipality thereof affecting said premises.

The deed shall be a full covenant warranty deed in the proper form, and shall be duly executed and

acknowledged by the seller, at the seller's expense, to convey to the purchaser, or the purchaser's assigns, the absolute fee of the above premises, free of all encumbrances, except as above stated.

The deed shall be delivered and title passed at the office of Wall, Haight, Carey & Hartpence, 15 Exchange Place, Jersey City, New Jersey, on or before July 1, 1944 at 10 o'clock forenoon.

Taxes, rents, water rents, insurance premiums and interest on mortgages if any, are to be apportioned.

If at the time of the delivery of the deed the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments, 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 upon the delivery of the deed.

If there be a water meter on the premises, the seller shall furnish a reading to a date not more than thirty days prior to the time herein set for closing title and the unfixed meter charge for intervening time shall be apportioned on the basis of such last reading.

All notes or notices of violation of law or municipal ordinances, orders or requirements noted in or issued by any State or Municipal Department, Board, Commission or other authority, having jurisdiction against or affecting the premises at the date hereof, shall be complied with by the seller and the premises shall be conveyed free of same, and this provision of this contract shall survive delivery of the deed hereunder.

The risk of loss or damage to said premises by fire, until the delivery of the deed, is assumed by the seller.

The purchaser is to pay all assessments levied and imposed after the date hereof.

The Stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

The purchaser binds himself to pay the consideration in the manner aforesaid.

The seller agrees that James Rosensohn, Inc. brought about this sale and agrees to pay 5 per cent. of the purchase price the broker's commission in full therefor.

WITNESS, the hands and seals of the above parties:
In presence of:

Nicholas Marcalus (Seal)
Nicholas Marcalus

A. G. Griffiths

Mildred N. Marcalus (Seal)
Mildred M. Marcalus

A. G. Griffiths

Albert F. Reitemeyer (Seal)
Albert F. Reitemeyer
Julia A. Reitemeyer (Seal)
Julia A. Reitemeyer

R. E. Scott

State of New Jersey }
County } ss.

BE IT REMEMBERED, That on this 26 day of May, in the year of our Lord One Thousand Nine Hundred and Forty-four, before me, the subscriber,

personally appeared Albert F. Reitemeyer and Julia A. Reitemeyer, his wife, who, I am satisfied are two of the persons named in and who executed the foregoing instrument; and I having first made known to them the contents thereof they did thereupon acknowledge that they signed, sealed and delivered the

same as their voluntary act and deed, for the uses and purposes therein expressed.

R. E. Scott
A Notary Public of New Jersey
(Seal)

REQUIREMENTS ON CLOSING TITLES.

Insurance policies and duplicates; Tax and Water Receipts, Leases, Deeds or Agreements relating to premises; Interest receipts and receipts for principal payments on mortgages should be produced.

If the grantor is married, both parties must join in the execution of the deed.

The Purchaser should have cash or a certified check drawn to his order.

(Filed September 25, 1944.)

In Chancery of New Jersey.

148/182.

On Bill, etc.

Between

Albert F. Reitemeyer and Julia A. Reitemeyer, His Wife,

Complainants,

and

Nicholas Marcalus and Mildred M. Marcalus, His Wife,

Defendants.

ANSWER AND COUNTER-CLAIM.

The Answer of the defendants Nicholas Marcalus and Mildred M. Marcalus, his wife, and the Counter-Claim of said defendants against the complainants, Albert F. Reitemeyer and Julia A. Reitemeyer, his wife.

These defendants Nicholas Marcalus and Mildred M. Marcalus, his wife, answering the bill of complaint, say that:

1. Paragraphs 1 and 2 are admitted.

2. These defendants have no knowledge or information sufficient to form a belief as to the statements in Paragraph 3, except that they admit that the complainants have paid or caused to be paid to them on account of the purchase price of said lands and premises the sum of $1,900.

3. Paragraph 4 is denied.

4. The first sentence of paragraph 5, commencing with the word "Notwithstanding", and ending with the word "day" is admitted. The remainder of said paragraph is denied.

5. Paragraphs 6, 7, 8, 9 and 10 are denied.

6. Further answering the Bill of Complaint these defendants say that the judgment referred to in Paragraph 6 of the Bill of Complaint was an interlocutory and not a final judgment; that no costs of suit or costs of accounting have been taxed in the suit in which said interlocutory judgment was rendered, and no accounting has been had therein, and that said interlocutory judgment is not a lien against said lands and premises or a cloud on the title thereto.

7. On July 3, 1944, and at all times thereafter prior to the commencement of this suit, these defendants were ready and willing, and offered, to perform said contract on their part, and to deliver a deed to the complainants in accordance with the terms of said contract, but the defendants at all times refused to accept said deed, and to perform their part of said contract.

By way of Counter-Claim against the complainants Albert F. Reitemeyer and Julia A. Reitemeyer, his wife, the defendants Nicholas Marcalus and Mildred M. Marcalus say:

1. On and prior to May 26, 1944, and at all times thereafter, the defendant Nicholas Marcalus was the owner in fee simple of the land and premises described in paragraph 1 of the Bill of Complaint.

2. On or about May 26, 1944, the defendants and the complainants entered into the contract referred to in paragraph 2 of the Bill of Complaint, a copy of which is annexed to said bill and marked Exhibit "A".

3. On July 3, 1944, and at all times thereafter prior to the commencement of this suit, these defendants were ready and willing and offered to perform said contract on their part and to deliver a deed to complainants in accordance with the terms of said contract, but the defendants, in violation and breach of said contract, at all times refused to accept said deed and to perform their part of said contract.

4. By reason of the aforesaid breach of said contract by the complainants, and their refusal to comply with its terms, the defendants have elected to deem said contract null and void, and at an end.

5. By reason of the breach of said contract by complainants and their failure and refusal to take title to said lands and premises, these defendants have sustained damages in divers respects and amounts, viz.,

a. At the time the said contract was entered into, said premises were rented to tenants of defendants under a lease, and defendants, at the request of the complainants, and in reliance upon their agreement to perform said contract, terminated said lease and caused said tenants to vacate said premises, and the defendants have been unable, and will continue to be unable, to lease said premises to other tenants, and have lost and will continue to lose rentals from said premises during the pendency of this suit.

b. The defendants have had opportunities to sell the said lands and premises to other parties since the complainants refused to perform said contract, but they have been and are unable to sell said lands and premises, and will continue to be unable to sell the same, by reason of the pendency of this suit, and during its continuance, and defendants have sustained and will hereafter sustain loss in profits and in sale value of said premises.

c. Prior to the making of said contract between the defendants and the plaintiffs, the defendants employ a real estate broker to find a purchaser for said premises, to wit, James Rosensohn, Inc., and said broker was instrumental in procuring a purchaser for said premises, to wit, the complainants. Claim has been made by said broker against these defendants for a commission for procuring the complainants as purchasers, and if said claim is established, defendants will be obliged to pay said commission, notwithstand-

ing the breach of the contract of sale by complainants, and their failure to complete their purchase.

d. By reason of the fact that said premises have been, since the breach of said contract by the complainants, without tenants or occupants the cost to the defendants of maintenance of the premises has been greatly increased, and will continue at such increased cost, during the pendency of this suit, and until tenants can be secured and said premises shall be occupied.

These defendants therefore pray:

1. That the bill of complaint be dismissed with costs.

2. That this court decree that said contract dated May 26, 1944, between the defendants Nicholas Marcalus and Mildred M. Marcalus, his wife, therein described as the sellers, and the complainants Albert F. Reitemeyer and Julia A. Reitemeyer, his wife, therein described as the purchasers, is null and void, and at an end, by reason of the breach thereof by the complainants, and the election by the defendants to terminate said contract.

3. That this court decree that because of the breach of said contract by complainants, the complainants have forfeited the sum of $1,900 paid by the complainants to the defendants on the signing of said contract.

4. That this court decree that the complainants pay to the defendants the sum of $5,000 as damages.

5. That the defendants have such other and further relief as the court may deem just.

WALL, HAIGHT, CAREY & HARTPENCE,
By JOHN A. HARTPENCE,
Solicitors for and of Counsel
With Defendants.

(Sgd.) WILLIAM W. SHAW,
Of Counsel.

(Filed September 26, 1944.)

IN CHANCERY OF NEW JERSEY.

148/182

On Bill, etc.

Between

Albert F. Reitemeyer and Julia A. Reitemeyer, His Wife,
Complainants,

—and—

Nicholas Marcalus and Mildred M. Marcalus, His Wife,
Defendants.

REPLICATION AND ANSWER TO COUNTERCLAIM.

The complainants join issue on the answer of the defendants.

As to the counterclaim contained in said answer, complainants say:

1. They admit the allegations of paragraphs 1 and 2 thereof.

2. They deny the allegations of paragraph 3 and reiterate that said defendants failed and refused to clear said title of the lien, cloud and judgment set forth in paragraph 6 of their bill of complaint.

3. As to paragraph 4 of said counterclaim, complainants say that they have always been ready and willing to perform said contract and have never refused to comply with its terms, but that the entire fault lies with the arbitrary refusal of the defendants as alleged in paragraphs 6 and 7 of complainants' bill.

4. As to paragraph 5 of said counterclaim, these complainants deny the same and in substantiation of

said denial allege that they offered to enter into possession of the premises in question as tenants thereof under an arrangement that they would continue as tenants until such time as the judgment mentioned in paragraph 6 of their bill of complaint was either set aside, determined or settled and that the time for the performance of the contract of sale should be extended until the defendants could convey said property free, clear and discharged of the lien and cloud of said judgment, but that the defendants were unwilling to permit complainants to enter into possession of said premises unless complainants would surrender their rights under the aforesaid contract of sale. Complainants are as alleged in the bill of complaint, ready, willing and able to accept title to said premises when they can receive a deed which will not subject them or their title to litigation or doubt or any cloud or lien.

Complainants pray that said counterclaim may be dismissed and that the defendants may be decreed to perform the contract of sale and to convey title free and clear of doubt, cloud or lien or encumbrance as expressly provided in said contract of sale.

The complainants, as defendants in said counterclaim, reserve the right to move at or before the final hearing to dismiss the same and the various parts thereof on the ground that damages sought thereunder by said counterclaim are not recoverable in equity.

And these complainants as defendants to said counterclaim will ever pray, etc.

KOESTLER & KOESTLER,
Solicitors for and of Counsel With Complainants.

In Chancery of New Jersey.

148/182

On Bill, etc.

Between

Albert F. Reitemeyer and Julia A. Reitemeyer, His Wife,
Complainants,

—and—

Nicholas Marcalus and Mildred M. Marcalus, His Wife,
Defendants.

NOTE JOINING ISSUE ON COUNTERCLAIM.

These defendants Nicholas Marcalus and Mildred M. Marcalus, his wife, join issue on the answer of the complainants Albert F. Reitemeyer and Julia A. Reitemeyer, his wife, to the counterclaim of these defendants.

Wall, Haight, Carey & Hartpence,
Solicitors for Defendants.

(Filed October 10, 1944.)

IN CHANCERY OF NEW JERSEY.

148/182

On Bill, etc.

Between

Albert F. Reitemeyer and Julia A. Reitemeyer, His Wife,
Complainants,

—and—

Nicholas Marcalus and Mildred M. Marcalus, His Wife,
Defendants.

ORDER OF REFERENCE TO A VICE CHANCELLOR.

Upon the consents hereunder written, it is on this 10th day of October, 1944, ORDERED, that the above entitled cause be referred to Alfred A. Stein, one of the Vice Chancellors, to hear the same for the Chancellor and to advise what order or decree should be made therein.

Consent is hereby given to the making and entry of the foregoing order.

KOESTLER & KOESTLER,
Solicitors for Complainants.
WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for Defendants.

(Filed January 9, 1945.)

IN CHANCERY OF NEW JERSEY.

On Bill.

Docket 148, page 182.

Between

Albert F. Reitemeyer and Julia A. Reitemeyer, His Wife,

Complainants,

—and—

Nicholas Marcalus and Mildred M. Marcalus, His Wife,

Defendants.

MEMORANDUM.

(Not for print in any Report.)

(Decided January 8, 1945)

Appearances:

Messrs. KOESTLER & KOESTLER (MR. SAMUEL KOESTLER appearing), for complainants.

Messrs. WALL, HAIGHT, CAREY & HARTPENCE (MR. JOHN A. HARTPENCE appearing), for defendants.

STEIN, V. C.

This is a bill for specific performance. Nicholas Marcalus and Mildred M. Marcalus, his wife, the defendants herein, on May 26, 1944, entered into contract in writing with Albert A. Reitemeyer and Julia A. Reitemeyer, his wife, to convey premises known as 527 Riverside Drive, Elizabeth, upon which is erected a dwelling. The contract provides for the payment of the purchase price of $9450.00 as follows: $500.00 on the signing of the contract and the balance of $8950.00

in cash on the delivery of a warranty deed to be delivered on July 1, 1944 "free of all encumbrances, except as above stated." The exception mentioned is that the property is to be conveyed subject to the present tenancy and of restrictive covenants of record.

At the time the contract was entered into the property was to the knowledge of the defendant encumbered by two mortgages and a judgment which was entered on February 8, 1944, at the suit of Automatic Paper Machinery Company, Inc., against Marcalus Manufacturing Company, Inc., and Nicholas Marcalus. This judgment awards the costs of the litigation including the costs of an accounting ordered thereunder "of all claims for profits and damages arising out of all infringements * * *" of a certain patent of the plaintiff and provides for a reference to a Special Master to take and state an account of the defendant's profits and to assess the plaintiff's damages.

When the contract was entered into Marcalus knew that Reitemeyer was obliged to move from the home in which he was then living and that he was purchasing the premises in question as a home.

Correspondence in evidence between counsel for the complainants and counsel for the defendants relates to the question of whether or not the judgment is final and a lien upon the premises, the defendants, through their counsel, asserting that the judgment is not a lien, and insisting that the complainants take the property "with the judgment as it stands." In one of such letters, the solicitors for the defendants say, "He (Marcalus) is not willing to incur the expense of legal proceedings to remove the judgment from the property as he claims it is not a lien."

The judgment in question is final and a lien upon the premises. "* * * And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay

a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed. * * *'' *Forgay et al. v. Conrad,* 12 L. ed. 404. ''A decree which determines the principal matter in controversy between the parties is final although it directs certain accounts to be taken.'' *Dean v. Nelson,* 19 L. ed. 94, 74 U. S. 94.

An appeal taken by Marcalus from the judgment in question is presently pending. Yet, the situation is not one where the defendant cannot comply with his contract of sale by procuring the release of the lien of the judgment upon application for that purpose to the court in which the judgment was rendered. Such procedure is open to him, and he is possessed of financial ability to deposit with the Court such amount as shall be by the Court ordered in order to procure an order releasing the premises from the judgment lien, for it appears in the testimony that he is worth at least $100,000.00.

§ *814, U. S. C. A.,* provides: ''Judgments and decrees rendered in a district court, within any State, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease, by law, to be liens thereon.''

Our statute, *R. S. 2:27-374* provides: ''If appellant, in an appeal from a judgment of the Supreme Court, a circuit court or court of common pleas, deposits with the clerk of the court in which the judgment appealed from was rendered such an amount as shall be deemed by the court in which the judgment was rendered, or a justice or judge thereof, to be sufficient, as security for the payment of such amount as

may finally be determined and ascertained to be due in the action, the court or a justice or judge thereof, may make an order discharging the real estate of appellant from the lien of the judgment appealed from.

"The amount so deposited shall be subject to the lien of the judgment appealed from and of any subsequent judgment recovered in the action, and shall be retained by the clerk until the final determination of the action in which the judgment appealed from was rendered."

Complainants, it appears from the testimony, have caused to be paid on account of the purchase price of the premises not $500.00 as the contract provides, but the sum of $1900.00, and at the time fixed for closing title made tender and was ready, willing and able to consummate the sale according to the terms of the agreement. The insistence of the defendants that complainants take the property "with the judgment as it stands", in the face of his agreement to convey the premises by "a full covenant warranty deed * * * free of all encumbrances", is unwarranted and inequitable.

It is not a violent presumption to say that the Court in which the judgment was rendered will not require an amount to be deposited much in excess, if anything, of the amount of the equity of the defendant in the premises contracted to be sold, since the judgment-creditor would not realize out of the particular premises in satisfaction of the judgment anything in excess of such equity.

The complainants are entitled to a decree for the specific performance of the contract. The defendants must procure the release of the lien of the judgment. *Millard v. Merwin,* 23 N. J. Eq. 419.

The defendants' counterclaim praying forfeiture of the sum of $1900.00 paid by complainants and damages for breach of contract will be dismissed.

(Filed January 15, 1945.)

IN CHANCERY OF NEW JERSEY.

148/182.

On Bill, etc.

Between

Albert F. Reitemeyer and Julia A. Reitemeyer, His Wife,
Complainants,

and

Nicholas Marcalus and Mildred M. Marcalus, His Wife,
Defendants.

FINAL DECREE.

This cause coming on before the Court upon final hearing in the presence of Koestler & Koestler, solicitors for and of counsel with the complainants, and Messrs. Wall, Haight, Carey & Hartpence, solicitors for and of counsel with defendants, upon the pleadings and proofs taken in open Court, and the Court having considered of said pleadings, proofs and arguments of said respective solicitors, and it appearing therefrom that the complainants have not breached the terms and agreements contained in the contract between said parties bearing date the 26th day of May, 1944, and that said complainants have been at all times ready, willing and able to carry out and perform said contract upon their part, and that the defendants have failed to perform said contract in accordance with its terms and conditions; and it further appearing that the complainants are entitled to have said defendants specifically perform and carry out said contract by con-

veyance of the real estate therein mentioned, free and clear of all encumbrances excepting subject to the present tenancy (if any) and also subject to restrictive covenants of record affecting said premises (if any):

It is thereupon on this 15th day of January, 1945, on motion of Koestler & Koestler, solicitors for and of counsel with complainants, ORDERED, ADJUDGED and DECREED as follows:

(1) That the complainants have not breached on their part said contract of May 26, 1944 and have been at all times ready, willing and able upon their part to perform and carry out said agreement.

(2) That said defendants do within 20 days from the date of this decree specifically perform and carry out said contract of May 26, 1944 by executing and delivering to complainants a full covenant warranty deed for the lands and premises mentioned and described in said contract of May 26, 1944 and also described in complainant's bill, free and clear of all encumbrances and in particular free and clear of a mortgage lien upon said premises held by the Prudential Insurance Company of America, recorded in book 873 of mortgages for Union County on pages 508 etc., also free and clear of a mortgage made by defendants to Harry J. Sievers, recorded in book 1105 of mortgages for Union County on pages 261, etc., and also free and discharged of the lien or cloud of a certain judgment or order entered in the United States District Court for the District of New Jersey on the 7th day of February, 1944 in Civil Action File #2826 pending therein, wherein the Automatic Paper Machinery Company, Inc., is plaintiff and the said Nicholas Marcalus and another are defendants, being subject to the present tenancy (if any) and also subject to restrictive covenants of record affecting said premises (if any).

(3) That upon delivery of said deed of conveyance free and clear of encumbrances as aforesaid, said com-

plainants do pay to said defendants the unpaid balance of the purchase price of said premises as provided by said contract to wit, the sum of $7,550.00 plus or minus adjustments for taxes, rents, water rents and insurance premiums as provided in said contract.

(4) That the counterclaim contained in the answer of said defendants as against complainants be dismissed.

(5) That the defendants do pay to the complainants or their solicitor the costs of this suit to be taxed including a counsel fee of $300.

Respectfully advised.

ALFRED A. STEIN,
V. C.

(Filed January 24, 1945.)

In Chancery of New Jersey.

148/182.

On Bill, etc.

Between

Albert F. Reitemeyer and Julia A. Reitemeyer, His Wife,

Complainants,

and

Nicholas Marcalus and Mildred M. Marcalus, His Wife,

Defendants.

NOTICE OF APPEAL.

The defendants, Nicholas Marcalus and Mildred M. Marcalus, his wife, hereby appeal from the final decree made in the above entitled cause on January 15, 1945, by the Chancellor, on the advice of Vice Chancellor Alfred A. Stein, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: January 19, 1945.

Wall, Haight, Carey & Hartpence,
Solicitors for and of Counsel With Defendants Nicholas Marcalus and Mildred M. Marcalus, His Wife.

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

WILLIAM W. SHAW,
Of Counsel With Defendants Nicholas Marcalus and Mildred M. Marcalus, His Wife.

Service of a copy of within Notice of Appeal acknowledged this 22d day of January, 1945.

KOESTLER & KOESTLER,
Solicitors for Albert F. Reitemeyer and Julia A. Reitemeyer, Complainants.

(Filed February 10, 1945.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

On Appeal from the Court of Chancery.

Albert F. Reitemeyer and Julia A. Reitemeyer, His Wife,
Complainants-Respondents,

v.

Nicholas Marcalus and Mildred M. Marcalus, His Wife,
Defendants-Appellants.

PETITION OF APPEAL.

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

The petition of Nicholas Marcalus and Mildred M. Marcalus, his wife, the appellants in the above entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Luther A. Campbell, Chancellor of the State of New Jersey, bearing date January 15, 1945, in a certain cause in said Court of Chancery, wherein the said Albert F. Reitemeyer and Julia A. Reitemeyer, his wife, were complainants, and the said Nicholas Marcalus and Mildred M. Marcalus, his wife, were defendants, whereby it is adjudged:

(1) That the complainants have not breached on their part the contract of May 26, 1944, and have been at all times ready, willing and able upon their part to perform and carry out said agreement;

(2) That the defendants specifically perform and carry out said contract of May 26, 1944, by executing and delivering to complainants a deed for the lands and premises mentioned and described in said contract, free and clear of all incumbrances, except the present tenancy (if any), and restrictive covenants of record affecting said premises (if any), and in particular free and discharged of the alleged lien or cloud of a certain judgment or order entered in the United States District Court for the District of New Jersey, on February 7, 1944, in Civil Action File #2826 pending therein, wherein the Automatic Paper Machinery Company, Inc., is plaintiff, and the said Nicholas Marcalus and another are defendants.

(3) That upon delivery of said deed of conveyance, free and clear of encumbrances as aforesaid, said complainants pay to said defendants the unpaid balance of the purchase price of said premises as provided by said contract, to wit, the sum of $7,550, plus or minus certain adjustments as provided in said contract.

(4) That the counterclaim contained in the answer of the defendants as against complainants be dismissed.

(5) That the defendants pay to the complainants or their solicitor the costs of the suit to be taxed, including a counsel fee of $300.

2. And petitioners appeal from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in the following respects, viz.:

(1) Upon the pleadings herein, and the evidence and testimony submitted and taken in open court upon the final hearing, the court should have found and decreed that the complainants had breached on their part said contract of May 26, 1944, and had unlawfully refused and failed to perform same, and to accept a deed from defendants in accordance with said contract, and

that the defendants, at the time stated in the contract, or at the adjourned date for performance thereof, and at all times thereafter prior to the commencement of this suit, were ready and willing, and offered, to perform said contract on their part, and to deliver a deed to the complainants, in accordance with the terms of said contract, which deed complainants refused to accept.

(2) Upon the pleadings herein, and the evidence and testimony submitted and taken in open court upon the final hearing, the Court should have found and decreed that the said judgment or order entered in the United States District Court for the District of New Jersey, on February 7, 1944, in an action wherein the Automatic Paper Machinery Company, Inc., is plaintiff, and Nicholas Marcalus and another are defendants, is not a lien on the lands and premises mentioned and described in the bill of complaint, or a cloud on the title thereto.

(3) The court erred in ordering the defendants by its decree to specifically perform and carry out said contract of May 26, 1944, by executing and delivering to the complainants a deed for said lands and premises mentioned and described in said contract, free and discharged of the alleged lien or cloud of the judgment or order entered in the United States District Court for the District of New Jersey, on February 7, 1944, in an action wherein the Automatic Paper Machinery Company, Inc., is plaintiff, and Nicholas Marcalus and another are defendants, and in directing the defendants to satisfy or otherwise procure the discharge of the lands and premises mentioned and described in said contract from the alleged lien or cloud of title of said judgment or order for the following reasons:

a. The said judgment or order was not a lien on the lands and premises described in the bill of complaint, or a cloud on the title thereto.

b. The court was without power or jurisdiction to make such order and decree.

c. No proof was presented on the final hearing to show in what manner the defendants could procure the release and discharge of the premises described in the bill of complaint from the alleged lien of the said judgment or order in the said United States District Court, or to show what action, if any, said District Court could or would take in the matter, or to show that the conditions for granting such release and discharge, if the said court should make an order therefor, would be such as the defendants could reasonably comply with, and without such proof, the Court of Chancery had no evidence or basis to support such decree, and no power or jurisdiction to make it.

(4) Upon the pleadings herein, and the evidence and testimony submitted and taken in open court upon the final hearing, the court should have rendered a decree dismissing the bill of complaint.

(5) Upon the pleadings herein, and the evidence and testimony submitted and taken in open court upon the final hearing, the court erred in dismissing the counterclaim of the defendants, and the court should have permitted the defendants to submit evidence in proof of theirk counterclaim, as reserved on the hearing, and should have rendered a decree that the complainants pay to the defendants the amount found due on their counterclaim, as damages.

(6) Upon the pleadings herein, and the evidence and testimony submitted and taken in open court upon the final hearing, the court should have decreed that the contract dated May 26, 1944, between the defendants Nicholas Marcalus and Mildred M. Marcalus, his wife, and the complainants, is null and void, and at an end, by reason of the breach thereof by the complainants and the election of the defendants to terminate said contract.

(7) Upon the pleadings herein, and the evidence and testimony submitted and taken in open court upon the final hearing, the court should have decreed that because of the breach of said contract by complainants, the complainants have forfeited the sum of $1900 paid by them to the defendants on the signing of said contract.

Petitioners therefore pray that the said decree of the Chancellor may be wholly reversed, set aside and for nothing holden, that this court may decree that the prayer for relief in the answer and counterclaim be granted, and that petitioners may have such other relief in the premises as to this court shall seem proper.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel With Defendants-Appellants.

IN CHANCERY OF NEW JERSEY.

(November 22, 1944.)

Between

Albert F. Reitemeyer and Julia A. Reitemeyer, His Wife,

Complainants,

and

Nicholas Marcalus and Mildred M. Marcalus, His Wife,

Defendants.

TESTIMONY.

Transcript of shorthand notes of testimony taken in the above entitled cause, before his Honor, Alfred A. Stein, Vice Chancellor, at the Chancery Chambers, Elizabeth, New Jersey, in the presence of Samuel Koestler, Esq., for complainants; Messrs. Wall, Haight, Carey & Hartpence (By Mr. Hartpence and Mr. William W. Shaw) for defendants.

Roger E. Salmon, C. S. R.

THE COURT: You may proceed.

MR. KOESTLER: If your Honor please, in the case of Reitemeyer against Marcalus, for final hearing today, I have here the notice of hearing. Does your Honor desire an opening?

THE COURT: Yes, you may, briefly, open.

MR. KOESTLER: This suit is for specific performance of a contract dated May 26, 1944, made by the defendants to complainants, and provided for title to pass in Jersey City, on July 1, 1944, at the office of the counsel for the defendants. By agreement, that was changed to be closed at my office, on July 3. At that time, Mr. Reitemeyer had arranged with the Elizabeth

Trust Company to grant him a first mortgage of five thousand dollars. The funds were available. He also produced, at the time for closing, his certified check of $2,550, which was made up together, the unpaid balance of the purchase price, $1,900, having been previously paid.

Our search disclosed there was open of record two mortgages, one to the Prudential and one to Harry J. Sievers. Those mortgages were still open of record. It also disclosed by my search in the Federal Court that there was a judgment of the Automatic Paper Machinery Company, Incorporated, against Marcalus Manufacturing Company and Nicholas Marcalus, entered on February 17, 1944, stated to be an interlocutory judgment, for the plaintiff.

Inquiries disclosed that this was an infringement suit of patent rights, in which the answer of the defendant Marcalus was struck out and summary judgment ordered entered in favor of the plaintiff in that suit against the defendant, with costs to be taxed by the Clerk of the Court and costs of the accounting to be added.

The order directed an accounting before a master of the amount due from the defendants therein to the plaintiff in that suit. And from that judgment an appeal was taken to the United States Circuit Court of Appeals by Marcalus and his company. That appeal is still pending.

We requested that that judgment be re-listed, under the statutes, and cited—letter correspondence, citing the statute under which it could be listed, and that it was a lien under the United States statute.

That letter was responded to by letter of July 12 from the other side, contending that it was not a final judgment and therefore was no lien or cloud on the title.

There was additional correspondence back and forth, citing decisions, and so forth. And, finally, we

received a letter under date of July 25, that Mr. Marcalus was unwilling to incur the expense of legal proceedings to remove the judgment from the property, as he concluded it was not a lien, and there was additional correspondence, with a suggestion made that we enter into possession as a tenant, pending the determination of the case and the listing or other disposal of that judgment, they claiming that they would reverse it on appeal. So our proposal was not accepted, but, instead of that, there was a conference between Mr. Reitemeyer, on the one hand, and Mr. Marcalus, on the other, in which it was suggested that Mr. Reitemeyer should surrender his contract, get back $1,900 of the deposit, and that they would give him a lease for one, two, three, four or five years at ninety dollars a month.

He telephoned back a few days later and he was willing to take a two-year lease, but nothing ever came of it. He never got his lease. And there was further conversation, and then Mr. Marcalus told him over the telephone he wouldn't give him the lease, he wouldn't sell the property to him, he wouldn't do anything, he was going to sell it to somebody else at an advance of five hundred dollars. Therefore, we recorded our contract and notified Mr. Marcalus we were going to file a suit in the Chancery Court for specific performance. Not hearing from him, we did that.

I have here in my hand the correspondence, and counsel, I think—I am not sure—have agreed these letters are proper letters, and I think they will agree that they be admitted in evidence. So that the question comes down, primarily, to this: Is this judgment or order of the court a cloud on this title? Its judgment, of course, which question has not been passed upon, the other side puts forth that execution could not issue on it.

That is not the question at all. That is outside of the question. We have not been tendered a deed at

any time. In the beginning, they sent me a form of deed, unexecuted, but we have not been tendered a deed free and clear of any of these encumbrances.

We have here the check ready to show we were ready and willing at all times to take this title, provided it would be free and clear.

Mr. Reitemeyer took the position, when we made certain suggestions, that he wanted his title, he wanted it free and clear and he didn't want to be subject to litigation, if something went wrong with that judgment against Marcalus. And we thought he was justified in taking that position and therefore we filed this bill, and we ask for a decree of the court compelling the defendants to carry out their agreements and giving us a title free and clear of any liens. The contract provided that it is subject to the present tenancy and subject to restrictions of record, if any.

I understand that the tenant who was in there removed from the property, so that that situation does not face us any more.

Now, on October 13, Mr. Reitemeyer came to me and said, "Winter is coming on here and this suit is coming, but something ought to be done to fix the place."

We then wrote a letter, asking that we be permitted to protect that property for the winter, or that they do something.

Counsel for Marcalus sent that letter to Marcalus, as they advised by a subsequent letter, but we have not heard one word from them as to the protection of this property. Now, we are getting into cold weather and we feel it is urgent, an emergency, something should be done in that nature, and also in the nature of giving immediate possession.

We suggested in one of our previous letters that we would go in there as a tenant at seventy-five dollars a month and pay all carrying charges and remain there under that condition, subject to the disposition of the

suit on the appeal which they had and that if that was acceptable to them we would enter into an extension of time accordingly for the performance of this contract.

That was not acceded to, but then they got into negotiations with Mr. Reitemeyer relative to a lease and surrender, but nothing ever came of that, although Mr. Reitemeyer was willing even to give up his contract and take a lease, but he never had any lease, and, finally, Mr. Reitemeyer was told by Marcalus he wouldn't give him a lease and he wouldn't give him a deed.

That is the situation as concisely as I can explain it to your Honor.

Mr. Shaw: If the court please, in our answer we claim, and shall prove, that at the time arranged for a closing of the title, that is on July 3, we were ready and willing to convey title, and we claim that we would have been able to convey a good title, notwithstanding the claim on the part of complainants that this contract was a lien on the property, and to that end the complainants executed a deed—or defendants executed a deed and were ready to deliver the deed.

The basic question seems to be as to whether that judgment was, in fact, a lien on the property.

In the patent suit it was stated to be an interlocutory judgment and it was determined that the patent had been infringed, and that the plaintiffs in the Federal suit were entitled to damages and to their costs.

It further provided that it be referred to a special master to take proofs of the defendant's profits, to assess damages and to report thereon to the court.

No reference was ever made. The defendants appealed from that judgment, and the appeal is now pending. It has been argued and it has not been decided.

Our position is that there was no money involved in the interlocutory judgment. While it has been de-

termined a material issue, that is, the validity of the title and question of the infringement, it did not——

THE COURT: It also determined that there was to be money paid, when the amount was ascertained.

MR. SHAW: Yes, when the amount was ascertained, which could not be done until the reference was had and until final judgment was entered. Therefore, our position is, as I have noted in our reply brief, that there was no lien, and nothing, at the time of the entry of the interlocutory judgment, on which a lien could be predicated or on which the judgment could become a lien.

THE COURT: Well, the judgment is there, isn't it?

MR. SHAW: What?

THE COURT: The judgment is of record.

MR. SHAW: The judgment is of record.

THE COURT: All that needs to be done is to determine the amount.

MR. SHAW: Yes. And that could only be done after a hearing and after a final judgment. So our claim is there was no lien on the property; that is, the interlocutory judgment did not constitute a lien.

Now, we also refer to a statute of the Federal Court which provides that "Judgments and decrees rendered in a district court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent—"

THE COURT: Well, the record as it now exists, I think you will agree, constitutes a cloud, at least, doesn't it?

MR. SHAW: No, sir. Our position is that it does not constitute a cloud.

THE COURT: I didn't ask your position. I know your position. Doesn't it constitute a cloud? I say

that because it seems to me you gentlemen have very little, if any, testimony to take. It is a question of law.

MR. SHAW: Well, on that question——

THE COURT: And if it be so, that the interlocutory judgment constitutes, at least, a cloud, and if it be that the purchaser was willing to enter into an arrangement to occupy the premises and pay the rental that you might agree upon pending the removal of the cloud, what more could he do?

MR. SHAW: Well, then we also cite this statute of the Federal Court which says that

> "Judgments and decrees rendered in a district court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State. Whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana before a lien shall attach, this section and section 813 of this chapter shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State."

Now, the New Jersey statute which I cite here is R. S. 2:29-58 and it provides:

> "No decree of the court of chancery shall, as against a person not a party thereto, become a lien upon or bind any real estate other than that

specifically mentioned and described in the decree or in the bill of complaint on which the same is founded, until the parties interested in the decree, or one of them, shall have filed in the office of the clerk of the supreme court a statement or abstract of the decree, containing the names of all parties thereto, designating particularly those against whom it is rendered, with the state and county in which they respectively resided, the time at which the decree was signed, and the amount of the debt, damages, costs or other sum of money thereby directed to be paid. The clerk of the supreme court shall forthwith record the statement or abstract in a proper book, to be by him provided and kept in his office for that purpose; which book shall be properly indexed by the clerk, and be a public record, to which all persons desiring to examine the same shall have access."

Now, this action in which the Federal judgment was rendered was an equity action, and, while the new rules of Federal procedure have abolished the distinction in form, nevertheless, it was essentially an equity action. The relief granted was for an injunction, determining the validity of a patent and determining the amount of profits. Therefore, our contention is that this came within the provisions of this case and statute which I have just read, and would not become a lien on the property unless it was docketed in the supreme court on the law side.

THE COURT: Well, it may not be a lien. Of course, I am not deciding anything, I am just trying to call your attention to that which is going through my mind so that you might answer, if you will. Does it have to be a lien in order for a purchaser to say "I won't take this title because there is at least a question——"

MR. SHAW: Well——

THE COURT: —"or a cloud?"

MR. SHAW: —our position is that it is not a lien. And, if it is not a lien, it cannot be a cloud upon the title.

THE COURT: I see. Well, all right.

MR. SHAW: So that is on the question of——

THE COURT: You have answered what I am asking.

MR. SHAW: That is our position. We have alleged that there is a breach of the contract on the part of the complainants, and we are ready and willing to tender a deed and give a good title, and they refused, and we claim damages, certain specific items of damages; for instance, the loss of rent occasioned.

The complainants wanted to move in this property and so, to accommodate them, we gave notice, caused the tenants to vacate the property before the termination of their lease. The property has been vacant and there is a loss of rent which we claim as damages. Then, the loss of the sale; we will show by the testimony Mr. Marcalus had an opportunity to sell this property at a higher price. And that is an essential element of damage. And the amount of the broker's commission; we hadn't paid the broker's commission on the sale and the broker brought suit and obtained judgment.

THE COURT: Your counterclaim would not become an issue here, if it be determined that the complainant was not obliged to take this title, would it?

MR. SHAW: No, sir. Well, the complainant is asking to take title.

THE COURT: Yes, he is asking.

MR. SHAW: Now, if the court holds that this is not a lien—this judgment is not a lien and that complainants were at fault, that would seem important and an essential item of damage.

THE COURT: I get your idea. All right. You may proceed.

MR. SHAW: And then the amount of broker's commission, which is stated, we will prove is five per cent on the sales price. And then the cost of maintenance of the property is also another item of damage which we mention.

I believe there were some repairs necessitated by damages done by the storm, and other repairs, and we are entitled to damages. An aggregate amount of $6,900 is the amount which we claim for damage.

Now, the complainants in their prayer for relief ask that we be obliged, not only to give a deed to the property and convey title, which we were at the time of the proposing ready and willing to do, but that we take proceedings, the necessary procedure, incur the necessary expense of going into the Federal Court and having this lien removed from the property—that is, the property released from the lien of this judgment, which would require, I think, the deposit of a considerable sum of money for security. And there is nothing in the contract that requires us to do that. I don't think there is any decision of this court requiring us to take those steps and incur that expense. And then on the appeal, bond for ten thousand dollars was given as security for costs and damages.

THE COURT: Well, that is given to the complainant.

MR. SHAW: I beg your pardon, sir?

THE COURT: That is given to the complainant in the case.

MR. SHAW: Yes, in the Federal suit.

THE COURT: Surely.

MR. SHAW: That was—that we answer all claims—supposed to answer all claims.

THE COURT: Claims by whom?

MR. SHAW: Claims by the plaintiff.

THE COURT: Who is to determine that? There has not been a reference yet to determine what the claim is.

MR. SHAW: No. That is true.

THE COURT: Just an arbitrary amount fixed by the court. It was on there in the event that that judgment is an effective judgment for the amount of this debt, at some time or another, I mean the complainant, at some time or other, there may be a judgment for damages of—well, any amount.

MR. SHAW: That is true. And if the title is still in——

THE COURT: And if a judgment is obtained, it is obtained by reason of this interlocutory decree.

MR. SHAW: Yes.

THE COURT: That is under the right of the complainants to damages for the violation of a patent right.

MR. SHAW: Of course, that is just the point.

THE COURT: The amount not yet determined.

MR. SHAW: Yes.

THE COURT: But when it is determined, the lien attaches from what time?

MR. SHAW: We claim it should not be retroactive.

THE COURT: What do you mean, "retroactive"?

MR. SHAW: Not retroacitve as of the time of the interlocutory judgment in the Federal Court.

THE COURT: All right. You may proceed.

MR. KOESTLER: Mr. Reitemeyer.

ALBERT F. REITEMEYER, called as a witness on behalf of complainants, being duly sworn according to law on his oath, testified as follows:

DIRECT EXAMINATION BY MR. KOESTLER:

Q. Mr. Reitemeyer, are you married?
A. Yes.
Q. What is your wife's name?
A. Julia A.
Q. Where do you live now?
A. 534 Riverside Drive.
Q. You and your wife are the complainants in this case?
A. We are.
Q. What is your business?
A. Secretary and treasurer of the Perth Amboy Gas Pipe Company.
Q. You have had that position for how long?
A. For seven years.
Q. I show you a contract dated May 26, 1944, between Nicholas Marcalus and Mildred M. Marcalus, his wife, and Albert F. Reitemeyer——

THE COURT: The contract is not denied. Put it in evidence.

MR. KOESTLER: No, sir. I offer the contract in evidence.

(Contract above referred to marked Ex. C-1.)

EXAMINED BY MR. KOESTLER:

Q. This contract calls for the purchase of this property in question for $9,450. Did you pay anything on account?
A. $1,900.
Q. You wanted to buy this property for a home for yourself and your wife?

A. That is right.

Q. The house in which you are now living has been sold to somebody else who desires possession. Is that right?

A. That is right.

Q. And you have been given notice to move from it?

A. I beg your pardon?

Q. You have been given notice to remove?

A. That is right.

Q. Now, after you entered into the contract, did you arrange to borrow some money from the Elizabeth Trust Company on mortgage?

A. Right.

Q. Was a loan granted to you? Was the loan granted?

A. Yes, it was.

Q. How much?

A. Five thousand dollars.

Q. I show you a check dated June 29, 1944, of the Elizabeth Trust Company to the order of Albert F. Reitemeyer and Julia A. Reitemeyer for five thousand dollars, and ask you if you and your wife are the parties named therein as payees?

A. We are.

Q. And that was the five thousand dollars loaned on the mortgage?

A. Correct.

MR. KOESTLER: I offer the check in evidence.

(Check above referred to marked Ex. C-2.)

EXAMINED BY MR. KOESTLER:

Q. Did you also, at the time fixed for closing, July 3, produce any additional money of your own?

A. I did.

Q. In what way?

A. $2,550, certified check.

Q. I show you a certified check to the order of Samuel Koestler, attorney, for $2,550, and ask you if that is the check?

A. That is correct.

Q. And, after the title had been closed, you redeposited this check?

A. I did.

MR. KOESTLER: I offer the check in evidence.

(Check above referred to marked Ex. C-3.)

EXAMINED BY MR. KOESTLER:

Q. Did you receive information from anybody as to the state of this title in respect to judgments or mortgages?

A. Yes, I received the information from you that you could not get a clear title for the property.

Q. Did you want a clear title?

A. Beg pardon?

Q. Did you want a clear title?

A. I sure did. That was the reason I had a search made.

MR. KOESTLER: If your Honor please, I have a number of letters here. We may be able to save time by putting them in evidence.

THE COURT: Show them to counsel.

MR. KOESTLER: They are correspondence both ways, from them to me and from me to them.

MR. SHAW: Are these the letters that were asked for, back and forth?

MR. KOESTLER: Yes, that is correct: by notice to produce both ways.

MR. HARTPENCE: We have no objection, your Honor, to the letters and replies going in evidence on any ground, that is, of competency or otherwise, but we do feel that some of them are entirely immaterial and irrelevant to the issue. They

merely pertain to the discussions which took place between counsel for the respective parties with regard to the existence of this judgment that has been referred to, and the question of whether or not this was a lien or constituted a cloud on the title, and to the extent that it shows discussion back and forth between counsel, I think that, while we have no objection to the competency, we do not think it has any relevancy or materiality.

There is one letter there, however, where counsel of the defendants indicated very clearly that they were perfectly willing to call the whole matter off and have the contract rescinded, and would have been glad to have the complainants agree to that, and let the parties stand where they were.

Aside from that, we have no objection to the letters on any other grounds.

Mr. Koestler: The first letter is a letter of June 27 from defendants' counsel to me, enclosing the deed, and there is my response of June 28, 1944.

There is my letter to them, of July 5, 1944, calling attention to the judgment and the statutes respecting the same, and their response of July 17, 1944, setting up their claims to the contrary, to the lienability of the judgment and what they cite.

Then, there is a letter refuting that claim, under date of July 17, from my office to them.

Then, there is a letter of July 25 from them to me, referring to my letter. This letter I think I ought to read to your Honor.

Mr. Hartpence: All right. That is the one I have in mind.

Mr. Koestler: "We have just talked with Mr. Marcalus who has returned from his vacation. He takes the position that the judgment of the Automatic Paper Machinery Co., Inc., against the Mar-

calus Manufacturing Co. and Mr. Marcalus personally, is not a lien on the above mentioned property. He is willing and makes the offer to your clients, Albert F. Reitemeyer and his wife, to cancel his contract for the sale of the above property and return the purchase money received unless your clients will take the property with the judgment as it stands. He is not willing to incur the expenses of legal proceedings to remove the judgment from the property as he claims it is not a lien. Will you please let us know what reply your clients desire to make to this offer."

That is signed by Wall, Haight, Carey and Hartpence.

That letter is responded to by me under date of July 28, 1944, in the following language to Mr. Shaw:

"This will acknowledge receipt of your letter of the 25th instant, which I have submitted to my client, Mr. Albert F. Reitemeyer. Mr. Reitemeyer entered into the contract in good faith to purchase the property as a place of residence and has made arrangements accordingly. He cannot see why he should receive his money back and be subject to the expenses to which he has gone in having the title examined and the inconvenience to which he would be put if the contract were surrendered. The fact that Mr. Marcalus has a judgment against him is not in any manner chargeable to Reitemeyer.

"Since receiving your letter we have very carefully re-examined the law, and the decisions indicate and hold quite definitely that the judgment is in effect a final judgment and is a lien on the property and I am firmly convinced that my opinion in that regard will be sustained by our courts. However, it seems to me that there is a

practical solution to this matter without working injury to either of the parties and I have Mr. Reitemeyer's consent to the following suggestion:

"Mr. Reitemeyer will be willing to move into the property as a tenant at a monthly rental of seventy-five dollars and will stay in possession as such tenant until the due course of the litigation removes or satisfies the judgment in question. Mr. Reitemeyer is now paying seventy-five dollars rent where he is living. He will have to remove from the property at an early date owing to the fact that it has been purchased by a third party. Mr. Reitemeyer figures that the seventy-five dollars a month will be more than ample to pay all of the carrying charges on the property.

"Upon acceptance of this proposition by Mr. Marcalus we can arrange for an extension of the time for closing title accordingly. Please submit this to Mr. Marcalus and advise me.

"Yours very truly,

Samuel Koestler."

Under date of August 4, Mr. Shaw wrote me that he had sent that letter to Mr. Marcalus, that letter of July 28.

That was then followed by a letter from Wall, Haight, Carey and Hartpence, signed by Mr. Shaw, to me:

"The writer has just talked with Mr. Marcalus on the phone and he makes this suggestion and proposition to your client:

"The amount of the purchase price is $9,400. Of this $1,900 has been paid, leaving a balance due of $7,550——"

THE COURT: You said "$9,400." It was $9,450, wasn't it——

MR. KOESTLER: $9450 is correct.

THE COURT: —the purchase price?

MR. KOESTLER: Yes. There is no question about that.

"The suggestion is that he convey the property subject to the existing mortgage held by the Prudential. The amount due on this mortgage is approximately $4,500. I do not know the amount of the mortgage which the bank intended to take, but it probably was in excess of the amount due the Prudential. If Mr. Reitemeyer is not in a position to finance the sale, in view of the smaller amount of the existing Prudential mortgage, Mr. Marcalus is willing to take a second mortgage on convenient terms for the amount needed to make up the difference between the present mortgage and the proposed mortgage of the bank. Crediting $4,500 due on the present mortgage and $1,900 cash paid, leaves a balance due of $3,050. If necessary to carry through the sale Mr. Marcalus is willing to take a purchase money mortgage for all of this balance so that no more money will be needed to complete the purchase. The terms as to interest and installment payments of the purchase money mortgage could be arranged between Mr. Marcalus and Mr. Reitemeyer.

"Will you be good enough to submit this proposal to your client, and advise me."

The last letter is mine to them, of August 21, which relates to this particular subject, although there is a later letter which I mentioned in my opening.

My letter of August 21 is as follows:

"Gentlemen: This will acknowledge receipt of your letter of the 16th instant written for you by Mr. Shaw. I am addressing this letter to the

firm rather than Mr. Shaw because he has informed me over the telephone today that he is leaving on his vacation and that the matter would be turned over to someone else in your office.

"My client, Mr. Albert F. Reitemeyer, now is and ever since July 3rd (the day fixed for closing title) has been ready, willing and able to accept title pursuant to the contract of May 26th, 1944, provided your client will give title free and clear of encumbrances and otherwise as provided in the written agreement of sale. Mr. Reitemeyer has no desire to change the terms of payment and does not require financial assistance from Mr. Marcalus in order to consummate this transaction. Our search definitely indicates a judgment of record against Marcalus in the United States District Court at the suit of Automatic Paper Machinery Company, Inc. We have called your attention to the statutes under which the lien of this judgment may be released or discharged, but Mr. Marcalus has taken the position that he will not go to any expense to relieve the property from the lien or cloud of this judgment.

"Mr. Marcalus has made several propositions to Mr. Reitemeyer and has always changed his mind. The proposition which I have made in my letter to you of July 28th still holds good.

"Mr. Reitemeyer has just left my office and has authorized the writing of this letter and has further instructed me that unless something definite is done within the next few days towards carrying out the contract that I am to file a bill for specific performance. I will, therefore, delay the filing of this bill until Friday of this week to give you an opportunity to get this matter settled on a business basis. Mr. Reitemeyer now insists that Mr. Marcalus must carry out the contract and give

him title free and clear in accordance with the terms of the written agreement."

That was followed by a letter of October 13 by me to Wall, Haight, Carey and Hartpence in which we merely called their attention to the approaching winter and that something should be done to obviate that condition. And I received their letter of October 16, acknowledging receipt of mine of October 13.

I offer all these letters in evidence.

(Letters above referred to marked Ex. C-4.)

EXAMINED BY MR. KOESTLER:

Q. Now, Mr. Reitemeyer——

MR. SHAW: Are they to be marked as one exhibit?

THE COURT REPORTER: Yes, sir; C-4.

EXAMINED BY MR. KOESTLER:

Q. Mr. Reitemeyer, on or about or shortly after July 28, did you receive a letter from Mr. Marcalus?

A. Yes, I did.

Q. And was that letter sent to you by mail or delivered to you?

A. No. It was delivered to me by Mr. Greenberg, an employe of his.

Q. Did that letter of Mr. Marcalus contain a copy of this letter of July 28, 1944, which I have just read to the court?

A. That is right.

Q. Now, in response to that letter which Mr. Marcalus sent you, or in connection with it, did you, on or about August 7, receive a telephone call from Mr. Marcalus?

A. I did.

Q. And what, if anything, did Mr. Marcalus say to you in that telephone call?

MR. HARTPENCE: Objected to as immaterial and irrelevant.

THE COURT: I will hear it.

MR. KOESTLER: If your Honor please, this is to show——

THE COURT: I will hear it.

THE WITNESS: Why he said to me, he said, "Now, I don't want to have anything to do with Koestler or Scott. I don't know what they are talking about."

THE COURT: With Koestler or who?

THE WITNESS: And Scott, Mr. Scott. He said, "You and I are going to do business together." He said, "I will be better off if you will send me a letter cancelling the contract." He said, "I will send you my check for $1,900 that you paid on account and I will also send you a lease, if you want a lease on the property."

I said, "How long a lease?"

He said, "Oh, one, two, three, four or five years."

I said, "Very well, I will think it over."

So two days afterwards, I decided the two-year lease would be sufficient. All right.

He said, "I will send you the check and I will send you the lease by mail tomorrow morning."

That was about the early part, about August the second, and on—I think on or about the 16th of August——

EXAMINED BY MR. KOESTLER:

Q. Just a moment. Did you get from Mr. Marcalus a form of lease?

A. I did not.

Q. Or did you get the check?

A. No. He didn't do it all as he promised. So, on or about August 16, in going home, I noticed a "To

let'' sign on the house, and I called him up and I asked him what it was all about. Well, he said——

MR. HARTPENCE: Of course, if your Honor please, I am objecting again to the relevancy and materiality or competency of the testimony, going on now to recite a narrative, and at this point I desire my objection noted.

THE COURT: I will hear it.

EXAMINED BY MR. KOESTLER:

Q. Proceed.

A. I saw a ''To let'' sign on the house, and I immediately removed it, and I called up Mr. Greenberg, who was the agent or, apparently, who was told to put up the sign.

Q. Mr. Greenberg is the man who brought you the letter?

A. Yes, that is right. Well, he said, ''I don't know anything about it.''

MR. HARTPENCE: If your Honor please, I object.

THE COURT: Yes.

EXAMINED BY MR. KOESTLER:

Q. I don't want you to tell what Mr. Greenberg said, but, as a result of what Mr. Greenberg said to you, did you call up Mr. Marcalus?

A. I called up Mr. Marcalus and Mr. Marcalus said to me, ''Well,'' he said, ''you don't want to buy the house so I am going to rent it to somebody else.''

Q. What did you tell him?

A. I said, ''The house belongs to me under contract.'' I said, ''You promised to send me a lease and send me the check, nineteen hundred paid on account, which you haven't done.'' ''Well, that's all right,'' he said, ''I am going to rent it.'' ''Well,'' I said, ''you are not going to rent it.'' So that went on for a short time, and again I had him on the wire, and he

promised a lease, once more, and that was not forthcoming. So, finally, he called me up one evening and he said, "Now, listen, you didn't send me that letter." "Well," I said, "you didn't send me your check, nor you didn't send me the lease." "Well," he said, "now, listen, I won't sell you the house." He said, "I won't lease it to you. I won't do anything." He said, "I have a prospect," he says, "who is willing to buy the house and pay five hundred dollars more than you will pay." And he further said, "I have already accepted a check for five hundred dollars on account, endorsed, 'provided Mr. Reitemeyer doesn't purchase.' "

Q. Was it after that that you instructed me to go ahead and start proceedings?

A. Yes. Then he wanted me to call on him for an interview, which I refused. I said the matter was entirely out of my hands now, it was up to my attorney. So, well, he said, "Go as far as you like." He said, "I have got one hundred thousand dollars in the bank. I have got enough money on hand to buy all of Riverside Drive."

Q. Now, from the time you got this contract of May 26, Exhibit C-1, you have never surrendered—released to Mr. Marcalus any of your rights under it, have you?

A. I did not.

MR. KOESTLER: Cross-examine.

CROSS-EXAMINATION BY MR. HARTPENCE:

Q. Why did you tear down the "To let" sign?

A. Simply—simply because I was under contract to buy the house. He had no right to put it up.

Q. Why not?

A. Simply because it didn't belong to him.

Q. You said it was your house and it belonged to you and you took the sign down, in your direct examination.

A. Yes, I had as much right to the house as he had.

Q. If——

A. He had no more right to the house than I.

Q. Well, if it belonged to you under the contract, why did you go to the trouble to start a suit about it?

A. Simply because Mr. Marcalus didn't carry out his contract.

Q. The property belongs to you, you say?

A. Well, of course, it belongs to me.

Q. It belongs to you now, then, just as much as when you tore the sign down. Isn't that so?

A. Why not? If I have a contract to buy a piece of property, I think it belongs to me absolutely.

Q. You took it subject to the rights of the tenant, didn't you?

A. Why not?

Q. Well, I say, you took it subject to the rights of the tenant——

THE COURT: Well, the contract provides that.

Q. —did you not?

A. Why, yes. Why not?

Q. How did the tenants come to remove from the premises, do you know?

A. Yes.

Q. How?

A. Why, because they bought a piece of property elsewhere.

Q. No. How did they come to move out?

A. They moved out simply because they got notice from Mr. Marcalus because he told them the house had been sold.

Q. Did you give them any notice to move out?

A. No.

Q. None that you know gave them any notice to get out?

A. No.

Q. Well, if the house belonged to you, when you tore the "To let" sign down, why didn't you move in?

A. Well, where were we going to get the keys? Mr. Marcalus didn't give us any key. We had no right to go into the property, did we?

Q. I am not answering the questions. You say it belongs to you. Why didn't you go in and take it?

THE COURT: Please stop.

A. Why, we couldn't.

THE COURT: Please stop. That is an argument. Next question.

EXAMINED BY MR. HARTPENCE:

Q. When was it you say Mr. Greenberg came to you and delivered the letter?

A. Well, I don't know the exact date. It was about around the middle of August.

Q. Have you got that letter?

A. Yes.

Q. Will you produce it?

A. The counsellor has the letter.

MR. KOESTLER: No. The one of Greenberg? Have I got the letter?

THE WITNESS: I think you have.

MR. KOESTLER: No. I think you've got that.

THE WITNESS: No. You have a copy of it, I think.

MR. KOESTLER: What Mr. Hartpence is asking for is the letter that Mr. Marcalus wrote to you and sent by Mr. Greenberg.

THE WITNESS: Yes.

MR. KOESTLER: Haven't you got that in one piece?

THE WITNESS: No, I haven't that letter. I thought you had a copy of it. I am quite sure you have.

MR. KOESTLER: Have you got an envelope with some letters in it?

THE WITNESS: Yes. No, I haven't it with me, counsellor.

THE COURT: Well, while you are looking for that, put your next question.

MR. HARTPENCE: What is that?

THE COURT: I say, while they are looking for that letter, put your next question.

EXAMINED BY MR. HARTPENCE:

Q. Well, all these telephone calls that you say you had back and forth with Mr. Marcalus, resulted in neither you nor Mr. Marcalus getting together on the question——

A. Yes.

Q. —isn't that right? You never reached a point where there was an agreement between you——

A. No.

Q. —of anything that changed in any way the written agreement—the written contract for the sale and purchase of the premises, did you?

A. That is right.

Q. And, finally, Mr. Marcalus told you that he was going to throw up the agreement, cancel it and return to you what you had paid him on account. Is that right?

A. Yes.

Q. Did you agree to that?

A. No, I didn't agree to anything.

Q. When Mr. Marcalus said to you that he had a hundred thousand dollars in the bank, enough to buy all Riverside Drive, didn't he tell you that, in the course of your conversation with him, to assure you that he was financially able to take care of anything that might result from this?

A. No.

Q. Well, you knew that he was financially able to take care of it?

A. I don't know whether he is or not.

Q. Well, did you ever make any effort to ascertain?

A. No.

Q. Did you know in the suit in which this judgment was obtained, an interlocutory judgment had been entered in the United States Court, in the amount of ten thousand dollars, had been filed with the court to answer all damages that might result?

A. I didn't understand anything of the kind. I understood there was a judgment, an interlocutory judgment against him, that is all.

Q. That is all. You left the rest of it to your counsel, I suppose. Is that it?

A. That is right.

MR. HARTPENCE: Have you that?

MR. KOESTLER: I haven't it, but I can tell you what it was, if you wish me to.

MR. HARTPENCE: If you have it, I would like to see the letter itself.

MR. KOESTLER: I have looked through here. It may be——

MR. HARTPENCE: I think it can be brought in later, your Honor, when he finds it.

THE COURT: All right.

MR. HARTPENCE: I simply called for the record.

MR. KOESTLER: If you want me, off the record, I can tell you what it was.

THE COURT: No. He would rather see the letter.

MR. KOESTLER: If I can find it.

THE COURT: Are you through with this witness?

MR. HARTPENCE: I think so, your Honor.

THE COURT: Any further questions?

MR. KOESTLER: That is our case, your Honor.

THE COURT: All right. Step down.

MR. KOESTLER: There is only one thing I would like counsel to admit, and that is that the contract, C-1, was drawn by them, in the office of Wall, Haight, Carey and Hartpence.

MR. HARTPENCE: I understand it was, yes.

MR. KOESTLER: That is all. I am perfectly content, if your Honor please, that there may be offered in evidence this form of the judgment in the Federal Court, which is included in the brief which was submitted to the United States Circuit Court of Appeals on behalf of Marcalus. That shows the form of the order.

THE COURT: Is it very long?

MR. KOESTLER: No.

THE COURT: Read it into the record.

It is agreed that the following is the form of the judgment. And then give the title and cause.

MR. KOESTLER: The title of the cause is: The United States District Court for the District of New Jersey. Automatic Paper Machinery Company, Inc., Plaintiff, versus Marcalus Manufacturing Company, Inc., and Nicholas Marcalus, defendants. Civil Action Number 2826. Order and interlocutory judgment.

"This cause having come on to be heard on plaintiff's motion for summary judgment under Rule 56, Rules of Civil Procedure, on the pleadings, deposition and affidavits herein, it is ordered, adjudged and decreed:

"1. That, except as to the amount of damages, there is no genuine issue of any material fact within the meaning of Rule 56.

"2. The plaintiff, being entitled to a judgment as a matter of law, its motion for summary judgment be, and the same hereby is granted.

"3. That plaintiff, Automatic Paper Machinery Company, Inc., is now and has been, since its date of issue, the sole owner of the patent in suit No. 1,843,429, and of all claims for profits and damages arising out of all infringements of it.

"4. That defendants are estopped to deny the validity of Patent No. 1,843,429.

"5. That since the issue of Patent No. 1,843,429, and prior to the filing of the complaint in this suit, the defendants, Marcalus Manufacturing Company, Inc., and Nicholas Marcalus have made and used in the United States machines for mounting cutters on box blanks which machines embody the invention of that patent and, in particular, the invention defined in Claims 1, 2, 3, 4, 7 and 8 thereof, and that they have infringed those claims after notice of infringement.

"6. That perpetual injunctions issue out of and under the seal of this Court directed to the defendants, Marcalus Manufacturing Company, Inc., and Nicholas Marcalus, their officers, directors, employees, agents and workmen and all claiming or holding under or through either, enjoining and restraining them and each of them during the remainder of the term of Patent No. 1,843,429 from directly or indirectly making, using or selling or offering for sale machines for mounting cutters on box blanks embodying the invention described in that patent and secured by its claims, Nos. 1, 2, 3, 4, 7 and 8 and from in any wise infring-

ing upon plaintiff's exclusive rights in the premises.

"7. That the plaintiff recover from defendants the profits that each of them has derived, received or made by reason of its or his infringement of the patent in suit and that plaintiff also recover from the defendants all damages which it, the plaintiff, has sustained by reason of those infringements.

"8. That this cause be referred to as a Special Master of this Court, to take and state an account of the defendants' profits, to assess plaintiff's damages and to report thereon to this court with all convenient speed, and that the defendants, their officers, agents and employees are hereby directed and required to attend before the master from time to time as he shall direct and to produce before him such apparatus, books, papers, vouchers, documents and writings as he may require, and to submit to such oral examination, or otherwise as he may require in connection with the accounting and the assessing of damages.

"9. That plaintiff recover the costs of this litigation including the costs of the accounting ordered by this judgment, all to be taxed by the clerk.

"Approved

Smith

"February 8, 1944. United States District Judge."

That is the whole order.

I would state that, in the search which I received, it indicates that this order was entered on February 7.

Is that the correct date?

MR. HARTPENCE: It is stated in the record.

MR. KOESTLER: That is the order.

MR. HARTPENCE: As I understand it, your Honor had requested us to agree to put in that judgment in that form, and I assume, therefore, that that goes in as part of the complainants' case, part of complainants' exhibits.

MR. KOESTLER: That is perfectly agreeable to me.

MR. HARTPENCE: If the court please: Mr. Koestler, will you concede that no costs have been taxed and no damages assessed?

MR. KOESTLER: I don't know anything about that, but, if you say there has been no costs taxed, I will admit your statement.

MR. HARTPENCE: It is the fact. The cost has not been taxed, nor has there been any assessment of damages under the order because an appeal was taken from that interlocutory judgment, which, of course, stayed the whole proceedings.

MR. KOESTLER: If you want to make a statement on the record there is an appeal taken and pending, I shall even agree that that shall be evidential of that fact.

MR. HARTPENCE: As I gave it there. The amount is specific——

THE COURT: What did you take, Mr. Salmon?

(Statement of Mr. Hartpence read by court reporter as follows: "It is the fact. The cost has not been taxed, nor has there been any assessment of damages under the order because an appeal was taken from that interlocutory judgment, which, of course, stayed the whole proceedings."

THE COURT: This is off the record.

(Statement off the record.)

MR. HARTPENCE: Perhaps, I should have said that a supersedeas bond of ten thousand dollars was filed, which stayed the proceedings.

THE COURT: Yes. The appeal itself would not stay the appeal on the order of reference.

MR. HARTPENCE: It is in equity in Federal Court.

THE COURT: Well, the same as New Jersey in the Chancery Court, if there is an appeal taken, we go right on with the order to show cause, but we don't enter finally what the master reports. This is off the record.

(Discussion off the record.)

THE COURT: Defendants' case? He has closed his case.

MR. HARTPENCE: I don't want to close the case, if he wishes to put in anything else, but, as it is now, I don't know what to meet.

MR. KOESTLER: I have merely referred in my memorandum to the Federal statutes and also to the State statutes. I don't think it is necessary to offer them in evidence.

THE COURT: Oh, no, no. I haven't read either of your memorandums.

MR. HARTPENCE: What is the State statute?

THE COURT: That is set forth in his brief.

MR. KOESTLER: That is set forth in my memorandum, of which you have a copy.

MR. HARTPENCE: The Supreme Court, the Circuit Court and Common Pleas, it doesn't apply to the——

THE COURT: Does the matter rest where it is on the complainants' side of the case?

MR. HARTPENCE: I don't know. I am merely remarking——

THE COURT: As to that, I will take the briefs and read them.

MR. KOESTLER: I was wondering if it were necessary to offer the statutes?

THE COURT: No.

MR. HARTPENCE: No. Take them at their own value.

THE COURT: Is there anything you want to offer now?

MR. HARTPENCE: Me? Pardon me just a moment your Honor.

THE COURT: We will take a recess for ten minutes.

(Short recess.)

MR. HARTPENCE: If the court please, we desire to show some of these items and elements of damage. That really goes to our counterclaim in the event that your Honor should decree we have the right to elect such a contract be cancelled and the sale is null and void.

I am wondering, therefore, whether at this stage of the proceedings your Honor desires us to go into that feature, or whether or not you prefer to have the other side go on and determine it first; just as your Honor feels inclined about it, because, naturally, we do not wish to take up the time of the court with elements that might not later on be determined.

THE COURT: In other words, your conception of the pleadings is this, that, if I decide that the complainant is entitled to specific performance, including removal of his cloud, that your counterclaim should fall.

MR. HARTPENCE: I assume that your Honor would decree, at least, that the counterclaim be

dismissed. I assume that. On the other hand, if you wish the testimony complete to deal with when the time comes, of course, we can show those elements of damage.

THE COURT: I think that might be postponed. What do you think about it, Mr. Koestler?

MR. KOESTLER: I don't know what elements of damage they could prove. It doesn't seem to me the proof is particularly pertinent at this time, in view of the facts in the matter. I don't see how a counterclaim would lie at all. That would be a breach of the contract, for which there can be a recovery at law and not in this court at all.

THE COURT: Well, I will allow the matter to rest. You have given your brief to Mr. Hartpence, and you can file a reply as you deem it necessary to do so, and I will reserve the decision until I read both your briefs. I have not read either one of your briefs yet.

Now, if you want to reply to this brief, I will give you five days in which to do it.

MR. HARTPENCE: If the court please, we don't like to foreclose our rights to put in testimony on some of the other matters, but I was wondering about the question of the damages.

THE COURT: Well, your rights to press your counterclaim will be reserved to you, in the event I decide that specific performance shall not be had, and then I will hear counsel on the question of whether or not your counterclaim should be proceeded with here, or whether you should be left to your remedy at law.

MR. HARTPENCE: Will your Honor pardon me just a moment? I will call Mrs. Marcalus, if your Honor please, on the main questions involved on the complainants' case in the bill.

MILDRED M. MARCALUS, called as a witness for the defendants, being duly sworn according to law, on her oath, testified as follows:

DIRECT EXAMINATION BY MR. HARTPENCE:

Q. Mr. Marcalus, you are one of the defendants in this suit, are you not?

A. I am.

Q. And you are the wife of Nicholas Marcalus?

A. Yes.

Q. Do you have any official connection with the Marcalus Manufacturing Company, Inc.?

A. Yes. I am secretary and treasurer.

Q. Secretary and treasurer. And as such do you have any familiarity at all with its ordinary business operations, from time to time?

A. Some.

Q. Do you know Mr. Reitemeyer, the gentleman who testified here this morning?

A. Yes.

Q. How long have you known him?

A. Well, I have seen Mr. Reitemeyer for, oh, I guess, a period of possibly seven or eight years. Oh, no. It is more than that. I guess it is perhaps ten or eleven; since Mr. Reitemeyer moved away from Riverside Drive, I have never seen him until this morning.

Q. Yes. But you did know him for some time before that?

A. Yes.

Q. Did you have anything personally to do with the communications between Mr. Reitemeyer and Mr. Marcalus, that Mr. Reitemeyer referred to in his testimony this morning?

A. No, outside of having seen them. I didn't write any of them down.

Q. No, but did you overhear, or did you hear any of the telephone conversations between Mr. Reitemeyer and Mr. Marcalus?

A. Yes, several.

Q. And in what manner did you do that?

A. On the extensions, in my house.

Q. On the extensions. And did you hear Mr. Reitemeyer say anything to Mr. Marcalus, or Mr. Marcalus say anything to Mr. Reitemeyer, with regard to a rental of these premises——

A. Yes.

Q. —pending this settlement of this dispute?

A. Yes, I did. Mr. Marcalus was perfectly willing to rent the house to Mr. Reitemeyer, if Mr. Rosensohn would withdraw his claim for commission on the sale of the house. Mr. Marcalus said he couldn't afford to pay that and not sell the house. Mr. Reitemeyer's reply was he would take care of that himself, forget about that, he would—he was willing to rent the house for a period of two years at ninety dollars a month and assume the commission claimed by Rosensohn, if he pressed it.

Q. And what did Mr. Marcalus say about his informing him of that in writing?

A. Mr. Marcalus said if he would—if he would confirm that in writing to him, he would return the contract, together with Mr. Marcalus' check—that is, Mr. Reitemeyer's deposit of nineteen hundred dollars. In turn, Mr. Marcalus sent his check to Mr. Shaw for nineteen hundred dollars, pending the receipt of Mr. Reitemeyer's confirmation to that effect, which Mr. Reitemeyer never sent.

Q. Never sent?

A. Therefore, Mr. Marcalus decided, in view of the shortage of homes, so many people need homes, and the fact that the place was a loss to us, that we should rent it, on the strength of which a buyer came along, he was willing to either rent or buy—he preferred to buy the house—and Mr. Marcalus accepted his deposit contingent on Mr. Reitemeyer's refusal to buy the house.

Q. And that deposit was afterwards returned, was it?

A. Yes, it was. Now, that check will show that Mr. Marcalus only accepted it on that basis. He wanted Mr. Reitemeyer to have first choice on it—on the house.

Q. Did you have any photostatic copy made of that check——

A. I did.

Q. —and the endorsement?

A. Yes.

Q. Is that it (handing witness paper)?

A. That is it.

Mr. Hartpence: Any objection to the photostat going in?

Mr. Koestler: None at all.

Mr. Hartpence: I offer it in evidence.

(Photostatic copy of check above referred to marked Ex. D-1.)

Mr. Hartpence: The endorsement on the check is "Deposit on house 527 Riverside Drive, Elizabeth, N. J. pending formal contract and Reitemeyer's refusal to purchase."

Mr. Koestler: What is the date of the check?

Mr. Hartpence: 8/9/44: August, 1944, five hundred dollars.

Mr. Koestler: O. K.

Mr. Hartpence: "Samuel Lonoff to N. Marcalus."

Examined by Mr. Hartpence:

Q. Later, Rosensohn sued you and Mr. Marcalus for the amount of that commission on this contract, didn't he?

A. Yes.

MR. HARTPENCE: We ask the other side to admit the judgment was recovered and paid.

MR. KOESTLER: We admit it.

MR. HARTPENCE: And I offer the certificate of the cancellation of the judgment.

(Certificate above referred to marked Ex. D-2.)

MR. HARTPENCE: That is all. Cross-examine.

CROSS-EXAMINATION BY MR. KOESTLER:

Q. Mrs. Marcalus, on how many conversations, which your husband had with Mr. Reitemeyer, did you listen in?

A. Whenever I was at home. I can't tell just how many.

Q. How many?

A. I can't figure the definite number. I didn't keep track of it.

Q. Was it one or more than one?

A. More.

Q. How many more?

A. I just told you I can't remember. I can't tell you a definite number, whether there was two, three or four. I can't tell you that.

Q. Was it your habit to listen in on all the conversations your husband had?

A. No, it was not.

Q. Why did you listen in on this one?

A. Inasmuch as I was involved, being a co-owner of the house, I felt that I was entitled to do that.

Mr. Marcalus knew that I was doing it.

Q. Did you know of the fact that the objection was raised to the title on account of the judgment in the Federal Court on that patent in suit?

A. Will you kindly repeat it?

MR. KOESTLER: Repeat the question.

(Question read by reporter.)

A. After Mr. Koestler advised us to that effect.

Q. You also knew that your husband was unwilling to do anything to have that judgment released?

A. No.

MR. HARTPENCE: That is objected to as incompetent, irrelevant and immaterial, what her husband was unwilling to do.

THE WITNESS: Mr. Marcalus made every effort——

THE COURT: Wait for the question. It is always wise to wait for the question.

THE WITNESS: I am sorry.

EXAMINED BY MR. KOESTLER:

Q. Did you listen in on the conversation that your husband had on the night of August 19 with Mr. Reitemeyer?

A. I haven't a record of the dates.

Q. Did you listen in on the conversation in which your husband said to Mr. Reitemeyer that he would not sell him the house or rent it to him under any conditions?

A. What was that question? Will you repeat that?

(Question read.)

A. Yes, because Mr.——

Q. No. You did listen in?

A. Yes.

Q. You heard your husband say that?

A. Yes.

Q. Do you know when that was?

A. The date?

Q. Yes.

A. No.

Q. You won't deny that it was on the night of August 19, will you?

A. I can neither deny it or affirm it.

Q. In other words, from what you heard, your husband was expecting to get a letter from Mr. Reitemeyer to surrender the contract and giving up his rights under it, before he got his money back or before he saw the lease?

A. Mr. Marcalus wanted a letter from Mr. Reitemeyer to the effect that he was willing to assume all that he promised, such as the payments of the commission to Rosensohn, making repairs on the house and his willingness to pay a certain amount for the house.

Q. Now let us understand: Your husband first told Mr. Reitemeyer that he would give him a lease for any number of years he wanted, didn't he?

A. Yes.

Q. And then he subsequently said, when Mr. Reitemeyer said, "I will have the lease for two years," he said, "I will give you the lease for two years if you pay all of your own expenses and also pay Mr. Rosensohn his commission." That was Mr. Reitemeyer's suggestion that he pay, and your husband was willing to do that, but he never sent him the lease, did he?

A. Because he told Mr. Reitemeyer he would send the lease after he received his letter.

Q. And Mr. Reitemeyer told your husband, after his lawyer approved the lease, he would send him the letter, didn't he?

A. Yes.

Q. And they never got together on it, did they?

A. Evidently not.

MR. KOESTLER: That is all.

THE COURT: Call your next.

RE-DIRECT EXAMINATION BY MR. HARTPENCE:

Q. You said, Mrs. Marcalus, in answer to the question on cross-examination that you listened in at the time that Mr. Marcalus told Mr. Reitemeyer he would not sell to him. And what else was said at that time as

the reason for it? Did he give any reason why he wouldn't sell, your husband?

A. Because Mr. Reitemeyer came down to Mr. Marcalus' offer to clear what they called a cloud as much as possible, but Mr. Marcalus didn't feel that there was a cloud on the—on the deed—that is, on the title because he had deposited this ten thousand-dollar bond just in case anything did turn up. And, therefore, he told Mr. Reitemeyer he was willing for him to forget about his equity in the house until such time as the case was cleared up. He said to Mr. Reitemeyer that he was willing to do everything in his power to make it possible for him to take possession so he wouldn't feel that he would be jeopardized in any way.

Q. Did he at that time tell Mr. Reitemeyer about the filing of the ten thousand-dollar bond?

A. Of course he did.

Q. Did you hear him say that?

A. I heard it.

Q. Did you hear him say anything about being worth a hundred thousand dollars?

A. Merely——

Q. And did he say anything else?

THE COURT: She has not answered it yet.

THE WITNESS: May I?

THE COURT: Yes.

THE WITNESS: Merely to show Mr. Reitemeyer's——

THE COURT: No. The question was, did you hear him say he was worth a hundred thousand dollars.

THE WITNESS: Yes, but not in the manner Mr. Reitemeyer implied.

EXAMINED BY MR. HARTPENCE:

Q. What else, if anything, did he say about that?

THE COURT: Well, what did he say?

THE WITNESS: Well, he told Mr. Reitemeyer that he was perfectly good for—after all, he explained to him that he could not possibly lose the case but, if by chance he did, the amount involved would be so small that it would be, oh, just a mere fraction of what he would be able to take care of: not in a boastful manner.

MR. HARTPENCE: That is all.

RE-CROSS-EXAMINATION BY MR. KOESTLER:

Q. And he would have been able to take care of a hundred thousand-dollar judgment, wouldn't he?

A. Well, it is not likely it would amount to that, but he could take care of it, yes.

Q. Yes. All right.

MR. HARTPENCE: That is all, Mrs. Marcalus.

If your Honor please, we would also like to introduce in evidence a copy of the supersedeas bond in the Federal case.

MR. KOESTLER: I have no objection.

THE COURT: It will be received.

(Supersedeas bond above referred to marked Ex. D-3.)

MR. HARTPENCE: I think we rest, your Honor, reserving the right to proceed upon the counterclaim for damages, if the case should reach that stage of the proceeding.

THE COURT: All right.

MR. KOESTLER: Complainant has no rebuttal, your Honor.

THE COURT: Now, if you want to file a reply brief, you can do it within five days.

MR. HARTPENCE: Five days? Thanksgiving is tomorrow, and Sunday, would take out two of the days. Could we have ten days, your Honor?

THE COURT: I will give you ten days.

MR. KOESTLER: This is very important, your Honor. Mr. Reitemeyer has received a notice to get out, and I am afraid it is going to put him in a very embarrassing position. They won't let him in here. They haven't done anything to protect this house. We wrote them a letter on October 13——

MR. HARTPENCE: Yes, we have.

MR. KOESTLER: Well, we haven't been informed.

THE COURT: Your remarks are addressed to the request for a ten-day period in which to make a reply to your brief?

MR. KOESTLER: Yes. I am giving the reasons why I think it should be short.

THE COURT: I understand that, but you spoke of Mr. Reitemeyer having to get out of possession where he is.

MR. KOESTLER: Where he is, yes.

THE COURT: Well, he won't get into possession of the place any sooner, will he?

MR. KOESTLER: I don't know.

THE COURT: If that is decided, there will probably be an appeal. Judging from the conduct of the parties, the way they are going on, there will probably be an appeal anyway.

MR. KOESTLER: Then I would apply to the court to put us in possession pending the appeal.

THE COURT: This matter could be very nicely settled if they had not gotten at the point where they are now at loggerheads on both ends.

The suggestion which was made of returning his deposit and giving him a lease for two years would

have been the fortunate culmination of the whole thing, but that has been rejected by everybody, so now, unfortunately they will have to take the consequences of whatever happens.

MR. KOESTLER: Well, they had all——

THE COURT: If it is going to interfere with Mr. Reitemeyer's possession of his present residence, and all that sort of thing, there is nothing I can do about it.

MR. KOESTLER: There is this——

THE COURT: Counsel is entitled to have an opportunity to reply to your brief.

I only want to be told about one thing, whether it is not within the power of the Court of Chancery, as the case now stands, to say to this defendant, "You agreed to give this complainant this property free and clear, with the exception of the restrictions. If it is within your power to give him that, you must do it." If it is not, that is something else.

Now, that is the way the case stands now.

MR. HARTPENCE: If I could have ten days——

THE COURT: If you can show me it is not within the power of your client to remove this cloud—that is all I am going to call it now, "cloud"—and he refuses to do it, if it can be done, you will have to do it.

MR. HARTPENCE: That seems to be the real milk of the case, your Honor.

THE COURT: I don't see anything else to it.

Now, the procedure for the doing of that I know nothing about just now, because I have not read either one of your briefs.

Mr. Koestler says there is a procedure——

MR. KOESTLER: That is right.

THE COURT: —which he can follow to remove this cloud. If that procedure is there for him and you

refuse to take it he cannot be blamed. We cannot compel a man to do the impossible.

In a specific performance case, for instance, where a survey shows the property is over the line, we cannot compel them to buy the land next door, because we have no control over the owner of that land, but, if there is any proceeding in his power to give the deed as he agreed to give it, we can compel him to do that. There is no question about that in my mind. There was never in any of the case.

MR. HARTPENCE: May I have ten days in which to seek to persuade your Honor to the contrary?

THE COURT: As I understand it, Mr. Koestler, you are pointing to a statute. Are you pointing to a statute in this proceeding?

MR. KOESTLER: I am.

THE COURT: What is your claim based upon, that you assert he has the power to remove this cloud?

MR. KOESTLER: The statute.

THE COURT: All right. Now, the statute is right there before you. It won't take ten days to read that.

MR. KOESTLER: Here is the statute in my brief.

THE COURT: Either you agree or you don't agree with him.

MR. HARTPENCE: I will have to look up the law.

THE COURT: I will give you five days. You gentlemen know this case. You have studied it. I will take your reply in five days. I won't commit myself to decide the thing in five minutes, though.

MR. KOESTLER: No, I am not asking that.

Will a copy of the memorandum also be sent to me?

MR. HARTPENCE: Oh, yes.

THE COURT: Yes. As things look to me, I will probably be working Thanksgiving Day and there is no reason nobody else should.

MR. HARTPENCE: I had in mind Sunday. I expect to work Thanksgiving Day, but as long as the five days carry me over——

THE COURT: I have been known to work on Sunday, too.

MR. HARTPENCE: I have conscientious scruples about that unless it is a great emergency.

THE COURT: I have, too, but counsel in cases sometimes compel me to work.

Well, I will take your brief in five days.

COMPLAINANTS' EXHIBIT C-1.

THIS AGREEMENT, made this 26th day of May 1944 Between NICHOLAS MARCALUS and MILDRED M. MARCALUS, his wife, of the City of Englewood in the County of Bergen and State of New Jersey hereinafter described as the seller And ALBERT F. REITEMEYER and JULIA A. REITEMEYER, his wife, of the City of Elizabeth in the County of Union and State of New Jersey hereinafter described as the purchaser

WITNESSETH, That the seller agrees to sell and convey, and the purchaser agrees to purchase all that lot of land, with the buildings and improvements thereon, situate in the City of Elizabeth County of Union State of New Jersey, described as follows:

Beginning at a point in the easterly line of Riverside Drive as laid out on a map of Section 1 Riverside Park made by Grassman & Kreh, Surveyors, May 10, 1926, said point being distant two hundred ninety-five and eighty-three one-hundredths (295.83) feet northerly along the said easterly line of Riverside Drive from its intersection with the northerly line of Parker Road as laid out on aforesaid map; thence easterly and at right angles to Riverside Drive one hundred thirty (130) feet to a point; thence northerly and parallel with Riverside Drive fifty (50) feet to a point; thence westerly and parallel with the first course one hundred thirty (130) feet to the easterly line of Riverside Drive; thence southerly along the said line of Riverside Drive fifty (50) feet to the point or place of Beginning.

Said premises being also known as Lot Eight (8) on Block A of the aforesaid map.

Being the same premises conveyed to said Nicholas Marcalus by Harry J. Sievers and Frances Sievers, his wife, by deed dated September 14, 1933, and recorded October 3, 1933, in the Registers's Office

of the County of Union in Book 1276 of Deeds, on page 251 &c.

Said premises being also known and designated as 527 Riverside Drive, Elizabeth, New Jersey.

Subject to the present tenancy.

Subject to restrictive covenants of record affecting said premises, if any.

The price is Nine Thousand Four Hundred Fifty (9,450.00) Dollars Payable as follows:

Five Hundred (500.00) Dollars
on the Signing of this contract, the receipt of which is hereby acknowledged.

Eight Thousand Nine Hundred Fifty (8,950.00) Dollars
in cash on the delivery of the deed, as hereinafter provided.

All fixtures and personal property, such as shades, chandeliers, electrical fixtures, gas ranges, etc., appurtenant to or used in connection with said premises are included in this sale.

This sale covers all right, title and interest of the seller of, in and to any land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining said premises, to the center line thereof, and all right, title and interest of seller in and to any award made or to be made in lieu thereof, and in any award for damage to said premises by reason of change of grade of any street; and the seller will execute and deliver to the purchaser, on closing of title, or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of any such award.

Said premises are sold subject to the provisions of Zoning Ordinances or restrictions and regulations affecting the construction and use of buildings, adopted or imposed by the State of New Jersey or municipality thereof affecting said premises.

The deed shall be a full covenant warranty deed in the proper form, and shall be duly executed and acknowledged by the seller, at the seller's expense, to convey to the purchaser, or the purchaser's assigns, the absolute fee of the above premises, free of all encumbrances, except as above stated.

The deed shall be delivered and title passed at the office of Wall, Haight, Carey & Hartpence, 15 Exchange Place, Jersey City, New Jersey, on or before July 1, 1944 at 10 o'clock forenoon.

Taxes, Rents, water rents, insurance premiums and interest on mortgages if any, are to be apportioned.

If at the time of the delivery of the deed the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments, 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 upon the delivery of the deed.

If there be a water meter on the premises, the seller shall furnish a reading to a date not more than thirty days prior to the time herein set for closing title and the unfixed meter charge for intervening time shall be apportioned on the basis of such last reading.

All notes or notices of violation of law or municipal ordinances, orders or requirements noted in or issued by any State or Municipal Department, Board, Commission or other authority, having jurisdiction against or affecting the premises at the date hereof, shall be complied with by the seller and the premises shall be conveyed free of same, and this provision of this contract shall survive delivery of the deed hereunder.

The risk of loss or damage to said premises by fire, until the delivery of the deed, is assumed by the seller.

The purchaser is to pay all assessments levied and imposed after the date hereof.

The Stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

The purchaser binds himself to pay the consideration in the manner aforesaid.

The seller agrees that James Rosensohn, Inc. brought about this sale and agrees to pay 5 per cent. of the purchase price broker's commission in full therefor.

WITNESS, the hands and seals of the above parties:
In presence of:

A. G. GRIFFITHS
A. G. GRIFFITHS

NICHOLAS MARCALUS (SEAL)
Nicholas Marcalus
MILDRED M. MARCALUS (SEAL)
Mildred M. Marcalus

R. E. SCOTT
R. E. SCOTT

ALBERT F. REITEMEYER (SEAL)
Albert F. Reitemeyer
JULIA A. REITEMEYER (SEAL)
Julia A. Reitemeyer

STATE OF NEW JERSEY }
COUNTY OF } ss.

BE IT REMEMBERED, That on this 26 day of May in the year of our Lord One Thousand Nine Hundred and Forty-four, before me, the subscriber, personally appeared Albert F. Reitemeyer and Julia A. Reitemeyer, his wife who, I am satisfied are two of the persons named in and who executed the foregoing instrument; and I having first made known to them the contents thereof they did thereupon acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

R. E. SCOTT,
(Seal) A Notary Public of New Jersey.

(Endorsed): Contract for Sale of Property

Dated 19

REQUIREMENTS ON CLOSING TITLES

Insurance policies and duplicates; Tax and Water Receipts, Leases, Deeds or Agreements relating to premises; Interest receipts and receipts for principal payments on mortgages should be produced.

If the grantor is married, both parties must join in the execution of the deed.

The Purchaser should have cash or a certified check drawn to his order.

COMPLAINANTS' EXHIBIT C-4.

June 27, 1944

Re: 527 Riverside Drive, Elizabeth, N. J.
Samuel Koestler, Esq.,
Hersh Tower Building,
Elizabeth 4, N. J.
Dear Mr. Koestler:

We herewith enclose copy of proposed deed to be given by Mr. and Mrs. Marcalus on the sale of the above property. Please let me know if same is in proper form.

Yours very truly,

WALL, HAIGHT, CAREY & HARTPENCE

ENCL.
WWS:S

June 28, 1944.
8405

Messrs. Wall, Haight, Carey & Hartpence,
15 Exchange Place,
Jersey City, 2, N. J.
ATTENTION: Mr. Shaw.
Gentlemen:

This will acknowledge receipt of your letter of the 27th inst. enclosing form of deed. I have examined the deed and it is apparently O. K.

As I suggested to you, when we close the title, will you kindly bring the last receipted tax bill and also the O. P. A. certificate relative to tenancy. I would also like to have a letter to the tenant that all rentals due and owing from and after July 1st are to be paid to the new owners.

Thank you for your courtesy.

Yours very truly,

SAMUEL KOESTLER

SK:RIL

(Copy)

SAMUEL KOESTLER
Counselor at Law
Hersh Tower Building
Elizabeth 4, N. J.
Elizabeth 2-6650

Benjamin Nohemie
Melvin J. Koestler
Joseph R. Kane

July 5, 1944
8405

Messrs. Wall, Haight, Carey, &Hartpence
15 Exchange Place
Jersey City, 2, New Jersey

Attention: Mr. William W. Shaw.

Re:—527 Riverside Drive, Elizabeth, N. J.

Dear Mr. Shaw:—

I have been examining the statutes in reference to the judgment against your client rendered in the United States District Court. According to the decisions and general law, although the judgment is designated as an interlocutory judgment, it is final as it fixes the liability of the defendants and charges them with the costs of suit and the costs of the accounting, even though the amount of the damages will be determined on the subsequent accounting. Therefore, the judgment is a lien on all of the lands of the defendants pursuant to 28 U. S. C. A. 812. Under section 814, the judgment ceases to be a lien on real estate pursuant to state law.

The bond which you filed on the appeal is similar to our recognizance in error which merely stays the issuance of execution. (N. J. R. S. 2:27-370) R. S. 2:27-374 provides "The lien of the judgment against real estate may be released and discharged."

In the short time at my disposal, I have been unable to find any other means by which the lien of the

present judgment against your clients' property may be discharged. If you can refer me to any other statute or decision, I will be pleased to review the same as I am particularly anxious to close this title at the earliest possible date. I have turned this matter over to my son who will be able to handle it in my absence.

Yours truly,

SAMUEL KOESTLER
Samuel Koestler

SK:D

(Copy)

WALL, HAIGHT, CAREY & HARTPENCE

July 12, 1944

Re: 527 Riverside Drive, Elizabeth, N. J.
Melvin J. Koestler, Esq.
Hersh Tower Building
Elizabeth, 4, New Jersey

Dear Mr. Koestler:

Since the writer talked with you by phone on this matter, we have made an examination of the authorities on the question of the lien of the judgment of the Automatic Paper Machinery Company, Inc., against Mr. Marcalus and have reached the conclusion that the judgment is not a lien for the following reasons:

1. Section 812 Title 28 U. S. C. A. provides that judgments of a District Court shall be liens on property throughout the state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of the state. The Revised Statutes of N. J., Section 2:29-58 provides that no decree of the Court of Chancery shall, as against a person not a party thereto, become a lien

upon or bind any real estate other than that specifically mentioned in the decree or Bill of Complaint until an abstract of the decree has been docketed in the Supreme Court. We assume that the decree in the Automatic Paper Company case has not been so docketed.

The action of the Automatic Paper Machinery Company against Marcalus was a suit for infringement of a patent. While under the new Federal Rules the distinction between equity and law actions as to form has been abolished, it is nevertheless a fact that the rules of procedure have remained the same and a suit for patent infringement is still an equity suit. Therefore Section 2:29-58 would seem to apply.

2. The judgment in the patent suit is interlocutory and not final. The amount of damages, if plaintiff is entitled to recover, remains to be determined by reference to a Special Master. There is nothing in the interlocutory judgment as rendered on which an execution for money could be based and no execution for money could be issued until the final judgment is rendered.

Section 2:27-252 of the Revised Statutes provide that "no judgment shall affect or bind any real estate but from the time of the actual entry of such judgment on the minutes or records of the court".

R. S. 2:27-256 prescribes the form of a rule for final judgment and the matters to be contained therein including the amount of the debt, damages and costs recovered.

R. S. 2:26-139 provides that Sheriff's deed of sale under execution shall vest in the purchaser as good an estate in the premises as the debtor was seized of or entitled to at or before the judgment for the enforcement of which the execution issued.

It was held in Russell v. Russell-Robinson Co., 86 N. J. L. 13 that when plaintiff obtained a verdict in an action in the Supreme Court and thereafter a rule to show cause why the verdict should not be set aside was

allowed and thereupon judgment nisi was entered on the postea and the rule was afterwards discharged, the judgment nisi bound the lands of which the judgment debtor was then seized.

Garrison, J., in the opinion of the court said "the judgment entered on June 3d, 1913 (the judgment nisi) is one upon which execution may issue". When judgment final was entered it was issued *nunc pro tunc* as of the time of the filing of the postea.

The effect of this decision seems to be that a judgment nisi entered on a postea after a rule to show cause has been allowed may be a lien on lands of the debtor as of the date of the judgment nisi if the rule is afterwards discharged and a final judgment would be nunc pro tunc as of the date of the judgment nisi.

It is obvious that there is a wide distinction between the case of a judgment nisi where the full amount of the award is set forth and the case of an interlocutory judgment such as we are discussing. The judgment against Mr. Marcalus is not one on which an execution for money could be based. We are unable to find any rule, statute or authority for the entry of a final judgment nunc pro tunc in such a case, and we do not believe there is.

We enclose a printed copy of the brief which contains the order and interlocutory judgment and would be glad if you would return it to us when it has served your purpose.

Will you please let us have your thoughts in this matter.

Yours very truly,

WALL, HAIGHT, CAREY & HARTPENCE

WWS:LV
Enc.

(Copy)

SAMUEL KOESTLER
Counselor at Law
Hersh Tower Building
Elizabeth 4, N. J.
Elizabeth 2-6650

Benjamin Nohemie
Melvin J. Koestler
Joseph R. Kane

July 17, 1944
8405

Messrs. Wall, Haight, Carey & Hartpence
15 Exchange Place
Jersey City, New Jersey

Attention: Mr. William W. Shaw

Re: 527 Riverside Drive, Elizabeth, N. J.

Dear Mr. Shaw:

Your letter of July 12 is at hand. I have considered the same but cannot agree with your conclusions.

In your first argument you overlook entirely the second sentence of Section 812. Assuming for purposes of argument that all you say is correct, nevertheless I know of no statute of this state providing for the docketing of a Federal Equity Decree.

Therefore, the limitation of Section 812 would not apply, and the decree would become a lien then entered. I refer you to 28 U. S. C. A., Section 812, Note 7.

In our opinion the judgment in the patent suit, while termed interlocutory, is a final judgment in that it awards costs and in that it finally determines the principal matter in controversy between the parties.

See, for instance, Dean vs. Nelson 19 L. ed. 94. Are you not attempting to "blow hot and cold?" Your firm is appealing from this judgment, or "final deci-

sion'' such as may be appealed from under 28 U. S. C. A., Section 225.

In our opinion the judgment is a lien upon the premises. Regardless of any argument you may make in that respect, you must certainly agree that it is a cloud upon the title.

The purchaser does not desire to buy a litigation but wants a clear title. Will you therefore kindly have this judgment lien released or discharged, or otherwise disposed of so that it will not be a cloud upon the title.

Yours very truly,

SAMUEL KOESTLER
By:—Melvin J. Koestler

MJK:SD

July 25, 1944

Re: 527 Riverside Drive, Elizabeth, N. J.
Samuel Koestler, Esq.
Hersh Tower Building
Broad Street
Elizabeth, 4, N. J.

Dear Mr. Koestler:

We have just talked with Mr. Marcalus who has returned from his vacation. He takes the position that the judgment of the Automatic Paper Machinery Co., Inc., against the Marcalus Manufacturing Co. and Mr. Marcalus personally, is not a lien on the above mentioned property. He is willing and makes the offer to your clients, Albert F. Reitemeyer and his wife, to cancel his contract for the sale of the above property and return the purchase money received unless your clients will take the property with the judgment as it stands. He is not willing to incur the expense of legal proceedings to remove the judgment from the property as he claims it is not a lien.

Will you please let us know what reply your clients desire to make to this offer.

Yours very truly,

WALL, HAIGHT, CAREY & HARTPENCE

WWS:LV

July 28, 1944.
8405

Messrs. Wall, Haight, Carey & Hartpence,
15 Exchange Place,
Jersey City, 2, N. J.
ATTENTION: Mr. William W. Shaw.

Re: 527 Riverside Drive, Elizabeth, N. J.

Dear Mr. Shaw:

This will acknowledge receipt of your letter of the 25th inst. which I have submitted to my client, Mr. Albert F. Reitemeyer. Mr. Reitemeyer entered into the contract in good faith to purchase the property as a place of residence and has made arrangements accordingly. He cannot see why he should receive his money back and be subject to the expenses to which he has gone in having the title examined and the inconvenience to which he would be put if the contract were surrendered. The fact that Mr. Marcalus has a judgment against him is not in any manner chargeable to Reitemeyer.

Since receiving your letter we have very carefully re-examined the law and the decisions indicate and hold quite definitely that the judgment is in effect a final judgment and is a lien on the property and I am firmly convinced that my opinion in that regard will be sustained by our Courts. However, it seems to me that there is a practical solution to this matter without working injury to either of the parties and I have Mr. Reitemeyer's consent to the following suggestion:

Mr. Reitemeyer will be willing to move into the property as a tenant at a monthly rental of $75.00 and will stay in possession as such tenant until the due course of the litigation removes or satisfies the judgment in question. Mr. Reitemeyer is now paying $75.00 rent where he is living. He will have to remove from the property at an early date owing to the fact that it has been purchased by a third party. Mr. Reitemeyer figures that the $75.00 a month will be more than ample to pay all of the carrying charges of the property.

Upon acceptance of this proposition by Mr. Marcalus we can arrange for an extension of the time for closing title accordingly. Please submit this to Mr. Marcalus and advise me.

Yours very truly,

SAMUEL KOESTLER

SK:RIL

WALL, HAIGHT, CAREY & HARTPENCE
Counsellors at Law

Telephone Bergen 4-2000

Albert C. Wall
Thomas G. Haight, (1920-1942)
William H. Carey
John A. Hartpence
Edward J. O'Mara
Alfred F. Conway
Frederic W. Shumann
Gerald F. O'Mara

Charles J. Gormley
William W. Shaw

15 Exchange Place
Jersey City 2, N. J.
August 4, 1944.

Samuel Koestler, Esq.
Hersh Tower Building
Broad Street
Elizabeth, N. J.

Re: 527 Riverside Drive, Elizabeth, N. J.

Dear Mr. Koestler:

Your letter of the 28th ulto. was duly received and forwarded to Mr. Marcalus. He tells me that he is making some arrangement with Mr. Reitemeyer to take possession of the property as a tenant. I have no information as to details of the plan.

Yours very truly,
WM. M. SHAW
M. M.

WWS:MM

August 16, 1944

Re: 527 Riverside Drive
Samuel Koestler, Esq.
Hersh Tower Building
Elizabeth 4, N. J.
Dear Mr. Koestler:

The writer just talked with Mr. Marcalus on the phone and he makes this suggestion and proposition to your client:

The amount of the purchase price is $9,450. Of this $1,900. has been paid, leaving a balance due of $7,550. The suggestion is that he convey the property subject to the existing mortgage held by the Prudential. The amount due on this mortgage is approximately $4,500. I do not know the amount of the mortgage which the Bank intended to take, but it was probably in excess of the amount due the Prudential. If Mr. Reitemeyer is not in a position to finance the sale, in view of the smaller amount of the existing Prudential mortgage, Mr. Marcalus is willing to take a second mortgage on convenient terms for the amount needed to make up the difference between the present mortgage and the proposed mortgage of the bank. Crediting $4,500. due on the present mortgage and $1,900. cash paid, leaves a balance due of $3,050. If necessary to carry through the sale Mr. Marcalus is willing to take a purchase money mortgage for all of this balance so that no more money will be needed to complete the purchase. The terms as to interest and installment payments of the purchase money mortgage could be arranged between Mr. Marcalus and Mr. Reitemeyer.

Will you be good enough to submit this proposal to your client, and advise me.

Yours very truly,

WALL, HAIGHT, CAREY & HARTPENCE

WWS:S
cc to Mr. Marcalus.

August 21st, 1944.
8405

Messrs. Wall, Haight, Carey & Hartpence,
15 Exchange Place,
Jersey City, 2, New Jersey.

Re: 527 Riverside Drive, Elizabeth, N. J.

Gentlemen:

This will acknowledge receipt of your letter of the 16th inst. written for you by Mr. Shaw. I am addressing this letter to the firm rather than Mr. Shaw because he has informed me over the telephone today that he is leaving on his vacation and that the matter would be turned over to someone else in your office.

My client, Mr. Albert F. Reitemeyer, now is and ever since July 3rd (the day fixed for closing title) has been ready, willing and able to accept title pursuant to the contract of May 26th, 1944, provided your clients will give title free and clear of encumbrances and otherwise as provided in the written agreement of sale. Mr. Reitemeyer has no desire to change the terms of payment and does not require financial assistance from Mr. Marcalus in order to consummate the transaction. Our search definitely indicates a judgment of record against Marcalus in the United States District Court at the suit of Automatic Paper Machinery Company, Inc. We have called your attention to the statutes under which the lien of this judgment may be released or discharged, but Mr. Marcalus has taken the position that he will not go to any expense to relieve the property from the lien or cloud of this judgment.

Mr. Marcalus has made several propositions to Mr. Reitemeyer and has always changed his mind. The proposition which I have made in my letter to you of July 28th still holds good.

Mr. Reitemeyer has just left my office and has authorized the writing of this letter and has further instructed me that unless something definite is done

within the next few days towards carrying out the contract that I am to file a bill for specific performance. I will, therefore, delay the filing of this bill until Friday of this week to give you an opportunity to get this matter settled on a business basis. Mr. Reitemeyer now insists that Mr. Marcalus must carry out the contract and give him title free and clear in accordance with the terms of the written agreement.

Yours very truly,

SK:RIL SAMUEL KOESTLER

October 13, 1944.

Messrs. Wall, Haight, Carey & Hartpence,
15 Exchange Place,
Jersey City, 2, N. J.

Re: Reitemeyer vs. Marcalus

Gentlemen:

Mr. Reitemeyer has just called to my attention that the approaching winter season may do considerable damage to the building on the premises in question, unless the same is properly and suitably protected, particularly insofar as the plumbing and heating systems are concerned. These systems should be protected by your client unless he will give us permission to enter into the premises and do the same ourselves. This might be obviated if Mr. Marcalus will consent to Mr. Reitemeyer entering into possession of the property as tenant pending the determination of the specific performance suit.

If Mr. Marcalus does not acquiesce in either of these suggestions, then whatever damage may be caused to the property in the meantime will undoubtedly be attributable to your client and he will be charged with the same.

Yours very truly,

KOESTLER & KOESTLER

SK:RIL By:

WALL, HAIGHT, CAREY & HARTPENCE
Counsellors at Law

Telephone Bergen 4-2000

Albert C. Wall
Thomas G. Haight, (1920-1942)
William H. Carey
John A. Hartpence
Edward J. O'Mara
Alfred F. Conway
Frederic W. Shumann
Gerald F. O'Mara

Charles J. Gormley
William W. Shaw

15 Exchange Place
Jersey City 2, N. J.
October 16, 1944

Reitemeyer v. Marcalus
Samuel Koestler, Esq.
125 Broad Street
Elizabeth, N. J.

Dear Mr. Koestler:

We are in receipt of your letter of the 13th inst. We have forwarded the contents of same to Mr. Marcalus for his attention.

Yours very truly,

WALL, HAIGHT, CAREY & HARTPENCE

S.

WWS:S

Civil—2826.

Order and Interlocutory Judgment.

This cause having come on to be heard on plaintiff's motion for summary judgment under Rule 56, Rules of Civil Procedure, on the pleadings, deposition and affidavits herein, it is

ORDERED, ADJUDGED AND DECREED:

1. That, except as to the amount of damages, there is no genuine issue of any material fact within the meaning of Rule 56.

2. That plaintiff, being entitled to a judgment as a matter of law, its motion for summary judgment be, and the same hereby is granted.

3. That plaintiff, Automatic Paper Machinery Company, Inc., is now and has been, since its date of issue, the sole owner of the patent in suit No. 1,843,429, and of all claims for profits and damages arising out of all infringements of it.

4. That defendants are estopped to deny the validity of Patent No. 1,843,429.

5. That since the issue of Patent No. 1,843,429, and prior to the filing of the complaint in this suit, the defendants, Marcalus Manufacturing Company, Inc., and Nicholas Marcalus have made and used in the United States machines for mounting cutters on box blanks which machines embody the invention of that patent and, in particular, the invention defined in Claims 1, 2, 3, 4, 7 and 8 thereof, and that they have infringed those claims after notice of infringement.

6. That perpetual injunctions issue out of and under the seal of this Court directed to the defendants, Marcalus Manufacturing Company, Inc., and Nicholas Marcalus, their officers, directors, employees, agents

and workmen and all claiming or holding under or through either, enjoining and restraining them and each of them during the remainder of the term of Patent No. 1,843,429 from directly or indirectly making, using or selling or offering for sale machines for mounting cutters on box blanks embodying the invention described in that patent and secured by its claims, Nos. 1, 2, 3, 4, 7 and 8 and from in anywise infringing upon plaintiff's exclusive rights in the premises.

7. That the plaintiff recover from defendants the profits that each of them has derived, received or made by reason of its or his infringement of the patent in suit and that plaintiff also recover from the defendants all damages which it, the plaintiff, has sustained by reason of those infringements.

8. That this cause be referred to as a Special Master of this Court, to take and state an account of the defendants' profits, to assess the plaintiff's damages and to report thereon to this Court with all convenient speed, and that the defendants, their officers, agents and employees are hereby directed and required to attend before the Master from time to time as he shall direct and to produce before him such apparatus, books, papers, vouchers, documents and writings as he may require, and to submit to such oral examination, or otherwise as he may require in connection with the accounting and the assessing of damages.

9. That plaintiff recover the costs of this litigation including the costs of the accounting ordered by this judgment, all to be taxed by the clerk.

Approved:

SMITH,
United States District Judge.

February 8th, 1944.

DEFENDANTS' EXHIBIT D-1.

55-14

FEDERAL TRUST COMPANY

Newark, N. J. 8-19 1944

Pay to the order of N. Marcalus $500 00/100

Five hundred 00/100 ..... Dollars

No. .....

Samuel Laroff

(On back)

Deposit on house 527 Riverside Drive Elizabeth, N. J. Pending formal contract and Reitemeyer's refusal to purchase

DEFENDANTS' EXHIBIT D-2.

NEW JERSEY SUPREME COURT.

James Rosensohn, Inc., a corporation of the State of New Jersey,
Plaintiff,

vs.

Nicholas Marcalus and Mildred M. Marcalus, his wife,
Defendants.

Action at Law. Summary Judgt.
Entered October 18, 1944.

Damages	$483.52
Costs	27.86
	$511.38

Koestler & Koestler, Att'ys.

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey, do certify that the judgment, of which the above is a true statement, was this day cancelled of record.

In testimony whereof, I have hereto set my hand and the seal of said Court, at Trenton, this twentieth day of November A. D. nineteen hundred and forty-four.

(Seal)

James J. Gavin
Clerk.

DEFENDANTS' EXHIBIT D-3.

UNITED STATES DISTRICT COURT
District of New Jersey

Civil Action

File #2826

Automatic Paper Machinery Company, Inc.,
Plaintiff

—against—

Marcalus Manufacturing Company, Inc. and Nicholas Marcalus,
Defendants

SUPERSEDEAS BOND

Know All Men by These Presents: That Marcalus Manufacturing Company, Inc. and Nicholas Marcalus, as Principals, and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, duly authorized to transact business pursuant to the Act of Congress, approved August 13, 1894, and having an office and principal place of business for the State of New Jersey, at Military Park Building, Newark, N. J., as Surety, are held and firmly bound unto the above named Automatic Paper Machinery Company, Inc. in the sum of Ten Thousand ($10,000) Dollars to be paid to the said Automatic Paper Machinery Company, Inc. to the payment of which well and truly to be made, said Principals and Surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed and dated the 23rd day of February, 1944.

WHEREAS, the above named defendants have filed a notice of appeal to the United States Circuit Court of Appeals for the Third Circuit, from the judgment entered in the above entitled suit, by a Judge of the District Court of the United States for the District of New Jersey, on the 7th day of February, 1944.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That, if the above named MARCALUS MANUFACTURING COMPANY, INC. and NICHOLAS MARCALUS shall within three months from the 8th day of February, 1944 prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

MARCALUS MANUFACTURING COMPANY, INC.,

By: Nicholas Marcalus /s/
President.

Nicholas Marcalus /s/

Attest:

Mildred M. Marcalus /s/

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By: R. R. Phelan /s/
Attorney-in-fact

Attest: Lillian D. ? /s/
Attorney-in-fact

Approved as of February 8, 1944 and ordered that all proceedings herein in the United States District Court for the District of New Jersey be and the same hereby are suspended and stayed for a period of three months.

William F. Smith
U. S. D. J.

Dated:
February 25, 1944 from February 8, 1944

New Jersey Court of Errors and Appeals

ALBERT F. REITEMEYER and JULIA A. REITEMEYER, his wife,
Complainants-Respondents,

vs.

NICHOLAS MARCALUS and MILDRED M. MARCALUS, his wife,
Defendants-Appellants.

On Appeal from the Court of Chancery

BRIEF FOR DEFENDANTS-APPELLANTS.

Statement of the Case.

This action was brought to compel the specific performance of a contract of sale, whereby the defendants-appellants (hereinafter referred to as the "defendants") agreed to sell, and the complainants-respondents (hereinafter referred to as the "complainants") agreed to purchase a residence property in the City of Elizabeth, New Jersey, No. 527 Riverside Drive. A copy of the contract is in the State of Case at page 78. (The pages hereinafter referred to by numbers are pages of the State of Case, unless otherwise stated.)

The agreed price for the property was $9,450 cash, and it was to be conveyed by a full covenant warantee deed, free and clear of incumbrances, except the existing tenancy, zoning ordinances and building restrictions. $1,900 was paid by complainants on account of the purchase price. The time for passing title fixed by the contract was July 1, 1944, and this was extended by agreement

to July 3. Complainants then refused to take title to the property referred to in the contract of sale, and thereafter filed their bill for specific performance.

Statement of the Facts.

The reason given by complainants for refusing to take title was that a judgment had been returned on their judgment search. This was rendered in an action in the United States District Court for the District of New Jersey brought by Automatic Paper Machinery Company, Inc., against Marcalus Manufacturing Company, and Nicholas Marcalus, and was entered February 7, 1944. A copy of this judgment is in the State of Case, at page 97. An appeal was taken from this judgment to the United States Circuit Court of Appeals, and was pending at the time this suit was commenced (p. 62).

Complainants claimed that this judgment was a lien and cloud on the title to said premises, and refused to accept a deed to said premises, and pay the balance of the contract price, until the alleged lien and cloud should be removed.

Defendants were, at the time set for passing title as aforesaid, ready and willing, and offered, to perform said contract on their part, and execute and deliver a deed in accordance with said contract. Defendants claimed and still claim, that said judgment was not a lien or cloud of title on said premises, and so informed complainants' counsel.

Thereafter, the parties carried on negotiations with the purpose of effecting a settlement of the controversy whereby complainants could take possession of said premises. See correspondence, Exhibit C-4 in the State of Case. But no satis-

factory arrangement could be agreed upon, and on August 27, 1944, complainants filed their bill of complaint.

Thereupon, defendants elected to deem said contract null and void, and at an end, by reason of the breach thereof by complainants.

At the close of the hearing of the case in the Court below, the defendants rested, reserving, with the consent of the Court, the right to proceed upon their counterclaim, if the case should reach that stage of the proceeding (p. 73).

Grounds of Appeal.

The grounds of appeal, and the particulars in which the decree appealed from is alleged to be erroneous, are stated in the Petition of Appeal, set forth in the State of Case, at page 27.

Questions Involved.

1. The judgment in the case of *Automatic Paper Machinery Company, Inc.*, against *Nicholas Marcalus,* in the United States District Court, was not a lien on the property referred to in the contract of sale.

2. The complainants were not entitled, in right and justice, to a decree for specific performance, even though the judgment against Marcalus was a lien on said property, and regardless of the fundamental power of the Court of Chancery to decree specific performance in a proper case, it has no power or jurisdiction to compel the defendants in the instant case to affirmatively vacate and discharge an alleged existing lien.

3. The procedure indicated by complainants for obtaining a release of the alleged lien, does not

apply to the instant case, since the action in the United States District Court was an Equity suit, and the provisions of the state statute were not complied with.

THE ARGUMENT.

I.

The judgment obtained by Automatic Paper Machinery Company, Inc., against Nicholas Marcalus in United States District Court, was not a lien on his property, and therefore was not a cloud on the title.

Complainants rely for their claim that the judgment was a lien, on a Federal statute, title 28 U. S. C. A. § 812, which is as follows:

> "Judgments and decrees rendered in a district court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State. Whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana before a lien shall attach, this section and section 813 of this chapter shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conform to the rules and requirements relating to the judgments and decrees of the courts of the State."

Reference should therefore be made to the statutes and decisions of the courts of New Jersey, to determine in what manner and to what extent the Federal judgment applies to the procedure followed in our state.

It will be noted that the suit of *Automatic Paper Machinery Company* in the Federal court was one for the infringement of a patent, and the judgment was a summary judgment rendered under Rule 56 of Rules of Civil Procedure of the United States District Court, which provides in part paragraph (a), that "A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon *all or any part thereof.*" (Italics ours.)

It is further provided, in this rule, paragraph (d) that if on motion under this rule judgment is not rendered *upon the whole case or for all of the relief asked,* and a trial is necessary, the court shall make an order "specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

It is also provided in Rule 54, paragraph (b) as follows:

> (b) "JUDGMENT at VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counter-claims arising out of the

> transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims."

See also Rule 53(e) (2), which provides in part as follows:

"(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."

It thus appears that under the new Rules of Civil Procedure, the judgment of the United States District Court in the *Automatic Paper Machinery Company* case was an interlocutory judgment as to a part only of the case. It was final only as to the issues therein decided.

It adjudged infringement of the patent in suit; it granted an injunction; it adjudged the *right* of the plaintiff to recover damages and profits *if any;* and it ordered a reference to a special master to find and determine defendant's profits and plaintiff's damages. It did not determine *the amount* of damages or profits, *or even that any had accrued.* That was reserved for a further trial before the master, and the final judgment of the court on the master's findings. *Then and then only* could a lien arise, if damages and profits were found to have accrued.

Referring now to the laws of New Jersey, which must govern the application of this Federal statute we will consider the cases and statutory provisions:

> "The lien of a judgment at law upon lands of a judgment debtor is purely statutory. *Voohrees* v. *Chaffers,* 24 N. J. Law 507. Our

first statute was passed by the Colonial General Assembly in 1743 (*Neville's Laws 279—80-81*) and its provisions respecting such lien are now embodied in *R. S. 2:26-138-139.*" *McLaughlin* v. *Whaland,* 127 N. J. E. 393, 397.

R. S. 2:27-252 provides that "No judgment shall affect or bind any real estate, but from the time of the actual entry of said judgment on the mintues or records of the court."

Assuming that the judgment of the *Automatic Paper Machinery Company* above referred to has been entered so as to comply with this provision, there is nothing in the judgment as entered which could bind or in any way affect the lands of the defendants.

R. S. 2:27-256 states the requirements for the entry of a final judgment for a sum of money only, including the following:

"b. The style of the action and the amount of debt, damages and costs recovered, which shall be entered in figures and words at length; and

"c. The date of the actual entry of such judgment."

It is perfectly obvious that the judgment of the *Automatic Paper Machinery Company* does not meet these requirements.

The *Automatic Paper Machinery Company* judgment grants costs to the plaintiff to be taxed by the clerk. No costs were taxed (page 62) and if and when they should be taxed, pursuant to the direction of the judgment, or the statute, no lien could arise prior to the time of the taxation. It was held by our Supreme Court, in *Den* v. *Morse,* 12 N. J. L. 331, 335, that after a judgment was entered and actually signed by the Trial Judge, and a blank space had been left to insert the

amount of costs, the subsequent taxation of the costs would not permit of their insertion in the judgment, and the judgment could not be increased by the addition of the costs, thereby increasing to that extent, the amount of the judgment lien on execution. In the *Automatic Paper Machinery Company* case the costs were not even taxed.

R. S. 2:26-138, which deals with a sale under execution is as follows:

> "A sheriff or other officer selling real estate by virtue of an execution to him directed, shall make to the purchaser thereof a deed of conveyance of the real estate sold, which shall recite the execution by virtue of which the real estate therein described was sold."

and *Section 2:27-139* provides that

> "The deed mentioned in section 2:26-138 of this title shall transfer to and vest in the purchaser as good and perfect an estate to the premises therein described as the execution debtor was seized of or entitled to at or before the judgment for the enforcement of which the execution issued, as fully to all intents and purposes as if the execution defendant had sold such real estate to such purchaser, and had received the consideration money and signed, sealed and delivered a deed for the same."

It is clear that no execution could issue on the interlocutory judgment in the *Automatic Paper Machinery Company* case, and if issued on the final judgment after sale and conveyance by Marcalus, no lien would attach to the property in the hands of his purchaser, or any subsequent owner.

We are unable to find any statutory or other authority, whereby a final judgment, in a case like

that of the *Automatic Paper Machinery Company,* can be entered *nunc pro tunc,* or would operate retroactively to impress a lien, as of the date of the interlocutory judgment. On the contrary many authorities hold that judgments like or similar to the one in the *Automatic Paper Machinery Company* case create no lien, and do not operate retroactively.

In *McNamara* v. *N. Y. L. E. & W. R. Co.,* 56 N. J. L. 56, it was held that by the common law practice judgment *nunc pro tunc* could not be entered without special leave of the Court. But see Rule 40 (now 128) which provides that when judgment *nisi* is taken and a rule to show cause is allowed, and afterward discharged, judgment final may be entered *nunc pro tunc* as of the date judgment *nisi* was rendered.

The decision in *Russell* v. *Russell-Robinson Co.,* 86 N. J. L. 13, follows Rule 128 and holds that the lien of a final judgment relates back to the date of the judgment *nisi,* where a rule to show cause was allowed and afterwards discharged. This Rule 128 seems to be the only exception to the rule that a judgment can create a lien only from its actual entry, but the rule embodied in the exception is clearly distinguishable from the facts in our case, as the judgment *nisi* fixes definitely *the amount* of the judgment, while the interlocutory judgment of the *Automativ Paper Machinery Company fixes no amount,* and furnishes no basis for an execution, but leaves the whole sum to be determined by a future and final judgment.

Some decisions of the courts of other states, which show the general trend of judicial rulings are as follows:

Hagan v. *Chapman,* 41 A. 974, Superior Court of Delaware.

> "A judgment does not create a lien on the real property of the debtor, unless it is capable of collection by execution against said property."

Harris v. *Parks,* 77 Oklahoma 197; 187 Pacific 470,

> "It is essential to the creation of a judgment lien that there should be a judgment which is final and not merely interlocutory, capable of collection by execution against the debtor's property, rendered by a lawfully and validly constituted court, and being a valid and subsisting judgment, for the payment of a certain sum of money."

Mansfield v. *Hill,* 56 Oregon 400, 107 Pacific 471.

> "The provision of the divorce decree for the future monthly payments by defendant until the further order of the court, being for an indefinite time and amount not yet accrued, is not a definite liability or a judgment for a specific sum which may become a lien upon his property. The very idea of a lien upon property involves certainty as to the amount, so that persons dealing with defendant as well as defendant himself, may know how much is involved; otherwise he would be precluded from dealing with his property at all, since it would be impossible for him to pay the lien. Freeman on Judgments, § 340, says: 'There can be no lien except upon such judgments as the plaintiff is entitled to satisfy by levy upon the lands of the debtor' * * *. The judgment must be for a specified sum. To the same effect is Black on Judgments, § 407."

It is immaterial in our opinion whether or not the judgment of the *Automatic Paper Machinery Company,* may properly be termed final or inter-

locutory. It was final with respect to certain material issues involved in the case, viz., the ownership and validity of the patent in suit, the fact of infringement, and the right of the plaintiff to recover profits and damages. It was not final with respect to other material issues involved, viz., the amount of profits earned by the defendant and the amount of damages sustained by the plaintiff. These issues could only be determined on final judgment, and if and when that judgment should be rendered, it would be a lien on the defendant's real property to the amount of the money adjudged to be due; provided all of the statutory requirements for making it a lien had been complied with.

Under the rules and practice of the Federal Court an appeal can now be taken from an interlocutory judgment, but that does not make it a final judgment with respect to the *amount* of the profits and damages which may eventually be found to be due.

As we said above, no execution could be issued on the interlocutory judgment, and since an execution is the basis of a lien, no lien could arise by reason of the interlocutory judgment, because no definite amount of money is involved.

> "It is essential to the creation of a judgment lien that there shall be a judgment, which is final, valid and subsisting, and rendered by a lawfully and validly constituted court, for the payment of a definite and certain sum of money, capable of collection by execution against the debtor's property" 34 C. J. page 571.
>
> "Since the lien of a judgment is the creation of the statute, it is necessary to its existence that statutes requiring certain formalities of docketing and indexing should be fol-

lowed in all substantial particulars'' 34 C. J. page 578.

Among those essential particulars is the amount of the debt. R. S. N. J. Section 2:27-256, (b).

There is no statutory provision in New Jersey, and we can find no decision of any court, which makes a judgment such as the interlocutory judgment above referred to, a lien on real estate. If the judgment was not a lien, and if execution could not be issued on it, it could not be a cloud on the title.

II.

The complainants were not entitled, in right and justice, to a decree for specific performance, and the Court was without power to grant same.

In *Ten Eyck* v. *Manning,* 52 N. J. Eq. 47, at page 49, VAN FLEET, V. C., says:

> '' * * * The remedy by specific performance is not a matter of strict right, but of sound judicial discretion, and will be granted or denied as the justice and right of the particular case shall seem to the court, on full consideration of the rights and equities of the parties, to require. The enforcement or denial of this remedy is regulated by certain well-established principles, one of which is that it will not be granted, as a general rule, in cases where mutuality of obligation and remedy does not exist; or, stated in another form, mutuality of remedy is essential to the maintenance of a suit for specific performance.''

This rule was recognized by the Court of Errors in an opinion by Judge KAYS in *Degheri* v. *Caro-*

bine, 102 N. J. Eq. 264, on page 268, and also on page 269, where he quoted from an opinion by LEAMING, V. C. in *Public Service Corporation* v. *Hackensack Meadows Co.,* 72 N. J. Eq. 285.

Is there mutuality of obligation and remedy in the instant case? According to the complainants' contention there is not. While the complainants are able to perform, the defendants cannot, so the complainants assert, because of the alleged defect in title.

The rule is also recognized and applied in the recent case of *Fiedler Inc.* v. *Coast Finance Co., Inc.,* 129 N. J. Eq. 161, wherein BROGAN, C. J., in the opinion of the Court of Errors, said, at page 166:

> "The general rule is that specific performance is decreed only where there is mutuality. * * * The test seems to be whether the remedy is mutual as well as the obligation. *Ten Eyck* v. *Manning, supra.* If the enforcement of the obligation may not be granted to both contracting parties, it should not be enforced against one party."

Regardless of the fundamental power of the Court of Chancery to decree specific performance in a proper case, it has no power or jurisdiction to compel the defendants in the instant case to affirmatively vacate and discharge an alleged existing lien.

Millmore v. *Murphy,* 56 Atl. 292 (Court of Errors and Appeals) is a case directly in point. It was a suit for specific performance by a vendee against the vendor of real property. There was a flaw in the title which the defendant vendor was unable or unwilling to perfect. The Court of Errors (in 65 N. J. Eq. 767) affirmed the Court of Chancery on the opinion of the Vice-Chancellor,

from whose opinion we quote as follows, at page 293:

> "* * * In the second place, the bill prays, not for a specific performance cypres; not for a conveyance of such title as defendant is able to give, but for absolute performance. It prays 'that the said William Murphy may be decreed to specifically perform the agreement herein set forth with your orator.' On the trial the complainant did not recede from this position. He did not ask for a conveyance of such title as the defendants had, but for a conveyance of a perfect title. As, according to the complainant's insistence, the defendant did not have such title, a decree to convey would not give complainant either what he wants or what he is willing to pay for. He stands in this dilemma. If defendant's title is good, then he is himself in default for not complying with the contract, for the evidence shows that defendant Murphy was willing to convey what he had. If the title is bad, then complainant is not willing to pay the agreed price on a decree for a conveyance. He has never tendered the money, and he has always taken the position that he is not obliged to pay any part of the consideration until he gets a perfect title. In this aspect of his case, what he is trying to do is not only to secure specific performance, but, as an indispensable preliminary, to obtain a decree directing defendant to perfect his title—a thing which he may or may not be able to do. Of course, the court can make no such decree."

In *Public Service Corporation* v. *Hackensack Meadows Co., supra,* suit was brought by a vendee for specific performance of a contract to convey a plot of land by an assignor of the defendant, to

the complainant. It appeared that title to a portion of the premises was not in the vendor, but that defendant could have acquired title thereto at a reasonable price, and it was contended by complainant that no embarrassment in the execution of the decree could be reasonably anticipated. The bill was dismissed. LEAMING, V. C., in the opinion said, at page 287:

> "* * * It is urged on behalf of complainant that the underlying reason for the refusal to decree specific performance in such cases will be found to rest in the inability of the court to enforce such decrees and its reluctance to make nugatory decrees, and upon that view it is argued that the present case is free from the operation of the rule in that the bill avers that defendant can acquire title to the land in question at a reasonable price, and this fact being admitted, it is urged that no embarrassment in the execution of the decree can be reasonably anticipated. In this contention I think that counsel of complainant fails to give full force to the reasons for the rule in question. While in the cases above cited decrees may seem to have been refused because of their manifest want of inherent coercive force, yet that does not appear to be the sole ground upon which equity is impelled to deny relief in such cases. It is a well-established rule in equity that no contract will be specifically enforced unless there is in the contract such mutuality of obligation that either party may enforce it against the other. As a vendor without title to the subject-matter of the contract of sale cannot enforce the contract against his vendee, or at least cannot until he shall have actually acquired title, courts of equity hold such contracts unenforceable at the instance of the vendee be-

cause of want of mutuality as well as because of the possible infirmity of the decree."

We refer again to *Fiedler, Inc.* v. *Coast Finance Co., Inc., supra,* which was a suit to compel specific performance of a contract to convey land, entered into by the defendant with the complainant, Fieldler, Inc. The Chief Justice, in his opinion, says, on page 168:

> "But assuming for the sake of argument that the contract was one which could otherwise be specifically enforced, the question arises whether the respondent could obey the decree. The contract required the respondent to get the approval of the F. H. A. as to maps, street construction, parks, recreation area, grade, width of street, water supply, and what-not. A decree compelling a specific performance of this contract and embodying the covenants imposed by the contract upon the respondent, a compliance with which manifestly rests in the will or discretion of a third party uncontrolled by the respondent, would be a vain decree, one which in truth and in fact the respondent would find it impossible to obey. Decrees that would in the final result be nugatory should not be made. *4 Pom. Eq. Jur. (4th ed.) 3334, § 1405.* There was no jurisdiction over the federal agency in question, it has not been made a party; nor could this court control the discretion of that agency even if it were 'in court.' For these reasons the decree under review should be affirmed."

In *Mowers* v. *Fogg,* 45 N. J. E. 120 (Feb. Term 1889, Bird, V. C.), it was held that the Court would not undertake to compel the performance of an agreement to take care of and provide for the

complainant in case of her "general debility or sickness". We quote from the opinion of the Vice Chancellor on page 122 as follows:

> "So far as the bill seeks to enforce the contract to take care of the complainant in case of 'general debility or sickness' I can find neither principle nor precedent upon which to base a decree in favor of the complainant. The authorities all seem to be against the court undertaking to enforce any such contract. * * * I can see no way by which the court can aid the complainant; and this seems to have been the experience of every court which has been called upon to inquire whether or not such aid could be afforded" (citing cases.)
>
> "The only exception that I can find to this rule is in cases where the court can interpose to prevent a breach of a negative covenant, and thereby, in effect, enforce an affirmative one, or, as clearly expressed by the Lord Chancellor, in Lumley v. Wagner, 1 DeG., M. & G. 604, 615, that 'preventing the commission of an act may as effectively perform an agreement as an order for the performances of the act agreed to be done'."

In *Wood* v. *Boney*, 21 Atl. 574 (Mar. 17, 1891, BIRD, V. C.):

> "jurisdiction was entertained, not for the purpose of compelling the specific performance of a contract to construct a railroad, but [among other things, quoting from the opinion at p. 577] 'to restrain the defendant company from disposing of so much of its assets as were necessary to comply with such condition, and the rest of the assets of the company for a like purpose in case Wood should faithfully perform the balance of the contract upon his part. This view, * * * to the extent

> that it restrained the Company from disposing of the balance of the assets to another contractor, and thereby preserving them, that they might be applied to Wood in case he performed the contract on his part, was in accord with the spirit of the authorities found in High, Injunction, § 1164, Lumley v. Wagner, 1 DeGex. M. & G. 604.' "

The case of *Young Lock Nut Co.* v. *Brownley Mfg. Co.*, 34 Atl. 947 (Chancery May 27, 1896), was an action for specific performance of a contract whereby Young Lock Nut Company agreed with Brownley Mfg. Co. to put on the market in the United States an injector known as the "Brownley Injector". The Young Lock Nut Co. was to have the full and exclusive right to sell same in the United States during the term of the patent. The Brownley Co. covenanted that it would not grant any rights to others to sell in the United States, and that it would supply all demands of the trade and ship same as ordered.

We quote from the opinion as follows:

> "In my judgment there should be no decree for specific performance. First— * * * There is no inadequacy in the legal remedy open to the complainant, for the alleged breach of the contract, by an action at law. Secondly—The details involved in the execution of the contract are such that a court of equity will not usually undertake a supervision. As Sugden, L. C. remarked in Gervais v. Edwards, 2 Dru. and W. 80-85, 'The court acts when it can perform everything in the terms specifically agreed upon; and when they come to the execution of a contract depending upon many particulars, but of uncertain events, the court must see whether it can be specifically executed. The court must execute the whole contract.'

> "While courts of equity will sometimes enjoin the breach of a negative covenant contained in the contract, which contract it will not specifically enforce (Lumley v. Wagner, 1 DeGex, M. & G. 604) yet, when the conduct of the complainant in executing its side of the contract is violated, it will not exert the power."

The bill of complaint was dismissed.

Lumley v. *Wagner,* 1 De Gex, M. & G. 604, cited in the foregoing cases, is a leading English authority. J. W. agreed with B. L. that she, J. W., would sing at B. L.'s theatre during a certain period of time, and would not sing elsewhere without his written authority. Held, on a bill filed to restrain J. W. from singing for a third party, and granting an injunction for that purpose, that the positive and negative stipulations of the agreement formed but one contract, and that the Court would interfere to prevent the violation of the negative stipulation, *although it could not enforce the specific performance of the entire contract.* The Lord Chancellor, in his opinion (on page 615) expressed the view that "a prohibition preventing the commission of an act may as effectually perform an agreement as an order for the performance of the act agreed to be done."

III.

The statutory procedure indicated by complainants, for obtaining a release of the alleged lien of the judgment, does not apply to the instant case.

The federal statute is set out under Point I hereof, and the New Jersey Statute is R. S. 2:29-58, and is as follows:

"No decree of the court of chancery shall, as against a person not a party thereto, become a lien upon or bind any real estate other than that specifically mentioned and described in the decree or in the bill of complaint on which the same is founded, until the parties interested in the decree, or one of them, shall have filed in the office of the clerk of the supreme court a statement or abstract of the decree, containing the names of all parties thereto, designating particularly those against whom it is rendered, with the state and county in which they respectively resided, the time at which the decree was signed, and the amount of the debt, damages, costs or other sum of money thereby directed to be paid. The clerk of the supreme court shall forthwith record the statement or abstract in a proper book, to be by him provided and kept in his office for that purpose; which book shall be properly indexed by the clerk, and be a public record, to which all persons desiring to examine the same shall have access."

The action of the *Automatic Paper Machinery Company* was a suit for infringement of a patent. While under the new Federal Rules the distinction between equity and law actions as to form has been abolished, it is nevertheless a fact that the rules of procedure remain the same, and a suit for a patent infringement is still an equity suit. The relief granted by the judgment was distinctly equitable relief. It granted an injunction; determined the validity of a patent; it ordered that the plaintiff recover profits derived from the infringement, which profits were to be determined by a reference to a Master. There is no allegation in the bill of complaint that the requirements of Section 2:29-58 above set forth have been complied with, and as there is no provision in the statutes

of this state for the docketing of a federal judgment in the Supreme Court, we may assume that the judgment has not been so docketed.

As to the application of R. S. 2:29-58, to the point here involved, see *Close* v. *Close,* 28 N. J. E. 472.

In the instant case the complainants contend that the defendants should take steps under the statute to procure a release from the alleged lien of the Federal judgment, and counsel cites, as authority for such procedure, our State Statute R. S. 2:27-374 (p. 84). If complainants seek the decree of this Court requiring defendants to obtain such relief, they should at least point out the authority and the method for doing so. We submit that the statute above mentioned does not apply.

a. It applies only to suits and judgments at law, and not to suits in equity.

b. Even if it be held that the statute does apply, there is nothing to show the amount that would be required to secure the release of the premises from the alleged lien. It might be so large a sum that the defendants would find it impossible to comply with the court's requirements.

c. Any application to the Federal Court for this release would have to be on notice to the plaintiff's attorneys in the Federal suit, and they might object, and the court might sustain their objection, to the granting of the release.

d. The application to the Federal Court, which might require the disclosure by the defendant of vital matters pertaining to his defense in the Federal suit, might seriously embarrass or prejudice him in his defense in that suit, and would be unfair to the defendant. It would in effect be a trial in advance, of the issues referred by the Federal decree to a special master.

e. The fact that complainants have obtained a release from the *Automatic Paper Machinery Company* judgment, does not show that defendant could have done so, or that it would have been just to require defendants to seek such release. Complainants, being strangers to the federal suit, were in a different position in that respect from defendants.

If complainants are entitled to relief, they have an adequate remedy at law.

We respectfully submit:

1. That the final decree of the Court of Chancery should be reversed.

2. That the contract of sale referred to in the bill of complaint should be decreed to be null and void and of no effect.

3. That the record in the case should be remitted to the Court of Chancery with a direction that defendants be permitted to proceed upon their counterclaim in accordance with the prayer therein contained.

Respectfully submitted,

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel
with Defendants-Appellants.

Orally by
JOHN A. HARTPENCE, or
WILLIAM W. SHAW,
of Counsel.

New Jersey Court of Errors and Appeals

Between: ALBERT F. REITEMEYER, and JULIA A. REITEMEYER, his wife, *Complainants-Respondents,* and NICHOLAS MARCALUS and MILDRED M. MARCALUS, his wife, *Defendants-Appellants.*	On Appeal.

BRIEF FOR REITEMEYER.

This appeal is by the vendors from the decree of specific performance of a contract for the sale of real estate located at 527 Riverside Drive, Elizabeth, New Jersey. (c. p. 22).

On May 26, 1944, the defendants-appellants, (hereafter called Marcalus), being the owners of a one-family house located on Riverside Drive, Elizabeth, N. J., entered into a written contract to convey the same to complainants-respondents (hereafter called Reitemeyer) by warranty deed free and clear of all encumbrances (except restrictive covenants of record and zoning ordinances) for the sale price of $9,450.00. While the contract merely calls for a down payment of $500.00 (c. p. 6) the purchasers made several payments aggregating $1,900.00 (c. p. 43).

The contract called for closing title on July 1, 1944 at the office of Messrs. Wall, Haight, Carey & Hartpence, sellers' attorneys who drew the contract. By arrangement made between the attorneys, title was agreed to be closed at the office of the attorneys of Reitemeyer on July 3, 1944. A search made of the title disclosed that the property was subject to two open mortgages, and an official judgment search disclosed a judgment rendered in the United States District Court for the District of New Jersey against the defendant, Nicholas Marcalus and another, entered February 8, 1944 (c. p. 97). The existence of the judgment was by telephone conversation immediately called to the attention of the sellers' attorneys and a course of correspondence ensued between them, which is set forth in a series of letters appearing as Exhibit C-4. (c. p. 83-96).

From this correspondence it will appear that Reitemeyer, through their attorneys, contended that this judgment was a lien which should be lifted from the property prior to the closing of title, while Marcalus' attorneys contended that this judgment was neither a lien nor a cloud on the title and they did nothing to relieve the title therefrom. The correspondence shows numerous efforts made by Reitemeyer to induce the sellers to carry out the contract and give title free and clear of all liens. Being unable to induce Marcalus to take steps to release said judgment, the purchasers on August 29, 1944 filed their bill of complaint in the Court of Chancery for relief by way of specific performance.

After hearing the case and considering the testimony and exhibits and briefs of counsel, Vice Chancellor Stein filed his opinion (c. p. 18) granting relief as prayed by complainants; from such decree the present appeal was taken. After the appeal was filed, Reitemeyer, through their attorneys, obtained from the Marcalus judgment creditor a release of the judgment under the terms and conditions as set forth in papers filed with this Honorable Court on respondents' motion to dismiss the proceedings on the ground that the matter is academic and that the appeal of Marcalus is not undertaken in good faith.

A resumé of the record and correspondence and the motion to dismiss will undoubtedly lead your Honors to the conclusion that for some ulterior purpose Marcalus does not want to carry out his contract of sale with Reitemeyer.

Argument.

The evidence presented to the Court of Chancery and now submitted here is within the most narrow compass. Every action from May 26, 1944 to the present time indicates most conclusively that Reitemeyer at all times was not only ready, willing and able to carry out his contract, but was most anxious to do so because he was compelled to move from the home where he was living as tenant.

That Reitemeyer was anxious to conclude the purchase of this house as a dwelling for himself and his wife is emphatically shown by the following chain of circumstances:

(a) The payment of $1,900.00 on account and arranging for a $5,000.00 mortgage from the Elizabeth Trust Company, and his production of $2,550.00 by certified check. (c. p. 44).

(b) The letter of July 28, 1944 expressing his willingness to move into the property as tenant and extend the time for closing title. (c. p. 90-91).

(c) The letter of August 21, 1944 in which Reitemeyer renews the proposal made in the letter of July 28. (c. p. 94).

(d) The filing of his bill of complaint on August 29, 1944. (c. p. 1.)

(e) The letter of October 13, 1944. (c. p. 95.)

(f) Reitemeyer's present willingness to accept a deed free and clear in conformity with the contract of May 26, 1944.

On the contrary, Marcalus has resisted every effort, and he not only refused to apply to the United States District Court to release the property which was the subject of his contract of sale from the judgment, but he has refused to permit Reitemeyer to enter into the property and pay rental pending the determination of Marcalus' appeal from the Federal judgment. He knows of the release obtained by Reitemeyer from the judgment creditor, and still he refuses to execute a deed of conveyance.

Marcalus does not come into Court as a witness, but sends his wife, who listened in on the

telephone extension to telephone conversations between Reitemeyer and Marcalus. (c. p. 66-67.)

Reitemeyer testifies to a telephone conversation in which Marcalus said, "I would be better off if you will send me a letter cancelling the contract. * * * I will send you my check for $1,900. that you paid on account and I will also send you a lease, if you want a lease on the property." (c. p. 52, line 18.) Two days later Reitemeyer decided a two year lease would be sufficient, and Marcalus said, "I will send you the check and I will send you the lease by mail tomorrow morning." (c. p. 52, line 30.) Reitemeyer testifies that he did not get the lease or the check, but noticed a "To Let" sign on the property. (page 52, line 39.)

Reitemeyer testifies to a further conversation in which Reitemeyer said to Marcalus, "Well, you didn't send me your check nor you didn't send me the lease." Marcalus replied, "Well, now listen, I won't sell you the house. I won't lease it to you. I won't do anything. I have a prospect who is willing to buy the house and pay $500. more than you will pay. I have already accepted a check for $500. on account, endorsed 'provided Mr. Reitemeyer doesn't purchase'." Reitemeyer then told him it was up to his attorney, and Marcalus replied, "Go as far as you like. I have got one hundred thousand dollars in the bank. I have got enough money on hand to buy all of Riverside Drive." (c. p. 54.)

Mrs. Marcalus was called as the only defense witness. She says she listened in on a telephone

conversation over an extension telephone. She testifies, "Mr. Marcalus was perfectly willing to rent the house to Mr. Reitemeyer if Mr. Rosensohn would withdraw his claim for commission on the sale of the house * * *" In cross examination, Mrs. Marcalus testifies as follows:

"Q. Did you listen in on the conversation that your husband had on the night of August 19 with Mr. Reitemeyer?

A. I haven't a record of the dates.

Q. Did you listen in on the conversation in which your husband said to Mr. Reitemeyer that he would not sell him the house or rent it to him under any conditions?

A. What was that question? Will you repeat that.

(Question read.)

A. Yes, because Mr.—

Q. No. You did listen in?

A. Yes.

Q. You heard your husband say that?

A. Yes.

Q. Do you know when that was?

A. The date?

Q. Yes.

A. No.

Q. You won't deny that it was on the night of August 19, will you?

A. I can neither deny it or affirm it.

Q. In other words, from what you heard, your husband was expecting to get a letter from Mr. Reitemeyer to surrender the contract and giving up his rights under it, before he got his money back or before he saw the lease?

A. Mr. Marcalus wanted a letter from Mr. Reitemeyer to the effect that he was willing to assume all that he promised such as the payments of the commission to Rosensohn, making repairs on the house and his willingness to pay a certain amount for the house.

Q. Now let us understand: Your husband first told Mr. Reitemeyer that he would give him a lease for any number of years he wanted, didn't he?

A. Yes.

Q. And then he subsequently said, when Mr. Reitemeyer said, 'I will have the lease for two years,' he said, 'I will give you the lease for two years if you pay all of your own expenses and also pay Mr. Rosensohn his commission.' That was Mr. Reitemeyer's suggestion that he pay, and your husband was willing to do that, but he never sent him the lease, did he?

A. Because he told Mr. Reitemeyer he would send the lease after he received his letter.

Q. And Mr. Reitemeyer told your husband, after his lawyer approved the lease, he would send him the letter, didn't he?

A. Yes.

Q. And they never got together on it, did they?

A. Evidently not."

Thus it appears that Reitemeyer would have been willing to have surrendered his contract and pay the expenses of the search which had been made and the commission of the agent who made the sale, had he received a proper lease for the property for two years. But Marcalus would not even do that; thus making it necessary for Reitemeyer to protect his position and his rights by filing suit in the Court of Chancery for relief by way of specific performance. Every equity is in favor of Reitemeyer while no equity is in the position taken by Marcalus. We will consider the questions as raised by appellant in the order in which they are raised.

POINT I.

The Federal judgment against Marcalus is a lien and a cloud on the title.

The pertinent Federal Statutes will be found in 28 U. S. C. A. as sections 812, 813 and 814 in the following language:

> 812. Judgments and decrees rendered in a district court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only if such judgments and decrees had been rendered by a court of general jurisdiction of such State. Whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office, or county, or parish in the State of Louisiana before a lien shall attach, this section and section 813 of this chapter shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State.
>
> 813. The clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices of all judgment debtors under decrees, judgments, or orders of said court, and such indices and judgments shall at all times be open to the inspection and examination of the public.
>
> 814. Judgments and decrees rendered in a district court, within any State, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease, by law, to be liens thereon.

The present pertinent New Jersey statutes are R. S. 2:26-97.1 and R. S. 2:27-252. R. S. 2:26-97.1 reads:

> "All real estate shall be liable to be levied upon and sold by executions to be issued on judgments obtained in any court of record in this state, except small cause courts, district courts and recorders' courts for the trial of small causes, for the payment and satisfaction of the debt, damages, sum of money and costs so recovered or to be recovered; but no real estate of any testator or intestate shall be sold or in anywise affected by any judgment or execution against executors or administrators."

R. S. 2:27-252 reads:

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

Appellants in their brief at page 7 say:

> "Assuming that the judgment of the Automatic Paper Machinery Company above referred to has been entered so as to comply with this provision (R. S. 2:27-252) there is nothing in the judgment as entered which could bind or in any way affect the lands of the defendants."

On page 2 of their brief, they say that they were informed that this judgment was returned on complainants' judgment search and they then go on to say that the judgment was entered February 7, 1944. There should, therefore, be no question in the minds of your Honors but that this Federal judgment was entered and indexed by the Clerk of the United States District Court as required by Section 813 above set forth. As a practical

matter, it stands to reason that it could not have been returned to us on our judgment search unless it was, in fact, entered and indexed by the Clerk as required and authorized by Section 813.

It was also claimed by respondents that the costs were not taxed. They, however, offer as Exhibit D-3, page 101, their supersedeas bond which was approved as of February 8, 1944 by Judge William F. Smith, United States District Judge.

It is also claimed that the judgment had no finality and was therefore not a lien. It seems to us that all of these matters have been settled by decisions of the United States Supreme Court.

In Forgay vs. Conrad, 6 Howard, 201, Chief Justice Taney said that the appeal is authorized to be taken from the decree "although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by further decree the accounts between the parties pursuant to the decree passed."

Again, in Dean vs. Nelson, 19 Sup. Ct. Rep., 94, a motion was made to dismiss the appeal, and in denying the motion Chief Justice Chase referred to the Forgay case, *Supra.*, and mentioned a rule of the court for an appeal, and the court held that the decree was a final decree from which an appeal could be taken, notwithstanding that there were left open to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership.

Appellants recognize the finality of the judgment because they appealed from it and they even in their brief concede that in certain respects the judgment was final.

As to lienability, we refer to the case of Massingill vs. Downs, 7 Howard 760, 12 Law Edition 903, in which Mr. Justice McLean said:

> "A Judgment lien on land constitutes no property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of the judgment, to cut out intermediate encumbrances. * * * The Lien, if not an effect of the judgment, is inseparably connected with it. And this is the case, whether the lien was created by the judgment and execution, or by statute. And in either case, where the right has attached in the courts of the United States, a State has no power, by legislation or otherwise, to modify or impair it."

In Rhea vs. Smith, 274 U. S., 434; 47 Law Edition 698, the United States Supreme Court held that by the Act of August 1, 1888, regulating liens of judgments and decrees of courts of the United States, Congress did not intend to change the rule that federal court judgments were liens on land throughout the territorial jurisdiction of the respective federal courts, except under certain conditions.

In that case a suit in the United States District Court for the Southern Division of the Western District of Missouri, was dismissed and costs ad-

judged against the defendant in the sum of $8,-890.20. Subsequent to the entry of that judgment, the plaintiff against whom the costs were adjudged sold her property. After the sale, execution was issued on the judgment for costs, and the same property was sold to Rhea. The Missouri court held that as a transcript of the federal proceeding had not been docketed in accordance with the Missouri laws, the sale under the federal execution was not effective to transfer title. The United States Supreme Court in an opinion written by Chief Justice Taft, held that the Missouri statutes did not secure the needed conformity in the creation, extent and operation of the resulting lien as upon land as between federal and state court judgments, and that there was error in the decision made by the Missouri court and reversed the same.

From these decisions, it is apparent that a federal judgment is a lien on land throughout the territorial jurisdiction of the federal court in which rendered. As the jurisdiction of the federal court in New Jersey is co-executive with the territory of the State of New Jersey, it follows that a judgment rendered by the United States District Court for the District of New Jersey becomes a lien on all lands of defendant within the State of New Jersey. Section 812 would merely limit the lien if there were statutes of New Jersey which would require the filing of a transcript or the docketing of a judgment in a state court as required for the docketing or filing of judgment granted by New Jersey courts.

On pages 20 and 21 of appellants brief they say

> "There is no allegation in the bill of complaint that the requirements of Section 2:29-58 above set forth having been complied with, and as there is no provision in the statutes of this state for the docketing of a federal judgment in the Supreme Court, we may assume that the judgment has not been so docketed."

It is true that there is no New Jersey statute which requires the docketing of a federal judgment in the New Jersey State Court. For that very reason the federal judgment is a lien on all lands of the defendant located within the State of New Jersey. This is indicated and decided in the case of Lineker vs. Dillan, 275 Federal, 460 at page 473.

Appellants cite Den vs. Morse, 12 N. J. L. 331, relative to adding costs to a judgment. This case was an ejectment suit decided in 1831. The present statute which we have above set forth, R. S. 2:26-97.1 expressly relates not only to "costs recovered" but "to be recovered." Our statutes on amendment are entirely different and far more liberal than they were in 1831.

The case of McLaughlin vs. Whaland, 127 N. J. E., 393 is also cited. This was a suit to impress the lien of the judgment on an equitable estate, and what is there said must be taken in connection with the other facts of that case which have absolutely no application to the present issue.

In 33 Corpus Juris, page 1205, Section 138, it is said:

> "Costs are fixed by law, and when allowed, the amount thereof is certain or capable of being made certain."

34 Corpus Juris, 571, section 874, it is said:

> "A final judgment of a court of record is a lien on the debtor's land although the money judgment is for costs only." Citing Forrest vs. Camp. 16 Ala. 642; Lind vs. Adams, 10 Iowa, 398, 77 Am. D. 123.

In the instant case, the judgment and order signed by Judge Smith of the United States District Court for the District of New Jersey on February 7, 1944, definitely charges the defendant, Marcalus, with costs.

Approaching this subject from a common sense point of view, let us see what any title searcher or title officer would do. A search is made against the owner for judgments in the Federal Court. If judgments entered in that Court were not liens on land, it stands to reason that no search would be made in the federal court for judgments. That has been the practice as long as any of us can remember. Here the Clerk of the Court indexed this judgment as a judgment; it was returned to the attorneys of the purchaser as a judgment. On the other hand, if there was any law in New Jersey which required federal procedures or judgments to be docketed in a state court, then there would be no necessity for searching for judgments in the federal court.

The taxing of costs is merely a ministerial duty and costs are now and for a long time have been absolutely controlled by statute. Our state laws fix the amount of costs, and the federal laws do

the same, and it is merely a question of something being certain or by a simple mathematical calculation being rendered certain. Anybody could have taken the statute books down and calculated the costs which went with the judgment as directed, and ordered by Judge Smith on February 7, 1944.

What was said by the Iowa Court in Frankel vs. Chicago Railroad Company, 70 Iowa, 424 at page 428 is interesting and in point. The Court said:

> "In each case the record shows an entry in the words 'Judgment for costs taxed at $.....' This is the uniform practice of entering judgments. Probably it is usual for the amount of costs to be entered after the term when the clerk finds time to tax them. But the judgment is for the costs which the clerk is authorized to tax at any time he may fill the blank."

In Russell vs. Russell-Robinson Company, 86 N. J. L., page 13, it was held that the entry of a judgment *nisi* or a rule for judgment *nisi* pending the determination on a rule to show cause created a lien on the land of the defendant. This decision was unanimously affirmed by the Court of Errors and Appeals, 84 N. J. E., 208.

The whole cry of appellants' brief is that the proceeding against Marcalus in the federal court is not such a one upon which an execution could have issued. That is not the question which we have. The question is: "Is this order which was entered in the federal court on February 7, 1944 an encumbrance upon the property which Marcalus agreed to convey to Reitemeyer free and

clear of encumbrances?'' We do not know of any title officer who would have passed that title without obtaining a release or discharge of the judgment. Certainly, Reitemeyer was not asking anything extraordinary or outrageous in requesting that he get title free and clear as provided in the contract.

It must be remembered that when Marcalus signed the contract on May 26, 1944, he knew that this judgment had been recovered against him in the United States District Court, and he made no provision in the contract except that he would convey free and clear. Certainly it is most inequitable on his part to have even suggested that Reitemeyer must take the property with the judgment on it and take the risk of a future law suit at the suit of Marcalus' creditor. The federal proceeding was at least a judgment for costs of suit.

The federal judgment was read into the record at the direction of the Court (c. p. 59) and a copy of it is set forth as an exhibit. (c. p. 97). Now let us see if this is a judgment. It is entitled ''Order and Interlocutory Judgment.'' Paragraph 2 thereof reads: ''That plaintiff, being entitled to judgment as a matter of law, its motion for *summary judgment* be and the same is hereby granted.'' Paragraph 9 thereof reads: ''That plaintiff recover the costs of this litigation including the costs of the accounting ordered by this *judgment,* all to be taxed by the Clerk.''

This judgment was indexed by the Clerk as a judgment under Section 813 of the federal law.

It was returned as a judgment on the judgment search. It certainly was a judgment and as such constituted an existing lien on the property in question.

POINT II.

The complainants are entitled to specific performance.

The decree of the Court of Chancery is that the complainants have not breached on their part the contract of May 26, 1944 and have been at all times, ready, willing and able upon their part to perform and carry out said agreement. (c. p. 23). The overwhelming weight of the evidence sustains that finding.

The decree further directs the defendants do specifically perform and carry out their contract (c. p. 23, line 18). We concede that it is practically elementary that the remedy by specific performance is not a matter of strict right but of sound discretion, and that it will be granted or denied as the right of the particular case shall require on a full consideration of the rights and equities of the parties. Now, what right, equity or justice is with Marcalus? He had a judgment against him at the time he signed the contract to convey free and clear. He has refused to lift his little finger to ask the federal court to release the property from the lien of the judgment. Even after Reitemeyer has obtained a written release of the judgment as a lien against the property, Marcalus still refuses to give a deed.

On the contrary, Marcalus, by his counterclaim, has asked the Court of Equity and this Court on the appeal to let him proceed on his counterclaim not only to keep the $1,900. paid on account of the purchase price, but for great and excessive alleged damages. So we ask: Is this the type of man who is entitled to any consideration from any Court, particularly a Court of equity? On the other hand, Reitemeyer is willing to pay the money; he wants this house as a home. There is here no impossibility of performance by Marcalus; there is just his arbitrary action in trying to get out of the contract so that on a rising market he can sell the property to someone else at an excess figure.

The cases cited by appellants under point II of their brief are not in point; they are not parallel and the facts in them readily distinguish the principles that were applied there and are to be applied here. By way of illustration:

Ten Eyck vs. Manning, 52 N. J. E., 47 was a case where the complainant did not have title to the lands he agreed to convey, and therefore the defendant could not have procured specific performance against complainant.

Fieldler, Inc., vs. Coast Finance Co., Inc., 129 N. J. E., 161, was a case where it would have been required to get the approval of the F. H. A. which was not a party to the contract nor a defendant to the suit.

Millmore vs. Murphy, 56 Atl. Rep. 292 was a case where the vendee did not sign, and it was held

he estopped himself from claiming specific performance because he had demanded damages for breach of contract and the property had in fact already been sold to a third party, a bona fide purchaser.

Public Service Corporation vs. Hackensack Meadows Company, 72 N. J. E., 285 was a case where the Public Service had entered into possession and then discovered that part of the property was owned by someone else and the Court refused to direct the defendant to go out and purchase the property which it did not own.

Here Marcalus at all times owned the property and he owed the judgment.

What appellant asserts is that because of the judgment which Marcalus has suffered to be entered against him in the Federal Court, he could not, without lifting that judgment, compel Reitemeyer through a suit for specific performance to accept title. That is not exactly so because as we herein point out, there is a method by which he could have relieved the property in question from the judgment, and he cannot be heard in equity to turn his own default or fault or fraud to his own benefit as against a third innocent party.

But the doctrine of mutuality does not mean what appellant asserts. This is shown by the statements of noted jurists and writers. Pomeroy's Equity Jurisprudence, Fifth Edition, volume 4, page 1043, section 1405 says:

> "It is held in many modern cases and is the view of the American Law Institute that

> 'the fact that the remedy of specific performance is not available to one party is not a sufficient reason for refusing it to the other party.' Mutuality of obligation is one thing, and mutuality of remedy another."

Judge Cardoza in Epstein vs. Flucken, 233 New York, 490 at 494 says:

> "What equity exacts today as a condition of relief is the assurance that the decree if rendered, will operate without injustice or oppression either to plaintiff or to defendant. Mutuality of remedy is important insofar only as its presence is essential to the attainment of that end. The formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice. We may not suffer it to petrify at the cost of its animating principle."

This doctrine was cited with approval by the New York Court of Appeals in Walter vs. Hoffman in an opinion by Justice Lehman, 267 N. Y. 365; 101 A. L. R. at 921.

49 American Jurisprudence at page 50, section 36 says:

> "According to modern authority, the doctrine of mutuality in specific performance does not mean that the granting or refusal of the decree is to be determined by whether the remedy of specific performance is mutually available to both parties to the contract. It is now the generally accepted rule of both courts and text writers that in the absence of any statutory limitation, specific performance of a contract at the instance of one party will not be denied merely because of the fact that remedy by way of specific performance is not available to the party against whom the enforcement of the contract is sought."

In the instant case there is mutuality. By performance of the decree Reitemeyer gets the property; Marcalus gets the amount of money which Reitemeyer agreed to pay him. On the other hand, Marcalus' obligation was to convey the property free and clear, and Reitemeyer's obligation was to pay $9,450.00. If Reitemeyer had refused to take title Marcalus could have had specific performance by relieving the property from the lien of the federal judgment.

Under section 814, U. S. C. A., the judgment and decree of the District Court shall cease as a lien in the same manner as the lien of a judgment or decree of the state court.

Our state statute R. S. 2:27-374, reads as follows:

> "If appellant, in an appeal from a judgment of the Supreme Court, a circuit court or court of common pleas, deposits with the clerk of the court in which the judgment appealed from was rendered, such an amount as shall be deemed by the court in which the judgment was rendered, or a justice or judge thereof, to be sufficient, as security for the payment of such amount as may finally be determined and ascertained to be due in the action, the court or a justice or judge thereof, may make an order discharging the real estate of appellant from the lien of the judgment appealed from.
>
> The amount so deposited shall be subject to the lien of the judgment appealed from and of any subsequent judgment recovered in the action, and shall be retained by the clerk until the final determination of the action in which the judgment appealed from was rendered."

By way of illustration, let us assume that Marcalus had sued Mr. X in the New Jersey Supreme Court for damages for an alleged automobile accident, and he were non-suited with costs. That judgment for costs would be a lien on all of Marcalus' property in the State of New Jersey, and he could, under R. S. 2:27-374, get an order pending his appeal relieving the property in question from the lien of the judgment for costs. Under the combination of the two statutes, he could likewise have applied to the federal court.

His brief on pages 21 and 22 thereof give his excuses for not so applying. We urge that those excuses cannot deprive the Court of Chancery from doing justice and equity in compelling him to do what he agreed to do, namely, to convey his property free and clear of encumbrances.

Asking Marcalus to release the property in question from the lien of this federal judgment or proceeding was not placing any great burden upon him. The fact that we obtained the release for $25.00 is conclusive. We thereby bring ourselves clearly within the decision in the case of Meyer vs. Reed, 91 N. J. E. 237.

There the property was subject to a perpetually renewable lease made by the Trinity Episcopal Church to Caleb Perry, the rent reserved being a peppercorn. This lease was not mentioned in the option to purchase. The defendant objected to performing the contract because he seemed to think it impossible to have the cloud on the title removed except at great expense, and he has not,

apparently, made any effort to ascertain if it is possible to have the rent reserved released. Complainant secured definite information. Vice Chancellor Foster stated that for a release of the lease, the church only requires the payment of the costs of drawing the necessary papers. Vice Chancellor Foster said:

> "The fact that a release of the peppercorn lease on this property can be obtained by defendant on the reasonable terms mentioned, disposes of the last excuse or pretense urged by him against the performance of his contract; and a decree will be advised for complainant."

Here, Marcalus refused to do anything to even inquire from his judgment creditor for a release, or to ask Judge Smith on motion to release the property in question. Our case is parallel with Meyer vs. Reed; and specific performance as decreed by the Court of Chancery is absolutely proper.

POINT III.

The meaning of U. S. C. A. 28, Section 814 and our statute R. S. 2:27-374 is clear and unambiguous.

R. S. 2:29-58 cited by appellants at page 20 of their brief has absolutely no application. While it is true that our Chancery decrees as such do not constitute lien on lands unless docketed in the Supreme Court, there is no federal statute or New Jersey state statute which provides in any manner for the docketing of a judgment or decree of

the United States District Court in any New Jersey court. Section 812 applies only in those cases where the state, by its statutes, creates a regulation and requirement for such docketing of a federal judgment, decree or order. It is conceded that there is no such New Jersey statute. Therefore, all federal judgments are liens throughout the State of New Jersey on all lands owned by the defendant from the time of the entry of such judgment in manner as provided in section 813.

Appellant, in effect, asked this Honorable Court to declare his contract for sale of the property void because the United States District Court for the District of New Jersey struck out his answer and awarded summary judgment against him with costs. He wants to keep the $1,900 which Reitemeyer paid him on account of the purchase of his house, and he asks to be sent back to the Court of Chancery to mulct Reitemeyer in damages.

Reference to the letters of July 28, August 21 and October 13, 1944 will show that Reitemeyer at all times wanted to enter into that property and pay rental pending the determination first of the suit by Automatic Paper Machinery Company against Marcalus, and secondly of his own specific performance suit. Marcalus would have none of this, he wanted to sell the property to somebody else at a greater price. This is not the type of man who should receive the least consideration from any court of justice. The facts and the law are against him.

POINT IV.

It is respectfully submitted that the decree of the Court of Chancery should in all things be affirmed with costs.

Respectfully submitted,

KOESTLER & KOESTLER,
Solicitors for Complainants-Respondents.

SAMUEL KOESTLER,
of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

F. W. BAKER, NEW JERSEY REPRESENTATIVE,
11 COMMERCE ST., NEWARK, N. J. PHONE MA-RKET 2-2007

New Jersey Court of Errors and Appeals

Between: ALBERT F. REITEMEYER and JULIA A. REITEMEYER, his wife, *Complainants-Respondents,* and NICHOLAS MARCALUS and MILDRED M. MARCALUS, his wife, *Defendants-Appellants.*	On Appeal Case No. 211 May Term, 1945

SUPPLEMENTAL MEMORANDUM FOR REITEMEYER.

The appeal taken by Marcalus from the judgment of the United States District Court to the Circuit Court of Appeals was undoubtedly authorized by Section 227a of the Judicial Code, which reads as follows:

> "When in any suit in equity for the infringement of letters patent for inventions, a decree is rendered which is final except for the ordering of an accounting, an appeal may be taken from such decree to the circuit court of appeals; Provided That such appeal be taken within thirty days from the entry of such decree or from February 28, 1927; and the proceedings upon the accounting in the court below shall not be stayed unless so ordered by that court during the pendency of such appeal." (As amended February 28, 1927) U. S. C. A. Title 28, page 177 of 1944 annual pocket part.

I also refer to two Federal decisions as follows:

> "Where a decree finally determined the rights of the parties, the fact that it also re-

ferred the case to a master, for the making of certain ministerial computations to determine the amount recoverable, did not render it interlocutory, so as to preclude an appeal therefrom. Marian Coal Co. v. Peale (Pa. 1913) 204 F. 161, 122 C. C. A. 397, modifying (C. C. 1911) 190 F. 376, certiorari denied (1913) 33 S. Ct. 1050, 229 U. S. 623, 57 L. Ed. 1355."

"A judgment entered by a federal court in an action at law, which includes costs against the losing party, is none the less final because a blank is left for the insertion of the amount of such costs when taxed, such taxation and entry being made as of course under section 830 of this title, by the judge or clerk, and requiring no further judicial action, and the time for suing out a writ of error to review such judgment runs from such entry, and not from the time when the blank is filled. Allis-Chalmers Co. v. U. S. (Ill. 1908) 162 F. 679, 89 C. C. A. 471."

Said section 830 reads as follows:

"The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause." (U. S. C. A. Title 28, section 830.)

The decree below should be affirmed.

Respectfully submitted,

KOESTLER & KOESTLER,
Solicitors for Complainants-Respondents.

SAMUEL KOESTLER,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

F. W. BAKER, NEW JERSEY REPRESENTATIVE,
11 COMMERCE ST., NEWARK, N. J. PHONE MA-RKET 2-2007

New Jersey Court of Errors and Appeals

ALBERT F. REITEMEYER and JULIA A. REITEMEYER, his wife,
Complainants-Respondents,

vs.

NICHOLAS MARCALUS and MILDRED M. MARCALUS, his wife,
Defendants-Appellants.

On Appeal from the Court of Chancery. Case No. 211 May Term, 1945.

MEMORANDUM FOR APPELLANTS, IN REPLY TO SUPPLEMENTAL MEMORANDUM FOR REITEMEYER.

We submit the following decisions supplemental to the authorities cited under Point I of our main brief, and in reply to the supplemental memorandum for Reitemeyer:

> "On the general affirmance on appeal of an interlocutory decree in a patent case, sustaining the patent, finding infringement, and awarding an injunction, such issues were conclusively settled; but so much of decree as relates to the accounting remains purely interlocutory, and subject to modification by the District Court until final decree."
>
> *Racine Engine & Machinery Co.* v. *Confectioners' M. & Mfg. Co.*, 234 Fed. 876.

The period for which a judgment lien exists by statute cannot be extended by consent or agreement.

> *Savings & Trust Co. of Cleveland, Ohio* v. *Bear Valley Irr. Co.*, 89 Fed. 32, 40.

This is in line with the rule or principle that a judgment lien is purely statutory.

The lien of a judgment on real property is statutory, and must stand or fall by the statute which gives it. *In re Boyd,* 3 Federal Cases, 1091, Case No. 1746.

In *National Brake & Electric Co.* v. *Christensen,* 258 Fed. 880, which was a suit for patent infringement, it was said by the Court, at page 885:

> "* * * But when the parties have submitted everything they have respecting title and right to exclusive possession and the defendant's minatory attitude, and thereupon the chancellor enters a permanent injunction, *immediately executable* (italics ours), the order is final in essence on the issues submitted and determined, but may be either final or interlocutory in time relation. It is final in time, if the owner asks no damages for past trespasses, or, having asked waives them. In McGourkey v. Toledo & Ohio Ry. Co., 146 U. S. 536, 546, 13 Sup. Ct. 170, 172 (36 L. Ed. 1079), it was said that a decree fixing the rights and liabilities of the parties and ordering an accounting before a master is final in time relation, that is, for the purposes of appeal, 'if such accounting be not asked for in the bill.' It is interlocutory in time if the owner sets up and demands his damages for past trespasses and the chancellor reserves that matter for future judicial action."
>
> "A decree in a patent suit, making the injunction prayed for perpetual, with a reference to a master to ascertain the damages, is not a final decree." *Reeves* v. *Keystone Bridge Co.,* Fed. Cases No. 11,661.

We quote from the opinion in the case of *Virtue* v. *Creamery Package Mfg. Co.,* 123 Minn. 17, 142 N. W., as follows:

> "It has proceeded to an interlocutory decree. That decree was favorable to the Creamery Package Manufacturing Company. It determined that the three roll device used by these plaintiffs was an infringement on the four-roll device used in the Victor churn, and ordered an accounting. This interlocutory decree is not final or res adjudicata. Harmon v. Struthers, (C. C.), 48 Fed. 260; Australian Knitting Co. v. Gormly (C. C.) 138 Fed. 92, Hills & Co. v. Hoover (C. C.) 142 Fed. 904. But it is conclusive that these plaintiffs have not yet prevailed in the litigation."

Also from two of the cases above cited, viz.:

> "A decree of a Circuit Court sustaining the validity of a patent, and awarding a permanent injunction against infringement, and referring the case to a master for an accounting as to damages and profits, is interlocutory, merely, and not final, and is not conclusive of the validity of the patent in a subsequent suit between the same parties prior to the rendition of final decree in the cause, although, on appeal from such interlocutory decree, it has been affirmed by the Circuit Court of Appeals." *Australian Knitting Co.* v. *Gormly,* 138 Fed. 92.
>
> "A decree awarding a perpetual injunction, and an accounting by the defendant in copyright infringement proceedings and referring the cause to a master to ascertain the amount complainant is entitled to recover is a mere interlocutory decree, and is therefore not res judicata as to any issues involved." *Hills & Co.* v. *Hoover et al.,* 142 Fed. 904.

Referring to U. S. C. A. Title 28, Section 830, cited by respondents, we call attention to the case of *Flynn* v. *Edwards* (C. C. Mo. 1888), 36 F. 873, in which it is pointed out that *under the Missouri statutes,* the amount of costs is not expressed in the judgment, but the clerk merely makes an itemized statement of the debt and costs on the back of the execution. This, however, is directly contrary to our statute, R. S. 2:27-256, quoted on page 7 of our main brief, which requires the abstract of the judgment to contain, among other things, "The style of the action and the amount of debt, damages and costs recovered * * * ". In the case of *Allis-Chalmers Co.* v. *United States,* cited by respondents, the distinction is pointed out between the procedure laid down by the Illinois law, and statutes such as the New Jersey statute above referred to.

Respectfully submitted,

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel with Defendants-Appellants.

JOHN A. HARTPENCE,
WILLIAM W. SHAW,
Of Counsel.

New Jersey Court of Errors and Appeals

ALBERT F. REITEMEYER and JULIA A. REITEMEYER, his wife, *Complainants-Respondents,* *vs.* NICHOLAS MARCALUS and MILDRED M. MARCALUS, his wife, *Defendants-Appellants.*	On Appeal from the Court of Chancery.

MEMORANDUM OF APPELLANTS IN REPLY TO RESPONDENTS' BRIEF.

I.

Respondents' counsel cites, on page 13 of his brief, our reference to *Den* v. *Morse,* 12 N. J. L. 331, and says: "Our statutes on amendment are entirely different and far more liberal than they were in 1831." He quotes from the present statute, which, he says, relates not only to "costs recovered" but *"to be recovered."* (Italics ours.) On referring to the statute in force in 1831, we find that it contains exactly the same language as the present act quoted by counsel.

The former statute is found in "Laws of New Jersey, Revision 1703-1820," published in 1821, at page 430, and is as follows:

> "AN ACT making lands liable to be sold for the payment of debts.
>
> Passed the 18th of February 1799.
>
> "1. BE IT ENACTED *by the Council and General Assembly of this state, and it is hereby*

> *enacted by the authority of the same,* That all lands, tenements, hereditaments and real estate, shall be, and hereby are made liable to be levied upon and sold by executions to be issued on judgments, which are or shall be obtained in any court of record of this state (except justices' courts constituted for the trial of small causes) for the payment and satisfaction of the debt, damages, sum of money, and costs, so recovered or *to be recovered.''* (Italics ours.)

The same language occurs in the subsequent revisions. It is obvious, therefore, that the statutes and the law have remained unchanged since the decision in *Den* v. *Morse.*

The present statute to which counsel refers (R. S. 2:26-97.1) is quoted at length on page 9 of his brief. Reference thereto will demonstrate that that statute and the statute in force in 1831, quoted *supra,* are identical; so that the decision in *Den* v. *Morse* stands unimpaired.

Manifestly the citation at page 15 of complainants' brief of *Frankel* v. *Chicago RR. Co.,* 70 Iowa 424, at page 428, indicating the practice in Iowa, has no application here in the face of the New Jersey authorities.

II.

Complainants' counsel, in his brief, at pages 22 and 23, cites *Meyer* v. *Reed,* 91 N. J. E. 237. In that case, however, it should be noted that complainants produced proof at the trial to show what could be done to release an alleged impediment to performance; and the securing of such release did not involve pending litigation between the releasor and the defendant. In the present case, however, complainants produced no proof what-

ever to show what could be accomplished to remove the alleged lien of the judgment in the United States Court, but merely indulged in argument and *assumption* respecting it; and then, after the case had been tried, and decided, in the court below, complainants' counsel indulged in the *presumption* of officiously obtaining a release, without the knowledge or assent of defendants, for which he paid $25.00, according to his statement at page 22 of his brief. The obtaining of this release, he now assays to set up in this court, on appeal, for the first time in the case, as a reason why the decree of the court below (a fact not then before that court) should be affirmed.

If that had been made an issue by complainants in the court below, the defendant, Nicholas Marcalus, might well have produced very cogent counter testimony to show how and why any step taken by him to secure a concession from his adversary might have put his whole case, then still pending, in jeopardy. Complainants' counsel had no right to interfere, as he did; and, his action may still jeopardize defendant's rights vitally in that litigation. Likewise, we respectfully submit, there was no power or jurisdiction in the court below to compel defendant to take any such affirmative action to that end on the *mere assumption* that it was easy of accomplishment and not injurious to defendant's rights in that litigation.

That fact might well be extremely to the contrary. Nor is there anything in the record to show that the United States Court would have entertained any application which might interfere with the *status quo* of either of the parties to that pending litigation.

III.

Objectionable, also, are the personal characterizations of defendant, Nicholas Marcalus, in complainants' brief, on page 18, line 6, and page 24, fourth line from bottom, which, we respectfully submit, are unwarranted and inappropriate in an argument in this court. (*In re Glauberman*, 107 N. J. E. 384.)

IV.

Attention should also be called to statements of complainants' counsel at the top of page 11 of his brief, to the effect that appellants recognize the finality of the judgment because they appealed from it, and that they so concede in their brief. This is a clear misapprehension. Appellants have not so conceded in the discussion of the question in their brief (see Point I, p. 4, *et seq.*)

Furthermore, it should be borne in mind that the then pending litigation in the United States Court was in equity, and that in equity appeals may be taken from interlocutory orders and decrees and are not restricted to final judgments.

Respectfully submitted,

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel with Defendants-Appellants.

JOHN A. HARTPENCE,
WILLIAM W. SHAW,
Of Counsel.