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New Jersey Court of Errors and  
Appeals

Between

ANNA L. HARVEY,  
Complainant Appellant

—and—

JOHN D. RANDALL and  
MAEZE BIANCHI,  
Defendants Respondent

On Appeal.

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STATE OF THE CASE

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WARD KREMER,  
Attorney for Complainant Appellant.

DONOHUE & O'BRIEN,  
Attorneys for Defendants Respondent

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## IN CHANCERY OF NEW JERSEY

TO THE HONORABLE EDWIN ROBERT WALKER,  
Chancellor of the State of New Jersey:

Complainant, ANNA L. HARVEY, of the City of Asbury Park, County of Monmouth and State of New Jersey, respectfully shows that:

1. On the 6th day of April, 1925, and for a year prior thereto, the defendant, JOHN D. RANDALL, was the owner in fee of all that certain lot, tract or parcel of land and premises, situate, lying and being in the City of Asbury Park, County of Monmouth and State of New Jersey, and more particularly described as follows: 10

BEGINNING at a point in the southerly line of Seventh Avenue distant one hundred (100) feet westerly from the southwest corner of Seventh Avenue and Kingsley Street and extending thence (1) westerly along the southerly line of Seventh Avenue fifty (50) feet to a point; thence (2) southerly at right angles with the southerly line of Seventh Avenue one hundred and fifty (150) feet to a point; thence (3) easterly and parallel with the southerly line of Seventh Avenue fifty (50) feet; thence (4) northerly at right angles to the southerly line of Seventh Avenue one hundred and fifty (150) feet to the southerly line of Seventh Avenue and the point or place of beginning. 20

2. On the 20th day of April, 1925, the defendant, the said John D. Randall, entered into an agreement with the complainant whereby he agreed to convey to the complainant the said premises for the sum of Ten Thousand Dollars (\$10,000.00) upon the following terms and conditions: \$100.00 by check; \$400.00 by check; the balance of \$9500.00 in cash on the delivery of the deed. 30

3. A copy of this contract was duly recorded in the Clerk's Office of the County of Monmouth on May 9th, 1925 in Book U of Miscellaneous Records, pages 368 &c.; a copy of which contract is attached hereto and made a part hereof and marked Schedule A. 40

4. The complainant paid to the defendant on the 25th day of March, 1925, \$100.00 as deposit on the said property; and complainant paid to the defendant on the 6th day of April, 1925, \$400.00 as deposit on the said property and in accordance with the terms of the said contract and the negotiations which had been conducted between complainant and defendant prior to the execution of the said contract, both of which payments the defendant accepted.

10 5. Complainant has been ready and willing at all times to execute and carry out the terms and conditions of the said contract and to make the payment of \$9,500.00 in cash called for in the said contract; and complainant has tendered herself ready and willing at divers times between the 20th day of April, 1925, and the present time to accept conveyance of the said property from the defendant, to make the payments called for under the terms of the said contract and in all respects to execute and carry out the terms and provisions of the said contract.

20 6. The said John D. Randall, defendant, has refused to accept such payments and make conveyance or execute and deliver to complainant a warranty deed conveying to the complainant the said premises according to the terms of the said agreement; and on the 1st day of May, 1925, the defendant, John D. Randall, returned the check of \$400.00 forwarded by the complainant to the defendant as hereinabove referred to, to the complainant, together with a letter stating that the defendant could not sell the property to the complainant; a copy of which letter is attached hereto and made a part hereof and marked Schedule B.

30 7. Complainant says that the defendant has good, marketable title to the said property and could make conveyance to the complainant in accordance with the terms of the contract aforesaid, if the defendant were willing to do so; and complainant further says that the defendant has had such good title and has been in a position to make conveyance to the complainant ever since the 20th day of April, 40 1925, the time of the signing of the said contract.

8. Complainant further says that she is informed and verily believes that the defendant has sold or is about to sell the said property, the subject of this suit, to some other person or persons for a price greater than that agreed upon between complainant and defendant, and that it is on account of the possibility of defendant selling the property for a larger sum than that which complainant contracted to pay that the defendant has failed and refused to make conveyance to this complainant.

9. Complainant further says that she has been ready, willing and able at all times since the 20th day of April, 1925, and is now ready, willing and able to carry out and execute the terms and conditions of the said contract, to pay the sum of \$10,000.00 in cash to the defendant, to make the payments called for under the terms of the said contract and in all respects to carry out the terms and provisions of the said contract.

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

1. That the said John D. Randall, who is defendant to this suit, may answer this Bill of Complaint without oath and each statement therein made.

2. That the said defendant may be decreed to specifically perform his agreement with complainant and to convey to her the said premises as above described and to execute a good and sufficient conveyance by a deed of warranty according to the terms of the said contract for the said property situate on the south side of Seventh Avenue in the City of Asbury Park, County of Monmouth and State of New Jersey and known as No. 204 Seventh Avenue.

3. That a Writ of Subpoena may issue commanding the said defendant to answer this Bill of Complaint and to abide by such decree as this Court may make in the premises.

4. That complainant may have such other and further relief as to the Court shall seem meet.

WARD KREMER,

Solicitor and of counsel with  
Complainant.

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SCHEDULE A.

\$500.00 Miami, Florida, April 20, 1925

10 RECEIVED OF Mrs. A. L. Harvey, checks for amounts aggregating Five Hundred Dollars, as a deposit for an option which, if accepted by the owner, is to apply as part payment on the purchase of the following property, described as House known as 204 7th Avenue, Asbury Park, N. J.

The full purchase price of same being Ten Thousand Dollars, Net, to be paid as follows:

- One Hundred Dollars by check
- Four Hundred Dollars by check
- Balance of Ninety-five Hundred Dollars in cash on delivery of deed.

Purchaser to assume taxes or assessments subsequent to...

20 IT IS ALSO UNDERSTOOD that this property is purchased and sold subject to all the restrictions and provisions ordinarily contained in the regular form deed or contract for deed of the subdivision in which it is located.

IN THE EVENT THE PURCHASER shall fail to comply with his part of this agreement on delivery of deed, this deposit shall be forfeited as liquidated damages.

30 IF THE PRESENT OWNER does not approve of the terms of this contract, or other terms agreeable to both parties, or if he can not furnish good title to the above property, or if for any reason same can not be delivered in a reasonable length of time, this deposit shall be returned to the purchaser.

.....  
.....HEREBY AGREE to purchase the above described property on the terms and conditions above mentioned.

(Signed) JOHN D. RANDALL,  
Seller.

SCHEDULE B.

May 1, 1925.

A. L. Harvey:

Find I can not sell property 204 7th Avenue., Asbury Park, N. J., satisfactory. I return your deposit of Five Hundred Dollars.

(Signed) John D. Randall. 10

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## IN CHANCERY OF NEW JERSEY

Between

ANNA L. HARVEY,  
Complainant,

—and—

JOHN E. RANDALL,  
Defendant.On Bill & Etc.  
Petition.

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To the HONORABLE EDWIN ROBERT WALKER,  
Chancellor of the State of New Jersey:

The petition of Maeze W. Bianchi of the City of Orange, County of Essex and State of New Jersey, respectfully shows that:

1. On May 26th, 1925, the bill of complaint herein was filed seeking to obtain specific performance on the part of the defendant of an alleged agreement by which the defendant is alleged to have agreed to convey to the complainant premises known and designated as No. 204 7th Avenue, Asbury Park, New Jersey and more particularly described in said bill of complaint. 20

2. On May 8th, 1925, your complainant for good and valuable consideration bought from the said John E. Randall the above mentioned premises and received from the said John E. Randall on May 8th, 1925, a deed to said premises bearing that date. 30

3. On May 26th, 1926, the complainant filed his bill above mentioned.

4. Petitioner recorded the said deed in the office of the Clerk of Monmouth County on May 27th, 1925 at eight A. M., the said deed having been received in the eight o'clock mail by the said clerk on May 27th, 1925.

5. The complainant, Anna L. Harvey, filed a lis 40

pendens with the clerk of said county by mailing it to him, which lis pendens was received by him in the eight o'clock mail on May 27th, 1925, and recorded as was petitioner's deed on May 27th, 1925 at eight A. M.

10 6. At the time of the filing of the complainant's bill, your petitioner had already bought the property for a good and valuable consideration and filed and recorded her deed before she received any notice of said suit from the above mentioned lis pendens or from any other sources.

7. The defendant, John E. Randall, is no longer in possession of said premises and cannot give to the complainant a deed therefor nor can the petitioner be forced to give a deed therefor because she is a bona fide purchaser for value without notice.

20 8. Your petitioner is desirous of mortgaging the above mentioned property but cannot do so by reason of the lis pendens having been filed in the above mentioned clerk's office.

Your petitioner therefore prays that she may be made a party defendant to the bill of complaint filed herein and that the court may adjudge that the said lis pendens, not having been filed prior to the recording of her deed, should be discharged of record so that your complainant may be permitted to sell or mortgage the above mentioned property.

30 MAEZE W. BIANCHI,  
Petitioner.

JAMES F. X. O'BRIEN,  
Solicitor for Petitioner.

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IN CHANCERY OF NEW JERSEY

Between  ANNA L. HARVEY, <div style="text-align: right;">Complainant,</div> <div style="text-align: center;">—and—</div> JOHN E. RANDALL, <div style="text-align: right;">Defendant.</div>	}	On Bill & Etc. Affidavit.	10
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STATE OF NEW JERSEY }  
 COUNTY OF ESSEX } ss.

MAEZE W. BIANCHI, being duly sworn according to law, upon her oath deposes and says:

That on May 26th, 1925, a Bill of complaint was filed in the above cause in which Anna L. Harvey sought specific performance of an alleged contract between herself and the defendant whereby the defendant agreed to convey to the said Anna L. Harvey, premises No. 204 7th Avenue, Asbury Park, New Jersey, which is more fully described in the said Bill of Complaint. 20

On May 8th, 1925, I bought all the right, title and interest of John E. Randall in and to the above property and paid therefor a good, full and sufficient consideration and received from him a deed made and dated May 8th, 1925. 30

On May 26th, 1925, the complainant filed the above mentioned bill of complaint. On May 27th, 1925, the above mentioned deed which I received and which had been mailed to the clerk of Monmouth County was received by said clerk in the eight o'clock mail and recorded stamped May 27th, 1925, eight o'clock. I am also informed and know that the clerk received in the same mail a lis pendens covering the above property filed in this cause and which lis pendens was filed stamped May 27th, 1925 eight A. M. 40

That I bought the property from John E. Randall and up to and after the time, the said lis pendens was filed and my deed recorded, I knew nothing of complainant's alleged agreement of sale with the said Randall and I had paid a good and valuable consideration for the property and recorded my deed before I received any notice of such claim.

10 The defendant, John E. Randall, is no longer in possession of said premises, the title thereto being in me. I am desirous of mortgaging the said premises but cannot do so because of the lis pendens which has been filed.

I never had any notice either from the said lis pendens or in any other way of complainant's claim until after my deed had been recorded.

Sworn and subscribed to  
at Newark, New Jersey,  
this 10th day of September, 1925.

MAEZE W. BIANCHI

20 JAMES W. DONOHUE,  
Attorney at law of New Jersey.

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## IN CHANCERY OF NEW JERSEY

ANNA L. HARVEY,  
Complainant,

vs.

JOHN D. RANDALL and  
MAEZE W. BIANCHI,  
Defendants.

STIPULATION

It is hereby stipulated and agreed by and between the Solicitors for the Complainant and Defendants herein that Maeze W. Bianchi be joined as a party defendant in the above entitled cause.

10

It is further stipulated and agreed that the following facts are true and are admitted as true.

1. That the deed from Randall to Bianchi as recorded in the Clerk's Office of the County of Monmouth shows upon its face to be dated May 8, 1925.

2. That on May 26th, 1925, the Bill of Complaint in the above entitled cause was filed in the office of the Clerk in Chancery.

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3. That the subpoena to answer issued in the above entitled cause was dated May 26th, 1925.

4. That the authorization by the Sheriff of Monmouth County to the process server who served said subpoena was dated May 27th, 1925.

5. That the subpoena to answer was served on the defendant, Randall, on May 28th, 1925.

6. That on May 27th, 1925, the deed from Randall to Bianchi was recorded and that on the same day a lis pendens in the above entitled cause covering the property described in said deed was also recorded and that both the said deed and the lis pendens were recorded simultaneously as of May 27th, 1925, eight A. M.

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WARD KREMER,

Solicitors of Complainant.

DONOHUE & O'BRIEN,

Solicitors of Defendant,

Maeze W. Bianchi. 40

AGREEMENT OF SALE

\$500.00

Miami, Florida, April 20, 1925

10 RECEIVED OF Mrs. A. L. Harvey, checks for amounts aggregating Five Hundred Dollars, as a deposit for an option which, if accepted by the owner, is to apply as part payment on the purchase of the following property, described as House known as 204 7th Avenue, Asbury Park, N. J.

The full purchase price of same being Ten Thousand Dollars, Net, to be paid as follows:

- One Hundred Dollars by check
- Four Hundred Dollars by check
- Balance of Ninety-five Hundred Dollars in cash on delivery of deed.

Purchaser to assume taxes or assessments subsequent to...

20 IT IS ALSO UNDERSTOOD that this property is purchased and sold subject to all the restrictions and provisions ordinarily contained in the regular form deed or contract for deed of the subdivision in which it is located.

IN THE EVENT THE PURCHASER shall fail to comply with his part of this agreement on delivery of deed, this deposit shall be forfeited as liquidated damages.

30 IF THE PRESENT OWNER does not approve of the terms of this contract, or other terms agreeable to both parties, or if he can not furnish good title to the above property, or if for any reason same can not be delivered in a reasonable length of time, this deposit shall be returned to the purchaser.

.....

.....HEREBY AGREE to purchase the above described property on the terms and conditions above mentioned.

(Signed) JOHN D. RANDALL,  
Seller.



## IN CHANCERY OF NEW JERSEY

10	Between  ANNA L. HARVEY, <div style="text-align: right;">Complainant,</div> <div style="text-align: center;">—and—</div> JOHN E. RANDALL, <div style="text-align: right;">Defendant.</div>	} On Bill & Etc. ORDER
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20 This matter having come before the Court on a motion to discharge of record the lis pendens filed herein in the Monmouth County Clerk's office on May 27th, 1925, in the presence of the presence of the solicitors for petitioner on the motion and the complainant, and the Court having heard and considered the oral arguments of counsel and having read and considered the written memorandums submitted by counsel and the petition and affidavit filed herein by M. W. Bianchi and having considered the record and papers filed in the above cause, and it appearing that M. W. Bianchi purchased from the defendant, John E. Randall, for a good and valuable consideration the property described in said lis pendens on May 8th, 1925 and that the complainant filed his bill of complaint in this cause on May 26th, 1925 and that subpoena was served upon the defendant on May 28th, 1925 and that on May 27th, 1925, the said 30 lis pendens and the deed by which the property was sold as above mentioned were recorded simultaneously, both being recorded as of May 27th, 1925, 8 A. M.

40 And it appearing from the above facts that since the said lis pendens was not first filed, it gave no notice to the above mentioned purchaser and further that the said lis pendens did not become effective until May 27th, 1925, the day upon which the subpoena was served upon Randall and which was one day after the recording of the above mentioned deed.

And it further appearing that the said lis pendens is acting as a cloud of title upon said property.

It is thereupon on this 6th day of October, 1925, ORDERED that the filing of the aforesaid lis pendens recorded in Book 5 of Lis Pendens in the Monmouth County Clerk's office, page 130 be and the same is hereby declared to be null and void and of no effect and that the Clerk of Monmouth County be and he is hereby directed to discharge the said lis pendens of record.

Respectfully advised,

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(Signed) ALONZO CHURCH,

V. C.

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her a deed for the premises for the consideration paid as set forth in the affidavits. On May 26th Anna L. Harvey, complainant in this case, filed a bill seeking specific performance of an agreement with Randall covering the same property. On May 27th the clerk of Monmouth county received by mail the deed which conveyed the property to Maeze Bianchi and the lis pendens. He recorded each one as of May 27, 1925, 8 a. m.

The Lis Pendens Act, amendment of 1925 (P. L. 1925, p. 416, c. 168), provides that:

“Neither the issuing of a summons or subpoena, or other process, \*\*\* shall be deemed \*\*\* constructive notice to any bona fide purchaser \*\*\* until the plaintiff or complainant in such action, or his attorney or solicitor, shall have first filed in the office of the clerk of the court of common pleas \*\*\* a written notice of the pendency of such suit.”

The suit was filed on May 27th. The lis pendens and the deed were filed simultaneously on May 27.

(1,2) It is alleged that the deed to Bianchi was dated on May 8th. A deed, unless there are other circumstances, speaks from the date of its delivery. It should be noticed that the contract on which Harvey is suing Randall was an agreement of sale, and it was recorded in the office of the clerk of Monmouth county on May 9th in Book U of Miscellaneous Records, p. 368. It is contended that this filing should have been notice to Bianchi of the prior contract.

Section 52 of the act respecting conveyances (P. L. 1898, p. 690) as amended in P. L. 1904, p. 70 (2 C. S. p. 1552), provides that—

“No deed or instrument of the nature or description set forth in the twenty-first section of this act, heretofore or hereafter to be made and executed, shall be recorded in the office of any clerk of the court of common pleas, unless the execution of the same shall have been first acknowledged or proved and certified in the manner hereinbefore directed except as herein stated, and except conveyances made by a sheriff or other officer or auditors in attachment, in pursuance of a decree, judgment, execution or order of a court, which may be recorded as heretofore.”

Section 21 of the act respecting conveyances, as amended (P. L. 1917, p. 296) and referred to in section 52 includes in the list of instruments to be recorded "Agreements for Sale."

In addition to the above requirement the act respecting conveyances provides that, when such "Agreements for Sale" are recorded, they shall be recorded under "Deeds." It will therefore be seen that this alleged agreement was not recorded under "Deeds" but under "Miscellaneous Records," and that it had no acknowledgment. I therefore think that it was improperly recorded and that Bianchi was not in laches for not discovering it under the caption "Miscellaneous Records", when it should have been recorded under the caption "Deeds."

(3) Assuming the deed to Bianchi and *lis pendens* were filed simultaneously, as the records show, the question arises, Is this *lis pendens* a proper notice?

I cannot see how a *lis pendens* filed on the very same day, hour, and minute that a deed was filed can possibly be a notice to the filer of the deed. Apparently, Bianchi searched the records and could find no prior contract recorded, because it was not acknowledged, as it should have been, and was not recorded in the place where the act requires it to be recorded, and therefore title under his deed was not affected by it.

I do not think there is any reason why the recording of the *lis pendens* is binding on Bianchi, and I shall therefore advise a decree that the *lis pendens* shall be discharged of record insofar as it affects Bianchi.

## NEW JERSEY COURT OF ERRORS AND APPEALS

ANNA L. HARVEY, Complainant-Appellant, vs. JOHN D. RANDALL, and MAEZE W. BIANCHI, Defendants-Appellees.	}	On Appeal from the Court of Chancery.  PETITION OF APPEAL.
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To the Honorable Court of Errors and Appeals in the last resort in all causes :

The petition of Anna L. Harvey, the appellant in the above entitled cause, shows that :

1. Petitioner finds herself aggrieved by a certain order made in the Court of Chancery by His Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 6th day of October, in a certain cause in the said Court of Chancery wherein the said Anna L. Harvey was complainant and the defendant, John D. Randall, was defendant in this respect, to wit, that the said order discharges of record a certain notice of lis pendens filed in the office of the Clerk of the County of Monmouth on the twenty-seventh day of May, A.D., 1925. The petitioner appeals from the order of the Chancellor, which decrees as aforesaid, upon the ground that the said order discharging the said notice of lis pendens is erroneous in that the lis pendens was filed one day after the filing with the Clerk in Chancery of the bill of complaint in the said cause and was regularly and properly filed and should not have been dismissed and discharged until the final hearing and the adjudication.

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

(Signed) WARD KREMER,  
Solicitor and of Counsel with Appellant. 40



## IN CHANCERY OF NEW JERSEY

Between

ANNA L. HARVEY,  
Complainant,

—and—

JOHN D. RANDALL and  
MAEZE W. BIANCHI,  
Defendants.

On Bill &amp;c.,

ORDER STAYING PRO-  
CEEDINGS ON AP-  
PEAL FROM ORDER. 10

This matter being opened to the Court by Ward Kremer, solicitor of the complainant, Anna L. Harvey, and in the presence of Donahue & O'Brien, solicitors of the defendant, Baeze W. Bianchi, and it appearing that a petition has been filed herein by the complainant, Anna L. Harvey, alleging that she has appeared to the Court of Errors and Appeals from an order made in this cause on the 6th day of October, 1925, and that unless all further proceedings pursuant to the said order are stayed pending the disposition of said appeal by said Court, it will be impossible to restore her to her former position; and the Court having heard the arguments of counsel and having duly considered the matter and being of the opinion that further proceedings on the order above referred to in this cause should be stayed pending the determination of said appeal by the Court of Errors and Appeals: 20

It is this 6th day of October, 1925 ordered that all further proceedings pursuant to the order of October , 1925, be and the same are hereby stayed pending the determination of the said appeal by the Court of Errors and Appeals or until the further order of this Court. 30

(Signed) ALONZO CHURCH,

V. C. 40

## NEW JERSEY COURT OF ERRORS AND APPEALS

10	<p>ANNA L. HARVEY, Complainant,</p> <p style="text-align: center;">vs.</p> <p>JOHN D. RANDALL and MAEZE W. BIANCHI, Defendants.</p>	} Action at Law On Appeal. REASONS
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20 The complainant, Anna L. Harvey of the City of Asbury Park, County of Monmouth and State of New Jersey, assigns the following reasons why the order entered in the above entitled cause in the Court of Chancery on the 6th day of October, 1925, should be set aside:

1. Because the notice of lis pendens filed in the Clerk's Office of the County of Monmouth on the 27th day of May, 1925, in the said cause was legally and properly filed and should remain a matter of record until the final determination of the said cause in the Chancery Court.

2. Because the order of October 6, 1925 discharging the said lis pendens of record was improperly and improvidently made.

30 3. Because the said notice of lis pendens is not a cloud upon the title of the property in question.

4. Because at the time of the filing of the notice of lis pendens in the County Clerk's Office of the County of Monmouth, there was no other deed of conveyance of the property on record to any other person than the complainant, nor was there any contract of sale or other evidence of the transfer of the property from the defendant, John D. Randall, to any other person than the complainant, on record at that time.

40 5. Because the complainant, upon the filing of her bill in Chancery and the filing thereafter of the notice of lis

pendens in the manner in which it was filed, was entitled to have the property, the subject of the suit, preserved in its then status until the final determination of the suit in Chancery.

6. Because the order vacating the lis pendens destroys the subject matter of the suit by permitting encumbrances to be made thereupon and nullifies the effect of the suit instituted by complainant, even though complainant may be successful therein.

7. Because the order was in other respects contrary to law and prejudicial to the interests of complainant. 10

WARD KREMER,  
Solicitor and of counsel with  
Complainant.

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## NEW JERSEY COURT OF ERRORS AND APPEALS

10	ANNA L. HARVEY, Complainant-Appellant, vs. JOHN D. RANDALL and MAEZE W. BIANCHI, Defendants-Appellees.	} On Appeal from the Court of Chancery.  } Answer and Petition of Appeal.
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The answer of Maeze W. Bianchi, the above named appellee to the petition of appeal of Anna L. Harvey, the above named appellant.

20 This appellee, not admitting the truth of any or all of the matters in the said petition of appeal contained for answer thereto, nevertheless, admits that an order was on October 6th, 1925, made and entered in the Court of Chancery of New Jersey in the above entitled cause for the purposes in said petition mentioned and has therein set forth; but as to the substance of form of said order, this appellee takes leave to refer thereto that the same shall be produced.

30 This appellee is advised and believes that the said order is agreeable to equity and prays that the same may be affirmed with costs to be taxed in favor of this appellee.

DONOHUE & O'BRIEN,  
 Solicitors for Appellee,  
 Maeze W. Bianchi.

JAMES F. X. O'BRIEN,  
 Of counsel with Appellee,  
 Maeze W. Bianchi.

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New Jersey Court of Errors and  
Appeals

Between

ANNA L. HARVEY,  
Complainant Appellant

—and—

JOHN D. RANDALL and  
MAEZE BIANCHI,  
Defendants Respondent

On Appeal.

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STATE OF THE CASE

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WARD KREMER,  
Attorney for Complainant Appellant.

DONOHUE & O'BRIEN,  
Attorneys for Defendants Respondent

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## NEW JERSEY COURT OF ERRORS AND APPEALS

ANNA L. HARVEY,

Complainant-Appellant,

vs.

JOHN D. RANDALL and

MAEZE W. BIANCHI,

Defendants-Appellees.

On Appeal  
NOTICE OF  
ARGUMENT

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TO DONOHUE & O'BRIEN,

Counsel for Defendant, Maeze W. Bianchi:

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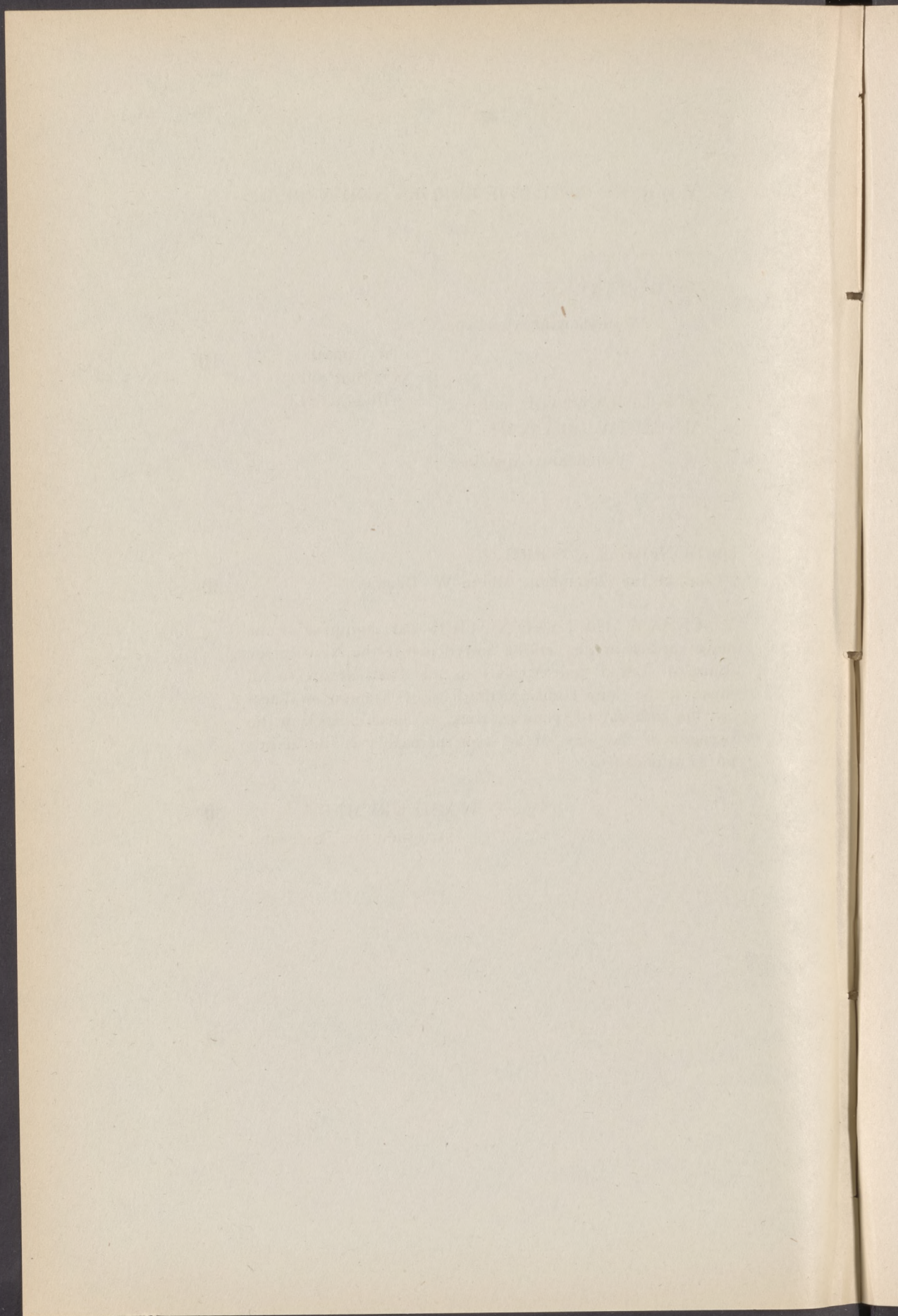
PLEASE TO TAKE NOTICE that argument of the above entitled matter will be moved before the New Jersey Court of Errors and Appeals in the Last Resort in all causes at the State House in the City of Trenton on Tuesday, the 20th day of October, 1925, at eleven o'clock in the forenoon of that day, or as soon thereafter as the matter can be attended to.

(Signed) WARD KREMER,

Attorney for Appellant.

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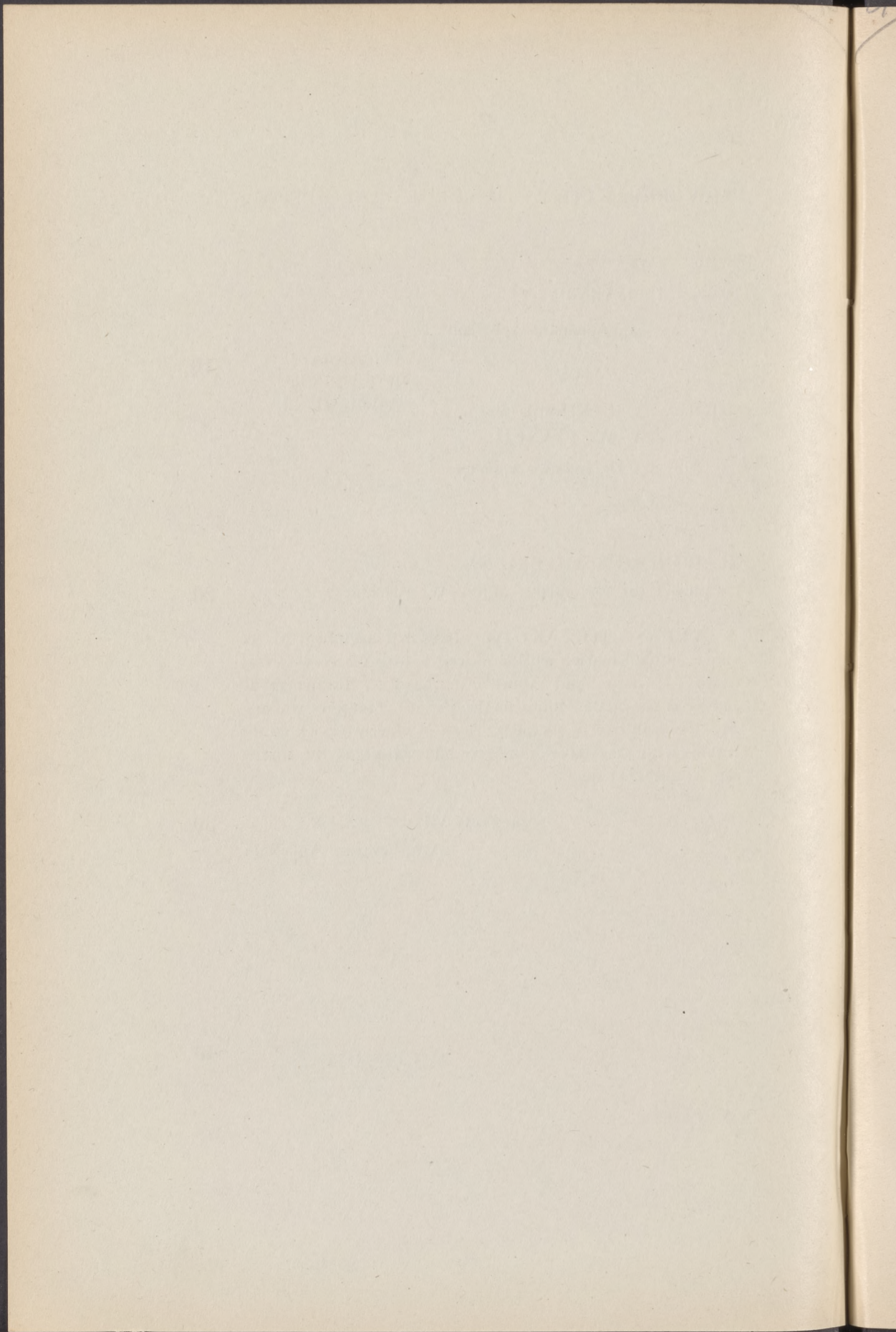
## NEW JERSEY COURT OF ERRORS AND APPEALS

ANNA L. HARVEY, Complainant-Appellant, vs. JOHN D. RANDALL and MAEZE W. BIANCHI, Defendants-Appellees.	On Appeal NOTICE OF ARGUMENT	10
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TO DONOHUE & O'BRIEN, Counsel for Defendant, Maeze W. Bianchi:		20
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PLEASE TO TAKE NOTICE that argument of the above entitled matter will be moved before the New Jersey Court of Errors and Appeals in the Last Resort in all causes at the State House in the City of Trenton on Tuesday, the 20th day of October, 1925, at eleven o'clock in the forenoon of that day, or as soon thereafter as the matter can be attended to.

(Signed) WARD KREMER, Attorney for Appellant.	30
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New Jersey Court of Errors and  
Appeals

ANNA L. HARVEY,  
Complainant-Appellant

vs.

JOHN D. RANDALL and  
MAEZE W. BIANCHI,  
Defendants-Respondent.

ON APPEAL.

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BRIEF FOR APPELLANT

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WARD KREMER

Attorney for Appellant,

Asbury Park, N. J.

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THE UNIVERSITY OF CHICAGO

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1917

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THE UNIVERSITY OF CHICAGO

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NEW JERSEY COURT OF ERRORS AND APPEALS

ANNA L. HARVEY,  
Complainant-Appellant

vs.

JOHN D. RANDALL and  
MAEZE W. BIANCHI,  
Defendants-Respondent.

ON APPEAL.

BRIEF FOR  
APPELLANT.

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This is an appeal from an order of the court of chancery discharging a notice of lis pendens filed during the pendency of a suit for specific performance.

On April 20 the defendant Randall entered into a written contract with the complainant to sell a parcel of land in Asbury Park to the complainant. (State of Case, page 6). The complainant paid to the said Randall who was then in Florida, the deposit called for, but on May 1, 1925, Randall wrote the complainant repudiating the contract and stated that he was returning complainant's deposit. (State of Case, page 7).

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On May 26, 1925 complainant filed her bill for specific performance against the defendant Randall and the subpoena issued in the cause was dated the same day. On May 27 the sheriff of Monmouth county issued an authorization to his deputy to serve the subpoena and it was served on May 28 on the defendant Randall. On May 27 the complainant filed a notice of lis pendens in the Monmouth county clerk's office and it appears that on the same day a deed from Randall to one Maeze Bianchi was also recorded. This deed was dated May 8. (State of Case, page 13). The defendant Bianchi petitioned the court of chancery to discharge the notice of lis pendens, the petition stating that the said Bianchi "was desirous of mortgaging the property." (State of Case, page 10). This petition was filed September 10, 1925 and on October 6, 1925 an order was entered discharging the same of record. It is from this order that complainant appeals.

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It will readily be seen that if the defendant Bianchi is to be permitted to mortgage or in any way encumber the property then even a successful termination of the complainant's suit may be rendered of no effect. The property might be mortgaged to an amount exceeding the price complainant contracted to pay. Moreover, it might be sold, were the *lis pendens* removed, to a bona fide purchaser and a decree in complainant's favor would be unenforceable.

10 In dealing with the rights of the vendee under a contract for the sale of land, where the vendor conveys while the suit is pending, Professor Pomeroy in his work on Specific Performance (Third Edition, 1926, page 950) says:

20 "If during the pendency of a suit brought by the purchaser to compel a specific performance, the vendor defendant conveys to a third person, the court of equity does not thereby lose its jurisdiction, even though the subject matter should have been put beyond its reach by a transfer to a bona fide grantee for value. It is still able to award whatever remedy is adopted for the particular circumstances of the case, either pecuniary damages against the vendor, *or by bringing in the grantee as an additional defendant*, a decree for the payment of the purchase price by the vendor or his grantee to the plaintiff, *or a specific performance against the grantee himself if he is not a bona fide purchaser*. If the rules of procedure have been observed by the plaintiff and he has properly filed a notice of *lis pendens* it is of course impossible for the vendor to convey the land during the suit beyond the reach of the plaintiff and of the court."

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In the present case Bianchi, who bought from the defendant Randall and recorded his deed after the filing of complainant's bill and hence during the pendency of the suit, is now before the court, having been brought in as a party defendant. Obviously, one of the vital questions to be decided on the final hearing of the specific performance suit is whether Bianchi was in fact a bona fide purchaser

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without notice of the complainant's claim. But it is respectfully urged that the effect of the order now appealed from is to prejudge this question and to decide before hearing that Bianchi is such innocent purchaser, without notice.

The result of the final hearing may be to establish the fact that Bianchi is not a bona fide purchaser and the complainant may obtain a decree against him. But even if that eventuality should happen, and the present order be allowed to become effective, the property may then be beyond the reach of the complainant and of the court. If complainant's *lis pendens* be discharged, Bianchi may then encumber or even alienate the property. The purchaser of it, unimpressed with any lien in favor of the complainant would be at liberty to mortgage or sell and the complainant would be remediless. It was to prevent such situations arising, and to preserve the res intact until the final disposition of the cause that the legislature has provided for the filing of the notice of *lis pendens*. 10

In providing this protection to a purchaser of property, moreover, two methods have been established for the discharge of the *lis pendens*. The act relating to *lis pendens* provides, (3 C.S. 3176) that when a final decree be made in favor of the defendant it shall be the duty of the clerk of the county where such *lis pendens* is filed to enter a statement of the substance of the decree on the margin of the record and discharge the same, upon a certified copy of the decree being filed in his office (Section 4). 20

Section Five of the same act (3 C.S. 3176) provides that the chancellor of a supreme court justice may order the *lis pendens* discharged upon the giving of proper security by the defendant, in cases in which the enforcement of a claim for the payment of money upon the lands is sought. *There is no statutory provision for the discharge of the lis pendens for the reason assigned in the present case.* 30

It may be argued by the defendant that the *lis pendens* was ineffective as to Bianchi for the reason that he recorded his deed a day before the actual service of a subpoena upon Randall in the complainant's specific performance suit. The fallacy of this position is that it does not take into account 40

that the *lis pendens* is not notice to Randall and Bianchi alone but it is notice to the world. To persons having actual or constructive notice of the suit in chancery no notice of *lis pendens* is necessary. (Kocher's Chancery Practice, page 334). The statute however has to do with notice to bona fide purchasers. In the case of *Wood v. Price*, 79 N. J. Eq. 620, the Court of Errors and Appeals speaking through Mr. Justice Voorhees, says: (623):

10            "What our statute really did, not only in effect but in words, for it is limited in its scope to any bona fide purchaser or mortgagee, was to abrogate the rule that parties to a litigation could not alienate the property in dispute as against the rights of the opposing parties to such suit \* \* \* \* \*

"It will thus be clear that the statute did not at all deal with the rights of persons who had notice, either actual or constructive, of equities which would bind or charge their rights \* \* \* \* \*

20            "The old rules, under which the litigation itself was made to limit the rights of parties acquiring interests in the subject matter were changed by the statute above cited, unless the statutory notice was recorded.

30            "Having now disposed of the effect of the *lis pendens* act and shown that it does not apply to persons who do not acquire interest in the subject matter bona fide, we must look to the situation of the parties and discover whether there was notice, actual or constructive, to the purchaser of the property."

40            It is respectfully urged that the order complained of entirely disregards the complainant's statutory right to give notice to bona fide purchasers. Whether the defendant Bianchi is a bona fide purchaser or whether he had actual or constructive notice is a matter properly to be determined on the final hearing of the cause. If he were in the first category, no *lis pendens* was necessary as to him. If it be determined that he was a bona fide purchaser then the

sufficiency of the notice as to him would be of moment. *Meantime, however, the complainant is entitled to the protection which the legislature has given her to have on record as to all possible bona fide purchasers a notice of her claim upon the property.* The court of chancery moreover by a policy established by a long line of cases has given the vendee an additional protection by preserving the property in its original status pending the final determination of the cause. Both the statute and the equitable principle are offended by the order here complained of.

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The complainant has used all possible diligence. Her bill of complainant was filed May 26. The *lis pendens* could not be filed before the filing of the bill or it would have been a nullity. (*Walker v. Hill*, 22 N. J. Eq. 513). It was filed May 27 and the subpoena issued the same day. Complainant therefore has taken every step provided by law to enforce and protect her rights and it is respectfully submitted that she is entitled to have the property the subject of the litigation preserved in its present state until the court of chancery can pass upon the cause at issue. The Complainant therefore submits that the order discharging the *lis pendens* should be set aside.

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WARD KREMER,  
Attorney for Appellant.

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## New Jersey Court of Errors and Appeals

ANNA L. HARVEY,  
*Complainant-Appellant,*

*vs.*

JOHN D. RANDALL and MAEZE  
W. BIANCHI,  
*Defendants-Respondents.*

### BRIEF FOR RESPONDENT, MAEZE W. BIANCHI.

#### Statement of Facts.

This is an appeal from an order of the Court of Chancery, discharging of record a notice of lis pendens filed in the office of the Clerk of Monmouth County, covering premises 204 Seventh avenue, Asbury Park, New Jersey. The facts are as follows:

On May 8th, 1925, defendant Randall sold to defendant Bianchi the above-mentioned property, by deed bearing that date and acknowledged on that date (State of Case, p. 13, l. 17).

On May 26th, 1925, complainant filed a bill of complaint against defendant Randall for specific performances of an alleged contract of sale and subpoena was issued on that day.

On May 27th, 1925, the deed from Randall to Bianchi was received by the Clerk of Monmouth County in the eight o'clock mail. He also received the lis pendens in question on the same date in the same mail and recorded both as of May 27th, 1925, 8 A. M.

On May 28th, 1925, the subpoena was served upon defendant Randall.

On September 10th, 1925, defendant Bianchi filed a petition seeking to be made a party defendant in this cause and alleging that she was a bona fide purchaser for value of the property in question and seeking to have the lis pendens set aside on the ground that it had been improperly filed and had not given her constructive notice. This petition was duly verified by affidavit setting forth the facts at length (State of the Case, pp. 9, 10, 11, 12).

The matter came on for hearing on the petition, and on October 6th, 1925, an order was made by the Chancellor to set aside the said lis pendens on the ground that it had not given defendant Bianchi any constructive notice (State of the Case, pp. 16 and 17).

#### **Lis Pendens Did Not Give Notice.**

The question to be determined on this appeal is whether or not the lis pendens filed by complainant on May 27th, 1925, gave constructive notice to defendant Bianchi.

The Lis Pendens Act as amended in P. L. 1925, page 416, Chapter 158, provides that neither the issuance of summons or subpoena or other process *shall be deemed constructive notice* to any bona fide purchaser "*until the plaintiff or complainant in such action or his attorney or solicitors shall have first filed in the office of the Clerk of the Court of Common Pleas \* \* \* a written notice of the pendency of such suit.*"

In the case of *Wood v. Price* (Court of Errors and Appeals), 79 N. J. E. 620, 81 Atl. 983, Jus-

tice Voorhees stated that the purpose of the Lis Pendens Act was to eradicate the old rule of law that neither party could alienate property in dispute, and that the Lis Pendens Act was instituted to give notice of such suit where it would be readily found.

It thus appears that the purpose of the act was to give notice and a lis pendens can only give constructive notice *from the time it shall have been filed*.

*Haughwout & Pomeroy v. Murphy*, 22 N. J. E. 531.

This case resolves itself into a matter of common sense, that the lis pendens being filed concurrently with the deed could not have given notice to the purchaser under said deed.

It is an admitted fact that the lis pendens *was not first filed* in compliance with the act and it is therefore contended that the filing of it could in no way have affected the purchaser. The Lis Pendens Act provides that the lis pendens *shall have been first filed*, and since the act is a penal act, at least in result, it must be strictly construed.

#### **Lis Pendens Did Not Become Effective as Constructive Notice Until Subpoena Served.**

Even if it could be said that the lis pendens, having been filed simultaneously with the deed, could ordinarily have given constructive notice, nevertheless, in this case, constructive notice could not have been given at that time, since the subpoena had not been served.

Before the enactment of the Lis Pendens Act, constructive notice was not given until the bill had been filed and the subpoena served. The

Lis Pendens Act did not change this rule of law, but merely added one more condition precedent. Therefore, until the bill had been filed, the lis pendens filed and the subpoena served, no constructive notice was given. The deed in question was filed on May 27th, 1925 (State of the Case, p. 13, l. 20), and the subpoena was not served upon the defendant Randall until May 28th, 1925. Constructive notice was not given until May 28th, the day after the deed to defendant Bianchi was recorded.

In the case of *Delaware River Quarry & Construction Company v. Board of Chosen Freeholders of Mercer County, et als.*, 88 N. J. E. 506, 103 Atl., p. 18, V.-C. Backes said:

“Suits in Chancery are commenced by the issuance and service of subpoena or the making of a bona fide attempt to serve it, after the bill has been filed (*Haughwout v. Murphy*, 22 N. J. E. 531; *Hermann v. Mexican Petroleum Corp.*, 85 N. J. E. 367, 96 Atl. 492; *Haupt Co. v. Board of Education of Edgewater*, 100 Atl. 337), and a notice filed under the Lis Pendens Act (3 C. S., p. 3175) before the action is thus commenced, is ineffectual, as suits in equity were before the act was passed; innocent purchasers being charged with constructive notice of the pendency of the suit only by the filing of the bill and the service of the subpoena. A reason for this rule of practice may be found in the hardships imposed on innocent third parties by the doctrine of lis pendens, but no such reason can be advanced for its application to the Municipal Mechanic's Lien Act where no innocent parties are involved. Here the notice is actual, not constructive, and it serves an entirely different purpose.”

**Defendant Bianchi was a Bona Fide Purchaser  
for Value Without Notice.**

The defendant, Bianchi, was a bona fide purchaser for value without notice of complainant's alleged rights in and to the premises in question. In the petition filed in this cause by defendant Bianchi on September 10th, 1925, it was alleged that she was a bona fide purchaser for value and without notice of any rights which complainant might have had (State of the Case, pp. 9 and 10). This was also set forth in the affidavit sworn to and annexed to the petition (State of the Case, pp. 11 and 12).

In the order made by the Chancellor on October 6th, 1925, it was found by him that defendant Bianchi was a bona fide purchaser for value (State of the Case, p. 16, ll. 24 to 28).

Complainant, in her brief filed in this cause, urges as a reason why the Chancellor's order should be set aside, that the question of defendant Bianchi being a bona fide purchaser for value is one for final hearing (Brief, p. 4, l. 38).

This is incorrect, inasmuch as the bill of complaint did not allege that defendant Bianchi was not a bona fide purchaser for value and made no reference to her (State of the Case, pp. 3, 4 and 5).

Defendant Bianchi was made a party defendant on her own petition, in which it was alleged and sworn to that she was a bona fide purchaser for value and that she had no notice of complainant's rights. Complainant did not file any affidavit or offer any proof to controvert these allegations, and the Chancellor properly found her to be a bona fide purchaser for value without notice. The proper time to have raised

the question of defendant's bona fides was at the hearing of her petition. It should be noted in this respect that complainant did not allege as a reason on appeal the Chancellor's finding that defendant Bianchi was a bona fide purchaser for value without notice. It is respectfully contended that the question cannot therefore be raised on appeal, and that this appeal is limited to the question of whether or not the lis pendens gave constructive notice.

The deed to Bianchi was dated and acknowledged May 8th, 1925, and suit was not instituted by complainant against Randall, the vendor, until May 26th, 1925. The purchaser acquired her interest before the institution of the suit against defendant Randall and she cannot be affected by that suit.

In the case of *Slack v. John*, 63 N. J. E. 126, 51 Atl. 151, the Court held that one who has acquired from the defendant an interest in the subject matter of the litigation prior to the litigation or prior to the time the lis pendens is filed, is not charged with constructive notice, and cannot be bound by the decree on any theory of constructive notice.

### Conclusion.

Complainant in her brief filed herein asks that this Court protect her interest and disregards the fact that she is asking at the same time that the rights of a bona fide purchaser for value be violated. If the rights of any person are to be protected, those of the defendant Bianchi are deserving of it. Defendant Bianchi had no actual notice, and it is contended that no constructive notice was given by the lis pendens

which was filed simultaneously with the deed of conveyance. It is respectfully submitted that this Court should affirm the Chancellor's order setting aside the lis pendens filed herein.

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Solicitors for Defendant-Respondent Bianchi.

O. C. BIANCHI,  
Of Counsel with  
Defendant-Respondent Bianchi.

