of negligence must be deemed conclusively adjudicated by the prior decisions and that the parties must be bound thereby. Accordingly, since in the prior proceeding the plaintiff had been found guilty of negligence a motion to dismiss the complaint was granted. This case is refreshingly sound and it is only to be hoped that within the near future the Court of Errors and Appeals of this State will find occasion to explain the cases of *Smith* v. *Fisher Baking Co.*[20] and *Carter* v. *Public Service*[21] consistently with the firmly fixed and highly desirable rules heretofore announced by a multitude of decisions.

THE VENDEE'S LIEN—In two opinions[1] handed down in 1929 the Court of Errors and Appeals of New Jersey declared that a bill by a vendee under an executory contract, which alleged a breach of the contract and sought the return of the deposit money, presented a purely legal question not within the jurisdiction of equity. In February, 1930, the court held[2] that the additional fact that the bill prayed a lien for the amount paid still did not bring the case within equity's jurisdiction. Finally, on May 19, 1930, the court held[3] that a bill by a vendee which sought a decree rescinding the contract and fixing a lien upon the land for the return of the deposit money did not state a cause of action within the jurisdiction of equity.[4]

The opinions in the first three of these cases[5] were written by the same Justice.[6] The opinion in the last case[7] was "per curiam". After the decision in the last case there was a change in the personnel of the court[8] and then the case of *Richeimer* v. *Fischbein* came up.[9]

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[20] *Supra,* note 16.
[21] *Supra,* note 13.

[1] Bailey v. B. Holding Company, 104 N.J. Eq. 241 (January 14, 1929); Grunt v. Olsan, 104 N.J. Eq. 242 (January 14, 1929).
[2] Clark v. Badgely, 105 N.J. Eq. 534 (Feb. 3, 1930).
[3] Slomkowski v. Levitas, 106 N.J. Eq. 266.
[4] The court said:
"The action (sic) in the court below was to rescind the contract upon the ground that the vendors could not deliver a marketable title under the proper construction of the will of one Anna Van Winkle Todd and also because the buildings upon the lands were not entirely within the boundaries of the property contracted to be conveyed and the proceeding was for the further purpose of impressing a lien upon the lands for the down money paid by the vendees under their contract * * * the matter is controlled by the findings of this court in Bailey v. B. Holding Company, 104 N.J. Eq. 241, and Grunt v. Olsan, 104 N.J. Eq. 242."
[5] Bailey v. B. Holding Company, (*supra,* note 1); Grunt v. Olsan, (*supra,* note 1); Clark v. Badgely, (*supra,* note 2).
[6] Justice Charles C. Black.
[7] Slomkowski v. Levitas, (*supra,* note 3).
[8] Justice Peter F. Daly succeeded Justice Charles C. Black.
[9] 107 N.J. Eq. 493 (E. & A. 1931). The case was argued May 23, 1930

In this case a vendee sought the cancellation of a contract which the vendor could not perform, and a lien for his down payment. The court below, feeling itself bound by the decisions in *Bailey* v. *B. Holding Company, Grunt* v. *Olsan* and *Clark* v. *Badgely,* had dismissed the bill for lack of jurisdiction.[10] The vendee appealed, and placed before the Court of Errors and Appeals the single question: "Does a vendee under an executory contract for the sale of lands, if the vendor's title proves defective, have an equitable lien upon the lands for the installments of purchase price paid by him?"[11] Appellant's argument upon the appeal was a frank attack upon the first three cases[12] and a request that the Court of Errors and Appeals overrule them.[13]

The case placed the Court of Errors and Appeals in a dilemma. Since the vendee's lien is an equitable lien never enforced at law,[14] the four decisions denied a lien to the vendee altogether. Yet as each of the decisions had inferentially recognized that in a proper case the lien would be decreed[15] and the Court of Chancery had repeatedly held that a vendee was entitled to such a lien,[16] the Court of Errors and Appeals could not, like Massachusetts,[17] say that New Jersey never recognized the vendee's lien. It might have followed New York in holding that here recission was sought, so there could be no lien;[18] but that doctrine was so unjustly mechanical and so thoroughly discredited[19] that no court could justifiably follow it.

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[10] 105 N.J. Eq. 627, (Ch., Feb. 18, 1930).

[11] Brief of complainant-appellant, page 1.

[12] Id. pages 2 to 4. Slomkowski v. Levitas, (*supra* note 3) was decided May 19, 1930, only four days prior to the presentation of Richeimer v. Fischbein to the Court of Errors and Appeals. It was, therefore, not mentioned in the briefs.

[13] Id. pages 4 to 10.

[14] Lonzello v. D'Amato, 107 N.J.L. 422 (Sup. Ct. 1931).

[15] Bailey v. B. Holding Company, (*supra* note 1); Grunt v. Olsan, (*supra* note 1); Clark v. Badgely, (*supra* note 2).In Kohoot v. Gurbisz, 101 N.J. Eq. 757, (E & A 1927) the court had affirmed a decree granting a lien to a vendee; and see Bailey v. B. Holding Company, (*supra* note 1), in which the Court of Errors and Appeals said, "The case is clearly distinguished from such cases as Goldstein v. Ehrlick, 96 N.J. Eq. 52." In Goldstein v. Ehrlick (Ch. 1924) a vendee's lien had been decreed.

[16] Crawford v. Bertholf 1 N.J. Eq. 458 at 469 (Ch. 1831); Cleveland v. Bergen Building and Improvement Co. 55 Atl (Ch. 1903); Craft v. Latourette, 62 N.J. Eq. 206 (Ch. 1901); Goldstein v. Ehrlick, 96 N.J. Eq. 52 (Ch. 1924); Blum v. Guarino, 6 N.J. Misc. 288 (Ch. 1928); Jawitz v. Caldwell Investment Co., 103 N.J. Eq. 61 (Ch. 1928); Isserman v. Welt, 101 N.J. Eq. 634 (Ch. 1927)

[17] Young v. Walker, 224 Mass. 491, 113 N.E. 363, (Mass. Sup. 1916); Ahrend v. Osborne, 118 Mass. 261, 19 Amer. Rep. 449. See also Philbrook v. Delano, 29 Me. 410.

[18] Davis v. William Rosenzweig Realty Co., 192 N.Y. 128, 84 N.E. 943 (Ct. of App. 1908).

[19] Davis v. William Rosenzweig Realty Co., (*supra* note 18) is a perfect example of mechanistic deduction from words with no thought to the realities behind them. The case was decided together with Elterman v. Hyman, 192 N.Y. 113, 84 N.E. 937. In Elterman v. Hyman, plaintiff vendee asked for a lien for the return of his deposit money because the vendor was unable to deliver good title. The Court of Appeals held him entitled to the lien, and the opinion by Judge Vann for the court is one of the ablest dissertations on the vendee's lien

If the Massachusetts and New York rules offered no way out, then certainly the cases in every other American jurisdiction in which the question has arisen[20] and in England, offered no means of graceful escape. Beginning with the dictum of Lord Keeper Henley in 1759, the cases in England[21] and America gave the vendee a lien for his purchase money in every case in which the contract was terminated without his fault. There seemed no solution for the Court of Errors and Appeals except to reverse itself.

But the subtlety of the legal mind is equal to any emergency, and with a skill worthy of Sir Hudibras, (who it may be recalled

> * * * could distinguish, and divide
> A hair twixt south and south-west side;
> On either side he would dispute,
> Confute, change hands, and still confute),

the Court of Errors and Appeals distinguished the three decisions relied on by the court below. The fourth[22] (whether because it stubbornly resisted distinction, or because it was forgotten by the court) was ignored.

The distinction, said the New Jersey Court of Errors and Appeals, lies "between cases in which there is a prayer for the specific performance, or for cancellation and surrender of a written instrument, in which a vendee's lien is proper *as incidental to a case of purely equit-*

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to be found in American case law. In Davis v. William Rosenzweig Realty Co. the "action was brought to rescind a contract for the purchase of 10 vacant lots * * * on account of fraud practiced by the vendor upon the vendee, to recover the sum of $5,000 paid down thereon, and to establish and foreclose a lien on the land therefor." The Court of Appeals, again in an opinion by Judge Vann, held (1) the vendee's lien flows from the contract; (2) recission terminates a contract *ab initio;* (3) therefore Davis having rescinded, there was no contract and hence no lien! As the court said, "Recission therefore destroys the contract *ab initio,* and leaves the parties in the same situation as if no contract had been made. Under these circumstances there can be no lien." The dissenting opinion by Judge Gray clearly points out the empty logic of this view; but the case is still law in New York. Fleckinger v. Glass, 222 N.Y. 404 (Ct. of App. 1918); Giarratano v. McIlwain, 214 N.Y.S. 582 (Sup. Ct., App. Div. 1926). This view has been generally repudiated. Michigan followed it in the cases of Von Holne v. Barber, 215 Mich. 538, 184 N.W. 526 (1921), and Mulheron v. Koppin Co., 221 Mich. 187, 190 N.W. 674 (1922), but reversed itself and repudiated it in Witte v. Holboth, 224 Mich. 286, 195 N.W. 82 (1923). See cases collected in note to Davis v. Rosenzweig in 20 L.R.A. (N.S.) 176.

[20] A fairly complete collection of the cases may be found in 45 A.L.R. 352, *et seq.*

[21] Burgess v. Wheate, 1 W. Black 123, 150, 96 Eng. Rep. 67, 79 (1759); Mackreth v. Symmons, 15 Ves. Jun. 329, 33 Eng. Rep. 778 (1808); Oxenham v. Esdale, 3 Y&J, 262, 148 Eng. Rep. 1177 (1829); Dinn v. Grant 5 DeG. & S 450, 64 Eng. Rep. 1194 (1852); Wythes v. Lee, 3 Drewry 395, 61 Eng. Rep. 954 (1855); Rose v. Watson, 10 H. L. Cases 672, 11 Eng. Rep. 1187 (1864); Westmacott v. Robins 4 DeG. F. & J. 389, 45 Eng. Rep. 1234 (1862); Abermin Ironworks v. Wickens 20 L. T. 89, 17 H. W. 221 (1868); Mycock v. Beatson, 13 Ch. Div. 384 (1879); Levy v. Stoyden, 1 Ch. 478 (1898); Cornwall v. Henson, 2 Ch. 710 (1899); Whitbread Co. v. Watt, 1 Ch. 835 (1902); Ridout v. Fowler, 1 Ch. 658 (1904).

[22] Slomkowski v. Levitas, note 3, *supra.*

able cognizance, and cases in which the vendee merely asks the return of money paid without more."[23] *Richeimer* v. *Fischbein* was a case of the former class, and was therefore within equity's jurisdiction; the others were of the latter class, and had been properly dismissed.

A comparison of the pleadings in *Richeimer* v. *Fischbein* with the pleadings in the other cases shows that the distinction drawn by the court has no basis in fact;[24] an examination of the authorities shows that it has no foundation in law; and certainly the innovation has no support in reason.

The net result of the decision in *Richeimer* v. *Fischbein* is that the vendee's lien will be recognized and enforced simply as incidental relief in causes which are in and of themselves cognizable in equity. In other words, in cases of specific performance, recission, cancellation, or other cases within equity's exclusive or concurrent jurisdiction the Court of Chancery may, if justice requires it, give relief by way of vendee's lien in addition to all other relief that the case warrants.

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[23] Richeimer v. Fischbein, *supra* note 9, at page 501.

[24] The bill in Richeimer v. Fischbein, after alleging the making of the contract and the payment of the deposit thereunder, alleges that the building on the premises extended beyond the boundary lines contrary to the terms of the contract; that these matters could not be remedied at the time of closing or for a long time thereafter; and

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

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

Then, in addition to the usual prayers, are these prayers:

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

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

The Court of Errors and Appeals makes a point of the fact that defendant counterclaimed for specific performance. This counterclaim was withdrawn prior to the motion to dismiss (State of case on appeal, page 17). Further, a similar counterclaim for specific performance was filed in Bailey v. B. Holding Company.

In Clark v. Badgely, *supra* note 2, the bill, after alleging the making of the contract, the payments thereunder and the breach, alleges:

"9. Complainants thereupon rescinded the said contract and demanded in

From this it must follow that if a proper case for the primary equity is not made out, Chancery may not hold the bill.[25] Therefore, the impression of a vendee's lien will depend not upon a showing that the vendee is entitled to a lien, but upon a showing that he is entitled to cancellation, or recission or specific performance, or some other equitable relief for which he may care nothing and to which indeed he may not be able to show himself entitled. Let us assume for example that the vendee sues the vendor at law for the return of his down payment and has judgment. Certainly he could not then maintain a bill in Chancery for the cancellation of the contract. Yet a vendee may enforce his equitable lien even after judgment in his favor at law.[26] Or let us assume that the contract was an oral one, but the vendee has taken possession and done acts upon the land sufficient to take the contract out of the Statute of Frauds as to him. He has nothing to cancel; there may be no ground for recission, and the vendor

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return said deposit of five hundred ($500.00) dollars paid in accordance with the said contract, but the said defendants have refused so to return the same."

and complainant prayed:

"3. That the said contract be delivered up for cancellation upon the payment of the said sums of money aforementioned, by the said defendants and duly cancelled by the said parties.

"4. That the sum of five hundred ($500.00) dollars, together with interest and search fees be impressed as a lien upon the said lands and premises and in the event the said defendants do not pay the same to the complainants, that the said property be sold to raise the same sum due to the complainants."

In Slomkowski v. Levitas, *supra* note 3, the bill, after alleging the agreement and the payment thereunder, alleges that the building on the premises extended beyond the boundary lines contrary to the terms of the contract; and

"9. Complainants further charge that the said Samuel Levitas and Fannie Levitas, the defendants herein, have refused to return to the complainants said sum of five hundred ($500.00) dollars paid on account of the purchase price of said property as hereinbefore stated, and a further sum of one hundred ninety ($190.00) dollars search fees and disbursements incurred by complainants as aforesaid."

Then, in addition to the usual prayers, is this prayer:

"2. That a decree be made rescinding the said contract between the complainants and Samuel Levitas and Fannie Levitas, his wife, the said defendants and directing the said defendants to repay the said sum of five hundred dollars ($500) paid on account of the purchase price of said contract as hereinbefore stated, and a further sum of one hundred ninety dollars ($190) with interest, and that the said total sum of six hundred ninety dollars ($690) with interest, be impressed as a lien upon the lands and premises hereinabove described, and in the event that the said defendants do not pay the same to the complainants, that the said property be sold to raise and satisfy the said sum due complainants."

In Goldstein v. Ehrlick, *supra* note 15, which was approved by the Court of Errors and Appeals in Bailey v. B. Holding Co., (*supra* note 1) there was no prayer for cancellation, recission or specific performance.

[25] Logan v. Flattau, 73 N.J. Eq. 222 (Ch. 1907); Public Service Corp. v. Hackensack Meadows, 72 N.J. Eq. 285 (Ch. 1906); 1 Pomeroy, Sec. 237.

[26] Fleckinger v. Glass, 222 N.Y. 404, 118 N.E. 792 (Ct. of App. 1918). In Graves v. Coutant, 31 N.J. Eq. 763 (E&A 1879), a vendor's lien was enforced in equity after judgment in his favor at law.

is unable to perform. Under *Richeimer* v. *Fischbein* he would have no standing in equity; yet numerous cases have given such a vendee a lien.[27] Examples could be multiplied of cases in which equity will not grant cancellation, rescission or specific performance, but in which reason, justice and the cases in other jurisdictions grant the lien.[28] Not only is it dangerous to litigants to require them to allege and prove their right to relief other than the relief they desire, but it introduces a type of legal mummery more vicious because less obvious than the fictions of our early law.

If the vendee's lien has any basis in reason, it must be that the vendee ordinarily pays his money, not on the credit of the seller, but on the credit of the land.[29] If the law considers it desirable that the disappointed purchaser have a lien[30] for the return of his money, there can be no justification in reason for limiting that right to those who can otherwise bring themselves into equity.[31]

The vendee's lien is usually postulated upon equitable conversion. The argument is that immediately upon the making of the contract, the vendee is in equity the owner, subject to the vendor's lien for the purchase money. Upon the vendor's failure to perform, the vendee is entitled to retain the equitable ownership until his money is refunded. If his money is not refunded, he may apply to the Court of Equity to sell the property to raise and pay him the money due him, the balance to go to the vendor. Obviously these rules have no foundation other than the courts' desire that they be so; but they are logically consistent. The rule in *Richeimer* v. *Fischbein* has no logical relation to these rules, and therefore cannot even lean upon the poor crutch of the syllogism.

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[27] See cases collected in 45 A.L.R. 361.

[28] In Whitbread & Co. v. Watt, *supra* note 21, the court held that a vendee is entitled to a lien under a contract which he terminated in accordance with a provision thereof. See also Wilson v. Sunnyside Orchard Co., 33 Idaho 501, 196 Pac. 302 (1921).

[29] Obviously the right to a lien is, as Lord Justice Williams said in Whitbread & Co. v. Watt, *supra* note 21, an invention of equity. He said, "The lien which a purchaser has for his deposit is not the result of any express contract; it is a right which may be said to have been invented for the purpose of doing justice." See also Wythes v. Lee, *supra* note 21; the dissent of Gray, J. in Davis v. William Rosenzweig Realty Co., *supra* note 19; the opinion of the court in Elterman v. Hyman, *supra* note 19; and the opinion of the court in Witte v. Holboth, *supra* note 19.

[30] In Mackreth v. Symmons, *supra* note 21, the court said (page 782): "It has always struck me * * * that it would have been better at once to have held that the lien should exist in no case."

[31] In Wythes v. Lee, *supra* note 21, Sir R. T. Kindersley, Vice Chancellor, said, "If there is a right of lien, as that is a right in equity, it follows that it must be capable of being enforced by bill."