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THE VENDEE'S LIEN- ON LAND AND CHATTELS

THE VENDEE'S LIEN ON LAND AND CHATTELS — The vendee's lien is now firmly established as an equitable device to insure full restitution to the purchaser of land on his rescission for the vendor's fraud or default.[1] It first appeared in a dictum in an early English case where it was suggested as a possible analogy to the implied vendor's lien for the purchase money.[2] But it was 1855 before the question was presented squarely to an English court of record,[3] and 1860 when the House of Lords definitely approved it.[4] Long before this, however, courts of equity in the United States had begun to use this device in land contract cases,[5] apparently without reliance on the early English dictum.[6]

I.

In searching for the essential basis of this equitable lien[7] courts have commonly said that it is a substitute for the equitable ownership which equity attributes to the purchaser by virtue of the contract, the vendor holding the legal title merely "in trust" for him.[8] Occasionally

[1] Larson v. Metcalf, 201 Iowa 1208, 207 N. W. 382, 45 A. L. R. 344 (1926); Rose v. Watson, 10 H. L. C. 672, 11 Eng. Repr. 1187 (1864); Whitbread & Co. v. Watt, [1902] 1 Ch. 835; 3 POMEROY, EQUITY JURISPRUDENCE, 4th ed., sec. 1263 (1918); 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., sec. 694 (1929). Massachusetts rejects the vendee's lien altogether. Young v. Walker, 224 Mass. 491, 113 N. E. 363 (1916); Ahrend v. Odiorne, 118 Mass. 261, 19 Am. Rep. 449 (1875). This state apparently stands alone.

[2] Burgess v. Wheate, 1 Eden 177 at 211, 28 Eng. Repr. 652 at 665 (1757-1759), where it was said, "as where conveyance is made prematurely before money paid, the money is considered as a lien on that estate in the hands of the vendee. So, where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor. . . ."

[3] Whythes v. Lee, 3 Drew. 396, 61 Eng. Repr. 954 (1855). See also Mackreth v. Symmons, 15 Ves. Jr. 329 at 344, 33 Eng. Repr. 778 at 784 (1808), where the Burgess v. Wheate dictum is quoted.

[4] Rose v. Watson, 10 H. L. C. 672, 11 Eng. Repr. 1187 (1864).

[5] Newnan v. Maclin, 6 Tenn. 241 (1813); Farmer & Arnold v. Samuel, 14 Ky. 187 (1823); Wright v. Swayne, 44 Ky. 441 (1845).

[6] But see Payne v. Atterbury, Har. Ch. (Mich.) 414 (1836-1842).

[7] See 32 MICH. L. REV. 685 (1934) for a discussion of the nature and basis of the equitable lien as a remedy in cases of breach of contract.

[8] Rose v. Watson, 10 H. L. C. 672, 11 Eng. Repr. 1187 (1864); Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937, 15 Ann. Cas. 819 (1908); Stewart v. Mann, 85 Ore. 68, 165 Pac. 590, 1169 (1917).

it is asserted that the vendee's lien is simply the counterpart of the vendor's lien.[9] But there are analytical difficulties with both of these propositions. By rescission for the vendor's fraud or substantial breach the vendee abandons whatever claim he may have had to the land itself. Unlike the vendor's lien, which is perfectly consistent with an enforcement of the contract, the vendee's lien can aim only at insuring the vendee's complete withdrawal from the contract, with full restitution of what he has transferred to the vendor until the time of his rescission. The New York Court of Appeals was misled by its acceptance of orthodox analyses into denying a lien where the vendee rescinded for the vendor's fraud, asserting that the lien depended on the contract and was destroyed when the contract was itself rescinded.[10] This reasoning was adopted in Michigan for a brief period but was later repudiated,[11] and it has made no impression in other States.[12] The basis of the vendee's claim is essentially quasi-contractual, and the lien is merely a remedial device to guarantee, so far as possible, a restoration of the status quo. It is, therefore, wholly immaterial whether the ground for the rescission is the vendor's fraud, failure of title, or other default.

The purely remedial character of the vendee's lien is most clearly shown by cases in which it has been allowed where the contract was wholly unenforceable on account of the statute of frauds[13] or the ven-

[9] Davis v. Heard, 44 Miss. 50 (1870). Arizona, Iowa, and Washington allow the vendee's lien although the grantor's lien has been abolished. Pima Farms Co. v. Elliott, 32 Ariz. 342, 258 Pac. 304 (1927); Larson v. Metcalf, 201 Iowa 1208, 207 N. W. 382, 45 A. L. R. 344 (1926); Ihrke v. Continental Life Ins. & Inv. Co., 91 Wash. 342, 157 Pac. 866 (1916).

[10] Davis v. Rosenzweig Realty Co., 192 N. Y. 128, 84 N. E. 943, 20 L. R. A. (N. S.) 175 (1908); Diven v. Ashbaugh, 121 Misc. 213, 200 N. Y. S. 634 (1923).

[11] Mulheron v. Henry S. Koppin Co., 221 Mich. 187, 190 N. W. 674(1922), followed the New York rule but was overruled in Witte v. Hobolth, 224 Mich. 286, 195 N. W. 82 (1923).

[12] But by a similar analysis of the lien, the Illinois court felt itself forced to say that there could be no lien when the entire legal title had been conveyed to the vendee, since the lien arises only in favor of a vendee who has made payments under a contract and thus becomes pro tanto the *equitable* owner. Clarke v. Mayberry, 165 Ill. App. 639 (1911); but see Murray v. Hill, 60 Ill. App. 80 (1894). Other courts have refused to accept such artificial reasoning. Ft. Jefferson Imp. Co. v. Dupoyster, 108 Ky. 792, 51 S. W. 810, 48 L. R. A. 537 (1899); Wolfinger v. Thomas, 22 S. D. 57, 115 N. W. 100, 133 Am. St. Rep. 900 (1908).

[13] Clough v. Clough, 42 Ky. 64 (1842). But see Elliott v. Walker, 145 Ky. 71, 140 S. W. 51 (1911), where the court held that a purchaser under an oral contract must have possession in order to have a lien on rescission of the contract. Ordinarily this is not so. Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937, 15 Ann. Cas. 819, 127 Am. St. Rep. 862 (1908); Bullitt v. Eastern Ky. Land Co., 99 Ky. 324, 36 S. W. 16 (1896).

dor's incapacity.[14] It is not so clear whether the lien will be given where the purchaser's own default has made the contract unenforceable. It is generally said that the purchaser may not sue affirmatively to establish a lien in this situation,[15] but there is abundant authority for a lien in his favor where as defendant he resists the vendor's rescission and claims restitution of purchase money or improvements.[16] The powers of a court of equity to decree such defensive relief[17] are derived from its broad control over the operation of its remedies to secure a just result.

The analysis of the nature of the vendee's lien may affect the result where the statute of limitations is involved. One court[18] held that the suit for a lien to secure repayment of the purchase money was governed by the six-year statute of limitations covering debts evidenced by writing, since the lien arose out of the written contract, but that the action to recover for improvements was barred since it did not grow out of the contract and hence was governed by the four-year statute covering all actions other than for the recovery of real estate and not otherwise provided for. On the other hand, courts which have said that the vendee's lien is the counterpart of the grantor's lien may find themselves saying that the debt is barred but that the lien may be enforced in equity until the lapse of such time as the local statute requires to give title by adverse possession.[19] It would seem more

[14] Pilcher v. Smith, 39 Tenn. 208 (1858); Wiley v. Heidell, 59 Tenn. 98 (1873); Work v. Walker, 1 Tenn. Ch. 487 (1873). Minnesota has refused to grant the vendee's lien at all in this situation. In Gruesner v. Thatcher, 158 Minn. 470 at 473, 197 N. W. 968 at 969 (1924), the court said, "That result [granting a vendee's lien] presupposes a contract whereby vendees acquired an equitable interest in real estate."

In Kentucky the court has said that the vendee in this situation has a "resisting equity" which entitles him to retain possession till he is repaid the consideration he is out, or to have a lien adjudged as a condition to relief against him. "But the resisting equity which he has is a shield and not a sword, and does not authorize him to maintain an action for affirmative relief in advance of an attempt to eject him from the premises." Hall v. Hall, 236 Ky. 42 at 45, 32 S. W. (2d) 536 at 537 (1930).

[15] Tuttle v. Ehrehart, 102 Fla. 1129, 137 So. 245 (1931); Merrill v. Merrill, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392 (1894).

[16] Deere & Co. v. Young, 39 Iowa 588 (1874); Prater v. Peters, 31 Ky. L. Rep. 1311, 105 S. W. 102 (1907); Jones v. Galbraith, (Tenn. Ch. 1900) 59 S. W. 350.

[17] This is very similar to Kentucky's "resisting equity." See note 14, supra, where a vendee in default may not be able to get affirmative relief, but may be able to get the same relief, indirectly, through a condition to the relief granted the other party.

[18] Pima Farms Co. v. Elliott, 32 Ariz. 342, 258 Pac. 304 (1927).

[19] This is the rule generally applied when grantor's right to sue for the debt is barred by the statute of limitations. Bizzell v. Nix, 60 Ala. 281, 31 Am. Rep. 38 (1877); Magruder v. Peter, 11 G. & J. (Md.) 217 (1840); 2 WOOD, LIMITATION OF ACTIONS, 4th ed., sec. 232 (1916). New York and Mississippi, however, hold that

desirable to consider the claim to be purely quasi-contractual for this purpose as well, so as to be barred by the "implied contract" clause which is generally applied to quasi-contractual actions.[20]

Further difficulties arise where it is necessary to determine priorities as between the rescinding vendee and other lienors or subsequent purchasers. It seems to be generally agreed that the vendee's lien is a full-fledged security interest, entitling the vendee to prove as a secured claimant in bankruptcy[21] or rceivership[22] and to demand priority over subsequent claimants of the property in question.[23] If the lien were treated as a mere substitute for the vendee's "equitable ownership" arising out of the contract, it would be necessary to give him priority as of the date of the contract itself, at least as against purchasers or lienors with notice. Apparently no court would take this position.[24] On the other hand, if his claim were rigorously analyzed as a quasi-contractual claim arising from rescission, the date of the rescission might be taken as decisive. But if the lien is viewed as a remedial device which equity can adapt to contingencies that were never anticipated by the parties, then various intermediate stages can be selected. The decisions on this question seem to agree that priority will date from actual payment of the purchase money or from the making of the improvements.[25] As in other instances of remedial liens, where questions arise as to the actual or constructive notice of the subsequent purchaser or lienor, there may be practical difficulties with such a solution,[26] but it is

the grantor's lien for purchase money is barred when the debt itself is barred. Borst v. Corey, 15 N. Y. 505 (1857); Littlejohn v. Gordon, 32 Miss. 235 (1856). They apparently stand alone.

[20] WOODWARD, QUASI-CONTRACTS, sec. 294 (1913).

[21] Everett v. Mansfield, (C. C. A. 1st, 1906) 148 Fed. 374, 8 Ann. Cas. 956.

[22] Steele v. Citizens' State Bank, 116 Kan. 510, 227 Pac. 352 (1924).

[23] Franklin Finance Co. v. Bowden, 36 Ohio App. 19, 172 N. E. 698 (1930) (preferred over subsequent mortgagee with notice); Larson v. Metcalf, 201 Iowa 1208, 207 N. W. 382, 45 A. L. R. 344 (1926) (preferred over subsequent purchasers with notice). See Voorheis v. Eiting, 15 Ky. L. Rep. 161, 22 S. W. 80 (1893), as to intervening judgment creditor.

[24] Such a position was specifically rejected in Green v. Linn-haven Orchard Co., 89 Ore. 513, 174 Pac. 620 (1918).

[25] Green v. Linn-haven Orchard Co., 89 Ore. 513, 174 Pac. 620 (1918); First Savings Bank v. Linn-haven Orchard Co., 89 Ore. 354, 174 Pac. 614 (1918).

[26] One court has indicated that priority over subsequent lien claimants will depend on the date when payments were actually made by the purchaser. (First Savings Bank v. Linn-haven Orchard Co., 89 Ore. 354, 174 Pac. 614 (1918). But it has been held that his equitable lien may be cut off by a subsequent legal lienor or purchaser who has no notice. Voorheis v. Eiting, 15 Ky. L. Rep. 161, 22 S. W. 80 (1893). Here a creditor of the vendor attached half an hour before a deed was recorded, but after payment under an oral contract. Even had there been a written contract, there is doubt whether it could have been recorded so as to give notice.

perfectly consistent with the main purpose and essential nature of the vendee's lien.

The lien, of course, includes the purchase money, and also interest thereon.[27] It also includes amounts paid for taxes,[28] and permanent improvements on the land.[29] In other respects as well, the measure of recovery is consistent with the theory of rescission which underlies the lien. Thus, on a rescission of the contract the vendee is entitled to receive as damages in addition to the purchase price expenses necessarily incident thereto,[30] and the vendee's lien would seem to include such amounts.[31] But since the vendee's lien is used to restore the status quo after a disaffirmance of the contract, it will not include profits lost by virtue of the failure of the venture.[32] But this does not mean that the lien is completely unrelated to and independent of the contract. It may be impressed only against those lands which are the subject of the contract,[33] or perhaps the proceeds thereof,[34] and only to the extent of the vendor's interest in the property.[35]

[27] Foster v. Gressett's Heirs, 29 Ala. 393 (1856); Everett v. Mansfield, (C. C. A. 1st, 1906) 184 Fed. 374, 8 Ann. Cas. 956. When the vendee has been in possession, the interest is charged off against the use and occupation. Schultz v. Freeland, 107 Fla. 286, 145 So. 257 (1933); Robinson v. Bressler, 122 Neb. 461, 240 N. W. 564 (1932).

[28] Company *A*, 1st Regiment, National Guard Training School v. State, 58 N. D. 738, 227 N. W. 362 (1929); Skinner v. Scholes, 59 N. D. 181, 229 N. W. 114 (1930); Montgomery v. Meyerstein, 186 Cal. 459, 199 Pac. 800 (1921).

[29] Montgomery v. Meyerstein, 186 Cal. 459, 199 Pac. 800 (1921); Skinner v. Scholes, 59 N. D. 181, 229 N. W. 114 (1930); Jones v. Sandlin, 160 N. C. 150, 75 S. E. 1075 (1912).

[30] 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., secs. 561 and 695 (1929). See Rogge, "Damages upon Rescission for Breach of Warranty," 28 MICH. L. REV. 26 (1929), for a discussion of how far courts can go in giving damages on rescission for breach of warranty in chattel cases.

[31] Goodrich-Lockhart Co. v. Sears, (D. C. Ky. 1919) 270 Fed. 971. But see Goldstein v. Ehrlich, 96 N. J. Eq. 52, 124 Atl. 761 (1924), and Occidental Realty Co. v. Palmer, 117 App. Div. 505, 102 N. Y. S. 648 (1907), aff'd in 192 N. Y. 588, 85 N. E. 1113 (1908), where expenses in examining the title were not allowed. But see also Gerstell v. Shirk, (C. C. A. 7th, 1913) 210 Fed. 223.

[32] Holden v. Efficient Craftsman Corp., 234 N. Y. 437, 138 N. E. 85 (1923); Miswalde-Wilde Co. v. Armory Realty Co., (Wis. 1933) 246 N. W. 305.

[33] Groves v. Stouder, 58 Okla. 744, 161 Pac. 239 (1916); O'Neil v. Bennett, 49 S. D. 524, 207 N. W. 543 (1926).

[34] Davison v. MacDonald, 124 Misc. 726, 209 N. Y. S. 145 (1925); Waukesha Savings Bldg. & Loan Ass'n v. Hamill, 203 Wis. 414, 232 N. W. 877, 234 N. W. 879 (1930); Matthews v. Crowder, 111 Tenn. 737, 69 S. W. 779 (1902).

[35] Villone v. Feinstein, 132 App. Div. 31, 116 N. Y. S. 384 (1909) (vendee's lien granted, but subject to dower of vendor's widow who had not joined in the contract); Harding v. Burke, 205 App. Div. 597, 200 N. Y. S. 144 (1923) (lien impressed against land which was held by a corporation, court looking through corporation and deciding defendant vendor and corporation were the same); Gerstell v. Shirk,

2.

The extension of the vendee's lien to contracts involving chattels is a comparatively modern development. There is excellent authority, although with some conflict, for the use of the vendee's lien in chattel contracts.[36] The Uniform Sales Act, now very widely adopted, expressly recognizes the vendee's lien by analogy to and on the same terms as the vendor's lien.[37] The use of the vendee's lien in chattel cases raises acutely the problem as to methods for its enforcement. In land cases it seems to be universally assumed that enforcement will be by equitable foreclosure and public sale.[38] It seems likewise to be

(C. C. A. 7th, 1913) 210 Fed. 223 (lien impressed on land where rescission granted because vendor could not give good title, there being a possibility that the land would escheat to the state, the court saying the vendor had a right to remove the encumbrance which was an equity which could be subjected to decree and sale.

[36] Truman's Pioneer Stud Farm v. Hansen, 108 Kan. 717, 196 Pac. 1087 (1921); Witte v. Hobolth, 224 Mich. 286, 195 N. W. 82 (1923); Alexander v. Walker, (Tex. Civ. App. 1922) 239 S. W. 309; Pratt v. Weeks, (D. C. S. D. Fla. 1932) 1 Fed. Supp. 953 (lien imposed on pending patent applications); Mycock v. Beatson, 13 Ch. D. 384, 49 L. J. Ch. (N. S.) 127 (1879) (lien on partnership assets). The Kentucky court decreed a vendee's lien on a slave as early as 1808. Scott v. Clarkson, 4 Ky. 277 (1808).

One court refused to recognize such a lien. National Cash Register Co. v. Hude, 119 Miss. 36, 80 So. 378, 7 A. L. R. 990 (1919); and see People's Electric Ry. v. McKeen Motor Car Co., (C. C. A. 8th, 1914) 214 Fed. 73 at 74, where the court said, "Liens may be created by statute or by contract or may arise from usages of trade or commerce. They are rights of property and not mere matters of procedure, and therefore they cannot be created here and there by the courts merely from a sense of justice in particular cases." Doubt has been expressed as to its existence at common law. Grainger Bros. Co. v. G. Amsinck & Co., (C. C. A. 8th, 1926) 15 F. (2d) 329; Levy v. Chonavitz, 163 N. Y. S. 658 (1917). And two cases have restricted the lien to cases where defendant is insolvent. Hackney Mfg. Co. v. Celum, (Tex. Civ. App. 1916) 189 S. W. 988; Apple v. Edwards, 92 Mont. 524, 16 Pac. (2d) 700 (1932).

[37] Sec. 69 (5) provides:

"Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, and subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed on unpaid sales by section 53."

And in Section 53 the seller has

"(a) A lien on the goods or right to retain them for the price while he is in possession of them. . . .

"(c) A right of resale as limited by this act."

[38] Harding v. Burke, 205 App. Div. 597, 200 N. Y. S. 144 (1923); Martin v. Bell-Woods Co., (Tex. Civ. App. 1933) 57 S. W. (2d) 271; Johnson v. Berns, 111 Ore. 165, 209 Pac. 94, 224 Pac. 624, 225 Pac. 727 (1922); Hafner v. Stuart Land Co., 246 Mich. 465, 224 N. W. 630 (1929). In Jett v. Locke, 28 Ky. 591 (1831), the court held that foreclosure and sale should be ordered at the time the lien was decreed, as it should not be permitted to run on indefinitely; but see Jones v. Galbraith,

agreed that the lien does not depend on a retention of possession by the vendee.[39] In a few cases involving chattels the method of equitable foreclosure has been used, apparently without observing any reasons for a different treatment of these two types of property.[40] But it seems clear that a more summary method of enforcement is required in the case of chattels than in transactions involving land, particularly where the subject matter of the contract is perishable. The long delay involved in an equitable foreclosure might in some cases be disastrous. The Uniform Sales Act and a few decisions not based on statute have recognized that the normal remedy for enforcing the vendee's lien on chattels will be resale, as in the case of the vendor's lien.[41] Where courts have not yet permitted resale it seems to be assumed that the lien is at least a possessory lien, authorizing a retention of possession as against the seller until full restitution has been made.[42] One decision has taken the further, and perhaps unnecessary, step of declaring that the vendee's lien on chattels depends on possession, and will be lost if the goods are surrendered to the vendor.[43]

3.

The implications of this new remedy have not yet been fully developed in law actions for the rescission of contracts. It may be anticipated that resort to equity will be unnecessary in jurisdictions which recognize a possessory lien in the vendee, and this will be even more clear if the power of resale is attached. The chief result in law actions will be the recasting of traditional notions as to the necessity of restitution as a condition to recovery at law on a theory of rescission.[44] It has already been held that the effect of the Sales Act is to authorize a

(Tenn. Ch. 1900) 59 S. W. 350, where the court said it was not customary to decree a sale in the same suit in which the lien was declared.

[39] See note 13, supra.

[40] Witte v. Hobolth, 224 Mich. 286, 195 N. W. 82 (1923); Giarranto v. McIlwain, 215 App. Div. 644, 214 N. Y. S. 582 (1926).

[41] Either public sale, Alexander v. Walker, (Tex. Civ. App. 1922) 239 S. W. 309; Giarranto v. McIlwain, 215 App. Div. 644, 214 N. Y. S. 582 (1926), or private sale, Truman's Pioneer Stud Farm v. Hansen, 108 Kan. 717, 196 Pac. 1087 (1921). In Wilson & Co. v. M. Werk Co., 104 Ohio St. 507, 136 N. E. 202, 24 A. L. R. 1438 (1922), it was held the buyer was permitted to sell to himself after soliciting bids, when he paid more than the offer of the highest bidder.

[42] Southern Iron & Equipment Co. v. Bamberg E. & W. Ry., 151 S. C. 506, 149 S. E. 271 (1929); Apple v. Edwards, 92 Mont. 524, 16 Pac. (2d) 700 (1932); Auto Brokerage Co. v. Ullrich, 102 N. J. L. 341, 131 Atl. 901 (1926).

[43] Johnson v. Berns, 111 Ore. 165, 209 Pac. 94, 224 Pac. 624, 225 Pac. 727 (1924).

[44] See 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., secs. 616 ff. (1929).

conditional tender of restitution.[45] This is not in itself startling, since the common law cases had been steadily working toward the idea that a plaintiff should be allowed to retain the consideration received by him as an indemnity in case full restitution could not be secured from the opposite party. To describe the vendee's interest as a lien is merely to attach a label to ideas that were formulated obscurely in the cases.[46] Again, the privilege of retaining the goods as security will help greatly to relieve the purchaser's embarrassment after the opposite party has rejected his tender of restitution, whether the tender be conditional or unconditional in form. The requirement of prompt restitution and the prohibition of any intervening use of the property have been strictly enforced in law actions. Mere delay, especially if coupled with a continued use for the purchaser's benefit, will result in a loss of the privilege of rescission.[47] There was likewise serious doubt whether a resale was not an "affirmance" of the contract inconsistent with an action based on a theory of rescission.[48] The chief indulgence shown to the purchaser was in cases where use or resale was for the purpose of mitigating the vendor's damages or to save him from loss.[49] The modern recognition of a vendee's lien on chattels has not yet enlarged the powers of the rescinding vendee in using the property for his own benefit, and it probably will not have that result.[50] But an express recognition of the vendee's interest in the property received by him from the vendor should very clearly justify his continued retention of possession, and the privilege of resale on the vendor's account should give the vendee a means of promptly resolving his dilemma.

4.

Apart from the greater convenience which it affords to the rescinding vendee through his retention or possible resale of the property received, the vendee's lien has its greatest utility in cases of vendor's

[45] Levy v. Chonavitz, 163 N. Y. S. 658 (1917); Land Finance Co. v. Sherwin Electric Co., 102 Vt. 73, 146 Atl. 72 (1929). If this privilege is to be generally recognized, it will probably be necessary for courts to exercise more freely their ancient power of giving conditional judgments in law actions. See 31 MICH. L. REV. 696 (1932).

[46] Kavanagh v. Omaha Life Ass'n, (C. C. N. D. Ill. 1897) 84 Fed. 293; Keefe v. Jefferson, 151 Minn. 368, 186 N. W. 789 (1922); Sisson, Potter & Co. v. Hill, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206 (1893).

[47] For a collection of cases see 77 A. L. R. 1165 (1932).

[48] Estes v. Kauffman, 44 Pa. Super. 114 (1910); Marquette-Bailey Lbr. Co. v. Gibboney, 87 Pa. Super. 243 (1926); 3 WILLISTON, CONTRACTS, sec. 1530 (1920).

[49] Norman Lumber Co. v. Keystone Mfg. Co., 100 W. Va. 515, 131 S. E. 12 (1925); Barnett v. Perrine, (Tex. Civ. App. 1923) 250 S. W. 1111. See cases collected in 24 A. L. R. 1445 (1923).

[50] Mallow v. Hall, 209 Wis. 426, 245 N. W. 90 (1932).

insolvency. But the courts have not yet faced the questions of policy that are here involved. While it is true that the vendor's insolvency makes damage remedies inadequate for the particular vendee, it is a serious question whether it does not at the same time raise countervailing equities in the vendor's creditors.[51] On a completed rescission the asset received by the rescinding vendee is restored to the general ownership of the vendor and should ordinarily be treated as property belonging to him.[52] If it does not fall back into the general assets and become subject to the claims of the vendor's creditors some substantial reason should be given for this result, since it in effect creates a preference in favor of the vendee. In this situation it is not possible to say that the vendee is retaking "his own" property, with or without the aid of equitable doctrines of tracing, so that the justification given for an important class of equitable preferences is not available here.[53] The assumption of the decisions seems to be that the purchaser has a negative interest in the subject matter of the contract, for the purpose of insuring a safe and complete withdrawal from the transaction. Although his claim is primarily one for money restitution, he is not forced to rely on the general credit of the opposite party.[54] Although there

[51] Most courts have said that a mere prayer for a vendee's lien in the land cases is sufficient to give equity jurisdiction. Leesburg State Bank v. Lyle, 99 Fla. 535, 126 So. 791 (1930); Tudor v. Raudabaugh, (D. C. Mont. 1922) 278 Fed. 254; Ahrens v. Ijams, 156 Md. 1, 142 Atl. 489 (1928). But some have said there must be some other basis for jurisdiction, such as insolvency. Clark v. Badgley, 105 N. J. Eq. 534, 148 Atl. 736 (1929); Richeimer v. Fischbein, 105 N. J. Eq. 627, 149 Atl. 26 (1930). And when the question of the vendor's insolvency has been raised, it has been thought to be an additional reason for the imposition of a lien. Larson v. Metcalf, 201 Iowa 1208, 207 N. W. 382, 45 A. L. R. 344 (1926); Steele v. Citizens' State Bank, 116 Kan. 510, 227 Pac. 352 (1924); Ramirez v. Barton, (Tex. Civ. App. 1897) 41 S. W. 508.

[52] 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., sec. 701 (1929). See also cases where the vendee will be held to have "waived" his right to rescind the contract if he uses the property in such a way that the court feels he is exercising acts inconsistent with the vendor's ownership. McCutchen & Co. v. Kimball, 135 Misc. 299, 238 N. Y. S. 102 (1929); Estes v. Kauffman, 44 Pa. Super. 114 (1910); 77 A. L. R. 1165 (1932).

[53] See 31 MICH. L. REV. 826 (1933) for a criticism of these doctrines. A reaction against free use of tracing presumptions to the injury of other creditors of a fraudulent defendant is shown in such cases as Cunningham v. Brown, 265 U. S. 1, 44 Sup. Ct. 424 (1924); People v. California Safe Deposit & Trust Co., 175 Cal. 756, 167 Pac. 388 (1917).

[54] Thus, in Occidental Realty Co. v. Palmer, 117 App. Div. 505, 102 N. Y. S. 648 (1907), the court pointed out that the remedy at law for damages was not adequate and that the vendee should not be forced to rely on the general credit of the vendor in transactions involving the sale of realty, particularly in a community like New York City. The court said at p. 510,

is much to be said for this position, it is difficult to relate it to anything more than general considerations of fairness. On the other side are very strong considerations of fairness to the general creditors of the vendor, which in special cases, at least, should overcome the claims of the vendee to a preference.[55]

W. I. R.

"It would be unreasonable in most cases to expect to find a seller content to tie up his property by a contract to convey unless he received some payment on account, or other security, to protect him from loss if the purchaser refuses to complete the contract, and yet it would be equally unreasonable to expect a purchaser to be willing to pay part of the consideration upon signing the contract, if he had no better prospect of protection in case of a defective title, or the vendor's default, than an action at law for damages, with no recourse against the land."

Similarly, the necessity for recognizing this negative interest of the vendee is pointed out in those cases which recognize the vendee's lien, though the grantor's lien has been abolished. See note 9, supra. The vendor can protect his interest by reserving a mortgage or other security at the time of the conveyance, even though the implied grantor's lien is not recognized, but the vendee will not ordinarily be in a position to contract for security in the event of his own rescission.

[55] Similar considerations would seem to be involved when the vendee's lien is sought to be used in order to gain priority over other lien claimants. In Tuttle v. Ehrehart, 102 Fla. 1129, 137 So. 245 (1931), the court denied the vendee's lien because the vendee was in default. The court did not discuss the problem from the point of view of the other creditors, but rested its decision squarely on the ground that the lien is not available to a vendee in default. As pointed out in note 16, supra, a lien has been given to a vendee though in default, and the court might well have said that the lien will be denied because it would not be fair to grant it to one who is in default when the result would be to give him priority over other lien claimants.