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VENDOR AND PURCHASER - MORTGAGING OF LAND BY VENDOR - EFFECT ON VENDEE's DUTY TO CONTINUE INSTALLMENT PAYMENTS

VENDOR AND PURCHASER — MORTGAGING OF LAND BY VENDOR — EFFECT ON VENDEE'S DUTY TO CONTINUE INSTALLMENT PAYMENTS — Plaintiffs agreed in writing to purchase a tract of land from the defendant, the purchase price to be paid in stated installments or in full at any time at the option of the plaintiffs. Two days after the formation of the contract the defendant mortgaged the land, and about eight months later placed a second mortgage on it. Plaintiffs denied having any knowledge of the mortgages until attempts were made to foreclose them. Previous to this, however, they had defaulted in their payments. In an action in general assumpsit to recover the amount of the installments paid it was *held* on appeal that the plaintiffs might recover that amount less an allowance for their occupation of the land. *Huff v. Knight*, (R. I. 1934) 173 Atl. 121.

There is substantial authority in accord with the statement in the principal case that in the absence of an express stipulation in a contract for the sale of land there is an implied covenant on the part of vendor to convey a good title free from encumbrances.[1] The vendor's inability to convey such a title on the date set for performance or within a reasonable time thereafter gives the vendee the privilege to rescind the contract and to recover the purchase money paid.[2] On the question of when, if at all, the vendee may rescind because of the vendor's defective title at other times, the courts are in conflict. If the vendee knows of the defect at the time of the formation of the contract or before making payments under the contract, probably all courts would say that by going ahead and making payments he waives any objection to that defect.[3] Where the vendor disposes of or encumbers the land after the contract of sale has been made, some courts treat the lack of good title as justifying rescission as a matter of course.[4] Other courts, going to the other extreme, hold that the vendee may not rescind on the theory that there can be no breach of contract until the time set for conveyance, since no conveyance is due until that time.[5] Both of these positions have been criticized on the ground that the problem is one of rescission for prospective failure of consideration and that the result should be made to depend upon the probability and degree of that prospective failure.[6] Some courts have refused rescission where it appeared that the vendor had an interest in the land so that

[1] 2 BLACK, RESCISSION AND CANCELLATION, 2d ed., sec. 427 (1929); Espalla v. Lyon Co., 226 Ala. 235, 146 So. 398 (1933); Grant v. Pizzano, 264 Mass. 475, 163 N. E. 162 (1928).

[2] 2 BLACK, RESCISSION AND CANCELLATION, 2d ed., secs. 427 and 432 (1929); Heaton v. Nelson, 69 Colo. 320, 194 Pac. 614 (1921); Bishoff v. Myers, 101 Okla. 36, 223 Pac. 165 (1924).

[3] 2 WILLISTON, CONTRACTS, sec. 878 (1931); Hufstutler v. Grayburg Oil Co., (Tex. Comm. of App. 1932) 48 S. W. (2d) 591, approved 11 TEX. L. REV. 237 (1933).

[4] Stavnezer v. Cooley, 115 Conn. 452, 161 Atl. 863 (1932); Ft. Payne Coal & Iron Co. v. Webster, 163 Mass. 134, 39 N. E. 786 (1895), cited in the principal case.

[5] Luette v. Bank of Italy Nat. Trust and Savings Ass'n, (C. C. A. 9th, 1930) 42 F. (2d) 9, 9 TEX. L. REV. 301 (1931); Wilson v. Corcoran, 73 Mont. 529, 237 Pac. 521 (1925), criticized 39 HARV. L. REV. 134 (1925).

[6] 2 WILLISTON, CONTRACTS, sec. 879 (1931); 31 MICH. L. REV. 1002 (1933).

he could acquire title or clear encumbrances without the consent of third parties,[7] or where good title could be secured by the application of the purchase money.[8] A choice between the legal rules and fact considerations stated above will, in the ordinary case, determine whether the vendee will be allowed to recover the purchase money paid, unless the jurisdiction is one of the few that allow a vendee who is first in substantial default to recover.[9] In the instant case the court took the view that because of the acceleration clause in the contract the defendant's failure to keep the land free from encumbrances placed him first in default and entitled the plaintiffs to recover. But the plaintiffs' ignorance of this default makes the situation essentially different from that in the ordinary case where the vendee refuses to continue payments because of the vendor's defective title; it is rather the case of two contracting parties defaulting independently of each other.[10] It is submitted that on the anomalous set of facts presented the decision should not have been placed upon the application in retrospect of the formulæ in the ordinary case but rather upon the relative equitable strength of the parties. This approach would seem to bring the same result as the court reached. Although the court denied the existence of fraud,[11] the defendant's mortgaging the land indicates bad faith and was at least a conscious aggravation of the risk of the transaction which the purchaser had undertaken. On the other hand, it is impossible to ignore the fact that the plaintiffs' failure to meet the installments was not justified subjectively by anything the defendant had done, although it appeared objectively to be related to defendant's failure to clear off the mortgage. Under such circumstances a restoration of the parties to the *status quo* seems the best available remedy.

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[7] 2 BLACK, RESCISSION AND CANCELLATION, sec. 432 (1929); Galvin v. Collins, 128 Mass. 525 (1880); Adadow v. Perry, 225 Mich. 286, 196 N. W. 190 (1923).

[8] Guild v. Atchison, etc. R. R., 57 Kan. 70, 45 Pac. 82, 57 Am. St. Rep. 312, 33 L. R. A. 77 (1896); Normandy Beach Properties Corp. v. Adams, 107 Fla. 583, 145 So. 870 (1933).

[9] Dooley v. Stillson, 46 R. I. 332, 128 Atl. 217 (1925); Corbin, "The Right of a Defaulting Vendee to the Restitution of Instalments Paid," 40 YALE L. J. 1013 (1931).

[10] Chandler v. Wilder, 215 Ala. 209, 110 So. 306 (1926), criticized 36 YALE L. J. 580 (1927); Dent v. Johnson, 111 Neb. 162, 195 N. W. 938 (1923). *Cf.* 2 WILLISTON, CONTRACTS, sec. 882 (1931).

[11] Donald v. Reynolds, (Ala. 1934), 154 So. 530.