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Equity - Contracts for the Sale of Land - Vendee's Lien

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ering an agreement in addition thereto, nor embodying a new obligation or contract to do something in relation to the thing delivered. *Wigmore on Evid.*, 2d Ed., § 2432; *Greenleaf on Evid.*, 16th Ed., p. 435; *Seeger* v. *Manitowoc Steam Roller Works*, supra. In the principal case much reliance is placed on the rule that, to hold an instrument in the form of a receipt to be contractual in nature, it must be shown that it was drawn with such care and precision that by its terms it represents an agreement between the parties and defines their contractual relations with reference thereto. In view of this rule, the instrument was considered so informal, incomplete, and lacking in language expressing or attempting to express any contract, promise, or agreement, that it could only be a receipt, not a contract; and parol evidence to vary or contradict it admissible.

CARL HOFMEISTER.

EQUITY—CONTRACTS FOR THE SALE OF LAND—VENDEE'S LIEN.—An action was brought by the plaintiff vendee under two contracts for the sale of land to recover damages against the defendant vendor for the breaches of the contracts, and to have said damages declared a lien on the lands. In the original opinion, 243 N.W. 492 (1932), it was held that the damages found by the trial court, together with interest thereon and costs, should be a lien on the lands described in the land contracts. These damages amounted to some $65,000; the plaintiff had paid only $6,885 on the contracts. Motion for rehearing granted. *Held*, former opinion modified. The vendee's lien is limited to the amount paid on the contracts, and does not cover loss of probable profits. The court, however, allowed the plaintiff to elect whether to take judgment for damages without lien or waive every other right and have a lien for the recovery of the payments made. *Miswald-Wilde Co.* v. *Armory Realty Co.* (Wis. 1933) 246 N.W. 305.

The vendee's lien before conveyance under a contract for the sale of land has been held to be the exact counterpart of the vendor's lien after conveyance, or more correctly, the grantor's lien. 3 Pomeroy's Equity Jurisprudence, 3d Ed., p. 2536, § 1263; *Wickman* v. *Robinson*, 14 Wis. 535 (1861); *Flickinger* v. *Glass*, 222 N.Y. 404, 118 N.E. 792 (1918). The grantor's lien is given to secure the payments due him on the purchase price, *De Forest* v. *Holum*, 38 Wis. 516 (1875); *Willard* v. *Reas*, 26 Wis. 540 (1870), and does not extend to damages for breach of contract. 3 Pomeroy's Equity Jurisprudence, 3d Ed., p. 2508, § 1251; *Wright* v. *Buchanan*, 287 Ill. 468, 123 N.E. 53 (1919). Likewise, the vendee's lien before conveyance embraces only payments made to the vendor under the contract, and does not extend to damages for breach of contract, including lost profits. *Holden* v. *Efficient Craftsman Corp.*, 234 N.Y. 437, 138 N.E. 85 (1923); *Elterman* v. *Hyman*, 192 N.Y. 113, 84 N.E. 937 (1908). The vendee's lien has been based upon several different grounds. It has been held that, as the vendee makes payments under the contract, he becomes pro tanto the equitable owner of the land, and the vendor holds so much of the land as trustee for the vendee. From this trust springs the vendee's lien. *Rose* v. *Watson*, 10 H.L. Cas. 672 (1864); *Elterman* v. *Hyman*, 192 N.Y. 113, 84 N.E. 937 (1908). In view of the doctrine of equitable conversion, whereby the vendee becomes equitable owner at the execution of the contract, the reasoning used in these cases seems superfluous. Other courts have held that the basis of the lien is the doctrine of equitable conversion. 3 Pomeroy's Equity Jurisprudence, 3d Ed., p. 2536, §§ 1263, 1261. The lien under these two doctrines depends upon the contract. However, many courts have disregarded these theories, basing the lien

on a quasi contractual right, independent of contract. Upon breach of the contract by the vendor, the vendee is entitled to rescind the contract; and upon his election, a lien arises to secure his quasi contractual right to recover the payments made. *Wickman* v. *Robinson,* supra; *Taft* v. *Kessel,* 16 Wis. 291 (1862); *Richer* v. *Carlson,* 136 Wis. 353, 117 N.W. 815 (1908) and *Durkin v. Machesky,* 177 Wis. 595, 188 N.W. 77 (1922), where lien was given vendee, although the contract was void; 8 Col. Law Rev. 571 (1908); 29 Mich. Law Rev. 1103 (1931). Under the principal case this seems to be the controlling theory in Wisconsin. The case of *McLennan* v. *Church,* 163 Wis. 411, 158 N.W. 73 (1916), where the vendee, suing for specific performance, was granted a lien on the land for payments made and for damages, is expressly modified. The lien at most extends only to payments made, with interest and the value of the improvements made on the land, *Schneider* v. *Reed,* 123 Wis. 488, 101 N.W. 682 (1904); and it can only be enforced if the vendee waives all his other rights, i. e., to sue for specific performance or breach of contract, and sues only to recover the purchase money paid, in effect rescinding the contract. This is not the rule in New York, where enforcement of the contract gives rise to the lien which is lost by a suit for rescission. *Davis* v. *Rosenweig Realty Operating Co.,* 192 N.Y. 128, 84 N.E. 943 (1908); *Flickinger* v. *Glass,* supra; *Kaston* v. *Zimmerman,* 183 N.Y.S. 615 (1920); *Dioen* v. *Ashbaugh,* 200 N.Y.S. 634 (1923). The New York courts seem to have confused the real question in the cases; the theory of the Wisconsin court is more easily understood, since it embraces no legal fiction; gives greater effect to the intention of the parties, and is grounded in its entirety on principles of natural justice.

RICHARD F. MOONEY.

EVIDENCE—TRANSACTION WITH DECEASED—INTEREST IN THE EVENT—In order to pay the balance due on some lots owned by husband and wife, the husband executed a note payable to the deceased. The money to pay the note was given to the wife by the husband, since she was accustomed to handle all financial affairs; but the deceased looked to the husband for payment, saying at the time the note was executed that the signature of the husband alone was sufficient. Upon action for the debt being brought by the administratrix of deceased's estate, the wife sought to testify as to payment of the debt. *Held,* the wife was competent to testify as to payment of the debt. *Laka* v. *Krystek,* 261 N.Y. 126, 184 N.E. 732 (1933).

Section 347 of the New York Civil Practice Act and sec. 325.16, Wisconsin Stats., provide, in substance, that upon the trial of an action, a person interested in the event shall not be examined as a witness in his own behalf against the administrator of a deceased person. It would be difficult to determine, however, whether the instant case would have been decided in the same way had it arisen in Wisconsin. An employer has been allowed to testify, in an action by a deceased's administrator against his employee, that payment of the claim sued upon was made to him, and he in turn applied the amount of the claim upon a contractual obligation due him from the deceased. *Laack* v. *Runge,* 104 Wis. 59, 80 N.W. 61 (1899). An agent has been allowed to testify although his principal was a party to the action. *Hanf* v. *Northwestern Masonic Aid Association,* 76 Wis. 450, 45 N.W. 315 (1890). Mere relationship has been held to affect only the credibility of the witness and not to render him incompetent. *Curtis* v. *Hoxie,* 88 Wis. 41, 59 N.W. 581 (1894). Parents have been competent