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Notes

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NOTES

MORTGAGES—PRIORITIES—PURCHASER IN POSSESSION UNDER LAND CONTRACT AND SUBSEQUENT MORTGAGEE.—In *Franklin Finance Co. v. Bowden et al.*[1] the defendant Charles purchased lot 8832 from the defendant Bowden on a land contract, title to be retained by the vendor until all of the purchase money was paid; further provisions were that if any default be made in payment of interest, principal, etc., all prior payments to be forfeited. Charles paid $200 down and continued his payments without breach. Defendant Bowden thereafter executed a mortgage on lots 8832, 9098, 9124, and 9129 to the plaintiff. Defendant Bowden having defaulted in payment of his mortgage plaintiff, the Franklin Finance Company, seeks to foreclose and marshal liens, praying that its lien be declared prior to that of the defendant Charles. Defendant Charles had paid $875.39 on the lot 8832 which he bought under the land contract. Part of the payments made by defendant Charles have been made to the Franklin Finance Company. Defendant Charles also was in possession of the lot before the mortgage was executed to plaintiff. Nothing is said in the facts of the case whether or not the land contract by which defendant Charles was buying the land was recorded. Plaintiff, however, had *constructive notice* of some outstanding lien upon the lot in question from the fact that defendant Charles was in *possession* of said lot. The construction placed by the courts upon the recording acts has been in effect to make the record of an instrument in accordance with the acts equivalent to notice, to every subsequent purchaser, of the existence and contents of the instrument, irrespective of whether he actually examines the records so as to obtain

1 172 N. E. 698 (1930).

such information; the recording acts being thus in effect made to involve an application and extension of the pre-existing doctrine that a purchaser with notice of a prior right takes subject to such right.[2]

According to some earlier decisions the record of an equitable title was not regarded as sufficient to affect a subsequent purchaser with notice thereof.[3] The rule is now generally settled otherwise, sometimes by express statutory provisions, and consequently a purchaser of a title, legal or otherwise, takes subject to an instrument, creating or transferring an equity which has been recorded.[4] Under the New York type of recording statute one does not seem to be entitled to record a mere equitable mortgage.[5] However, under the more liberal type of statute, such as the Virginia type, the recording of all transactions affecting land are allowed to be recorded.[6]

Defendant Charles was certainly entitled to have his land contract recorded under the Ohio Statute, which provides that "All other deeds and instruments of writing for the conveyance or incumbrances of lands, tenements or hereditaments, executed agreeable to the provisions of this chapter, shall be so recorded in the office of the recorder of the county in which the premises are situated, and until so recorded or filed for record, they shall be deemed fraudulent so far as relates to a subsequent *bona fide* purchaser, having at the time of the purchase no knowledge of the existence of such former deeds or instrument." [7]

Plaintiff also had constructive notice from the fact that defendant Charles was in possession of the land at the time the mortgage was given to the plaintiff. An intending purchaser of land is, as a general rule, by the fact that the land is in possession of a person other than he who is undertaking to sell it, charged with notice of the rights of such person, to the extent that he could by reasonable inquiry, have ascertained the nature of such rights.[8]

Here if the plaintiff had made reasonable efforts to ascertain whether any besides the vendor or mortgagor was in possession would certainly have found beyond doubt that defendant Charles was in possession and then by following up such reasonable inquiry could have discovered from defendant Charles himself the true nature of Charles' rights. Hence, plaintiff had constructive notice of the rights of Charles. A purchaser who has not paid the consideration before receiving either

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[2] 2 POMERORY, EQUITY JURISPRUDENCE (4th ed.) § 649.

[3] 2 TIFFANY, REAL PROPERTY § 476.

[4] Edwards v. McKernan, 55 Mich. 520 (1885); Fish v. Benson, 71 Cal. 428, 12 Pac. 454 (1886).

[5] See Rochester Distilling Co. v. Rasey, 37 N. E. 632 (N. Y. 1894).

[6] See First National Bank of Alexandria v. Turnbull & Co., 32 Grat. 695 (Va. 1880).

[7] 2 PAGE'S ANN. OHIO GEN. CODE § 8543.

[8] Kirby v. Tallmadge, 160 U. S. 379 (1896); Truesdale v. Ford, 37 Ill. 210 (1860); Rorer Iron Co. v. Trout, 83 Va. 379 (1887).

actual or constructive notice of the earlier conveyance or incumbrance cannot claim priority thereto, even though he has received a transfer of the legal title thereto.[9]

Under the Ohio Statute the only question in so far as the question of priority is concerned, is whether plaintiff was a *bona fide* purchaser. Presumably the statute refers to a purchaser who gives value and plaintiff, who is a mortgagee, has given value. Also to be a *bona fide* purchaser, the plaintiff would have to take without actual or constructive notice of the rights of the defendant Charles. In the instant case defendant was in possession and possession is constructive notice in equity to the plaintiff. Therefore defendant's claim under his land contract is prior to that of plaintiff under the mortgage. If defendant's claim is prior why should he be demoted to plaintiff's claim after he has notice of it? The court says: "We believe the authorities are that his lien, (Charles') would continue to the date of his knowledge of this mortgage." But it goes on to say: "The plaintiff, the Franklin Finance Company, and defendant Bowden, having knowledge of these subsequent payments, and acquiescing, consenting to them and accepting and being parties thereto, are bound by these subsequent payments after the notice to Charles of the mortgage in question."

If defendant's claim is prior, why would acceptance of payments by plaintiff, made by defendant Charles, be the ground for holding plaintiff prior in point of time? Does not this assume that plaintiff had priority over the defendant, which clearly is not true? The purchaser of land by an executory contract, where the contract fails by reason of the vendor's default and without any fault of the purchaser is entitled to a lien upon the land for the repayment of what he has paid under the contract. The purchaser's lien is an invention or creation of equity, except where allowed by statute.[10] It is a right correlative to that of the vendor without payment.[11]

In the present case there was no failure of the contract on the part of the vendor, neither was there a default on the part of the purchaser. The latter's remedy would seem to be specific performance.[12] His title, upon completion of his contract, would date back to the original purchase and he would have priority over intermediate conflicting rights.

The land contract, which is in general use in the locality where this case arose, provides substantially that if any default is made by the party of the second part, whether of the payments, or *any part thereof*, or performance of the covenants, the contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made on the contract and

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9 2 POMERORY, *op. cit. supra* note 2 §§ 691, 750; Brown v. Welsh, 18 Ill. 343 (1857); Blanchard v. Tyler, 12 Mich. 339 (1869).

10 VENDOR AND PURCHASER, 39 Cyc. p. 2033.

11 VENDOR AND PURCHASER, *supra* note 10, at p. 2034.

12 Gartrell v. Stafford, 12 Neb. 545 (1882); Kitchen v. Herring, 42 N. C. 191 (1851); Crosbie v. Toofe, 1 M. & K. 431 (1833).

such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages and shall have the right to re-enter and take possession of the premises aforesaid without legal process or any notice to said second party. The unfairness and lack of equity of this contract is evident. Let us suppose the vendee is purchasing land under this sort of contract. The purchase price is $10,000 and so far the vendee has not defaulted but on the contrary has performed all the covenants, and has paid the amount of $9,500. However, due to circumstances, he is unable to complete the balance of the payments amounting to $500. According to the contract in use in this locality in Ohio the vendor at his option could declare all payments so made forfeited and enter upon the land and retake possession. Is this equitable? Clearly not. Upon this question the Ohio Court says: "Upon the issue made by Bowden that he has a right to forfeit Charles' contract, we believe that it is only necessary to refer to the well-established rule that a court of equity will not decree a forfeiture where it would be inequitable to do so, or where the vendee has made a substantial compliance with his contract. A court of equity will even go so far as to relieve against a forfeiture where it would be inequitable to enforce it."

Could the proposition be sustained upon the principle of liquidated damages? Where a vendee fails to perform a contract to purchase real estate the law is as follows: ". . . unreasonableness of the provision may cause it to be regarded as a provision for a penalty."[13] Courts have refused to regard deposits or part payments as liquidated damages, and the party making them has been allowed to recover it back and have it applied as originally intended, although he has made a default in the contract, or in compliance with some of its terms.[14] This seems to be the law in Ohio. Then would the sum in question in this case be considered liquidated damages under this rule? Clearly not.

E. L. Hessmer.

PAROL AGREEMENT WITH PARENTS OF INFANT TO LEAVE REAL ESTATE TO SUCH INFANT FOR LIVING WITH PROMISORS, THOUGH VOID UNDER THE STATUTE OF FRAUDS, IS ENFORCIBLE IN EQUITY, WHEN PERFORMED BY THE INFANT.—The law is well settled that a gift of real estate by parol, followed by possession of the property thereunder and the making of valuable improvements thereon, is valid, when made by adults, but where the promisee is an infant, a different situation is presented. A leading case is that of *Kofka v. Rosicky*,[1] decided in 1894, and ever since followed by the Nebraska court. The facts are well stated in the 4th section of the syllabi as follows: "A girl about seventeen months old was given by her parents to her uncle and aunt under an

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[13] DAMAGES, 71 C. J. § 254.
[14] DAMAGES, *supra* note 13 § 242.
[1] 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685 (1894).