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Vendor and Purchaser--Rescission of Contract--Tender of Possession

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terest of value which was severed from the surplus and assets of the corporation and was, in effect, a property dividend.¹⁸

—WILLIAM H. WALDRON, JR.

VENDOR AND PURCHASER — RESCISSION OF CONTRACT — TENDER OF POSSESSION. — A contract for the sale of land provided that conveyance be made after payment of a specified part of the price. Time was stipulated to be of the essence. Defendant defaulted, plaintiffs rescinded the contract and sought recovery of the purchase money. No tender of possession was made but at the trial plaintiffs stated they were making arrangements to move. The lower court rendered judgment for the plaintiffs, which was reversed on the ground that restoration or an offer to restore possession was a condition precedent to an action for the purchase money. *Bey v. Kanawha Savings & Loan Ass'n*.¹

The instant case involved a rather uncommon application of a principle established by a long line of decisions, both in England² and America,³ with respect to restoring the *status quo* where there has been a rescission of a contract to convey land. The comparatively few decisions in point are in accord.⁴

It has been held in at least one jurisdiction that failure to tender reconveyance before commencing suit would not be ground

¹⁸ See *Metcalf's Estate v. Commissioner*, *supra* n. 11, in which rights to subscribe to stock in another corporation had been sold, the court termed such rights "dividend". The court in the present case attempts to distinguish that case on the ground that no assets of the parent company in the instant case were transferred to the new corporation. This distinction is more apparent than real since the parent corporation bought the stock with its surplus out of which dividends are presumably declared, and assets were transferred. See n. 16, *supra*.

¹ 174 S. E. 796 (1934).

² *Hunt v. Silk*, 5 East 449, 102 Eng. Reprint 1142 (1804). Contract for the lease of land in which plaintiff refused recovery because of technical defect in holding of premises two days over a ten day period, Lord Ellenborough says: "Now where a contract is to be rescinded at all, it must be rescinded in toto and the parties put in statu quo."

³ MAUPIN ON MARKETABLE TITLE TO REAL ESTATE (3d ed. 1921) § 256.

⁴ Cases dealing with breach of contract by defendant thus giving plaintiff right to rescind, yet recovery refused at law because of plaintiff's failure to re-deliver possession are: *Weech v. Read*, 208 Iowa 1083, 226 N. W. 768 (1929); *Hayt v. Bentel*, 164 Cal. 680, 126 Pac. 370 (1913); *Beekhuis v. Palen*, 76 Cal. App. 680, 245 Pac. 795 (1926); *Martin v. Chambers*, 84 Ill. 579 (1877); *Gwynne v. Ramsey*, 92 Ind. 414 (1883); *Mellenthin v. Donovan*, 168 Minn. 216, 209 N. W. 623 (1926); *Hurst v. Means*, 2 Swan (Tenn.) 594 (1853); *Phelps v. Mineral Springs Heights Co.*, 123 Wis. 253, 101 N. W. 364 (1904).

for a reversal of judgment for the plaintiff.⁵ That, of course, is a stronger case than one involving simply a transfer of possession. It would work no great hardship so to relax the rule that tender might be made during trial, — such a tender has been deemed sufficient in equity.⁶

A court of equity will also allow a purchaser of land, although not in possession, a lien for money paid which can be foreclosed on default of the vendor.⁷ The courts of common law will not, of course, recognize an equitable lien.⁸ In an action at law, although the purchaser has possession, he must restore or tender such possession to the defaulting vendor, placing him completely in *statu quo*, while the purchaser, if fortunate enough to gain judgment, must take his risk with a general lien. Thus, it may be readily seen that the legal remedy is not entirely satisfactory.

In the principal case, however, if the judgment of the lower court had been affirmed and the plaintiffs had remained in possession, defendant's only remedy would have been to resort to another action of either unlawful entry and detainer⁹ or ejectment.¹⁰ The case serves to illustrate that an oversight as to a more or less formal matter may defeat the plaintiff though his cause of action is good on merits.

—HOUSTON A. SMITH.

⁵ In an action at law to recover money paid under the contract, the court says: "It is also urged that plaintiff should have tendered a reconveyance before commencing suit. It must be admitted that he should have done so, but his failure in this respect does not entitle defendant to a reversal of the judgment." (Tender was made by plaintiff, during trial, of a quitclaim deed.) *Sutton v. Meyering Land Co.*, 248 Mich. 601, 227 N. W. 783 (1929), citing *Peters v. Fagan*, 244 Mich. 46, 221 N. W. 274 (1928).

⁶ The tendency in courts of equity seems to be to allow the purchaser to make tender of possession in his complaint, or sometimes even after suit has been commenced. *Lightner v. Karantz*, 258 Mich. 74, 241 N. W. 841 (1932); *Navilio v. Sica*, 113 N. J. Eq. 340, 166 Atl. 719, 171 Atl. 796 (1933); *Plotkin v. Galowitz*, 109 N. J. Eq. 304, 157 Atl. 153 (1931); *Jacoby v. Duncan*, 247 N. Y. S. 318, 138 Misc. 177 (1931); *Saunders v. Erickson*, 45 S. D. 500, 189 N. W. 116 (1922); *Empey v. Northwestern & Pac. Hyp.*, 129 Wash. 392, 225 Pac. 226 (1924). *Contra*: *Masters v. Van Wart*, 125 Me. 402, 134 Atl. 539 (1926); *Youngman v. Smadbeck*, 117 N. Y. S. 1030, 64 Misc. 60 (1909); *Sheehan v. McKinstry*, 105 Ore. 473, 210 Pac. 167 (1922).

⁷ *Everett v. Mansfield*, 148 Fed. 374 (C. C. A. 1st, 1906); *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937 (1908); *Bryan v. Lofftus*, 1 Rob. 12 (Va. 1842). See Note (1926) 45 A. L. R. 352.

⁸ *Lonzello v. D'Amato*, 107 N. J. L. 422, 154 Atl. 336 (1930); *Elterman v. Hyman*, *supra* n. 7.

⁹ W. VA. REV. CODE (1931) c. 55, art. 3, § 1.

¹⁰ W. VA. REV. CODE (1931) c. 55, art. 4, § 1.