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Foreclosing a Mechanic's Lien on an Equitable Interest

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RECENT DECISIONS

Foreclosing a Mechanic's Lien on an Equitable Interest—Defendants, vendor and purchaser, entered into a land contract for the purchase of a farm for the sum of $11,750. The down payment was $500. Purchaser hired the plaintiff contractor to improve the house, the value of which services amounted to $4,539.61. Purchaser paid $2,000 of this debt after which plaintiff filed claim for a mechanic's lien. Shortly thereafter, purchaser and vendor agreed to rescind the land contract and agreed that purchaser would forfeit the $500 down payment and the $2,000 paid to plaintiff for improvements. Plaintiff sued to foreclose his mechanic's lien against both defendants demanding a sale of the property and a judgment for any deficiency against the purchaser. *Held:* that intervening incumbrances on the purchaser's equity, attaching while the purchaser still held the equity, cannot be cut off by a voluntary rescission between vendor and purchaser, but that where an equitable title and a legal title reach the same person after some other interest has attached itself to the equitable estate, a merger is not presumed. *Else v. Cannon et al., 62 N.W. 2d 3 (Wis. 1953).*

This holding is in harmony with the uniform current of decisions that, while rescission generally will produce the same effect as if no contract had ever existed, rescission can be achieved only in equity, and intervening rights will not be prejudiced by such decree.[1] The doctrine of merger is, like rescission, a matter for equity. Insofar as equity has refused to recognize or give effect to the parties' attempted nullification of the purchaser's equity, no merger is possible since the interests of the vendor and purchaser are still separate.[2]

The Wisconsin court in the instant case states further that "the plaintiff (mechanic's lienor) may have a sale in his foreclosure action but that only the equity which the purchaser had at the time of the surrender may be sold." The case was remanded for "further proceedings in accordance with this opinion." This is perhaps the most interesting problem raised and is, of course, strictly practical. Precisely what "further proceedings" are indicated?

Assuming the lands to be worth the contract price and to have been increased in value to the extent of the subsequent improvement bill, the lands were worth $16,109.61. The purchaser had paid or become responsible for payment of $4859.61, *i.e.* the down payment plus the amount of the improvement bill, or approximately 1/3 of the total value

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[1] Milwaukee Loan and Finance Co. v. Grundt, 207 Wis. 506, 242 N.W. 131 (1932); Carisch v. Lund, 195 Wis. 488, 218 N.W. 826 (1928); Scheuer v. Chloupek, 130 Wis. 72, 109 N.W. 1035 (1906); Scott v. Webster, 44 Wis. 185 (1878).

[2] Delap v. Parcell, 230 Wis. 152, 283 N.W. 305 (1939); Bahrs v. Kattke, 192 Wis. 642, 212 N.W. 292 (1927); Morgan v. Hammett, 34 Wis. 512 (1874).

of the land. The decision suggests a lien-foreclosure sale of the purchaser's equity; yet, in practical terms, this equity amounts on its face to no more than a right to redeem from the purchaser's default and, upon payment of the balance of the purchase price, to buy the lands and receive a deed.

The plaintiff contractor's remedy, therefore, is to procure a foreclosure-sale bid of up to $2359.61 (amount of contractor's lien) for such equity. A successful bidder at that price would be in a position to purchase the whole premises upon payment of the balance of $11,250.00 due the vendor, so that on the initial assumption as to value, he could buy a property worth $16,109.61 for $2,500.00 under that price.

The apparent "hitch" lies in two facts: (1) from the contractor's attempt to obtain right to foreclose on the whole property, it is apparent that the value of the premises on the market is, in fact, considerably less than the theoretical $16,109.61 figure and (2) a purchaser on foreclosure of the contractor's lien would be hard-put to insure himself of any enforceable right to buy the lands. The interest offered for sale is barely marketable.

It is suggested, however, that the decision taken in connection with *Oconto Co. v. Bacon*[3] necessarily presupposes that the vendor under these circumstances is prohibited from avoiding the land contract by unilateral action (*e.g.* strict foreclosure) before the intervening interests have had a fair opportunity to be asserted; and that if the contractor and his successors in interest are diligent in prosecuting and protecting their interests, the redemptive right can expire only after the contractor and his successors in interest have defaulted.

After the decision in the principal case, in just what position does the contractor find himself?[4] On remand, the contractor may ask the trial court to order the sheriff to expose for sale and sell to the highest bidder the purchaser's equity in the lands to satisfy the contractor's claim. If the original vendor buys the purchaser's equity (which is not likely), the merger for which the contractor argued will, at last, have occurred.

If the contractor or a third party buys, the court will enforce his right to buy the vendor's title upon tender of the balance of the purchase price plus the vendor's damages for the delay, provided tender is made within a reasonable space of time (customary redemptive period allowed is from 30 to 90 days, depending upon the size of the equity.)

[3] 181 Wis. 538, 195 N.W. 412 (1923), where the court held that when a vendor under a land contract elects an equitable remedy against a defaulting purchaser, equity will intervene on the part of the purchaser or a person who can show equitable defenses upon which to base this relief.

[4] WIS. STATS. (1951), ch. 289, *see* §289.09 through §289.15; WIS. STATS. (1951), ch. 278.

Of course, if the contractor buys, there is no necessity of his putting up cash (except sheriff's costs and fees), for he simply bids in his lien. However, unless he is willing to tender to the vendor the balance of the contract price himself, he must find someone willing to pay that balance due on the lands, or he has a rather hollow legal victory.

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Indemnity—The Right of the United States Government to Recover Indemnity From Its Negligent Employee*—In an action against the United States for injuries arising when plaintiff's automobile collided with a government vehicle, the United States District Court for the Southern District of California, Central Division, gave judgment against the United States and in favor of the plaintiff, but gave judgment over in favor of the United States against the driver of the government vehicle, who had been impleaded as a party defendant. On appeal by the employee to the court of appeals, *Held:* That after suffering judgment against it under the Federal Tort Claims Act,[1] the government could not recover, by way of indemnity, the amount of such judgment from its employee, who was guilty of the negligence which caused the injuries. *Gilman v. United States, 206 F. 2nd 846* (9th Cir. 1953).

Thus the United States as an employer was not allowed to recoup its losses from its negligent employee for damages caused while acting within the scope of his employment. This holding is in direct conflict with the universally accepted common law doctrine[2] which was ably summarized by an early Wisconsin decision:

> "As between the master and a stranger, the servant represents the master, and the master is responsible; but as between the master and the servant who has committed the wrong or violated his duty no less to the master than to the stranger, no such rule prevails. A servant is directly liable to his master for any damage occasioned by his negligence or misconduct, whether such damage be direct to the property of the master, or arise from compensation which the master has been obliged to make to third persons for injuries sustained by them."[3]

Were the United States Government not the employer seeking recoupment, even the majority justices in the *Gilman* case would con-

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* The principal case was affirmed in United States v. Gilman, 74 S.Ct. 695 (May 17, 1954).

[1] 28 U.S.C.A. §1346 (b) (1948).

[2] For a discussion of the common law see especially: PROSSER, TORTS at 1114 (1941); RESTATEMENT, AGENCY §401 comment c (1933); MECHEM, AGENCY §532 (4th ed. 1952); Note, 110 A.L.R. 831 (1937).

[3] Zulkee v. Wing, 20 Wis. 408, 91 Am. Dec. 425 (1866).