

## Amendment of the Civil Practice Act Relating to the Awarding of a Vendee's Lien Upon His Rescission of the Contract

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## CURRENT LEGISLATION

AMENDMENT OF THE CIVIL PRACTICE ACT RELATING TO THE AWARDING OF A VENDEE'S LIEN UPON HIS RESCISSION OF THE CONTRACT.—A vendee of land, having made a down payment on the purchase price and thereafter discovering that the contract had been induced by fraud or by a material mistake of fact, was unable to rescind the contract in equity, if he wished to be awarded a lien in the land as a security for the repayment of the advancements made.<sup>1</sup> If, however, he had rescinded by self-help and then sued at law for money had and received, he would in equity have been entitled to a lien.<sup>2</sup> Such was the state of the law in New York before March 10, 1947; for on that day Section 112-h<sup>3</sup> of the Civil Practice Act became effective, and New York joined the ranks of those jurisdictions which granted a vendee's lien whenever the vendee petitions for one irrespective of the remedy requested by him.<sup>4</sup>

In arriving at this singular conclusion, the Court of Appeals took a narrow view not only of the remedy of rescission but also of the vendee's lien. Rescission has as its primary purpose the relieving of the defrauded or mistaken party of an onerous burden which he would not have assumed if the facts had been as they finally appeared to be.<sup>5</sup> This result is reached by returning the parties as far as possible to the *status quo ante*, and in doing so acting as if the contract had never been entered into.<sup>6</sup> The law on the other hand, not to be outstripped by equity, reached the same result by permit-

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<sup>1</sup> Flickenger v. Glass, 222 N. Y. 404, 118 N. E. 792 (1918); Davis v. Rosenzweig Realty Co., 192 N. Y. 128, 84 N. E. 943 (1908).

<sup>2</sup> Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937 (1908); Garrett v. Cohen, 63 Misc. 450, 117 N. Y. Supp. 129 (Sup. Ct. 1909).

<sup>3</sup> N. Y. CIV. PRAC. ACT § 112-h. Vendee's lien not to depend upon form of action. When relief is sought in an action or proceeding or by way of defense or counterclaim, by a vendee under an agreement for the sale or exchange of real property, because of the failure, invalidity, disaffirmance or rescission of such agreement, a vendee's lien upon the property shall not be denied merely because the claim for relief is for rescission, or is based upon the rescission, failure, invalidity, or disaffirmance of such agreement.

<sup>4</sup> Tudor v. Raudebaugh, 278 Fed. 254 (D. C. Mont. 1922) (rescission); Aday v. Echols, 18 Ala. 353, 52 Am. Dec. 225 (1850) (as a counterclaim to an action for specific performance); Montgomery v. Meyerstein, 186 Cal. 459, 199 Pac. 800 (1921) (rescission); Wolfinger v. Thomas, 22 S. D. 57, 115 N. W. 100 (1908) (rescission); Delano v. Saylor, 113 S. W. 888 (Ky. 1908) (defective title); Gayle v. Troutman, 31 Ky. L. R. 718, 103 S. W. 342 (1907) (rescission); Larson v. Metcalf, 201 Iowa 1208, 207 N. W. 382 (1926) (rescission); Goldstein v. Ehrlick, 96 N. J. Eq. 52, 124 Atl. 761 (1924) (defect in title); Cleveland v. Bergen Bldg. & Imp. Co., 55 Atl. 117 (N. J. Eq. 1903).

<sup>5</sup> WILLISTON, CONTRACTS, § 1455 (rev. ed. 1937).

<sup>6</sup> Dooley v. Stillson, 46 R. I. 332, 128 Atl. 217, 218 (1925).

ting the injured party to rescind by self-help, *i.e.*, a one-sided disaffirmance, and thereafter sue at law for money had and received.<sup>7</sup> As can readily be seen the result attained is identical, in spite of the different means used to attain the end.

Equity, in addition to its remedy of rescission, sought to relieve the injured party, who in reliance upon a contract has paid part of the consideration required and who through no fault of his own has been unable to receive what he bargained for, by giving him a lien on the land equivalent to his monetary outlay.<sup>8</sup> A lien, as interpreted by the courts, "is a charge upon property which exists in favor of a person to whom another owes a debt or duty."<sup>9</sup> The majority of the courts award the lien, which has been recognized since the time of Blackstone,<sup>10</sup> through their application of either the trust theory<sup>11</sup> or on purely equitable principles to prevent unjust enrichment.<sup>12</sup> Under the trust theory, the courts of equity merely extended their policy of regarding the vendee of land as the owner, even though the vendor still held the legal title. As the vendee's equity increased through his payment of the purchase price, more and more land was held in trust for him by the vendor, and when the whole purchase price had been paid, equitable conversion was completed and the legal title was only an empty right, for in equity the vendee could at any time after the law date compel the vendor to convey it to him.<sup>13</sup> Where, however, the vendee did not wish to accept title because of its unmarketable<sup>14</sup> or defective character,<sup>15</sup> or where the contract had been induced by fraud or mistake,<sup>16</sup> the vendee was entitled to the return of his money together with the interest earned from the time of the discovery of the fraud<sup>17</sup> or the date of default.<sup>18</sup> Since the vendor might have dissipated the funds and might have become financially irresponsible, the court would

<sup>7</sup> Cory v. Freeholders of Somerset, 47 N. J. L. 181 (1885).

<sup>8</sup> First Savings Bank of Albany v. Linnhaven Orchard Co., 89 Ore. 354, 174 Pac. 614 (1918).

<sup>9</sup> Marshall v. C. S. Young Const. Co., 94 Fla. 11, 113 So. 565, 566 (1927).

<sup>10</sup> Burgess v. Wheate, 1 Wm. Blacks. 123, 96 Eng. Rep. 67 (1759).

<sup>11</sup> See Gray, J., dissenting in Davis v. Rosenzweig Realty Co., 192 N. Y. 128, 139, 84 N. E. 943, 945 (1908).

<sup>12</sup> Whitbread & Co., Ltd. v. Watt, [1902] 1 Ch. 835.

<sup>13</sup> Jennison v. Leonard, 21 Wall. (U. S.) 302, 22 L. ed. 539 (1874); see Gray, J., dissenting in Davis v. Rosenzweig Realty Co., 192 N. Y. 128, 139, 84 N. E. 943, 945 (1908).

<sup>14</sup> Wetmore v. Bruce, 118 N. Y. 319, 23 N. E. 303 (1890); Feldblum v. Laurelton Land Co., 151 App. Div. 24, 135 N. Y. Supp. 349 (1st Dep't 1912).

<sup>15</sup> Delano v. Saylor, 113 S. W. 888 (Ky. 1908); Goldstein v. Ehrlick, 96 N. J. Eq. 52, 125 Atl. 761 (1924).

<sup>16</sup> Montgomery v. Meyerstein, 186 Cal. 459, 199 Pac. 800 (1921); Witte v. Hobolth, 224 Mich. 286, 195 N. W. 82 (1923).

<sup>17</sup> Griffith v. Depew, 3 A. K. Marsh. 177, 13 Am. Dec. 141 (Ky. 1820).

<sup>18</sup> Everett v. Mansfield, 148 Fed. 374 (C. C. A. 1st 1906).

permit the vendee to have the original land sold to satisfy the obligation of the vendor<sup>19</sup> or if he preferred, he could remain in possession of the land until paid.<sup>20</sup>

In spite of the logic behind this reasoning, New York turned its back on the trust theory and maintained that the vendee's lien was one of the rights arising out of the contract of sale.<sup>21</sup> In the logical application of this theory, the court inevitably was compelled to hold that where the vendee came into a court of equity praying for rescission of the burdensome contract, he could not be the recipient of the vendee's lien, for by his choice of action and of remedy he was of necessity alleging that no contract had ever existed,<sup>22</sup> and *a fortiori* rights which could arise only from a contract could not arise from a nullity.<sup>23</sup> Therefore, unless the vendee actually sued for the vendee's lien or counterclaimed for one, he would only receive a judgment for the money debt, no security to insure its satisfaction being awarded. The result of this arbitrary holding was that the vendee affirmed the contract no matter how much fraud was involved and sued to recover a lien on the land as well as the down payment, for then only did he receive the complete relief to which he was entitled.

Where the vendee's lien is granted, the court includes within its scope all monies paid under the terms of the contract,<sup>24</sup> interest on the purchase price,<sup>25</sup> together with money expended for improvements and taxes,<sup>26</sup> but it does not include money spent in the title search,<sup>28</sup> nor for attorney's fees,<sup>29</sup> nor for loss in profit through the failure to make a subsequent resale of the land,<sup>30</sup> for these latter expenses were not stipulated for in the contract of sale. No possession of the land, constituting the subject matter of the contract of sale, need be shown today, although formerly the vendee needed this

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<sup>19</sup> *Tudor v. Raudebaugh*, 278 Fed. 254 (D. C. Mont. 1922); *FRY, SPECIFIC PERFORMANCE*, § 1176 (6th ed. 1921).

<sup>20</sup> *Griffith v. Depew*, 3 A. K. Marsh. 177, 13 Am. Dec. 141 (Ky. 1820).

<sup>21</sup> *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937 (1908); *Davis v. Rosenzweig Realty Co.*, 192 N. Y. 128, 84 N. E. 943 (1908); *Flickenger v. Glass*, 222 N. Y. 404, 118 N. E. 792 (1918).

<sup>22</sup> *Davis v. Rosenzweig Realty Co.*, 192 N. Y. 128, 84 N. E. 943 (1908); *Garrett v. Cohen*, 63 Misc. 450, 117 N. Y. Supp. 129 (Sup. Ct. 1909).

<sup>23</sup> *Diven v. Ashbaugh*, 121 Misc. 213, 200 N. Y. Supp. 634 (Sup. Ct. 1923).

<sup>24</sup> CAL. CIV. CODE (Deering, 1937) § 3050; *Montgomery v. Meyerstein*, 186 Cal. 459, 199 Pac. 800 (1921); *Coleman v. Floyd*, 131 Ind. 330, 31 N. E. 75 (1892); *Craft v. Latourette*, 62 N. J. Eq. 206, 49 Atl. 711 (1901).

<sup>25</sup> *Wolfinger v. Thomas*, 22 S. D. 57, 115 N. W. 100 (1908).

<sup>26</sup> *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225 (1850); *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785 (1868).

<sup>27</sup> *Montgomery v. Meyerstein*, 186 Cal. 459, 199 Pac. 800 (1921).

<sup>28</sup> *Occidental Realty Co. v. Palmer*, 117 App. Div. 505, 102 N. Y. Supp. 648 (1st Dep't 1907), *aff'd mem.*, 192 N. Y. 588, 85 N. E. 1113 (1908).

<sup>29</sup> *Ungrich v. Shaff*, 119 App. Div. 843, 105 N. Y. Supp. 1013 (1st Dep't 1907).

<sup>30</sup> *Holden v. Efficient Craftsman Corp.*, 234 N. Y. 437, 138 N. E. 85 (1923).

additional equity,<sup>31</sup> for the payment of the money pursuant to the contract gives the vendee the right to a lien.<sup>32</sup> As has become apparent, the vendee is permitted to have his lien only to the extent of his actual expenditures; therefore, he is not accorded one covering the value of those improvements which were on the land when he entered into possession. Since they had always belonged to the vendor, the court does not favor a result which would compel the vendor to pay twice for his property, once for its construction and again to the vendee as damages.<sup>33</sup> The court of equity does not penalize the vendor, beyond returning to the vendee those rights which he surrendered in reliance upon performance of the contract, and to whose return he became entitled upon the vendor's default. In line with this policy, the vendee has never been the recipient of the lien where he was the defaulting party, nor where the vendor's failure to perform was attributable to the vendee's prior default.<sup>34</sup> Therefore, the granting of the lien is not inconsistent with the remedy of rescission, for equity would only be giving an additional proof of its ability to give the fullest relief possible.

The new amendment to the laws of New York has abolished the old distinctions between the remedies available to the vendee, where the vendor was in default. It will therefore be immaterial whether the vendor had an unmarketable title, or owned less land than he had contracted to sell, or had committed fraud, for in all instances the vendee, unless he was the cause of the default, may receive a lien.

This amendment, therefore, brings New York in line with the majority. But will New York go as far as other common law jurisdictions in its application? Some courts have held that the vendee was entitled to the lien even though he exercised an option given in the contract to rescind.<sup>35</sup> This relief was given in spite of the vendor's not being in active default. The court's departure from the strict law was made upon the theory of mutuality of remedy, *i.e.*, if the option had been for the benefit of the vendor, and had been exercised by him, the vendee would, because of the vendor's default, have been entitled to one, and the court did not incline to deprive the vendee of the remedy which was only in the nature of security for the repayment of money, even though the option was for his benefit.<sup>36</sup> Whether the New York courts, in their interpretation of Section

<sup>31</sup> CAL. CIV. CODE (Deering, 1937) § 3050; *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937 (1908); *Occidental Realty Co. v. Palmer*, 117 App. Div. 505, 102 N. Y. Supp. 648 (1st Dep't 1907), *aff'd mem.*, 192 N. Y. 588, 85 N. E. 1113 (1908).

<sup>32</sup> *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937 (1908).

<sup>33</sup> *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. 768 (1894), *aff'd*, 103 Cal. 287, 37 Pac. 392 (1894).

<sup>34</sup> *Griffith v. Depew*, 3 A. K. Marsh. 177, 13 Am. Dec. 141 (Ky. 1820).

<sup>35</sup> *Whitbread & Co., Ltd. v. Watt*, [1902] 1 Ch. 835; *Wilson v. Sunnyside Orchard Co.*, 33 Id. 501, 196 Pac. 302 (1921).

<sup>36</sup> *Whitbread & Co., Ltd. v. Watt*, [1902] 1 Ch. 835.

112-h of the Civil Practice Act, will follow this holding has yet to be seen, as the statute makes no provision for this eventuality. It is submitted that there appears to be no reason for not granting the vendee's lien, where he exercised the right of rescission given him in the contract. Since the parties successfully bargained for the right to rescind, the statute, which has as its aim the enlargement of the remedy's scope, should not be narrowly construed.

In another aspect the statute has not altered the common law, namely where the vendor purported to sell land to which he had no title. By definition, the lien is a mere right, through the medium of the court, to charge the land. It is not a title to or an estate in the land, neither a *jus in re* nor a *jus in rem*.<sup>37</sup> Therefore, if the vendor's default consisted in agreeing to sell land to which he had no title, the court can not give the vendee a lien for there is no land to which it could attach.<sup>38</sup> This set of facts would prevent the court from giving complete relief, and the obstacle exists irrespective of the remedy sought by the vendee. By necessity, since the lien is given as security for the down payment it can attach only to the specific land contracted for and not to other parcels owned by the vendor.<sup>39</sup> In such a situation, therefore, the vendee must of course be satisfied with a money judgment on which he can later issue execution.<sup>40</sup> Before the passage of this amendment, the court could attach the vendee's lien to personalty owned by the vendor,<sup>41</sup> as long as the rights of other creditors had not intervened,<sup>42</sup> but by the terms of the new section it may be a charge only on reality.

In accordance with its policy of returning to the vendee those rights of which he had been wrongfully deprived, the courts have considered the vendee's lien as paramount to and prevailing over all purchasers and incumbrancers from the vendor with notice of its existence.<sup>43</sup> Like all equitable rights, it can be defeated only by a bona fide purchaser for value without notice. Hence, since it has been held that the lien is in the nature of an equitable mortgage,<sup>44</sup> there should be some provision made for its recording, even though they are not interests in land. In New York today, liens may be

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<sup>37</sup> Arnold v. Porter, 122 N. C. 242, 29 S. E. 414, 416 (1898).

<sup>38</sup> Robinson v. Campbell, 222 Mich. 111, 192 N. W. 644 (1923).

<sup>39</sup> See Gray, J., dissenting in Davis v. Rosenzweig Realty Co., 192 N. Y. 128, 139, 84 N. E. 943, 945 (1908); Galbreath v. Reeves, 82 Tex. 357, 18 S. W. 696 (1891).

<sup>40</sup> Robinson v. Campbell, 222 Mich. 111, 192 N. W. 644 (1923).

<sup>41</sup> Witte v. Hobolth, 224 Mich. 286, 195 N. W. 82 (1923); Giarranto v. McIlwain, 215 App. Div. 644, 214 N. Y. Supp. 582 (3d Dep't 1926).

<sup>42</sup> Giarranto v. McIlwain, 215 App. Div. 644, 214 N. Y. Supp. 582 (3d Dep't 1926).

<sup>43</sup> Larson v. Metcalf, 201 Iowa 1208, 207 N. W. 382 (1926); Lowe v. Maynard, 115 S. W. 214 (Ky. 1909); First Savings Bank of Albany v. Linnhaven Orchard Co., 89 Ore. 354, 174 Pac. 614 (1918).

<sup>44</sup> Wickman v. Robinson, 14 Wis. 493, 80 Am. Dec. 789 (1861); Elterman v. Hyman, 192 N. Y. 113, 125, 84 N. E. 937 (1908).

registered under Section 417 of the Real Property Law,<sup>45</sup> but no case has been decided which holds that the vendee's lien may be recorded there, although there appears to be no reason for opposing its registration. One objection which might be advanced is that the lien is a part of a judgment and will be docketed as such. But it is submitted that it will be enforced, not by execution, but by a foreclosure sale. Although these problems will not affect a vendee in the usual case where he has become entitled to a lien, they do show that less than complete relief is occasionally given in a rescission action.

LENORE BENARIO.

AMENDMENT TO THE CIVIL SERVICE LAW PROHIBITING STRIKES BY PUBLIC EMPLOYEES.—At the 170th session of the New York Legislature a bill was enacted amending the Civil Service Law by inserting, therein, a new section to follow section twenty-two, to be known as section twenty-two-a. This section declares that a public employee who strikes loses his civil service protection, and if re-employed does not regain it for five years. To remove any possibility of profit from his wrongful act, his compensation may not be increased for three years.<sup>1</sup>

With the enormous growth and expansion of the labor movement we have had a parallel development of the right to strike, and as the strength and size of the unions have increased, the right to strike has gained greater recognition from the courts. It has become increasingly evident that there is a conflict of interests—the workers' interest in protecting the right to strike as against the general interest in the public health, welfare and safety. The necessity of preserving and insuring our national economy, as the superior duty of our legislative officers, has stirred them into action both in the state and national legislatures. One aspect of this great problem was before the New York Legislature and the solution offered was the amendment under discussion. It was necessary to distinguish the public servant from all other workers or employees and to take the precaution of denying to these employees the right to strike in order to preserve this general interest in the public health, welfare and safety.

This addition to the Civil Service Law, *i.e.*, section twenty-two-a, raises several questions:

1. Does the New York Anti-Injunction Act (C. P. A. 876-a) apply where the employee is a public employee?

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<sup>45</sup> Laws of 1916, c. 547, § 11.

<sup>1</sup> N. Y. CIVIL SERVICE LAW § 22a.