

No 4680 Equity

in Bank in which they were directors, by substituting, each his individual note to the Bank for \$250. That after the said Herman S. Meyer had left the State, the defendants, Benjamin F. Rochester, William H. Hooper, Samuel F. Whip, Roubahn A. Bower and Charles H. Haller, filed their Mechanic Lien Claims for materials furnished for, and work and labor performed, on said building, against the building and the land covered thereby and adjacent thereto, necessary for the ordinary and useful purposes thereof. The aforesaid purchase money remaining unpaid the complainant filed his bill in this Cause, to enforce his vendor's lien for the payment of the unpaid purchase money. On the 2^d day of May 1881 a decree was passed for the sale of the land, and on the 28th day of May 1881 the same was sold by the Trustees for the sum of \$2600. The sale was ratified and confirmed and the case referred to the auditor who filed his report, in which, after allowing costs and expenses, there remained for distribution among creditors, the sum of \$2354 ⁷⁵/₁₀₀. The whole of which under instructions from the Complainant's Solicitor, the Auditor in "Distribution A" allowed to Caspar Mierling, the Vendor, treating the \$250, paid by Mierling as surety for Meyer on his note in Bank, as so much unpaid purchase money.

Court's Opinion & Order, ratifying the Auditor's Report except as to "Distribution A"

In "Distribution B," under the instructions from the Plaintiff's Solicitor, the Auditor allowed to Caspar Mierling in discharge of his Vendor's Lien \$2129 ⁷⁵/₁₀₀, and distributed the balance among the said Mechanic Lien Creditors, treating the said \$250 as a mere debt due from Meyer to Mierling, and as being no part of the unpaid purchase money.

The question for the Court, under these facts, is whether this sum of \$250, is any part of the unpaid purchase money for the land. If it is, then "Distribution A," is correct, if it is not, then "Distribution B," is proper.

The Vendor's Lien exists only for unpaid purchase money. This all the cases on the subject decide.

Therefore if the first payment of \$346 ⁷⁵/₁₀₀, was paid by the vendor to the vendor in May 1880, he has no lien in the fund in this case, for the \$250 paid by him for Meyer, as the lien was thereby extinguished to the extent of the sum so paid by the vendor.

Payment is money given in discharge of a debt. It is "that is given to execute what has been promised, or it is the fulfilment of a promise. By payment is understood, every way by which, a creditor is satisfied, or ought to be, and the debtor liberated." The sum of \$346 ⁷⁵/₁₀₀, given or passed to Mierling by Meyer, was certainly in discharge of the debt payment on the land, and it makes no difference that Mierling loaned his credit, or name to Meyer to enable him to procure the money wherewith to make the payment. The money borrowed by Meyer from the bank on the faith of Mierling's name, was the property of Meyer, and had no connection whatever with, or reference to, the land. The vendor having received the first instalment of the purchase money from the vendor, that much of the debt was discharged, and the Court cannot see upon what principle or rule of law or equity, it could be revived or renewed by the vendor being obliged, four months subsequently, to pay a surety debt for the vendor.

The case of the United States vs. Thompson and others, 33 Mad. 575, is a strong case to sustain the view, that the payment of the \$346 ⁷⁵/₁₀₀, by Meyer to Mierling, was an full satisfaction of the first instalment of the purchase money. The payment of the note in bank, only created a new obligation, on the part of Meyer to Mierling for money paid for him, and Meyer is now indebted to Mierling, in the sum of \$250, independently of any question arising out of the sale of the land.

The enforcement of a vendor's lien is analogous to the enforcement of the specific performance of a contract, and rests in the sound discretion of the Court, and which the Court will never

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