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REMEDIES OF THE VENDOR AND PURCHASER UNDER A CONTRACT FOR THE SALE OF REALTY IN PENNSYLVANIA

The law of Pennsylvania dealing with the remedies available to buyers and sellers for the breach of an agreement of sale of real estate differs in many respects from the law prevailing elsewhere. This Comment will attempt to survey the major remedies available to the parties. It is assumed that a valid agreement of sale exists but that a deed has not yet passed to the vendee. For purposes of clarity, the remedies available to the vendee and vendor will be considered separately.

I.

REMEDIES OF THE VENDEE

A. Vendee's Action for Damages

An action for damages resulting from the vendor's breach is perhaps the most obvious remedy available to the disappointed purchaser. Two rules have been adopted by courts in the United States to measure these damages. The first, or so-called "American" rule, adopts the same measure of damages as is generally used when any contract is breached; that is, to place the plaintiff in the same position he would have enjoyed if the contract had been fulfilled, together with recompense for any consequential losses the seller could reasonably have anticipated when the contract was made. The reasons for the vendor's breach are immaterial and the purchaser recovers the market value of the property on the date it should have been conveyed, less the unpaid balance of the contract price.

Secondly, the "English" rule limits the purchaser's damages to the actual expense he has incurred if, without any default of his own, the vendor is unable to perform owing to some defect of title. However, if fraud is shown or if

1. Cf. Nanovic & Hitchler, A Synopsis of the Law Concerning the Enforcement of Contracts for the Sale of Real Estate, 57 Dick. L. Rev. 357 (1953), where it is claimed that the difference results from the following propositions:
   (1) The common law courts of Pennsylvania administer equitable principles in common law forms of action;
   (2) The jurisdiction of the equity courts in Pennsylvania depends entirely upon statutory enactments and is not general but is confined to certain specifically enumerated subjects;
   (3) The fourth section of the Statute of Frauds is not part of the law of Pennsylvania.
4. Watkins v. American Nat'l Bank, 134 Fed. 36 (8th Cir. 1905). Stated in the alternative, plaintiff is entitled to recover the difference between the contract price and the market value plus any payment made by him upon the purchase price.
6. Flureau v. Thornhill, 2 W. Bl. 1078, 96 Eng. Rep. 635 (1776), wherein the rule was first formulated.
the vendor fails to do all in his power to correct a defect or remove an encumbrance,\textsuperscript{7} loss of bargain damages will be awarded. Some form of the English rule has been adopted in a large number of states,\textsuperscript{8} Pennsylvania being one of them.\textsuperscript{9} One reason for applying the English rule lies in the somewhat visceral feeling that a vendor who believes he has good title should not be held liable for the vendee's lost profit when, after a good faith attempt, he is unable to convey good title. The rule is strengthened somewhat by analogizing it to those cases which limit recovery to money paid when a defect in title is discovered after conveyance;\textsuperscript{10} there should be no windfall simply because the defect is discovered before conveyance.

The position taken by Pennsylvania courts on the measure of damages which a disappointed purchaser may receive has been explained by the courts by reference to the Pennsylvania statute of frauds. The earliest reported Pennsylvania case held that the English statute of frauds was not in force in Pennsylvania.\textsuperscript{11} In 1772 the Pennsylvania statute of frauds was passed, but the colonial assembly consolidated only the first three sections of the English statute.\textsuperscript{12} As a result, oral contracts for the sale of land are not invalid. However, a slightly different rule for the measurement of damages applies when the agreement of sale sued upon is oral rather than written.

In \textit{Jack v. McKee},\textsuperscript{13} testator had orally promised plaintiff that he would give her a certain parcel of land if she would live with and care for him. Plaintiff fulfilled her promise, but testator never conveyed the land to her. After deciding that the action on the contract was not barred by the statute of frauds,\textsuperscript{14} the court awarded plaintiff the value of the promised land as damages, that is, the court gave her loss of bargain damages. Two facts should be noted: first, the agreement was oral; and second, the consideration was in the form of services and not tangible property. Undue hardship was the natural result of this decision.\textsuperscript{15} Eleven years later, the state supreme court, again confronted with breaches of oral contracts to convey in \textit{Hertsog v. Hertsog's Adm'r},\textsuperscript{16} and in \textit{McNair

\begin{itemize}
\item \textsuperscript{7} Day v. Singleton, [1899] 2 Ch. 320.
\item \textsuperscript{8} McCormick, Damages § 179 n.30 (1935).
\item \textsuperscript{9} Seidlek v. Bradley, 293 Pa. 379, 142 Atl. 914 (1928).
\item \textsuperscript{11} Anonymous, 1 Dall. 1 (Pa. 1754).
\item \textsuperscript{12} 1 Sm. L. 389, § 1 (1772), PA. STA. ANN. tit. 33, § 1 (1949).
\item \textsuperscript{13} 9 Pa. 235 (1848).
\item \textsuperscript{14} Id. at 244.
\item \textsuperscript{15} See e.g., Beach v. McClentock (unreported) and Malaun v. Ammon, 1 Grant's Cases 123 (Pa. 1854). In \textit{Beach} a grandson was promised land in return for services. The services rendered were admittedly worth only $1,800, but he was awarded a judgment of nearly $10,000. As a result the greatest part of testator's estate was swept away from his rightful heirs. In \textit{Malaun}, just as in \textit{Beach}, a conveyance of land was promised in return for services. The land promised far exceeded the value of the services rendered, and the testator's entire estate was taken as damages.
\item \textsuperscript{16} 34 Pa. 418 (1859).
\end{itemize}
v. Compton, rejected the rule of Jack v. McKee. In Hertzog, plaintiff, son of testator, pleaded and proved an oral promise by his father to purchase a farm for the son and payment of the purchase price by the son in money and services. The court ruled that, in the absence of fraud in the agreement, the disappointed vendee is entitled only to the return of his money with interest and expenses. In McNair, defendant breached a parol agreement to convey. The court reiterated the rule of the Hertzog case and found specifically that if services were rendered their fair value was recoverable and if money was paid it would be returned with interest and expenses. The result in McNair and Hertzog is dictated by the Pennsylvania statute of frauds. Since the vendor has the privilege of rescinding the contract and invoking the statute as a defense, the purchaser cannot recover loss of bargain damages. Such damages would indirectly compel enforcement of a contract to create an interest in land in violation of the statute, for loss of bargain damages supposedly put the purchaser in the same position as if the contract had been executed.

The only instance in which loss of bargain damages will be awarded when a parol contract is breached occurs if fraud in the inception of the contract is shown. The courts allow indirect enforcement of the contract in this situation because of a reluctance to allow the statute of frauds to be used as an instrument of fraud.

The measure of damages awarded when a vendor breaches a written contract of sale depends upon the cause of the breach. In Bitner v. Brough, the defendant promised in writing to convey to plaintiff and to procure his wife's signature to the conveyance. Defendant was unable to secure his wife's signature. The court, after concluding that the defendant had acted in good faith, awarded the plaintiff the money he had paid with interest and expenses. The rule there stated was that where a vendor, without fraud on his part, is unable to perform, the vendee is not entitled to damages for the loss of his bargain; however, where the vendor is guilty of collusion, tort, artifice, fraud, or does acts not in good faith in order to escape a bad bargain, the vendee is entitled not only to a return of the money paid plus expenses, but also damages arising from the loss of his bargain or the money he might have received from its completion. There was some decisional confusion in the courts between written and parol contracts until Seidlek v. Bradley clarified the basis of the vendee's damages under each type of contract. Prior to that case, the courts had

17. 35 Pa. 23 (1859).
18. The court characterized the results of cases decided under the Jack v. McKee rule as “monstrous,” 34 Pa. 418, 422 (1859). See note 15, supra.
22. 293 Pa. 379, 142 Atl. 914 (1928).
sometimes applied the rule for ascertaining damages in parol contract cases to cases dealing with written contracts.24

Since the clarification in Seidlek, there have been few decisions in the state's appellate courts dealing with what constitutes such collusion, tort, artifice, fraud, or bad faith which will render a breaching vendor liable for loss of bargain damages.

In Del Vitto v. Schiavo,25 it was held that a refusal to convey because of a desire for more money was unjustified and would presumably entitle plaintiff-vendee to damages for loss of bargain. Refusing to sign a lease pursuant to an agreement to do so unless the vendee agreed to a condition which would render the lease considerably less valuable is bad faith, entitling the plaintiff to loss of bargain damages.26 Not having equitable title at the time of entering into the contract and not informing the vendee of that fact also constitutes such conduct.27

B. Specific Performance

The ordinary and effective remedy of the buyer, where the seller who is able to perform fails to make settlement, is a suit in equity for specific performance. Story points out that this remedy is granted where it is impossible for money damages to place the vendee in all respects in the same situation contemplated by the contract; the character, locality, and accommodation of the land give it a special and peculiar value in the eyes of the vendee.28

Unless it is impossible for the vendor to convey, a written contract to sell realty will be specifically enforced.29 The basic principle on which specific performance is decreed is that "an agreement of sale properly executed conveys equitable title, and equity will decree that the legal title shall be conveyed on payment of the agreed consideration."30 (Emphasis added.) In the case of Tiernan v. Roland,31 the court was presented with the question of whether the purchaser was entitled to a decree of specific performance in light of the fact that the vendor had sold the property in question to a third party subsequent to the contract with the plaintiff. The court, after setting out the validity of the agreement with the plaintiff and the fact that the third party purchaser knew of the first agreement, awarded specific performance to the plaintiff. Pennsylvania courts have


28. 2 Story, Equity § 746 (1836).
31. 15 Pa. 429 (1850).
also held that inadequacy of price, unless grossly disproportionate, will not defeat specific performance.\textsuperscript{52}

Where a land contract provides for liquidated damages, the right of the nonbreaching party to ignore such clause and proceed for specific performance depends upon the intention of the parties. If it clearly appears that the purpose of the liquidated damage clause was to fix the maximum responsibility of the defaulting party, such provision is the exclusive remedy available and no specific performance is possible.\textsuperscript{53} However, the normal inference is that the purpose of such a clause is to facilitate the nonbreaching party's proof of damages. Therefore, the innocent party may employ such remedies as are available to him.\textsuperscript{54}

A purchaser is not entitled to specific performance of an oral contract.\textsuperscript{55} This seems inconsistent with the holdings in the Pennsylvania cases which allow a purchaser under an oral contract to sue for damages.\textsuperscript{56} The unique character of the Pennsylvania statute of frauds again lies at the root of the problem. It does not provide that a contract for the sale of land must be in writing; nor does it declare such a contract to be unenforceable if oral. Nevertheless, the statute of frauds provisions applicable to the creation of interests in realty do provide that any interest in real estate shall be revocable at will unless created by a writing signed by the party creating the interest (or by his agent who himself has been duly authorized in writing).\textsuperscript{57} Thus, in order to be susceptible of specific performance the terms of the contract must ordinarily be in writing. The reason for this is that an attempt to obtain specific performance is an attempt to enforce an equitable title in the subject matter. But the creation of any interest in the subject matter cannot be irrevocable unless the statute of frauds has been satisfied. A decree of specific performance of a parol contract would create an irrevocable interest in land. However, the statute of frauds makes any interest created by parol a mere estate at will. By this reasoning the Pennsylvania courts reach the same conclusion as courts sitting in jurisdictions having the usual statute of frauds provisions when dealing with specific performance of parol contracts.\textsuperscript{58}

In some cases, however, it is inequitable to refuse to specifically enforce an oral contract.\textsuperscript{59} Thus, if it is proved that the contract had been entered into and that the purchaser had taken possession in pursuance of it or had made valuable improvements to the property, the contract will...

\textsuperscript{53} Roth v. Hartl, 365 Pa. 428, 75 A.2d 583 (1950).
\textsuperscript{54} \textit{Id}.
\textsuperscript{55} Haskell v. Heathcote, 363 Pa. 184, 69 A.2d 71 (1949).
\textsuperscript{56} See discussion in text of Vendee's Action for Damages, \textit{supra} § I-A.
\textsuperscript{57} 1 Sm. L. § 389 (1772), PA. STAT. ANN. tit. 33 § 1 (1949).
\textsuperscript{59} Greenlee v. Greenlee, 22 Pa. 225 (1853).
be enforced notwithstanding the fact that all of the purchase money has not yet been paid.\textsuperscript{40} If an oral agreement for exchange of lands has been so far executed that it would be unjust to permit rescission, it will be enforced.\textsuperscript{41} It is important to note that the terms of the contract must be clearly and precisely proven.\textsuperscript{42} Where equitable considerations intervene to make a denial of specific performance a denial of justice, the purchaser will be excused from the requirements of the statute of frauds.\textsuperscript{43}

In the above discussion of the remedies available to a buyer, it was assumed that the seller had totally breached the contract by being unable to, or refusing to, convey title. The problem often arises when the vendor, although perfectly willing to perform, is unable to do so because of a defect in his title. It is obvious that a vendee could treat this as a total breach, and, as mentioned above, sue for damages. But if the vendee wants the property and not just a money recovery, the question arises as to whether he can obtain specific performance with an adjustment in the price. This very question faced the Chancery Court in England in 1674 in \textit{Cleaton v. Gower}.\textsuperscript{44} The defendant was life tenant of certain mining lands and had leased them to the plaintiff. Defendant then made a subsequent agreement to lease the lands to another. Plaintiff sued to enforce his lease with defendant, and defendant pleaded that he was subject to liability for waste and therefore could not carry out the lease. The court ordered plaintiff to perform as much as he was able and to account to defendant in damages for that part he was unable to perform. This report of the \textit{Cleaton} case did not contain the reasoning employed by the court in arriving at its conclusion. However, it seems evident that because the lessee was interested in the land rather than in damages he, in all fairness, should have been able to take advantage of as much of his bargain as he could. This doctrine seems to have been generally followed in England\textsuperscript{45} and in the United States.\textsuperscript{46} However, in its evolution two requirements have been engrafted upon the rule. The first requirement is that the defect must go to the quantity\textsuperscript{47} of the land itself or to the quality\textsuperscript{48} of the vendor's title.

\textsuperscript{40} Eisenberger v. Eisenberger, 38 Pa. Super. 569 (1909).
\textsuperscript{41} Jermyn v. Elliott, 195 Pa. 245, 45 Atl. 938 (1900); Brown v. Bailey, 159 Pa. 121, 28 Atl. 245 (1893).
\textsuperscript{43} Klingensmith v. Klingensmith, 375 Pa. 178, 100 A.2d 76 (1953). For a complete discussion of the doctrine of part performance in suits for specific performance of parol contracts to convey real property, see Annot., 101 A.L.R. 923 (1936).
\textsuperscript{44} Rep. Temp. Finch 164, 23 E.R. 90 (Ch. 1674).
\textsuperscript{45} Rudd v. Lascelles, [1900] 1 Ch. 815; Rutherford v. Acton-Adams, [1915] A.C. 866; Cato v. Thompson, L.R. 9 Q.B. 616 (1856).
\textsuperscript{46} Van Blarcon v. Hopkins, 63 N.J. Eq. 466, 52 Atl. 147 (1902); Millman v. Swan, 141 Va. 312, 127 S.E. 166 (1925); McCreary v. Stallworth, 212 Ala. 238, 102 So. 52 (1924); Chicago, M. & St. P. Ry. v. Durant, 44 Minn. 361, 46 N.W. 676 (1890); Chapman v. Latt, 144 Miss. 841, 110 So. 793 (1927); Corby v. Drew, 55 N.J. Eq. 387, 36 Atl. 827 (1897).
\textsuperscript{47} Sears v. Stinson, 3 Wash. 624, 29 Pac. 205 (1892) (deficiency in quantity; held in absence of fraud purchaser recovers difference between contract price and lesser value due to deficiency).
Thus, where there was an innocent misrepresentation by the vendor concerning the mileage of the fences surrounding the land the vendee was refused specific performance with a deduction in price since the deficiency did not go to the quantity of the land or quality of the vendor's title.\(^{49}\) But where there is a shortage in acreage, specific performance with an abatement in price will be allowed.\(^{50}\) The second requirement is that the defect must not be so great as to change the character of the original agreement to such an extent that a new contract is written for the parties.\(^{51}\) When the defect is comparatively incidental the court will grant relief.\(^{52}\) Where the total price contracted for was $3,500 and the compensation claimed was $1,000 the court refused to grant the relief requested.\(^{53}\) In *Cato v. Thompson*,\(^{54}\) it was said that to enforce the contract with a large compensation would be a great hardship on the defendant who may not have considered selling the property at such a reduced sum.

In measuring the amount of compensation to be given the buyer in cases where there is a shortage in the quantity of the land or in the quality of the vendor's title, compensation is measured in the same manner as was discussed above in the section on damages. Hence, where the American rule of loss of bargain is used, the vendee is given the difference between the market value of the land actually conveyed and the market value which the land agreed to be conveyed as a whole would have had, if the lack of title to part, or the defect of encumbrance upon the title to all or the deficiency in acreage had not existed.\(^{55}\) Where the English rule prevails, the measure of compensation depends upon the defect. If the defect is in the quantity of the land, the purchaser is allowed that portion of the purchase price which the value of the land lost bears to the value of the entire tract agreed to be sold.\(^{56}\) However, if the defect goes to the title, such as an encumbrance on the whole property, the proper measure is the difference between the value of the land as is and its value without the encumbrance.\(^{57}\)

If the two requirements set out above are not met the vendor is generally left to his other remedies at law or in equity,\(^{58}\) most of which have been or will be discussed.

In Pennsylvania this remedy for the vendee has found general acceptance.\(^{59}\) In *Burk's Appeal*,\(^{60}\) the court laid down the rule that a purchaser

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51. Cato v. Thompson, L.R. 9 Q.B. 616 (1856).
53. Rudd v. Lascelles, [1900] 1 Ch. 815.
54. L.R. 9 Q.B. 616 (1856).
55. Phinizy v. Guernsey, 111 Ga. 346, 36 S.E. 796 (1900); Sears v. Stinson, 3 Wash. 615, 29 Pac. 205 (1892).
56. Rust Land & Lumber Co. v. Wheeler, 189 Fed. 321 (8th Cir. 1911); Gates v. Parmly, 93 Wis. 294, 66 N.W. 253 (1896).
60. 75 Pa. 141 (1874).
is entitled to have a contract of sale of land specifically performed so far as the vendor is able, and to have an abatement in the purchase price for any deficiency in the title, quantity, or any other matter touching the estate. Justice Horace Stern, in the case of *Merritz v. Circelli*, sets out Pennsylvania's acceptance of the rule and its requirements for application. In that case defendant had agreed to sell plaintiff a parcel of land representing that there were sewers under the adjoining street bed which could easily and inexpensively be used by the purchaser. In reality the sewers were on the opposite side of the street and it would cost approximately $8,500 to connect them. The agreed purchase price of the land was $12,500. The court denied plaintiff's claim for specific performance with an abatement because the misrepresentation concerning the sewers did not go to the quantity of the land or to the quality of vendor's title thereto. Furthermore, the court held that even if the defect did go to the quantity of the land or the quality of the vendor's title the defect would be so large ($8,500 as compared to total purchase price of $12,500) that to enforce the contract with an abatement would be enforcing a contract so radically different from that which the parties entered into and so beyond their contemplation as to work both a probable hardship and an injustice.

C. *Rescission*

Another remedy available, on proper grounds, to the vendee against a defaulting vendor is rescission. This merely entails a return of the parties to the same position they were in before the contract was entered into; usually the purchaser will be entitled to whatever he has paid toward the purchase price and also any funds reasonably expended in reliance upon the existence of a valid contract.

In England, the purchaser is entitled to rescind immediately upon the vendor's failure to perform something which goes to the root of the contract. Rescission is allowed upon the failure of the vendor to show good title, where the vendor cannot convey substantially the same property as that contracted to be sold, or where the vendor cannot obtain the necessary consent of a third party. However, rescission will not be permitted where the purchaser is aware of a defect in title at the time he entered into the contract and knows that it cannot be cured on or before the date due for conveyance. A buyer cannot rescind after a judgment for specific performance has been rendered. Material misrepresentations...

61. 361 Pa. 239, 64 A.2d 796 (1949).
65. *In re* Head's Trustees and McDonald, 45 Ch. D. 310 (1890); *In re* Priestly and Davidson's Contract, 31 L.R. 122 (Sr. 1892).
68. Wyson v. Dunn, 34 Ch. D. 569 (1887).
innocently made\textsuperscript{71} either expressly\textsuperscript{72} or impliedly,\textsuperscript{73} are grounds for rescission, as is a mutual mistake of fact.\textsuperscript{74}

In the United States, rescission will be permitted in cases of mutual mistake of material fact,\textsuperscript{75} misrepresentation,\textsuperscript{76} and fraud.\textsuperscript{77} In Pennsylvania, a purchaser may rescind when the vendor is unable to, or refuses to, convey.\textsuperscript{78} If rescission is based on fraud or misrepresentation, not only the fraud or misrepresentation must be shown but also a reliance thereon.\textsuperscript{79} In\textit{Erie Borough v. Vincent},\textsuperscript{80} the plaintiff caused wharf privileges incident to the property to be curtailed after the contract of sale to the defendant had been made. The court held that a vendee may rescind when the vendor has materially lessened the value of the property.

The inability of the vendor to convey the title contemplated by the contract is a ground for rescission. Thus, in\textit{La Course v. Kiesel},\textsuperscript{81} the contract called for conveyance of land free from encumbrances except for certain building restrictions. The court granted rescission because the land was further encumbered at the time for conveyance. However, rescission will be denied where the claimed encumbrance is too trifling.\textsuperscript{82}

If the vendor has defaulted, justifying the purchaser’s rescission, the purchaser, if he elects to rescind, must do so promptly.\textsuperscript{83} A purchaser, however, may not rescind on account of the vendor’s default if the purchaser himself is in default.\textsuperscript{84}

D. \textit{Equitable Ejectment}

A purchaser out of possession also has available as an alternative to specific performance a quasi-legal action of equitable ejectment. This remedy, peculiar to the law of Pennsylvania, emerged from the common practice of law courts in Pennsylvania to administer equitable relief through legal forms during the period of time from the Revolution to 1836 when the courts of chancery did not exist and there was no other means of affording equitable relief.\textsuperscript{85} Although the action takes the form of ejectment, it is equitable in nature.\textsuperscript{86}

\begin{footnotes}
\item[71.] Holliwell v. Seacombe, [1906] 1 Ch. 426.
\item[72.] Daugherty v. Gates, 45 Sal. Jo. 119 (1900).
\item[73.] Schneider v. Heath, 3 Camp. 506 (1813).
\item[74.] Cooper v. Phibbs, L.R. 2 H.L. 149 (1867).
\item[75.] Wineberg v. Baker, 123 Neb. 411, 243 N.W. 122 (1932).
\item[76.] Lightner v. Karnatz, 258 Mich. 74, 241 N.W. 841 (1932).
\item[77.] \textit{Ibid.}
\item[78.] Midland Mining Co. v. Lehigh Valley Coal Co., 136 Pa. 444, 20 Atl. 634 (1890).
\item[80.] 8 Watts 510 (Pa. 1839).
\item[81.] 366 Pa. 385, 77 A.2d 877 (1951).
\item[82.] Pringle v. Smith, 289 Pa. 356, 137 Atl. 603 (1927).
\item[83.] Mahaffey v. Ferguson, 156 Pa. 156, 27 Atl. 21 (1893) ; Lightcap v. Nicola, 34 Pa. Super. 189 (1907).
\item[85.] Hawn v. Norris, 4 Binn. 77 (Pa. 1811). See also \textit{SUM. of PA. JUR., Real Property} § 177 (1959).
\item[86.] Deitzler v. Mishler, 37 Pa. 82 (1860).
\end{footnotes}
II.

REMEDIES OF THE VENDOR

A. Damages for Non-Performance

In England, when the buyer breaches the contract the seller is entitled to damages in the amount of the injury sustained by reason of the breach. This rule has been applied even though the purchaser is later found to be suffering from a mental disorder of which the vendor was unaware. If the vendor resells the property he may recover the difference between the original contract price and the lower resale price, plus expenses of resale.

In the United States, as in England, the normal standard of damages for such a breach is the value of the vendor's bargain. Under this rule the disappointed vendor will recover the excess, if any, of the purchase price at the time agreed for conveyance over the market value with interest. From the sum is deducted the amount of any deposit made by the purchaser. However, it is difficult to measure market value and doubly difficult to predict how a jury will appraise it. Perhaps it would be better if the seller could resell the property and hope to recover the difference between the two contract prices as he can in England. However, this assurance is denied the vendor by the decisions. The only exception to this is in cases where the original sale was a judicial sale. The resale value is, however, evidence of the market value at the date of the breach, but it is uncertain how much weight it will be accorded. Even though courts will not hold that the resale price of the land is conclusive as to damages caused by the breach, it was intimated in the case of Millikan v. Hunter that the resale price would be the upper limit of the vendor's recovery. Hence, where the value of the land depreciates rapidly, if the vendor resells at a good price this will limit his recovery, whereas if the value of the land increased rapidly but the vendor makes a bad resale this would not increase the measure of damages. As inconsistent as this may seem, it is at least arguable that such a measure would have the effect of dissuading the vendor from making a resale at less than arms length in order to recoup greater damages. Just as the courts refuse to hold conclusive the resale price of land in determining damages where the vendor

87. Robinson v. Harman, 1 Exch. 850 (1848). Plaintiff should be placed in as good a position as he would have been if the contract had been performed.
92. Harmon v. Thompson, 119 Ky. 528, 84 S.W. 569 (1905); Biddle v. Biddle, 202 Mich. 162, 168 N.W. 92 (1918).
93. Waters v. Pearson, 163 Iowa 391, 144 N.W. 1026 (1914).
95. Cowdery v. Greenlee, 126 Ga. 786, 55 S.E. 918 (1906), and cases there cited.
98. 180 Ind. 149, 100 N.E. 1041 (1913).
does not really own the land but merely holds an option on it, he is limited to recovering the difference between the option price and the contract price. At first it might appear that this is a distinction without a difference, but on further analysis the logic of the rule at once becomes apparent. Under both situations the seller is getting only the benefit of his bargain. In the case of the owner-seller, to give the vendor other than true market value, such as the resale price in an unwise resale, would perhaps put the vendor in a somewhat better position than he would have been in if the contract had been fully and faithfully carried out. So it is in the case of the vendor holding a mere option on the land; to give him anything more than the difference between the option price and the contract price would put him in a better position than he would have been in if the contract had been carried out.

Finally, it seems that expenses incurred by the vendor in preparation for performance, such as legal fees, title search, and the cost of abstracts are proper elements of damages. On the other hand courts have refused recovery by the vendor of brokers’ commissions in procuring the sale or resale.

The general measure of damages prevailing in the United States does not prevail in Pennsylvania. First of all, Pennsylvania once again draws the distinction between parol contracts and those reduced to writing. It was held in Ellet v. Parson that damages may be recovered for breach of a parol contract to convey land and the proper measure of damages is the difference between the contract price and the value of the land on the date of the breach. However, as held in Tripp v. Bishop, when the agreement of the parties is reduced to writing so as to remove it from the statute of frauds the vendor may recover the price of the land in damages. Hence, it would seem that Pennsylvania is at variance with the majority of the United States courts, which as stated above will only allow the vendor to recover the benefit of his bargain. The vendor’s recovery of the purchase price will be discussed infra.

In those cases where the vendor has resold the property upon the breach by the vendee it seems that Pennsylvania again adopts a modified English view and rejects the view prevailing in the majority of American jurisdictions. Hence, in Goodritz v. McMahon, it was held that when one who has agreed in writing to purchase land defaults, the vendor may subsequently sell the property, after notice, upon the same or equally advantageous terms as in the first sale, and if there is a loss, he may recover such loss from the one who defaulted under the earlier contract. The

103. 2 W.&S. 418 (Pa. 1841).
104. 56 Pa. 424 (1867).
105. 64 Pa. Super. 479 (1916).
court, in the case of Clever v. Clever,\(^{106}\) made the same ruling but in much more definite terms. The court there held that the measure of damages, where there has been a resale, is the difference between the price agreed to be paid by the vendee and that obtained on resale. The court then qualified its holding by stating that the resale must be a public one, fairly conducted, after full notice to the public and the vendee, and upon the same or as advantageous terms as the first sale.

At this juncture it might be worth mentioning that where the parties have stipulated for liquidated damages in the contract, Pennsylvania courts will uphold such a stipulation so long as it does not take on a penal nature. In Kraft v. Michael,\(^{107}\) the parties had stipulated that should the vendee fail to fulfill his obligation under the contract, the vendor would be entitled to retain, as liquidated damages, such sums as the vendee had paid. The vendee had paid $1,600 toward the total purchase price of $16,000. The court, after a review of Pennsylvania cases dealing with the question of liquidated damages, concluded that the liquidated damages clause was valid and that $1,600 on a total purchase price of $16,000 or a ratio of 10% was neither unconscionable nor in the nature of a penalty.

B. Vendor's Action for the Price

A second remedy available to the disappointed vendor is an action for the purchase price. This remedy will most likely be pursued in those cases in which the value of the land has decreased.

In England,\(^{108}\) there is some early authority to the effect that a vendor's action for the price, being one for money, was properly placed in law and not in equity.\(^{109}\) However, the law courts would not award damages equal to the full purchase price since, in their opinion, the purchaser had no interest in the land and the vendor had no interest in the money until the actual conveyance was executed.

Recognition of the inadequacy of damages returned by the law courts led to the development of the remedy of specific performance in equity. The English courts acted on the principle that the remedy must be mutual and, therefore, enforced the contract at the request of the vendor in every case in which a similar remedy was open to the purchaser.\(^{110}\) American courts will also grant specific performance to a nonbreaching vendor.

In Denby v. Dorman,\(^{111}\) the granting of this remedy was said to rest within the sound discretion of the court. However, where there is no misunderstanding on the part of the vendee and no misrepresentation on the part of the vendor, this remedy will be granted as a matter of right.\(^{112}\) The reasons given for granting this relief in the United States are varied. In

\(^{108}\) 34 HALSBURY'S LAWS OF ENGLAND, Sales of Land 330 (1960).
\(^{110}\) Scott v. Alvarez, [1895] 2 Ch. 603.
\(^{111}\) 261 Mich. 500, 246 N.W. 206 (1903).
\(^{112}\) Hotze v. Schlanser, 410 Ill. 265, 102 N.E.2d 131 (1951).
some decisions the doctrine has been based on the principle of mutuality,\textsuperscript{113} which is the same rationale used by the English court as set out above. In other jurisdictions the courts use the doctrine because the remedy at law is said to be inadequate.\textsuperscript{114} Finally, the doctrine of “equitable conversion” by which the vendee is deemed a trustee of the purchase price for the vendor, had been used to justify the doctrine.\textsuperscript{115}

Pennsylvania seems to be in the minority in allowing the vendor to tender a deed and sue at law for the purchase price.\textsuperscript{116} Furthermore, in Pennsylvania the action for the price may be maintained only at law.\textsuperscript{117} Hence, in the case of Appeal of Kauffman,\textsuperscript{118} plaintiff alleged in equity that he agreed to sell a lot to defendant and that defendant refused to pay the price, whereby plaintiff prayed for specific performance. The court, in dismissing the bill, held that where the only decree sought is one for the payment of money, it can only be recovered in an action at law. Further, in the case of Appeal of Dech\textsuperscript{119} it was said that where a bill for specific performance is brought by a vendor simply to obtain payment of the purchase price, it will not be entertained. Finally, by way of dicta in the case of Heights Land Co. v. Swengel’s Estate,\textsuperscript{120} the court stated:

The action at law in assumpsit for the purchase price is a familiar remedy available, under our blended system of law and equity, to the vendor of land as a substitute for a bill in equity for specific performance of the contract of sale. Indeed, by an application of the rule that equity will not act where there is an adequate remedy at law, a bill in equity whose object is simply to enforce payment of the purchase money will not be entertained.\textsuperscript{121}

The court, in the Heights Land Co. case, went on to say that the action for the purchase price of land is in legal effect a petition or bill for specific performance of the contract of purchase, and is governed by the same equitable principles. Since the law court in such cases is conducted according to equitable principles, it is said that the purchaser can raise any defense which is available to him in equity.\textsuperscript{122} Hence, in Freeman v. Lawton,\textsuperscript{123} the court stated that the equitable defense of laches would be
available to a defendant in such an action, despite the fact that the statute of limitations would not bar it at law.124

An interesting question is presented when the purchaser pleads a liquidated damage clause as a defense in an action by the vendor for the price. This precise question was raised in Boyd v. Hoffman.125 The defendant pleaded both a liquidated damage clause and the failure of the plaintiff to tender a deed within the thirty day limit set forth in the agreement. After finding that the tender of the deed was waived by the defendant, the court held that the damage clause in no way prevented the vendor from affirming the agreement and bringing an action for specific performance.126 Another interesting question was presented in the case of Stephenson v. Butts.127 The vendor had obtained a judgment against the vendee for the price. While the judgment was outstanding, the vendor received an offer from a third person to buy the land at a lower price than that agreed upon by the vendee. The plaintiff petitioned the court for a return of the deed, previously delivered to the prothonotary, permission to sell the land at the lower price, permission to credit the proceeds of the sale against the judgment and for the court to assess the vendee with the deficiency. The court granted plaintiff's petition and over-ruled defendant's objection that such action by plaintiff was barred by the doctrine of election of remedies.128

C. Vendor's Remedy of Rescission

In England, the vendor can rescind if there is a provision in the contract entitling him to do so upon the failure of certain events or contingencies.129 The contract may also give the vendor the power to resell and to recover any deficiency from the defaulting vendee.130 However, in the absence of an expressed contractual provision concerning rescission, it is generally held in England that the seller may rescind if the conduct of the purchaser is such as to amount to a repudiation of the contract.131 However, this right is exercisable only where the parties can be restored to their former positions.132 The vendor, upon rescission, has a right to resell the property and retain any excess of price obtained beyond the amount fixed by the contract133 but he cannot recover damages.134

124. See also Nicol v. Carr, 35 Pa. 381 (1860); Murray v. Ellis, 112 Pa. 485, 3 Atl. 845 (1886).
128. For additional Pennsylvania cases dealing with the area of the vendor's right to specific performance in general see Hunter v. Lewis, 234 Pa. 134, 82 Atl. 1100 (1912); Meason v. Kaine, 63 Pa. 335 (1869).
130. Essex v. Daniell, L.R. 10 C.P. 538 (1875).
133. Ex parte Hunter, 6 Ves. 94 (1801).
With regard to the status of the vendee's deposit upon rescission by the vendor, the English law is very explicit. Forfeiture of the deposit is generally provided for in the contract. However, such a provision has been held to be unnecessary, and unless the contract taken as a whole indicates an intention to exclude forfeiture, the vendor is entitled to retain the deposit as forfeited. This rule applies only to money paid as a deposit and not to installments of purchase money.

In the United States, the courts begin with the general proposition that the vendor may not arbitrarily rescind the contract. The courts have held that the forfeiture which might result in serious loss and damage to the purchaser should not be declared unless the equities of the case so demand. Hence, it has been held that mere inadequacy of price, improvidence, surprise, or hardship will not constitute grounds for rescission of the contract. The vendor may rescind when there has been a mutual mistake of material fact, fraud or misrepresentation on the part of the vendee, failure of consideration, or refusal by the purchaser to perform.

As to the status of the consideration already advanced by the purchaser upon rescission of the contract by the vendor, American courts are generally in agreement that a return thereof must be made by the vendor. Unlike the view taken by the English courts, discussed above, American courts require return of any consideration received by the vendor under the contract as a condition precedent to rescission.

Pennsylvania courts, in the area of rescission by the vendor, seem to follow the majority rule prevailing in the United States. Therefore, rescission has been granted to the seller in cases of fraud, mutual mistake of fact, or abandonment of the contract by the vendee. In Swank v. Fretts, defendant had an option to purchase certain coal land. The court...
granted rescission to plaintiff when the defendant refused to exercise his option. In *Unruh v. Lukens*,\(^{152}\) a reconveyance was ordered where the court found that the grantee, who was also the grantor's physician, had obtained a conveyance of land from an elderly woman through the exercise of undue influence. But in *Kuhn v. Skelley*,\(^{153}\) it was held that a vendor could no longer rescind after he had conveyed the property to a third person upon the original vendee's default. In Pennsylvania, as in the majority of states, a mere failure by the purchaser to make payment on the contract dates is not a ground for rescission unless the contract makes time of the essence.\(^{154}\)

It perhaps might be worthy of mention at this point that in Pennsylvania, as in the majority of the states,\(^{155}\) the vendor must tender a deed\(^{156}\) as a condition precedent to rescission. However, where rescission is based on fraud, tender of a deed is not essential.\(^{157}\)

As to the status of payments made by the vendee under the contract upon rescission, Pennsylvania again follows the view prevailing generally in the United States. Thus it is held that the vendor may not rescind without placing, or offering to place, the purchaser in status quo.\(^{158}\) However, as in the case of *Sharp v. Long*,\(^{159}\) it has been held that where rescission is based on fraud, the vendor need not tender the purchaser's payment.

Furthermore, Pennsylvania courts have ruled that where the value of the possession by the vendee has exceeded his loss through the rescission, no return of payments will be required as a condition precedent to rescission. Thus, return of consideration given by the vendee was not required in the case of *Axford v. Thomas*\(^{160}\) wherein the purchaser diminished the value of the property by removing stone therefrom.

Finally, it has been held in Pennsylvania that just as the parties can by contract stipulate the right of rescission,\(^{161}\) so too, they can agree that payments made by the purchaser may, after his default, be retained by the vendor.\(^{162}\)

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\(^{152}\) 166 Pa. 324, 31 Atl. 110 (1895).


\(^{155}\) Linch v. Game & Fish Commission, 124 Colo. 79, 234 P.2d 611 (1951).


\(^{158}\) Heacock v. Fly, 14 Pa. 540 (1850).

\(^{159}\) 28 Pa. 433 (1857).

\(^{160}\) 160 Pa. 8, 28 Atl. 443 (1894).

\(^{161}\) Jeffrey v. Pennsylvania Mining Co., 204 Pa. 213, 53 Atl. 772 (1902). The parties can stipulate to a rescission and forfeiture of the contract by the purchaser upon default by the purchaser.

\(^{162}\) Shilanski v. Farrell, 57 Pa. Super. 137 (1914). Note also that the purchaser may sue on the vendor's obligation to restore the money paid if he is entitled to repayment. See *Hudson v. Reel*, 5 Pa. 279 (1847). Note also that as in any contract the parties can mutually agree to rescind. However, rescission in this work deals with rescission by one party on default by the other. See *Fink's Estate*, 157 Pa. 292, 27 Atl. 724 (1893).
III.

CONCLUSION

The remedies discussed above are, of course, those primarily used by the parties and this Comment by no means purports to present an exhaustive list of remedies available to either the buyer or the seller.

In some jurisdictions, equity courts will permit a vendor to bring a bill to foreclose the buyer's rights under the contract. Subsection 163 The essence of this action is to say in effect to the vendee, "pay or get out." Subsection 164 However, this remedy does not seem too prevalent in Pennsylvania Subsection 165 and since this writing is intended to put primary emphasis on remedies in general use in Pennsylvania, a lengthy discussion of foreclosure is beyond its scope.

There is, however, one more action worthy of mention which a vendor might choose to bring, perhaps ancillary to those already set out above — an action in equity to quiet title. In the case of Goldstein v. Markovitz Subsection 166 where the parties had recorded the contract to sell land and the purchaser failed to perform such contract, the vendor was permitted to bring an action to remove the cloud put on the title by the recording of the contract.

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165. See full discussion and the absence of any Pennsylvania authority on the subject in Annot., 77 A.L.R. 270 (1932).
166. 276 Pa. 46, 119 Atl. 739 (1923).