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Vendor and Vendee-Damages Recoverable from Vendor for Breach of Written Contract-Statute of Frauds

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tration. This rule also gives a specific right of appeal to the Supreme Court, to anyone denied the right to take the examination. The procedure for action and certification thereof, by the County Board, upon the application for final examination, are the same as those provided in the case of applications for registration, previously mentioned herein in regard to Rule Nine. Applications to take the final examination in July, arising in Philadelphia and Allegheny Counties, shall be filed on or before February first, and in all other counties on or before May first. For the December examinations, applications from the two first mentioned counties must be filed on or before September first and from all other counties on or before October first.

Rule Thirteen is amplified to allow an applicant who was not a resident of this State during the whole or any part of the period of study described by these rules, to be registered, in the discretion of the Board, when satisfied as to his good moral character and general and special education, as of the time when his studies were commenced, and to be admitted to final examination upon the completion of his studies. No certificate recommending admission will be granted until he has served the regular clerkship of six months in a Pennsylvania law office as in other cases.

Rule Thirteen-and one-half allowing the Board to limit the number of times an applicant may take the final examination, needs no explanation, speaking clearly and decisively for itself.

Those who are interested may secure full particulars with respect to these requirements by addressing a request to Walter L. Douglass, Esquire, Secretary of the State Board of Law Examiners, Philadelphia, Pennsylvania.

J. F. I.

VENDOR AND VENDEE—DAMAGES RECOVERABLE FROM VENDOR FOR BREACH OF WRITTEN CONTRACT—STATUTE OF FRAUDS—*Seidlek v. Bradley, 293 Pa. 379 (1928)*, allows the recovery of the value of the bargain though the vendor was guilty of no fraud beyond the bad faith involved in his refusal to convey. The rule is otherwise when the contract is in parol. To recover such damages it must then be shown that the vendor practiced fraud, artifice, or collusion at the inception of the contract. Otherwise he can recover only what he

may have paid of the purchase price and his expenses incurred in the sale.

The recovery of any damages for breach of a parol contract to sell lands is due to the fact that there is nothing in the law of Pennsylvania at all similar to the fourth clause of the fourth section of the Statute of Frauds.[1] Pennsylvania is the only state in which this is true. Everywhere else a requirement similar to that provided by the 4th section of the Uniform Sales Act exists, i. e. a note or memorandum *signed by the party to be charged.* But in Pennsylvania both parties to a parol contract for the sale of land have always been permitted to get damages for the other's breach.[2] It has been declared that, "The legislature could have meant nothing else by this omission than to leave such contracts upon the footing which they would have had, if the act had never been passed * * *. But though it be true that no estate can be acquired by parol, and therefore no specific performance can be enforced by either party, it is equally true, and all the decisions show it from first to last, that if the vendee sues for damages, he has precisely the same standing in Court that he would have if the contract was in writing. The statute of frauds, therefore, has absolutely nothing to do with the subject."[3]

Seidlek v. Bradley, supra, shows that today the statute has a great deal to do with it. Many cases hold that in the absence of fraud in the inception of the contract, the vendee cannot recover the value of his bar-

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[1]29 Am. & Eng. Encyc. of Law, pp. 824 and 886; 27 C. J. 192; Bell v. Andrews, 4 Dall. 152 (1799); George v. Bartoner, 7 Watts 530 (1838); Lowry v. Mehaffy, 10 Watts 387 (1840); Wilson v. Clarke, 1 W. & S. 554 (1841); Ewing v. Tees, 1 Binn. 450 (1808); Moore v. Small, 19 Pa. 461 (1852); Tripp v. Bishop, 56 Pa. 424 (1867).

[2]George v. Bartoner, supra n. 1; McDowell v. Oyer, 21 Pa. 417 (1851); Hertzog v. Hertzog, 34 Pa. 418 (1859); Bender v. Bender, 37 Pa. 419 (1861); Malann v. Ammon, 1 Grant 123 (1854); Thompson v. Sheplar, 72 Pa. 160 (1872); Bell v. Andrews, supra, n. 1; Immel v. Herb, 43 Super. 111, 116 (1909); Poorman v. Kilgore, 37 Pa. 309 (1860).

[3]McDowell v. Oyer, 21 Pa. 417, 425 (1851).

gain for breach of a parol contract.[4] It has always been held that a parol contract could not be specifically enforced, (in the absence of such part performance as is said to take the case out of the statute.)[5] To grant it to the vendee would be to treat him as the owner in equity, when the statute declares he cannot become more than a tenant at will.[6] To allow it to the vendor is to ignore the lack of mutuality such a decision would create.[7] It is then conceived that to allow the vendee to recover the value of his bargain would be to give him about all he would have gained had specific performance been allowed, and so to avoid any compulsion of the vendor, the vendee is allowed merely to get back what he has

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[4]Dumars v. Miller, 34 Pa. 319 (1859); Hertzog v. Hertzog, supra, n. 2; Bender v. Bender, supra, n. 2; Thompson v. Sheplar, supra, n. 2; McCafferty v. Griswold, 99 Pa. 270 (1881); Heilman v. Weinman, 139 Pa. 143 (1891); Tyson v. Eyrick, 141 Pa. 296 (1891); Walter v. Transue, 17 Super. 94 (1900). Sedgewick on Damages, 9th Ed. Sec. 1009, states that the rule applies even when vendor knows he has no title.

[5]Compare Poorman v. Kilgore, 26 Pa. 365 (1855) and Id. 37 Pa. 309 (1860). Wilson v. Clarke, 1 W. & S. 554 (1841); Irvine v. Bull, 4 Watts 287 (1835); Ellet v. Paxson, 2 W. & S. 418 (1841); Meason v. Kaine, 63 Pa. 335 (1869); Sands v. Arthur, 84 Pa. 479 (1877); Sausser v. Steinmetz, 88 Pa. 324 (1879); Schwerdfeger v. Kelly, 223 Pa. 631 (1909); Martz v. Bower, 94 Pa. Super. 175 (1928). Likewise while a vendee under a written contract has an insurable interest in the buildings on the land sold, a vendee under a parol contract has no such interest. Prospect Dye Works v. Federal Ins. Co., 33 Super. 223 (1906).

[6]Bender v. Bender supra, n. 4.

[7]Wilson v. Clarke, 1 W. & S. 554 (1841). It is noteworthy that this is the only reason why a vendor cannot recover the price, when he has not signed the sale agreement. The general rule in other states permits specific performance of a land contract if the defendant has signed, though the contract could not have been enforced against the vendor for want of his signature. Thus the fourth section has the effect of abolishing the requirement of mutuality wherever it is in force. See also Ellet v. Paxson, 2 W. & S. 418 (1841); Title & Tr. Co., v. R. R., 230 Pa. 160 (1910).

parted with.[8] Fraud by the vendor at the inception of the contract was held to open the door to a full recovery, to avoid a multiplicity of suits.[9] But the mere fact that the vendor had no excuse for his nonperformance did not take the case out of the rule.[10]

Seidlek v. Bradley concedes that there are cases which apply the same rule to written and verbal contracts. *Haney v. Hatfield, 241 Pa. 413 (1913),* applied the parol contract rule to a written contract. *Orr v. Geiner, 254 Pa. 308 (1916)* and *Glasse v. Stewart, 32 Super. 385 (1907),* are condemned also as cases committing the same error. They are all overruled.

The origin of the error into which our courts had fallen is easy to understand. It has always been the law that a vendee who holds a written contract signed by the vendor cannot recover the loss of his bargain, if the vendor cannot make title. Like a vendee under a parol contract, he can recover only money paid, interest and expenses.[11] And again bad faith or "fraud" operates to let in the loss of the bargain.[12] But the fraud required when the contract is written is very different from the fraud required when it is verbal. The proper understanding of this difference requires an understanding of the reason for refusing the value of the bargain as part of

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[8]Sausser v. Steinmetz, supra, n. 5; Rineer v Collins, 156 Pa. 342 (1893); M'Clowry v. Croghan, 31 Pa. 22 (1856); McNair v. Compton, 35 Pa. 23 (1859); Hertzog v. Hertzog, supra, n. 2; Dumars v. Miller, supra, n. 4; Bellas v. Wolff, 11 Super. 150 (1899); Ruckert v. Domenec, 2 W. N. C. 195 (1870); In Bower v. Cessna, 62 Pa. 148 (1869), Justice Sharswood declares that when the vendor is unable to make title, the same measure of damages is applicable regardless of the parol or written character of the contract. The whole opinion in this case is instructive.

[9]Harris v. Harris, 70 Pa. 170 (1871).

[10]Rineer v. Collins, supra, n. 8; McNair v. Compton, supra, n Thompson v. Sheplar, supra, n. 2; McCafferty v. Griswold, 99 Pa. 270 (1881); supra, n. 4; Allison v. Montgomery, 107 Pa. 455 (1884); Grey v. Howell, 205 Pa. 211 (1903); Stephens v. Barnes, 30 Super. 127 (1905).

[11]Bitner v. Brough, 11 Pa. 127 (1849); Burk v. Serrill, 80 Pa. 413 (1876).

[12]Panagos v. Plack, 277 Pa. 431, 435 (1923); Richter v. Goldberg, 78 Super. 309, 312 (1921); Daley v. Reed, 63 Super. 507, 510 (1916); Stephens v. Barnes, supra, n. 10; Bartram v. Hering, 18 Super. 395 (1901).

the damages in suits by the vendee for innocent breach by a vendor of a written contract. In these cases the reason given in the parol contract cases, that this would amount to specific performance, no longer has force, for the contract is now in writing and can be specifically enforced. Accordingly, it is only in those cases in which the vendor cannot give title, and the vendee cannot get specific performance for this new reason, that the vendee may not get the equivalent of specific performance, the value of the bargain. It would be absurd to compel a purchaser to resort to specific performance to realize the value of his bargain. If he can get it directly, why not let the vendor retain his land and pay the cash, if this is also agreeable to the vendee? That the vendee has his choice of remedies is the point decided by the instant case.

But why, it may be said, should a vendor be excused from paying the value of the bargain when he sells what is not his? No adequate reason exists. The explanation of the rule is its antiquity. It began with *Flurean v. Thornhill*,[13] when the law of real property was in such a state and there was such an absence of adequate recording of land titles that it was practically impossible for one to be sure he had a good title. It was feared that to award full damages to the disappointed vendee would deter men from putting their land upon the market and so the development of the country would be retarded. So an implied condition was invented and read into all land contracts, that if the vendor did not have title, the contract was at an end. The English cases gave full damages when the vendor knew his title was defective and, of course, a refusal to convey by one who has a good title justifies the award of full damages.

The Pennsylvania cases give a further reason for refusing full damages. They call attention to the ancient rule allowing but limited damages for breach of covenants of warranty in deeds. This rule has long survived the reasons which explain its origin but it would unduly prolong this note to account for this ancient rule. But even if it must stand until changed by legislation, it does not follow that the same limitation upon the amount of damages recoverable for a broken contract to convey must be applied. The breach of the warranty may develop at a remote date when the allowance of the grantee's full loss would be ruinous to the grantor and his heirs. The

[13] 2 Wm. Bl. 1078 (1776).

breach of the contract to convey will occur almost immediately. There is nothing in the suggestion that vendors could convey and so reduce their liability. The vendee simply refuses to accept the deed, when it will not give a marketable title. It is high time to take the final step and bring the measure of damages for breach of a contract to sell land into harmony with the long settled rule in sales of goods, in which the recovery of the value of the bargain has always been allowed. Of course the Statute of Frauds must be complied with in both cases, if such a recovery is to be had. This is undoubtedly the tendency of all American decisions and the Pennsylvania cases should be brought into line.[14]

Of course, such fraud as will permit the recovery of the value of the bargain in the case of a breach of a parol contract will *a fortiori* permit such a recovery when the contract is in writing, i. e. fraud in the inception of the contract, as when the vendor knows he can not give a good title. If a vendor under a written contract is to be relieved of paying the value of the bargain in case he has no title, he should be required to expressly so stipulate in his sale agreement. The time for the judicial invention of such conditions has long since passed.

It may be well to add that to render a land contract specifically enforceable by both parties in Pennsylvania, it is only necessary that the vendor sign. The vendee's assent can always be proven by parol.[15] So too, the lessor

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[14]See note in 9 Col. L. Rev. 438.

[15]Parrish v. Koons, 1 Pars. Sel. Eq. Cas. 78 (1884) was decided on the mistaken notion that the vendee must sign, though the contrary had already been decided in Lowry v. Mehaffy, 10 Watts 387 (1840). Not only can a vendee or lessee enforce a contract he did not sign, McFarson's App., 11 Pa. 503 (1849); Shoofstall v. Adams, 2 Grant 209 (1858); Smith's App., 69 Pa. 474 (1871); Shrut v. Huselton, 272 Pa. 113 (1922); Brodhead v. Reinbold, 200 Pa. 618 (1901); Matson v. Slaughenhayt, 64 Super. 581, 583 (1916); Whitman v. Reading, 191 Pa. 134, 140 (1899); but so also can the vendor fully enforce a contract which the vendor only has signed, Tripp v. Bishop, 56 Pa. 424 (1867), the leading case; Johnson v. Cowan, 59 Pa. 275 (1868); Swisshelm v. Swissvale Laundry Co., 95 Pa. 367 (1880); Smith and Fleck's App., 69 Pa. 474 (1871). Where a contract for the purchase of land is made by one in his own name, the fact that he was the agent of an undisclosed principal, may be shown by parol evidence. Hall v. White, 123 Pa. 95 (1889); Brodhead v. Reinbold, 200 Pa. 618, 623 (1901). But see dictum contra in Humphrey v. Brown, 291 Pa. 53 (1927). The vendor's only remedy is an action at law, since this remedy is entirely adequate. Kaufman's App., 55 Pa.383 (1867); Dech's App., 57 Pa. 467 (1868); Smaltz's App., 99 Pa. 310 (1882).

only need sign a lease. So too, it is the grantor's, the lessor's, and the vendor's agent who must have authority in writing to execute the deed, the lease or the sale contract for the owner. The one taking title promises only to pay money and the proof of such a promise by parol cannot cast doubt on land titles. Our Statute of Frauds has a single object, the certainty of land titles and the protection of land owners. This is in conspicuous contrast to the rule in all other states, for they all have the fourth section of the British Statute, which requires purchasers of land to sign the agreement if they are to be charged by an action brought thereon. In Pennsylvania it is immaterial who is plaintiff, the vendor's signature is vital and the purchaser's is surplusage. Everywhere else it is the defendant's signature that is vital and that of the plaintiff is surplusage, since mutuality is not required outside of Pennsylvania. In Pennsylvania when the vendor his signed, the remedies of the parties are mutual. If he has not signed, neither can specifically enforce the contract. Curiously, however, it has never been held that a vendor, who cannot collect the price because the contract is in parol, may not for this reason collect the value of his bargain. The notion of the requirements of equal justice to both parties has not been carried so far. It would appear that if giving the vendee the value of the bargain is in effect specific performance, the same is true if such a recovery is allowed to the vendor. But all the cases are to the contrary.[16]

In conclusion it may be added that confusion in the Pennsylvania decisions and the frequently inaccurate comments upon them by leading text writers is attributable to three distinct causes. As Justice Kephart has pointed out, one is the failure to note the difference in the rules applicable to parol contracts and to written contracts. Another is the failure to note that decisions in any other state applicable to written contracts cannot be compared with our decisions because of the difference both in the substance and purpose of our statute as compared with that in force elsewhere. Finally, confusion results from the

[16]Bowser v. Cessna, supra, n. 8; Ashcom v. Smith, 2 P. & W. 211 (1830); Ewing v. Tees, 1 Binn. 450 (1808); Tompkins v. Haas, 2 Pa. 74 (1845); Ellet v. Paxson, supra, n. 5; But see the clearly erroneous decision in Carner v. Peters, 9 Super. 29 (1898), in which the court talks about "fraud" of the vendee as a prerequisite of a recovery of the value of the bargain.

assumption that reasoning applicable in vendee's suits is equally applicable in vendor's suits and that the rules must be the counterparts of each other.[17]

The instant decision was foreshadowed in one case, *Bartram v. Hering*,[18] in which it was declared that a vendor who declines to perform a bad bargain, in such form as to be susceptible of specific enforcement, must pay the value of the bargain, if the vendee elects to bring assumpsit. It is well that the highest court has now set this matter at rest.

J. P. McKeehan

DOMESTIC RELATIONS—CONFLICTING PRESUMPTIONS—EFFECT OF REMOVAL OF DISABILITY UPON MATRIMONIAL CONDUCT—A recent Pennsylvania case, *Holben's Estate, 93 Super. Ct. 472 (1928)*, presents some interesting questions of the law of marriage, (1) the conflict between the presumption of the continuance of a meretricious relationship and the presumption of marriage arising from subsequent cohabitation and reputation as husband and wife, (2) the creation of a true marital status after removal of a disability which has made the previous matrimonial conduct illicit.

The case involved the right to share as widow in the distribution of a decedent's estate. The claimant was married in 1871 to one Eastman, in Tennessee, where they lived until 1882. At that time, he left the state without her knowledge, and she never heard from him again. Soon after this desertion, she removed to Pennsylvania, and sometime prior to 1898 heard from a friend in Tennessee that her husband was reported to be dead. She employed an attorney to ascertain the truth of this report, which he was unable to do. In 1898, she married the decedent, and they lived together as husband and wife until his death in 1926. In 1903, the claimant learned that her first husband had died, after remarrying in Michigan in 1900. On these facts the Orphans' Court disallowed her claim as widow. On appeal the Superior Court, with two judges dissenting,

[17]See 3 Sedgewick on Damages, 9th Ed. sec. 1009. 2 Sutherland on Damages, sec. 583, p. 2003; Parrish v. Koons, 1 Pars. Eq. Cas. 78 (1844); Twitchell v. Phila. 33 Pa. 212 (1859); Schultz v. Burlock, 6 Super. 574 (1898); and other clearly erroneous decisions which might be cited.

[18]18 Super. 395 (1901).