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STUDIES IN THE LAW OF THE STATUTE OF
FRAUDS.¹

IX. THE STATUTE OF FRAUDS IN PENNSYLVANIA.

IN the discussion of the Statute of Frauds, both in the treatises and in judicial decisions, the peculiar condition of the law on that subject as existing in Pennsylvania has been much referred to, and the reason for the interest thus shown by the profession at large, has been the light which these local adjudications throw upon the general subject. The first three sections of 29 Car. II., c. 3, having for a long time been the only ones in force in that state, and only the seventh, eighth and a portion of the fourth having been since added, it was necessary to analyze the statute very carefully, to distinguish each section from every other, and to determine what portion of the law took its source from one provision, and what from another, in order to ascertain how far English rulings applied. When it is remarked that the lucid mind of GIBSON, to give no other instances, devoted itself to this work through a long period of years, the thorough sifting which the earlier decisions received and the minute investigation which the entire statute underwent, the results of which are to be found in the present law of Pennsylvania, must

¹ This, with the papers under the same title which have already appeared (13 Am. Law Reg. N. S. 593; Id. 721; 15 Id. 321), has been adapted from "Leading Cases in the Law of the Statute of Frauds," by HENRY REED, Esq., now in preparation.

be acknowledged to have a wider value than to regulate the litigation of the single state itself.

1. *The history of the statute.*

Before March 21st 1772, the statute of 29 Car. II., c. 3, though enacted prior to Penn's charter and subsequent to the settlement of the colony, was held not to be in force in Pennsylvania, on the ground that of such prior statutes (except those that expressly referred to the colony) none applied which were made during the latter's existence as a British possession, and that at the time of the passage of this particular law, the authority of the British governor of New York extended in point of fact over Pennsylvania, being by virtue of the word *territories* used in the royal charter to him. Such seems to be the reason of the ruling in *Anonymous*, 1 Dall. 1. (See the note thereto questioning this position and putting the decision upon the broader basis of the inapplicability of such a statute to the circumstances of the colony.) That this is the more correct view is confirmed by the fact that the statute was not re-enacted till 1772, and then only a small portion of it. See *Bell v. Andrews*, 4 Dall. 152; and as to British statutes applying to the colonies, see 1 Shars. Black. Com. 108 n.; Kent Com., 10th ed., 535 (*473) n.

Section 1st of Act 21st March 1772 (1 Sm. L. 389, 2 Car. & Bior. 65), is in substance the same as the first three sections of 29 Car. II., the provision in the latter as to cases "whereupon the rent reserved * * * shall amount to two-thirds * * * of the value * * * of the thing demised," being omitted (see Rawle's Smith on Contracts, *64 n.), and there being also omitted so much of the third section as relates to copyholds and customary interests. The only other parts of 29 Car. II., c. 3, re-enacted in 1772, are some (sections 14, 15, 16 and 25) relating to judgments, executions and intestate estates.

In *Murphy v. Hubert*, 7 Penna. St. 423, Chief Justice GIBSON said that the omission of the seventh and eighth sections of 29 Car. II., c. 3, was conclusive in its effect as to trusts, and that the transcriber of the Pennsylvania statute was a lawyer is evidenced by the masterly way in which he had consolidated the sections of the English statute. In *McDowell v. Oyer*, 21 Penna. St. 421, Chief Justice BLACK said that the omission of the fourth section was deliberate and not accidental. See also *Bowser v. Cessna*, 62 Penna. St. 149.

In Rawle's Smith on Contracts p. 118 (*47) n. 1, the learned editor expressed himself satisfied with the omission from the law of Pennsylvania of the provision of the Statute of Frauds relating to guaranties. See Judge HARE to the same effect in *Birkmyr v. Darrell*, 1 Sm. Lead. Cases, 5th Am. ed. 389 (the passage being omitted in the later editions of the work); see *contra*, *Jack v. Morrison*, 48 Penna. St. 113. In *Sidwell v. Evans*, 1 Penna. (P. & W.) 385, on the contrary, GIBSON, C. J., said: "The mischief produced by the want of a provision in our Act of Assembly similar to that in the Statute of Frauds by which a parol promise to pay the debt of another is void has induced the courts to lean against a recovery whenever the precise terms of the promise are not explicitly shown by clear and satisfactory proof." In *Pugh v. Good*, 3 W. & S. 57, Judge GIBSON expressed himself as of the opinion that the fourth section of 29 Car. II., so far as it related to land, should have been held to be in force in Pennsylvania.

The English decisions made prior to the Revolution in regard to the first three sections of 29 Car. II., were regarded by Judge GIBSON, in *Jones v. Peterman*, 3 S. & R. 543, as binding upon him. See *Pugh v. Good*, 3 W. & S. 58; *Reed v. Reed*, 12 Penna. St. 120; *Farley v. Stokes*, 1 Parsons 429.

By the Act of 26th April 1855 (Pamph. L. 308), sect. 1, so much of the fourth section of 29 Car. II. as relates to guaranties and to promises by executors to answer out of their own estates, was substantially re-enacted. By the Act of 22d April 1856 (Pamph. L. 533), sect. 4, the seventh and eighth sections of 29 Car. II. relating to trusts, are re-enacted almost verbatim. By sect. 5 of the same Act of 1856, so much of the fourth section of 29 Car. II. as related to contracts for the sale of land was re-enacted, but this section (5th) was repealed by Act of 13th May 1857 (Pamph. L. 500). In *Dumars v. Miller*, 34 Penna. St. 323, Judge WOODWARD said this fifth section was well considered and was repealed without due consideration. In *Ewing v. Thompson*, 66 Penna. St. 382, Judge READ regretted the repeal of this section.

Sect. 4 of Act of 22d April 1855 is prospective: *Lingenfelter v. Ritchey*, 58 Penna. St. 488; *Ballentine v. White*, 77 Id. 20; See also *Moffitt v. Rynd*, 69 Id. 387.

Sect. 6 of Act of 22d April 1856, provides that "no right of entry shall accrue or action be maintained for a specific performance of any contract for the sale of real estate, or for damages for non-

compliance with any such contract, or to enforce any equity of redemption after re-entry made, for condition broken, or to enforce any implied or resulting trust as to realty, but within five years after such contract was made, or such equity or trust accrued with the right of entry, unless such contract shall give a longer time for its performance, or there has been in part a substantial performance, or such contract, equity of redemption, or trust shall have been acknowledged by a writing to subsist by the party to be charged therewith within the same period;" with a provision that in the case of fraud the time shall only begin to run from the discovery of the fraud.

2. *The action of damages for the breach of a parol contract for the sale of land.*

As a consequence of the omission of the fourth section of 29 Car. II., it has been held in Pennsylvania, from a very early day to the present time, that though the Act of 1772 forbade the transfer of estates in land except by a writing, a parol contract of sale was not void, and that an action of damages lay for the breach of such an engagement (*Bell v. Andrews*, 4 Dall. 152); the court saying that the only effect of the Pennsylvania statute was to restrict the operation of the agreement as to the acquisition of an interest in land. In *Ewing v. Tees*, 1 Binn. 450, TILGHMAN, C. J., said, that at nisi prius several such actions for damages had been allowed. In *Whitehead v. Carr*, 5 Watts 368, HUSTON, J., said * * * "It is a grave question in what case and under what circumstances an action (*i. e.* for breach of a parol contract to sell land) will lie." In *George v. Barton*, 7 Watts 532, it was said by the court that "It is unnecessary to depend on *Bell v. Andrews* or *Ewing v. Tees* for a consequence so plain as that an action may be maintained on an unexecuted parol contract for the purchase and sale of land; we have not re-enacted the fourth section of 29 Car. II., c. 3, which forbids it, and the provisions of the three sections condensed by our statute into one merely operate upon the estate. We might as well doubt whether an action could be maintained on a parol contract of marriage; should the jury attempt to enforce the contract by damages given as a penalty, it would be the duty of the court to prevent it, as in *Irvine v. Bull*, 4 Watts 289." *Pattison v. Horn*, 1 Grant's Cases 302 (holding however that specific execution of a parol contract for the sale of land will not be decreed); *Bender v. Bender*, 17 Penna. St. 419; *Moore v. Small*, 19 Id. 461; *Kurtz v. Cum-*

mings, 24 Id. 35, affirm *Bell v. Andrews* and *Ewing v. Tres*. In *Pugh v. Good*, 3 W. & S. 57, Judge GIBSON doubted whether the prohibition of a parol contract for the sale of land, as far as such a contract has been prohibited in Pennsylvania, can well rest on the first section of the Statute of Frauds as adopted.

Before going into a consideration of the method of applying this doctrine, what damages may be recovered in such an action, how it is affected by the Statute of Limitations, etc., we stop to ascertain how far the right we are speaking of is peculiar to Pennsylvania. In *Ewing v. Thompson*, 66 Penna. St. 383, Judge READ said that it was unknown out of that state. In *Welch v. Lawson*, 32 Miss. 170, the court held that for trouble and loss of time and expense incurred by one under a parol contract invalid because of the Statute of Frauds, compensation would be decreed in equity, but none for the loss of the bargain. *Bell v. Andrews*, *supra*, was cited by counsel, with cases to effect that for expenses incurred on the faith of a parol contract, as for example, improvements made, equity will decree compensation; see also *Sutton v. Sutton*, 13 Vt. 71; *Reynolds v. Johnston*, 13 Texas 214; *Merithew v. Andrews*, 44 Barb. 200; *Richards v. Allen*, 17 Me. 296; *Battle v. Rochester City Bank*, 15 Barb. 414; *Lee v. Howe*, 27 Mo. 521; *Gupton v. Gupton*, 37 Mo. 46; *Jervis v. Smith*, Hoff. Ch. 470. See *Pugh v. Good*, *supra*, where it was said that notwithstanding the fourth section of the Statute of Frauds, compensation for acts of part performance done under an invalid parol contract could as easily be obtained in England as in Pennsylvania. See Browne on Statute of Frauds, § 118 *et seq.*, and § 124; Agnew on Statute of Frauds, pp. 118, 156-8, 229. See the arguments of counsel in *Welch v. Lawson*, for cases cited as showing that fraud will lay ground for an action in spite of the Statute of Frauds; see also *Lillard v. Casey*, 2 Bibb 459, and *Montague v. Garnett*, 3 Bush 297, where an action to partially enforce an invalid parol contract for the sale of goods was sustained. In *Couch v. Meeker*, 2 Conn. 302, there was endorsed on a promissory note a condition to the effect that if the defendant, the maker of the note, should stand to his agreement, which was in parol, to sell the plaintiff, the holder of the note, a certain farm, the note was to be void, otherwise not; it was held that though a recovery on the note was in substance giving damages for the breach of a parol contract for the sale of land, yet that the plaintiff could show that the bargain concerning the

land had not been complied with, and so recover on the note. These are, as far as the present writer knows, the only analogies to the Pennsylvania doctrine. In *Ballard v. Bond*, 32 Vt. 55, it was held that an action of damages for the breach of a parol contract would not lie, and in cases too numerous to mention the same rule has been made by implication.

In *Poorman v. Kilgore*, 37 Penna. St. 311, it was held that the evidence in an action for the breach of a parol contract for the sale of land must be clear, satisfactory and unambiguous.

In *Postlethwaite v. Frease*, 31 Penna. St. 472, the query was made probably without any good reason, whether the compensation for the breach of an invalid parol contract might not be had by a conditional verdict in ejectment.

In *Thurston v. Franklin College*, 16 Penna. St. 154, it was held that this right of action will accrue when the vendor conveys to a stranger and exists before an eviction by the grantee.

In *Ewing v. Tees*, 1 Binn. 450, it was said that an action for the breach of a parol contract for the sale of land must be begun within six years (now by Act of 22d April 1856, sect. 6, Pamph. L. 533, five years). In *Poorman v. Kilgore*, *supra*, it was held that the fact that an attempt to have a parol contract for the sale of land specifically enforced has been judicially decided against, is no bar to the action for damages.

In *Meason v. Kaine*, 67 Penna. St. 131, it was held that, where one who sued on a contract for the sale of land for a certain difference of price which he lost by the defendant's default, and was, owing to the Statute of Frauds, held not entitled to recover on the contract, he could amend and sue for damages for the breach of contract, the alteration not being a substantial change in the cause of action and one therefore allowed by the Pennsylvania law of amendments.

In *Gangwer v. Fry*, 17 Penna. St. 495, it was held that damages for the breach of a special unexecuted parol contract for the sale of land cannot be recovered under counts for goods sold and delivered or money had and received.

The last and most important question arising under the present head is that of the *measure of damages*.

In *Irvine v. Bull*, 4 Watts 289, it was held that a conditional verdict giving the plaintiff who sues for the breach of a parol contract relating to land, large damages, to be released upon the defendant giving the plaintiff a deed for the land, would not be sustained

by the court, a judgment for actual damages being all that the plaintiff can obtain in such an action. It should be noted that such a conditional verdict as the above was formerly in Pennsylvania the means by which, in default of chancery powers, the courts being merely common-law courts, though administering equitable principles, accomplished the ends for which a decree for specific performance, injunction, etc., are the appropriate machinery.

A certain amount of confusion has arisen in Pennsylvania in regard to the question how far in an action for the breach of a parol contract the vendor or vendee can recover for the loss of the bargain.

Two early cases, *Ellet v. Parson*, 2 W. & S. 433, and *Sedam v. Shaffer*, 5 Id. 524, by the generality of their language would seem to countenance a notion that the true measure of damages was the difference between the market value of the land at the time of the breach and the contract price, whether in the shape of a loss to be reimbursed to the vendor by a vendee who has refused to take the property, as in *Ellet v. Parson*, or in a profit realized by the defendant who was to buy for himself and the plaintiff, which profit he refused to let the plaintiff have, as in *Sedam v. Shaffer*. This is apparently compensation for the loss of the bargain, the recovery of which has always been persistently denied except in some special instances to be noticed in a moment. We shall consider, first, exactly what *Ellet v. Parson* and *Sedam v. Shaffer* decide; secondly, what are those exceptional instances in which damages for the loss of the bargain can be recovered. We think it will be seen as to the first head, that the result of *Ellet v. Parson* and *Sedam v. Shaffer* is to allow compensation for the loss of the bargain; as to the second head that the exceptional instances are, first, where the action is against a defendant who has failed to comply with his bid at a public sale for the difference in price brought on a re-sale, and second, where there has been actual fraud on the defendant's part in not complying with his contract, a fraud which must consist in something more than the mere failure to comply with his contract, even though he be able so to comply; and that further, the facts of *Ellet v. Parson* and *Sedam v. Shaffer* do not come within these two exceptions. And thirdly, that there are Pennsylvania cases not only upholding these exceptions strictly, and strictly defining the word "fraud;" but some which seem by implication to negative the doctrine of *Ellet v. Parson*, etc.

To give the cases in the above order, we begin with *Ellet v. Par-*

son, 2 W. & S. 433, in which it was held that in an action for the breach of a parol contract for the sale of land, the vendor cannot recover the whole amount of the purchase-money, as that would be equivalent to specific performance (see *Tripp v. Bishop*, 56 Penna. St. 426); but that the most the plaintiff could recover was damages "equal to the loss actually sustained by the non-fulfilment of the contract, which in this case would appear," said the court, "from the evidence, to be the difference between the value of the property at the time the defendant refused to fulfil the contract and the sum agreed to be paid as the price of it." Following in the same lead we have next *Sedam v. Shaffer*, 5 W. & S. 524, in which it was held that where the plaintiff and defendant agreed by parol, that upon a consideration which was performed by the former, the latter should buy land, and if he should sell it above a certain price, the difference was to go to the plaintiff, it was held that while an action for money had and received, and for specific performance of the contract by a decree that the amount of the difference between the sum mentioned in the contract and that actually brought by the land when sold should be paid the plaintiff under the contract, did not lie, yet that an action in disaffirmance of the contract for its breach would do so in Pennsylvania, and the measure of damages was the aforesaid difference. As confirming these cases, see the remarks of Judge STRONG in *Hoy v. Grenoble*, 34 Penna. St. 11, to the effect that profits to be made directly from the transaction are to be taken into consideration.

Under the second head, we have first the case of a failure to comply with a bid at a public sale. In *Bowser v. Cessna*, 62 Penna. St. 149, where the defendant's default was in not complying with his bid made at a public sale, it was said by Judge SHARSWOOD, in giving the opinion, that "It is well settled that the damages to be recovered (on a parol contract for the sale of land) is the difference between the value of the property at the time of the breach and the sum agreed on as the price: *Ellet v. Paxson*, *vide supra*, * * *. It is true that where a vendor, not wilfully and fraudulently, but because unable to make title, has not fulfilled his contract, the vendee can only recover what he may have paid and the expenses to which he has been subjected, but not the damages sustained by the loss of his bargain (*Dumars v. Miller*, *supra*), but that is not because the contract is by parol. The same rule applies to written contracts, and depends upon different principles * * *. The

objection of want of mutuality of remedy has therefore no application. The rule" (*i. e.* of fixing as damages for the failure to comply with a contract of sale, the difference in price as shown on a re-sale), the learned judge added, "has been universally acted upon in reference to the sale of chattels, and the Statute of Frauds being out of the way, there is no reason why the harmony of the system should not be preserved by resorting to it also in the sale of realty;" cases being cited. In *Ashcom v. Smith*, 2 Penna. (P. & W.) 211, which was an action against one who failed to comply with his bid made at a public sale, to recover the difference between his bid aforesaid and the amount brought by the land at a re-sale: said GIBSON, C. J., "where the vendor has acted bona fide and with reasonable care the measure of damages is the difference of price on the re-sale. But his conduct may be so grossly improper as to cast a loss from it upon him, as when the re-sale is wantonly delayed * * *. But mere unskilfulness, without mala fides, or even negligence, unless it be plain and palpable, will not be sufficient to charge him." See *Tompkins v. Haas*, 2 Penna. St. 75, to the same effect.

Leaving this, we come to the second consideration under the second head, that, namely, of fraud, and have first, *Rohr v. Kindt*, 3 W. & S. 563, in which it was said that if the defendant being unable to make title under his contract, gave notice to the plaintiff, the measure of damages would be the actual loss and damage suffered by the plaintiff under the contract and because of its breach. In *Bitner v. Brough*, 11 Penna. St. 139, it was held that where a defendant in good faith is unable to make title under a parol contract he is liable to the plaintiff for the money paid by the latter together with interest and expenses, but that if, however, the defendant acts in bad faith, the plaintiff is entitled not only to compensatory damages, but to damages arising from the loss of the bargain or the money he might have derived from the completion of the contract, but to no vindictive or exemplary damages. *Hoy v. Gronoble*, 34 Penna. St. 11, follows *Bitner v. Brough*, in allowing damages for the loss of the bargain and disallowing vindictive damages; authorities being cited. Judge STRONG said that the profits to be made directly from the transaction, are to be considered to be in the immediate contemplation of the parties to a contract, and if not speculative are not consequential (see *Bowser v. Cessna*, *supra*, and *Meason v. Kaine*, *infra*). In *McCloury v. Croghan*, 31

Penna. St. 22, it was held that where a vendor owing to a defect in the title and through no default or bad faith of his own is unable to make title, he is liable in an action on a parol contract for the sale of land only in nominal damages for the loss to the vendee of the bargain; and that where the vendor has been in default or shown bad faith he is liable for the subsequent difference in the value of the land, but not where he is simply unable to make title. In *McNair v. Compton*, 35 Penna. St. 28, Judge WOODWARD said that as against a *fraudulent* vendor it was reasonable that damages should be given to compensate for all the expenses in which his, the defendant's, fraud had involved the plaintiff. (See *Wilson v. Clarke*, 1 W. & S. 555, as to actions against such vendors.) In *Meason v. Kaine*, 63 Penna. St. 339, it was held that where three agree by parol to buy land and one of them refuses to pay his share, the measure of damages would be the difference between the price he agreed to pay and the present market value of the land; cases being cited. See, however, for the ground of fraud on which this case went, and for an explanation of the phrase "present market value," *Meason v. Kaine*, 67 Penna. St. 131, *infra*.

And next, as to what constitutes such fraud as is raised in these cases, we have *Meason v. Kaine*, 67 Penna. St. 131, in which it was held that where one of three persons who had by parol agreed to buy land, sued another of the three, the plaintiff having in accordance with the parol contract purchased the land, the measure of damages was not the defendant's quota of the purchase-money, for that would be to specifically enforce the trust subsisting between the parties, and which under the Act of 22d April 1856, being express could not be proved by parol, and would moreover violate the equitable doctrine of mutuality of remedy (see *infra*): It was further said that in the absence of fraud nothing can be recovered for the loss of a parol bargain, but compensation only for the actual loss sustained, such as the payment of money, &c., and for expenses incurred on the faith of the bargain. But that it was fraud in a defendant to induce the plaintiff to buy on a promise that he, the defendant, would participate in the purchase, thus leading the plaintiff to change his position and incur heavy responsibility which the bar of the Statute of Frauds preventing specific performance only intensified. That the phrase "present market value" of the land, used in *Meason v. Kaine*, 67 Penna. St. *supra*, meant the value at

the time of the final breach of the contract and not at the time of the trial; cases being cited. In *Harris v. Harris*, 70 Penna. St. 174, it was said that the only fraud on the vendor's part is in the *original contract*, mere failure to convey, though the vendor be able to convey, is not such fraud; thus negating the suggestion made with more or less directness in *Rohr v. Kindt*, *Bitner v. Brough*, *Hoy v. Grenoble*, *McCloury v. Croghan*, *Bowser v. Cessna*, all *supra*, to the effect that the wilful default in not complying with his contract on the part of a defendant who is able to comply, if he chooses, is an element in the compensation for the loss of the bargain, or is a reason for giving any other damages than those for the loss which the plaintiff has actually suffered. See Browne on the Statute of Frauds, § 429, *et seq.*

The exception made in favor of a bid at a public sale, it may be added, seems founded on the fact which the courts can hardly fail to recognise, of the nature of an auction sale in which the bids are a fair and natural gauge of what the land would have actually brought to its owner, the plaintiff, if the defendant had not by first making a bid and then refusing to comply with it, entailed upon the plaintiff the loss for which he sues; the difference between the defendant's bid and the price on a re-sale, represents the money which the plaintiff would have had but for the defendant's action, whereas when in the case of a private sale the defendant sues for the difference between the market price of the land at the time of the breach, and the amount of the defendant's offer, it does not follow that but for the defendant and his contract the plaintiff could ever have obtained so good an offer; *non constat*, that any one else would have valued the land so highly or that the land was worth what the defendant was willing to give for it. Even in cases where evidence might be offered to show that but for the defendant's interference the plaintiff could have sold the land to others at the price offered by the defendant, the court might well refuse to go into such consideration as being too uncertain and remote, and confine the recovery for such loss of bargain to the exception of a public sale, where, as has been suggested, the worth of the land is so simply and effectually tested as that the law will take notice of the fact. The exception in favor of damages for the loss of a parol bargain where the defendant has been guilty of fraud depends, as was aptly indicated by Judge SILLARSWOOD in *Bowser v. Cessna*, *supra*, upon

general considerations irrespective of the Statute of Frauds. See Field on Damages, § 479 *et seq.*, § 484 *et seq.*

Lastly, as cases which lay down a rule which would appear to exclude such a recovery as was allowed in *Ellet v. Parson*, and *Sedam v. Shaffer*, we have *Dumars v. Miller*, 34 Penna. St. 323, in which it was held that in the absence of fraud the plaintiff in an action for the breach of a parol contract for the sale of land, cannot recover the value of the bargain, and that the consideration, if it has been paid, must be returned with interest, and expenses incurred must be re-imbursed. In *Bender v. Bender*, 17 Penna. St. 419, in an action for the breach of a parol contract for the sale of land, it was held that the damages were "compensation for all that the plaintiff below did in pursuance of the contract and in satisfaction of his part thereof, and for all permanent improvements made upon the land in reliance upon the contract with the knowledge of the defendant and which the defendant gets the benefit of by taking back the land, deducting the value of the rents and profits of the land during the plaintiff's occupancy:" see *Harris v. Harris*, *supra*. In *Ewing v. Thompson*, 66 Penna. St. 383, Judge READ said "By our law such an action (*i. e.* on a parol contract for the sale of land) may be sustained, but the measure of damages is the actual consideration between the parties; if the consideration were services rendered, they are to be compensated according to their value; if moneys received they are to be returned with interest, but the value of the bargain is not the measure."

We come now to the last point under this general head of the *measure of damages*, viz., what are the damages where the parol contract has been to reward the plaintiff's services to the defendant by the conveyance of certain land. It was at first held in *Jack v. McKee*, 9 Penna. St. 245, Judge ROGERS relying on a dictum of his own in *Rohr v. Kindt*, 3 W. & S. 563, that the measure was the value of the land, and not merely the value of the services: *Bash v. Bash*, 9 Penna. St. 260; *Malawn's Adm'r v. Ammon*, 1 Grant 131 (see an able dissenting opinion by Judge WOODWARD); *McClintock v. Beach*, cited in 1 Grant 145; *McDowell v. Oyer*, 21 Penna. St. 421 (in which BLACK, C. J., in a forcible opinion, said that the doctrine of *Jack v. McKee* was one long known to the Common Pleas in certain parts of the state), follow *Jack v. McKee*. See also, as apparently in favor of *Jack v. McKee*, to a greater or less degree, *Basford v. Pearson*, 9 Allen 390; *Horn v.*

Goodrich, 37 N. H. 185 (where the court said that the value of the land did not fix the damages, but that in estimating these, the jury might take into consideration such value); *Thomas v. Dickinson*, 14 Barb. 90; *Nones v. Homer*, 2 Hilt. 116; *King v. Brown*, 2 Hill 485; *Clark v. Terry*, 25 Conn. 395; see, however, *Lisk v. Sherman*, 25 Barb. 433; *Erben v. Lorillard*, 19 N. Y. 299; *Emery v. Smith*, 46 N. H. 151; *Fuller v. Reed*, 38 Cal. 99; Browne on Stat. of Frauds, § 125.

In *Hertzog v. Hertzog*, 34 Penna. St. 419, *Jack v. McKee*, and its train of dependent cases, were overruled by an unanimous court, and it was held that the early rule was to be adhered to; namely, that the damages in an action for a breach of a parol contract relating to land were merely compensation for what had been paid and done on the footing of the contract and were to put the parties where they were before the contract was made. The unjust results of the ruling in *Jack v. McKee* were said to have been very palpable.

Among the earlier cases referred to in *Hertzog v. Hertzog*, the following throw, perhaps, the greatest light on the disputed point. In *Ewing v. Tees*, 1 Binn. 450, C. J. TILGHMAN said that, * * * "an action for damages for not performing a contract is of much less moment" (than an action by which title to land should be transferred); "the jury may give such damages as under the circumstances of each case appears reasonable, and these damages will often be very small, and there is less danger because they must be commenced within six years (*vide supra*)." In 1 Smith's Laws of Pennsylvania 397, said the annotator, quoting *Ewing v. Tees*, "But if in the mere case of a parol contract the jury could in any case be induced to give exemplary damages beyond the actual loss or injury or the difference in price on a second sale, the act * * * might then become a dead letter. If under the pressure of heavy damages the party could in such cases be deprived of what is called the *locus pœnitentiæ*, and on the one hand be compelled to convey, or on the other to accept of the purchase, having damages against him to the amount of the contract according as the jury may view the circumstances of the case, the distinction would then be without a difference and the absence of the fourth section of the Statute of Frauds be a serious inconvenience;" see for cases cited and distinguished. In *Pfeifer v. Landis*, 1 Watts 329, in an action of ejectment on a parol contract to reward services with the convey-