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THE RIGHT OF A DEFAULTING VENDEE TO THE RESTITUTION OF INSTALMENTS PAID

ARTHUR L. CORBIN*

THE question whether a vendee of land, who defaults after having paid one or more instalments of the price, can maintain an action for the recovery of any part of such instalments, is but a subordinate part of a larger problem. When can any contractor who is himself in default get judgment for compensation for a part performance rendered by him? It is a question of vital import to building contractors, sellers and buyers of goods, employees who have quit service or have been discharged for cause, as well as to vendees of land. In all these cases alike, there are conflict and inconsistency and differences of opinion as to what public policy and the general welfare require. The position of the defaulting vendee, however, has generally not been consciously related to the other types of cases.

In order to reconcile decisions, to eliminate actual conflict in the future, and to construct a consistent system of law, it is necessary to give more definite consideration to the equitable rules against the enforcement of penalties and forfeitures. If a contractor has committed a total breach of his contract, having rendered no performance whatever thereunder, no penalty or forfeiture will be enforced against him; he will be required to do no more than to make the injured party whole by paying full compensatory damages. In like manner, a contractor who commits a breach after he has rendered part performance must also make the injured party whole by payment of full compensatory damages. The part performance rendered, however, may be much more valuable to the defendant than the amount of the injury caused by the breach; and in such case, to allow the injured party to retain the benefit of the part performance so rendered, without making restitution of any part of such value, is the enforcement of a penalty or forfeiture against the contract-breaker. In these cases the following questions should be plainly

* Townsend Professor of Law, Yale University; editor of ANSON, PRINCIPLES OF THE LAW OF CONTRACT (Am. ed.)

put and definitely answered: Is a plaintiff who has partly performed a contract to be penalized more strongly than one who has not performed at all? Secondly, is a plaintiff who has almost fully performed his contract to be penalized more heavily than one who has performed only a small part of the contract? If a plaintiff in default is in no case to be given a restitutionary remedy, and if he must forfeit his entire part performance for nothing in return, whether that part is great or small, we are answering the foregoing questions in the affirmative.

In this article, the cases involving the vendee's right of restitution will be collected in considerable quantity; and an attempt will be made to analyze and classify them in accordance with the facts that were actually involved, as well as with the decision and reasoning of the court.

There are almost innumerable cases dealing with the right of a defaulting vendee to get restitution of instalments of the price paid by him prior to the default. The facts in these cases are of a very considerable variety, so that the right of restitution may well exist in some but not in others. Cases granting restitution and cases denying it can frequently be reconciled on reasonable grounds. In statements of the law, however, this is generally disregarded, the assumption being that all claims by a defaulting vendee should be decided alike. On such an assumption as this, it may be said that a very great majority of the cases have refused restitution.

It has been thought by some that restitution should always be refused, for the good and sufficient reason that the plaintiff is one who is guilty of a breach of contract and should never be allowed to have advantage from his own wrong; and cases are numerous that lay down such a rule, even where there is no express provision for forfeiture.¹ It is true that he has broken his

¹ Flagler v. Kroonen, 61 Cal. App. 359, 214 Pac. 1006 (1923); Beck v. Swank, 55 Cal. App. 552, 203 Pac. 1010 (1922); Petersen v. Bunting, 43 Cal. App. 707, 185 Pac. 508 (1919); Wheeler v. Mather, 56 Ill. 241 (1870); Ryan v. Shoenberger, 224 Ill. App. 308 (1922); Roberts v. Yaw, 62 Kan. 43, 61 Pac. 409 (1900); Frost v. Frost, 11 Me. 235 (1835); Nelson Real Est. Agency v. Seeman, 147 Minn. 354, 180 N. W. 227 (1920); Lowry v. Robinson, 3 Neb. (Unoff.) 145, 91 N. W. 174 (1902); Page v. McDonnell, 55 N. Y. 299 (1873); Toomey v. Sporn, 145 Okla. 38, 291 Pac. 22 (1930) (\$1,000 down payment on an \$18,000 purchase); Helm v. Rone, 43 Okla. 137, 138, 141 Pac. 678, 679 (1914), "the rule is, without exception, that where a party advances money in part performance of an executory contract of sale, and afterwards breaches his contract, he cannot recover the money paid;" Boyd v. McCullough, 137 Pa. 7, 20 Atl. 630 (1890) (\$811 paid, out of \$1,350). See extensive notes in L.R.A. 1918B 540, and 59 A.L.R. 189 (1929).

In Lawrence v. Miller, 86 N. Y. 131, 140 (1881), the court refused to give judgment for restitution of instalments paid by the vendee, saying: "The defendant came by it rightfully; in pursuance of a contract lawfully made, between competent parties. He has made no breach of that contract.

contract; for, if his non-payment of the balance promised by him is excused by the law, whether by the vendor's prior repudiation or breach, or by failure of consideration due to nobody's breach, or otherwise, all agree that he has a right of restitution. Such cases are not within the present subject. It is true, also, that the plaintiff's breach is a total breach—that is, one that goes to the essence; for if it is a mere partial and minor breach, it does not justify the vendor's refusal to convey, and the vendee can get damages for such a refusal, as well as the alternative remedy of restitution. But the right of a contractor, who is himself vitally in default, to some compensation of a restitutionary character, has been recognized and enforced in too many thousands of cases to deny such a right to a vendee merely because he is in default. As in other cases, we must consider why he is in default, and the terms of the contract, and the amount that he has paid, and the extent of injury that his breach has caused.

Not infrequently it has been thought sufficient reason for denying restitution that the express terms of the contract made time of the essence and provided that, in case of default, all instalments paid should be "forfeited" to the vendor or should be "retained" by him as liquidated damages.² But here, too, factors

He has failed in no duty to the vendee. Wherefore, then, should he give up that which was rightfully his own? When and whereby did it cease to be his and to be due to the vendee? If the contract had been kept by both parties, the money paid would still be his of right. The contract would have been kept but for the breach of it by the vendee. . . . To maintain this action would be to declare that a party may violate his agreement, and make an infraction of it by himself a cause of action. That would be ill doctrine."

² *Hansbrough v. Peck*, 72 U. S. 497 (1866); *Public Industrials Corp. v. Reading Hdw. Co.*, 29 F. (2d) 975 (C. C. A. 3d, 1929); *Glock v. Howard & Wilson C. Co.*, 123 Cal. 1, 55 Pac. 713 (1898); *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 123 Pac. 363 (1912); *Hyman v. Harbor View Land Co.*, 46 Cal. App. 98, 188 Pac. 828 (1920); *Chubb v. J. Harker Chadwick & Co.*, 93 Fla. 114, 111 So. 538 (1927); *Bryson v. Crawford*, 68 Ill. 362 (1873); *Heckard v. Sayre*, 34 Ill. 142 (1864); *Chrisman v. Miller*, 21 Ill. 227 (1859); *Stoddard v. Abercrombie*, 46 Idaho 69, 266 Pac. 431 (1928); *Butler v. Cortner*, 42 Idaho 302, 246 Pac. 314 (1926) (no recovery "at law," with suggestion that there might be "in equity," this being a civil action in a code state); *Papesh v. Wagnon*, 29 Idaho 93, 157 Pac. 775 (1916); *Hawkins v. Robertson*, 136 N. E. 576 (Ind. 1922); *Miller v. Fletcher Sav. & T. Co.*, 78 Ind. App. 183, 133 N. E. 174 (1921); *Krisky v. Bryan*, 63 Ind. App. 611, 115 N. E. 70 (1917); *Converse v. Elliott*, 200 Iowa 1023, 205 N. W. 867 (1925); *Hamaker v. Johnson*, 199 Iowa 1298, 202 N. W. 10 (1925); *Liewen v. Blau*, 184 Iowa 327, 168 N. W. 811 (1918); *Iowa R. R. Land Co. v. Mickel*, 41 Iowa 402 (1875); *Gamer v. Piper*, 125 Kan. 395, 264 Pac. 1071 (1928); *McCain v. Hicks*, 150 La. 43, 90 So. 506 (1922); *Keefe v. Fairfield*, 184 Mass. 334, 68 N. E. 342 (1903); *Crenshaw v. Granet*, 237 Mich. 367, 211 N. W. 636 (1927); *Security Inv. Co. v. Meister*, 214 Mich. 337, 183 N. W. 183 (1921); *Maloy v. Muir*, 62 Neb. 80, 86 N. W.

enter in that are considered influential in other fields of law and, in fact, are influential here. Penalties and forfeitures are not favored; and calling an outrageous penalty by the more kindly name of liquidated damages does not absolve it from its sin. The absence of such an express provision, on the other hand, has often been given as a reason for granting restitution.³ The cases stating that a vendee in default cannot have restitution of instalments, and also that an express provision for their forfeiture is valid and enforceable, are so numerous that such statements are very generally regarded as existing law. They ought to be so regarded only if the actual facts in these cases are to be treated as immaterial, if other accepted principles of law that are inconsistent with them are to be disregarded, and if the various decisions that are in conflict with them are declared to be erroneous.

VENDEE HAS NO RIGHT OF RESTITUTION WHILE VENDOR STILL HAS
RIGHT TO SPECIFIC PERFORMANCE

A contract for the sale of land differs in several material respects from other contracts. It is almost invariably held to be specifically enforceable at the suit of either the vendor or the

916 (1901); Patterson v. Murphy, 41 Neb. 818, 60 N. W. 1 (1894); Beveridge v. West Side Const. Co., 130 App. Div. 139, 114 N. Y. Supp. 521 (1st Dep't 1909); Kershaw v. Hurtt, 66 Okla., 117, 168 Pac. 202 (1917); Anderson v. Hurlbert, 109 Ore. 284, 219 Pac. 1092 (1923); Mitchell v. Hughes, 80 Ore. 574, 157 Pac. 965 (1916); Taylor v. Martin, 51 S. D. 536, 215 N. W. 695 (1927); Thiel v. Miller, 122 Wash. 52, 209 Pac. 1081 (1922); Palmer v. Wash. Sec. Inv. Co., 43 Wash. 451, 86 Pac. 640 (1906); Jennings v. Horton, 43 Wash. 301, 86 Pac. 576 (1906); Reddish v. Smith, 10 Wash. 178, 38 Pac. 1003 (1894). See further AM. DIGEST SYSTEM, tit. "Vendor and Purchaser," Key No. 335.

³ Michigan Yacht Co. v. Busch, 143 Fed. 929 (C. C. A. 6th, 1906); Pierce v. Staub, 78 Conn. 459, 62 Atl. 760 (1906); Gray & Co. v. McDaniel, 73 Ga. 118 (1884), also McDaniel v. Gray & Co., 69 Ga. 433 (1882); Giles v. Gullion, 13 Ind. 487 (1859); Lloyd v. Davis, 2 Ind. App. 170, 28 N. E. 232 (1891); Davis v. Wilson, 55 Ore. 403, 106 Pac. 795 (1910); Dooley v. Stillson, 46 R. I. 332, 128 Atl. 217 (1925).

In *Malmberg v. Baugh*, 62 Utah 331, 342, 218 Pac. 975, 979 (1923), which contains one of the best discussions of this subject, the court said: "There is nothing in the contract, unless it can be read between the lines, by which they agreed to forfeit payments on the purchase price. Equity abhors a forfeiture, and the law does not favor it. This is elementary; in fact, it is axiomatic in every jurisdiction of the country, and we feel justified in propounding the question: Why should anything more than compensatory damages be allowed in cases of this kind, especially where there is no stipulation in the agreement upon which to base the allowance? It is ordinarily considered oppressive and intolerable to enforce a forfeiture amounting to punitive damages even where it is expressly agreed to by the parties. *A fortiori*, such damages should not be awarded where they are not expressly stipulated in the contract."

vendee. Even before any deed of conveyance, the vendee is regarded as having some property interest in the land by virtue of the contract alone. Numbers of cases have held that he bears the risk of loss through destruction of buildings on the land before conveyance and is bound to pay the full price for a proper conveyance in spite of such destruction.⁴ Even the courts that decide otherwise as to this risk of loss do not doubt that the vendee has a property interest by reason of the contract.⁵ The vendor is often said to hold the formal title merely as security for the unpaid price, being, to some degree, in the same position as a mortgagee. He can compel payment of the price in full by a decree for specific performance, or he can foreclose his lien on the premises, the proceeding operating like the foreclosure of a mortgage.⁶

All this being true, it can be seen that there are special reasons for refusing to allow the vendee to repudiate the contract of

⁴ *McGinley v. Forrest*, 107 Neb. 309, 186 N. W. 74; (1921), 22 A.L.R. 567 (1923); *Sewell v. Underhill*, 197 N. Y. 168, 90 N. E. 430, 27 L.R.A. (N. S.) 233 (1910); *Paine v. Meller*, 6 Ves. 349 (1801); AMES, *CASES IN EQUITY* (1909) 227, citing many cases. *Contra: Durham v. McCready*, 151 Atl. 544 (Me. 1930); *Thompson v. Gould*, 20 Pick. 134 (Mass. 1838).

⁵ See *Richeimer v. Fischbein*, 153 Atl. 514 (N. J. Eq. 1931), quoting from *Rose v. Watson*, 10 H.L.C. 672, 683 (1864).

⁶ See *Hansbrough v. Peck*, *supra* note 2 (*semble*); *Odd Fellows Sav. Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109 (1899) (60 days' time being allowed for redemption by the vendee); *Catterline v. Peterson*, 60 Cal. App. 617, 213 Pac. 515 (1923); *Coe v. Bennett*, 46 Idaho 62, 266 Pac. 413 (1928) (strict foreclosure, and no restitution of sums paid); *Dimon v. Wright*, 206 Iowa 693, 214 N. W. 673 (1927) (same); *Freeson v. Bissell*, 63 N. Y. 168 (1875) (foreclosure by sale); *Taylor v. Martin*, 51 S. D. 536, 215 N. W. 695 (1927) (strict foreclosure with no restitution); *Banks v. McQuatters*, 57 S. W. 334 (Tex. Civ. App. 1900), (same). In *Anderson v. Hurlbert*, 109 Ore. 284, 219 Pac. 1092 (1923), where the vendor tendered a conveyance, the vendee was denied restitution but was given a stated time within which to pay the balance due. There was an express forfeiture clause. In some states this is a "strict foreclosure," vesting complete ownership in the vendor; but more often the decree is for foreclosure by a sale of the property. See AMES, *op. cit. supra* note 4, at 226, citing many cases.

The Georgia court has said: "Where the vendee has entered and made improvements, or where he has paid a part of the purchase money, he has acquired an interest in the land. This interest is property. He cannot be deprived of such property except by virtue of some valid contract. It cannot be done by way of penalty or forfeiture. In the sale of land on credit, where the vendor retains title, he has not the absolute estate, but is a trustee holding the title only as security. For many purposes the transaction may be treated in equity as though the vendor had made a deed to the vendee, and the latter had thereupon given a common-law mortgage to secure the purchase money. . . . As in a mortgage, so in its equitable equivalent, a conditional sale of land, a forfeiture will not be enforced even for the vendee's default." *Lytle v. Scottish-American Mortg. Co.*, 122 Ga. 458, 467, 50 S. E. 402, 406 (1905). See also *Yost v. Guinn*, 106 Kan. 465, 188 Pac. 427 (1920).

purchase and to recover judgment for restitution of advance instalments paid. Neither by a repudiation nor by mere failure to pay other instalments, when due, can the vendee terminate the vendor's right to payment of the full price—his right to specific performance, his right as holder of a lien for the purchase price.⁷ As long as the vendor continues to assert these rights and to remain ready and willing to make conveyance as agreed, the defaulting vendee has no right of restitution; he cannot recover back money that he has paid if it is money that the vendor could still compel him to pay if as yet unpaid.⁸ Some of the cases denying restitution to the vendee can be justified on this reasoning, even though the court may not have used it and may not have been conscious of its application.⁹ Few of them have been based upon it in express terms; but not infrequently emphasis is laid upon the fact that the vendor has at all times been ready and willing to perform as agreed.¹⁰ This should be considered in connection with those cases that allow restitution in case the vendor has declared the contract "rescinded."

⁷ The vendor may still enforce specific performance after an unsuccessful suit by the vendee to get restitution of an instalment paid. *Nass v. Munzing*, 100 N. J. Eq. 421, 136 Atl. 344 (1927).

⁸ *Bradford v. Parkhurst*, 96 Cal. 102, 30 Pac. 1106 (1892). See also *Kyger v. Caudill*, 115 Okla. 102, 241 Pac. 814 (1925). The vendor can get judgment for instalments due, remaining himself ready and willing to convey as agreed, and in such case the vendee has no right to money back. *Chace v. Johnson*, 98 Fla. 118, 123 So. 519 (1929); *Meagher v. Hoyle*, 173 Mass. 577, 54 N. E. 347 (1899); *Brown v. Norcross*, 59 N. J. Eq. 427, 45 Atl. 605 (1900); *Champion v. Brown*, 6 Johns. Ch. 398 (N. Y. 1822); *Lea v. Blockland*, 122 Ore. 230, 255 Pac. 801 (1927). The vendor's continued willingness and ability to convey will prevent restitution of instalments, even though for some independent reason the remedy of specific performance is not available to him. *Keystone Hdw. Corp. v. Tague*, 246 N. Y. 79, 158 N. E. 27 (1927). In *Nasha Holding Corp. v. Ridge Bldg. Corp.*, 221 App. Div. 238, 223 N. Y. Supp. 223 (2d Dept. 1927), the vendor, when sued for a down payment, successfully counterclaimed for specific performance.

⁹ In *Hansbrough v. Peck*, *supra* note 2, the vendor had previously obtained a decree for specific enforcement of the contract. Also in *Mintle v. Sylvester*, 202 Iowa 1128, 211 N.W. 367 (1927).

¹⁰ See *Utterbach v. Binns*, Fed. Cas. No. 16,809, 1 McLean 242 (C.C.D. Ky. 1834); *Walbridge v. Richards*, 290 Pac. 304 (Cal. App. 1930) (deposit of \$1,000 on a \$15,000 contract, "the vendor being ready, able, and willing to perform upon his part"); *Nance v. Avenall*, 26 Cal. Pac. 551, 147 Pac. 583 (1915); *List v. Moore*, 20 Cal. App. 616, 129 Pac. 962 (1912); *Roberts v. Yaw*, 62 Kan. 43, 61 Pac. 409 (1900) (down payment of \$290 on a \$1,000 contract, the vendor always tendered performance, even in court); *Smith v. McMahon*, 197 Mass. 16, 83 N. E. 9 (1907); *Pioneer Gold Mining Co. v. Price*, 189 Mo. App. 30, 176 S. W. 474 (1915); *Gallagher v. Dettelbach*, 25 Ohio C. C. 342 (1903) (down payment of \$300 on a \$2,475 contract); *Beatty v. Wintrode Land Co.*, 53 Okla. 118, 155 Pac. 574 (1916); *Snyder v. Johnson*, 44 Okla. 388, 144 Pac. 1035 (1914) (\$1,000 paid down on a \$13,000 contract); *Helm v. Rone*, *supra* note 1; *Foxley v. Rich*, 35 Utah 162,

RESCISSION OF THE CONTRACT AND ITS EFFECT IN CREATING
A RIGHT OF RESTITUTION

In order to avoid the supposed rule that a plaintiff in default has no right of restitution, the courts have often fortunately discovered a "rescission" of the contract, without making any distinction between rescission by mutual assent and that kind of unilateral rescission that consists merely in a declaration of freedom by the injured vendor while loudly asserting all of his own rights under the contract. Some consideration of what is meant by the word "rescission" is here necessary.

In the first place, it is clear that the vendee's own breach is not a rescission in any sense. It is equally clear that he cannot, by his own breach alone, create a right of any kind against the innocent vendor. If, in spite of the breach, the vendor continues to insist upon specific performance and remains ready and willing to convey as agreed, the vendee certainly has no right to any part of his money back. But, generally, the vendor does not insist upon specific performance and does not remain ready and willing to convey. His action, along with the other existing facts, may make it unjust for him to retain all of the money paid.

Let us first consider rescission of the contract by mutual assent of the two parties. A breach of contract is not an offer to rescind, but either party may make such an offer; and if he does so, the other has power of acceptance. The validity of such an agreement is determined in accordance with the same rules as in the case of other contracts. If there has been an effective rescission by mutual assent, neither party is any longer in default if he ever was. The mutual rights of the parties will usually be determined by the terms of the rescission agreement. Sometimes, however, the agreement makes no provision at all with respect to instalments already paid or any other part performance rendered. In such cases, there is a right to the restitution of such instalments, making due allowance for benefits received by the vendee, but with no deduction of damages for a breach. In a few of the cases that award restitution to the vendee, there may have been such a rescission as this.¹¹

There is a second kind of "rescission," one that has caused a

99 Pac. 666 (1909) (down payment of \$500 on a \$3,500 contract); *Woodman v. Blue Grass Land Co.*, 125 Wis. 489, 103 N. W. 236 (1905), rehearing denied 104 N. W. 920 (1905) (express forfeiture of \$1,000 earnest money on a \$31,500 contract).

¹¹ See *King v. Seebeck*, 20 Idaho 223, 118 Pac. 292 (1911); *Baston v. Clifford*, 68 Ill. 67 (1873); *Wright v. Swigart*, 172 Iowa 743, 154 N. W. 938 (1915) (the court labored to find a "mutual abandonment"); *Reiger v. Turley*, 151 Iowa 491, 131 N. W. 866 (1911); *Hurley v. Anicker*, 51 Okla. 97, 151 Pac. 593, L.R.A. 1918B 538 (1915).

good deal of confusion of thought. This is rescission by the act of the vendor alone, not as an acceptance of an offer by the vendee, but as a remedy for the vendee's breach of contract. The words and acts of the vendor in so "rescinding" may be of various kinds; but they are never "I accept your offer to rescind." Instead, the vendor may say: "I rescind the contract for your breach;" or "I declare the contract at an end and your rights terminated." At the same time, he may or he may not assert the forfeiture of instalments paid or make a claim for damages. Again, he may say nothing at all to the vendee, but may merely proceed to sell the land to some one else. The effect of such words or action by the vendor is not the same as the effect of a rescission by mutual assent. The validity and operation of such a rescission depend upon its terms and upon the fact that the parties have both assented thereto. "Rescission" by one party for breach by the other party, on the other hand, is not an agreement and has no terms; and there are no mutual expressions of assent.¹²

The effect of this second kind of "rescission" by a vendor is as follows: It is an assertion of his own privilege not to perform further, a privilege that was already created, however, by the vendee's breach, and is not created by his assertion of it. Its legal operation consists of the fact that it extinguishes the vendor's own right to specific performance, thus also extinguishing the vendee's interest in the land and restoring to the vendor his full property interest as it existed prior to the making of the contract. These effects would not follow upon the vendee's breach alone. Furthermore, it may perhaps create a right of restitution in the vendee; but it does not extinguish the vendor's right to damages for the breach.¹³

¹² In *Malmberg v. Baugh*, *supra* note 3, at 337, 218 Pac. at 977, the court well understood that there had been no rescission by mutual assent. The court said: "Was there a mutual rescission as matter of law? If so, it must be upon the theory that, when a vendee defaults and the vendor for that reason terminates the contract, it amounts to a rescission entitling both parties to be put in *statu quo*. . . . In the cases cited by appellant in which the vendee was permitted to recover for payments on the purchase price, the courts also generally find there was a rescission of the contract, but in many of them, when carefully analyzed, it will be found there was no rescission at all, unless we concede that the facts and circumstances of the instant case amount to a rescission. The fact is that the rule contended for by respondent, that a defaulting vendee cannot recover for payments made on the purchase price when the vendor is without fault, has been so manifestly unjust and oppressive in many cases that courts in order to mete out justice to a defaulting vendee have placed a strained construction upon the conduct of the vendor and denominated it a 'rescission,' when such holding was hardly justified under the law as applied to the facts." The court held that the vendee in this case was entitled to restitution.

¹³ Cases holding that he has no right to damages must generally be

As has been said previously, the vendee can have no right of restitution as long as he still has his purchaser's interest in the land and the vendor still has his right to specific performance of the balance. But now that the vendor has terminated these, the question of restitution may properly arise. There are cases holding that the vendee has a right to restitution of instalments paid if the vendor has thus "rescinded";¹⁴ and there are other cases refusing restitution on the ground that there has been no "rescission."¹⁵ In both kinds of cases it may not be at all clear

regarded as in error. The vendee should never be given restitution of all instalments paid, without a deduction for injury done. Damages were awarded to the vendor in spite of such a "rescission" by him in *Malmberg v. Baugh*, *supra* note 3.

¹⁴ *Chandler v. Wilder*, 215 Ala. 209, 110 So. 306 (1926); *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774 (1892) (\$500 paid "as a forfeit" was recovered in spite of vendee's default because the vendor then "abandoned the trade"); *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749 (1891); *Lytle v. Scottish-Amer. Mortg. Co.*, *supra* note 6; *Blitch v. Edwards*, 96 Ga. 606, 24 S. E. 147 (1895) (after vendee's default, the vendor ejected him by process of law); *McDaniel v. Gray & Co.*, *supra* note 3; *Gilbreth v. Grewell*, 13 Ind. 484 (1859); *Waters v. Pearson*, 163 Iowa 391, 144 N. W. 1026 (1914); *Norris v. Letchworth*, 167 Mo. App. 553, 152 S. W. 421 (1912); *Malmberg v. Baugh*, *supra* note 3; *McGreedy v. Hodder*, 4 Ont. W. N. 536, 8 D.L.R. 755 (1912).

In *Pierce v. Staub*, *supra* note 3, where the vendee defaulted after paying \$60,000 out of a total of \$150,000, the court gave judgment for restitution of the money so paid, on the theory of "rescission," although clearly there was no mutual assent to rescind. Here the court employed the fiction of a mutual rescission in order to avoid an inequitable forfeiture, which, as the court said, "equity abhors and the law does not favor." In *Howard v. Stillwagon*, 232 Pa. 625, 628, 81 Atl. 807, 808 (1911), the vendee got judgment for instalments paid in advance, the vendor having ousted him from possession of the land. The court said: "The rights of each of the parties must be found in the agreement, and, in the absence of anything therein authorizing the appellees to treat as forfeited to them the purchase money which the appellant paid them, and which they accepted from him before they undertook to rescind after they had the right to do so, their claim to retain it is no more favored by the law than in equity. Even if they had resold the property at a loss, they could not have retained out of the moneys paid them by the appellant more than sufficient to reimburse them for the loss sustained."

¹⁵ *Golly v. Grinnell Coll. Found.*, 204 Iowa 319, 213 N. W. 252 (1927) ("the contract was terminated by forfeiture and not by rescission"); *Downey v. Riggs*, 102 Iowa 88, 70 N. W. 1091 (1897) (instalments not recoverable if vendor has not rescinded or refused to complete); *Hanschid v. Stafford*, 25 Iowa 428 (1868); *Steinbach v. Pettingill*, 67 N.J.L. 36, 50 Atl. 443 (1901) (no recovery if vendor is ready and willing to complete); *Keystone Hdw. Corp. v. Tague*, *supra* note 7 (the vendor was ready and willing to convey, and he counterclaimed for specific performance, the denial of this remedy not being based on any inability or unwillingness); *Kershaw v. Hurtt*, 66 Okla. 117, 168 Pac. 202 (1917); *Lea v. Blockland*, 122 Ore. 230, 257 Pac. 801 (1927) (buyer asked relief from the contract, the defendant remaining ready and willing to perform); *Hathaway v. Hoge*, 1 Sadler 119, 1 Atl. 392 (Pa. 1885).

whether the court meant a rescission by mutual assent or a "rescission" by the action of the vendor alone as a remedy for the vendee's breach. In some cases involving the second kind of "rescission," the court has seen the difference and has attempted to distinguish other cases on the ground that in them there had been a rescission by mutual assent.¹⁶ This attempt is a failure, however, because the facts of the cases so classified generally justify no such distinction. Still other cases clearly recognize the distinction and refuse restitution of payments if the only rescission is the vendor's recognition of the vendee's default as a total breach and his assertion of his privilege of retaining both the land and the instalments paid.¹⁷

In a most instructive case,¹⁸ the Georgia court recognized that

¹⁶ In *Winter v. Kitto*, 100 Cal. App. 302, 309, 279 Pac. 1024, 1026 (1929), the court says: "It has been held that, after the vendee's breach, the vendor may agree to a mutual abandonment or rescission, in which case the vendee would be entitled to recover the amounts paid. Such were the facts proved or admitted in the following cases wherein recovery was allowed. [Ten California cases are cited.] The court further says: "But a vendee in default cannot recover where the vendor who is not in default stands upon the contract; and the right to retain the purchase money upon an unexcused default by the vendee is independent of any express clauses in the contract for the forfeiture of rights or the retention of payments as liquidated damages, such clauses being but declarations of what would have been the legal rights of the vendor without such provisions." In this case there was an express provision for forfeiture of instalments paid in case of default by the vendee; and a breach having occurred, the vendor gave notice that the contract was cancelled and of no effect. The court held that this was not a rescission, but merely an election to enforce the express terms of the contract, and that the vendee could not recover the instalments paid. The plaintiff had paid \$600, the full purchase price being \$4,000.

¹⁷ *List v. Moore*, *supra* note 10; *Glock v. Howard & Wilson C. Co.*, 123 Cal. 1, 55 Pac. 713 (1898); *Todd v. Collier*, 53 Ind. 122 (1876); *Mintle v. Sylvester*, 202 Iowa 1128, 211 N. W. 367 (1926); *McLain v. Smith*, 201 Iowa 89, 202 N. W. 239 (1925); *Pioneer Gold Mining Co. v. Price*, 189 Mo. App. 30, 176 S. W. 474 (1915); *Battle v. Rochester City Bank*, 3 N. Y. 88 (1849), *aff'g* 5 Barb. 414 (N. Y. 1848); *Snyder v. Johnson*, 44 Okla. 388, 144 Pac. 1035 (1914). In the case of *King v. Milliken*, 248 Mass. 460, 143 N. E. 511 (1924), the court held that the buyer who had wrongfully repudiated the contract could not maintain suit for the recovery of the deposit of \$500. It held further that the fact that the vendor had subsequently made a lease of the premises after the vendee's repudiation did not constitute a rescission. This was acquiescence in the finality of the vendee's repudiation, but it was not the acceptance of an offer of rescission, and it created no right in the vendee to the return of his deposit.

Bozeman v. Curtis, 291 Pac. 870, 871 (Cal. App. 1930): "Where the vendee is in default and the vendor is not, the latter is not liable for the purchase money unless there has been a mutual rescission of the contract. The notice of termination was not a notice of rescission because it expressly declared that the payments would be held forfeited in accordance with the contract. Rescission is itself a contract subject to the same rules of interpretation. An essential element is intent. Here the notice negatives intent to rescind."

¹⁸ *Lytle v. Scottish-American Mortg. Co.*, *supra* note 6.

by the express terms of the contract the vendor had a power of "rescission" for the vendee's breach; but it refused to enforce the ironclad provisions for forfeiture and it granted equitable relief to both parties. The vendor was not allowed both to "rescind" and to forfeit; he could not have both the land with its improvements and the part of the price that had been paid.

VENDEE HAS NO RIGHT OF RESTITUTION UNLESS PAYMENTS
EXCEED THE VENDOR'S INJURY

If the vendor has exercised his power created by the vendee's breach and has terminated the vendee's property interest and also his own right to specific performance, must he give back any part of the payments already received? This question requires the consideration of two more matters: First, the proportion that these payments bear to the amount of injury suffered by the vendor; and secondly, the effect of an express provision in the contract that, in case of breach by the vendee, the vendor may retain some or all of the payments made. First, is there any unjust enrichment? Secondly, does the contract make a valid liquidation of damages or does it prescribe a penalty or forfeiture?

Whether the vendor has "rescinded" for the vendee's breach or not, and whether there is an express provision for forfeiture or not, it is clear that the vendee in default should in no case be given restitution of money paid unless it affirmatively appears that the money so paid is in excess of the injury caused to the vendor by the breach. The vendee sues because he asserts that retention of the money is unjust enrichment; but there is no injustice if the defendant is retaining no more than the amount of injury caused by the plaintiff's breach. In cases where the plaintiff may have a right of restitution, he should be permitted to show that the defendant's injury is less than the instalments paid; but unless he successfully shows this, he should recover nothing.

In very many of these instalment cases, the amount actually paid by the plaintiff, for the restitution of which he sues, was a small amount in comparison with the entire contract price. Sometimes it was merely a first instalment or earnest money.¹⁹

¹⁹ *Public Industrials Corp. v. Reading Hdw. Co.*, 29 F. (2d) 975 (C.C.A. 3d, 1929) (down payment of \$300,000, out of a total price of \$3,900,000); *Nourse v. Azvedo*, 185 Cal. 47, 195 Pac. 669 (1921) (initial payment of only \$200, no evidence as to amount of defendant's injury); *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 123 Pac. 363 (1912) (\$20,000 paid, the total being \$40,000, but the vendee took possession and drilled for oil); *Glock v. Howard & Wilson C. Co.*, *supra* note 17 (\$382 paid out of a total of \$1,000, with no proof as to extent of defendant's injury, the court thinking the express provision for retention to be a liquidation of damages); *Winter*

In such cases, it is unlikely that the amount retained by the vendor was greater than the injury suffered by the plaintiff's

v. Kitto, 100 Cal. App. 302, 279 Pac. 1024 (1929) (\$600 out of total of \$4,000); List v. Moore, *supra* note 10 (\$5,000 paid out of \$25,000); Young v. Jordan, 183 Ill. 459, 56 N. E. 85 (1899) (\$1,000 paid, total of \$11,000); Mintle v. Sylvester, 202 Iowa 1128, 211 N. W. 367 (1926) (\$35,000 paid out of \$140,000); Wolf v. Lake, 178 Ill. App. 340 (1913) (\$150 "earnest money," total of \$6,900); Cody v. Wiltse, 130 Iowa 139, 106 N. W. 510 (1906) (first instalment only); Downey v. Riggs, 102 Iowa 88, 70 N. W. 1091 (1897) (first instalment \$100); Long v. Clark, 90 Kan. 535, 135 Pac. 673 (1913) (\$400 on a total of \$2,200); Hillyard v. Banchor, 85 Kan. 516, 118 Pac. 67 (1911) (\$100 out of \$1,500, the court finding no "equity" in the plaintiff); Ward Real Estate v. Childers, 223 Ky. 302, 3 S. W. (2d) 601 (1928) (ten per cent earnest money retained); Rounds v. Baxter, 4 Me. 454 (1827) (plaintiff had paid only \$10 out of \$130); Chertok v. Kassabian, 255 Mass. 265, 151 N. E. 108 (1926) (first deposit only); King v. Milliken, 248 Mass. 460, 143 N. E. 511 (1924) (\$500 down, out of \$8,000); Garcin v. Pennsylvania Furnace Co., 186 Mass. 405, 71 N. E. 793 (1904); Malone v. Levine, 240 Mich. 222, 215 N. W. 356 (1927) (\$5,000 down payment on a lease for 10 years at total rental of \$210,000); Monahan v. Addy, 176 Minn. 50, 222 N. W. 88 (1928) (\$200 "earnest money" out of \$7,000); True v. Northern Pacific Ry., 126 Minn. 72, 147 N. W. 948 (1914) (one-sixth of the price); Massey v. Butts, 204 Mo. App. 55, 221 S. W. 153 (1920) (\$1,000 paid out of \$19,000); Dooley v. Kushin, 105 N.J.L. 595, 146 Atl. 208 (1929) (\$15,000 paid, total price \$1,150,000); Page v. McDonnell, 55 N. Y. 299 (1873) (\$2,000 paid, whole price \$49,000); Sanders v. Brock, 230 Pa. 609, 79 Atl. 772 (1911) (vendor had resold the land at an advance, but it did not appear how long he had been delayed or what expense had been incurred; and the plaintiff had paid only \$2,000 out of \$104,000); Vanity Fair Co. v. Hayes 31 R. I. 77, 76 Atl. 771 (1910) (\$5,000 paid, total of \$40,000); Taylor v. Martin, 51 S. D. 536, 215 N. W. 695 (1927) (first instalment of \$4,100, total price \$22,000); Joyce v. Hagelstein, 163 S. W. 356 (Tex. Civ. App. 1914) (\$500 "earnest money," total price \$8,000); Foxley v. Rich, 35 Utah 162, 99 Pac. 666 (1909) (\$500 out of \$3,500); Bock v. Celleyham, 100 Wash. 545, 171 Pac. 525 (1918) (\$2,000 down payment out of \$10,000); Howe v. Smith, 27 Ch. D. 89 (1884) (£500 as a deposit, the full price being £12,500). In Ketchum v. Evertson, 13 Johns. 359 (N. Y. 1816), a vendee of land sued for restitution of \$700 paid by him on account of the price. He had, without any sufficient justification, repudiated the contract and refused to make any further payments. The court gave judgment for the defendant, saying: "It may be asserted, with confidence, that a party who has advanced money, or done an act in part performance of an agreement, and then stops short, and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfill all his stipulations, according to the contract, has never been suffered to recover for what has been thus advanced or done." But the facts in this case showed that the defendant received a much lower price on the second sale, so that the injury caused him by the plaintiff's breach was in fact more than \$700. In Hansbrough v. Peck, *supra* note 2, the court held that the vendee had no right of restitution. In this case, however, the vendor had previously obtained a decree in chancery for the enforcement of the contract. In that proceeding the vendee ought to have asked for restitution if the facts entitled him to any. Instead of so doing, however, he brought a subsequent action for restitution. With respect to the amounts involved, the court says: "Of the \$93,000 purchase-money, they have paid only \$10,000; of interest, some \$28,000. They

breach. Whatever the amount, the plaintiff must show that it is greater than the injury done.²⁰ In most cases that injury is wholly unliquidated and difficult of accurate estimation; and in few cases does the plaintiff attempt to show how much it was. The defendant is not resting merely on the "letter of his bond;" he is an injured party, from whom a wrongdoer is asking the court to take money. The plaintiff has no bond upon which to rest, either in letter or in spirit. He is asking for justice. The very justice that he seeks requires him to make reparation for his wrong and, before awarding judgment, requires him to show that retention by the defendant is unjust.²¹

In some cases, however, the instalments paid are large in comparison; and sometimes the plaintiff in fact shows or offers to show that the injury is less. In cases like this, the plaintiff should not be denied the opportunity to prove what he asserts, although often his evidence may be so indefinite and uncertain that it should be thrown out. If he can and does show by proper evidence that the defendant is holding an amount of money as

expended for improvements \$18,000. There still remained due against them \$83,000 purchase-money and over \$20,000 interest, at the time the vendor went into possession. The plaintiffs themselves had been in the possession and enjoyment of the premises for a period exceeding that for which the interest on the purchase-money had been paid, which, at least, must be regarded as an equivalent for the money thus paid." On this showing it does not appear that the defendant's enrichment was more than his injury.

²⁰ *Stennick v. Jones*, 252 Fed. 345 (C.C.A. 9th, 1918) ("the damages which the appellees have suffered seem to have been considerably greater than the value of the property forfeited"); *Lytle v. Scottish-Amer. Mortg. Co.*, *supra* note 6; *Osterhout v. Brandts*, 114 Kan. 537, 220 Pac. 171 (1923) (restitution denied because not more than defendant's injury); *Sandusky v. Waller*, 272 S. W. 1045 (Mo. App. 1925) (the damages to defendant having exceeded the amount of the money that had been paid to him by plaintiff, the decree was undoubtedly for the right party); *Harrington v. Eggen*, 51 N. D. 87, 199 N. W. 447 (1924) (payment of only \$5,000 out of a total price of \$67,500, and the land had depreciated in value); *Dluge v. Whiteson*, 292 Pa. 334, 141 Atl. 230 (1928) (stock of merchandise was resold at an advance by the vendor, but the court said that the vendee was "endeavoring to take advantage of the defendant's labor and skill in selling the goods without compensating him therefor"); *Hathaway v. Hoge*, 1 Atl. 392 (Pa. 1885) (plaintiff had paid over half of the agreed price but had also operated oil wells on the land); *Burton v. Ryther*, 38 S. D. 342, 141 N. W. 350 (1917) ("the court found that the defendant had suffered damages sufficient in amount to offset the amounts that had been paid and expended by the plaintiff under the contract"); *Pierson v. Dorff*, 198 Wis. 43, 223 N. W. 579 (1929) (vendor's injury greater than the amount paid); *Quinlan v. St. John*, 28 Wyo. 91, 201 Pac. 149, 203 Pac. 1088 (1922) (rental value of land occupied by plaintiff may have exceeded the instalments paid, burden of proof being on the plaintiff). In *Beveridge v. West Side Constr. Co.*, 130 App. Div. 139, 114 N. Y. Supp. 521 (1st Dep't 1909), the vendee showed that the injury was much less than the instalments, but the court enforced the forfeiture.

²¹ *Lipscomb v. Fuqua*, 103 Tex. 585, 131 S. W. 1061 (1910).

a penalty rather than as compensation for injury, he should be given judgment for restitution of that amount.²²

It should in every case be borne in mind that the vendor is the wronged party and that his injury may not be capable of accurate estimation. Among the factors to be weighed are the length of the delay, the loss of rents and profits if the vendee has had possession, the depreciation in value of the land, the removal of minerals from the land. Matters tending to counterbalance these are the payment of interest to the vendor and the addition of valuable improvements of a permanent character.²³

The making of valuable improvements by the vendee very considerably complicates the situation. It may neither be just to allow them to go to the vendor as a forfeiture for the vendee's breach nor to enable the defaulting vendee to compel the vendor to pay for improvements that he would not himself have made. In such a case, if the vendor is unwilling to pay for the improvements, the court may order a sale of the land with its improvements, paying the vendor in full and the balance if any to the vendee.²⁴

²² *Sherburne v. Hirst*, 121 Fed. 998 (C. C. D. Ore. 1903); *Pierce v. Staub*, *supra* note 3; *Biddle v. Biddle*, 202 Mich. 160, 168 N. W. 92 (1918); *Becker v. Rothschild*, 141 N. Y. Supp. 528 (App. Div. 1st Dept. 1913); *Taylor v. Kelley*, 56 N. C. 240 (1857); *Graham v. Lebanon*, 240 Pa. 337, 87 Atl. 567 (1913); *Burchfield v. Hageman*, 35 S. D. 147, 151 N. W. 47 (1915); *Malmberg v. Baugh*, *supra* note 3 (restitution of instalments allowed beyond compensatory damages to the vendor, which included depreciation in value of the land, rental value, and interest). In *Cornwall v. Henson*, [1900] 2 Ch. 298, the vendee paid all but a last small instalment. As to that he was in default for nearly three years, and he departed from the premises for nearly two years. Meantime, the vendor resumed possession and leased to a tenant. The vendee then reappeared and tendered full payment. The contract provided that for thirty days' default the vendor might resell, pay himself the unpaid balance due, and pay any excess to the vendee. It was held that the vendor had committed a breach, the vendee not having repudiated, and that the vendee had a right to damages therefor.

²³ See *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 133 Pac. 694 (1913), where matters such as these were taken into consideration in granting statutory relief to a vendee against the forfeiture of his payments.

²⁴ "This does not lead to the conclusion that the vendor can be compelled to pay for costly changes which he did not order and does not desire, and which, though valuable, are not of a character useful to him. Such a result is obviated by the terms of the decree. If the vendor elects to take back the land, he must return the purchase money, less damages and rent. If the land has been improved, he must allow the vendee for the enhancement in value occasioned thereby, before he can take the land thus improved. But the vendee cannot force the vendor to pay for the building or other meliorations. When the vendee asks compensation therefor, another factor is injected into the case, whereby he loses the absolute right to the purchase money, and forces an accounting under which he can secure only what legally comes to him on a sale of the property. The rights of the parties must be adjusted, and, upon the vendor's paying the vendee what is equitably due for improvements and return of purchase money, the vendor has

Where the payments made prior to the default are large in proportion to the whole price, and are therefore likely to be in excess of any injury to the vendor, the court has in some cases been astute to find a "waiver" by the vendor.²⁵ His continuing to receive delayed payments, his express extension of time, or his statement that payment on time will not be required so as to prevent a forfeiture, may not prevent the vendee's delay in performance from being a breach; but they will prevent it from going "to the essence" and operating to discharge the contractual duty of the vendor. In such a case the latter's refusal to convey will itself be a breach, for which the vendee can get restitution, as an alternative remedy with damages.²⁶

If the amount paid by the plaintiff to the defendant is merely the agreed price of an option to buy or to sell, good for a definitely specified period, the option-holder certainly has no right to restitution of this price in case he fails to exercise his power within the period of its life. The amount so paid by him is neither a penalty nor liquidated damages; it is the price of a valuable power, good for a particular period, and at the end of that period the option-holder has received the full equivalent of his money. There is no failure of consideration or unjust enrichment if he fails to exercise his power before it expires.²⁷

the option to take the land under the terms of the rescinded contract. If he does not desire to exercise this option, the property should be sold, the proceeds should be first applied to the payment of what is due the vendor, and the balance should be paid over to the vendee. In this way the rights of both parties are fully preserved." *Lytle v. Scottish-American Mortg. Co.*, *supra* note 6, at 470, 50 S. E. at 407.

²⁵ *Walker v. Burtless*, 82 Neb. 211, 214, 117 N. W. 349, 350, 118 N. W. 113 (1908): "By the terms of the agreement a forfeiture is to be declared under certain conditions. The forfeiture clause must be construed strictly against defendant, and if she did not declare a forfeiture, she was not, and is not, entitled to retain said money." See also *Curtis v. Factory Site Co.*, 12 Ohio App. 148 (1919).

²⁶ *Hayt v. Bentel*, 164 Cal. 680, 684, 130 Pac. 432, 433 (1913) (\$600 paid on a total of \$825): "But this undoubtedly sound doctrine does not apply to a case where the vendor has waived the delay in making payments. . . . The waiver of the right to insist upon prompt payment is established by the acceptance of a part of the final installment long after it was due." See also *King v. Seebeck*, 20 Idaho 223, 118 Pac. 292 (1911) (waiver here by a contractual rescission); *Graham v. Merchant*, 43 Ore. 294, 72 Pac. 1088 (1903) (\$29,544 paid, out of total of \$40,000); *Lowenstein v. Armstrong*, 27 Pa. Super. Ct. 543 (1905) (vendee found not in default because vendor had not tendered conveyance); *Burchfield v. Hageman*, 35 S. D. 147, 151 N. W. 47 (1915); *Spedden v. Sykes*, 51 Wash. 267, 98 Pac. 752 (1908) (\$5,000 paid on total of \$20,000); *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026 (1903) (\$220 paid, total of \$275, and improvements made).

²⁷ See *Torrey v. McFadyen*, 165 N. C. 237, 81 S. E. 296 (1914).

FORFEITURE PROVISION DISTINGUISHED FROM A GENUINE LIQUIDATION OF DAMAGES

An express provision in a contract for the sale of land or chattels that time shall be of the essence and that in case of non-payment of any instalment at the time specified all previous instalments (and not merely a first instalment or other definite amount) may be retained by the vendor as liquidated damages, ought to be held to be a penalty provision and, therefore, unenforceable.²⁸ Indeed, there are some very well-considered cases in which the court has held that in spite of such an express provision the vendee can recover the instalments already paid, less damages for the injury that his breach has caused to the vendor; ²⁹ in some of them, the decision was rested upon a supposed "rescission" by the vendor: Many other cases have held the contrary; but most of them, as has been indicated previously, can be explained on other and better grounds—as that the vendor still

²⁸ In *Malmberg v. Baugh*, *supra* note 3, at 345, 218 Pac. at 980, the court clearly recognized the penalty element in such an agreement. The contract in this case contained no express provision for a forfeiture of instalments paid, but it did provide for the return of the deed of conveyance to the vendor by the party to whom it had been delivered in escrow. The court said: "The rule contended for by respondent, carried to its logical sequence, would forfeit every dollar paid by appellants and still leave respondents in possession of the land even if appellants had paid the last instalment but one, and then defaulted. . . . A rule that admits of such oppression and hardship is unjust and inequitable. It ought not to be enforced in a court of justice whenever the damages exceed an adequate and just compensation for the wrong complained of." In the case of *In re Dagenham Dock Co.*, L. R. 8 Ch. App. 1022, 1025 (1873), it was said by Mellish, L. J.: "I have always understood that where there is a stipulation that if, on a certain day, an agreement remain either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty."

²⁹ *Sherburne v. Hirst*, *supra* note 22; *Lytle v. Scottish-Amer. Mortg. Co.*, *supra* note 6; *Brown v. Verzani*, 181 Iowa 237, 164 N. W. 601 (1917); *Waters v. Pearson*, 163 Iowa 391, 144 N. W. 1026 (1914); *Horse Shoe Mining Co. v. Red Rose L. & Z. Mining Co.*, 104 Okla. 45, 230 Pac. 492 (1924); *Steedman v. Drinkle*, [1916] 1 A. C. 275; *Brown v. Walsh*, 45 Ont. L. R. 646 (1919). In *Troughton v. Eakle*, 58 Cal. App. 161, 208 Pac. 161 (1922), the court took notice of a code provision (CAL. CIV. CODE, § 3275) with regard to relief from forfeitures and permitted the vendee to amend his petition so as to bring his claim for restitution within the terms of the statute. This code provision has not been referred to in many of the California cases involving restitution of payments. See (1930) 18 CALIF. L. REV. 681. See also *Fickbohm v. Knaust*, 61 Cal. App. 369, 284 Pac. 692 (1930). In *Cook-Reynolds Co. v. Chipman*, *supra* note 23, restitution was granted in spite of an express forfeiture on the basis of § 6039 of the Revised Code. In *Sabas v. Gregory*, 91 Conn. 26, 98 Atl. 293 (1916), the buyer was given judgment for the excess of payments over injury, nothing being said as to penalties or liquidated damages.

has a right to full specific performance, or that the vendor's injury is not shown to be less than the instalments paid.³⁰

Cases of this sort have one important difference from cases in which a party promises to pay a specified sum as liquidated damages in case of a future breach. It is the difference between an agreement that a vendor shall be privileged to keep what he has already received and an executory promise creating in the vendor a right that money shall be paid to him. It is the difference between the executed and the executory, between possession and the hope to possess, between a bird in the hand and a bird in the bush. Here it may be that possession is nine points in the law. It is little less harsh on the vendee that the vendor may keep sums already paid when they are in excess of injury suffered than to compel him to pay a sum not yet paid, if we consider the fact that the agreed exchange for those sums is not going to be performed.³¹ But there are sometimes substantial reasons for letting a vendor keep instalments already paid that are not applicable to the enforcement of an executory promise to pay. The instalments, when paid, come to him as his own, and he is justified in making investments and expenditures in accordance therewith. Nevertheless, in the absence of any proof of such a justified change of position involving an impossibility of restoring the former *status quo*, the vendor should not be allowed to keep, by way of penalty or forfeiture, that which he would not be allowed to recover if it had not yet been paid. Possession itself should not be nine points in law, even though in some instances changes of position may mount up as high as ten points. The injured party should be given full compensation, and no more; and he should be required to trust a disinterested court to determine its amount, rather than to make use of his economic power in advance not only to drive a hard bargain, but also to determine the penalty for breach.

That such contracts do, in fact, provide for a penalty in place of just compensation cannot be doubted. In most such instances the breach consists of the mere non-payment of money at the time specified; and the amount of the forfeiture increases as performance proceeds, so that the penalty grows larger as the breach grows smaller.³² A provision that time shall be of the essence is in itself harsh enough, as is indicated by the fact that equity (now the prevailing law) would practically never make it of the essence in the absence of an express provision. Under

³⁰ See *Stennick v. Jones*, 252 Fed. 345 (C.C.A. 9th, 1918), where the injury was greater in amount than the forfeiture.

³¹ See *Malmberg v. Baugh*, *supra* note 3.

³² This is expressly recognized in *Chace v. Johnson*, 98 Fla. 118, 123 So. 519 (1929); *Davis v. Freeman*, 10 Mich. 188 (1862); *Kilmer v. British Col. Orchard Lands*, [1913] A. C. 319. And see the similar dictum in *Union Pacific Ry. v. Mitchell-Crittenden Tie Co.*, 190 Fed. 544 (C.C.A. 8th, 1911).

such a provision, failure by the vendee to make a payment on time deprives him of his right to the promised conveyance; and he cannot compel a specific conveyance by the vendor,³³ at least in the absence of circumstances of great hardship.³⁴ But the very fact that it often seems harsh to deprive the vendee of his contract right to a conveyance because of a mere delay in payment and that the performance of an express condition precedent is sometimes excused because of impossibility or extreme difficulty, *a fortiori* indicates the injustice of permitting the vendor to keep an outrageous penalty merely because he has collected it in advance. Indeed, there are good cases holding that a vendee who fails to pay as agreed can get a decree for specific performance by the vendor, in spite of an express provision for forfeiture, if payments or improvements have been made greatly in excess of any injury to the vendor.³⁵

The cases now under discussion differ also from those in which a party makes a deposit as security for performance, to be forfeited in case of his default; but the difference is somewhat less than that just considered above. The instalments paid by a vendee are paid as part of a promised performance and go to the vendor for his own use as he may see fit. The deposit is put into his possession merely as security; and he is not privileged to use it in making investments or expenditures. In such a case, he is not permitted to keep it all if it operates as a penalty instead of just compensation for injury suffered. Here possession as security only is not nine points in the law. While these cases can be distinguished from those providing for retention of all advance instalments, it is believed that the same result should be reached, in the absence of a change of position by the vendor, as suggested above.

The express provision for retention of money by the vendor

³³ *Smith v. Berkau*, 123 Ark. 90, 184 S. W. 429 (1916); *Andrews v. Karl*, 42 Cal. App. 513, 183 Pac. 838 (1919); *Brickles v. Snell*, [1916] 2 A. C. 599; *Steedman v. Drinkle*, [1916] 1 A. C. 275. *Contra*, if hardship, *Leak v. Colburn*, 55 Cal. App. 784, 204 Pac. 249 (1922).

³⁴ A vendor who brings a bill to quiet title or for some other equitable remedy may be denied the relief asked except on such terms as would nullify an express forfeiture of instalments paid. See *Witherstine v. Snyder*, 225 Ill. App. 189 (1922).

³⁵ *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498 (1890) (*semble*); *Steele v. Branch*, 40 Cal. 3 (1870) (*semble*); *Haas v. Coburn*, 22 Idaho 47, 124 Pac. 476 (1912); *Jones v. Robbins*, 29 Me. 351 (1849); *Richmond v. Robinson*, 12 Mich. 193 (1864); *Edgerton v. Peckham*, 11 Paige 352 (N. Y. 1844); *Kilmer v. British Col. Orchard Lands*, [1913] A. C. 319; *Vernon v. Stephens*, 2 P. Wms. 66 (1722); *AMES. op. cit. supra* note 4, at 339n. *Contra*: *Fresno Irr. Farms Co. v. Canupis*, 39 Cal. App. 184, 178 Pac. 300 (1918); *Heckard v. Sayre*, 34 Ill. 142 (1874); *Pickens v. Campbell*, 104 Kan. 425, 179 Pac. 343 (1919); *Missouri River Fort Scott & Gulf, etc. R. R. v. Brickley*, 21 Kan. 275 (1878); *AMES, op. cit. supra* note 4, at 341.

may in some cases properly be held to be one for liquidated damages. This may be so, irrespective of the words used in the contract. It is not conclusive for or against a party that the contract describes the amount as a penalty, a forfeiture, or liquidated damages. If the provision is merely for the retention of a comparatively small sum paid as earnest money or as a first instalment, and not for the retention of all instalments that may have been paid, few or many, large or small, it should usually be held to be a genuine provision for liquidated damages, the actual injury being uncertain and difficult to estimate and the amount not being unreasonable or disproportionate to the total values involved.³⁶ In such a case the vendor may retain the amount specified as liquidated damages; but he must return all other instalments if he wishes to retain the land itself.³⁷

CONDITIONAL SALE OF GOODS COMPARED

Similar problems have arisen in the case of conditional sales of goods. Formal title is reserved as security for payment of the price. The contract sometimes expressly provides for forfeiture of payments in case of a default and sometimes does not. The common law courts generally enforced a forfeiture in these cases, sometimes suggesting that the buyer might have relief in equity. There were numerous cases, however, that permitted the buyer

³⁶ *Public Industrials Corp. v. Reading Hdw. Co.*, 29 F. (2d) 975 (C.C.A. 3d 1929) (\$300,000 down payment, forfeited as "liquidated damages," the total price being \$3,900,000); *Walbridge v. Richards*, 290 Pac. 304 (Cal. App. 1930) (deposit of \$1,000 on a \$15,000 contract); *Poheim v. Meyers*, 9 Cal. App. 31, 98 Pac. 65 (1908) (deposit of \$500 on a \$14,625 contract); *Wolf v. Lake*, 178 Ill. App. 340 (1913) (\$150 paid as "earnest money" on a \$6,900 contract); *Garcin v. Pennsylvania Furnace Co.*, 186 Mass. 405, 71 N. E. 793 (1904); *First Nat. Bank of Garfield v. Dressler*, 100 N.J.Eq. 381, 136 Atl. 417 (1927); *Moore v. Durnam*, 63 N.J.Eq. 96, 51 Atl. 449 (1902); *Feldman v. Reliant Holding Co.*, 129 N.Y.Supp. 504 (Sup. Ct. 1911) (\$1,000 deposit paid on a \$95,000 contract, the \$1,000 "to be returned to plaintiff when the plaintiff complied with all the requirements of the contract"); *Roth v. Goodman*, 52 Misc. 509, 102 N.Y.Supp. 683 (Sup. Ct. 1907) (\$200 paid as a deposit on a \$46,500 contract); *Goldman v. Willis*, 64 Pa. App. Div. 508, 72 N.Y.Supp. 292 (2d Dept. 1901); *Lichetti v. Conway*, 44 Pa. Super. Ct. 71 (1910) (deposit of \$500 on a \$33,000 contract); *Joyce v. Hagelstein*, 163 S. W. 356 (Tex. Civ. App. 1914) (\$500 paid as "earnest money" on a contract of over \$8,000); *Woodman v. Blue Grass Land Co.*, *supra* note 10 (\$1,000 "earnest money" on a \$31,500 contract). In *Sherburne v. Hirst*, *supra* note 22, under the existing circumstances, even a provision of this kind was held to be for a penalty and was not enforced.

³⁷ *Artzerounian v. Demetriades*, 276 Pa. 303, 120 Atl. 142 (1923) (first instalment of \$1,000 retained, other instalments ordered repaid). If the amount is not a true liquidation of damages, it will not govern the amount to be retained. Additional instalments may be retained to the full extent of injury actually suffered. See *McCain v. Hicks*, 150 La. 43, 90 So. 506 (1922).

to recover money paid, so far as it was in excess of injury, on the theory that there had been a rescission of the contract by the seller. Just as in the land cases, "rescission" is here a slippery word, usually meaning nothing except that the seller has exercised his legal privileges as owner by retaking possession of the goods and has declared his contractual duties at an end.³⁸

The Uniform Conditional Sales Act, already adopted in a number of states,³⁹ fully recognizes that the retention of title is for security only and contains provisions for the prevention of an unjust forfeiture. In case of a retaking of the goods by the seller, the buyer can require their resale and the repayment to him of any balance remaining after full payment of the contract price and expenses.⁴⁰ If the payments already made by the buyer are small, or the depreciation in value is great, the buyer may not find it to his interest to require a resale. In such cases, the forfeiture of his interest in the goods may not operate as a penalty, but may instead be a fair compensation for the seller's injury.

Of course, the seller should in no case be deprived of his protection against loss and his security for the price. There is greater reason for this in the case of a sale of goods than in that of a sale of land. Goods generally depreciate much more rapidly than does land.⁴¹ Therefore, if it is just and equitable for the buyer of goods to have a right of restitution, in spite of his default and in spite of an express provision for forfeiture, this is even more certainly true in the case of the vendee of land.

GENERAL CONCLUSION

The cases denying restitution can, in the light of the preceding discussion, be justified on one or more of the following grounds:

³⁸ The cases dealing with the subject matter of this paragraph are collected and discussed by Bogert, in his *Commentaries on Conditional Sales* 2A UNIFORM LAWS ANNOTATED—§§ 113-115, 130-132.

³⁹ Alaska (1919), Arizona (1919), Delaware (1919), New Jersey (1919), New York (1922), Pennsylvania (1925), South Dakota (1919), West Virginia (1925), Wisconsin (1919). The New York Personal Property Law, § 65, had previously contained similar provisions. See Bogert, *op. cit. supra* note 38, at § 132.

⁴⁰ The Act, §§ 18-23, provides for redemption after default, just as in the case of land and chattel mortgages. Bogert says that "the provisions for redemption under the Uniform Act are believed to follow very closely the statutory or equitable provisions established before the Uniform Act." *Op. cit. supra* note 38, at 157. The provision for repayment to the buyer of the excess over the price and expenses received on resale of the goods does not follow previously existing common law, although there is some indication that equity was developing a similar form of relief.

⁴¹ The depreciation of a chattel sold and in use may be very rapid; and there are times when even land rapidly declines in value. That this generally justifies the retention of instalments on an automobile, see SELIGMAN, *THE ECONOMICS OF INSTALMENT SELLING* (1927) 61.

(1) The defendant has not rescinded and remains ready and willing to perform, and still has a right to specific performance by the vendee; (2) the plaintiff has not shown that the injury caused by his breach is less than the instalments received by the defendant; (3) there is an express provision that the money may be retained by the vendor and the facts are such as to make this a genuine provision for liquidated damages, and not one for a penalty or forfeiture.⁴² If the facts are such that none of these justifications exists, restitution should be allowed.

⁴² If the express provision is held to be for a penalty or forfeiture, it does not determine the damages recoverable by the vendor and does not prevent restitution to the vendee; but the vendee may still be denied restitution on either of grounds (1) and (2).