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## The Rule in Shelley's Case in Washington

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## COMMENTS

### THE RULE IN SHELLEY'S CASE IN WASHINGTON

As a state grows in age and the accumulations of private capital within its boundaries increase in size and number, problems of future interests in property law become of greater importance. Propertied individuals seek to extend control over their accumulations beyond their deaths, whether wisely or not is here unimportant. Washington is reaching this stage of maturity and its lawyers consequently will be more frequently confronted with the difficulties in creation of future interests.

One of the major pitfalls facing the lawyer in this field is the rule in Shelley's Case which by its operation defeats the effort of a transferor to continue his dominance over the devolution of his property.<sup>1</sup> There is no question that the rule did not first arise in the case from which its name is taken.<sup>2</sup> Probably the best short statement of the rule was made by defendant's counsel in the case itself:<sup>3</sup> ". . . it is a rule in law when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail; that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase."<sup>4</sup>

That Washington is just reaching the stage wherein widespread attempts at domination of property interests are to be expected is evidenced by the present paucity of cases wherein the rule is considered or applied. The writer has found but four.

The first is *Shufeldt v. Shufeldt*<sup>5</sup> wherein appears the following paragraph,

"It is thought that the rule in Shelley's Case, which as a principle of common law is in force in this state, sustains the contention that the remainder under discussion could not be a vested remainder. That arises from a misunderstanding of the rule in Shelley's Case."<sup>6</sup>

This is followed by a statement of the rule:

"Under the rule in Shelley's Case, if an estate for life is granted by an instrument and the remainder is limited by the same instrument either mediately or immediately, *to the heirs of the life tenant*, the life tenant takes the remainder as well as the life estate."<sup>7</sup>

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<sup>1</sup>The operative effect of the rule is usually stated, "The rule defeats the testator's intention." The annotator in Note (1911) 29 L. R. A. (n. s.) 963, "The Rule in Shelley's Case," takes exception to this statement. Rather it is the particular or special intent that is defeated, the annotator explains, but not the general intent. The use of such language is confusing. In ordinary discussion of the problem it seems certain that to limit the estate of the "first taker" to one for life is the transferor's primary intent, if not his only one, except the intent that certain persons in a designated relation to the first taker will take what remains after the first taker's share. The general intent is explained to mean the desire of the testator that the property should go by inheritance in indefinite succession. This purpose the rule's operation achieves. But query, is this ordinarily the intent of the testator?

<sup>2</sup>See discussion in V, "Antiquity of the Rule," in 29 L. R. A. (n. s.) 977 *et seq.*

<sup>3</sup>1 Coke 93b (1581)—as stated in 29 L. R. A. (n. s.) 969.

<sup>4</sup>A more elaborate statement of the rule is presented in 29 L. R. A. (n. s.) 974, n. 20, quoted from 4 KENT, COMMENTARIES (13th ed. 1884) 215. Chancellor Kent's words are: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

<sup>5</sup>130 Wash. 253, 227 Pac. 6 (1924).

<sup>6</sup>*id.* at 268.

<sup>7</sup>*ibid.*

Of the discussion of the rule in the *Shufeldt* case, the court in the second case, *Fowler v. Wyman*,<sup>8</sup> explains,

"Counsel for appellants say that our recognition in *Shufeldt v. Shufeldt* . . . of the rule in question was 'pure *obiter dictum*'. No need of any controversy about that. They admit that the question of the validity of the rule is in this case, and we take occasion to say now that the rule is a rule of decision in this state because of the common law and the provisions of REM. COMP. STAT. (1922) § 143."<sup>9</sup>

The most recent decision in which the rule is applied is *Fowler v. Lanpher*.<sup>10</sup> As there can be little question of the court's position in the two earlier cases that in fact the rule is part of the common law of Washington, this discussion henceforth will be primarily of the application of the rule to the facts in the *Lanpher* case.<sup>11</sup>

In that case Mrs. Fanny E. Fowler transferred certain property to the Everett Trust and Savings Bank as trustee under an agreement which contained the following provision (alone important for the purpose of this discussion):

"Upon the death of the party of the first part, the trustee shall divide all that remains of said trust estate (and for the purpose of making such division shall have the authority if it deems best to reduce the same or any portion of it to cash) into six equal parts and deliver and pay over one of such parts to my son, Alger Fowler, if he be living, or to his heirs if he be dead . . ."

with similar provisions for each of her other five children.<sup>12</sup>

The action was by the settlor, Mrs. Fowler, and her six children to cancel or revoke the trust. Grandchildren who had attained their

<sup>8</sup>169 Wash. 307, 13 P. (2d) 501 (1932).

<sup>9</sup>*id.* at 308-309.

REM. REV. STAT. (1932) § 143: "The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."

It is probable that the *Shufeldt* case discussion of the rule was dictum, because in that case the court was able to find a vested remainder in the taker who would have had to be the ancestor under the rule without the necessity of application of the rule. The *Wyman* case, however, clearly presented the question. In the latter case a conveyance recited in the granting words, ". . . said property to be vested in her during her lifetime, and at her death to be the property of the heirs of her body. Said property not transferable during her lifetime." The habendum clause of the deed was in the ordinary form with no restrictions. The action was by heirs of the grantee against the transferee of the grantee. The defendant prevailed on the court's reasoning that the rule in *Shelley's Case* vested the remainder in the grantee, leaving nothing with which the plaintiffs in the case could argue.

<sup>10</sup>193 Wash. 308, 75 P. (2d) 132 (1938).

<sup>11</sup>The problem arose under an action for the revocation of a trust. The writer is not here concerned with the correctness of the revocation, which was permitted, but only with the use of the rule in *Shelley's Case* in the process. Two trusts were involved, but only the second result, under the Fanny E. Fowler trust, was explained by use of the rule. Consequently the first portion of the opinion concerning the other trust is not here pertinent.

<sup>12</sup>193 Wash. 308, 313, 75 P. (2d) 132, 134 (1938).

majorities joined as parties plaintiff and those under age were joined as defendants by guardian *ad litem*. The trustee appealed from an order revoking the trust on the grounds that there might be an outstanding contingent interest in the grandchildren and consequently all interested parties had not sought revocation. The court answered thus:<sup>13</sup>

"Respondent's contention that the grandchildren have a contingent interest in the trust estate cannot be sustained. The trust agreement makes a definite provision for the division of the property and designates just who shall have the divided shares. It makes no provision for grandchildren unless one of the children dies before death of the maker of the trust agreement.

"In *Burton v. Boren*, 308 Ill. 440, 139 N. E. 868, 869, it was said: 'Where a grantor conveys a life estate with a remainder over to *his* heirs, the heirs do not take a remainder at all. [Italics by writer.] The word "heirs" will be regarded as defining or limiting the estate which the first taker has. In such case the heirs would take as reversioners by descent from the grantor and not under the deed.'

"The rule in Shelley's Case is a part of the law of this state. *Fowler v. Wyman* . . .

"In *Shufeldt v. Shufeldt* . . . the rule was stated to be as follows . . . [quoting the same statement previously set out herein].

"Applying the rule we find that the grandchildren are not interested parties in the trust agreement and their consent is not necessary in order to compel its termination."

A careful reading of the words of the court above quoted will disclose that *two* rules of property are stated. The situations to which the rules apply can be illustrated thus: *A* to *B* for life, remainder to *B*'s heirs (rule in Shelley's Case); and, *A* to *B* for life, remainder to *A*'s heirs (rule as to remainder to grantor's heirs). Although the court quotes the rule in Shelley's Case the language still does not make clear which of the two rules is being applied.<sup>14</sup> If the rule relating to conveyance of a remainder to the grantor's heirs is the one to which the court has reference, it is inapposite here. There is no limitation to the

<sup>13</sup>*Id.* at 319.

<sup>14</sup>The rule quoted from *Burton v. Boren* is not the same as the rule in Shelley's Case. There is this vital distinction: in the *Burton* case the remainder over is limited to heirs of the grantor, not of the grantee. Under the rule in Shelley's Case the estate is granted to the grantee and the remainder is limited to the grantee's heirs. Under the first case the rule applied leaves a reversion in the grantor after the expiration of the granted estate—in this instance, a life estate. Under the rule in Shelley's Case, the grantor is out of the picture entirely, so far as application of the rule is concerned. The reasoning of the court follows that used by plaintiff's attorneys in their reply brief. The distinction between the rule applied in the *Burton* case and the rule in Shelley's Case is clearly discussed in SIMES, *THE LAW OF FUTURE INTERESTS* (1936) c. 8, § 148 particularly, in which there is a footnote citation to the *Burton* case. See also *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919). In New York the rule in Shelley's Case is abrogated by statute but the court nevertheless applied the other rule.

heirs, as such, of Mrs. Fowler, the grantor-settlor in this case. The argument in the briefs<sup>15</sup> was to the effect that no matter who took, either the six children or surviving grandchildren (children of a deceased child), the takers would be heirs of the "grantor" (Mrs. Fowler), and therefore the rule in *Shelley's Case* would be operative and the remainder to the heirs would be vested in the grantor. Thus were the two rules entangled.

But assuming the argument was based on the rule relating to conveyance to the grantor's heirs, the rule is here inapplicable because the alternative takers, should one of the children die before Mrs. Fowler, were heirs of the deceased child who were not necessarily grandchildren of Mrs. Fowler. It needs no citation of authority to demonstrate that heirs of a child might not be heirs of the parent. Under Washington law, for example, the surviving spouse is an heir, but it is clear that such son-in-law or daughter-in-law would not be an heir of Mrs. Fowler.

If, on the other hand, the rule in *Shelley's Case* is the one actually applied by the court, the case is unique in its application. An analysis of the characteristics of the interests created by the trust instrument will demonstrate that the rule was misapplied.

First, the trust instrument created an equitable life estate in the settlor, Mrs. Fowler, which is followed by the remainders the court found to be extinguished by the application of the rule.<sup>16</sup> Second, the instrument created a remainder in the six children, determination of the nature of which is a problem, but probably it is vested.<sup>17</sup> The remainder, if vested, is subject to defeasance if the child does not survive the parent the language being, ". . . to my son . . . if he be living, or to his heirs if he be dead . . ." Third, if the child is dead, the remainder interest goes to the heirs of the deceased child. The exact nature of this interest is equally difficult of determination.

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<sup>15</sup>Appellants' Reply Brief, pp. 29-34.

<sup>16</sup>Whether the remainders are legal or equitable would be important if the rule is to operate on the interest given the six children rather than the heirs of the children. If the interests in remainder are legal the rule could not operate thereon because of the fourth requisite quoted in the *Shufeldt* case at p. 269, from *Beals v. Davis*, 241 Ill. 536, 89 N. E. 706, 29 L. R. A. (N.S.) 937 (1909): ". . . fourth, the estates must be of the same quality—that is, both legal or both equitable." See also Chancellor Kent's statement of the rule quoted Note 4, *supra*. But it seems certain that the court did not intend to abolish the remainders to the children by use of the rule, because their remainders did not go to "heirs" and that requisite is clearly stated in the *Shufeldt* case on the same page; and further the court at p. 320 of the *Lanpher* case said,

"It is our opinion that those interested in the Fanny Fowler trust were Mrs. Fowler and her living children and all being of age and competent were entitled to have her trust determined." (Italics supplied.)

For these reasons the writer believes the court referred to the interests given to the heirs of the children when it stated that applying the rule the grandchildren were not found to be interested parties.

<sup>17</sup>The Washington test seems to be that quoted from the *Shufeldt* case, 130 Wash. 253, 262, 227 Pac. 6, 9 (1924), in the opinion *In re Elvigen's Estate*, 191 Wash. 614, 618, 71 P. (2d) 672 (1937):

"If, when the will goes into effect there is no contingency either as to the person entitled to the remainder or as to the event by which the intermediate estate is to be determined then the remainder is vested."

The test is further stated on p. 269 of the *Shufeldt* case, ". . . the remainder to Edwin Hughes was certain as to identity of the remainderman

The interest given to the heirs of a child predeceasing the settlor the court apparently classified as a remainder over after the interest of the child, which remainder vested in the child by operation of the rule in Shelley's Case. But the interest of the child of the settlor was a fee simple in remainder, and the court's approach runs afoul the principle that there can be no remainder after a fee.<sup>18</sup> The only possible explanation of the interest of the heirs of the child, upon this analysis, is that it is an executory interest,<sup>19</sup> and to this type of interest the rule in Shelley's Case does not apply.<sup>20</sup> Under this analysis the rule in Shelley's Case has been used to destroy an executory interest, generally believed to be indestructible. This effect has not been given the rule in any other case found nor has this effect been suggested by any of the authorities examined. The contrary is the usual position.<sup>21</sup>

It is also possible to interpret the limitations after the equitable life estate as alternative contingent remainders. If the interest of the child is contingent upon his survival of the parent, Mrs. Fowler, it is therefore a contingent remainder, but still a remainder in fee simple. The interest to the heirs of the child then is alternative, taking the place of the child's interest after the life estate of Mrs. Fowler, *not* after the interest of the child. The rule that there can be no remainder after a remainder in fee is still applicable. The language of the trust agreement is: "to my son . . . if he be living, *or* to his heirs if he be dead . . ." (italics supplied). This wording supports such a construction for the use of the disjunctive imports substitution, not succession.

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and he was capable and competent to take possession and enter into the enjoyment thereof the moment the prior estates would determine. It was therefore a vested remainder."

It is possible to consider the remainder contingent because of the provision "upon the death of the party of the first part" appearing in the trust instrument, but a somewhat similar argument in the *Shufeldt* case was rejected. It seems possible to consider the remainder as vested subject to defeasance by a condition subsequent and thereby classify it as is done in the RESTATEMENT, PROPERTY (1936) § 157; and see POWELL, CASES ON FUTURE INTERESTS, (2d ed. 1937) 44 *et seq.*

<sup>18</sup>"It is clear that there can be no remainder after a vested remainder in fee simple." SIMES, *op. cit. supra* note 14, § 75.

<sup>19</sup>"Where there are limitations in the alternative and the first gift is to an ascertained person and in form unconditional followed by a condition subsequent in form, the great weight of American authority is to the effect that the first gift is a vested remainder and the second is an executory interest." From a discussion of limitations in the alternative in America, SIMES, *op. cit. supra* note 14, § 79. The difficulty is, of course, whether the requirement for survival is a condition subsequent or precedent.

<sup>20</sup>"The rule in Shelley's Case is not applicable to executory limitations, because the limitation to the ancestor and to the heirs, if they were both of them executory limitations, would not be parts of the same estate, but would be distinct and independent dispositions of the subject." Note (1911) 29 L. R. A. (N. S.) 963, 1011.

<sup>21</sup>See, *e. g.*, note 20, *supra*; and SIMES, *op. cit. supra* note 14, §§ 97, 98 in c. 6, *Contingent Remainders Distinguished from Executory Interests*, particularly at p. 165 which reads:

"Another point of difference is that a remainder to the heirs of a person to whom a preceding estate of freehold is given by the same instrument calls for the application of the rule in Shelley's Case, while an executory interest limited to the heirs of a person who has a preceding estate of freehold does not."

Rephrased the limitations over would be: "To my son in fee if he be living at the time of my death or, in the alternative, to my son's heirs if he predecease me."

Upon this reasoning there would be alternative contingent remainders in fee simple (1) to the child *or* (2) to his heirs. Neither the rule in Shelley's Case nor the rule relative to remainders limited to the heirs of the grantor applies to such limitations. There would still be nothing upon which the rule in Shelley's Case could operate, because the heirs would not be taking by inheritance from the child, but in place of the child, from the settlor—grantor of the trust agreement.<sup>22</sup> The rule in Shelley's Case is applied only to cases in which there is a remainder limited to the heirs of the first taker; here the first taker (Mrs. Fowler's child) takes in fee, if he takes at all, to the exclusion of his heirs. The rule relative to remainders limited to heirs of the grantor does not apply because the alternative remainder here is limited to heirs of the grantor's child, not to the heirs of the grantor.

A failure upon the part of counsel and the court to distinguish between the two common law rules relative to limitations of remainder interests to heirs and a failure properly to ascertain the character of interests arising under the limitations here presented seem to have led the court into statements and a result which indicate that executory interests occupy a precarious position under the law of this state, although their indestructibility has been continuously recognized in England and in this country since *Pells v. Brown*<sup>23</sup> which was decided in 1620.

Another aspect of the rule in Shelley's Case should be considered. Not infrequently statements are made that the rule does not apply to devises by will because of the rule that the intention of the testator governs. If the analysis of the annotator in 29 L. R. A. (N. S.) 963 is accepted, this distinction in application is unwarranted because the rule doesn't defeat the intention. *In re Johnson's Estate*,<sup>24</sup> the fourth Washington case mentioning the rule, contains dictum on this point. In certain states, says the court,<sup>25</sup> the rule in Shelley's Case has been abolished by statute and in others by judicial decision:

"It does not necessarily follow from the decision in *Fowler v. Wyman* that the rule applies to devises in wills, in view of REM. REV. STAT. § 1410<sup>26</sup> and especially in view of § 1415<sup>27</sup> in

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<sup>22</sup>There is the further possibility that the rule should not be applied in any event here because the trust concerned in part, at least, personal property. This possibility is of little weight, however, because although by its terms the rule in Shelley's Case is applicable only to realty, by analogy it is frequently applied to personalty.

<sup>23</sup>Cro. Jac. 590, 79 Eng. Reprints 504.

<sup>24</sup>192 Wash. 439, 73 P. (2d) 755 (1937).

<sup>25</sup>192 Wash. 439, 445-6, 73 P. (2d) 755 (1937).

<sup>26</sup>REM. REV. STAT. (1933) § 1410: "If any person, by last will, devise any real estate to any person for the term of such person's life, such devise vests in the devisee an estate for life, and without the remainder is specially devised, it shall revert to the heirs at law of the testator."

<sup>27</sup>REM. REV. STAT. (1933) § 1415: "All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them."

which the courts are enjoined to have due regard to the true intent of the testator in carrying out and executing wills. On the other hand, the reasons given in *Fowler v. Wyman* for holding the rule not 'incompatible with the institutions and condition of society in this state,' would seem to apply as fully to devises by will as to conveyances by deed. We need not, however, determine that question in this case . . ."

In conclusion it seems clear that the rule in Shelley's Case is applicable in Washington at least to conveyances by deed. The *Lanpher* case apparently is authority that it is applicable to trust agreements, and although the court expressly refuses to decide the question in *In re Johnson's Estate, supra*, the dictum therein is about as strong as possible without a direct holding that the rule is applicable to devises by will.

An understanding of the operation of the rule and a study of its elements make it clear that avoiding its *usual* operation is not an unsurmountable difficulty, but the common confusion as to the purpose and operation of the rule makes advisable its statutory abrogation. This has been attempted in at least 32 states and the District of Columbia<sup>28</sup>, although the effectiveness of the attempts has been questioned.<sup>29</sup> A writer in the *FORDHAM LAW REVIEW*<sup>30</sup> praises the statute of West Virginia, stating it "constitutes as perfect a model as could be desired" and sets it out in full.<sup>31</sup> A later proposal is embodied in the Law of Property Act, Proposed Final Draft No. 1.<sup>32</sup> Section 12 thereof reads:

"The Rule in Shelley's Case Abolished. Whenever any person by conveyance, takes a life interest and in the same conveyance an interest is limited by way of remainder, either mediately or immediately, to his heirs, or the heirs of his body, or his issue, or next of kin, or some of such heirs, heirs of the body, issue, or next of kin, the words 'heirs,' 'heirs of the body,' 'issue' or 'next of kin,' or other words of like import

<sup>28</sup>See Legis. (1935) 4 *FORDHAM L. REV.* 316, 320, n. 39, for citations to the statutes.

<sup>29</sup>Legis., *The Rule in Shelley's Case Has Been Abolished—Sed Quare.* (1935) 4 *FORDHAM L. REV.* 316.

<sup>30</sup>*ibid.*

<sup>31</sup>W. VA. CODE (1931) c. 36, art. 1, § 14 (as quoted *id.* p. 326): "Wherever any person, by deed, will, or other writing, takes an estate of freehold in land, or takes such an estate in personal property, as would be an estate of freehold, if it were an estate in land, and in the same deed, will, or writing, an estate is afterwards limited by way of remainder, either mediately or immediately, to his heirs, or the heirs of his body, or his issue, the words 'heirs', 'heirs of his body', and 'issue' or other words of like import used in the deed, will or other writing in the limitation therein by way or [*sic.*—of?] remainder, shall not be construed as words of limitation carrying to such person the inheritance as to the land, or the absolute estate as to the personal property, but they shall be construed as words of purchase, creating a remainder in the heirs, heirs of the body, or issue; it being the intent and purpose of this section to completely abolish the rule of law known as the Rule in Shelley's Case."

<sup>32</sup>April 2, 1938—a proposal by The American Law Institute drafted in cooperation with the National Conference of Commissioners on Uniform State Laws.

used in the conveyance, in the limitation carrying to such person any estate of inheritance or absolute estate in the property, are words of purchase creating a remainder in the designated heirs, heirs of the body, issue, or next of kin."

The other problem discussed herein in connection with the *Lanpher* case is met by Section 15 of the proposed law, which reads:

"Inter Vivos Conveyance to the Heirs or Next of Kin of the Conveyor. When any property is limited, in an otherwise effective conveyance *inter vivos*, in form or in defect [*sic.*—effect?], to the heirs or next of kin of the conveyor, which conveyance creates one or more prior interests in favor of a person or persons in existence, such conveyance operates in favor of such heirs or next of kin by purchase and not by descent."

Until there is effective statutory abrogation of both rules in Washington, it would appear that attorneys preparing instruments for propertied clients in this jurisdiction would be wise to make a study of the rules and then to steer a course far from them.

If only the rule in Shelley's Case were to be abolished, the West Virginia statute seems better, for the two sections of the proposed uniform law quoted above need the help of other, definitive sections to operate fully and effectively. In any event, the Washington cases illustrate in this instance, as in other real property problems, the need for careful legislative treatment of the matter.

HARRY M. CROSS.

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## DOES THE LAW REQUIRE A USELESS ACT?

PARCHEN V. ROWLEY

Conditions, super-imposed upon the terms of a contract by law, present some complex problems. This comment aims to point out one small but important and recurrent factual situation in which proper argument and presentation are vital in order that the correct theory of action or defense may be accurately defined. We postulate a contract for the sale of land, *S* to convey upon final payment. Since the contract has fixed the same date for final payment and for conveyance, the law makes these promises dependent one upon the other through the operation of constructive conditions. Normally neither party can put the other in default without a seasonable tender of his own performance<sup>1</sup>.

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<sup>1</sup>*Reese v. Westfield*, 56 Wash. 415, 105 Pac. 837 (1909), 28 L. R. A. (n.s.) 956 (1910); *Carter v. Miller*, 155 Wash. 14, 283 Pac. 470 (1929); *Stusser v. Gottstein*, 178 Wash. 360, 35 P. (2d) 5 (1934). The above statement should be qualified to include the situation where a period of time has elapsed which is sufficiently long to be deemed a material failure of performance on the part of the vendee so that the vendor's promise to convey is excused. Similarly, the duty of payment would also be excused and the contract regarded as dead simply because of the passage of time during which both parties failed to act upon it. *Virtue v. Stanley*, 87 Wash. 167, 151 Pac. 270 (1915); *RESTATEMENT, CONTRACTS* (1932) §§ 274, 276.