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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.

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 performance¹.

¹*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.

We assume these additional facts. The time for payment and conveyance has passed, and neither party has tendered his performance. *B* then says, "I can't perform." *S* tenders no deed, and either changes his position so that he cannot convey to *B* upon a subsequent demand for performance, or now desires to bring an action against *B* to quiet title and/or to get damages for *B*'s non-performance. *B* argues in an action for specific performance or damages against *S* that since *B* was never put in default by the tender of the deed, *S* himself has breached the contract. *B* defends *S*'s action against him, arguing that his payment is still dependent upon *S*'s tender of conveyance.

It is axiomatic that "the law will not require a useless act." Section 280 of the Restatement of Contracts would phrase the axiom as follows in our case: If *B* manifests to *S* that he cannot or will not perform his promise of payment, *S* is justified in changing his position, and if he makes a material change of position (for example, conveys to a third party, or brings an action against *B*) he is discharged from the duty of performing his promise to convey. Thus *S* in our problem case has a perfect defense to *B*'s action².

Section 306 of the Restatement of Contracts can be paraphrased as follows: When *S* has been induced not to tender the deed by *B*'s manifestation that he cannot or will not perform his own promise to pay, or doubts that he will do so, *B*'s duty becomes *independent*. Under this principle, the seller in our problem case has an action against *B*. *B* can nullify his manifestation of inability, but not if *S*, in reliance thereon, has changed his position³. A "change of position" will be made by sale to another or by commencement of an action against *B*. But it will not consist in failure to tender the deed because that standing alone is not regarded as detrimental. Two Washington cases are in accord with Section 306.

*Kane v. Borthwick*⁴ was an action by *S* to quiet title. *B* had stated that he would not complete the contract because of alleged defects in title. The court found that the buyer was unjustified in his refusal, and

²RESTATEMENT, CONTRACTS (1932) § 280 (1) provides: "Where there are promises for an agreed exchange, if one promisor manifests to the other that he cannot or will not substantially perform his promise, or that, though able to do so, he doubts whether he will substantially perform it, and the statement is not conditional on the existence of facts that would justify a failure to perform, and there are no such facts, the other party is justified in changing his position, and if he makes a material change of position he is discharged from the duty of performing his promise." In *Martin v. Pierce*, 57 Wash. 389, 106 Pac. 1127 (1910), a purchaser of land sued to remove a cloud caused by the defendant's previous contract with the vendor. The case turned on whether or not the vendor's duty of conveyance to the defendant had been excused by the defendant's statement that he did not desire to purchase the property followed by the vendor's conveyance to the plaintiff. The court held that the vendor was excused despite his failure to tender a deed to the defendant.

³RESTATEMENT, CONTRACTS (1932) § 306 provides: "Where failure of a party to a contract to perform a condition or a promise is induced by a manifestation to him by the other party that he cannot or will not substantially perform his own promise or that he doubts whether though able he will do so, the duty of such other party becomes independent of performance of the condition or promise. He has power to nullify his manifestation of unwillingness or inability by retracting it, so long as the former party, in reliance thereon, has not changed his position."

⁴50 Wash. 8, 96 Pac. 516 (1908), 18 L. R. A. (N. S.) 486 (1909).

that *S* could maintain his action although he had failed to tender the deed. "A tender is not necessary where it appears that, if made, it would have been fruitless."⁵

In *First National Bank v. Mapson*⁶ the buyer tried to defend an action by *S* for the purchase price by alleging failure to tender a deed. The court found that *B* had unjustifiably asserted that he already had title. "From the pleadings in the case, and from the whole record, it is apparent that the tender of a deed, even if necessary, would have been a vain and useless thing. This the law does not require."

Parchen v. Rowley,⁷ decided in 1938, seems *contra* to the earlier cases and the Restatement. *B* was in default on his periodic payments, and the time for final payment had passed. *B* stated "I cannot pay," no deed was tendered, and the property was sold to a third party. Subsequently, *B* demanded performance, and *S* sued to quiet title. The court stated: "He (*B*) never repudiated the contract nor refused to carry it out—although it is claimed he made the statement he could not pay the balance due. *This alone, however, cannot be construed as an offer to rescind or a declaration of abandonment. Appellant cannot be deprived of his legal rights under the contract by a casual remark of that sort.*"⁸ The buyer's cross-complaint in restitution for payments made was allowed on the theory that the seller himself had breached the contract by selling to the third party.⁹

The italicized sentences above suggest (a) that the court was interested in whether or not the buyer's words, "I cannot pay," indicated positively that his performance would not be forthcoming; (b) that the court regarded the form "I cannot" as significant because it indicated that default would flow from inability rather than from wrongful purpose. It is submitted that such an approach is erroneous. The proper test should be the reasonableness of the seller's reliance upon a manifestation of inability by the buyer, and not the buyer's subjective intention nor the causes which induced his statement. The buyer's pur-

⁵The court also refused *B*'s cross-complaint for return of payments made, which manifests the proposition of § 280 of the RESTATEMENT.

⁶181 Wash. 196, 42 P. (2d) 782 (1935).

⁷196 Wash. 340, 82 P. (2d) 857 (1938).

⁸Italics mine. The trial court had declared an abandonment. During the trial, the buyer had maintained that the full contract price was paid. This statement was convincingly impeached, and the trial court expressed mistrust of the buyer's testimony.

⁹The recovery allowed the buyer is questionable. "... ascertain the amount the property has been enhanced in value by the improvements made by appellant, and enter judgment in that amount, without interest, plus the amount paid on the contract, with interest from dates of payment." Restitution has for its purpose restoration of the injured party to as good a position as that occupied by him before the contract was made. Therefore, the buyer's recovery should be reduced by the reasonable rental value of the property during the period which he occupied the premises. This reduction was not allowed in the *Parchen* case. Interestingly, in its award after the reversal, the trial court allowed the buyer to recover for payments made upon the contract by the buyer's lessee in the form of rental, and also let *B* have the allowances given him on the contract by *S* for a period when *B* had quit the land and a relative of *S*'s was living there. Thus, rental was allowed as part of the award to *B*, but no reasonable rental was subtracted! *B* was given a judgment of \$919.35 when he had made payments of only \$138.33. See RESTATEMENT, CONTRACTS (1932) § 347.

pose is immaterial save as it may, from its objective expression, bear upon the reasonableness of the seller's reliance. Clearly, the cause of the inability is not significant. The law discharges the seller's duty, not as punishment to the buyer for his wrongdoing, but to protect the promisor who has changed his position.

The degree of positiveness in the buyer's statement is important in an analogous situation where the issue is—has an expression of purpose by the buyer not to perform, made before the due date for his performance, created a cause of action for anticipatory breach?¹⁰ Since anticipatory breach operates to allow an action earlier than it would normally accrue, the court must be certain that the manifestation was unequivocal—that the buyer's statement positively indicates that performance will not be forthcoming. A less positive manifestation will justify the change of position contemplated by Sections 280 and 306 of the Restatement. This attitude appears justifiable. After the vendor has changed his position he should perhaps receive greater consideration than where he is merely attempting to recover before the due date of the defendant's performance.¹¹ In the *Parchen* case, the court apparently demanded the unequivocal manifestation required in actions for anticipatory breach.¹²

In the earlier Washington cases involving the principles of the Restatement Sections 280 and 306, the buyer had said "I will not per-

¹⁰Anticipatory breach is covered in RESTATEMENT, CONTRACTS (1932) § 318. Comment (g) states: "The acts which constitute an anticipatory breach must be distinguished from those which excuse non-performance of a condition or discharge a contractual duty. Such an excuse or discharge exists not only where there is a positive repudiation but also where there is a statement of doubt by a promisor whether he will perform." Note illustration No. 4. To be an anticipatory breach, the manifestation must be "a positive, unconditional, and unequivocal declaration of fixed purpose not to perform." *Dingley v. Oler*, 117 U. S. 490 (1886); or "a distinct and unequivocal absolute refusal to perform." *Wells v. Hartford Manila Co.*, 76 Conn. 27, 55 Atl. 599 (1903).

¹¹Notice again that in the *Parchen* case the seller had conveyed the land to another and could not convey to the defendant when the latter demanded a deed.

¹²*Weisberger v. Smith*, 175 Wash. 292, 27 P. (2d) 324 (1933), strongly relied upon by *S* in his brief in the *Parchen* case, cited by the dissenting judge, but ignored by the majority, may partially explain the misconception. Before payment was due in that case, *B* repeatedly stated financial inability to *S*. After the due date, *S* declared a forfeiture without the tender of a deed, and *B* brought an action on the theory of § 306 of the RESTATEMENT, claiming that such a declaration of forfeiture by *S* was a manifestation of unwillingness to perform which gave him a cause of action. *S* had a perfect defense to this action since payment of the purchase price was not tendered, because as has been subsequently held in *Davis v. Downie Investment Co.*, 179 Wash. 470, 38 P. (2d) 215 (1934), and *Crim v. Watson*, 196 Wash. 99, 82 P. (2d) 172 (1938), the declaration of a forfeiture with no deed tendered does not manifest an intention not to perform the contract. But the court seemed to find for the seller upon the theory that *B* was in default himself, apparently regarding his statements as an anticipatory breach. See RESTATEMENT, CONTRACTS (1932) § 397. In the *Parchen* case, the real issue is the applicability of § 280, but the facts approach those of the *Weisberger* case where the court stressed *B*'s positiveness unnecessarily. The faulty analysis of the *Parchen* case, stressing positiveness, brought the two cases into relationship. The *Weisberger* case is cited by the dissenting judge in the *Parchen* case, but was ignored by the majority apparently on the theory that it was not authority for *S* because the statement here was less positive.

form."¹³ In theory, no distinction can be made between this statement and "I cannot." Either may indicate that performance will not be rendered.¹⁴ But when the court requires an unequivocal declaration that the buyer's performance will not be made they incidentally become concerned about his purpose in making the statement. Thus, "I can't" may confuse because it indicates, not purpose, but a state of affairs.¹⁵

The underlying distinction which apparently must be clearly presented to the Washington Court in the future is the difference between the facts needed for an anticipatory breach and those which will excuse conveyance as a duty, or as a condition. Failure to make the distinction in the *Parthen* case resulted in improper penalization of the seller. Under this case, the seller would have had to tender a deed before he could safely convey the property to another. Such a tender would certainly have been futile.

ROBERT A. PURDUE.

¹³*Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32 (1911), and *Kane v. Borthwick*, 50 Wash. 8, 96 Pac. 516 (1908), 18 L. R. A. (N.S.) 486 (1909) (vendee claimed defects in vendor's title); *Martin v. Pierce*, 57 Wash. 389, 106 Pac. 1127 (1910) (vendee stated no desire to purchase); *First National Bank v. Mapson*, 181 Wash. 196, 42 P. (2d) 782 (1935) (vendee claimed title in himself). See also *Bodin v. Wilcox*, 129 Wash. 208, 224 Pac. 558 (1924), applying the useless act exception to the reversed situation of tender of final payment, where the vendee was excused that tender when the vendor had said he would require an additional \$1,000 to convey.

¹⁴The RESTATEMENT, CONTRACTS (1932) § 280, comment (a) makes a distinction between inability and unwillingness when "I doubt" qualifies the manifestation "will not" or "cannot". "A promisor may justly be required to take large risks as to the possibility of getting what he bargained for in return for his own performance, where this risk is due to circumstances over which the other party has no control, and as to which he has made no warranty or misrepresentation; but where the risk is due to a statement by the other promisor that he will not perform his duty, or even to a statement by him of doubt whether he will perform it, the risk of failure of consideration is wrongfully imposed and unless retracted discharges the other party."

¹⁵In *Johnstone v. Milling*, 16 Q. B. D. 460 (1886), Lord Esher stated that a promisee whose promisor constantly stated that he could not get enough money to perform his promise could not maintain an action for anticipatory breach. "Did he mean to say that whatever happened, whether he came into money or not, his intention was . . . (non-performance)?" Such a distinction is not of practical value because both inability and unwillingness equally indicate that performance will not be forthcoming. Compare footnote 14. No cases from other jurisdictions have been found which make any distinction between inability and refusal. Most courts in applying the rule herein discussed state them in the alternative as does the RESTATEMENT. *Johnston v. Johnson*, 43 Minn. 5, 44 N. W. 668 (1890), is exactly *contra* to the *Parthen* case. There the vendee stated he did not have sufficient funds to pay for the land, and the vendor having contracted to sell to another party in reliance thereon was excused his deed of conveyance even though he had not tendered the deed. The case contained no discussion of a distinction between financial inability and refusal to perform for other unjustifiable reasons.