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Sales—Waiver of Right to Rescind

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complete proof of death.

However, since the court has chosen to refer the parties to the absentee statute, it must be pointed out that the provisions of the Washington act appear to be a combination of the better features of the Pennsylvania and Massachusetts statutes; i.e., notice of distribution, the giving of security by the distributees, and final distribution only after a reasonable period of years has elapsed. It is likely that it would survive any attack upon its constitutionality, particularly as a statute of limitations. It has provided a program which is in accord with established practices in other jurisdictions, and can be administered under statutes already existing for the purpose of handling this type of problem.

JAMES B. MITCHELL

Sales—Waiver of Right to Rescind. *P* installed a heating system in *Ds'* house, removing and keeping the old furnace as part of the purchase price. On discovering faulty installation, *Ds* notified *P* of their desire to rescind and demanded reinstallation of the old furnace. *P* refused and filed a lien for the purchase price on *Ds'* house, which he now seeks to foreclose. These events took place in winter, and *Ds*, aged and in poor health, continued to use the new heating system, there being no other adequate means of heating the house. The trial court refused to foreclose the lien and held for *Ds* on their counterclaim for rescission based on breach of warranty of proper installation. Appeal. *Held*: Reversed. If *Ds* had a right to rescind, they waived it by continuing to use the furnace. *Coovert v. Ingwerson*, 37 Wn. 2d 797, 226 P. 2d 187 (1951).

It is suggested that the court may have been unduly harsh in holding that continued use constituted a waiver. This may be demonstrated by a consideration of the alternative courses of conduct open to *Ds* once they decided to rescind. These were: (1) redelivery of the furnace to *P*; (2) installation of another furnace with *P's* furnace being removed and held in storage by *Ds*; (3) discontinuance of use; (4) notice to *P* to remove his furnace. To require *Ds* to follow the first alternative in order to retain their right to rescind would present an inconsistency with the lien that a rescinding buyer has on goods received under a sale contract in favor of payments made on the purchase price. REM. REV. STAT. § 5836-69 [P.P.C. § 852-7] (Uniform Sales Act § 69(5)). The second alternative would put *Ds* to the expense of paying a third party to remedy a situation caused by *P's* breach, since *Ds* undoubtedly lack the technical ability to remove the old furnace and install a new one themselves. Further, there is authority for placing the duty of removal on the seller who has notice of his buyer's election to rescind in cases where the latter's residence was the place of delivery. *Noll v. Baida*, 202 Cal. 98, 259 Pac. 433 (1927); *White v. Miller*, 43 Pa. Super. Ct. 572 (1910); *Schaefer v. Lange*, 37 Pa. Super. Ct. 617 (1907). The third alternative is the most unreasonable of the four in view of *Ds'* age and health, the time of year in which the breach was discovered, and the fact that the new furnace was the sole adequate method of heating the house. Thus the fourth course of action—that adopted by *Ds*—appears to be the most equitable. As the Washington Court has previously said, the remedy of rescission is equitable in nature, and the circumstances of each case determine what the party seeking it must do to restore the other to his status quo. *Erkenbrack v. Jenkins*, 33 Wn. 2d 126, 204 P. 2d 831 (1949); *Hopper v. Williams*, 27 Wn. 2d 579, 179 P. 2d 283 (1947).

Foreign courts have frequently reached results contrary to that of the instant case. *Hartman v. Smyth Sales Inc.*, 11 N.J. Misc. 168, 11 A. 2d 716 (1939), passing on a virtually identical fact pattern, held that the buyer was required neither to discontinue using the furnace nor to have it removed and a new one installed. Similar conclusions

were reached in *Beuret v. Stahl*, 76 Ind. App. 131, 129 N.E. 407 (1920), and *Manitowoc Steam Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N.W. 515 (1903). Wisconsin has announced a rule that reasonable latitude must be allowed a buyer whose continued use was necessary to protect him from injury or inconvenience caused by the seller's breach of warranty. *Advance Rumely Thresher Co. v. Born*, 189 Wis. 309, 206 N.W. 904 (1926); *Fox v. Wilkinson*, 133 Wis. 337, 113 N.W. 669 (1907).

The Washington Court itself dealt more liberally with a buyer in *Empey v. Northwestern and Pacific Hypotheekbank*, 129 Wash. 392, 225 Pac. 226 (1924), which held that a purchaser of land did not waive his right to rescind by remaining in possession after giving notice of his election to rescind, and that an offer to restore the seller to his status quo was not a condition precedent to his cause of action for rescission.

JOHN L. HAY

Statute of Frauds—Executory Land Contracts—Requisites and Sufficiency for a Written Description of Platted Land by Street Number, City, County and State. In an action for specific performance of a real estate contract, *D* set up the plea of the statute of frauds, in that there was an insufficient legal description. *D* had signed an earnest money agreement containing the following description: "real property: at 309 E. Mercer, Seattle, King County, Washington." Held: the legal description is insufficient. Every contract for the sale or conveyance of platted real property must contain in addition to the other requirements of the statute of frauds, the description of such property by correct lot number(s), block, addition, city, county, and state. *Martin v. Seigel*, 35 Wn. 2d 223, 212 P. 2d 107 (1949).

The problem presented in the *Martin* case is what type of property description is necessary to make a contract enforceable under the statute of frauds. In Washington, executory contracts for the conveyance of real property, while required to be in writing, are not specialties, but are simple contracts, valid whether or not they are executed with the formalities required for the execution of deeds. See REM. REV. STAT. §§ 10550, 10551 [P.P.C. §§ 497-1, 498-1]. Thus in this field, resort must be had to the common law statute of frauds and prior case holdings.

The rule in the majority of states is that it is not essential that the description have such particulars of identification as to render resort to extrinsic aid entirely needless when the writing comes to be applied to the subject matter. It is enough if, with the assistance of extrinsic evidence, the description without being contradicted or added to can be connected with and applied to the very property intended, to the exclusion of all other property. Where the writing is in itself capable of application to something definite, the situation of the parties and the surrounding circumstances when the contract was made may be shown by extrinsic evidence so that the court may be placed in the position of the parties themselves, and if the subject matter is identified with reasonable certainty, it is enough. *Ryan v. U.S.*, 136 U.S. 68 (1889); *Corrado v. Monuovi*, 49 R.I. 78, 139 Atl. 791 (1928); *Sawert v. Lunt*, 360 Pa. 521, 62 A. 2d 34 (1948); *Bogard v. Barhan*, 52 Ore. 212, 96 Pac. 673 (1908); *Baller v. Spivack*, 213 Mich. 426, 182 N.W. 70 (1921); *People v. Abrahams*, 88 Cal. 245, 26 Pac. 99 (1891); *Heller v. Baird*, 191 Wis. 288, 210 N.W. 680 (1926); 1 *Restatement, Contracts* § 207(b).

Under the majority rule the opposite result would, in all probability, have been reached. But in Washington, a contract for the conveyance of a real interest is void under the statute of frauds when such a contract does not contain a description of the land sufficient to locate it without recourse to extrinsic evidence. *Gilman v. Brunton*, 94 Wash. 1, 161 Pac. 835 (1916); *Marshall v. Hillman Inv. Co.*, 151 Wash. 529, 276 Pac. 276 (1929); *Martinson v. Cruikshank*, 3 Wn. 2d 565, 123 P. 2d 335 (1940).