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# Specific Restitution of the Title to Land upon Failure of Consideration in a Contract for the Sale of Land

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# NOTES AND COMMENTS

## SPECIFIC RESTITUTION OF THE TITLE TO LAND UPON FAILURE OF CONSIDERATION IN A CONTRACT FOR THE SALE OF LAND

The term restitution has been defined as a means by which a party is restored of something received by another.[1] The concept generally refers to the restoration of money value, rather than the return of a specific thing. Whereas the purpose of the remedy in damages for breach of contract is to put the injured party in the position he would have been in had the contract been fully performed, the purpose of the remedy in restitution is to put the injured party in the position he was in before the contract was made.[2]

The courts rarely discuss restitution in connection with contracts for the sale of land. Cancellation of the deed, which is an equitable remedy, is the terminology most often employed by the courts.[3] The practical effect of cancellation, however, is the restoration of title in the property to the grantor. Cancellation of a deed, therefore, must be discussed in conjunction with restitution.

In general, the courts have been rather reluctant in granting restitution to the grantor for failure of consideration in contracts for the sale of land.[4] In *Ware v. Shartle*,[5] the court exemplified this view by stating:

> Where the grantor accepts the grantee's promise to perform certain acts, without specifically providing in the deed that failure to perform shall work a forfeiture, affect the validity of the deed, or entitle him to a reconveyance of the realty, equity will not ordinarily set aside the deed for a failure of consideration.[6]

In *City of Cleveland v. Herron*,[7] the plaintiff agreed to sell certain land to the municipality, the City of Cleveland. In consideration for the conveyance, the City was to make a payment of $3,000 coupled with a promise to improve the land "as rapidly as possible." Although the City paid the $3,000, it failed to make rapid improvements upon the land pursuant to the agreement. Due to the partial failure of consideration, the plaintiff instituted an action to cancel the

[1] Fineg v. Pickrell, 81 Ariz. 313, 305 P.2d 455 (1956); 5 Corbin on Contracts § 1107 (1964).

[2] 5 Corbin on Contracts § 1104 (1964); Crofoot Lumber, Inc. v. Thompson, 163 Cal. App. 2d 324, 329 P.2d 302 (3d Dist. 1958).

[3] Owens v. Ridgeway, 395 S.W.2d 704 (Tex. Civ. App. 1965).

[4] 5 Williston on Contracts § 1456 (Rev. ed. 1937); 6 Pomeroy, Equity Jurisprudence and Equitable Remedies § 686 (3d. ed. 1905). *See also* Burgess v. Hatton, 209 S.W.2d 799 (Tex. Civ. App. 1948), where the court said, "Want or failure of consideration is in itself ordinarily no grounds for the voidance of an executed deed." *Accord*, Hewett v. Dole, 69 Wash. 163, 124 P. 374 (1912); Foster v. Flack, 140 Wis. 48, 121 N.W. 890 (1909); Tedder v. Tedder, 108 S.C. 271, 94 S.E. 19 (1917).

[5] 59 Ohio L. Abs. 156, 94 N.E.2d 579 (1948).

[6] *Id.* at 157, 94 N.E.2d at 580.

[7] 102 Ohio St. 218, 131 N.E. 489 (1921).

deed. In denying the requested relief, the court said that cancellation of a deed will not be ordered for a "mere breach of contract."

In *New Orleans Great Northern R. Co. v. Belhaven Heights Co.*,[8] the court refused to cancel a deed upon the total failure of consideration. There, the plaintiff conveyed a tract of land in consideration for the defendant's promise to construct a railroad which would enhance the value of the plaintiff's adjoining property. Upon the defendant's failure to perform, the plaintiff sought cancellation of the deed. The court in denying relief said:

> The grantor in a general warranty deed cannot maintain a bill in equity for cancellation on account of a mere failure of the grantee to perform a promise forming in whole or in part the consideration.[9]

These decisions are in conformity with the general view that courts will not ordinarily cancel a deed when there is other compensatory relief available. The grantor may always maintain an action for damages for the breach of contract. Courts have also expressed the fear that cancellation of deeds upon a failure of consideration would cause much uncertainty in the validity of deeds with severe adverse effects in real estate transactions.[10]

### Fraud in the Execution

When fraud occurs in the execution of a contract, the court of equity will exercise jurisdiction and cancel the grantor's deed.[11] An excellent example of this exception is illustrated in *Nathoo v. Jones*.[12] In that case, the plaintiff's husband introduced her to a prospective purchaser of her property. The plaintiff was shown a contract for the sale of land upon terms agreeable to her and she signed the purported agreement. She later learned that she had in fact signed a deed. An action was instituted to cancel the deed based on the fact that the grantee had switched the contract with the deed and thereby gained title to the property by fraud in the execution. The court held that the plaintiff stated proper grounds for equitable relief.

There is, however, a manifest difference between fraud in the execution of a contract and failure of consideration.[13] Whereas fraud in the execution implies that the contract is void from the inception, failure of consideration implies that a consideration which originally was sufficient has ceased to exist.[14]

[8] 122 Miss. 190, 84 So. 178 (1920).

[9] *Id.* at 209, 84 So. at 180.

[10] Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382 (1889).

[11] Steiner v. Steiner, 160 Cal. App. 2d 665, 325 P.2d 109 (2d Dist. 1958); C.I.T. Corporation v. Panac, 25 Cal. 2d 547, 154 P.2d 710 (1942).

[12] 111 Kan. 406, 207 P. 645 (1922).

[13] Plummer v. Bradford, 395 S.W.2d 856 (Tex. Civ. App. 1965).

[14] Douglass v. Douglass, 199 Okla. 519, 188 P.2d 221 (1947).

### CONDITION SUBSEQUENT

A second area in which a grantor may be restored of his real estate is upon the occurrence of a condition subsequent. In *Salamanca Trust Co. v. Crouse*,[15] one Neltson Widrig conveyed certain land by deed to one Maggie Rowan in consideration for the grantee's promise to care for the grantor for the remainder of his life. The deed provided that in case of interruption of these services for any reason whatsoever, the grant would become void and the title would revert to the grantor and his heirs. When Mrs. Rowan died, Widrig re-entered and conveyed the premises to the plaintiff who brought this action to remove the cloud on the title. The defendants, the heirs of Mrs. Rowan, made a motion to dismiss the complaint on the grounds that the grantee's services were interrupted owing to an act of God. The court rendered a judgment for the plaintiff because of the occurrence of a condition subsequent in the deed which created a right in the grantor to re-enter.

In *Parsons v. Smilie*,[16] the paintiff conveyed certain land to the defendant. The deed contained a clause whereby the grantor was given a right of re-entry if the grantee failed to maintain the premises as a lumber yard for five years. The need for lumber decreased and the grantee discontinued using the property for such purposes. In upholding the plaintiff's right to re-enter, the court stated that the damages in this action were unascertainable.

From these two decisions, it is apparent that the courts will allow rights of re-entry provided, however, there is a clause in the deed permitting such action on the occurrence of a condition subsequent.

### EXCHANGE OF LAND

A contract which requires an exchange of land is a third area in which the court has recognized an exception and has ordered a cancellation of the injured party's deed. In *Piper v. Queeny*,[17] the defendant, who was planning to build a garage, found it necessary to purchase a portion of adjoining land which was owned by the plaintiff. The plaintiff was willing to convey the needed portion of his land to the defendant in exchange for a section of the defendant's property. Upon the defendant's failure to deliver a deed, the court granted the plaintiff's prayer for cancellation of his deed.

In *Simpson v. Bostwick*,[18] a more recent decision, the plaintiff and the defendant entered into an agreement for an exchange of property. The plaintiff agreed to convey his farm in consideration for the defendant's promise to pay the plaintiff $2,500 immediately and to deliver title to his trailer court to the

[15] 129 Misc. 609, 222 N.Y.S. 83 (1927).
[16] 97 Cal. 647, 32 P. 702 (1893).
[17] 282 Pa. 135, 127 A. 474 (1925).
[18] 248 Ia. 238, 80 N.W.2d 339 (1957). *Accord*, Olsen v. Sortedahl, 143 Ia. 166, 121 N.W. 559 (1909).

plaintiff within one year. The defendant also agreed that if he was unable to convey title to the trailer court within the one-year limitation, the $2,500 was to constitute a rental of the farm. The court ordered a cancellation of the plaintiff's deed upon the failure of the defendant to fulfill his promises.

Although the courts have not mentioned the basis for this exception, it is readily apparent that the remedy in damages for breach of contract is inadequate. If a grantor conveys land for a consideration other than an exchange of realty, monetary damages are generally adequate. This is proper because the grantor is bargaining for money or something which can be compensated by monetary damages. In an exchange of land situation, however, the injured party cannot be properly compensated by damages because each piece of property is unique.

### Grantee's Promise to Support the Grantor

In *Lockwood v. Lockwood*,[19] the plaintiff, a seventy-year old widow, conveyed fifty acres of land to her son, the defendant, who had always lived with her. The transfer was made upon his promise to maintain and support his mother for the remainder of her life. When the defendant breached his promise by compelling his mother to leave the premises, she instituted an action requesting that the deed be cancelled. In holding for the plaintiff, the court stated that cancellation was a proper remedy because the consideration had completely failed.

The court, in *Martinez v. Martinez*,[20] recognized this exception and said:

> Where an aged person conveys all of his property to another in consideration for a promise by the grantee to support the grantor for life, and if the grantee fails to keep this promise or perform the agreement, a court of equity will grant relief by rescinding the contract, setting aside the deed, and ordering a reconveyance of the property, without the necessity of alleging or proving fraud.[21]

The reason for this deviation from the majority rule is essentially the same as that mentioned in the exchange of realty exception. If an elderly person has transferred all of his property for a promise by the grantee to support him for life, an action in damages for a breach of contract is generally inadequate. Under these circumstances, cancellation of the deed is the only adequate remedy.[22]

Some courts have reached the same result by basing the cancellation of the deed upon the concept of fraud.[23] In *Stebbins v. Petty*,[24] the plaintiff conveyed land to one Emily Petty in consideration for her promise that she, her heirs and

[19] 124 Mich. 627, 83 N.W. 613 (1900).
[20] 57 Colo. 292, 141 P. 469 (1914).
[21] *Id.* at 298, 141 P. at 471.
[22] Pressey v. Heath, 35 N.J. Super. 346, 114 A.2d 16 (1955).
[23] Frazier v. Miller, 16 Ill. 48 (1854); Oard v. Oard, 59 Ill. 46 (1871); Fabrice v. Von Der Brelie, 190 Ill. 460, 60 N.E. 835 (1901); McClelland v. McClelland, 176 Ill. 83, 51 N.E. 559 (1898); O'Ferrall v. O'Ferrall, 276 Ill. 132, 114 N.E. 685 (1916).
[24] 209 Ill. 291, 70 N.E. 673 (1904).

her assigns would support and maintain the grantor for the remainder of his life. Mrs. Petty began fulfilling her agreement but died within three months. Thereafter her husband and her children refused to continue to support and maintain the plaintiff. Although the plaintiff was denied his request for cancellation of the deed, the court seemed to intimate that under different circumstances such relief would be ordered. The court stated:

> The cancellation by courts of equity of deeds executed in consideration of the agreement of the grantee to support the grantor, on the grantee's failure to perform, is based on the theory that the grantee's refusal to comply with the contract raises a presumption that he did not intend to comply with it in the first instance, making the contract fraudulent in its inception.[25]

In Rhode Island, the courts advance a trust theory in these situations. In *Grant v. Bell*,[26] the plaintiff brought an action seeking reconveyance of a lot of land held by the defendant who had failed to perform his promise to support the grantor. In concluding that the legal remedy was inadequate owing to the fact that a continuing obligation to support could cause a multiplicity of suits, the court imposed a constructive trust on the property in favor of the grantee.

## Conclusion

The courts have been reluctant to grant restitution of the title to land upon failure of consideration. The prevailing view is that an aggrieved party can be adequately compensated in damages. Where, however, there has been a fraud in the execution of the contract, a promise by the grantee to support the grantor, a contract for an exchange of land, or an occurrence of a condition subsequent in a deed the courts have concluded that the remedy of money damages is not adequate and have permitted the grantor to regain title to his land. Outside of these four basic exceptions the law is relatively well-established and the injured party has been denied the equitable remedy of cancellation of the deed of conveyance.

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[25] *Id.* at 293, 70 N.E. at 673.
[26] 26 R.I. 288, 58 A. 951 (1904).