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## Contracts—Earnest-Money Payments—Vendee's Recovery Denied Where Agreement Fails to Comply with Statute of Frauds

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## CONTRACTS

**Earnest-Money Payments—Vendee's Recovery Denied Where Agreement Fails to Comply with Statute of Frauds.** In *Schweiter v. Halsey*,<sup>1</sup> the Washington Supreme Court held that if a vendor of real property has not repudiated, but is ready, willing and able to perform, the vendee cannot recover payments made upon the purchase price although the earnest-money agreement does not satisfy the Statute of Frauds.

In October, 1956 the vendor and vendee had executed an earnest-money receipt. This receipt, the court held, failed to comply with the Statute of Frauds because it did not contain an adequate legal description of the land at the time that it was executed.<sup>2</sup> In January, 1957 the vendor executed a deed and requested the vendees to execute a note and mortgage with an insurance company to provide the necessary financing. The vendee refused to sign the papers and gave notice of rescission. The vendor promptly tendered performance, which was refused by the vendee.

The vendee instituted an action seeking a declaration of its rights and duties under the receipt. The vendor, having sold the land to a third party for seven-thousand dollars less than the vendee had agreed to pay, answered with a counter-claim, seeking recovery of the seven-thousand dollars plus special damages. The trial court permitted the vendee to recover his earnest-money payment and dismissed the vendor's counter-claim. The vendor appealed.

The supreme court, stating that an action at law presupposes a valid binding contract,<sup>3</sup> affirmed the lower court's dismissal of the counter-claim. It refused to allow recovery of the earnest-money payment, however, since the vendor had not repudiated the agreement and had tendered performance to the defaulting vendee.

In refusing to allow recovery of the earnest-money payments, although the agreement would not have been enforceable against the

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<sup>1</sup> 57 Wn.2d 707, 359 P.2d 821 (1961).

<sup>2</sup> Only oral authority was given the broker to subsequently attach the legal description. The vendors could not only have kept the earnest-money payments, but also had a valid cause of action for specific performance of the contract, or in the alternative, an action for damages, had they authorized their broker to attach the legal description at a later date by noting such on the receipt at the time of execution. *Edwards v. Meader*, 34 Wn.2d 921, 210 P.2d 1019 (1949).

Such an authorization to attach the legal description can not be implied from the fact of the real estate brokers' possession of the earnest-money-agreement signed by both parties. *Barth v. Barth*, 19 Wn.2d 543, 143 P.2d 542 (1943).

<sup>3</sup> 57 Wn.2d 707, 714, 359 P.2d 821, 825 (1961). *Accord*, *Hedges v. Hurd*, 47 Wn.2d 683, 289 P.2d 706 (1955).

defaulting vendee at law or in equity, the court followed prior Washington case law<sup>4</sup> and the weight of authority.<sup>5</sup> The court's result is achieved in many jurisdictions on the theory that an agreement in violation of the Statute of Frauds is unenforceable rather than void.<sup>6</sup> The elements essential to the existence of a contract are found to exist, including the consideration necessary to justify the vendor's retention of earnest-money payments.<sup>7</sup> Failure to comply with the statute results only in loss of the right to enforce the contract directly.<sup>8</sup>

In jurisdictions where recovery of earnest-money payments by a buyer in default is allowed, the Statute of Frauds is usually interpreted to void contracts which do not comply with it.<sup>9</sup> No contract exists and no legal relations result from the purported contract. The lack of consideration results in the defaulting buyer's right to a return of the earnest-money in an action for restitution.<sup>10</sup> In some jurisdictions where recovery is allowed, the Statute of Frauds is not interpreted to void non-complying contracts. Rather, restitution is granted on the belief that the statute must prevent indirect as well as direct enforcement of contracts which do not comply with its requirements.<sup>11</sup>

The Washington Statute of Frauds<sup>12</sup> has been interpreted as voiding

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<sup>4</sup> *Dubke v. Kassa*, 29 Wn.2d 486, 187 P.2d 611 (1947); *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 Pac. 867 (1902) (dicta). *But see Hooper v. First Exchange Nat. Bank of Coeur D'Alene*, 53 F.2d 593 (9th Cir. 1931). The court allowed recovery of money paid on void agreement by a purchaser who had defaulted on mortgage payments. The court disposed of the defenses of estoppel and laches and stated at page 597: "It seems quite unwarranted to say that in such circumstances there was such conduct . . . as to preclude him from relief to which he otherwise would be entitled."

<sup>5</sup> 49 AM. JUR. *Statute of Frauds* § 564 (1943); RESTATEMENT, CONTRACTS § 355 (1932). The Restatement of Contracts gives no right of restitution unless such a right would exist if the requirement of the statute were satisfied and the contract an enforceable one.

<sup>6</sup> 49 AM. JUR. *Statute of Frauds* § 564 (1943); 2 CORBIN, CONTRACTS § 279 (1950); RESTATEMENT, CONTRACTS § 344, comment on subsection (4) (1932).

<sup>7</sup> 2 CORBIN, CONTRACTS § 286 P.945 (1950): "An oral promise is a sufficient consideration for a return promise, even though the oral promise is within the statute of frauds and not directly enforceable. . . . Such an oral promise is not void."

<sup>8</sup> 49 AM. JUR. *Statute of Frauds* § 564 (1943); 169 A.L.R. 192 (1947); RESTATEMENT, CONTRACTS § 355 (1932).

<sup>9</sup> 49 AM. JUR. *Statute of Frauds* § 564 (1943).

<sup>10</sup> *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311 (1873); *Reedy v. Ebsen*, 60 S.D. 1, 242 N.W. 592 (1932).

<sup>11</sup> See, e.g., *Garbarino v. Union Sav. & Loan Ass'n*, 107 Colo. 149, 109 P.2d 638 (1941). 49 AM. JUR. *Statute of Frauds* § 564 (1943). Colorado, Minnesota, New York, Oklahoma, and Oregon have refused recovery when the applicable Statute of Frauds provided that agreements in violation were void or not to be valid, rather than merely unenforceable. 169 A.L.R. 191 (1947).

<sup>12</sup> Wash. Sess. Laws 1929, ch. 33, § 1. "[E]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: . . ." *But see Comment, The English Statute of Frauds in Washington*, 34 WASHINGTON L. REV. 124, 133 (1959).

contracts which do not comply with its requirements.<sup>13</sup> Thus the Washington court has adopted an underlying rationale which, in most jurisdictions that have adopted it, allows the defaulting vendee to recover his down payment if the statute is not complied with.<sup>14</sup> While the court in *Schweiter v. Halsey* followed the weight of authority in terms of result, it neglected to make clear the reasoning by which it reached its conclusion.

The court had considered whether a defaulting vendee can recover earnest-money payments under an agreement failing to comply with the Statute of Frauds on two previous occasions. In *Stanek v. Peterson*<sup>15</sup> the vendor had conceded the vendee's right to "ask for and receive the return of the initial payment."<sup>16</sup> In view of the conceded point the court readily allowed the vendee to recover without a review of the question. *Dubke v. Kassa*<sup>17</sup> presented facts nearly identical with those in *Schweiter v. Halsey*: The vendee had refused to purchase property after executing a defective earnest-money agreement and paying the vendor two-hundred and fifty dollars. Accepting the vendor's argument<sup>18</sup> that *Stanek* was not controlling, the court did not allow the vendee to recover. In support of its decision the court cited sources which say that an agreement not complying with the Statute of Frauds is unenforceable rather than void.<sup>19</sup>

In finding that the agreement in the *Schweiter* case was void, yet making its decision turn on the vendee's repudiation and the vendor's willingness to perform, the court has committed itself to a logical inconsistency. If the agreement was void, it gave rise to no legal relations.<sup>20</sup> There was no legal excuse for refusing to return the vendee's earnest-money; no consideration had been given for holding it.<sup>21</sup> If the vendee's repudiation was significant, it was because he owed a legal duty to the seller. In attaching significance to the vendee's repudiation the court impliedly recognized a legal duty, created by a

<sup>13</sup> *Martin v. Seigel*, 35 Wn.2d 223, 212 P.2d 107 (1949); *Leo v. Casselman*, 29 Wn.2d 47, 185 P.2d 107 (1947); *Fosburgh v. Sando*, 24 Wn.2d 586, 166 P.2d 850 (1946); *Martinson v. Cruikshank*, 3 Wn.2d 565, 101 P.2d 604 (1940).

<sup>14</sup> See authorities cited note 8 *supra*.

<sup>15</sup> 26 Wn.2d 385, 174 P.2d 308 (1946).

<sup>16</sup> *Id.* at 387, 174 P.2d at 309.

<sup>17</sup> 29 Wn.2d 486, 187 P.2d 611 (1947).

<sup>18</sup> Brief for Appellant, p. 15.

<sup>19</sup> *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 Pac. 867 (1902) (dicta). 49 AM. JUR. *Statute of Frauds* § 564 (1943). 37 C.J.S. *Statute of Frauds* § 256 (1943); RESTATEMENT, CONTRACTS § 355 (1932).

<sup>20</sup> "A contract void under the statute of frauds is a mere nullity, and can not be used for any purpose whatever." *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311, 312 (1873).

<sup>21</sup> "The parol contract being void, furnishes no consideration for the payment." *Reedy v. Ebsen*, 60 S.D. 1, 242 N.W. 592, 594 (1932).

confessedly void agreement. It enforced this duty indirectly by refusing restitution.<sup>22</sup>

Chief Justice Finley, in dissent, recognizes this logical inconsistency of the majority. He states in his opinion<sup>23</sup> that if the purported contract is void, recovery of the earnest-money should be granted. He justifiably demands a clarification of the majority's reasoning in arriving at its decision.

In stating the accepted rule against recovery of earnest-money by a defaulting purchaser, the court cites<sup>24</sup> the Restatement of Contracts<sup>25</sup> as authority. In commenting on the cited subsection the Restatement explains: "Contracts within the statute of frauds are neither illegal nor void, even though the requirements for direct enforcement are not complied with." (Emphasis added.) In holding the agreement between Schweiter and Halsey void, the majority rejects the Restatement rationale, yet adopts and cites the conclusion of that rationale in denying recovery. The court also cited *Johnson v. Puget Mill Co.*<sup>26</sup> and *Browne v. Anderson*<sup>27</sup> as authority for its decision. In *Johnson* the agreement had been taken without the statute by part performance<sup>28</sup> so that the question of a vendee's recovery under an agreement violative of the statute was not presented. The rule against recovery was stated as a dictum in *Johnson*, however. In *Browne*, which relied on *Johnson* and *Dubke v. Kassa*,<sup>29</sup> the vendee was denied recovery because the agreement was found to comply with the statute. The court did not intimate what its decision would have been if the agreement had violated the statute.

If the Washington court wishes to clarify its rule of denying earnest-money restitution to defaulting purchasers, it could follow one of two alternatives. It could establish this policy as one of protection to the vendor which will be administered in the face of legal inconsistency. Washington would not be alone if such a course were followed.<sup>30</sup> Or, it could recognize that agreements which fail to comply with the Statute of Frauds are not void, but incapable of being enforced directly.<sup>31</sup> If the latter course were followed, indirect enforcement would not result

<sup>22</sup> 2 CORBIN, CONTRACTS § 332 (1950).

<sup>23</sup> *Schweiter v. Halsey*, 57 Wn.2d 707, 716, 359 P.2d 821, 826 (1961).

<sup>24</sup> *Id.* at 711, 359 P.2d at 823.

<sup>25</sup> RESTATEMENT, CONTRACTS § 355 (4) (1932).

<sup>26</sup> 28 Wash. 515, 68 Pac. 867 (1902).

<sup>27</sup> 36 Wn.2d 321, 217 P.2d 787 (1950).

<sup>28</sup> *Johnson v. Puget Mill Co.*, 28 Wash. 515, 519, 68 Pac. 867, 868 (1902).

<sup>29</sup> *Dubke v. Kassa*, 29 Wn.2d 486, 187 P.2d 611 (1947).

<sup>30</sup> See authorities cited note 11 *supra*.

<sup>31</sup> See authorities cited note 6 *supra*.

in inconsistency. It makes no great difference to the attorney whether the Washington court chooses to solidify its position in denying restitution on the *Schweiter* facts by declaring such agreements merely unenforceable, or continues to treat them as void. The court's decision will apparently be to deny restitution in keeping with Washington case law.<sup>32</sup> Non-compliance with the Statute of Frauds will prevent only the direct enforcement of the contract. Legal relations will continue to be indirectly enforced, with the unenforceable contract serving as a valid defense to the defaulting purchaser's action for restitution.

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### CRIMINAL LAW

**Murder — Negligent Medical Treatment Intervening Between Defendant's Act and Decedent's Death.** In reviewing a murder conviction, the Washington court recently was confronted with the problem of negligent medical treatment intervening between the defendant's act and the ensuing death. In affirming, the court apparently took the extreme position that proximate causation is solely a jury question, the inquiry on appeal being limited to a cause-in-fact analysis.

In *State v. Little*<sup>1</sup>, the defendant Little and the decedent, Ross Johnson, were both inmates of the state prison at Walla Walla. In settling a previous disagreement, Little punched and kicked Johnson about the head, sending him to the prison hospital in a dazed and semiconscious condition. In a cursory preliminary examination, his injuries were diagnosed as a concussion with possible skull fracture and brain damage. Johnson remained in a bed without side rails or other means of restraint for five days, during which time he was described as continually "thrashing around . . . throwing his arms about."<sup>2</sup> While at the prison hospital, he fell out of bed five times, striking his head against the wall, an iron radiator, and on the terrazzo floor. On the fifth day, X-rays and a thorough examination counseled his prompt removal via the prison doctor's station wagon to Western State Hospital, where he died before an operation could be performed.

The case presented a serious causation problem, for it was impossible to ascertain the source of the fatal injuries. Both the beating and the five falls had occurred before any X-rays were made. At the trial,

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<sup>32</sup> See cases cited note 4 *supra*.

<sup>1</sup> 57 Wn.2d 516, 358 P.2d 120 (1961).

<sup>2</sup> *Id.* at 518, 358 P.2d 121.