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Restitution in Washington Contracts

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COMMENT

RESTITUTION IN WASHINGTON CONTRACTS

The evolution of the remedy of restitution[1] has been most tenuous, both with respect to its Anglo-American history[2] and its Washington development. The remedy has origins in both law and equity.[3] While restitution as such is seldom mentioned in the cases, its principles often underlie a strained rationale. Perhaps today, with the merger of law and equity, restitution may be considered equitable in nature,[4] with the doctrine of "unjust enrichment" its backbone.[5] The purpose of this Comment is to examine the requisites and mechanics of the remedy of restitution for breach of contract, and how these principles have been applied by the Washington court.

The scope of this Comment will be limited to discussion of restitution as an *alternative* remedy for a breach of contract by the defendant, and as a sole remedy for a plaintiff unable to enforce a contract by reason of his own breach, his non-performance of a condition, or the Statute of Frauds. Restitution as a remedy where no agreement has been entered into, or where an agreement is void or voidable, will not be treated, although some fraud and misrepresentation cases are

[1] The word "restitution," when used in this Comment, is limited to the remedies described in sections 347-357 of the *Restatement of Contracts.*

[2] Restitution is a slice of the law of quasi contracts. Lord Mansfield's opinion in Moses v. Macferlan, 2 Burr. 1005 (1760), is generally considered to mark the emergence of quasi contract as a distinct species of common law obligation. WOODWARD, QUASI CONTRACTS § 2 (1913). In holding that indebitatus assumpsit would lie against an indorsee of a note who had violated his agreement not to bring suit on the note against the indorser, Lord Mansfield declared: "If the defendant be under an obligation, from the ties of natural justice, to refund, the law *implies a debt* . . ." (Emphasis added.)

That assumpsit should be a vehicle for finding an implied obligation is not too surprising, considering that the extension of special assumpsit into the remedy termed indebitatus (or general) assumpsit, used in actions for debts, was achieved by finding an implied promise to pay a debt. WOODWARD, QUASI CONTRACTS at 3,4 (1913); KIEGWIN, CASES, COMMON LAW PLEADING §§ 73, 74 (2d ed. 1934). Hence, in quasi contracts, assumpsit was made to lie by finding both a fictitious debt and a fictitious promise to pay such debt.

[3] If for any reason the Chancellor regarded the restitutionary remedy in assumpsit as not adequate to achieve justice, equitable relief was available, typically in the form of a "bill for rescission and restitution." 2 CORBIN, CONTRACTS § 330 (1950) [hereinafter cited as CORBIN]; 5 *id.* § 1102.

[4] See 5 CORBIN § 1103. In Peterson v. Boyd, 46 Wn.2d 97, 278 P.2d 400 (1955), the court declared that it was immaterial whether the action was one in equity for rescission or was an action at law to recover money on a contract that has been rescinded, since in either case principles of equity governed. See Annot., *Action Involving Rescission or Right to Rescind Contract and to Recover Amount Paid Thereunder as One at Law or in Equity,* 95 A.L.R. 1000 (1935).

[5] However, availability of restitution as a remedy for a breach of contract does not depend wholly upon the idea that the defendant has been unjustly enriched by the plaintiff's part performance. 5 CORBIN 1107. This is illustrated by the result reached in Dygert v. Hansen, 31 Wn.2d 858, 199 P.2d 596 (1948). See also note 68 *infra.*

cited for principles which are equally germane to the restitution discussion.

Only a few Washington cases discuss the remedy of restitution as such. Most often the court characterizes the action as "rescission," and hence a brief analysis of the meaning of this term is a requisite preliminary to the restitution discussion.

The definition of "rescission" approved by most text-writers is that it consists of a new contract the purpose of which is to discharge the old,[6] and in this sense is referred to as "rescission by mutual assent" or simply "mutual rescission." There must be mutual assent for this rescission agreement,[7] but it may be implied from the conduct of the parties.[8] Since the most common mutual rescission fact pattern involves a bilateral contract with each party still subject to some duty thereunder, the consideration requirement[9] is usually fulfilled by each party agreeing to surrender his rights under the contract for the other person's corresponding agreement.[10] It is then a question of interpretation[11] whether such rescission agreements include a promise to make restitution by returning payments made or paying for performance rendered.[12] The Washington court has indicated that the absence of

[6] RESTATEMENT, CONTRACTS § 406 (1932) [hereinafter cited as RESTATEMENT]; 5 CORBIN § 1131.

[7] RESTATEMENT § 406, comment *b*.

[8] Gooden v. Hunter, 154 Wash. Dec. 907, 344 P.2d 723 (1959) (where vendee abandoned contract for sale of boat, the vendors' subsequent repossession of the boat indicated that they "acquiesced" in the abandonment and elected to treat the contract as being riscinded); Morango v. Phillips, 33 Wn.2d 351 at 357, 205 P.2d 892 (1949) and cases cited therein ("Mutual rescission is a matter of contract... An assent to an offer of rescission may be express or implied."); Ridder v. Cottle, 32 Wn.2d 538, 202 P.2d 741 (1949) (there was no implied acceptance by the vendor of an ice cream business of the vendee's implied offer of rescission where the vendor did nothing with the business property inconsistent with the vendee's contractual rights until after the vendee was in default).

[9] For exceptions to the requirement of consideration, see RESTATEMENT §§ 410-416.

[10] RESTATEMENT § 406, comment *a*. It is immaterial that part of the contract was performed on one side, and nothing on the other; or that one party was guilty of partial breach. These matters merely pertain to mere adequacy of consideration. RESTATEMENT § 81. But distinguish this from the situation when one party *wholly* performs, or there is a total breach.

[11] RESTATEMENT § 409. Note that the "restitution" here resembles *specific performance* of an implied in fact agreement, rather than a remedy for a breach of contract.

[12] In an early case, Croup v. Humboldt Quartz & Placer Mining Co., 87 Wash. 248, 151 Pac. 493 (1915), the court said that when an obligee repudiates his contract, and the obligor "acquiesces" therein, there is mutual rescission by the parties and the courts will "leave the parties where they placed themselves." Although the issue in *Croup* was whether the repudiation resulted in failure of consideration for the obligor's note, it would still seem that the Washington court is stating that it will not be inclined to find by interpretation a promise to make restitution in situations involving rescission by mutual assent. However, in McMillen v. Bancroft, 162 Wash. 175, 298 Pac. 460 (1931), where the vendor "acquiesced" in the vendee's abandonment of the contract, the court held that this constituted mutual rescission and hence the parties were entitled to restoration of their original rights. The *Croup* and *McMillen* cases can be factually distinguished in that *Croup* involved an obligee who abandoned the contract while in

a forfeiture clause will be an important factor in finding such an implied promise to make restitution.[13]

There is a second category of "rescission" employed by the courts which affects the restitution remedy in an altogether different fashion. This type may be designated "unilateral rescission,"[14] and is effected by the act of the injured party *alone* asserting his privilege not to perform further, such privilege having been created by the wrongdoer's breach and not by the assertion.[15] Professor Corbin goes on to say that the legal effect of such unilateral rescission is to extinguish the injured party's own right to specific performance of the contract.[16] As will be described later, this results in the removal of one of the bars

McMillen the vendee (in a position similar to that of an "obligor") so acted, and it can be logically argued that the vendee's "offer to rescind" would be more likely to include a condition that the vendor make restitution of payments paid.

The Washington court has often made the statement, "to rescind a contract is to declare it void in its inception, and restore the parties to their status quo." Russell v. Stephens, 191 Wash. 314, 71 P.2d 30 (1937). When the court finds such a "rescission," the result is identical to interpreting a promise to make restitution in a mutual agreement of rescission, and should be construed as such.

In Van Keulen v. Sealander, 183 Wash. 634, 49 P.2d 19 (1935), it was held that the vendee's mailing of a quitclaim deed of the property to the vendor, and the latter's retention of the deed for three months, was not, of itself, sufficient to "establish a mutual rescission." The court believed the vendee was merely trying to escape a bad bargain, and hence permitted the forfeiture. Considerable discussion was given to the import of "rescission," and the court seemed to recognize the principle of the interpretation of a promise to make restitution in mutual rescission, stating that "rescind" did "not always imply such an abrogation of the contract *ab initio* as would impose upon the vendor the obligation to restore the payments made..." This suggests, despite the court's earlier statement, that mutual rescission was the basis of this decision, and that a promise to make restitution was not found for the reason that the vendee studiously avoided requesting a return of his payments during the three month period.

[13] Gooden v. Hunter, 154 Wash. Dec. 907, 911, 344 P.2d 723 (1959) ("In the absence of a forfeiture clause... a vendor who rescinds must restore amounts paid on the purchase price... when the vendee, although in default, acquiesces in the rescission."). However, this rule was borrowed from Tungsten Products, Inc. v. Kimmel, 5 Wn.2d 572, 105 P.2d 822 (1940), and other cases involving restitution rather than rescission by mutual assent.

[14] 5 CORBIN § 1131; Van Keulen v. Sealander, *supra* note 12 (the court here refers to "unilateral rescission," but its decision seems better explained as mutual rescission without restitution); Lea v. Young, 168 Wash. 496, 12 P.2d 601 (1932) (vendee defaulted, vendor brought action to "rescind and cancel" the contract and was granted forfeiture of the $2,796 in payments; the court stated the vendor's action of "rescission" here amounted to an "election to terminate" the contract rather than mutual rescission.)

[15] CORBIN § 1131. Hence, unilateral rescission can be effected *only* when the other party has committed a *total* breach.

[16] Corbin, *The Right of a Defaulting Vendee to the Restitution of Instalments Paid*, 40 YALE L.J. 1013 (1931). This article was cited in Litel v. Marsh, 33 Wn.2d 441, 206 P.2d 300 (1949), the opinion expressly recognizing the principle that a vendee has no right of restitution while the vendor still has a right to specific performance of the contract. The reason for this rule is simply that it would be futile for the plaintiff-vendee to recover payments if the vendor could compel him to pay the entire price by an action of specific performance. Unilateral rescission removes this obstacle. In an earlier case, Russell v. Stephens, 191 Wash. 314, 71 P.2d 30 (1937), the court reached a similar result under election of remedies reasoning; stating that upon the vendee's default in payments, the vendor could: (1) declare the contract forfeited and, if the contract so provided, retain the payments as liquidated damages, or the vendor could elect to bring action for (2) specific performance or (3) damages actually suffered.

to the wrongdoer's obtaining restitution under section 357 of the *Restatement.*

Additional usages of rescission arise in decisions involving a contract which is voidable as a consequence of fraud,[17] duress or undue influence,[18] material misrepresentation of fact,[19] mistake of fact,[20] or impossibility.[21] Within these fact patterns, "rescission" is used to describe both (1) the timely assertion of the power to avoid such contracts, *i.e.*, "disaffirmance,"[22] and (2) the remedy of discharging such contracts. While the remedy of rescission of voidable contracts has many requirements identical to those of the remedy of restitution,[23] it differs in that *affirmance*[24] of a voidable contract can result from a mere "unreasonable delay"[25] in disaffirming after acquiring knowledge that such power is held.[26] This exclusionary rule is more broad in its application than any comparable bar to the restitution remedy.[27] However, the Washington court on occasion has apparently improperly imposed the voidable contract limitation on the remedy of restitution, under the guise of "acquiescence."[28]

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[17] RESTATEMENT §§ 471, 476.
[18] *Id.* §§ 495, 496.
[19] *Id.* §§ 470, 476.
[20] *Id.* § 502.
[21] *Id.* §§ 454-469.
[22] See RESTATEMENT §§ 488, 489.
[23] The *Restatement* recognizes one such similarity where it states factors requiring the return of the consideration received by the plaintiff, as a condition of restitution (RESTATEMENT § 349), which are identical to the factors requiring an offer to restore performance received as a condition of disaffirmance (RESTATEMENT § 480). Also compare sections 354 and 489 of the *Restatement.*
[24] The injured party in voidable contract situations may have three possible things he can do: seek a decree for reformation (RESTATEMENT § 491), disaffirm the contract and sue for rescission (RESTATEMENT §§ 480-489), or *affirm* the contract and lose his power of avoidance. This affirmance can be either by affirmative acts (RESTATEMENT § 484) or by an unreasonable delay in disaffirming (RESTATEMENT § 483(1).)
[25] See RESTATEMENT § 483(2) for factors determining whether a delay is "unreasonable."
[26] RESTATEMENT § 483(1). The Washington court typically describes these acts as "waiver." Salter v. Heiser, 39 Wn.2d 826, 239 P.2d 327 (1951) (lessees who continued in possession of leased premises and brought action for damages after discovery of lessor's fraud thereby "waived" their right to rescind); Coovert v. Ingwerson, 37 Wn.2d 797, 226 P.2d 187 (1951) (vendee "waived" his right to rescind by continuing to use furnace up to time of trial).
[27] There is an election of remedies with respect to restitution or damages, but it only applies where the injured party makes an affirmative "manifested choice," rather than by mere non-action. RESTATEMENT § 381(1). Another doctrine to be considered with respect to this area of conduct is "acceptance," also operating as a bar to restitution. Acceptance also requires affirmative conduct. See note 80 *infra.*
[28] A gross example of such confusion is found in Central Life Assur. Soc'y v. Impelmans, 13 Wn.2d 632, 126 P.2d 757 (1942), where the court denied restitution to a vendee in default for the reason that the vendee had "waived the right to rescind" by treating the contract as in force after having knowledge of the defect in title. The court predicated this conclusion on the rule in fraudulent representation cases, and then compounded its error by stating that the vendee was all the more required to act with reasonable promptness in the case at hand, since there was *no showing of fraud!*

A remedy termed "rescission" is also given to both the vendor[29] and vendee[30] under the provisions of the Uniform Sales Act. "Rescission" as used in the act ought not overlap with the remedy of restitution.[31] Confusion of the two is particularly unfortunate because of the large role of "acceptance" in the Sales Act.[32]

In the following discussion of the principles of restitution in Washington, the analyses of most of the cited cases involve the preliminary question of which of the above senses the court is using "rescission."

RESTITUTION AS ALTERNATIVE REMEDY FOR TOTAL BREACH OF CONTRACT

When there is total breach[33] of a contract, the injured party is discharged of his contractual duties[34] and has the power to bring an action against the wrongdoer.[35] In all cases the injured party can maintain an action for damages;[36] in some cases he will have the alternative of suing for restitution.[37] Whether restitution will be preferable to damages will depend on the circumstances of each individual case.[38] The discussion will now treat the elements required for the remedy of restitution to be available.

Requirement of total breach. To maintain an action for restitution the injured party must allege and prove a total breach of the contract.[39] Total breach is generally established by: (1) non-performance or prevention which is sufficiently "material"[40] that it discharges the

[29] RCW 63.04.620. The effect of "rescission" under this section is to restore title in the goods to the vendor and, in addition, to compensate him in damages for any loss occasioned by the vendee's breach. This remedy can perhaps be compared to specific restitution.

[30] RCW 63.04.700(1)(d). The effect of "rescission" under this section is to restore payments on the price to the vendee, conditioned on the vendee's offering to return the goods to the vendor. Since such action will not always result in a restoration of the *status quo ante,* the remedy in this section should *not* be compared with restitution; rather it resembles the old action of injunction and cancellation. 5 PAGE, CONTRACTS § 3023 at 5338 (2d ed. 1922).

[31] Even where the vendee's "default in the payment of the price" in RCW 63.04.620 constituted total breach by the vendee, the vendor still would not have restitution available since in such a case the only performance due is a "sum of money constituting a liquidated debt." RESTATEMENT § 350.

[32] See discussion in notes 83 and 84 *supra,* and 171 *infra.*

[33] For a description of total breach, see RESTATEMENT §§ 275,276,313,316-318.

[34] RESTATEMENT § 397.

[35] RESTATEMENT § 313.

[36] RESTATEMENT § 327.

[37] Damages and restitution are alternative remedies, only one of which will be given as a remedy for a breach of contract. RESTATEMENT § 384; Ahrens v. Ladley, 53 Wn.2d 507 at 510, 334 P.2d 778 (1959).

[38] See discussion under sub section entitled, "Measure of Recovery," *infra.*

[39] RESTATEMENT § 347; 5 CORBIN § 1104. The Washington court expressly stated the requirement of total breach to maintain restitution as an alrernative remedy, citing the aforementioned section of *Corbin,* in Ahrens v. Ladley, *supra* note 37.

[40] Rules for determining "materiality" are described in RESTATEMENT §§ 275,276.

plaintiff from any duty on his part,[41] or (2) non-performance which is accompanied by an act of repudiation[42] by the wrongdoer.[43] Where the question is whether a breach is sufficiently "material" to be total, the factual question is most difficult.[44] However, such acts as the vendor's failure to furnish "good" title on the date specified in the contract,[45] the vendor's merely phoning vendee and saying title report was available when contract required vendor to "furnish" the report within thirty days,[46] the failure of a heating system to adequately heat the purchaser's home in violation of vendor's express warranty,[47] and the discovery that a used steam plate press warranted to be "in good working order" in fact had badly dented or pitted plates and a scored and gouged hydraulic ram,[48] have all been indicated as constituting "total breach" by the Washington court.

The picture is clearer where the wrongdoer effects a total breach by coupling his non-performance with subsequent acts of repudiation. As for what constitutes "repudiation," the Washington court has been quite liberal. Wrongful sale of the property to third parties,[49] declaration of forfeiture without serving the prescribed thirty-day notice,[50] repossession of property without notice to vendee,[51] and in an extreme case, the vendor's breach of his "duty of fair-dealing,"[52] have all been

In Central Life Assur. Soc'y v. Impelmans, 13 Wn.2d 632, 126 P.2d 757 (1942), it was held that a defect in the title as to a tiny strip of land which did not adversely affect the operation of the apartment building, the main subject matter of the contract, was so "inconsequential" that the vendee was not entitled to rescind.

[41] RESTATEMENT §§ 274,317.

[42] See RESTATEMENT § 318, for conduct required to constitute "repudiation."

[43] Bean v. Hallett, 40 Wn.2d 70, 240 P.2d 931 (1952) (vendee defaulted in payments; without sending the thirty-day notice of forfeiture required by the contract, the vendors instructed the vendee's tenant to pay the rent to them; the court held the vendor's conduct constituted wrongful repossession of the property, a total breach, and hence the vendee was granted restitution).

[44] The problem is aggravated by the failure of the Washington court to consistently employ the terms "total" and "partial" in its analyses. Shattuck, *Contracts in Washington: 1937-1957*, 34 WASH. L. REV. at 487 (1959).

[45] Gillmore v. Green, 39 Wn.2d 431, 235 P.2d 998 (1951); Bruckart v. Cook, 30 Wn.2d 4, 190 P.2d 725 (1948).

[46] Kolosoff v. Turri, 27 Wn.2d 81, 176 P.2d 439 (1947).

[47] Eliason v. Walker, 42 Wn.2d 473, 256 P.2d 298 (1953). Actually the granting of "rescission" was based on the Uniform Sales Act provisions. However, there is authority that the partial-total breach distinctions carry over into sales transaction. See 5 CORBIN § 1119.

[48] Lacey Plywood Co. v. Wienker, 42 Wn.2d 719, 258 P.2d 477 (1953).

[49] Jackson v. White, 104 Wash. 643, 177 Pac. 667 (1919); Reidt v. Smith, 75 Wash. 365, 134 Pac. 1057 (1913).

[50] Gibson v. Rouse, 81 Wash. 102, 142 Pac. 464 (1914).

[51] Knowles v. LaPure, 189 Wash. 456, 65 P.2d 1260 (1937).

[52] Stewart v. Moss, 30 Wn.2d 535, 192 P.2d 362 (1948) (where the vendor refused to allow the subject of the contract, a truck, to go into escrow so as to enable the vendee to obtain a chattel mortgage thereon, so that he could obtain the cash necessary to avoid forfeiture).

found to entitle the vendee to restitution of payments under the contract.

Proof of the total breach may be the most crucial hurdle facing the vendee seeking restitution as an alternative remedy. It may be open to question whether methods of discharge other than total breach will satisfy this requirement.[53]

Requirement that plaintiff offer restoration. The right to restitution is conditioned upon the plaintiff's returning, or offering to return, what he has received as part performance by the defendant.[54] This restoration of consideration must be made promptly after the plaintiff becomes aware of the defendant's breach.[55] Where land or unique chattels have been received by the plaintiff, he may be required to return the specific property, in substantially as good condition as when it was transferred to him.[56] The Washington court has expressly rejected the argument that this requirement of restoration, with respect to a tender of deed and possession of premises by plaintiff-vendee to vendor, has been negated by virtue of the *Ashford v. Reese*[57] statement that an executory contract for the sale of real property conveys no interest to the vendee.[58]

[53] Section 347 of the *Restatement* includes only total breach, but some cases hint that other forms of discharge might also give rise to restitution. Johnson v. Stalcup, 176 Wash. 153, 28 P.2d 279 (1934) (house accidentally destroyed by fire; vendee granted "rescission" on grounds of failure of consideration); Payette v. Ferrier, 20 Wash. 479, 55 Pac. 629 (1899) (See note 101 *infra*); Stewart v. Moss, *supra* note 52 (dictum to the effect that $2,000 of vendee's $3,000 recovery based on theory of failure of consideration). There seems no logical reason why such forms of discharge as failure of consideration (RESTATEMENT § 399), occurrence of a condition subsequent (RESTATEMENT § 396) or cancellation (RESTATEMENT § 431 should not also give rise to the restitutionary remedy. The *Restatement* does recognize that such other forms of discharge as rescission (§ 409) and avoidance of voidable duties (§ 431, comment *c*) *may* also give rise to restitution. On the other hand, such modes of discharge as accord and satisfaction, assignment, or novation obviously ought not create a right to restitution.

[54] RESTATEMENT § 349(1); 5 CORBIN § 1114; Hopper v. Williams, 27 Wn.2d 579, 179 P.2d 283 (1947); Erckenbrack v. Jenkins, 33 Wn.2d 126, 204 P.2d 831 (1949) (vendee denied restitution of $2,000 down payment, the court stating that one who demands "rescission" must restore whatever he may have received under the contract); Miller v. Clithero, 191 Wash. 122, 70 P.2d 1021 (1937) (vendee denied rescission for purchase of right to participate in expected profits from salvage operation where vendee did not offer to return these rights upon learning they did not include ownership in the salvage corporation, as was represented; the vendee's delay in seeking rescission until after the salvage operation had failed indicated he was speculating on the outcome).

[55] RESTATEMENT § 349(1); Eliason v. Walker, 42 Wn.2d 473, 256 P.2d 298 (1953) (the court here cites comment *c* of this *Restatement* section).

[56] 5 CORBIN § 1114. Alaska Airlines, Inc. v. Molitor, 46 Wn.2d 882, 285 P.2d 893 (1955). If in such a case the plaintiff is unable to return the property in such condition, he will have no right to restitution. But there are qualifications to this rule. See RESTATEMENT § 349, comment *b*.

[57] 132 Wash. 649, 233 Pac. 29 (1925).

[58] Hopper v. Williams, *supra* note 54. The court stated that "rescission" was an equitable action and hence restoration was still required due to the maxim, "he who seeks equity must do equity."

There are many limitations on this restoration requirement.[59] In *Holland Furnace Co. v. Korth,*[60] the Washington court found the vendee did not "waive" his right to "rescind" where after giving prompt notice of rescission and requesting the vendor to remove the furnace, the vendee continued to use the furnace pending its removal. The court has also recognized that a reasonable retention and use of the goods may be necessary in order to determine the existence of a breach;[61] and perhaps that this requirement of prompt restoration can be waived by the defendant's offer to repair the goods and thereby remove his breach, said repair being unsuccessful.[62] The court has indicated that where the plaintiff's complaint lists all the property involved, together with a prayer for parties to be restored to the status quo, this is a sufficient restoration.[63]

The requirement of restoration, or offer of restoration, is codified in the Uniform Sales Act[64] and is recognized as necessary to obtain "rescission" for breach of warranties.[65]

The Washington court has made a curious statement with regard to the restoration requirement. In *Hopper v. Williams,*[66] another fraud case, the court stated that "restoration or tender of restoration of property is not a condition precedent to the . . . maintenance of an action for the rescission of a contract for the purchase of land, but that it is sufficient to show a willingness to do equity." Since the plaintiff here did not offer to reconvey the real property he had received, and since restitution was denied, the language can be passed off as dictum. The statement itself defies analysis.[67]

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[59] See RESTATEMENT § 349(2).

[60] 43 Wn.2d 618, 262 P.2d 772 (1953). This case involved misrepresentation by the vendor. Hence, the terms, "acceptance" and "waiver" must necessarily concern the issue of whether the plaintiff-vendee affirmed the contract. However, the restoration requirements in avoidable contracts is identical to that in restitution. Compare RESTATEMENT § 840 (avoidable contracts) with RESTATEMENT § 349.

[61] Eliason v. Walker, 42 Wn.2d 473, 256 P.2d 298 (1953) (vendee's use of heating system for a three-month period was necessary in order for vendees to determine its adequacy).

[62] *Id.* But *cf.,* Coovert v. Ingwersen, 37 Wn.2d 797, 226 P.2d 187 (1951). However, the *Coovert* case can be distinguished: see note 85 *infra.*

[63] Bariel v. Tuinstra, 45 Wn.2d 513, 276 P.2d 569 (1954) (the vendee made no tender nor offer to tender prior to the commencement of the action). In Hopper v. Williams, *supra* note 54, the court denied restitution on the grounds of failure to tender restoration, laying stress on the fact that the plaintiff made no move to make such tender *during the trial* itself, such deficiency being pointed out to them at that time.

[64] USA 69(1)(d), codified in Washington as RCW 63.04.700(1)(d).

[65] Eliason v. Walker, *supra* note 61.

[66] 27 Wn.2d 579 at 588, 179 P.2d 283 (1947) (vendee denied restitution of $1,135 down payment on installment contract where vendee failed to prove his allegations of misrepresentation by the vendor, the court stressing the fact that the vendee made no tender of deed nor surrender of premises to vendor.

[67] The court reaffirmed its statement that one who demands rescission must offer to

Requirement that the performance shall have been received by the defendant. The basic concept of restitution is that the defendant must give something *back* to the plaintiff. Hence, restitution is available as a remedy, with respect to a performance by the plaintiff, only if (1) it is a performance[68] which the defendant has bargained for and received, or (2) if not bargained for, it is one from which he has in fact received a benefit.[69] However, restitution is not available for expenses incurred merely in preparation, without any performance ever having been rendered.[70]

Election of remedies as a bar to restitution. Under appropriate circumstances, the plaintiff's right to restitution can be barred, due to his manifesting a choice to sue for damages.[71] The Washington court has indicated that the plaintiff who is unsure of his proof can eliminate any uncertainty as to which remedy to elect by alleging *both* claims in his pleadings, and whichever claim he proves will be accepted.[72]

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restore the *status quo* in Rummer v. Throop, 38 Wn.2d 624, 231 P.2d 313 (1951) quoting from *Hopper*. Since the plaintiff in both cases alleged fraud, it is possible the court was confusing the requirements of disaffirmance with the restoration requirement. Another possible explanation of the *Hopper* case is raised by the fact that it was characterized as an action to *cancel* the contract. Perhaps the court had in mind the equitable action of Injunction and Cancellation, which was granted only if it were possible to place the adversary party in *status quo*. 6 PAGE, CONTRACTS § 3420 (2d ed. 1922). However, since the *Hopper* opinion cites section 349 of the *Restatement*, it may be hoped that the quote is nothing more than an extremely unartful paraphrase of the restoration requirement.

[68] "Performance" as used here includes services rendered and a requested forbearance in addition to transfer of property. 5 CORBIN § 1107. Bebb v. Jordan, 111 Wash. 73, 189 Pac. 553 (1920) (architects recovered on *quantum meruit* for the reasonable value of their services in preparing plans for defendant who changed his mind as to type of building he wanted, hence such plans were never finished nor used); Dygert v. Hansen, 31 Wn.2d 858, 199 P.2d 596 (1948) (plaintiffs recovered $1,135 as the reasonable value of their time expended in preparing halibut gear, even though, due to their inexperience, such gear was only worth $600).

Restitution for the reasonable value of plaintiff's services, where the defendant is not benefited thereby, constitutes a large area of restitution not predicated on unjust enrichment. The Washington court has recognized that benefit to the employer need not be alleged in these cases. Marcussen v. Greenwood, 154 Wash. Dec. 125, 338 P.2d 133 (1959).

[69] RESTATEMENT § 348; 5 CORBIN § 1107. Dygert v. Hansen, 31 Wn.2d 858, 199 P.2d 596 (1948) (restitution granted for value of performance bargained for, where the actual benefit to defendant was worth much less).

[70] RESTATEMENT § 348, comment *a*; 5 CORBIN § 1107. This principle explains the result in Stanek v. Peterson, 26 Wn.2d 385, 174 P.2d 308 (1946), although it apparently was not considered by the court. See note 178 *infra*.

[71] RESTATEMENT § 381. McKown v. Driver, 154 Wash. Dec. 39, 337 P.2d 1068 1959 (the court stated that where a vendor breaches an executory contract for the sale of real property, the vendee has an election to sue for specific performance, damages, or restitution of payments (upon returning property to vendor); and that the prosecution to a final judgment of any one of these three remedies would constitute a bar to the others under the election of remedies rule). Compare Willis T. Batcheller, Inc. v. Welden Constr. Co., 9 Wn.2d 392, 115 P.2d 696 (1941).

[72] Marcussen v. Greenwood, 154 Wash. Dec. 125, 338 P.2d 133 (1959) (a complaint may contain one cause of action on an alleged express contract, and another concerning

Plaintiff's full performance as a bar to restitution. Where a plaintiff has fully performed his part of a contract and the only part of the agreed exchange that has not been rendered by the defendant is a sum of money constituting a liquidated debt, then the remedy of restitution is not available to the plaintiff.[73] The reason for this rule is that such a plaintiff can get a money judgment for the amount of the liquidated debt. Justice does not require that the plaintiff should have an alternative remedy of restitution for the value of his performance, since he is able to get substantially the agreed exchange he desired in the first place.[74]

Full performance by the plaintiff will not make restitution unavailable, however, if any *part* of the agreed exchange from the defendant is something other than a liquidated debt.[75] Nevertheless, if the defendant substantially performs this unliquidated portion of the bargain, then restitution will be barred.[76]

Where a contract is "divisible,"[77] then restitution is unavailable as to any part of such contract where the plaintiff has fully performed his part and the equivalent portion to be rendered by the defendant is a liquidated sum of money.[78]

Accepting performance with knowledge of a breach as a bar to restitution. The "acceptance"[79] of a defective or incomplete performance with knowledge of such faults makes restitution unavailable.[80] There is an exception to this rule where the performance accepted by

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the same transaction based upon *quantum meruit*). *Accord*, Adjustment Dept. v. Brostrom, 15 Wn.2d 193, 130 P.2d 67 (1942).

[73] RESTATEMENT §§ 350, 351; 5 CORBIN §§ 1110, 1111. In Ahrens v. Ladley, 53 Wn.2d 507, 334 P.2d 778 (1959), an excellent opinion by Judge Hunter, the aforementioned sections of the *Restatement* and *Corbin* were cited and accurately applied, holding thereby that an employee had no right to the alternative remedy of restitution where the price per day for his services was stipulated in the employment contract.

[74] This is simply an application of the requirement in equity that the plaintiff lack an adequate remedy at law.

[75] RESTATEMENT § 350.

[76] RESTATEMENT § 350, comment *c*.

[77] For the elements requirement for a contract to be deemed "divisible," see RESTATEMENT § 266, comment *c*.

[78] RESTATEMENT § 351. Ahrens v. Ladley, *supra* note 73 (defendant owned a working share in a co-operative plywood corporation; plaintiff agreed to perform the work defendant was required to do under such share, and any wages plaintiff received thereby in excess of stipulated amounts were to be paid to defendant).

[79] The language of the Washington court in describing this defense is apt to be in terms of "waiver" or "acquiescence." It is critical that this legal characterization be distinguished from "acquiescence," when used to describe affirmance of a voidable contract, since conduct which will create the latter relationship should be more broad. See notes 24, 26, 27, and their textural referents.

[80] RESTATEMENT § 353. While the *Restatement* treats the effect of such conduct as a separate rule of restitution, it would seem proper to say the legal effect of such conduct is to waive the materiality of the defendant's breach, thus making restitution unavailable

the plaintiff is so connected with his own land or chattels that its rejection would require their abandonment or expensive alteration.[81]

The *Restatement* takes cognizance of the further qualification that restitution is not barred the plaintiff when, subsequent to his acceptance, the defendant's nonperformance or repudiation becomes sufficiently serious as to constitute total breach notwithstanding the plaintiff's prior conduct.[82]

The rule as to acceptance is substantially embodied in section 69(3)[83] of the Uniform Sales Act, with respect to the buyer's remedy for breach of warranty in sales transactions and contracts to sell involving chattels[84] as subject matter.[85]

Statute of limitations. The Washington court has indicated that the

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[81] RESTATEMENT § 353.

[82] RESTATEMENT § 353, comment *b*.

[83] RCW 63.04.700(3). See also RCW 63.04.490. The finding of "acceptance" by the purchaser in a Uniform Sales Act transaction terminates his right to rescind, but leaves him the alternative remedy of damages. RCW 63.04.500. Hence, the legal effect is identical to that of the restitution brand of "acceptance."

[84] The Uniform Sales Act applies to both sales and contracts to sell "goods." RCW 63.04.040. "Goods" are defined in the act as "all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." RCW 63.04.755. The act was passed in 1925 in Washington. Wash. Ex. Sess. Laws 1825, c. 142.

[85] Holland Furnace Co. v. Korth, 43 Wn.2d 618, 262 P.2d 772 (1953) (the court held that continued use of a home heating installation by the purchaser after giving the vendor prompt notice of the rescission and requesting that he remove the installation, for a period of eight months, did not constitute a "waiver or abandonment" of the rescission); Eliason v. Walker, 42 Wn.2d 473, 256 P.2d 298 (1953) (the purchaser's delay in electing to rescind a contract for the purchase and installation of a heating system, for a period of three months, during which time the vendor was attempting to improve the system, and after such election the purchaser ceased using the system, did not constitute "waiver" of the purchaser's right to rescind. The court here also made the statement: "Diligence in rescission is a relative question, and whether or not there has been an unreasonable delay in a given case depends upon the particular circumstances of that case."); Smelt Fisherman's Ass'n v. Soleim, 39 Wn.2d 524, 236 P.2d 1057 (1951) (purchaser of smelt did not "waive" his right to rescind where he paid the vendor the full purchase price after having knowledge that the smelt were spoiled where vendor's agent threatened to sell no more fish to purchaser if he did not pay, and the latter feared his business would be damaged thereby); Coovert v. Ingwersen, 37 Wn.2d 797, 226 P.2d 187 (1951) (purchasers did "waive" their right to rescind by continuing to use the heating system up to the time of the trial, a period of three months after they had elected to rescind and demanded that the vendor remove the installation; the court's readiness to find acceptance here may have been due to the fact that it was not entirely clear whether there was in fact a breach of warranty); Sloan v. State, 161 Wash. 414, 297 Pac. 194 (1931) (purchaser "waived" his right to rescind where he retained the subject matter of the contract, furniture, for a period of two years, without offering to return it to the builder); McCaw v. Advance-Rumley Thresher Co., 158 Wash. 533, 291 Pac. 319 (1930) (purchaser of two combine harvesters held to have "accepted" the machines and therefore could not claim a breach of warranty, by continuing to use the machines to harvest his crops, and making payments thereon, despite knowledge of the defect, and made no offer to rescind for a period of two years); Trunk v. Stewart, 146 Wash. 131, 262 Pac. 143 (1927) (purchaser of a dough mixing machine, upon breach of an express warranty, was held to

three-year statute of limitations is applicable in actions for restitution.[86]

Restitution as to contracts for the benefit of a third person. In donee beneficiary contracts, upon repudiation or total breach by the person who promised a benefit to the third-party beneficiary, the promisee is usually given the remedy of restitution of the consideration paid by him only if the promisor has been discharged of all further duty to the beneficiary by a disclaimer[87] or reservation of such power.[88]

In creditor beneficiary contracts, the right to restitution is determined in the same manner as in donee beneficiary contracts, except as affected by the fact that the promisee-plaintiff may have a somewhat more extensive power of discharging the duty of the promisor-defendant, and hence the right of restitution in the promisee is more extensive.[89]

Measure of recovery. The purpose of restitution is to place the parties in status quo ante insofar as possible.[90] This purpose is achieved by the application of the following rules governing the recovery in restitution.

General rule. Where restitution is available as an alternative remedy, the judgment is for the reasonable value of the performance rendered by the plaintiff, measured as of the time it was rendered, less the amount of benefits received as part performance of the contract and retained by the plaintiff, plus interest.[91] The important distinc-

have effectively rescinded by merely notifying the vendor to remove the machine, a tender to return the machine not being necessary).

[86] Geranios v. Annex Invs., Inc., 45 Wn.2d 233, 273 P.2d 793 (1954) (action for "unjust enrichment," predicated on failure of consideration; barred by statute); Halver v. Welle, 44 Wn.2d 288, 266 P.2d 1053 (1954) (action predicated on doctrine of quasi-contract, resulting from mistake of fact, barred by statute). See RCW 4.16.040(2) and 4.16.080(3).

[87] RESTATEMENT § 137.

[88] RESTATEMENT § 356(1); 5 CORBIN § 1117.

[89] RESTATEMENT § 356, comments *b, c.* In donee beneficiary contracts, only *T,* (the third party) has power to discharge his contractural rights, except when the contract expressly reserves such power to *P* (the promisee). However, in creditor beneficiary contracts, *P* has the power to discharge *D*'s (the promisor's) duty to *T* at any time before *T* has in any way changed his position in reliance of the contract. RESTATEMENT § 143. As long as *P* has this power, he can exercise it by electing restitution in his *own* favor as remedy for *D*'s breach. But, if *P* loses this power to discharge, he cannot get restitution as his alternative remedy unless such power was expressly reserved to *P* in the contract. 5 CORBIN § 1117.

[90] Eliason v. Walker, 42 Wn.2d 473, 256 P.2d 298 (1935); Jones v. Grove, 76 Wash. 19, 135 Pac. 488 (1913).

[91] RESTATEMENT § 347; 5 CORBIN § 1112. In a recent case, Bean v. Hallett, 40 Wn.2d 70, 240 P.2d 931 (1952), Judge Olson cited section 347 of the *Restatement* as authority for a recovery of the payments made under the contract, with interest thereon at the legal rate from the date of the vendor's breach, less the reasonable value of the use of the property from the date the vendee entered into possssion to the date the vendor repossessed. The only difficulty with this opinion arises from its citing two Washington cases to bolster the RESTATEMENT measure of recovery, namely: Knowles v. La-

tion from damages[92] is that the restitution yardstick is the amount for which such services and materials as constituted the part performance could have been purchased from one in the plaintiff's position,[93] rather than the losses caused and gains prevented by the defendant's breach.[94]

The Washington court has refuted the concept[95] that the measure of recovery in restitution is the reasonable value of the plaintiff's performance, uncontrolled by the contract price. The court has stated[96] that no recovery would be allowed in excess of the contract price.[97] These cases can be better explained as simply applying the rule[98] that the contract price is admissible as evidence of what was the "reasonable value" of the plaintiff's performance. Such evidence may well be difficult to rebut.

Specific restitution. In some instances restitution is employed to recover a specific thing rather than payment of money. If the per-

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Pure, 189 Wash. 456, 65 P.2d 1260 (1937) and Johnson v. Stalcup, 176 Wash. 153, 28 P.2d 279 (1934). The *Johnson* case involved a house accidentally destroyed by fire while the contract for its sale was executory. The court held the vendee's action for rescission on grounds of failure of consideration would lie, citing Ashford v. Reese, 132 Wash. 649, 233 Pac. 29 (1925). The *Johnson* case further ruled that the vendee's recovery should be offset by the rental value of the property during his occupancy, as distinguished from those cases where the failure of consideration consisted of total failure of vendor's title. In the *Knowles* case, involving the ordinary forfeiture fact pattern, the court cited and applied the recovery formula used in the *Johnson* case, without taking cognizance of the fact it was applying a formula developed in the *Ashford* risk-of-loss fact patterns to an entirely different factual situation. While the appropriate recovery formulae in the *Johnson* and *Knowles* cases happened to be identical, they ought not lend support to one another.

Where the subject matter of the sale is personal property, the "reasonable value of the vendee's use of the property" will usually be in terms of depreciation rather than rent. Cone v. Ariss, 13 Wn.2d 650, 126 P.2d 591 (1942) (vendee granted restitution for payments made on car less depreciation to car, where contract unenforceable and vendor repossessd).

[92] RESTATEMENT § 329.

[93] RESTATEMENT § 347, comment *c*.

[94] A case illustrating the practical importance of this distinction is Dygert v. Hansen, 31 Wn.2d 858, 199 P.2d 596 (1948) (plaintiffs granted restitution for $1,135 even though the value of their services to the defendant was only $600).

[95] 5 CORBIN § 1113.

[96] Bailey v. Furleigh, 121 Wash. 207, 208 Pac. 1091 (1922) (a contract to render services at a fixed price per day fixes the measure of damages, and where the employee was discharged before completion of the work, he cannot recover more on the theory of *quantum meruit,* for the reasonable value of his services; this statement may be no more than dictum since the contract here provided for the employee to share in any losses resulting from the project, and the employer here did in fact lose some $6,000); Noyes v. Pugin, 2 Wash. 653, 27 Pac. 548 (1891) (the court here expressly refuted the doctrine that where an employment contract was rescinded the employee may recover the reasonable value of the services rendered, irrespective of the price stipulated and agreed upon by the parties. The court stated that such a measure of recovery was valid where there was no contract stipulating remuneration. However, where the parties themselves have agreed upon a price to be paid for the employee's services, it was more just and equitable to make that price the measure of compensation for work done under the contract).

[97] This limitation does apply to cases involving section 357 of the *Restatement,* where restitution is granted to a plaintiff himself guilty of total breach.

[98] 35 AM. JUR. *Master and Servant* § 54 at n. 15 (1941).

formance received from the plaintiff by the defendant is the transfer of land, or of goods or choses in action of a unique character, then specific restitution may be allowed, resulting in the retransfer of the property to the plaintiff.[99] This remedy requires that the subject-matter still exist and that the interests of innocent purchasers[100] and creditors of the defendant are not unjustly affected.[101]

The most frequent fact pattern in which specific restitution is allowed involves an aged or infirm plaintiff transferring real property to a defendant-child in consideration of the latter's promise to care and support the plaintiff.[102] Upon the defendant's total breach or failure of consideration, such a plaintiff can obtain a decree for cancellation of the deed of conveyance and the restoration of ownership and possession.[103]

[99] RESTATEMENT § 354, 5 CORBIN § 1120.

[100] Gardner v. Frederick, 96 Wash. 324, 165 Pac. 85 (1917) (property conveyed by aged parent under a written contract providing for future support and care as consideration; where the defendants wrongfully withheld support, it was held that rescission could not be had because a portion of the land had been sold and conveyed to a third person, but that an action for damages would lie).

[101] One Washington case indicates a mortgage is not given the protection extended creditors. In Payette v. Ferrier, 20 Wash. 479, 55 Pac. 629 (1899), involving a deed made by a parent to a child in consideration of support and maintenance, upon failure of consideration resulting from the death of the child the parent was granted rescission and cancellation of the deed as against the administrator of the children's estate, the guardian of minor grandchildren, and the *mortgagee* of the property from the children. However, the court stated that the mortgagee had constructive notice of the covenants to support contained in the deed, and hence this result can be explained on the argument that the mortgagee was not "unjustly affected."

[102] 5 CORBIN § 1120.

[103] The Washington court granted specific restitution in Gustin v. Crockett, 51 Wash. 67, 97 Pac. 1091 (1908). However, the court stated its decision was based on the equitable theory of rescission of contract and cancellation of the deed for a *willful* violation of contract. Rescission and cancellation of a conveyance was also granted in Payette v. Ferrier, *supra* note 101.

The holding in the *Payette* case that specific restitution would be granted upon a mere failure of consideration, regardless of whether or not it was willful, was seemingly contracted by some dicta in Hesselgrave v. Mott, 23 Wn.2d 270, 160 P.2d 521 (1945). However, *Hesselgrave* was a proper application of the principle that the purpose of restitution is to return the parties to the *status quo ante* combined with the rule allowing compensation for improvements made before granting specific performance (see textual reference at note 104 below). In *Hesselgrave* the original value of the property deeded by the plaintiff was only $250, while its value after being enhanced by the transferee's improvements was $1,500. The court properly pointed out that to grant "rescission and cancellation" of the deed under these facts would be grossly unjust to the transferee, since the plaintiff's aged and infirm condition precluded the likelihood of his ever being able to reimburse for the value of the improvements, and hence the plaintiff was limited to a money recovery.

Specific restitution was also denied in the following cases: Ockfen v. Ockfen, 35 Wn.2d 439, 213 P.2d 614 (1950) (holding appears to be that there was in fact no contract to support, but rather the deed from the parent to her son was a gift); Carey v. Powell, 32 Wn.2d 761, 204 P.2d 193 (1949) (defendant-transferee here committed no total breach, instead the parent herself repudiated the contract); Thilman v. Thilman, 30 Wn.2d 743, 193 P.2d 674 (1948) (mother deeded land to son in consideration for his promise to support; one year later the son died; both specific restitution due to the absence of total breach. It is important to distinguish "acceptance" from the "acquiescence" problem in note 171 *supra*).

In granting specific restitution, the court will consider part performance and improvements made by the defendant, and will allow compensation therefor, requiring an accounting if necessary.[104]

Avoidable harm. Restitution will not be awarded with respect to a part performance rendered with knowledge that the other party has repudiated the contract, if the total amount awarded would be increased thereby.[105] This limitation on the restitution recovery is comparable to the limitation on damages as a result of the "doctrine of avoidable consequences."[106] The Washington court has extended this principle to deny restitution with respect to performance rendered by a plaintiff charged with knowledge that such performance will be of no value to the defendant.[107]

Forfeiture. In installment contracts for the sale of land, where it is clearly shown that the vendor is guilty of total breach, the Washington court has consistently awarded the vendee restitution of the installments paid on the contract by the vendee, whether or not a forfeiture clause was present.[108]

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and damages were denied the mother here, the court stating there was no failure of consideration here since the mother had assumed the risk of the son's death, by virtue of the express provision in the contract that the son would perform "so long as he is physically able"). The *Thilman* case seems inconsistent with the spirit of Payette v. Ferrier, *supra.* However, the court referred to the *Payette* case and distinguished it for lacking the provision contemplating the possibility of the son dying before the parents, the apparent result of this being that the death of the son in *Thilman* did not thereby constitute total breach.

This area of specific restitution should not be confused with the constructive trust cases. Both involve deeds by aged or infirm persons to their children or trusted friends. However, while specific restitution is employed to rectify a total breach by the transferee, constructive trusts are generally imposed to rectify fraud by the transferee. BOGERT, TRUSTS, § 77 (3rd ed. 1952). In the majority of states holding that the transferee's mere breach of promise, where a "confidential relationship" exists between the two, is sufficient to raise a constructive trust, considerable overlapping would be expected between these two remedies. However, Washington requires fraud in the inception in addition. Dowgialla v. Knevage, 48 Wn.2d 326, 294 P.2d 393 (1956). Hence, it is critical that where the fraud element is lacking, the transferor select specific restitution as his theory.

[104] Hesselgrave v. Mott, *supra* note 103.

[105] RESTATEMENT § 352.

[106] *Compare* the aspect of the avoidable consequences rule stated in 5 CORBIN § 1039 at n. 18, *with* the restitution requirement stated in section 352 of the *Restatement.*

[107] Bebb v. Jordan, 111 Wash. 73, 189 Pac. 553 (1920) (architect could not recover on *quantum meruit* for that portion of his services in drawing plans for a building which would be a violation of the building ordinances, and hence were useless to the defendant). The theory behind *Bebb* may be that the defendant would have repudiated the contract had the architect acted properly by disclosing the defect in the building for which he was commissioned to draw plans.

[108] Cases granted the vendee restitution where the contract did contain a forfeiture clause: Bean v. Hallett, 40 Wn.2d 70, 240 P.2d 931 (1952); Knowles v. LaPure, 189 Wash. 456, 65 P.2d 1260 (1937); Gibson v. Rouse, 81 Wash. 102, 142 Pac. 464 (1914). Restitution granted where the contract did not contain a forfeiture clause: Connelly v. Malloy, 106 Wash. 464, 180 Pac. 469 (1919); Jackson v. White, 104 Wash. 643, 177 Pac. 667 (1919); Reidt v. Smith, 75 Wash. 365, 134 Pac. 1057 (1913).

RESTITUTION AS SOLE REMEDY WHERE PLAINTIFF GUILTY OF TOTAL BREACH

General rule.[109] A plaintiff who is himself in substantial default may nevertheless have a right to restitution. In the words of section 357 of the *Restatement of Contracts:*

> Where the defendant fails or refuses to perform his contract and is justified therein by the plaintiff's own breach of duty or non-performance of a conditon, but the plaintiff has rendered a part performance under the contract that is a net benefit to the defendant, the plaintiff can get judgment . . . if (a) the plaintiff's breach or non-performance is not willful[110] and deliberate; or (b) the defendant, with knowledge that the plaintiff's breach of duty or non-performance of condition has occurred or will thereafter occur, assents to the rendition of the part performance, or accepts the benefit of it, or retains property received although its return in specie is still not unreasonably difficult or injurious.

Note that restitution is the only remedy available to a plaintiff in total default.[111] This extension of the restitution remedy no doubt evolved from the court's oft stated unwillingness to grant forfeiture.

Measure of recovery. Just as the application of the restitution remedy is much less extensive when the plaintiff is in substantial default, so also is the measure of recovery. The formula in section 357 is the reasonable value of the plaintiff's part performance less the value of any performance by the defendant and less any damages caused to the defendant by the plaintiff's breach.[112] Moreover, if this figure is in excess of the value which would have been paid to the plaintiff under the contract for such part performance, then this lesser figure shall govern.[113]

Forefeiture and installment contracts. The early Washington cases permitted forfeiture of installments paid by the defaulting vendee where the contract contained a forfeiture clause.[114] Later cases de-

[109] See 5 CORBIN §§ 1122-1135.

[110] That the court considered the vendee guilty of "willful, persistent and material breach" was an alternative ground for denying restitution in Litel v. Marsh, 33 Wn.2d 441, 206 P.2d 300 (1949). See note 129 *infra.*

[111] 5 CORBIN §§ 1126, 1127.

[112] In two cases the court has indicated the necessity of the defendant alleging and proving the damages caused by the plaintiff's breach. Gooden v. Hunter, 154 Wash. Dec. 907, 344 P.2d 723 (1959); Tungsten Products, Inc. v. Kimmel, 5 Wn.2d 572, 105 P.2d 822 (1940).

[113] 5 CORBIN § 1124. Hence the contract price does limit recovery here, in contrast with recovery under section 347. See note 95 *supra,* and its textual referent.

[114] Pease v. Baxter, 12 Wash. 567 (1895) (forfeiture allowed where defendant-vendee had paid over $13,000 of the $26,000 price on a contract for sale of land, then defaulted in payments); Reddish v. Smith, 10 Wash. 178 (1894). The Washington court in the *Reddish* case, at page 184, declared "the right to rescind belongs only to

veloped the refinement that forfeiture would not be allowed unless the clause were a valid liquidated damages provision as distinguished from a penalty.[115]

The defaulting vendee cases of the past few decades present a jungle of holdings for the Washington researcher. The typical fact pattern involves an installment contract for the sale of land containing a forfeiture clause where the vendee has defaulted in his payments and is bringing the action to "rescind" the contract and recover the installments paid.[116] The Washington court has taken the following positions: 1) a minority of the decisions granted the vendee restitution of the payments,[117] 2) a large group of cases granted the vendor forfeiture,[118] and 3) a majority of the cases deny forfeiture and reinstate the contract on condition that the vendee pay either the installments due or the full balance[119] due within a certain time period, usually termed the "grace period."[120] The latter remedy in effect gives the defaulting vendee a conditional right of redemption.

While the redemption approach does not have the harshness of a forfeiture, neither does it give the vendee in default the advantages of

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the party who is himself without default." Apparently this dictum has been qualified by the section 357 cases, although it is still often quoted by the court. Litel v. Marsh, 33 Wn.2d 441, 206 P.2d 300 (1949).

On the other hand, the court *denied* forfeiture against a defaulting vendee where the contract failed to include a forfeiture clause. Tungsten Products, Inc. v. Kimmel, *supra* note 112; Jones v. Grove, 76 Wash. 19, 135 Pac. 488 (1913).

[115] Miller v. Moulton, 77 Wash. 325, 137 Pac. 491 (1914).

[116] Another typical fact pattern having the same legal effect, and hence included under the aforementioned grouping is where, subsequent to the vendee's default, the vendor commits a material breach, but the vendee's "acquiescence" in the defect operates to waive the materiality of the breach. See RESTATEMENT § 275(d).

[117] Gooden v. Hunter, 154 Wash. Dec. 907, 344 P.2d 723 (1959); Stewart v. Moss, 30 Wn.2d 535, 192 P.2d 362 (1948).

[118] Mathews v. Heiser, 42 Wn.2d 326, 255 P.2d 366 (1953); Edwards v. Meader, 34 Wn.2d 921, 210 P.2d 1019 (1949); Litel v. Marsh, *supra* note 114; Erckenbrack v. Jenkins, 33 Wn.2d 126, 204 P.2d 831 (1949); Merlin v. Rodine, 32 Wn.2d 757, 203 P.2d 683 (1949).

[119] In the minority of cases where the defaulting vendee is required to pay the entire balance due, usually such vendee had indicated his ability to make such payments. Radach v. Prior, 48 Wn.2d 901, 297 P.2d 605 (1956) (vendee had tendered full balance due prior to vendor's suit to declare forfeiture); Moeller v. Good Hope Farms, Inc., 35 Wn.2d 777, 215 P.2d 425 (1950) (at the end of first grace period, vendee tendered part of balance in cash, plus a notice by a bank to give loan for balance if title good; upon appeal, court gave vendee an additional grace period to pay the balance, imposing a concurrent duty on the vendor to tender good title). But compare Central Life Assur. Soc'y v. Impelmans, 13 Wn.2d 632, 126 P.2d 757 (1942).

[120] Radach v. Prior, *supra* note 119 (vendee in default granted thirty-day grace period to pay installments past due); Knoblauch v. Sanstrom, 37 Wn.2d 266, 223 P.2d 462 (1950) (vendee granted thirty days to pay payments past due); Moeller v. Good Hope Farms, Inc., *supra* note 119 (vendee granted sixty days to pay full balance due); Bruckart v. Cook, 30 Wn.2d 4, 190 P.2d 725 (1948); Crook v. Tudor, 28 Wn.2d 289, 182 P.2d 740 (1947) (vendee granted thirty-day grace period to pay installments past due, plus vendor's costs in the legal action including $100 attorney fees); Dill v. Zielke, 26 Wn.2d 246, 173 P.2d 977 (1946); Central Life Assur. Soc'y v. Impelmans, *supra* note 119 (vendee granted ten days to pay full balance due).

the section 357 restitution remedy. In the vast majority of cases the redemption relief was originally granted by the trial court, and the supreme court affirms unless there has been an "abuse of discretion."[121] The Washington court has spelled out the "equities" justifying the exercise of such discretion.[122] On one occasion the Washington court reversed the trial court's granting of the redemption relief, it being clear the requisite "equities" did not exist.[123] The similarity of the redemption relief to remittitur[124] in its procedural aspects is emphasized by the fact that both can be granted at first instance by the supreme court itself.[125]

The large number of decisions where the court has seemingly ignored the restitution issue by making use of the redemption device discourages conclusions as to whether Washington conforms to Professor Corbin's opinion that a "very great majority" of cases, nationwide, have refused restitution of installments in favor of a defaulting purchaser of land or chattels.[126] On the other hand, the substantial number of cases[127] granting forfeiture might be said to answer this question affirmatively. However, Corbin observes[128] that the decisions denying restitution can be justified on one or more of the following grounds: (1) the retention of the right to specific performance by the injured party, the vendor, in contracts for sale of land or unique chattels,[129] (2) the failure of the plaintiff-vendee to show that the in-

[121] Radach v. Prior, Bruckart v. Cook, Crook v. Tudor, Dill v. Zielke, *supra* note 120.

[122] Radach v. Prior, *supra* note 119 (vendee's payments amounting to 68% of price, improvements on property by vendee, vendee's subsequent tender of payments due and also of entire balance due, and the vendor's retention of benefits received from vendee *subsequent* to expiration of forfeiture notice.) Dill v. Zielke, *supra* note 120 (vendee's payments amounting to 45% of price, vendee only $36 in default, vendee tendered payments due just three days after expiration of forfeiture notice).

[123] Krieg v. Salkovics, 18 Wn.2d 180, 138 P.2d 855 (1943). See note 147 *infra*. The court indicated that had the original vendee, rather than his assignee, been the defendant, the trial court's granting of the grace period would have been sustained.

[124] RCW 4.76.030.

[125] The grace period was granted on the supreme court level in Moeller v. Good Hope Farms, Inc. and Central Life Assur. Soc'y v. Impelmans, *supra* note 119. Similar action with respect to the remittitur procedure is found in Puget Sound Lumber Co. v. Mechanics' Ins. Co., 168 Wash. 46, 10 P.2d 568 (1932).

[126] 5 CORBIN 1129.

[127] Note 118 *supra*.

[128] Corbin, *The Right of a Defaulting Vendee to the Restitution of Instalments Paid*, 40 YALE L. J. 1013 (1931).

[129] See RESTATEMENT 357(1), comment *b*. Mathews v. Heiser, 42 Wn.2d 326, 255 P.2d 366 (1953) (vendee waived vendor's failure to provide good title on date specified; vendee subsequently repudiated the contract and abandoned the property; the court declared the vendee had breached the contract and hence could not "rescind," apparently referring to "unilateral rescission," and denied restitution of the vendee's down payment); Gillmore v. Green, 39 Wn.2d 431, 235 P.2d 998 (1951) (court denied vendee's action to rescind, stating that since the vendee was in default, the vendor had the right to demand specific performance, and hence the "vendee cannot rescind the contract and claim restitution"). Litel v. Marsh, 33 Wn.2d 441, 206 P.2d 300 (1949) (vendee, in

jury to the vendor caused by the vendee's breach is less than the installments he has paid,[130] and (3) the construing of an express provision in the contract for money paid to be retained by the vendor as a genuine provision for liquidated damages[131] and not a penalty.[132]

It is suggested that failure to show the absence of a right to specific performance in the vendor is the basis for many Washington cases[133] denying restitution to the defaulting vendee. One decision expressly recognized this requirement.[134] It might be noted that a finding of "unilateral rescission"[135] by the vendor will remove this obstacle to restitution, since the legal effect of such conduct is to extinguish the vendor's own right to specific performance.[136] The fact that the few Washington cases[137] granting restitution to a vendee in default all involved contracts with chattels as subject matter permits an inference as to the efficacy of the absence-of-specific-performance requirement, but leaves Washington with no case directly illustrating conduct which constitutes "unilateral rescission." However, a guide may be found in Professor Corbin's description of such rescission as "an assertion [by the vendor] of his own privilege not to perform

default in payments, repudiated contract; the court stated the vendee did not have the right to "rescind" and indicated three alternative grounds for denying restitution: the vendee's breach was "willful," the vendor still had the right to specific performance of the contract, and the vendee had failed to prove that the payments exceeded the vendor's damages); Bayley v. Lewis, 39 Wn.2d 464, 236 P.2d 350 (1951) (defendant granted specific performance of contract; plaintiffs' cross-action for restitution of consideration paid on contract denied). *Compare* the *Bayley* case *with* Hebb v. Severson, 32 Wn.2d 159, 201 P.2d 156 (1948) (vendor seeks specific performance, vendee brings cross-action for restitution; restitution granted and specific performance denied).

[130] See RESTATEMENT § 357(1), comments *d* and *g*. Washington cases are cited in note 139 *infra*.

[131] The requirements for a liquidated damages provision have become fairly settled in Washington, and the mere labeling as such has little effect. See Shattuck, *Contracts in Washington, 1937-1957*, 34 WASH. L. REV. at 501 (1959). Erckenbrack v. Jenkins, 33 Wn.2d 126, 204 P.2d 831 (1949) (forfeiture of $2,000 down payment allowed to vendor as "liquidated damages"). Bruckart v. Cook, 30 Wn.2d 4, 190 P.2d 725 (1948) (forfeiture of $1,000 down payment, plus several installments, allowed as liquidated damages where total price only $3,000; but vendee allowed grace period).

[132] The *Restatement* also denies restitution where the plaintiff's performance is "merely a payment of earnest money." RESTATEMENT § 357(2). Edwards v. Meador, 34 Wn.2d 921, 210 P.2d 1019 (1949) (vendor is entitled to forfeit earnest money paid where the vendees refused to complete the purchase). However, the Washington court has indicated it will not deny restitution just because a contract is labeled an "earnest money receipt." Stewart v. Moss, 30 Wn.2d 535, 192 P.2d 362 (1948). Hebb v. Severson, *supra* note 129 (plaintiff-vendee paid $1,000 on contract as "earnest money"; plaintiff granted restitution of the $1,000 where vendor failed to perform covenant to furnish unincumbered title or earnest money to be refunded. Probably the only effect of the label "earnest money" is to declare the intention of the parties to allow forfeiture, and hence the contract must still meet the requirements of a "genuine" liquidated damages provision. RESTATEMENT § 357, comment *i*.

[133] See cases cited in note 129 *supra*.

[134] Litel v. Marsh, *supra* note 129.

[135] See notes 14-16 *supra*, and their textual referents.

[136] 5 CORBIN § 1131.

[137] Note 117 *supra*.

further."[138] As examples of such "assertion," Corbin cites a vendor who expressly says, "I rescind the contract for your breach," and a vendor who says nothing, but proceeds to sell the land to some one else.

Failure to prove payments exceed damages may also explain many Washington cases denying restitution.[139] It seems only proper that the plaintiff seeking restitution should have the burden of proving the amount he ought recover, the same as in an action for damages.[140] Hence, in cases where the installments paid are small as compared to the total contract price, the plaintiff will be hard put to meet this burden.

It is the writer's opinion that the Washington cases and section 357[141] both suggest a fourth requirement for granting restitution, namely, that the plaintiff have some semblance of moral justification for his breach,[142] unless the defendant, with knowledge of the plaintiff's breach, "acquiesces"[143] in the part performance.[144]

Moreover, it is suggested that the "grace period" is a sound procedure in many instances for supplementing the policy of section 357. The *Restatement* rule is an attempt to compromise two conflicting

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[138] 5 CORBIN § 1131.

[139] Mathews v. Heiser, 42 Wn.2d 326, 255 P.2d 366 (1953) (vendee repudiated contract for sale of resort property for $70,000, on which vendee had paid $5,000; the court denied the vendee's action to recover the $5,000 on the grounds there was "no rescission;" the court stated that the vendor failed to establish any damage as a result of vendee's breach, and denied his cross-complaint for damages, saying the vendor's subsequent sale of the property for $56,000 did not adequately establish the market value). An alternate ground for this decision is that the vendor still had the right to specific performance. See note 129 *supra*. Moreover, since the court characterized the $5,000 as a "down payment," it may have been considered as liquidated damages, although this issue was not discussed. Bock v. Celleyham, 100 Wash. 545, 171 Pac. 525 (1918) (vendee denied restitution of $2,000 down payment on installment contract where total price was $10,000).

[140] "No vendee has a right of restitution . . . while the vendor's damages exceed the vendee's payments, and in the latter situation the burden of making a *prima facie* showing is on the vendee." Litel v. Marsh, 33 Wn.2d 441 at 448, 206 P.2d 300 (1949) (the court here quoting from Corbin's article cited in note 128 *supra*).

[141] RESTATEMENT § 357 (1) (a), (b), and comment *f*.

[142] Stewart v. Moss, 30 Wn.2d 535, 192 P.2d 362 (1948), see note 147 *infra*. In granting the vendee restitution, the court stated that: "Except where the . . . defective performance is of a sort that indicates moral obliquity . . . the tendency is to grant . . . [the plaintiff in default] restitution . . ." quoting from 5 WILLISTON, CONTRACTS § 1473 (rev. ed. 1936).

[143] A comparison of the section 357 and Uniform Sales Act language indicates similarity in the conduct which will establish the *Restatement* "acquiescence" and the sales act "acceptance." RESTATEMENT § 357(1) (b); RCW 63.04.490. It is important, however, not to confuse these two concepts since "acceptance" by a plaintiff-buyer will make unavailable his remedy of rescission for a breach of warranty. RCW 63.04.700(3). See discussion at note 80 *supra*, and notes 173, 174 *infra*, and their textual referents.

[144] In Radach v. Prior, 48 Wn.2d 901, 297 P.2d 605 (1956), the court recognized that the vendor's retention of vendee's payment of taxes made after vendor's notice of forfeiture expired constituted unjust enrichment to the vendor, but used this as one of the "equities" justifying the granting of a grace period to the vendee.

policies:[145] the dislike for harsh forfeitures even though expressly provided for in the contract, and on the other hand the desire for certainty and the fear that restitution, used too broadly, might be employed by vendees to avoid bad bargains.[146] Where the facts do not satisfy the stringent requirements of the section 357 remedy, the use of the grace period enables the court to avoid the opposite extreme of forfeiture, so long as the vendee is willing and able to carry out the conditions. Moreover, the court has indicated it will not tolerate any sharp practice on the part of the vendor which will hinder the vendee in meeting the required condition.[147]

It should again be stressed that the Washington court has granted, albeit in a minority of instances, the remedy of restitution to a defaulting vendee.[148] The fact that the court in the numerous cases granting redemption, and in the less numerous cases granting forfeiture, did not feel the need to overrule the cases granting restitution also lends weight to the validity of section 357 in Washington. Considering the broad applicability of the aforementioned exclusionary rules, it is not surprising that the defaulting vendee's right to restitution is so rarely decreed.

Conditional sale of chattel. Until a few months ago it appeared well settled in Washington that forfeiture would be granted against a vendee who defaulted in the payment of installments for the conditional sale of a chattel, where the contract contained a forfeiture clause.[149] While the origin in the Washington cases of this rule is some-

[145] In Stewart v. Moss, 30 Wn.2d 535, 192 P.2d 362 (1948), the Washington court quoted a passage from 5 WILLISTON, CONTRACTS § 1473 (rev. ed. 1936), recognizing these opposing legal policies, and suggesting that the dislike for forfeitures was becoming the dominant policy.

[146] The court recognized this danger in a very early case. Van Keulen v. Sealander, 183 Wash. 634, 49 P.2d 19 (1935). It would appear that in an extreme violation of this policy, restitution would be denied by the application of laches.

[147] Stewart v. Moss, *supra* note 145 (vendor refused to allow truck, the subject of the sale, to go into escrow, thereby preventing vendee from obtaining chattel mortgage on the truck which was necessary for vendee to complete payaments to vendor; vendee granted restitution of payments made).

On the other hand, in Krieg v. Salkovics, 18 Wn.2d 180, 138 P.2d 855 (1943), the supreme court granted forfeiture of over $1,000 of payments and improvements to the vendor, overruling the trial court's granting the vendee's assignee a fifteen-day grace period. The court said that it would have affirmed the trial court's action as against the original vendee. However, the fact that the assignee, a real estate agent, had purchased the property from the defaulting vendee after the vendor had declared forfeiture, and that he had already arranged for a sale to a fourth party at a price 50% over the price to the original vendee, induced the court to speculate that the assignee had purchased at a nominal sum, and hence the forfeiture would not exceed the vendor's injury.

[148] See note 117 *supra*.

[149] Jones-Short Motor Co. v. Bolin, 153 Wash. 198, 279 Pac. 395 (1929) (the court stated, "as a general proposition . . . in contracts of conditional sale, provisions for the forfeiture to the vendor, in case of breach of the contract, of the down payment . . . and

what obscure,[150] Professor Williston states it is the usual holding.[151] Cases citing this rule typically involved the collateral question of whether the conditional sale vendor had made an election of remedies in seeking the installments due, and therefore was barred from bringing an action to repossess the property.[152]

The recent case of *Gooden v. Hunter*[153] shattered the clarity of the Washington position on this issue. Judge Finley declared the question whether the contract was for a conditional sale or not to be of no importance; and furthermore, assuming there *was* a conditional sale

of installments of the purchase price subsequently paid, as liquidated damages . . . are valid and enforceable"); Jarred v. Burrows, 143 Wash. 183, 255 Pac. 99 (1927) (conditional sale of car; car was seized by federal agents for illegal transportation of intoxicating liquor, a total breach by the vendee under the express terms of the contract; vendee denied damages in conversion suit brought after the authorities had released the car to the conditional vendor); Eilers Music House v. Oriental Co., 69 Wash. 618, 125 Pac. 1023 (1912) (conditional sale contract, with forfeiture clause, of pianorchestra; contract price was $1900 of which vendee had paid $893 when he defaulted; forfeiture of vendee's payments was allowed upon the vendor bringing replevin for the chattel).

[150] Most of the cases assume that forfeiture is allowed, and limit the opinion to the election of remedies issue. (See cases in notes 151 and 152 *infra*.) In the Jones-Short Motor Co. case, *supra* note 149, three cases are cited as authority for the allowance of forfeiture: Eilers Music House v. Oriental Co., *supra* note 149; Pease v. Baxter, 12 Wash. 567, 41 Pac. 899 (1895); and Reddish v. Smith, 10 Wash. 178, 38 Pac. 1003 (1894). Both the *Pease* and *Reddish* cases concerned installment contracts for sale of land, and this raises the question of the legal effect of that type of contract as contrasted to the conditional sale contract for chattel, with respect to the allowance of forfeiture. See 3 WILLISTON, CONTRACTS § 791 (rev. ed. 1936). The *Pease* opinion appears to acquiesce in the argument of counsel that the contract there be viewed as a conditional sale. Thus, the spectre of Ashford v. Reese again looms on the horizon.

[151] 3 WILLISTON, *op. cit. supra* note 150, § 736. Professor Williston states the rationale for allowing forfeiture where the conditional vendor repossesses is that "the consideration for the promise to pay was the conditional right given the buyer, and 'when a man acts in consideration of a conditional promise, if he gets the promise he gets all that he is entitled to by his act, and if . . .the condition is not satisfied, and the promise calls for no performance, there is no failure of consideration.' If the terms of the bargain alone were to be considered, the exercise by the seller of his right to reclaim the goods would not debar him from recovering the full price. The only reason for denying him so broad a right is the equitable principle which forbids a forfeiture."

[152] Standard Fin. Co. v. Townsend, 1 Wn.2d 274, 95 P.2d 786 (1939) (vendor's commencing action against vendee for installments due constituted election); Rodger v. Johnson, 148 Wash. 675, 270 Pac. 105 (1928) (vendor's action on vendee's note for balance of purchase price constituted election; hence vendor's judgment was not a lien on the furniture, the subject matter of contract); Kimble Motor Car Co. v. Androw, 125 Wash. 225, 215 Pac. 340 (1923) (vendor's filing claim against vendee's estate for installments due constituted election, hence vendor could not repossess); Eilers Music House v. Douglass, 90 Wash. 683, 156 Pac. 937 (1916) (vendor's judgment for installments past due constitutes election, makes sale absolute even though additional unpaid payments had accrued); Winton Motor Carriage Co. v. Broadway Auto. Co., 65 Wash. 650, 118 Pac. 817 (1911) (vendor's indorsing, to a bank, vendee's note for balance of installments due, as collateral security for a bank loan to vendor, constituted election and absolute title passed to the vendee, despite vendor's subsequent taking up of the note).

For a case upholding the converse rule, that a vendor could not retain title and also maintain a suit for the purchase price, without alleging damages caused by the vendee's breach, see Hogan v. Kyle, 7 Wash. 595, 35 Pac. 399 (1894). However, this case involved a contract for the sale of land.

[153] 154 Wash. Dec. 907, 344 P.2d 723 (1959). Inasmuch as the Washington court granted a petition for rehearing of the *Gooden* decision in 155 Wash. Dec. 282, the doubts raised by this case may have ceased to exist by the time this Comment is printed.

and that the plaintiff-vendee was in default, such vendee was still entitled to restitution of payments. Judge Finley predicated this statement, with some justification,[154] on the reasoning that the absence of a forfeiture clause in the *Gooden* contract entitled the vendee to the restitution relief. In making this distinction, Finley sharply disapproved of the earlier *Rider v. Cottle*[155] case. Both the *Rider* and *Gooden* cases concerned a vendee who had abandoned the subject matter of the contract, the vendor subsequently repossessing. The language of both opinions indicates concern about such repossession constituting "acquiescence" by the vendor of the vendee's offer of rescission. If this language be construed as describing the issue of whether a promise to make restitution can be implied from the conduct constituting the mutual rescission agreement,[156] then the cases can be resolved as simply saying the absence or presence of a forfeiture clause will be a most important factor on this interpretation question. Irrespective of this, the result in *Gooden* has been reached in several jurisdictions outside of Washington in cases where the contract was known to be for a conditional sale.[157] Time will tell whether the statement that it is of "no importance" that the contract was a conditional sale will be employed to grant a defaulting vendee restitution even though the contract *includes* a forfeiture clause, where the requirements of section 357 are established.[158]

Forfeiture as failure of consideration. In several Washington cases the defaulting vendee has contended that the vendor's declaration of forfeiture raised the defense of failure of consideration against the vendee's note being sued on.[159] The availability of this defense would

[154] Both the installment contracts for land (*e.g.*, Reidt v. Smith, 75 Wash. 365, 134 Pac. 1057 (1913)) and the conditional sale of chattel cases generally required a forfeiture clause for the vendor to obtain forfeiture of the vendee's payments. Williston also states that several courts allow the vendee to recover installments paid, less a deduction for fair compensation for the use of the goods, where the vendor has repossessed the goods upon vendee's default, "at least if the contract does not provide for forfeiture of such payments." 3 WILLISTON, CONTRACTS § 736 (rev. ed. 1936).

[155] 32 Wn.2d 538, 202 P.2d 741 (1949).

[156] See note 13 *supra*, and its textual referent.

[157] See cases cited in 3 WILLISTON, *op. cit. supra* note 154, § 736, n. 8.

[158] It would seem to require an extreme fact situation to even raise this issue, since the rapid depreciation of chattels may very well lead the court to hold the forfeiture clause to be a valid liquidated damages provision.

[159] Van Geest v. Willard, 27 Wn.2d 753, 180 P.2d 78 (1947) (defendant-maker gave note as down payment on installment contract; note transferred to plaintiff-indorsee; defendant defaulted and plaintiff declared forfeiture before note matured; defense of failure of consideration held ineffective against plaintiff's action on note); Vickerman v. Kapp, 167 Wash. 464, 9 P.2d 793 (1932) ($300 note given by vendee as part of down payment on conditional sale contract for car; the court stated that the note was given in lieu of cash, and hence the failure of consideration defense was not available to the vendee in an action on the note after rescission of the contract). However, compare

seem to depend on whether the vendee gave his note to secure future payments, rather than as a past down payment, a queston of intent.[160] In the event this defense fails, such a vendee ought also plead for return of the note on restitution principles, providing he can prove the payments exceed the injury caused by his breach.

Ashford v. Reese.[161] If taken literally, this notorious case ought to have had considerable effect on the granting of restitution in installment contracts for sale of land. If it were true that the vendee had "no interest, legal or equitable," including the right to possession, this would logically make it more difficult for the defaulting vendee to gain restitution of payments paid.[162] The fact that the Washington cases have indicated no such trend is perhaps more evidence that *Ashford v. Reese* is truly limited to the rule that risk of loss is on the vendor.[163] The fact that the court has granted restitution to vendees in default despite the presence of a forfeiture clause also lends support to the contention that the statement in *Aylward v. Lally*,[164] declaring the doctrine of *Ashford* to be limited to contracts containing forfeiture clauses, is false.[165] It might be noted that if one desires to disregard title, the *Ashford* result of finding risk of loss on the vendor can be neatly reached on a quasi contract analysis.[166]

Blenz v. Fogle, 127 Wash. 224, 220 Pac. 790 (1923) (defendant-vendee paid $1,000 in cash as down payment on $37,000 installment contract; later defendant gave vendor a $6,000 note, $9,000 then being past due on the contract; vendor later declared forfeiture; vendor's action on note defeated on ground the note was only "additional evidence of that much of the consideration remaining unpaid," and not given in lieu of cash); Croup v. Humboldt Quartz & Placer Mining Co., 87 Wash. 248, 151 Pac. 493 (1915) (findings in favor of defendant-maker affirmed in plaintiff-payee's action on note; the trial court's findings were apparently based on the failure of consideration defense; however, from the supreme court's language it is not clear whether it followed the negotiable instruments defense or found a mutual rescission with a promise to make restitution).

[160] 7 AM. JUR. *Bills And Notes* § 255 (1937). In Van Geest v. Willard, *supra* note 159, the contractual language "purchase price is $1700, of which $500 has been paid," was held indicative that the $500 note was given as down payment. This issue is a mixed question of law and fact. Van Geest v. Willard, *supra* note 159; Norman v. Meeker, 91 Wash. 534, 158 Pac. 78 (1916).

[161] 132 Wash. 649, 233 Pac. 29 (1925).

[162] The reasoning here would be that if the rental value of the property were to be offset from the payments, the defaulting vendee in a typical long term installment contract would have a near impossible burden of proving the payments were in excess of the injury to the vendor resulting from the breach.

[163] This interpretation was suggested long ago by Schweppe, *The New Forfeiture Clause Test in Executory Contracts for The Sale of Real Estate*, 3 WASH. L. REV. 80 (1928). For deviations from *Ashford* even in this risk of loss area, with respect to the distribution of the proceeds from fire insurance policies, see Comment, *The Vendor-Purchaser Relationship in Washington*, 22 WASH. L. REV. 110 (1947).

[164] 147 Wash. 29, 264 Pac. 983 (1928).

[165] Schweppe, *supra* note 163.

[166] Where there is a supervening event, *i.e.*, destruction of the house by fire, rendering performance by the vendor (promisor) impossible, and the vendor is not at fault, the vendor is discharged so long as the event occurs before the vendee's final payment.

Acquiescence. The Washington court has a tendency to bandy the words "acquiescence" and "waiver" in its restitution cases. Under proper analysis, conduct which might be characterized as "acquiescence" should be a determining factor in section 357 cases. Where such conduct is by the defendant, this may be of help to a plaintiff in default without a moral justification for his default.[167] However, the Washington court's use of "rescission" in restitution cases has greatly extended the possibilities for discovering acquiescence.[168] "Acquiescence" has been used to describe acceptance of an offer for mutual rescission, which results in the granting of restitution.[169] The word has also been used to describe affirmance in voidable contract cases,[170] "acceptance" as used in the Uniform Sales Act,[171] and a waiver of the "right to rescind,"[172] all resulting in the denial of restitution. Where the defendant-vendor has performed acts which can be characterized

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RESTATEMENT § 457. Where the vendee has rendered performance, either in part or full, for which the vendor is excused from rendering the agreed exchange as a result of such impossibility, the vendee can recover the value of what he has rendered (his payments) less the value of what he has received (rental value), except where the contract expressly provides otherwise. RESTATEMENT § 468(2).

[167] See note 143 *supra.*

[168] See note 26 *supra.*

[169] Gooden v. Hunter, 154 Wash. Dec. 907, 344 P.2d 723 (1959); Tungsten Products, Inc. v. Kimmel, 5 Wn.2d 572, 105 P.2d 822 (1940); McMillen v. Bancroft, 162 Wash. 175, 298 Pac. 460 (1931).

[170] Frahm v. Moore, 168 Wash. 212, 11 P.2d 593 (1932).

[171] See notes 83 and 143 *supra.* One case indicating the improper application of the "acceptance" concept where such conduct was by the plaintiff seeking restitution was Bayley v. Lewis, 39 Wn.2d 464, 236 P.2d 350 (1951) (defendant breached her contract to forbear contesting of will, but in contest action she changed her mind; five months later defendant sued for specific performance of the contract, and plaintiffs sought restitution of the consideration paid defendant under the contract; the court stated that while plaintiffs had the right to rescission upon defendant's breach, they lost this right by not bringing action promptly). Since no prejudicial change of position by the defendant was shown, the *Bayley* case cannot be explained by laches. However, the proper ground for the denial of restitution should be that the defendant had the right to, and was granted, specific performance. See note 129 *supra.*

[172] Gillmore v. Green, 39 Wn.2d 431, 235 P.2d 998 (1951); Central Life Assur. Soc'y v. Impelmans, 13 Wn.2d 632, 126 P.2d 757 (1942). It must not be thought that waiver of "the right to rescind" means a waiver of the defendant's breach. If the defendant's performance of the condition was a material part of the agreed exchange (as would be necessary for its non-performance to give the plaintiff a right to restitution), then such a condition could not be excused by the plaintiff's waiver. RESTATEMENT § 297. (However, where the question of materiality of the breach is close, then such "waiver" may operate against the materiality itself).

Assuming the condition in these cases was a material part of the agreed exchange, the only analysis possible seems to be that the plaintiff's voluntary waiver removed the condition precedent to his own duty of performance, and hence the plaintiff himself was in default and the case falls under section 357. Therefore a finding of "unilateral rescission" by the defendant will be necessary before the plaintiff will have a right to restitution. Corbin remarks that courts are particularly astute to find a waiver or an estoppel where forfeiture is involved. 3 CORBIN § 754. It may also be possible that the court is misapplying the doctrine of "acceptance," in the Uniform Sales Act, to a land contract. See note 83 *supra.*

as "acquiescence," it should be noted that this conduct can properly be the basis of either the granting[173] or denying[174] of restitution to the plaintiff-vendee.

RESTITUTION AS A REMEDY FOR A CONTRACT WITHIN THE STATUTE OF FRAUDS

The parties to a contract that is rendered unenforceable by the Statute of Frauds very frequently act in reliance on such contract by rendering the agreed performance in part or in whole, or by making improvements on land which is the subject matter of the contract. Since the refusal of all relief would result in unjust enrichment, the remedy of restitution is available here, even though the Statute bars other remedies.[175] This is reasonable, since an action for restitution is not the kind of enforcement of a contract that the Statute of Frauds was designed to prevent.[176]

As against a defendant who is not in default, and who is ready and willing to perform the contract, the plaintiff has a right to restitution only if the requirements of section 357 are satisfied, the same as in the case of a contract not within the Statute of Frauds.[177]

The Washington court, in *Stanek v. Peterson*,[178] added a refinement by holding that restitution would be denied to a vendor who rendered performance with knowledge that the contract was unenforceable.

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[173] See note 169 *supra*, and its textual referent.

[174] Where such "acquiescence" indicates the lack of unilateral rescission by the vendor, in cases involving a plaintiff-vendee in default. See note 16 *supra*, and its textual referent.

[175] RESTATEMENT § 355. 2 CORBIN § 302. Stanek v. Peterson, 26 Wn.2d 385, 174 P.2d 308 (1946) (oral contract to sell land, vendors having knowledge such contract unenforceable; vendees granted restitution of $1,000 down payment, but vendors denied restitution for value of improvements on land rendered in preparation of sale); Cone v. Ariss, 13 Wn.2d 650, 126 P.2d 591 (1942) (oral contract for vendee employee to purchase car at reduced price, to use it as salesman's demonstrator in vendor's employ, and to pay price in 26 monthly installments; performance to be over a one-year period and therefore in violation of Statute; vendee quit work and vendor repossessed car; vendee granted restitution of $135 in payments less the depreciation to the car).

[176] RESTATEMENT § 355, comment *b*. But, by the same token, restitution will not be available where the particular Statute of Frauds so provides. RESTATEMENT § 355(3).

[177] RESTATEMENT § 355(4). Dubke v. Kassa, 29 Wn.2d 486, 187 P.2d 611 (1947) (vendee made $250 payment on oral contract to sell real property; later vendee refused to buy, although vendors remained ready and willing to sell; restitution of vendee's payment denied).

Even a defendant in default can extinguish the plaintiff's right to the restitution of the value of the goods by tendering restoration of the specific goods to the plaintiff, and keeping the tender good. RESTATEMENT § 355(2).

[178] 26 Wn.2d 385, 174 P.2d 308 (1946). This rule is probably desirable for the reason that otherwise such a vendor could make use of his greater knowledge to speculate on the contract. Note, however, that the result in *Stanek* can be explained on other grounds. See note 70 *supra*.

CONCLUSION

Examination of the attorneys' briefs in these cases indicates considerable unawareness of the remedy of restitution and its mechanics. The Washington court can hardly be criticized for its continued use of "rescission" when cases are pleaded and argued in those terms.

If the client's adversary-vendor has committed total breach, then restitution should be kept in mind by the attorney as a bonus, an alternative remedy that may give a more favorable recovery.

If the client-vendee himself has committed total breach, or if the facts are so conflicting that it is not certain who will ultimately be considered guilty of total breach, then it is most critical to determine whether section 357 will apply. If the client has ample funds to pay the overdue installments, and indicates that he simply wished to "get out" of the contract,[179] he should be advised that the best he can hope for is an opportunity to reinstate the contract; and to insure obtaining this he must tender the balance due to the vendor and, upon refusal, deposit such balance in the trial court to establish some "equities." However, where the vendee is insolvent, or is otherwise genuinely unable to reinstate the contract, there is no reason why he should not get restitution, assuming such relief is pleaded and the requisite elements are proven.[180] Special emphasis should be placed on proving that the vendee's payments are in excess of the injury to the vendor resulting from the breach, and that the vendor has no right to specific performance of the contract.

The attorney advising the *vendor* under these circumstances should make his client aware of the possibility of restitution; and should remind him that, excepting possibly the conditional sale of chattel cases, the court is most reluctant to grant forfeiture in those instances where the vendor is overeager and unreasonable in his desire to forfeit.[181] Moreover, it is important that the vendor remain ready and willing to perform since this will prevent his right to specific performance from terminating,[182] thus providing a defense to the vendee's action for restitution.

DONALD P. LEHNE

[179] In Van Keulen v. Sealander, 183 Wash. 634, 49 P.2d 19 (1935), the court granted the vendor forfeiture of more than $4,000, under the belief that the vendee merely "desired to escape from a bargain that had soured on his hands."

[180] However to be safe, the client-vendee would be well advised to secure a temporary injunction and post the bond required by WASH. RULES, APPEAL 24, prior to the time vendor's notice of forfeiture expires. Such action ought to preserve the *status quo* until a court decision can be had to determine whether restitution is available. Moeller v. Good Hope Farms, Inc., 35 Wn.2d 777, 215 P.2d 425 (1950).

[181] Stewart v. Moss, 30 Wn.2d 535, 192 P.2d 362 (1948).

[182] 5 CORBIN § 1130 at 579.