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## The Real Estate Broker's Statute in Washington

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# WASHINGTON LAW REVIEW

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## COMMENTS

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### THE REAL ESTATE BROKER'S STATUTE IN WASHINGTON

LISLE R. GUERNSEY

In 1905 the Washington Legislature enacted the following amendment to the statute of frauds, REM. REV. STAT., § 5825-5 [P. P. C. § 577-3]

In the following cases any agreement, contract, and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.

5. An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

This discussion is confined to a determination of the meaning and scope of this statute, and to an examination of some of the legal relations arising between parties to transactions which fall within the statute.

Shortly after its passage the validity of the statute was sustained against a constitutional attack on the ground of class legislation and

the interference with the right of contract.<sup>1</sup> In the case of sales of real property, only contracts between an agent or broker and an *owner* are covered by the statute.<sup>2</sup> An "owner" includes one whose title is only equitable<sup>3</sup> or a broker who is also an owner,<sup>4</sup> but excludes one who merely has an option to buy land.<sup>5</sup> The statute has been construed to cover only contracts to *pay a commission*.<sup>6</sup> The test of what constitutes a commission seems to be not the nature or manner of payment but whether the services for which the payment is made are such as to be within the category of "brokerage contracts."<sup>7</sup> The statute, of course, applies to "selling," "purchasing,"<sup>8</sup> and exchanges of real estate.<sup>9</sup>

An early case defined a real estate agent as " a person engaged in the business of procuring purchases or sales of land for third persons upon a commission contingent upon success."<sup>10</sup> A later case pointed out that one having no authority of any kind to *represent* a third person or to exercise discretion was not an "agent" or "broker" within the statute.<sup>11</sup> When the agreement involves the doing of other tasks as well as selling real estate a question arises as to whether it is a general employment contract outside or a brokerage contract within the statute. If payment is due only in case of a sale, the agree-

<sup>1</sup> Ross v. Kaufman, 48 Wash. 678, 94 Pac. 641 (1908).

<sup>2</sup> Jones v. Kehoe, 61 Wash. 422, 112 Pac. 497 (1911). Thus contracts between brokers are not covered. Orr v. Perky Investment Co., 65 Wash. 281, 118 Pac. 19 (1911), Armstrong v. Webber Co., 92 Wash. 295, 158 Pac. 957 (1916).

<sup>3</sup> Parker v. Bruggemann, 72 Wash. 309, 130 Pac. 358 (1913).

<sup>4</sup> Corporate Loan & Security Co. v. Litchfield, 153 Wash. 286, 279 Pac. 745 (1929).

<sup>5</sup> Maloney v. Montana Ranches Co., 100 Wash. 156, 170 Pac. 567 (1918).

<sup>6</sup> Pierce v. Wheeler, 44 Wash. 326, 87 Pac. 361 (1906). This holding might now be questioned because of Carkonen v. Alberts, 196 Wash. 575, 83 P.(2d) 899 (1938), comment, 14 WASH. L. REV. 210 (1939).

<sup>7</sup> The only questionable case discovered on this point is Haynes v. John Davis & Co., 22 Wn.(2d) 474, 156 P.(2d) 659 (1945), which held that the broker's interest in money forfeited by a purchaser under an earnest money contract reading, "earnest money herein receipted for shall be forfeited to [broker] to the amount of their regular commission, and balance, if any, to the owner " was not a commission, and that the subject matter of this portion of the earnest money contract was not within the statute.

<sup>8</sup> Keith v. Smith, 46 Wash. 131, 89 Pac. 473 (1907).

<sup>9</sup> Nance v. Valentine, 99 Wash. 323, 169 Pac. 862 (1918).

<sup>10</sup> Carstens v. McReavy, 1 Wash. 359, 362, 25 Pac. 471 (1890).

<sup>11</sup> Chambers v. Kirkpatrick, 145 Wash. 277, 259 Pac. 878 (1927) (re-hearing *en banc* overruling the previous decision appearing at 142 Wash. 630, 254 Pac. 1074 (1927), where the contention was finally accepted that this was a general employment contract involving payment for "information" concerning the location of timber and for help in cruising the timber. Very similar facts have been held to be a contract to "procure persons" to buy timber and within the statute even though no authority was given. Engleson v. Port Crescent Shingle Co., 74 Wash. 424, 133 Pac. 1030 (1913). The impact of the test established by the *Chambers* case, *supra*, upon those previously used, and not yet overruled, is not clear. An oral contract where the owner agrees to take a fixed sum, the broker to have all he could get over that amount, is within the statute. Broderius v. Anderson, 54 Wash. 591, 103 Pac. 837 (1909).

ment is probably a brokerage contract,<sup>12</sup> but an annual salary, expenses, and commission indicate a general employment contract.<sup>13</sup>

The final characteristic of a transaction covered by the statute is that the subject matter thereof must be real estate. It is interesting to note that what constitutes real estate for the purpose of other statutes is not conclusive on the question here. Neither a leasehold interest,<sup>14</sup> nor an easement<sup>15</sup> is "real estate" for the purpose of this statute, but standing timber is.<sup>16</sup> Contracts for the sale of personalty are of course not covered.<sup>17</sup> Where a transaction involves the sale of both personalty and realty, the ban of the statute applies only to the realty if the contract is severable, otherwise to the entire contract.<sup>18</sup> If personalty is exchanged for realty, the agreement must comply with the statute in order for the broker to recover his commission. But if the realty is given a fixed money value by the parties, the transaction is considered an exchange of personalty.<sup>19</sup> A later case holds that accepting real property as part consideration in exchange for personalty does not make the transaction other than an agreement for the sale of personalty.<sup>20</sup>

Four years after passage of the statute, *Muir v. Kane*<sup>21</sup> established a clear and significant qualification from which there has been as yet no departure.<sup>22</sup> There the proposition was established that an oral contract to pay a commission which is void under the statute raises a moral obligation constituting sufficient consideration to support a

<sup>12</sup> *Corporate Loan & Security Co. v. Litchfield*, 153 Wash. 286, 279 Pac. 745 (1929).

<sup>13</sup> *Chelan Orchards v. Olive*, 134 Wash. 324, 235 Pac. 805 (1925). For other cases involving the question of what is a broker see *Collins v. Harris*, 130 Wash. 394, 227 Pac. 508 (1924), *Griffiths v. Von Herberg*, 99 Wash. 235, 169 Pac. 587 (1917), and *Sherman v. Clear View Orchard Co.*, 74 Ore. 240, 145 Pac. 264 (1915).

<sup>14</sup> *Myers v. Arthur*, 135 Wash. 583, 238 Pac. 899 (1925). But a lease is "real estate" within the conveyancing statute. *REM. REV. STAT. § 10550 [P. P. C. § 497-1]*.

<sup>15</sup> *Barr v. Campbell Mill Co.*, 154 Wash. 83, 280 Pac. 929 (1929).

<sup>16</sup> *Engleson v. Port Crescent Shingle Co.*, 74 Wash. 424, 133 Pac. 1030 (1913).

<sup>17</sup> *Merritt v. American Catering Co.*, 71 Wash. 425, 128 Pac. 1074 (1912).

<sup>18</sup> *Godefroy v. Hupp*, 93 Wash. 371, 160 Pac. 1056 (1916).

<sup>19</sup> *Merritt v. American Catering Co.*, 71 Wash. 425, 128 Pac. 1074 (1912).

<sup>20</sup> *Evans v. Marengeer*, 133 Wash. 411, 233 Pac. 924 (1925). The court here seems to base its decision very largely upon the *intent* of the vendor.

<sup>21</sup> *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153 (1909), *Sams v. Olympia Holding Co.*, 153 Wash. 254, 279 Pac. 575 (1929), *Realty Mart Corp. v. Standring*, 165 Wash. 21, 4 P.(2d) 110 (1931), *Richey v. Bolton*, 18 Wn.(2d) 522, 140 P.(2d) 253 (1943). Despite this well-established rule, in construing another section of the same statute (that which relates to contracts not to be performed within a year) the court has said: "We cannot conceive of such a thing as a contract that is void under the statute, and yet can be the foundation of a legal obligation arising out of nothing else." *Hendry v. Bird*, 135 Wash. 174, 179, 237 Pac. 317, 319 (1925).

<sup>22</sup> *Henneberg v. Cook*, 103 Wash. 685, 175 Pac. 313 (1918), *Richey v. Bolton*, 18 Wn.(2d) 522, 140 P.(2d) 253 (1943), *Haynes v. John Davis & Co.*, 22 Wn.(2d) 474, 156 P.(2d) 659 (1945).

written agreement to pay the same, when made after rendition of the services. The limits of the application of this rule have not been made clear by the court, and in some respects it is subject to no little confusion. A few points are, however, clearly established. The subsequent agreement must be in writing, a parol modification not being sufficient.<sup>23</sup> Yet it need not contain all the formalities which the statute requires of the original contract.<sup>24</sup> The subsequent contract must contain a promise to pay,<sup>25</sup> but the property description need not be as detailed as in those contracts to which the statute is applicable.<sup>26</sup> To come within the rule of *Muir v. Kane* the subsequent contract must relate to past services, and to be certain that the contract is not held void it should recite that the payment is for past services.<sup>27</sup> Whether or not the amount of the commission to be paid must appear in the subsequent agreement is left unsettled. The early cases seem to hold that the amount of the commission must be stated and parol proof cannot be used to establish this or any other element of such subsequent contracts.<sup>28</sup> However, the statute has recently been held not to prevent recovery by a broker in an action for his commission on a "subsequent" contract in which the purchaser agreed "to pay all commissions, fees, and charges" of the broker,<sup>29</sup> nor does it apply where the purchaser, in case of forfeiture, agrees that the broker should receive "the amount of their regular commission."<sup>30</sup> The effect of these

<sup>23</sup> *White v. Panama Lumber & Shingle Co.*, 129 Wash. 189, 224 Pac. 563 (1924).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, where the promise was not in specific words, but the court said. "a reading of the instrument is convincing that such was the purpose and understanding of the parties" (p. 195). See also *Palmer v. Stanwood Land Co.*, 158 Wash. 487, 291 Pac. 342 (1930), *Nance v. Valentine*, 99 Wash. 323, 169 Pac. 862 (1918), where the promise was conditioned upon an actual exchange of the property being affected, and the court used the conditional element of the promise as an argument to support the conclusion that the doctrine of *Muir v. Kane* did not apply and that the contract was within the statute. On this point compare *Henneberg v. Cook*, 103 Wash. 685, 175 Pac. 313 (1918), which held that a similarly conditioned contract was not within the statute, and that the *Muir v. Kane* doctrine did apply.

<sup>26</sup> *Henneberg v. Cook*, 103 Wash. 685, 175 Pac. 313 (1918), *White v. Panama Lumber & Shingle Co.*, 129 Wash. 189, 224 Pac. 563 (1924), *Richey v. Bolton*, 18 Wn.(2d) 522, 140 P.(2d) 253 (1943). However, these cases do not lay down any rules or tests by which the sufficiency of the description in a subsequent contract is to be determined.

<sup>27</sup> Some cases support the position that it must appear on the face of the contract that the payment is for past services, *Nance v. Valentine*, 99 Wash. 323, 169 Pac. 862 (1918), while others rely on the fact that the services are complete, *Peoples v. British American etc. Properties*, 163 Wash. 353, 1 P.(2d) 235 (1931).

<sup>28</sup> Not allowing parol proof and holding as too vague: "a commission of 2½ per cent or such as agreed upon." *Houtchens Co. v. Nichols*, 81 Wash. 238, 142 Pac. 674 (1914).

<sup>29</sup> *Peoples v. British American etc. Properties*, 163 Wash. 353, 1 P.(2d) 235 (1931)..

<sup>30</sup> *Haynes v. John Davis & Co.*, 22 Wn.(2d) 474, 156 P.(2d) 659 (1945). This

later cases appears to be that the statute does not apply at all to contracts made after the services have been rendered.

It should be noted that for certain purposes and in limited instances a contract required by the statute to be in writing may be orally modified or abrogated. Thus an executed oral modification to a brokerage contract may be successfully pleaded as a defense to an action on the original contract.<sup>81</sup>

What are the necessary elements of a contract that does fall within this statute? It must be in writing and signed. The statute is satisfied when the name of the party to be charged is written by him or by an authorized agent *anywhere* in the contract.<sup>82</sup> The writer has been unable to discover any case which decides whether or not the authority of an authorized agent must be in writing *when the action is for a commission*. However, when the action is not for a commission, there is substantial authority to the effect that the statute does not prevent enforcement of a contract executed by an agent who has been lawfully authorized either orally<sup>83</sup> or when the principal is estopped by his conduct from denying such authority<sup>84</sup> Apparently the point is still undecided. The contract must further contain a promise to pay<sup>85</sup> This is not satisfied by a clause, "Commission, 5 per cent"<sup>86</sup> nor by a listing agreement providing for a net price.<sup>87</sup> Yet, "Commission to be paid"

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case holds that the trial court properly allowed the broker to introduce evidence of a "regular commission." The confusion on this subject is largely accounted for by the failure of the court to indicate whether the rules laid down are applicable to contracts within the statute or to contracts coming within the *exception* to the statute.

<sup>81</sup> Gerard-Filio Co. v. McNair, 68 Wash. 321, 123 Pac. 462 (1912) *McInnis v. Watson*, 116 Wash. 680, 200 Pac. 578 (1921), *see also* Lawson v. Black Diamond Coal Mining Co., 53 Wash. 614, 102 Pac. 759 (1909) which allowed a broker to recover a commission for the sale of a mine and held that the owner by his conduct had waived the sixty day limitation stated in the written contract. Another application of this doctrine is *Modern Irrigation & Land Co. v. Neely*, 81 Wash. 38, 142 Pac. 458 (1914), where it was held that the owner could not invoke the statute against the retention by the broker of commissions earned on the sales of land which had not been described in the original contract because they were earned under an admitted agreement, were retained without objection prior to the suit, and were charged against the owner in his own statement of the account. The owner's conduct amounted to an estoppel.

<sup>82</sup> *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644, 32 Pac. 737 (1893).

<sup>83</sup> *Monfort v. McDonough*, 20 Wash. 710, 54 Pac. 1121 (1898), *Pierce v. Wheeler*, 44 Wash. 326, 87 Pac. 361 (1906), *Degginger v. Martin*, 48 Wash. 1, 92 Pac. 674 (1907).

<sup>84</sup> *Horr v. Hollis*, 20 Wash. 424, 55 Pac. 565 (1898). Despite *Carikonen v. Alberts*, 196 Wash. 575, 83 P.(2d) 899 (1938), it is believed that the rule stated in these cases is still followed by the court.

<sup>85</sup> *Hege, Hachez, Phillips & Co. v. Hessel*, 57 Wash. 499, 107 Pac. 375 (1910).

<sup>86</sup> *Swartswood v. Naslon*, 57 Wash. 287, 106 Pac. 770 (1910).

<sup>87</sup> *Foote v. Robbins*, 50 Wash. 277, 97 Pac. 103 (1908), promise to pay a commission cannot be inferred by a statement of a net price. *Accord*, *Crouch v. Forbes*, 63 Wash. 564, 116 Pac. 14 (1911) (but note the dissent).

has been held a sufficient promise.<sup>38</sup> When it is necessary to resort to parol testimony to determine the amount of the commission, the contract is void under the statute.<sup>39</sup> Normally it is held that the contract must also state both to whom the payment is to be made and by whom. However, it has been held that failure to name the payor is not fatal if from the contract it is clear that the defendant-vendor is to pay.<sup>40</sup> The writing must also contain a sufficient description of the property, but no attempt will be made here to discuss or analyze the problems arising under this very important requirement.<sup>41</sup> As for all contracts there must also be consideration. The ordinary listing contract does not obligate the broker to perform any services, but when he has performed services in attempting to sell there clearly is consideration for the contract.<sup>42</sup> Applying normal contract principles it would seem that the listing contract could be made immediately binding and effective by proper bilateral phrasing of the promises on the part of both parties. Failure to specify the time during which the contract shall be effective does not render the agreement void because of indefiniteness.<sup>43</sup> In these circumstances the contract lasts for a reasonable time. Many contracts provide that the broker shall have the right to sell for a specified time "and thereafter until withdrawn by ten days written notice." This clause has been upheld against attacks of indefiniteness and as exceeding a reasonable time.<sup>44</sup>

Other problems arise with regard to transactions which are covered by the statute but which have not complied with its requirements. Despite the wording of the statute such transactions are not absolutely void. Thus one who purchases from an agent who has oral authority

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<sup>38</sup> *McRea v. Ogden*, 50 Wash. 495, 97 Pac. 503 (1908).

<sup>39</sup> *Orr Co. v. Interlaken Land Co.*, 74 Wash. 340, 133 Pac. 599 (1913), *Goodrich v. Rogers*, 75 Wash. 212, 134 Pac. 947 (1913). A contract stating, "Each party agrees to pay [broker] a commission of 2½ per cent or such as agreed upon" is void because it provides no basis upon which to compute the commission. *Houtchens Co. v. Nichols*, 81 Wash. 328, 142 Pac. 674 (1914).

<sup>40</sup> *McRea v. Ogden*, 50 Wash. 495, 97 Pac. 503 (1908). This case is possibly distinguishable in that while the court treats the contract as being within the statute, the facts of the case would seem to bring it within the *Muir v. Kane* rule, which of course is not covered by the statute.

<sup>41</sup> Normal rule requires a legal description. *Richey v. Bolton*, 18 Wn.(2d) 522, 140 P.(2d) 253 (1943).

<sup>42</sup> *Gunning v. Muller*, 118 Wash. 685, 204 Pac. 779 (1922).

<sup>43</sup> Performance within eighteen days has been held to be within a reasonable time. When reasonableness of the time depends upon construction of the contract and undisputed extrinsic fact, it is a question for the court. It is a jury question when it depends on extrinsic facts which are in dispute. *Robertson v. Wilson*, 121 Wash. 358, 209 Pac. 841 (1922).

<sup>44</sup> *Gunning v. Miller*, 118 Wash. 685, 204 Pac. 779 (1922).

to sell may successfully sue the seller for specific performance.<sup>45</sup> One who orally authorized an agent to buy<sup>46</sup> or sell<sup>47</sup> property may successfully recover from the agent any amounts received by him as a result of breaching the fiduciary relationship.<sup>48</sup> Where an agent buys property with money furnished by the principal, a constructive trust may be imposed upon the agent in favor of the principal,<sup>49</sup> this is not so where the agent uses his own money for the purchase.<sup>50</sup> Neither may an agent enforce a written contract against the principal when doing so would constitute a breach of the fiduciary relation which arose out of a previous contract that was void under the statute.<sup>51</sup> Moreover, despite the statute a valid agency is created such that a purchaser cannot recover forfeited earnest money from a broker without joining the principal, irrespective of whether the broker has retained the money<sup>52</sup> or has turned it over to his principal,<sup>53</sup> provided the breach is due to the principal.<sup>54</sup> It is clear that full performance will not take the contract out of the statute so as to allow the broker to recover on quantum meruit.<sup>55</sup> Neither may the broker recover in tort for actual fraud practised upon him by his client where the fraud is based upon a contract void under the statute. This rather astounding proposition was recently set forth in *American Inc. v. Bishop*,<sup>56</sup> in which the court held the action must be dismissed because of the statute even though every element of actionable fraud had been

<sup>45</sup> *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471 (1890), *Horr v. Hollis*, 20 Wash. 424, 55 Pac. 565 (1898), *Monfort v. McDonough*, 20 Wash. 710, 54 Pac. 1121 (1898), *Pierce v. Wheeler*, 44 Wash. 326, 87 Pac. 361 (1906), *Degginger v. Martin*, 48 Wash. 1, 92 Pac. 674 (1907).

<sup>46</sup> *Stewart v. Preston*, 77 Wash. 559, 137 Pac. 993 (1914).

<sup>47</sup> *Merriman v. Thompson*, 48 Wash. 500, 93 Pac. 1075 (1908).

<sup>48</sup> If there has been no breach of the fiduciary relation, the agent is sometimes permitted to retain his earned commissions on contracts that are void under the statute. *Modern Irrigation & Land Co. v. Neely*, 81 Wash. 38, 142 Pac. 458 (1914).

<sup>49</sup> *Peterson v. Hicks*, 43 Wash. 412, 86 Pac. 634 (1906), *query*: is this a contract authorizing an agent to sell for compensation and hence within the statute under *Collins v. Harris*, 130 Wash. 394, 227 Pac. 508 (1924)?

<sup>50</sup> *Carkonen v. Alberts*, 196 Wash. 575, 83 P.(2d) 899 (1938), comment, 14 WASH. L. REV. 210 (1939), and analyzing the distinction mentioned.

<sup>51</sup> *Ewing & Clark v. Mumford*, 157 Wash. 617, 289 Pac. 1026 (1930).

<sup>52</sup> *Wright v. Merritt Realty Co.*, 148 Wash. 380, 268 Pac. 873 (1928).

<sup>53</sup> *Tripple v. Littlefield*, 46 Wash. 156, 89 Pac. 493 (1907).

<sup>54</sup> Note that as between the seller and the broker, where failure to complete the contract is due to the seller, the broker has an independent right to money forfeited under an earnest money contract which apports it between seller and broker. The broker's interest in this money is not barred by the statute. *Haynes v. John Davis & Co.*, 22 Wn.(2d) 474, 156 P.(2d) 659 (1945).

<sup>55</sup> *Cushing v. Monarch Timber Co.*, 75 Wash. 678, 135 Pac. 660 (1913).

<sup>56</sup> 129 Wash. Dec. 92, 185 P.(2d) 722 (1947). The court here cites two scholarly and well-reasoned criticisms of this result which appear in 42 COL. L. REV. 312 and 37 MICH. L. REV. 683.

alleged. While this is unequivocally the present rule, the court has not always been so unsolicitous of the broker's welfare nor quite so categorical about the purpose of the statute.<sup>57</sup>

The remaining problems concern the legal relations created by contracts that are within the statute and have complied with its requirements. The rights and duties of the parties are, of course, dependent upon the particular phrasing of the contract. However, the normal listing transaction involves two things: the creation of an agency and a contract. Inasmuch as the broker is normally under no obligation to perform, the listing agreement is usually considered an offer which when accepted by performance becomes an executed unilateral contract and as such enforceable.<sup>58</sup> The agency is not an agency coupled with an interest so as to be irrevocable, and thus may be revoked at any time even though so doing is a breach of contract.<sup>59</sup> To terminate an offer once made there must be an explicit renunciation. Mere threats, or idle talk of nonperformance is not enough.<sup>60</sup>

To be an *exclusive* listing the contract must clearly indicate that such is the intent of the parties. The terms "sole agent,"<sup>61</sup> "exclusive agency"<sup>62</sup> or "exclusive right"<sup>63</sup> are each sufficient. The fixing of a definite time limit does not make the contract exclusive.<sup>64</sup> If the owner makes a sale during the existence of an exclusive listing, the broker may not recover his commission unless he shows that he is the procuring cause of the sale. An exclusive listing does not preclude the owner

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<sup>57</sup> "The statute should be construed and enforced so as to prevent such frauds, but it should not be construed or enforced in a manner that will defraud the broker." *McRea v. Ogden*, 50 Wash. 495, 498, 97 Pac. 503, 504 (1908). "To hold otherwise would be, in effect, to say that no conduct can operate as an estoppel as against a plea of the statute. This court has held otherwise." *Modern Irrigation & Land Co. v. Neely*, 81 Wash. 38, 47, 142 Pac. 458, 461 (1914). "There is no moral delinquency that attaches to an oral contract to sell real property as a broker. ... It was not intended by the statute to impute moral turpitude to such contracts." *Muir v. Kane*, 55 Wash. 131, 136, 104 Pac. 153, 154 (1909). In the principal case the court quotes a statement of the purpose of the statute taken from *Chambers v. Kirkpatrick*, 142 Wash. 630, 254 Pac. 1074 (1927). The holding of this case was reversed on a re-hearing *en banc* 145 Wash. 277, 259 Pac. 878 (1927).

<sup>58</sup> *Lasswell v. Anderson*, 127 Wash. 591, 221 Pac. 300 (1923), *Higgins v. Egbert*, 128 Wash. Dec. 199, 182 P.(2d) 58 (1947). Some listing agreements are bilateral. *Hunter v. Wenatchee Land Co.*, 50 Wash. 438, 97 Pac. 494 (1908).

<sup>59</sup> *Hammond v. Mau*, 69 Wash. 204, 124 Pac. 377 (1912).

<sup>60</sup> *Victor Safe & Lock Co. v. O'Neil*, 48 Wash. 176, 93 Pac. 214 (1908).

<sup>61</sup> *Brownell v. Hanson*, 109 Wash. 447, 186 Pac. 873 (1920).

<sup>62</sup> *Keith v. Peart*, 115 Wash. 552, 197 Pac. 928 (1921).

<sup>63</sup> *Sunnyside Land & Investment Co. v. Bernier*, 119 Wash. 386, 205 Pac. 1041 (1922).

<sup>64</sup> *Hammond v. Mau*, 69 Wash. 204, 124 Pac. 377 (1912).

from selling.<sup>65</sup> For the owner to be liable for a commission on a sale made by himself, the contract must in terms inhibit him from selling.<sup>66</sup> But where the owner sells through another agent he has then breached his contract, rendering performance by the broker impossible, and the broker need not show that he is the procuring cause of the sale or that he had a ready, willing, and able purchaser.<sup>67</sup> When the listing is not exclusive and a sale is made either by the owner or through another agent, the broker can recover only if he shows himself to be the procuring cause.<sup>68</sup> It should be noted that authority to procure a purchaser is not in itself authority to make a contract of sale.<sup>69</sup>

A broker has earned his commission when he has complied with the terms of his employment, which normally means producing a purchaser ready, willing, and able to buy upon terms set by the owner.<sup>70</sup> Unless expressly stipulated to the contrary, completion of the contract of sale is not essential to recovery of the commission if the failure is not due to the fault of the broker.<sup>71</sup> This rule applies even though the sale is eventually completed by the owner on terms different from those in the brokerage contract,<sup>72</sup> provided of course that the broker is the procuring cause. A broker must perform within the specified time in order to recover his commission<sup>73</sup> unless the owner thereafter makes the sale to the broker's customer in bad faith or unless he is estopped to assert the time limitation.<sup>74</sup> If someone other than the

<sup>65</sup> *Keith v. Peart*, 115 Wash. 552, 197 Pac. 928 (1921), *Sunnyside Land & Investment Co. v. Bernier*, 119 Wash. 386, 205 Pac. 1041 (1922), *Elsom v. Sanders*, 121 Wash. 391, 209 Pac. 842 (1922). This appears to be the minority rule. One exception to this should be noted. An "exclusive agency" does *not* imply the reservation of the right to sell when the contract is bilateral. *Hunter v. Wenatchee Land Co.*, 50 Wash. 438, 97 Pac. 494 (1908).

<sup>66</sup> *Hammond v. Mau*, 69 Wash. 204, 124 Pac. 377 (1912), *Sunnyside Land & Investment Co. v. Bernier*, 119 Wash. 386, 205 Pac. 1041 (1922).

<sup>67</sup> *Gunning v. Muller*, 118 Wash. 685, 204 Pac. 779 (1922), *Brownell v. Hanson*, 109 Wash. 447, 186 Pac. 873 (1920).

<sup>68</sup> *Parker v. Bruggemann*, 72 Wash. 309, 130 Pac. 358 (1913).

<sup>69</sup> *Lawson v. King*, 56 Wash. 15, 104 Pac. 1118 (1909), *but cf. Littlefield v. Dawson*, 47 Wash. 644, 92 Pac. 428 (1907).

<sup>70</sup> *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471 (1890).

<sup>71</sup> *Spencer v. Houtt*, 129 Wash. Dec. 237, 186 P.(2d) 613 (1947). *See also Hege, Haches, Phillips & Co. v. Hessel*, 57 Wash. 499, 107 Pac. 375 (1910), *Peeples v. British American etc. Properties*, 163 Wash. 353, 1 P.(2d) 235 (1931), *Grant v. Ten Hope*, 117 Wash. 531, 201 Pac. 750 (1921).

<sup>72</sup> *Peterson v. St. Francis Hotel Co.*, 61 Wash. 378, 112 Pac. 347 (1910), *Richey v. Bolton*, 18 Wn.(2d) 522, 140 P.(2d) 253 (1943)

<sup>73</sup> *Swift v. Starrett*, 117 Wash. 188, 200 Pac. 1108 (1921), *Davis & Co. v. Aabling*, 117 Wash. 579, 202 Pac. 2 (1921).

<sup>74</sup> *Lawson v. Black Diamond Coal Mining Co.*, 53 Wash. 614, 102 Pac. 759 (1909), *Duncan v. Parker*, 81 Wash. 340, 142 Pac. 657 (1914). In both of these cases recovery was allowed where the owner completed the sale by dealing directly with the broker's customer.

broker makes the sale, pending negotiations by the broker, the commission may still be recovered if the broker is the "procuring cause" of the sale, the issue of "procuring cause" being for the jury.<sup>75</sup> Where a sale is made to the broker's customer, there is an excellent chance that the broker will be held to have been the procuring cause unless he has abandoned negotiations before the sale.<sup>76</sup>

<sup>75</sup> *Godefroy v. Hupp*, 93 Wash. 371, 160 Pac. 1056 (1916), *Keith v. Peart*, 115 Wash. 552, 197 Pac. 928 (1921).

<sup>76</sup> *Bethel v. Preston*, 157 Wash. 652, 290 Pac. 224 (1930).

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## BOUNDARY DISPUTES IN WASHINGTON

JAMES R. ELLIS

Quarrels over the physical edges of land ownership still appear on court calendars with disturbing frequency, displaying their peculiar bitterness beyond all value involved. A major factor swelling this litigation has been confusion over the various legal doctrines available in these disputes. Boundary line problems are often capable of treatment on several similar grounds and occasionally present contradictory equities, but they need not be a legal quagmire. This comment will attempt to analyze certain of the formulae currently applied to boundary disputes in Washington with particular reference to the doctrines of Acquiescence and Recognition, Oral Agreement, and Estoppel *in Pais*.<sup>1</sup> It is the writer's opinion that recent definitive decisions by our court have placed these rules on a new plane of clarity.

### ORAL BOUNDARY AGREEMENTS

It has been long settled in the law that under certain circumstances boundary lines may be permanently and irrevocably established by a parol agreement between adjoining owners.<sup>2</sup> Such agreements have been favored as minimizing vexatious litigation by encouraging neighboring land owners to settle their problems between themselves.<sup>3</sup> It is in designating the circumstances requisite to the validity of these agreements that courts have differed. Our court has built an increasingly definite pattern of its own, from which a number of rules can now be determined with reasonable accuracy

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<sup>1</sup> The doctrine of Adverse Possession is omitted as requiring separate treatment.

<sup>2</sup> The conclusion of the author of an exhaustive annotation on the subject in 69 A. L. R. 1433.

<sup>3</sup> *Loustalot v. McKeel*, 157 Cal. 634, 108 Pac. 707 (1910), quoted with approval in *Rose v. Fletcher*, 83 Wash. 623, 626, 145 Pac. 989 (1915).