Contracts

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of thirteen executive agencies to move the offices of those agencies from Seattle to Olympia, the state capital. Affirming the lower court's action in overruling a demurrer to the petition, the court, in a five to four decision, held: (1) In the absence of a statute governing taxpayers' suits a demand on the proper officer to take action is a condition precedent to the maintenance of a taxpayer's action challenging the validity of what public officers have done or are about to do, unless facts are alleged which show such a demand would have been useless; (2) the courts of the state have jurisdiction to determine questions of the location of the seat of government; (3) the Governor should be dismissed as a respondent because the result of the order directed to the heads of the agencies will be the same whether the Governor is a party or not, the court declining to decide whether mandamus will lie to the Governor; (4) the state constitutional provision for the location of the executive departments of the state, Article III, § 24, in the light of the congressional enabling act and the historical background of the territorial laws, requires the location of the whole of the executive department at the seat of government. The dissent contended that since these executive agencies existing subsequent to the passage of the constitution were created by the legislature, the legislature, in the absence of limitation, has the power to locate the offices of these agencies and that such location is a political, not a constitutional question. See also *Equity* at page 138.

**CONTRACTS**

**Quasi-Contractual Remedy in Unjust Enrichment — Cause of Action.** The problem of the quasi-contractual remedy for unjust enrichment was raised in *Mill & Logging Supply Co. v. West Tenino Lumber Co.* One Herrington had been operating a lumber mill in Tenino under the name of Herrington Lumber Mill Co. and since 1939 had been regularly supplied with tools and machinery by the plaintiff and its assignors. On November 23, 1948, he executed a bill of sale for his mill to the Thurston County Investment Co., a co-partnership, which in June 1949 transferred the mill to the defendant. Both of these transfers were unknown to the plaintiff. Herrington continued to hold himself out as the owner, doing business under the old firm name and the plaintiff went on doing business with him as before. In March 1950 a receiver was appointed for the Herrington Lumber Mill Co. and the plaintiff learned for the first time about the change in ownership. The plaintiff brought this action to recover the value of the machines and tools supplied on credit. The complaint failed to allege the relation between Herrington and the defendant. The trial court sustained a demurrer to the complaint and dismissed the action. On appeal the court reversed and remanded the cause for a trial on the merits as to that part of the indebtedness which was incurred since the transfer of the title to the defendant. The decision, following the pleadings of the

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1. 44 Wn.2d 102, 265 P.2d 807 (1954). See also *Corporations* at page 109.
plaintiff, was based on the theory of a quasi-contractual remedy for unjust enrichment.

It is, of course, elementary that a complaint which pleads facts sufficient to state a cause of action on any theory is good as against a general demurrer and since, as of the time of writing, it is not known what the plaintiff will actually be able to prove it is impossible to make any very broad or definitive statements. It must also be borne in mind that the court followed the pleadings and arguments of the parties and that the plaintiff did not bother to allege the relation between Herrington and the defendant. However, the facts of this case, as presented in the pleadings, do not seem to fit the usual quasi-contractual situations, but rather an action on the contract executed by the agent of an undisclosed principal. Using reasonable inferences from the facts pleaded it would seem that Herrington, who was not the owner after the transfer of the mill but who continued in a managerial capacity, could only be an agent of the defendant. Because of the past history of dealings between Herrington and the plaintiff, as well as his holding himself out as owner under the old firm name, there should be no difficulty in finding an agency power and thus an express contract between the plaintiff and the defendant.

An extensive research does not disclose any Washington cases in point. There is, however, authority for this proposition in other jurisdictions. Watteau v. Fenwick, decided in England in 1893, is generally cited as the leading case. There the defendants bought a tavern keeping the previous owner as manager, leaving the old name over the door and not giving any notice of the transaction. The authority of the new manager was limited, but the defendants were held liable for credit purchases in excess of his authority. The same doctrine had previously been established independently in America in 1889 in the case of Hubbard v. Ten Brook, and first indicated in 1848 in a dictum in Smith v. Jessup & Moore. It has been applied in the case of a mother who

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2 See the discussion of this concept in Seavey, Agency Powers, 1 Okla. L. Rev. 3 (1948).
8 [1893] 1 Q.B. 346.
4 124 Pa. 291, 16 Atl. 817 (1889). In this case the plaintiff sold hams to one Slade who operated a grocery in his own name, but in fact as the defendant's agent. The defendant denied Slade's authority to make any purchases. This holding was followed two years later by the court in McCracken v. Hamburger, 139 Pa. 326, 20 Atl. 1051 (1891). The court held that there was no error in an instruction to the jury, that unless they found that the plaintiff knew of the change of ownership and of the former owner's limited authority, they could find the defendant liable on the contracts made by the former owner for the purposes of the distillery which he was managing for the defendant without any visible change in his position.
8 5 Harr. 121 (Del., 1848).
owned a photographic studio, operated by and in the name of her son; to an express company which bought a smaller company but continued to operate it under the old name with the former manager in charge; and to a defendant who put agents in charge of his business, who operated under their own names but with limited authority. The doctrine has been criticised in a recent Delaware case which is different on its facts. The doctrine has been adopted and restated by the American Law Institute in the *Restatement of Agency.*

Viewed in this way the case falls outside the quasi-contractual remedy, as generally the law will not imply a quasi-contract where there is an express one. The American Law Institute thus describes the difference between true contracts and quasi-contracts, "Implied contracts must be distinguished from quasi-contracts, which also have often been called implied contracts or contracts implied in law. Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performance in question, nor are they promises. They are obligations created by law for reasons of justice." Quasi-contracts have been repeatedly before the court and certain necessary elements are clearly required before relief is given. One requirement is that the enrichment of the defendant must be unjust. Thus a public body benefited financially by the work of another, but which was not in existence at the time of the performance of the work and which did nothing to mislead the plaintiff or to induce his effort, was not liable. Similarly the unjust enrichment must consist of something of

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9 McCabe v. Williams, 43 Del. (4 Terry) 191, 45 A.2d 503 (1944). In this case the plaintiff supplied chicken feed on credit to a chicken farmer. When the chickens were sold and he demanded his money he was informed that the chickens belonged to the defendant who had advanced money for their purchase and upkeep. The defendant denied ownership. This case is different from the above, and treated as such by the court, as the defendant was not the owner of the business but at best of the flock of chickens. The court denied recovery holding that even if the defendant was the owner it was a bailment situation. However, in a lengthy discussion the court criticized the doctrine of Watteau v. Fenwick, without mentioning its own case of Smith v. Jessup & Moore, supra note 5.
10 Restatement, Agency §§ 194, 195 (1933).
12 Restatement, Contracts § 5, comment (a) (1932).
13 Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 137 P.2d 97 (1943). The plaintiff in this case, a construction engineer, performed engineering studies in connection with the proposed Tacoma Narrows Bridge under a contract with a private company which was granted a franchise for construction. The franchise expired because of time limitations during which construction was not commenced. Thereafter the defendant was created by the legislature and benefited by the plaintiff's work, especially in its negotiations with federal authorities.
value passing from the plaintiff to the defendant. On the other hand the unjust enrichment may be based on a tort, waived by the plaintiff, who elects to sue in assumpsit.

Another requirement is, that the plaintiff in order to recover cannot be a mere volunteer. The usual fact patterns involve either a plaintiff who improves the realty of another relying on an unenforceable contract, or a defendant who stands by and lets a plaintiff expend money and labor because of a mistake of fact, such as the true state of mining claims or the correct boundary. Another example of the same proposition can be found in a case where the plaintiff performed services under a mistake of fact as to his status in the defendant organization, which knew of the mistake and actually induced it.

The theory of quasi-contracts has also been applied to cases of fraud by known agents where part or all of the benefits inured to the principal, who was estopped to deny the agent's authority without

14 Bowyer v. Boss-Tweed-Clipper Gold Mines, Inc., 195 Wash. 25, 79 P.2d 713 (1938). In this case third persons, together with some stockholders of a gold mining company, formed the defendant corporation in order to take up an option on mining property, which became available after default of the mining company which was unable to raise funds. The defendant was not held liable to creditors of the mining company as no property of net value was transferred.

15 Olwell v. Nye & Nissen Co., 26 Wn.2d 282, 173 P.2d 652 (1946). The defendant wrongfully used in its operations an egg-washing machine belonging to the plaintiff, which was kept in storage. The plaintiff waived the tort and recovered on the theory of unjust enrichment, the court holding that saving in labor costs in using the machine constituted a benefit.

16 Smith v. Kneisley, 187 Wash. 278, 60 P.2d 14 (1936). The plaintiff, attorney for the estate, sued for a fee for services rendered in connection with a life insurance policy. The court found that the defendant knew nothing of his efforts, if any.

17 Hardgrove v. Bowman, 10 Wn.2d 136, 116 P.2d 336 (1941). In this case the plaintiff recovered the value of the improvements put by him upon the defendant's premises, under a lease which was unenforceable as the defendant's wife did not join in the execution. Pitt v. Moore, 99 N.C. 85, 5 S.E. 398 (1888). In this case the executor recovered the deceased partner's share of partnership improvements put upon the defendant's land under an oral contract, unenforceable under the Statute of Frauds.

18 Florence-Rea Copper Co. v. Iowa Mining Co., 105 Wash. 503, 178 Pac. 462 (1919). In this case the owner of a mining claim, who stood by for over two years and permitted the defendant to incur expenses in development, was estopped from asserting possessory rights to the claim.

19 Rhyne v. Sheppard, 224 N.C. 734, 32 S.E.2d 316 (1944). The plaintiff who by mistake built on the defendant's land instead of his own, was permitted to recover as the defendant knew of the mistake and stood by letting the plaintiff proceed.

20 Houston v. Monumental Radio, 158 Md. 292, 148 Atl. 536 (1930). The defendant corporation, which took over the operation of a radio station, knew that the plaintiff believed that the station was still operated by a partnership of which he was a member. The amount of the recovery was the difference between the amount actually paid and the reasonable worth of his services.

21 First National Bank of Las Vegas v. Osborne, 121 Ill. 25, 7 N.E. 85 (1886). The defendant's agent indorsed commercial paper in the defendant's name without authority and negotiated it to the plaintiff. He used part of the proceeds to pay the defendant's creditors and appropriated the balance. Held, that the defendant was liable to the extent of the proceeds received.

22 Bluefield National Bank v. Picklesimer, 102 W.Va. 128, 135 S.E. 257 (1926). In this action against the receiver of a bankrupt bank it was held that the plaintiff could
having first restored the property to the injured party. There is, of course, no liability where the principal has received no benefits. In these cases the acts of the agents were not only unauthorized, but also tortious and criminal. There is an alternative theory upon which these cases could have been solved. The retention of benefits by such a principal constitutes a ratification of the agent's unauthorized act. This principle does not, however, apply to the present case in which the existence of the principal was unknown to the plaintiff; the general rule being that ratification can occur only where the agent purported to act for a principal. While the result in both cases may be substantially the same, the basis of liability in the present case more properly falls within the rule of *Watteau v. Fenwick* than either within the rule of ratification by acceptance of benefits or the principles of quasi-contracts.

It is apparent that this case extends the application of quasi-contractual remedies in Washington. It would also give, should the doctrine of *Watteau v. Fenwick* be adopted in this jurisdiction, an injured party who was dealing with an apparent owner in ignorance of the true owner a choice of remedies in either suing on the contract or in *quantum valebat* upon the theory of unjust enrichment.

**Illegal Bargains—Effects of Illegality.** During 1954 two cases involving illegal bargains came up on appeal, and both were reversed. These cases raised the basic problem of the rules applicable and, at least by implication, of the public policy considerations involved.

The first of these cases involved a sum of money entrusted by the plaintiff to the defendant for the purpose of obtaining a retail beer license for plaintiff's grocery which had been denied by the State Liquor Board. The defendant, a long time friend of the plaintiff, represented that he knew someone in the County-City building who could get a license. The license was never produced and the money was not recover the proceeds of two checks forged by one of the bankrupt's officers, fraudulently accepted in the name of the bankrupt and negotiated to the plaintiff, the proceeds inuring to the bankrupt.

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23 Alliance Corp. v. Sheridan Theatre Co., 241 N.Y. 216, 149 N.E. 837 (1925). The defendant's president obtained a loan on forged notes, deposited the proceeds in the defendant's account and at once withdrew them on a forged check and converted them to his own use.

24 Kraft v. Spencer Tucker Sales, Inc., 39 Wn.2d 943, 239 P.2d 563 (1952); Restatement, Agency § 85 (1) and comment (a) (1933).

25 *Supra* note 3.

26 Ibid.


turned. The defendant did not plead illegality; and both parties were very vague as to the methods to be employed, the plaintiff stating on the stand that he did not care how the money was spent as long as the license was obtained. The defendant testified that he gave the money to a man in the County-City building who neither returned it nor produced a license. The man was never properly identified and there was no other evidence as to this purported transaction. The trial court entered judgment for the plaintiff which was reversed on appeal with a direction to dismiss the action.

On appeal the primary question raised was whether the failure of the defendant to plead illegality amounted to a waiver. The court held that it did not, relying primarily on the Restatement of Contracts §600 and comment (a) thereto. This point is well settled in all American jurisdictions and in England, and need not be elaborated. However, the case was treated by the parties and by the court, as another case in this area, when in fact it is one of first impression in Washington. Prior Washington cases dealt with an agent who, through the use of personal influence, bribery, or other illicit means, obtained some advantage for his principal, and was suing to recover his fee. In this case the principal was suing the agent. It is a well settled principle in the jurisdictions which have dealt with it, that money placed in the hands of an agent for the purpose of bribery or other illegal use, but not so used, may be recovered by the principal,\(^9\) as no illegal transaction has as yet taken place. However, if even a part of the money has been spent in such illegal transaction,\(^0\) the principal is barred from recovery. Thus it seems that the purported transaction between the defendant and the mythical man in the County-City building should have been one of the main issues of the case.

The court based its decision to dismiss the action on the holding in Goodier v. Hamilton,\(^1\) where the court laid down the rule that if there is a possibility of illegality the contract should not be enforced. At the same time the court distinguished another leading Washington case in


\(^0\) Stone v. Freeman, 298 N.Y. 268, 82 N.E.2d 571 (1948). This case is distinguishable from Liebman v. Rosenthal, supra note 29 on the facts, as well as on the formal distinction that part of the money was spent.

\(^1\) 172 Wash. 60, 19 P.2d 392 (1933). In this case the defendant promised the plaintiff $1000 if he would find an attorney who could get him a license, after several attorneys had turned down the employment. The court in this case was impressed by the gravity of having the services of lawyers auctioned and bartered on the market.
this area which laid down another broad proposition, that the law will not presume illegality unless forced to do so, on the unusual ground that this case came up on demurrer and not after a trial on the merits. The court seems to have been bothered by the apparent inconsistency of these cases for some time. In another recent case, the court was faced with this problem and said:

In determining whether or not a contract is inherently corrupt, however, we seem to have applied a less stringent test in the Hall case than in the earlier Goodier case. In the Hall case, we stated that a contract was not inherently corrupt if it "could conceivably have been lawfully performed," while in the Goodier case we held that a contract should be condemned if it "contains the germ of possible corruption." The court refused to reconcile the two lines of authority, as it held that the contract would be illegal under either test, having adopted the construction of the executive order in question found in federal cases, which permits of no exceptions and treats the order as a statement of public policy in the area.

The court further laid down a broad proposition that illegality is such a serious matter that it may not be waived and, if suspected, the court should call witnesses on its own motion to probe into it. That such may be the case was recently dramatically illustrated in an English case. However, the proposition as stated seems again to conflict with several Washington cases. In an early case the court said that it was proper to sustain an objection to a question tending to show illegality of consideration, where the plaintiff did not plead illegality in defendant's cross-complaint on a note and the matter came up for the first time in his evidence in chief. However, a careful reading discloses that this was a mere dictum as there was another valid ground for objec-

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82 Hall v. Anderson, 18 Wn.2d 625, 140 P.2d 266 (1943). In this case the defendant, a contractor who submitted the lowest bid on a federal construction project, employed plaintiff, an attorney, to go to Washington, D.C. and try to persuade the War Department "by legal means" to award the contract to the defendant. Compensation was to be on a contingent fee basis, which was in violation of art. 12 of the proposed contract. The court said that it was not shown whether at the time of the execution of the contract either party knew about this provision.

83 York v. Gaasland Co., 41 Wn.2d 540, 545; 250 P.2d 967, 970 (1952). This case involved an oral contract whereby the plaintiff was to be paid $10,000 if he could obtain a road construction job in Alaska for the defendant. The evidence disclosed that the plaintiff spent several hundred dollars in entertaining government officials in Washington, D.C. An executive order, Executive Order No. 9001 promulgated by the President on December 27, 1941, prohibited any agreements whereby government contracts would be solicited.

84 Napier v. National Business Agency, [1951] 2 All Eng. 264 (C.A.), which involved a false provision for "expenses" in an employment contract, the purpose being to defraud the revenue authorities. Neither party raised the issue and it was held that the burden fell upon the judge to carry out the investigation to the best of his ability.

85 Lyts v. Keevey, 5 Wash. 606, 32 Pac. 534 (1893).
tion. In a later case, the court held that the defendant was precluded from introducing evidence of illegality where he failed to plead it as an affirmative defense. This case in turn was distinguished in Rathke v. Yakima Valley Grape Growers Association, which held that the illegality is shown on the face of the contract or brought out by the plaintiff's evidence, the failure of the defendant to plead it will not bar the defense.

On the other hand the broad language of the court in the present case, which seems to preclude waiver of illegality, finds support in at least two Washington cases.

Finally the court closes the opinion of this case, after having established that the parties were in pari delicto, by reiteration of the often repeated policy statement that, "... a court will not knowingly aid in the furtherance of an illegal transaction, but will leave the parties where it finds them..." However, even here there is seeming authority to the contrary, where, in an equitable suit for accounting between partners, relief was granted on the basis that the money was the product of an illegal transaction in which both parties were equally culpable.

The other recent case in this area involved an action against the estate of Albert C. Pettridge, deceased, on a written contract for personal services. The contract, in the form of a letter from deceased to the plaintiff and antedated by three months, was executed in Vancouver, B.C. and provided for services by the plaintiff as a nurse and

36 Wolfe v. Philippine Investment Co., 175 Wash. 165, 27 P.2d 132 (1933). The case involved the division of insurance policy fees in violation of RRS 7077 (this statute was repealed by the laws of 1947 ch. 79 art. 34).
37 30 Wn.2d 486, 192 P.2d 349 (1948). The illegality here involved was the violation of the Robinson-Patman Act [15 U.S.C. § 13 (a) (b) & (c) (1952)].
38 Reed v. Johnson, 27 Wash. 42, 67 Pac. 381 (1901). In this case directors of a railroad were promised a part of the land to be conveyed to the defendant in consideration of the defendant's efforts to have the railroad establish a depot on the plaintiff's land. Lower v. Cornelius, 72 Wash. 124, 129 Pac. 911 (1913). In this case the lower court sustained a demurrer to an answer pleading illegality, violation of REM. & BAL. CODE § 6282 prohibiting manufacturers of alcoholic beverages to have financial interests in retail outlets. The sweeping statement of the court, "... If such illegality appears in the pleadings of either party, it (the court) will not go into the technical accuracy of such pleadings; if it appears in the statement of witnesses at the trial, it will not inquire into the technical admissibility of such statements as evidence, but will in either case, start an inquiry of its own...", goes far beyond the needs of the case. It may be noted in passing that the case was decided at a time when the problem of alcoholic beverages constituted one of the main national issues.
39 44 Wn.2d 728, 731; 270 P.2d 800, 802 (1954).
40 Melton v. United Retail Merchants of Spokane, 24 Wn.2d 145, 163 P.2d 619 (1945). In this case the plaintiff, who did not have a state license as common carrier, hauled goods for the defendant; the plaintiff's trucks were registered in the defendant's name.
41 Anderson v. Petridge, supra note 27.
driver. Decedent, a married man who was separated but not divorced, proposed marriage to the plaintiff. The plaintiff did not discover the decedent's marital status until about a year later. While in Seattle the parties had an illicit relationship, which was proved by the defendant by introducing the pleadings in an action for breach of promise and seduction brought by the plaintiff which had been abated by death. The parties also executed, beside the contract sued upon, a number of other instruments which were described by the plaintiff as "phony". The trial court, sitting without a jury, found as a matter of fact that the parties never intended to be bound by the document, that the services performed by the plaintiff were in consideration of the promise of marriage which was made before the actual date of the contract, and dismissed the action. On appeal, the defendant, in support of the judgment, argued that the contract was illegal because of the illicit relation and because it violated a federal statute.

The court, which generally seems to take a properly liberal attitude in cases involving wronged women, dealt first with the problem of illicit relations as consideration. Relying on authority from other jurisdictions, this being a case of first impression in Washington, the court followed the general rule that such contracts will be enforced, unless made in contemplation of such illicit relation. Thereupon the court reversed the finding of facts of the lower court and held the contract to have been bona fide.

The second point would seem to be slightly more difficult, as the court was faced by a Washington case in point. The court avoided the difficulty by the simple expedient of ignoring the case and disposing of the cause as if it had been one of first impression in Washington. The court relied on only one federal case, quoting from it the public policy of the statute and holding that the instant case was not within the evils legislated against.

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44 One of the cases relied on by the court, Feig v. Bank of Italy, etc., 14 P.2d 612 (Cal.App. 1932), does not seem to be in point.
45 Tompkins v. Seattle Construction Co., 96 Wash. 511, 165 Pac. 384 (1917). Plaintiff, a British subject, contracted with the defendant in Vancouver, B.C. to work in the defendant's Seattle plant. Thereafter the parties renewed their contract in Seattle on the same terms. The plaintiff was discharged. The court held that the first illegal contract had been incorporated into the second contract also rendering it illegal. The case is criticized in 6 CORBIN, CONTRACTS § 1533 (1951).
46 It may seem overly meticulous to discuss the point at length as the statute in question is repealed and the exact question cannot arise. However, both the case of Anderson v. Petrige, supra note 27 and Tompkins v. Seattle Construction Co., supra note 45, may, and quite probably will be cited as authority for the effect of illegality.
The brief citation of cases may produce the impression of conflicting and irreconcilable authority. In considering approaches to these problems a distinction is made between the strict or federal rule and the liberal or majority rule. In a recent law review article Washington is included among the states following the federal rule on the authority of *Hall v. Anderson*; however, we have seen that there are cases in this state which seem to follow the majority rule. It seems to the present writer that the basic difficulty stems from the attempt to treat the whole field as one, and devise a single rule applicable to all cases. At the same time, when confronted with actual facts, the courts mold results to the exigencies of the cases in order to do justice. Much of the seeming confusion would be avoided if express recognition were given to the fact that there are at least two, if not more, distinct problems requiring different rules, depending on the gravity of the illegality, and that over the years cases move from one line of authority to another with the changing mores of society. If the existence of several problems, and of corresponding rules, were recognized, the futile attempt at reconciling irreconcilable cases would be avoided; when limited to their facts, the cases would stop presenting a confusing picture and would, with few exceptions, fall into an orderly pattern. The main line of division, running somewhat along the distinction between *mala prohibita* and *mala in se* as these terms are used in criminal law, is clearly discernible, separating illegal acts which merely violate some statutory provision from those which offend the moral sense of society. Within this broad framework there are subdivisions upon the enforceability of contracts and thus it would have been simpler if the Tompkins case had been overruled.

47 This rule is generally associated with the case of Providence Tool Co. v. Norris, 2 Wall. 45 (U.S. 1865), which had laid down the rule that all bargains contemplating the obtaining of government contracts, of desired legislation, etc. are illegal and unenforceable per se. The later case of Steel v. Drummond, 275 U.S. 199 (1927), radically departed from this rigid rule without, however, overruling the above case. 48 CORNELL L. Q. 433 (1952-53).

49 *Supra* note 32. This must be a mistake as the leading Washington case following the federal rule is Goodier v. Hamilton, *supra* note 31 and the Hall case represents the more liberal approach. 50 For instance the Supreme Judicial Court of Massachusetts in Claflin v. U.S. Credit System Co., 165 Mass. 501, 43 N.E. 293 (1896), refused to enforce an insurance contract made in violation of Massachusetts law, even though the illegality was not raised in the lower court at all. However, the same court refused to raise the issue of illegality where the bargain was made on Sunday, in O'Brien v. Shea, 208 Mass. 528, 95 N.E. 99 (1911). 51 For instance the declining importance of the execution of a contract on a Sunday which, in another age, was tinted with moral turpitude. 52 Thus the carrying of goods in Melton v. United Retail Merchants of Spokane, *supra* note 40, was not inherently immoral. It is not difficult to imagine what the court would have done if the suit for accounting had been between partners engaged, for instance, in the operation of a house of prostitution.
allowing for variations in cases where the parties are not in pari delicto, or where one party is thought to need special protection because of inferior economic bargaining power or prevailing notions of fairness and chivalry.

Commission of Realtor—Time of Execution of Contract. In *Burt v. Heikkala,* the plaintiff, a real estate broker, contracted with the defendants for a six month exclusive agency to sell the defendants' theatre at Woodland, and thereafter for a non-exclusive agency terminable by either party by written notice. The plaintiff was to earn 10% commission if he produced a buyer who would buy within 90 days of the termination of the contract. The plaintiff showed the property to a prospective buyer, but no sale was then made. However, the prospective buyer then secretly negotiated with the defendants, who gave the plaintiff a written notice of termination. The prospective buyer sold his home in California, bought a home in Woodland and was introduced by the defendants to the community. The conveyance was executed on the 91st day for the price specified in the agency contract less the amount of the commission. Judgment for the plaintiff was affirmed. The evidence, especially the sale and purchase of a home by the prospective buyer, was sufficient to establish a contract of sale during the life of the agency contract. The court stated that it is the production of a person ready, willing, and able to buy that entitles a broker to his commission, not the final closing of the deal.

This case is one of first impression in Washington, but the result was to be expected. While normally a broker employed to sell within a definite time must negotiate the sale within the time fixed to earn the commission, the court said previously that an exception to the rule shall be made where the failure of the broker to perform is due to the fraud or fault of the defendant. A case almost exactly like the principal one was decided in Louisiana, where the court used circum-

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86 See Rathke v. Yakima Valley Growers Association, supra note 37.
84 See Anderson v. Petrige, supra note 27.
54 44 Wn.2d 52, 265 P.2d 280 (1954).
56 Kane v. Dawson, 52 Wash. 411, 100 Pac. 837 (1909); Swift v. Starrett, 117 Wash. 188, 200 Pac. 1108 (1921); Pavey v. Collins, 31 Wn.2d 864, 199 P.2d 571 (1948).
57 Davis & Co. v. Aabling, 117 Wash. 579, 202 Pac. 2 (1921). This was a dictum as recovery was denied since the prevention was not caused by the defendants, who on the contrary were eager to close the deal.
58 Wolf v. Casamento, 185 So. 537 (La. Ct. of App. 1939). The plaintiff broker recovered the whole commission even though the sale was consummated after the expiration of the 90 days period when the court found bad faith on the part of the defendant. The fact most relied upon by the court in finding secret dealings was the application by the vendee for a loan on the premises before the conveyance and before the date negotiations between vendor and vendee began, according to their testimony.
stantial evidence to establish a contract of sale during the life of the agency contract. The Louisiana case and the principal case represent the general rule applicable in this exceptional situation. 59

Of course, this problem represents a specialized application of the broader rule that the unjustified prevention of performance of a condition eliminates it. As said by Corbin, “One who unjustly prevents the performance of a condition of his own promissory duty thereby eliminates it as such a condition. He will not be permitted to take advantage of his own wrong, and to escape from liability for not rendering his promised performance by preventing the happening of the condition on which it was promised.” 60

Accord and Satisfaction—Consideration. In Douglas County Memorial Hospital Association v. Newby 61 the defendant wife received medical treatment in the plaintiff hospital between November, 1952 and February 10, 1953, the date of the final discharge, at which time the defendants owed $715.86, the amount not being in dispute. The defendant husband, a farm hand, was unable to pay at once and after a talk with the head nurse he signed a card whereby he obligated himself to pay $20 a month. The defendants made regular payments for ten months when they were requested by a member of the board of trustees of the plaintiff to execute an interest bearing, negotiable note which could be discounted at a bank. The defendants refused claiming that the plaintiff was bound by its contract. The plaintiff attached the defendants' car and started an action in which it recovered a judgment for the whole balance, the trial court holding that the plaintiff's promise to accept $20 a month was not supported by consideration and thus not binding. The Supreme Court reversed saying,

We hold that respondent, under the facts of this case, is estopped to deny that there was no valid consideration for the written contract. By the contract appellants were induced to voluntarily pay to the hospital a substantial portion of the debt which they were wholly unable to pay in a lump sum when it was incurred. Without any inconvenience or expense of collection, the hospital received approximately one third of the indebtedness. Respondent should not now be allowed to attack either the executed or the executory portion of the written contract. 62

59 An exhaustive collection of authorities can be found in 27 A.L.R.2d 1357 (1953). See also 3 CORBIN, CONTRACTS § 768 (1951).

60 3 CORBIN, CONTRACTS § 767 (1951). See also, RESTATEMENT, CONTRACTS § 295 (1932).


Thus the problem of sufficiency of consideration, to make an accord legally binding, was once more discussed by the court which returned to its earlier position abandoned for more than twenty years.

The rule that the payment of a lesser sum of money, even when accepted by the creditor in full satisfaction, cannot discharge a liquidated debt is usually associated with the case of Foakes v. Beer. The facts of this case were very similar to the facts of the principal case. The plaintiff judgment creditor agreed to accept payments in installments in full satisfaction. When the principal was paid the plaintiff brought an action for the interest on the original obligation. The House of Lords held for the plaintiff on the authority of a dictum by Lord Coke in Pinnel's Case. The full historical background of the doctrine is discussed in the leading textbooks on contracts. The doctrine has been adopted and restated by the American Law Institute. However, the doctrine has been repudiated in several jurisdictions by statute and in others by court decision.

The early Washington cases expressed an unwillingness to follow the doctrine. As far as the present writer was able to ascertain the earliest Washington case in point is Rockford Shoe Co. v. Jacob in which the plaintiff brought an action for goods sold and delivered on February 25, 1892, alleging that the purchase price became due and payable on February 1. The defendant alleged in his answer that by the terms of the credit the price was not due until April 1. The plaintiff replied admitting that it promised an extension of time until April 1, but claiming that the promise was not legally binding as not supported by consideration. The court held that the plaintiff having admitted the extension was estopped from saying that such promise was void for want of consideration. This was shortly followed by two cases which, while not quite in point, strongly criticized the rule that a lesser sum could not discharge a liquidated obligation and took a stand for the

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63 L.R. 9 App. Cas. 605 (1884).
64 5 Coke 171a (1602).
65 1 Corbin, Contracts § 174-5 (1950) and 6 Corbin, Contracts 1281 (1951) where the rule is strongly criticized. 1 Williston, Contracts § 120 (Rev. ed. 1936) where the rule is supported, primarily because it is consistent with the general common law doctrine of consideration.
66 Restatement, Contracts § 76(a) and § 417 comment (c) (1932).
67 Clayton v. Clark, 74 Miss. 499, 22 So. 189 (1896); Frye v. Hubbell, 74 N.H. 358, 68 Atl. 325 (1907).
68 1 Williston, Contracts 120 (Rev. ed. 1936) in footnote 8, Washington is listed as belonging to the minority which abrogated the orthodox rule.
69 6 Wash. 431, 33 Pac. 1057 (1893).
minority position. In *Evans v. Oregon & Washington Railroad Co.* the plaintiff subcontractor refused to continue performance and was about to abandon the written contract. The court held that the principal contractor’s oral promise to pay an additional sum of money was enforceable. The court said:

We think the better rule is that, where a party has breached his contract and refused to perform it, it is optional with the adverse party to sue him for damages, or waive the breach, treat the contract as abrogated, and enter into a new contract with the delinquent party. It would seem to be elementary that parties competent to contract can abrogate or rescind the contract and enter into a new contract touching the same subject matter to be performed, in the same or a different way, upon a different consideration.

This case while not dealing with a liquidated debt illustrates the court’s approach to the antecedent duty rule.

Also in this category fall cases where the court enforced a promise by a mortgagee to remit overdue interest on the note secured by the mortgage; or where an oral agreement to reduce the rental on a written lease was held supported by sufficient consideration, as otherwise the lessee would have abandoned the lease because of inability to pay. Finally in *Vigelius v. Vigelius* the court held that a divorced wife, who for twelve years accepted one-third of the alimony pursuant to an oral agreement with the defendant, was estopped from asserting want of consideration. These early cases are fully discussed in Shepherd and Shattuck: “Accord and Satisfaction in Washington.” The authors closed this part of their discussion by saying, “Apparently these cases, while never expressly overruled, have been ignored and the later decisions indicate an adherence to the orthodox rule.”

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70 Brown v. Kern, 21 Wash. 211, 57 Pac. 798 (1899). An agreement by a judgment creditor with a financially embarrassed judgment debtor to accept partly cash and partly a note secured by mining stock, was binding and discharged the debt. The creditor, who recovered the judgment against two defendants, entered into such independent agreements with both for one half of the judgment. The other judgment debtor did not perform. The court criticized the rule of Fokes v. Beer as not in accordance with good morals. Williams v. Blumenthal, 27 Wash. 24, 67 Pac. 393 (1901) (the accord consisted of an acceptance of a lesser sum in satisfaction of a judgment and of the relinquishment of the right of appeal).

See also, Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724 (1906). In this case a lesser sum was paid in full satisfaction before maturity. In a dictum the court strongly criticized the orthodox rule.

71 58 Wash. 429, 108 Pac. 1095 (1910).


73 Hidden v. German Saving & Loan Society, 48 Wash. 384, 93 Pac. 688 (1908).

74 Conlau v. Spokane Hardware Co., 117 Wash. 378, 201 Pac. 26 (1921).

75 169 Wash. 190, 13 P.2d 425 (1932).

76 8 WASH. L. Rev. 112 (1934).

77 8 id. at 115.
As early as 1911 in *Seattle, Renton & Southern Railway Co. v. Seattle-Tacoma Power Co.*, the court said that the payment in full of the liquidated amount could not discharge the disputed amount as there was nothing left which could operate as consideration. It must be added, however, that the plaintiff in that case never accepted the payments in full satisfaction. In *Plymouth Rubber Co. v. West Coast Rubber Co.*, the court discussed the three possibilities in this area: a liquidated obligation which cannot be discharged by the payment of a lesser sum of money; an unliquidated obligation which can be discharged by the payment of any sum of money if it is given and received in full satisfaction; and a liquidated obligation which can be discharged by the payment of a lesser sum of money and the giving of some goods, which was the situation in the Plymouth case.

In *Champagne v. McDonald* the court adopted the orthodox rule holding that an agreement to extend the time of payment of a liquidated amount due upon a bill of sale and to make a 10% reduction thereof if paid within such time, was not binding upon the promisor as there was no consideration for the promise. Similarly in *Anderson v. Sanitary Dairy, Inc.*, the court held that the payment of $743 could not discharge an undisputed indebtedness of $2000. It must be added, however, that it was questionable in this case whether the payment of the lesser sum was accepted in full satisfaction. Also the cashing by a landlord of a check for rent due, which was marked that it was in payment for rent until the end of the lease, did not discharge the tenant. In a case involving a coal mine lease, where one of the issues was whether the payment of a lesser amount by the lessee could discharge his indebtedness, the court formulated the orthodox rule in its full rigidity:

Where a debtor pays what in law he is bound to pay and what he admits that he owes, such payment by the debtor and its acceptance by the

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78 63 Wash. 639, 116 Pac. 289 (1911). (The contract for electric current provided for minimum payments of $1000 a month irrespective of amount furnished. A dispute arose as to the proper method of computation and the buyer sent a check for $1000 each month in full satisfaction. The seller cashed the checks and applied the proceeds on account. Held, there was no accord and satisfaction as there was no consideration.)

79 131 Wash. 662, 231 Pac. 25 (1924). (The amount of the debt for goods sold, was liquidated. The debtor sent a check for part of the amount and returned the balance of the goods. The seller cashed the check and informed the buyer after fifty days that it refused to accept the goods. Held, that cashing the check and keeping the goods, which were part of the same transaction, was an acceptance and thus the whole debt discharged.)

80 131 Wash 617, 251 Pac. 874 (1927).

81 160 Wash. 647, 295 Pac. 925 (1931).

creditor, even if tendered as payment in full of a larger indebtedness, can not operate as an accord and satisfaction of the entire indebtedness, as there is an absence of consideration therefore.\textsuperscript{83}

The orthodox rule was also followed in a case involving the lease of well drilling equipment,\textsuperscript{84} and a lease and conditional sales contract.\textsuperscript{85}

There are also dicta in several recent cases to the effect that the payment of a lesser sum cannot discharge an obligation to pay a sum certain.\textsuperscript{86}

This brief survey makes it clear that \textit{Douglas County Memorial Hospital Association v. Newby}\textsuperscript{87} ignores all the recent cases, which are not even mentioned, and calls back from hibernation the early cases which lay dormant for over twenty years. It is the opinion of this writer that this development is to be applauded as the orthodox rule is rigid and unrealistic. The abrogation of the orthodox rule means to the practitioner, that when called upon to work out a settlement he will not have to use the subterfuge of the proverbial peppercorn. The criticism of the minority view that it is unfair to creditors is untenable since an accord must be based on mutual assent and a creditor cannot be forced to agree. All the minority rule does is to make such a voluntary agreement legally binding.

The only criticism of the case is that the decision is based on estoppel. Thus the orthodox rule is not fully repudiated and uncertainty is infused into contract law, where certainty and predictability of results is so important. In \textit{Vigelius v. Vigelius}\textsuperscript{88} performance for twelve years was enough to estop the plaintiff. In \textit{Douglas County Memorial Hospital Association v. Newby}\textsuperscript{89} this time has been reduced to ten months. The question of when the executory accord becomes binding

\textsuperscript{84} M\textsuperscript{a}yer v. Strom, 37 Wn.2d 818, 226 P.2d 218 (1951). The lease provided for a specific rental per foot of well drilled. Defendant paid the rent into plaintiff's account stating that a particular job, which defendant did gratuitously, was not included. Plaintiff remained silent for several months before bringing the action.
\textsuperscript{85} Harris v. Morgensen, 31 Wn.2d 228, 196 P.2d 317 (1948). Lessor became entitled to immediate possession of demised premises and of personal property covered by a conditional sales contract, because of lessee's default. Held, lessor's promise evidenced by written memorandum to pay $500 for lessee's interest in the personal property unenforceable because of want of consideration.
\textsuperscript{86} Graham v. New York Life Insurance Co., 182 Wash. 612, 47 P.2d 1029 (1935). Action on life insurance policy, issue whether deceased died as a result of an accident in which case a double indemnity, or whether he committed suicide. The plaintiff accepted a check for the amount of the policy with an express agreement in writing that it was not in full satisfaction. Mosher v. Mosher, 25 Wn.2d 778, 172 P.2d 239 (1946). The court found as a matter of fact that the alleged agreement for the payment of a lesser sum was never entered into by the parties.
\textsuperscript{87} Supra note 61.
\textsuperscript{88} Supra note 75.
\textsuperscript{89} Supra note 61.
has not as yet been answered. For instance, would a creditor, who agreed to extend the time of payment, or to receive the payments in instalments, or to accept a lesser sum in full satisfaction be estopped if he changed his mind the following day? The case does not answer these questions. An outright repudiation of the orthodox rule, which would make an accord binding from the time of execution, would be preferable in the interest of certainty and finality of commercial transactions.

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CORPORATIONS

Assumption of Obligations of Purchased Business—Prima Facie Presumption. If a partnership sells all of its assets to a corporation, does the corporation thereby become liable for the obligations of the partnership? This question was one of several arising in Mill & Logging Supply Co. v. West Tenino Lumber Co. The plaintiff brought an action, in part, for payment of debts incurred by a partnership which sold all of its assets to the defendant corporation. The court relied on the rule that a corporation is not liable for the partnership obligations where no showing is made that it either expressly or impliedly assumed them. Because of plaintiff’s failure to make such an allegation, defendant’s demurrer to this particular part of the complaint was sustained.

By way of dictum the court indicated the same rule would apply had the defendant corporation been shown to be a mere change in the partnership business structure. The dictum, it seems, overlooks the fact that such a showing would in and of itself imply that the corporation had assumed the partnership debts. This was brought out in Jones v. Francis, Northwest Perfection Tire Co. v. Perfection Tire Corp. and Seattle Investors’ Syndicate v. West Dependable Stores. In each case a new corporation, in substance merely the continuation of an old corporation, was held liable for the latter’s debts. In Bowyer v. Boss Tweed-Clipper Gold Mines the court quoted Fletcher, Cyclopedia of Corporations, with approval, as follows:

The general rule, which is well settled is that where one company sells or otherwise transfers all its assets to another company, the latter is not

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1 44 Wn.2d 102, 265 P.2d 807 (1954). See also Contracts at page 93.
2 70 Wash. 676, 127 Pac. 307 (1912).
3 125 Wash. 84, 215 P.2d 360 (1925).
4 177 Wash. 125, 30 P.2d 955 (1934).
5 195 Wash. 25, 79 P.2d 713 (1938).